

AGREEMENT

CITY OF FARMES BRANCH, TEXAS and ICHOOSR, LLC

This agreement (“Agreement”) is by and between the City of Farmers Branch, Texas (“the City”), and iChoosr, LLC, a Delaware limited liability company (“ICHOOSR”) (each a “Party” or collectively the “Parties”) acting by and through their authorized representatives,

WHEREAS, ICHOOSR has a registered office located at 251 Little Falls Drive, Wilmington, Delaware 19808, and is registered as a Class I aggregator under 16 Tex. Admin. Code § 25.111 at the Public Utility Commission of Texas under number #80419; and

WHEREAS, the Parties wish to enter into this Agreement for the principal purpose of providing the residents of the City (“Residents”) with group purchasing power in the procurement of retail energy (electricity and/or gas) services;

WHEREAS, the Parties intend to offer Residents’ an opportunity to register and participate in the Program (hereinafter defined), whereupon ICHOOSR will arrange a competitive bidding process of retail energy suppliers to procure competitive electricity rates for participating Residents;

NOW, THEREFORE, in consideration of the foregoing and of the covenants and agreements herein contained, and other good and valuable consideration the receipt and sufficiency of which is hereby acknowledged and approved, the Parties agree as follows:

ARTICLE 1 – DEFINITIONS

In this Agreement except where the context clearly indicates otherwise the following words shall have the meanings set forth below:

“Affiliate” shall mean any subsidiary or holding company, including any subsidiary of any such holding company, of ICHOOSR.

“Customer Service” shall mean the service that receives and responds to questions and issues raised by Residents interested in the Program and Participants, through email, chat or phone calls.

“Intellectual Property” shall mean all software, technology platforms, websites, databases and other content, business processes, domain names and registrations, and patent, trademark, and copyright registrations and applications thereof owned by a Party as of the Effective Date of this Agreement.

“Participants” are Residents who register and participate in the Program.

“Personal Data” shall mean _____

“Program” shall mean a group buying program (“Texas Power Switch”) with the principal purpose of providing Residents with group purchasing power in the procurement of retail energy services. For purposes of this Agreement the Program is limited to: (X) “Spring-Summer 2018 Program” (a) Registration phase from Monday, March 5, 2018 to Monday, April 16, 2018; (b) Auction Tuesday, April 17, 2018, and; (c) Decision phase from Monday, April 30, 2018 to Tuesday, May 22, 2018, and (Y) “Summer-Fall 2018 Program” (a) Registration phase from Monday, July 9, 2018 to Tuesday, September 25, 2018; (b) Auction Tuesday, August 21, 2018, and; (c) Decision phase from Tuesday September 4, 2018 to Tuesday, September 25, 2018.

“Residential Customer Agreement” shall mean the agreement between the prevailing retail energy supplier and the Participant, which commences after the successful enrollment of the Participant with the prevailing retail energy supplier(s).

“Resident Data” shall mean information regarding or relating to Residents, including Personal Data and Energy Data that is submitted by the City to ICHOOSR subject to the provisions of the Texas Public Information Act, as amended and other applicable law.

“Residents” shall mean residents of the City, who receive residential retail energy from their current electric service provider and are eligible to switch supplier.

“Side Letter Agreement” shall mean a separate agreement by and between the City and ICHOOSR regarding the activities that both parties to such agreement will undertake to promote the Program.

“Successfully Switched Participant” shall mean a Participant who has successfully switched and is accepted and enrolled by the prevailing retail energy supplier and executes a Residential Customer Agreement with the prevailing retail energy supplier.

“Visitor Data” shall mean information regarding or relating to Participants, including Personal Data and Energy Data that is submitted by Participants on the website of ICHOOSR, or submitted initially to a link on the CITY’s website, or submitted by Participants via the Customer Service of ICHOOSR.

ARTICLE 2 – OBLIGATIONS OF THE PARTIES

2.1 ICHOOSR shall:

2.1.1. Provide the City with webpages including the City's logo on the 'Texas Power Switch' platform to facilitate registration, auction and switching of Residents;

2.1.2. Set out information for Residents within its website about the Program including the fact that participation is free and provides them with no obligation to accept any recommended retail energy supplier(s)'s offer, including Information pages and a Frequently Asked Questions section;

2.1.3. Subject to relevant electricity laws and regulations, arrange for a competitive bidding process for a retail energy contract of at least one year. ICHOOSR will decide on the type of supply contract;

2.1.4. Arrange for a solicitation for retail energy suppliers for the purpose of providing retail energy services to participating Participant, while not guaranteeing that the solicitation will result in a market-leading offer;

2.1.5. Provide Customer Service for the Program;

2.1.6. Provide daily reports, dealing with the number of participants in the Program and the number of people who have confirmed that they wish to switch to the prevailing retail energy supplier(s). Such reports to be electronically accessible to the City.

2.1.7. Provide the option to carry out surveys among Residents or any sample thereof that it selects in order to obtain Residents' views in connection with the Program.

2.1.8. Obtain the City's prior approval for all marketing communications before posting, publishing or distributing such communications;

2.1.9. Provide the Program for the CITY.

2.1.10. Actively promote the Program, by carrying out the marketing, education and communication efforts as set out below: (i) Send out approximately 9,000 unaddressed bulk mailers approximately during the Registration phase and when successful also in the Decision Phase; (ii) Advertisement example: Arrange for a message or flyer about the Program that will be inserted in the monthly Utility bill going out during the Registration phase and during the Decision phase; (iii) Arrange for a message about the Program that will be inserted in an e-mail to e-bill households during the Registration phase and the Decision phase; (iv) Provide the CITY with a press release for the local newspaper(s) and local radio station(s) during the Registration phase and the Decision phase; (v) Provide the City with flyers or other material to be circulated by City organizations (e.g. home

owners' associations) and provide the City with text and images for City to use in email newsletters to be send the members during the Registration phase and the Decision phase; and (vi) Pay the costs incurred by City's cost for promoting the Programs under section 2.2.7.

2.2. City shall:

2.2.1. actively promote the Program via agreed marketing and communication efforts, as set out in the Side Letter Agreement.

2.2.2. promote the Program prominently on the home page of the City's web domain throughout the term of the Program;

2.2.3. include information regarding the Program on the City's web page, briefly explaining the Program and providing a hyperlink to the City's registration pages on the Texas Power Switch platform, by using unique URL's which are provided to the City by ICHOOSR for tracking purposes;

2.2.4. obtain ICHOOSR's prior approval for all marketing and other communications before posting, publishing, transmitting or distributing such communication in any way.

2.2.5. host and promote a minimum of two Programs each calendar year with ICHOOSR.

2.2.6 not during the term of a Residential Customer Agreement, without the prior written consent of ICHOOSR, directly contact by email, letter or telephone anyone who has entered into a Residential Customer Agreement with the prevailing retail energy supplier in an attempt to persuade that person to switch their gas and/ or electricity services to an alternative supplier.

2.2.7 actively promote the Program, by carrying out the following marketing, education and communication: (i) Provide feedback and content for the mailer; (ii) Arrange for sending out a message or flyer to be inserted in the monthly Utility bill; (ii) Arrange for sending out a message via an e-mail to e-bill households; (iii) Forward the press release under 2.1.4 local newspaper(s) and local radio station(s) and follow-up; and (iv) Encourage City organizations (e.g. home owners' associations) to promote the Program.

ARTICLE 3 –TERM; TERMINATION

3.1 The term of this Agreement shall commence on Effective Date and shall continue until completion of the Program, unless sooner terminated as provided herein.

3.2 Either Party may terminate this Agreement upon thirty (30) days prior written notice to the other Party.

3.3 Either Party may upon written notice to the other Party terminate this Agreement if the other Party is in breach of this Agreement and such breach is not cured within thirty (30) days after receipt of written notice thereof.

ARTICLE 4 – RELATIONSHIP OF THE PARTIES

4.1 It is understood and agreed by and between the Parties that ICHOOSR, in satisfying the conditions of this Agreement, is acting independently, and that the City assumes no responsibility or liabilities to any third party in connection with these actions. All services to be performed by ICHOOSR pursuant to this Agreement shall be in the capacity of an independent contractor, and not as an agent or employee of the City. ICHOOSR shall supervise the performance of its services and shall be entitled to control the manner and means by which the Program is provided and its services are to be performed, subject to the terms of this Agreement.

4.2 The Parties acknowledge and agree that neither Party is the agent or employee of the other, and nothing in this Agreement shall be construed to create a relationship between the City and ICHOOSR of a partnership, association, or joint venture, and neither Party shall hold itself out as an agent or partner of the other Party. The Parties recognize and agree that the City will not perform any function not legally permitted by state or federal law or the rules and regulations established by any applicable governing authority.

ARTICLE 5 – INTELLECTUAL PROPERTY

5.1 The Parties agree that any Intellectual Property belonging to a Party on the Effective Date of this Agreement shall remain the legal and beneficial property of that Party during the Term and following termination or expiry of this Agreement. It is not permitted for Parties to use, copy or share any Intellectual Property with any third party without written consent of the Party to whom the Intellectual Property belongs, neither during nor after the termination of this Agreement.

5.2 ICHOOSR hereby grants to the City a non-exclusive, non-transferable, royalty free, world-wide license (including the right to grant sub-licenses to employees of the City), for the Term, to access and use such of ICHOOSR's software as ICHOOSR may specify from time to time (and in the manner specified by ICHOOSR from time to time) for the purpose of performing its obligations under this Agreement and in connection with the operation of the Program.

5.3 Each Party hereby grants to the other a non-exclusive, non-transferable, royalty free, world-wide license, for the Term, to display the devices, logos, branding, trademarks, slogans and other materials of the other Party ("Branding") for the purpose of promoting the Program and their involvement in it, in each case subject to the prior written agreement of the granting Party as to what Branding may be used and the manner in which it may be used.

ARTICLE 6 – DATA PROTECTION

6.1. Both Parties warrant and undertake to comply with all applicable local, state, and federal laws in the performance of their obligations under this Agreement.

6.2. The City warrants to ICHOOSR that to its knowledge and without specific due diligence, it has made all appropriate notifications and has complied with any notification provisions as may be required by any applicable local, state, and federal laws in respect of its obligations under this Agreement and that performance of its obligations under this Agreement shall not breach or contravene such notifications, nor cause ICHOOSR or the City to breach the ICHOOSR's or the City's respective obligations under such local, state, and federal laws.

6.3. Both Parties acknowledge that any marketing activities in relation to its products or services which it directs to Residents and Participants whose Resident Data and Visitor Data it has obtained in accordance with this Agreement, shall be conducted in accordance with all applicable local, state, and federal laws and in accordance with any of the Participants' marketing preferences.

6.4. ICHOOSR warrants that it has appropriate technical and organizational processes and procedures in place to safeguard against any unauthorized or unlawful processing and against accidental loss or destruction of, or damage to, the Resident Data and Visitor Data.

6.5. Except for Visitor Data submitted to the prevailing retail energy supplier for performance of the Program, Resident Data and Visitor Data obtained in connection with the Agreement shall not be sold, transferred or disclosed to any third party without the consent of the Participant and the City.

6.6. The Resident Data and Visitor Data may only be used by ICHOORS for administering the 'Texas Power Switch' programs, subject to all relevant laws and regulations.

ARTICLE 7 - PUBLICITY

Neither Party shall engage in any publicity relating to this Agreement except with the prior written consent of the other Party, such consent not to be unreasonably withheld or delayed. The Parties shall at their own cost co-operate in terms of making or inputting into press releases and shall respond promptly for requests for assistance in that regard. Each Party shall promptly notify the other of facts and circumstances that could give rise to negative publicity that could cause harm to the position, the image, or reputation of either Party.

ARTICLE 8 – GENERAL PROVISIONS

8.1. Warranties.

8.1.1. The CITY will not enter into a similar type of partner agreement for a group switching program with any third party for at least three years from the Effective Date of this Agreement.

8.1.2. Unless otherwise permitted in this Agreement, neither Party shall use the other's name and/or logo for promotional use without the other Party's prior written permission.

8.1.3. The Parties hereby warrant, represent and undertake to each other that they will co-operate and provide each other with such information and assistance as each may reasonably require to enable and/or facilitate compliance with their respective obligations under this Agreement.

8.1.4. The Parties agree that their promotional activities under and in connection with this Agreement shall only promote the Program (and/or the Parties' connection with it) and shall not promote energy suppliers or their products either individually or as a group, provided that the Parties may refer to energy suppliers' involvement in the Program and/or the types of products offered in the Program (in generic terms).

8.2. Assignment. Neither Party may assign this Agreement without the prior written consent of the other Party. ICHOOSR shall not sub-contract any of its obligations under this Agreement without the City's prior written consent. Notwithstanding the foregoing, the City expressly consents to ICHOOSR's outsourcing of its Customer Service. Subject to the provisions regarding assignment, this Agreement shall be binding on and inure to the benefit of the Parties to it and their respective heirs, executors, administrators, legal representatives, successors and assigns.

8.3. Waiver. No claim or right arising out of this Agreement can be waived by a Party, in whole or in part, unless made in writing and signed by such Party. A failure or delay in enforcing an obligation, or exercising a right or remedy, shall in no way amount to a waiver of that obligation, right, or remedy. A waiver of a breach of a term of this Agreement shall not amount to a waiver of a breach of any other term in the Agreement. A waiver of a particular obligation in one circumstance will not prevent a Party from subsequently requiring compliance as to the obligation on other occasions or as to any other obligation in the Agreement.

8.4. Indemnification. ICHOOSR DOES HEREBY COVENANT AND CONTRACT TO WAIVE ANY AND ALL CLAIMS, RELEASE, INDEMNIFY, AND HOLD HARMLESS THE CITY, ITS OFFICERS, EMPLOYEES, AND AGENTS, FROM AND AGAINST ALL LIABILITY, CAUSES OF ACTION, CITATIONS, CLAIMS, COSTS, DAMAGES, DEMANDS, EXPENSES, FINES, JUDGMENTS, LOSSES, PENALTIES OR SUITS, CAUSED BY OR RESULTING FROM THE NEGLIGENCE, INTENTIONAL TORT, INTELLECTUAL PROPERTY INFRINGEMENT, OR FAILURE TO PAY A SUBCONTRACTOR OR SUPPLIER COMMITTED BY ICHOOSR, ITS AGENT, ITS

CONSULTANT UNDER CONTRACT, OR ANY OTHER ENTITY OVER WHICH THE ICHOORS EXERCISES CONTROL.

INDEMNIFIED ITEMS SHALL INCLUDE REASONABLE ATTORNEYS' FEES AND COSTS, COURT COSTS, AND SETTLEMENT COSTS IN PROPORTION TO ICHOORS'S LIABILITY.

ICHOORS'S OBLIGATIONS UNDER THIS SECTION SHALL NOT BE LIMITED TO THE LIMITS OF COVERAGE OF INSURANCE MAINTAINED OR REQUIRED TO BE MAINTAINED BY ICHOORS UNDER THIS AGREEMENT. THIS PROVISION SHALL SURVIVE THE TERMINATION OF THIS AGREEMENT.

8.5 Insurance.

(a) ICHOORS shall during the term hereof maintain in full force and effect the following insurance: (i) a comprehensive general liability policy of insurance for bodily injury, death and property damage including the property of the City, its officers, contractors, agents and employees (collectively referred to as the "City") insuring against all claims, demands or actions relating to the work and services provided by the ICHOORS pursuant to this Agreement with a minimum combined single limit of not less than \$2,000,000.00 per occurrence for injury to persons (including death), and for property damage and \$2,000,000.00 aggregate including products and completed operations coverage of \$1,000,000.00. This policy shall be primary to any policy or policies carried by or available to the City; (ii) policy of automobile liability insurance covering any vehicles owned, non-owned and hired and/or operated by ICHOORS, its officers, agents, and employees, and used in the performance of this Agreement with policy limits of not less than \$1,000,000.00 combined single limit for bodily injury, death and property damage; and (iii) statutory Worker's Compensation Insurance at the statutory limits and Employers Liability covering all of ICHOORS's employees involved in the provision of services under this Agreement with policy limit of not less than \$1,000,000.00.

(b) All insurance shall be endorsed to provide the following provisions: (1) name the City, its officers, and employees as additional insureds as to all applicable coverage with the exception of Workers Compensation Insurance; (2) provide for a waiver of subrogation against the City for injuries, including death, property damage, or any other loss to the extent the same is covered by the proceeds of insurance. A specific endorsement needs to be added to all policies, with a copy of the endorsement provided to the City that indicates the insurance company will provide to the City at least a thirty (30) day prior written notice for cancellation, non-renewal, and/or material changes of the policy. In the event the companies providing the required insurance are prohibited by law to provide any such specific endorsements, the ICHOORS shall provide at least thirty (30) days prior written notice to the City of any cancellation, non-renewal and/or material changes to any of the policies of insurance.

(c) All insurance companies providing the required insurance shall be authorized to transact business in Texas and rated at least "A" by AM Best or other equivalent rating service.

All policies must be written on a primary basis, non-contributory with any other insurance coverage and/or self-insurance maintained by the City.

(d) A certificate of insurance and copies of policy endorsements evidencing the required insurance shall be submitted to the City prior to commencement of services. On every date of renewal of the required insurance policies, the ICHOOSR shall cause a certificate of insurance and policy endorsements to be issued evidencing the required insurance herein and delivered to the City. In addition, the ICHOOSR shall within ten (10) business days after written request provide the City with certificates of insurance and policy endorsements for the insurance required herein.

8.6. Force Majeure. No Party shall be liable to another Party, nor be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement due to any of the following causes beyond such Party's reasonable control (such causes deemed "Force Majeure Events"): (i) acts of God, (ii) flood, fire, or explosion; (iii) war, invasion, riot, or other civil unrest; (iv) actions, embargoes, or blockades in effect on or after the date of this Agreement; (v) changes in law or regulation of any local, state, or federal governmental authority; (vi) national or regional emergency; or (vii) strikes, labor stoppages, or slowdowns or other industrial disturbances; (viii) shortage of adequate power or transportation facilities. A lack of funds shall not be deemed to be a Force Majeure Event. The Party suffering a Force Majeure Event shall give notice within 5 days of the Force Majeure Event to any other Party to which performance is owed, stating the period of time the occurrence is expected to continue, and shall use diligent efforts to end the failure or delay and ensure that the effects of such Force Majeure Event are minimized.

8.7. Severability. In the event any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provisions, and the Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained in it.

8.8. Entire Agreement. This Agreement constitutes the entire understanding of the Parties hereto with respect to the subject matter hereof and supersedes all prior negotiations, discussions, undertakings and agreements between the Parties.

8.9. Amendment. This Agreement may be amended or modified only by a writing executed by the duly authorized officers of the Parties hereto. It is understood and agreed that this Agreement may not be changed, modified, or altered except by an instrument, in writing, signed by both Parties in accordance with the laws of the State of Texas.

8.10. Indirect Damages. Neither Party shall be liable for any indirect or consequential loss whatsoever or howsoever arising out of or in connection with this Agreement.

8.11. Governing Law. The laws of the State of Texas shall govern this Agreement without regard to any conflict of law rules; and venue for any action concerning this Agreement

shall be in the State District Court of Dallas County, Texas. The Parties agree to submit to the personal and subject matter jurisdiction of said court.

8.12. Confidentiality. Parties shall keep confidential, and not disclose or use for a purpose other than the Program, any confidential and proprietary information (collectively, "Confidential Information") of any other Party hereto (the "Protected Party") provided however a Party may disclose Confidential Information: (a) to the extent consented to by the Protected Party, (b) to the extent required by the Texas Public Information Act or other applicable law.

8.13. Notices. All notices and other communications hereunder shall be in writing and shall be deemed duly given: (a) on the date sent by facsimile, with confirmation of transmission, or electronic mail if sent during normal business hours of the recipient during a Business Day, and otherwise on the next Business Day if sent after normal business hours of the recipient, provided that in the case of electronic mail, each notice and or other communication shall be confirmed within one Business Day by dispatch of a copy of such notice pursuant to one of the other methods described herein; (b) on the date of delivery if delivered personally; (c) if dispatched via a recognized overnight courier service, delivery receipt requested, with charges paid by the dispatching Party, on the later of (i) the first Business Day following the date of dispatch, or (ii) the scheduled date of delivery by such service; or (d) on the fifth Business Day following the date of mailing, if mailed by registered or certified mail, return receipt requested, postage prepaid to the Party to receive such notice. Where required, such notices shall be delivered to the following addresses:

If intended for ICHOOSR:

iChoosr, LLC,
5868 A1 Westheimer, #601
Houston, Texas 77057

If intended for City:

City of Farmers Branch, Texas
Attn: City Manager
13000 William Dodson Parkway
Farmers Branch, Texas 75234

With a copy to:

Peter G. Smith
City Attorney
Nichols, Jackson, Dillard, Hager & Smith, L.L.P.
1800 Ross Tower
500 N. Akard Street
Dallas, Texas 75201

8.14. Fees, Costs, and Expenses. ICHOOSR shall provide the Program with cost or charge to the City.

8.15 Prohibition of Boycott Israel. ICHOOSR verifies that it does not Boycott Israel, and agrees that during the term of this Agreement will not Boycott Israel as that term is defined in Texas Government Code Section 808.001, as amended.

(Signature Page to Follow)

DRAFT

EXECUTED this _____ day of _____, 2018.

CITY OF FARMERS BRANCH, TEXAS

By: _____
Charles S. Cox, City Manager

ATTEST:

By: _____
Amy Piukana, City Secretary

APPROVED AS TO FORM:

By: _____
Peter G. Smith, City Attorney

EXECUTED this _____ day of _____, 2018

ICHOOSR, LLC

By: _____
Filip Vissers, Vice President