

## PERFORMANCE AGREEMENT

This Performance Agreement (this "Agreement") is entered into to be effective as \_\_\_\_\_, 2012 ("Effective Date") by and between Pflugerville Community Development Corporation (the "PCDC"), a Section 4B corporation incorporated under the Development Corporation Act of 1979 (the "Act"), and Arista Data Centers, L.L.C., a Texas Limited Liability Company ("Company").

### RECITALS

PCDC has determined that it is in the best interests of PCDC and the City of Pflugerville, a Texas home rule municipal corporation in Travis and Williamson Counties, Texas (the "City"), to facilitate Company's construction of buildings and related facilities for data centers ("Company Facilities") in the corporate limits of the City of Pflugerville, Texas to be located on the real property described on Exhibit A attached to and made a part of this Agreement (Real Property) or on such other real property within the City of Pflugerville, Texas as Company may elect. Company has determined that it is in Company's best interest to locate data centers at the Company Facilities. PCDC has determined that the addition of the Company Facilities within the City will provide significant economic benefits and will further economic development in the City. The economic benefits of the Company Facilities to the City will include, without limitation, the proceeds received by the City from the ad valorem taxes (real and personal) levied upon the premises and equipment of the Company Facilities, and the maintenance of permanent full-time jobs within the City of Pflugerville and at the Company Facilities.

PCDC and Company have agreed to enter into this Agreement in connection with the Company Facilities to provide for certain incentives to Company and to further define certain obligations of the parties to this Agreement with respect to Company, the Company Facilities and such incentives. This Agreement is required pursuant to Section 40 of the Act.

### AGREEMENT

#### I.

#### Performance Agreement

1. This Agreement serves as a performance agreement by the parties hereto.
2. Company shall use commercially reasonable efforts to create at least 25 jobs in the City of Pflugerville, Texas within 4 years of the Effective Date. Company shall use commercially reasonable efforts to create an additional 145 jobs in the City of Pflugerville, Texas within 10 years of the Effective Date, for an aggregate total of 170 jobs in the City of Pflugerville, Texas.

Jobs created in Pflugerville, Texas will qualify as jobs for purposes of this Agreement as long as the applicable employees are employed by Company, an Affiliate (defined below) or any Tenants (Company, Affiliate and Tenants are sometimes referred to collectively in this Agreement as "Employer"). "Affiliate" for purposes of this Agreement means any person or entity which directly or indirectly controls, or is under common control with, or is controlled by, Company. "Tenants" for purposes of this Agreement means any of Company's tenants located in the Company Facilities. Company agrees to maintain and operate the Company Facilities in the City of Pflugerville until at least 15 years after the Effective Date. To qualify as jobs that satisfy the requirements of the preceding paragraph, the aggregate group of applicable jobs must have an average gross annual wage of \$67,500 (such wage to include bonuses, health insurance benefits and any retirement benefits paid by the Employer); each such employee must be entitled to receive health insurance benefits. Each job that meets the requirements of this paragraph is sometimes referred to in this Agreement as a, "Qualified Job."

3. Within 4 years of the Effective Date Company, subject to the occurrence of an event of Force Majeure, shall complete construction of Phase 1 of the Company Facilities in the Pflugerville, Texas. For the purposes of this Agreement Phase 1 is complete when the outer walls, structure and roof (i.e., hardened outer shell) of the first building on the Real Property is complete. Phase I of the Company Facilities shall have an aggregate ad valorem property tax value of \$60,000,000 or greater (as determined by the Travis Central Appraisal District, hereafter "TCAD"). The term "Company Facilities" includes the Real Property, and any improvements and business personal property located on the Real Property; all such business personal property may be owned by Company, its Affiliates or by any Tenants. However, if at least \$60,000,000 of the ad valorem property tax value associated with all Phases of construction has not been achieved by the 4<sup>th</sup> year of the Effective Date, and the Company is actively constructing improvements that have an anticipated total value of \$60,000,000 Company shall be entitled to an additional 2 years to achieve the 4 -Year Facilities Requirement ("Extended Completion Date"). If the total taxable value of the Property doesn't in any one year meet or exceed the Value Add and if the construction related to the Value Add is completed over several tax assessment periods (i.e. over more than one year), then the Value Add may be satisfied by the total taxable value of the Property at the expiration of the ten year time period specified above plus any depreciation or diminution in value which has been recognized by the Travis County Appraisal District in its determination of taxable value over the prior years.
4. Within 10 years of the Effective Date Company, subject to the occurrence of an event of Force Majeure, shall complete construction of Phase 2

through 5 of the Company Facilities in the Pflugerville, Texas. Phase 2 is complete when the outer walls, structure and roof (i.e., hardened outer shell) of the second building on the Real Property is complete, and Phase 5 is complete when the outer walls, structure and roof (i.e., hardened outer shell) of the final building on the Real Property is complete. Phase II through V of the Company Facilities (including land, improvements and business personal property, including such business personal property as may be owned by Company, its Affiliates or Tenants) shall have an aggregate ad valorem property tax value of \$150,000,000 or greater (as determined by the TCAD). However, if at least \$210,000,000 of the ad valorem property tax value associated with all Phases of construction has not been achieved by the 10<sup>th</sup> year of the Effective Date, and the Company is actively constructing improvements that have an anticipated total value of \$210,000,000 Company shall be entitled to an additional 2 years to achieve the 10 -Year Facilities Requirement (“Extended Completion Date”).

If the total taxable value of the Property doesn't in any one year meet or exceed the Value Add and if the construction related to the Value Add is completed over several tax assessment periods (i.e. over more than one year), then the Value Add may be satisfied by the total taxable value of the Property at the expiration of the ten year time period specified above plus any depreciation or diminution in value which has been recognized by the Travis County Appraisal District in its determination of taxable value over the prior years.

- 5.
6. Company agrees to use commercially reasonable efforts to cause the Facility to be certified LEED Silver (in accordance with Leadership in Energy and Environmental Design standards developed by the U.S. Green Building Council).
7. Company agrees to use commercially reasonable efforts to cause the Facility to be powered by renewable energy.

## **II. Benefit**

1. Jobs Grant. PCDC hereby grants and agrees to pay to Company an amount equal to \$3,000 for each Qualified Job created by Employers (Jobs Grant). No later than September 1 of each year, Company will provide PCDC with a written certification specifying the number of Qualified Jobs expected to be created by Employers during the subsequent one year period from October 1 to September 30. On a quarterly basis, Company will then provide the City with copies of Internal

Revenue Service Form 941, Texas Workers Commission forms, or equivalent forms for Employers to demonstrate the number of Qualified Jobs created in the City of Pflugerville, Texas (Quarterly Jobs Notice). Amounts due to the Company under this paragraph will be paid quarterly by PCDC within 30 days of its receipt of each Quarterly Jobs Notice until an aggregate of \$510,000 of Job Grant funds have been paid by PCDC to the Company at which time the PCDC's obligation under this paragraph will end. PCDC shall only be required to make Jobs Grant payments during the period lasting until 10 years after the Effective Date.

2. Fiber Grant. PCDC hereby grants and agrees to pay company up to \$350,000 for the extension of fiber optic lines to the Arista site. Payments to the company shall be made after Arista has received a certificate of occupancy for the Phase 1 building. Payments will be made annually to the Company in \$50,000 increments biannually from the anniversary date of the issuance of the certificate of occupancy for Phase 1 until paid in full.

### III.

#### Partial Performance

1. Jobs Grant. If Employers have not created at least 20 Qualified Jobs by the 4th anniversary of the Effective Date, PCDC may partially terminate this Agreement as to all portions of the Agreement relating to the Jobs Grant. If Employers have not created at least 170 Qualified Jobs within 10 years after the Effective Date, Company will reimburse PCDC for a portion of the prior Jobs Grant payments it received, such reimbursement amount being equal to the product of the aggregate Jobs Grant funds received as of such time multiplied by a fraction, the numerator of which is the total number of required Qualified Jobs that Employers failed to create as of such time and the denominator of which is 100. As an example, if Employers have created 90 Qualified Jobs as of the 10<sup>th</sup> anniversary of the Effective Date and Company received \$180,000 in Job Grant payments as of such date, Company shall be required to promptly reimburse PCDC for a portion of such payments received calculated as follows:

$$10/100 \times \$180,000 = \$18,000 \text{ required reimbursement amount}$$

If Employers have not created at least 80 Qualified Jobs by the 10<sup>th</sup> anniversary of the Effective Date, PCDC may partially terminate this Agreement as to all portions of the Agreement relating to the Jobs Grant. Upon such termination, for each Qualified Job that Company received a Jobs Grant payment on, Company shall reimburse PCDC a penalty of \$1,000. For example, if Company had received \$120,000 in Jobs Grants

(40 jobs x \$3,000) up to the time of such termination, Company must reimburse PCDC \$40,000 (40 jobs x \$1,000).

#### **IV. MICELLANEOUS**

*Representations and Warranties.* This Agreement is being entered into pursuant to Section 40 of the Act. PCDC hereby represents and warrants to Company that this Agreement is within its authority and that PCDC has been duly authorized and empowered to enter into this Agreement. Company hereby represents and warrants to PCDC that this Agreement is within its authority and that Company has been duly authorized and empowered to enter into this Agreement. Company acknowledges that the agreement may be terminated and payment may be withheld if this certification is inaccurate.

*Mutual Assistance.* PCDC and Company will each do all things reasonably necessary and appropriate to carry out the terms and provisions of this Agreement.

*Successor and Assigns.* This Agreement shall be binding upon and inure to the benefit of the respective legal representatives, successors, assigns, heirs, and devisees of the parties. Except as indicated in the remainder of this paragraph, neither party hereto may assign this Agreement without the prior written consent of the other party hereto. PCDC hereby consents and grants to Company the right to convey and assign Company's interest in this Agreement (Assignment) to any person or entity who is simultaneously purchasing the Real Property (Assignee). No PCDC consent shall be required for any change in ownership of Company. PCDC further hereby consents and grants to Company the right to encumber, hypothecate, mortgage or pledge (including by mortgage, deed of trust or personal property security instrument) Company's right, title or interest under this Agreement to any mortgagee as security for the repayment of any indebtedness and/or the performance of any mortgage on the Real Property. If any additional consent is needed, PCDC shall not unreasonably withhold, condition, or delay its consent to any assignment that is not allowed by the preceding portions of this paragraph. All Assignees will be subject to all of the obligations, covenants and conditions applicable to the Company under this Agreement. Upon Company's assignment of its entire interest under this Agreement, PCDC shall recognize the Assignee as Company's proper successor, the Assignee shall have all of the assigned rights, benefits and obligations of Company under and pursuant to this Agreement, and Company shall be relieved of all of its obligations under this Agreement that relate to acts or omissions which occur or accrue following the effective date of such conveyance or assignment.

*Representations and Warranties by Company.* If Company is a corporation or a limited liability company, Company warrants, represents, covenants, and agrees that it is duly organized, validly existing and in good standing under the laws of the state of its incorporation or organization and is duly authorized and in good standing to conduct business in the State of Texas, that it has all necessary power and has received all necessary approvals to execute and deliver the Agreement, and the individual executing the Agreement on behalf of Company has been duly authorized to act for and bind Company. Company acknowledges that the Agreement may be terminated and payment may be withheld if this certification is inaccurate and any such inaccuracy is not rectified within 30 days of written notice specifying such inaccuracy.

*Franchise Tax Certification.* Company certifies that it is not currently delinquent in the payment of any Franchise Taxes due under Chapter 171 of the *Texas Tax Code*, or that the Company is exempt from the payment of such taxes, or that the corporation or limited liability company is an out-of-state corporation or limited liability company that is not subject to the Texas Franchise Tax, whichever is applicable. Company acknowledges that the Agreement may be terminated and payment may be withheld if this certification is inaccurate and any such inaccuracy is not rectified within 30 days of written notice specifying such inaccuracy.

*Payment of Debt or Delinquency to the Local or State Government.* Company agrees that any payments owing to Company under an agreement with the City of Pflugerville may be applied directly toward any debt or delinquency that Company owes the State of Texas, Travis County, Williamson County the City of Pflugerville or any other political subdivision of the State of Texas regardless of when it arises, until such debt or delinquency is paid in full.

*Child Support Certification.* Company hereby certifies that none of the officers of the limited liability company are delinquent in their court ordered child support obligations and shall acknowledge that any agreement with the city may be terminated and payment may be withheld if this certification is inaccurate and any such inaccuracy is not rectified within 30 days of written notice specifying such inaccuracy.

*Severability.* If any portion of this Agreement is held invalid or inoperative, then so far as is reasonable and possible, the remainder of this Agreement shall be given the intent manifested by the portion held invalid or inoperative. The failure by either party to enforce against the other any term or provision of this Agreement shall be deemed not to be a waiver of such party's right to enforce against the other party the same or any other such term or provision. In the event any provisions of this Agreement are illegal, invalid or unenforceable under present or future laws, and in that event, it is the intention of the parties that the remainder of this Agreement shall not be affected. It is also the intention of the parties of this Agreement that in lieu of each clause and provision that is found to be illegal, invalid or unenforceable, a provision be added to this

Agreement which is legal, valid or enforceable and is as similar in terms as possible to the provision found to be illegal, invalid or unenforceable.

*Governing Law.* This Agreement shall be governed, construed, applied, and enforced in accordance with the laws of the State of Texas, and shall be performable with venue in Travis County, Texas.

*Third Party Beneficiaries.* This Agreement is not intended to give or confer any benefits, rights, privileges, claims, actions or remedies to any person or entity as a third party beneficiary.

*Amendments.* This Agreement may be amended or supplemented only by an instrument in writing executed by the party against whom enforcement is sought.

*Time.* Time is of the essence in the performance of this Agreement.

*Attorneys Fees.* Should any party employ attorneys to enforce any of the provisions hereof, the party losing in any final judgment agrees to pay the prevailing party all reasonable costs, charges and expenses, including reasonable attorneys' fees, expended or incurred in connection therewith.

*Notice and Payments.* All notices hereunder must be in writing and shall be deemed delivered on the day personally delivered on the third day from the day sent by registered mail or certified mail, return receipt requested with the U.S. Postal Service, or on the day after the day sent by national overnight courier, to the parties at the following addresses, or at such other addresses as shall be specified by notice.

If notice to the PCDC:  
Pflugerville Community Development Corporation  
Attention: Executive Director  
203 West Main Street, Suite C  
P.O. BOX 1160  
Pflugerville, Texas 78691

If notice to Company:  
Arista Data Centers, L.L.C.  
Attn: Mr. Angelos Angelou  
8121 Bee Caves Road, Suite 200  
106 E. Sixth Street, Suite 900  
Austin, Texas 78746

With copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

All payments to the PCDC required under this agreement shall be made to:

Pflugerville Community Development Corporation  
Attention: Executive Director  
203 West Main Street, Suite C  
P.O. BOX 1160  
Pflugerville, Texas 78691

*Construction.* The parties acknowledge that the parties and their counsel have reviewed and revised this Agreement and that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement or any exhibits or amendments hereto.

*Counterpart Execution.* This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, and all such counterparts shall constitute one Agreement.

*Performance.* Performance by PCDC under the Agreement is dependent upon the approval of the City Council of the City of Pflugerville (Council). If the Council fails to approve this agreement, then PCDC shall issue written notice to Company and PCDC may terminate the Agreement without further duty or obligation hereunder. Company acknowledges that the approval of this document is beyond the control of PCDC.

*Undocumented Workers.* Pursuant to Chapter 2264 of the Texas Government Code, Company certifies that they will not knowingly employ any undocumented workers. Company further agrees that if the business, or a branch, division, or department of the business, is convicted of a violation under 8 U.S.C. Section 1324a(f), Company shall repay the amount of the public subsidy with interest, at the rate of ten percent (10%) per annum from the date this Agreement is entered into, not later than the 120th day after the date the public agency, state or local taxing jurisdiction, or economic development corporation notifies the business of the violation.

*Notice and Cure Periods.* No party may terminate this Agreement unless (i) such party provides written notice by certified mail, return receipt requested (a "Notice") to the other party specifying a material default in the performance of a material covenant or obligations under this Agreement and (ii) such failure is not (x) excused by the occurrence an event of Force Majeure or (y) cured by the other party within ninety (90) days after Notice thereof, or if such failure cannot be cured within such ninety (90)-day period, the other party has commenced remedial action to cure such failure (and continued to diligently and timely pursue the completion of such remedial action); provided, however, that (A) if such failure arises from a violation of law, then such default shall not give rise to the termination of this Agreement so long as the

defaulting party acts in accordance with a plan of action to cure such default, which plan of action is approved by a governmental entity within one hundred and eighty (180) days after receipt by the defaulting party of such Notice; provided, however, that the defaulting party shall endeavor to cause such plan to provide for cure of such default within one hundred and eighty (180) days; or (B) if such default arises from a violation of law resulting from a change in law, or a change in the interpretation or enforcement of law, by a governmental entity, then such default shall not give rise to the termination of this Agreement so long as the defaulting party acts in accordance with a commercially reasonable plan of action to cure such default prepared by such defaulting party and delivered to the other party.

*Force Majeure.* For purposes of this Agreement, the term "Force Majeure" includes events not reasonably within the control of the party whose performance is sought to be excused thereby, including the following causes and events (to the extent such causes and events are not reasonably within the control of the party claiming suspension): acts of God and the public enemy, strikes, lockouts or other industrial disturbances, inability to obtain pipe or other material or equipment or labor, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, high water washouts, inclement weather, arrests and restraint of rulers and people, interruptions by government or court orders, present or future orders of any regulatory body, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, freezing of wells or pipelines, inability to obtain or delays in obtaining additional necessary rights-of-way or permits (provided Company has used reasonable efforts to obtain such rights-of-way or permits), any laws, rules, orders, acts or restraint of government or governmental body or court, or the partial or entire failure of gas supply or any other event that is beyond the reasonable control of the party claiming Force Majeure. Notwithstanding any other provision of this Agreement to the contrary, in the event a party is rendered unable, wholly or in part, by Force Majeure to carry out its obligations under this Agreement (other than any obligation to make payment of any amount when due and payable hereunder), the obligation of such party, so far as it is affected by such Force Majeure, shall be suspended during the continuance of any condition or event of Force Majeure, but for no longer period, and such condition or event shall so far as possible be remedied with all reasonable dispatch, provided that the party claiming Force Majeure shall not be relieved of liability in the event and to the extent there is a finding of gross negligence or willful misconduct on the part of such party with respect to such matter. The party prevented or hindered from performing shall give prompt (but in no event later than five business days after the occurrence of such event) notice and reasonably full particulars of such event to the other party and shall take all reasonable actions within its power to remove the basis for nonperformance (including securing alternative supply sources) and after doing so shall resume performance as soon as possible. The settlement of strikes or lockouts or resolution of differences with workers shall be entirely within the discretion of the affected party, and that the above requirement that

any Force Majeure shall be remedied with all reasonable dispatch shall not require the settlement of strikes, lockouts or differences by acceding to the demands of the opposing party in such strike, lockout or difference when such course is inadvisable in the reasonably exercised discretion of the affected party.

[ remainder of this page intentionally blank – signatures on next page ]

DATED to be effective as of the Effective Date.

Arista Data Centers L.L.C.  
A Texas Limited Liability Company

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

PFLUGERVILLE COMMUNITY DEVELOPMENT CORPORATION  
A Texas Economic Development Corporation

By: \_\_\_\_\_  
Name: Omar Pena  
Title: President

STATE OF TEXAS,

COUNTY OF TRAVIS.

BEFORE ME, the undersigned authority, on this day personally appeared \_\_\_\_\_, \_\_\_\_\_ of Arista Data Centers, L.L.C., Texas Limited Liability Company, known to me to be the person whose name is subscribed to the foregoing instrument, and sworn and acknowledged to me that he executed the same for the purposes and consideration therein expressed, and in the capacity therein stated and as the act and deed of the limited liability company.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

\_\_\_\_\_  
Notary Public in and for  
The State of Texas

STATE OF TEXAS,

COUNTY OF TRAVIS.

BEFORE ME, the undersigned authority, on this day personally appeared Omar Pena, President of the Pflugerville Community Development Corporation, a Section 4B corporation incorporated under the Development Corporation Act of 1979, known to me to be the person whose name is subscribed to the foregoing instrument, and swore and acknowledged to me that he executed the same for the purpose and consideration therein expressed, and in the capacity therein stated and as the act and deed of the Pflugerville Community Development Corporation.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

\_\_\_\_\_  
Notary Public in and for  
The State of Texas

Exhibit A

Real Property of 40-65 acres

All of Lots 1, 3, and 5, Block "A", Resubdivision of Lot 1, Block A, Springbrook Corporate Center, a subdivision in Travis and Williamson Counties, Texas, according to the map or plat thereof, recorded under Document No. 200800318 of the Official Public Records of Travis County, Texas and recorded in Cabinet FF, Slide 210 of the Plat Records of Williamson County, Texas; or such other real property within the City of Pflugerville, Texas as Company may elect.