

LEASE AGREEMENT

No. **4600012408**
2014-0054
 WT-1076-60mo

THIS AGREEMENT is made by and between

TOMCO₂ Systems –doing business as
 Tomco₂ Equipment Company
 3340 Rosebud Road
 Loganville, Georgia 30052
 a Georgia corporation
 (hereinafter referred to as “Lessor”)

and

City of Houston
 611 Walker, 21st Floor
 Houston, TX 77002
 (hereinafter referred to as “Lessee”)
 Federal ID #

For and in consideration of the mutual promises and mutual benefits herein the parties agree as follows:

1. RENTAL. During the term of this Agreement and any renewal thereof and upon the terms and conditions hereinafter stated, Lessor hereby leases to Lessee and Lessee hereby leases from Lessor the equipment (“Equipment”) for use at Lessee’s facility(ies) (“Facilities”) at the location(s) and for the monthly rental charge(s) (“Rental Charge”) set forth below or on the attached Schedule of Leased Equipment, Location and Rental(incorporated herein by this reference) or both.

Description of Equipment	Facility Where Located	Term Rent	Post Term	
			Rent	Purchase Price
Two (2) 4” PSF Carbonic Acid Feed Panels with Automatic pH control. Two (2) 30 ton model 3075CA liquid carbon dioxide storage receivers with refrigeration unit, vaporizer, vapor heater and first stage pressure regulator. (All Equipment is as detailed in the Lease Supplement Schedule for Leased Equipment-Attached)	Houston - Northeast Water Purification System, Humble, TX Phase 1 & 2	\$5200.00/mo.	\$5200.00/mo.	\$196,500.00

2. TERM. The term of this Agreement shall commence upon the date of January 1, 2014; and shall continue for 60 months. This Agreement shall hereafter continue on a month-to-month basis unless (or until) written notice of termination is given by either party to the other at least thirty (30) days prior to the expiration of the initial term (or thirty (30) days prior to the expiration of extension thereof), or unless (or until) Lessee pays the Purchase Price specified herein to Lessor for ownership of the Equipment. The termination date shall be the date the equipment is returned to Lessor or purchased.
3. INSTALLATION. Not Applicable – The Leased Equipment is installed at Lessee’s facility.
4. MAINTENANCE. Lessor shall provide normal and reasonable maintenance or repair to the Equipment leased hereunder at its expense. Lessee shall periodically inspect the Equipment consistent with prudent practices and shall promptly report to Lessor any abnormal or unusual conditions or circumstances observed by Lessee. Lessee shall not make any repairs or modifications to the Equipment. Lessee shall provide Lessor with access to any equipment to be maintained hereunder twenty-four (24) hours per day, seven (7) days per week. Lessor may make up to two (2) preventive maintenance calls per year at its expense. If Lessor is called upon by Lessee to service any equipment pursuant to this Agreement and, upon Lessor’s inspection of such equipment, Lessor determines that maintenance work is not needed, Lessor shall be entitled to receive payment for such service call in accordance with its then current schedule of prices. Lessor shall, at Lessee’s request, maintain Lessee storage equipment. In such event, Lessee shall pay Lessor for such maintenance in accordance with Lessor’s then current schedule of prices.
5. PAYMENT OF RENT. Lessor shall invoice Lessee at the end of each month for rental charges incurred that month. The Rental Charges shall be payable within thirty (30) days of the date of Lessor’s invoice during the term of this Agreement. Monthly rental for any partial month shall be prorated at the rate of one-thirtieth (1/30th) of the monthly Rental Charge per day. Lessee shall pay all freight and all rigging costs, if any, for removal of the equipment, and shall reimburse Lessor costs in this regard.

6. **TITLE.** Title to the Equipment shall at all times remain in Lessor unless and until payment to Lessor of the purchase price, at which time Lessor shall deliver good title to the Equipment to Lessor free and clear of any and all liens and encumbrances and shall execute such bills of sale or other transfer documentation as Lessee may reasonably require. Lessee agrees to take all necessary action to protect Lessor's title to the Equipment and to maintain the Equipment free and clear of any liens and encumbrances arising by, through or under Lessee. Notwithstanding any manner in which the Equipment may be affixed to the real property of Lessee, the parties agree that the Equipment is not intended to and shall not become a fixture to such real property.
7. **MODIFICATION/RELOCATION.** Lessee shall not make any modifications, changes, or alterations to the Equipment without first obtaining Lessor's written permission, including, without limitation, the removal or alteration of, or addition to, any trademark, trade name, or other label affixed to Equipment by Lessee. Lessee shall not relocate the Equipment without Lessor's approval. The expense of any relocation of Equipment shall be borne by Lessee.
8. **USE OF EQUIPMENT.** Lessee agrees to use the Equipment in conjunction only with carbon dioxide and Lessee shall operate the Equipment in compliance with the manufacturer's recommendations and all applicable laws, orders or regulations of any applicable governmental or public authority.
9. **RISK OF LOSS.** Lessee agrees that until the Equipment is returned to Lessor, all risk of loss or damage to the Equipment due to weather, floods, fire, riots, up-risings, or any other damages is assumed by Lessee unless caused by negligence of Lessor. Lessee agrees to pay Lessor within thirty (30) days of demand the actual cost of repair for any damage to the Equipment. In the event that the Equipment is damaged beyond repair, Lessee agrees to pay to Lessor on demand the full replacement value of the Equipment at Lessor's then current valuations, not to exceed the purchase price.
10. **RETURN OF EQUIPMENT.** Upon the termination of the lease of Equipment, Lessee shall surrender and return the Equipment to Lessor in as good and functioning condition as exists as of the date of this agreement, ordinary wear and tear excepted, and Lessor shall have the unrestricted right, with or without notice and legal process, to enter the premises and remove the Equipment. In the event of legal process, Lessee shall reimburse Lessor for all expenses incurred as a result of the repossession of the Equipment and to the maximum extent permitted by law, shall indemnify and hold Lessor harmless from any and all claims, loss, costs and expense, including reasonable attorneys' fees, arising from such repossession.
11. **LATE PAYMENT.** All Rental Charges not timely paid shall bear interest at the rate of one and one-half percent (1.5%) per month or portion thereof (or such lesser amount as maybe the maximum permitted by law) that such amount remains outstanding after the due date. If Lessee fails to timely pay Rental Charges for a period of thirty (30) days, in addition to other available remedies, Lessor may suspend performance and Lessee shall pay any attorneys' fees and/or other costs incurred by Lessor in collecting any amount due hereunder.
12. **WARRANTIES.** Lessor warrants that Lessor shall have good title and right to lease the Equipment to Lessee free of encumbrances to Lessee, and that any Equipment manufactured by it and leased or supplied hereunder shall be free from defects in materials and workmanship as of the date of this Agreement. Lessor hereby assigns to Lessee any manufacturer's warranties for Equipment leased hereunder by Lessee. **LESSOR MAKES NO WARRANTIES FOR EQUIPMENT NOT MANUFACTURED BY LESSOR. LESSOR MAKES NO OTHER WARRANTIES, EXPRESSED OR IMPLIED, AND MAKES NO WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.**
13. **REMEDIES.** Lessee's sole remedy and measure of recoverable damage for breach of warranty shall be Lessor's replacement or repair, at Lessor's option, of any nonconforming Equipment promptly after Lessor receives written notice from Lessee, no later than fifteen (15) days after the date of this Agreement, and makes verification of non-conformance.
14. **LIMITATION OF LIABILITY.** Lessee understands and acknowledges that there are hazards associated with the use and storage of carbon dioxide and the Equipment. Lessee shall be responsible for warning, protecting, and educating its employees and other persons exposed to such hazards due to Lessee's storage or use of carbon dioxide or Equipment. Lessee assumes all risk of liability for loss, damage or injury to persons or property of Lessee or others arising out of the delivery, presence or use of carbon dioxide whether used alone or in combination with other substances, or arising out of the delivery, presence or use of the Equipment. Except direct damage from breach of contract, neither party shall be liable to the other for any incidental, consequential, indirect, special or other damages, that are related to this Agreement, or the Equipment, whether in tort (including negligence), contract, or other legal theory. Lessor agrees to indemnify Lessee for damages of Lessor to third parties to the extent caused by Lessor's negligence, gross negligence or willful misconduct in performance of this Agreement. To the maximum extent permitted by law, Lessee shall otherwise indemnify and hold harmless Lessor from any claims, proceedings, liability, damages, or losses, including related costs and expenses, sought by third parties arising from or in any way related to performance, conformance or quality of Lessor's Equipment. In no event shall Lessee's total liability under this agreement be more than the twice purchase price of the equipment hereunder.
15. **EXCUSE OF PERFORMANCE.** Neither party hereto shall be liable to the other for default or delay in performance of any of its obligations hereunder, other than a default in payment, due to causes or events beyond its control, including, without limitation, any act of God, fire, riot, labor problems, legal action, present or future law, governmental order, rule or regulation, accidents to machinery or pipelines, freezing of pipelines, temporary failure of natural gas, electricity or fuel supply, and any other causes whether of the kind herein enumerated or otherwise, not reasonably within the control of the party claiming suspension and which by exercising due diligence such party is unable to prevent or overcome. Once any such contingency has terminated, both parties shall be bound by the obligations set forth herein.
16. **SETOFF, COUNTERCLAIM, TAXES.** All payments to Lessor by Lessee shall be made without setoff or counterclaim. Lessee shall pay or reimburse Lessor for any tax, assessment or other charge including sales, use, excise and property taxes with respect to, or which is ascertained by reference to, or measured by, the ownership, possession, or use of Equipment or services furnished by Lessor hereunder by virtue of any present or future federal, state or other law applicable thereto.

17. MISCELLANEOUS. This Agreement shall be binding upon and inure to the benefit of the parties and their successors and assigns and, except for an assignment to the City of Houston, Lessee shall not assign this Agreement without Lessor's prior written consent. This is a commercial contract. If any provision of this Agreement is held invalid under applicable law, such a provision shall be waived to the extent of such invalidity and the balance of the Agreement shall continue in full force and effect. This Agreement shall be governed and construed in accordance with the laws of the State of Georgia. Headings are inserted in this Agreement for convenience only and shall not affect the terms, conditions or interpretations thereof. All notices or other communications required or desired to be given under this Agreement shall be in writing, and shall be delivered by U.S. mail, certified, postage prepaid, return receipt requested and addressed to the party for whom intended at the address set forth below. Notices shall be deemed given upon deposit in the mail. This Agreement represents the entire agreement between the parties hereto and neither party has relied upon any fact or representation not expressly set forth herein; and this Agreement may not be modified or amended except by written instrument executed by the parties. No term or condition in any purchase order of Lessee issued or purported to be issued with respect to the sale or lease of Equipment shall vary the terms of this Agreement. Maintenance and delivery services will be performed by qualified personnel who hold all licenses required by law.

City of Houston. (Lessee)

By: _____
Name: _____
Date: _____
Lease # _____

TOMCO₂ EQUIPMENT COMPANY

By: Michael A. Dirth
Name: Michael A. Dirth
Date: 01/14/2014
Lease # _____

Approved as to form:

Council to City of Houston

Items NOT INCLUDED in TOMCO2 Scope of Supply:

1. Unloading of equipment upon delivery
2. Reloading of equipment upon return delivery
3. Installation and interconnecting piping
4. Electrical Connections
5. Foundations
6. Carrier Water Pumps
7. Taxes

ADDENDUM TO LEASE AGREEMENT

This Addendum is incorporated into and modifies the Lease Agreement (the "Agreement") with TOMCO₂ Equipment Company (the "Lessor") if this Addendum is attached to the Agreement and executed by the City of Houston, a home rule municipality (the "Lessee"). The Agreement is ineffective without full incorporation of the terms of this Addendum. Execution of this Addendum shall constitute execution of the Agreement as modified by this Addendum. In the event of a conflict between this Addendum and the Agreement, this Addendum shall be controlling.

1. RENTAL. The terms in paragraph 1 of the Agreement are subject to the following provisions: The Lessee's obligation to pay money to the Lessor under the Agreement is limited to \$187,200.00 (the "Original Allocation"). The Lessee, in the sole discretion of its officers, may allocate supplemental funds for the Agreement but are not obligated to do so.
 - a. SUPPLEMENTAL ALLOCATIONS. The Lessee makes a Supplemental Allocation by issuing to Lessor a Service Release Order, or similar form approved by the City Controller, containing the language set out below. When necessary, the Supplemental Allocation shall be approved by motion or ordinance of City Council.

NOTICE OF SUPPLEMENTAL ALLOCATION OF FUNDS

By the signature below, the City Controller certifies that, upon the request of the responsible director, the supplemental sum set out below has been allocated for the purposes of the Agreement out of funds appropriated for this purpose by the City Council of the City of Houston. This supplemental allocation has been charged to such appropriation.

\$ _____

- b. ALLOCATED FUNDS. The Original Allocation plus all supplemental allocations are the Allocated Funds. The City shall never be obligated to pay any money under this Agreement in excess of the Allocated Funds. Lessor must assure itself that sufficient allocations have been made to pay for services it provides. If Allocated Funds are exhausted, Lessor's only remedy is suspension or termination of its performance under this Agreement, and it has no other remedy in law or in equity against the City and no right to damages of any kind.

- c. **OPTION TO PURCHASE.** At any time during the term of this Agreement, the City shall have the option to purchase some or all of the Equipment for an amount not to exceed the Purchase Price. The Lessor and Lessee shall use the current fair-market price to determine the amount the Lessee shall pay to the Lessor for the Equipment purchased. The Lessor and Lessee shall enter a separate agreement concerning the operation and maintenance of the Equipment purchased.
2. **TERM.** The terms in paragraph 2 of the Agreement are subject to the following provisions:
- a. The term of this Agreement shall commence on the date this Agreement is countersigned by the City Controller and shall expire three years after this Agreement commences. This Agreement may be automatically renewed for up to two one-year renewal terms without any further Action by the Lessee or Lessor.
 - b. **TERMINATION FOR CAUSE.** If the Lessor defaults under this Agreement, the Director may terminate this agreement for cause. The Lessor's default is cumulative of all rights and remedies which exist now or in the future: Default by the Lessor occurs if:
 - i. The Lessor fails to perform any of its duties under this Agreement;
 - ii. The Lessor becomes insolvent;
 - iii. All or a substantial part of the Lessor's assets are assigned for the benefit of its creditors; or
 - iv. A receiver or trustee is appointed for the Lessor.
 - c. If a default occurs, the Director may, but is not obligated to, deliver a written notice to the Lessor describing the default and the termination date. The Director, at his or her sole option, may extend the termination date to a later date. If the Director allows the Lessor to cure the default and the Lessor does so to the Director's satisfaction before the termination date, then the termination is ineffective. If the Lessor does not cure the default before the termination date, then the Director may terminate this Agreement on the termination date, at no further obligation to the Lessee.
 - d. The Director may extend this Agreement for an additional 90 days for the Lessee's convenience by sending written notice to the Lessor prior to the expiration of this Agreement.
3. **INSTALLATION:** No changes.
4. **MAINTENANCE:** The terms in paragraph 4 of the Agreement are subject to the following provisions:

- a. The Lessee may repair or otherwise alter the equipment if the Lessee's Director determines that the repair or alteration is necessary to protect public health and safety.
 - b. The Lessor shall not charge the Lessee for repairs except (1) as approved by the Director in writing and (2) at the price listed in Lessor's latest schedule of prices. As mutually agreed by the Lessor and the Director, a schedule of prices shall be attached to this Agreement as Exhibit "B" and may be replaced as mutually agreed by the Lessor and the Director. The Director shall not unreasonably withhold approval of the Lessor's schedule of prices but may require the Lessor to provide an explanation of increases before providing approval.
 - c. The Lessor shall provide a minimum of two preventive maintenance calls per year at the Lessor's expense. The Lessor shall provide a preventive maintenance schedule approved by the Director at least 30 days before the Lessor performs the first preventive maintenance call under this Agreement. The Lessor may change the preventive maintenance schedule during the 30 days preceding the next scheduled preventive maintenance call only upon prior approval by the Director.
 - d. Within 48 hours of a preventive maintenance call, the Lessor shall provide the Director with a written copy of the maintenance report, detailing the condition of the Equipment; any repairs made; parts replaced; anticipated service needs; technician names; and related technical notes. The Lessor will send an electronic copy of the report within 15 business days.
 - e. Prior to entering the Secured Plan Process Area, the Lessor's technicians shall follow the Director's written entry procedures, which the Director may amend after providing the Lessor with prior written notice.
5. PAYMENT OF RENT. The terms of paragraph 7 of the Agreement are subject to the following provisions: The Lessor shall pay rent and charges to the extent permitted by law.
6. TITLE: No changes.
7. MODIFICATION/RELOCATION: The terms of paragraph 7 of the Agreement are subject to the following provisions: The Lessor and Lessee, by a letter agreement drafted by the Lessor and signed by the Director, may add or delete like or similar equipment or items. The Lessor shall deliver, remove, relocate, or modify such equipment or items in no fewer than 15 days and no more than 30 days after the Director signs the letter agreement, unless mutually agreed by the Lessor and Lessee in writing. The Lessor shall charge the Lessee for addition or deletion of

equipment or items the rates provided in the latest approved schedule of prices.

8. USE OF EQUIPMENT: No Change.

9. RISK OF LOSS: The terms of paragraph 7 of the Agreement are subject to the following provisions: The Lessor shall be liable to the Lessee to the extent permitted by law.

10. RETURN OF EQUIPMENT. The terms in paragraph 10 of the Agreement are subject to the following provisions: The Lessor shall not enter into the premises or remove the Equipment from the premises without prior written permission from the Director. The Equipment is necessary for the supply/management of water and important for public health and safety. The Lessor shall not take any action in removing the equipment that may threaten public health and safety. If the Lessor seeks to repossess the equipment, the Lessor and the Lessee shall be responsible for their own court costs and attorneys' fees. The Lessor shall exhaust any administrative remedies prior to seeking court action.

11. LATE PAYMENT: The terms of paragraph 7 of the Agreement are subject to the following provisions: The Lessor shall be liable to the Lessee for late payment to the extent permitted by law.

12. WARRANTIES: No Change.

13. REMEDIES. The terms in paragraph 13 of the Agreement are subject to the following provisions: The Lessor shall maintain in effect certain insurance coverage and shall furnish certificates of insurance, in duplicate form, before beginning its performance under this agreement. All policies except Workers' Compensation must name the Lessee as an additional insured. All liability policies must be issued by a Company with a Certificate of Authority from the State Department of Insurance to conduct insurance business in Texas or a rating of at least B+ and a financial size of Class VI or better according to the current year's Best's Key Rating Guide, Property-Casualty United States. The Lessor shall maintain, at minimum, the following insurance coverages in the following amounts:

(1) Commercial General Liability insurance including Contractual Liability insurance:

\$500,000 per occurrence; \$1,000,000 aggregate

(2) Automobile Liability for all automobiles (for vehicles used in performing under this Agreement, including Employer's Non-Owned and Hired Coverage):

\$1,000,000 combined single limit per occurrence; \$2,000,000 aggregate.

- (3) Workers' Compensation: Statutory limits for Workers' Compensation.

All insurance policies must require by endorsement that the insurance carrier waives any rights of subrogation against the Lessee. The Lessor shall give 30 days' written notice to the Lessee before the insurance policies are canceled, materially changed, or nonrenewed. If any insurance is written on a "claim made" basis, it must include a two-year extended coverage period after the last date that the Lessor performs under this Agreement.

14. LIMITATION OF LIABILITY. The terms in paragraph 14 of the Agreement are subject to the following provisions: The Lessee shall indemnify the Lessor to the extent permitted by law.

15. EXCUSE OF PERFORMANCE. The terms in paragraph 15 of the Agreement are subject to the following provisions: If the Lessor seeks excuse of performance, the Lessor shall contact the Director as soon as possible and provide a brief explanation of the circumstances and the estimated duration of such circumstance.

16. SETOFF, COUNTERCLAIM, TAXES. The terms in paragraph 16 of the Agreement are subject to the following provisions: The Lessee is exempt from payment of Federal Excise and Transportation Tax and Texas Limited Sales and Use Tax. The Lessor's invoices to the Lessee must not contain assessments of any of these taxes. The Director will furnish the Lessee's exemption certificate and federal tax identification number to Lessor if requested. The Lessor's fees shall cover all of the Lessor's costs.

17. MISCELLANEOUS. The terms in paragraph 17 of the Agreement are subject to the following provisions:

- a. This Agreement shall be governed by and construed in accordance with the Laws of Texas.
- b. The Lessor shall perform its obligations under this Agreement as an independent contractor and not as an employee of the City.
- c. Severability. If any part of this Agreement is for any reason found to be unenforceable, all other parts remain enforceable unless the result materially prejudices either party.
- d. This Agreement merges prior negotiations and understandings of the Parties and embodies the entire agreement of the Parties. No other

agreements, assurances, conditions, covenants (express or implied), or any other terms exist between the Parties regarding this Agreement.

- e. LESSOR DEBT. IF LESSOR, AT ANY TIME DURING THE TERM OF THIS AGREEMENT, INCURS A DEBT, AS THE WORD IS DEFINED IN SECTION 15-122 OF THE HOUSTON CITY CODE OF ORDINANCES, IT SHALL IMMEDIATELY NOTIFY THE CITY CONTROLLER IN WRITING. IF THE CITY CONTROLLER BECOMES AWARE THAT LESSOR HAS INCURRED A DEBT, THE CONTROLLER SHALL IMMEDIATELY NOTIFY LESSOR IN WRITING. IF LESSOR DOES NOT PAY THE DEBT WITHIN 30 DAYS OF EITHER SUCH NOTIFICATION, THE CITY CONTROLLER MAY DEDUCT FUNDS IN AN AMOUNT EQUAL TO THE DEBT FOR ANY PAYMENTS OWED TO LESSOR UNDER THIS AGREEMENT, AND LESSOR WAIVES ANY RECOURSE THEREFOR.
- f. Pay or Play. The requirements and terms of the City of Houston Pay or Play program, as set out in Executive Order 1-7, are incorporated into this Agreement for all purposes. Lessor has reviewed Executive Order No. 1-7 and shall comply with its terms and conditions as applicable and as those terms are set out at the time of City Council approval of this Agreement.

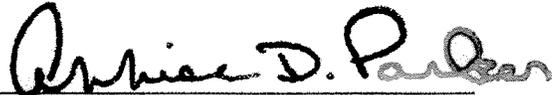
LESSEE

ATTEST/SEAL:

CITY OF HOUSTON



City Secretary

By 

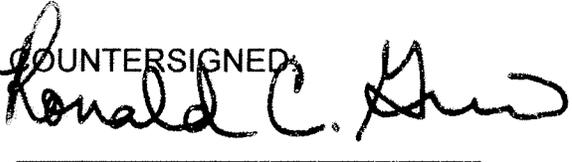
Mayor 

APPROVED:

COUNTERSIGNED:



← Director, Department of Public
Works and Engineering



City Controller 

APPROVED AS TO FORM:

DATE COUNTERSIGNED:



Assistant City Attorney
L.D. File No.
0801200065001

1-30-14

LESSEE

ATTEST/SEAL:

CITY OF HOUSTON

City Secretary

By _____
Mayor

APPROVED:

COUNTERSIGNED:

Director, Department of Public
Works and Engineering

City Controller

APPROVED AS TO FORM:

DATE COUNTERSIGNED: 01/14/2014

Assistant City Attorney
L.D. File No.



TOMCO₂ Systems