



City of Grand Island

Tuesday, November 22, 2005

Council Session

Item G8

#2005-329 - Approving the Continuing Disclosure Agreement and the Certificate of Participant for Nebraska City #2 Power Plant Participation

Staff Contact: Gary R. Mader; Doug Walker

Council Agenda Memo

From: Doug Walker, City Attorney
Gary R. Mader, Utilities Director

Meeting: November 22, 2005

Subject: Nebraska City Unit #2 – Separate System Bonds
Continuing Disclosure Agreement and Certificate of Participant

Item #'s: G-8

Presenter(s): Gary R. Mader, Utilities Director

Background

The City of Grand Island is a participant in a new coal fired power plant project being built by the Omaha Public Power District (OPPD) at the site of their existing Nebraska City Plant. The new unit will be the second on that site and is generally referred to as NC#2. All environmental permitting and state agency approvals have been completed, and the project is proceeding to the point that major capital expenditures are pending for construction. The methods of project funding are included in the Power Participation Agreement (PPA) between the City and OPPD.

The Project is a 600 MW power plant with OPPD having 300MW committed to their system and 300MW dedicated to seven Project Participants; public power utilities in Nebraska, Missouri and Minnesota. Grand Island's Participation Share is 30MW. The financing of the project is structured such that OPPD will issue their bonds for their share and will also issue the bonds for the Participants' share. The Participants' costs to service that debt are to be billed monthly over the 40 year life of the plant. Participants are obligated under the PPA to begin Capital Cost payments at the time the unit goes into commercial operation in 2009. The bond issue for the Participants' Share of the Capital Costs is referred to as the Separate System Bonds.

Discussion

Continuing Disclosure Agreement

Once the long term financing is in place for the Participants' share of the project capital costs, the administration of the bond issue requires each of the Participants to provide annual financial information to OPPD who will act as the Dissemination Agent. OPPD

will then compile the annual information from each Participant for dissemination to the bond holders and Underwriters in accordance with the bond covenants.

Attached is the *Continuing Disclosure Agreement*. By execution of this agreement, the City certifies that it will provide the required financial and operating information annually to OPPD over the term of the bond issue. The City also agrees that it will notify OPPD of circumstances that might occur during the term of the bonds that would have a material affect on the financial status of the Electric Utility. The information provided under this agreement would normally be provided by the City in support of Electric Revenue bonds issued directly by the City. But in the case of the NC#2 Project, each Participant makes submittal to OPPD, the Dissemination Agent, who compiles the data for dissemination in accordance with the Bond Covenants.

All participants in the Separate System Bonds issuance are required to execute the *Continuing Disclosure Agreement*.

Certificate of Participant

The NC#2 Separate System Bond issue requires the compilation of financial and operating data from each of the project Participants in order to prepare the Official Statement and other documents necessary to proceed with the issuance of the bonds to finance the Participants' share of the construction project. Each Participant must provide the required information and certify that this information is correct.

Attached is the *Certificate of Participant*. By execution of this document the City certifies that the information provided for preparation of the Separate System Bonds issue is correct, that there are not material legal matters pending which would affect the Participants' ability to meet its obligation to the project at the date of bond issuance.

All participants in the Separate System Bonds issuance are required to execute a *Certificate of Participant*.

Alternatives

It appears that the Council has the following alternatives concerning the issue at hand. The Council may:

1. Move to approve
2. Refer the issue to a Committee
3. Postpone the issue to future date
4. Take no action on the issue

Recommendation

City Administration recommends that the *Continuing Disclosure Agreement* and the *Certificate of Participant* be approved by Council for execution by the Mayor.

Sample Motion

Motion to approve the *Continuing Disclosure Agreement* and the *Certificate of Participant* and to authorize the Mayor to execute the documents.

CONTINUING DISCLOSURE AGREEMENT

\$112,000,000

**OMAHA PUBLIC POWER DISTRICT (NEBRASKA)
SEPARATE ELECTRIC SYSTEM REVENUE BONDS (NEBRASKA CITY 2)
2005 SERIES A**

THIS CONTINUING DISCLOSURE AGREEMENT, dated as of December 1, 2005 (this “Disclosure Agreement”), is executed and delivered by the undersigned (the “Participant”) and Omaha Public Power District, in its capacity as Dissemination Agent hereunder (the “Dissemination Agent”) and in its capacity as Issuer (the “Issuer”) of the above-captioned bonds (the “Bonds”) issued pursuant to the Issuer’s Resolution No. 5472 adopted November 17, 2005 (the “Resolution”). The Participant and the Issuer covenant and agree as follows:

Section 1. Purpose of the Disclosure Agreement. This Disclosure Agreement is being executed and delivered by the Participant, the Dissemination Agent and the Issuer for the benefit of the Holders and Beneficial Owners of the Bonds and in order to assist the Participating Underwriters in complying with, and constitutes the written undertaking of the Participant for the benefit of the Bondholders required by, Section (b)(5)(i) of Securities and Exchange Commission Rule 15c2-12 under the Securities Exchange Act of 1934, as amended (17 C.F.R. § 240.15c2-12) (the “Rule”).

The Participant, as an “obligated person” within the meaning of the Rule, undertakes to provide the following information as provided in this Disclosure Agreement:

- (1) Annual Financial Information; and
- (2) Audited Financial Statements, if any.

Section 2. Definitions. In addition to the definitions set forth in the Resolution, which apply to any capitalized term used in this Disclosure Agreement unless otherwise defined in this Section, the following capitalized terms shall have the following meanings:

“*Annual Financial Information*” means, in the case of the Participant, the financial information or operating data, provided at least annually, of the type included in the Participant’s section of Appendix A of the final official statement with respect to the Bonds, which Annual Financial Information may, but is not required to, include Audited Financial Statements. Annual Financial Information which consists of financial information derived from financial statements of the Participant (and not operating data) shall be prepared in accordance with generally accepted accounting principles as promulgated to apply to governmental entities from time to time by the Governmental Accounting Standards Board.

“*Audited Financial Statements*” means, in the case of the Participant, the annual audited financial statements of the Participant, if any. Audited Financial Statements shall be prepared in accordance with generally accepted accounting principles as promulgated to apply to governmental entities from time to time by the Governmental Accounting Standards Board.

“*Beneficial Owners*” means any person who has the power, directly or indirectly, to vote or consent with respect to, or to dispose of ownership of, any Bonds, including persons holding Bonds through nominees or depositories.

“*Dissemination Agent*” means initially, Omaha Public Power District, acting in its capacity as Dissemination Agent hereunder, or any successor Dissemination Agent designated in writing by the Issuer.

“ *Holders*” means either the registered owners of the Bonds, or, if the Bonds are registered in the name of The Depository Trust Participant or another recognized depository, any applicable participant in its depository system.

“*NRMSIR*” means a nationally recognized municipal securities information repository, as recognized from time to time by the Securities and Exchange Commission for the purposes referred to in the Rule; the NRMSIRs as of the date of this Disclosure Agreement being as follows: Bloomberg Municipal Repository, 100 Business Park Drive, Skillman, New Jersey 08558, Phone: (609) 279-3225, Facsimile: (609) 279-5962, E-Mail: Munis@Bloomberg.com; DPC Data Inc., One Executive Drive, Fort Lee, New Jersey 07024, Phone: (201) 346-0701, Facsimile: (201) 947-0107, E-Mail: nrmsir@dpcdata.com; FT Interactive Data, Attn: NRMSIR, 100 William Street, New York, NY 10038, Phone: (212) 771-6999, Fax: (212) 771-7390, E-Mail: NRMSIR@FTID.com, and Standard & Poor’s Securities Evaluations, Inc., 55 Water Street, 45th Floor, New York, New York 10041, Phone: (212) 438-4595, Facsimile: (212) 438-3975, E-Mail: nrmsir_repository@sandp.com.

“*Participant Report Date*” has the meaning set forth in Section 3(a) hereof.

“*Participating Underwriters*” means the original underwriters of the Bonds required to comply with the Rule in connection with offering of the Bonds.

“*Participation Agreement*” means the Participation Power Agreements dated January 15, 2004, between the District and each Participant and any replacements thereof, as the same may be amended from time to time, which contain commitments by the Participants to finance and pay for the construction and operation of the Separate System.

“*SID*” means a state information depository as operated or designated by the State of Nebraska as such for the purposes referred to in the Rule. As of the date of this Disclosure Agreement, there is no SID.

Section 3. Provision of Annual Reports.

(a) While any Bonds are outstanding, the Participant shall, or upon written direction shall cause the Dissemination Agent to, provide the Annual Financial Information on or before the 210th day after the end of each fiscal year (the “Participant Report Date”), beginning on or after the date hereof, to each then existing NRMSIR and the SID, if any. If the Dissemination Agent is to provide the Annual Financial Information, not later than 15 Business Days (as defined in the Resolution) prior to said date, the Participant shall provide the Annual Financial Information to the Dissemination Agent. The Participant shall include with each such submission of Annual Financial

Information to the Dissemination Agent a written representation addressed to the Dissemination Agent, upon which the Dissemination Agent may conclusively rely, to the effect that the Annual Financial Information is the Annual Financial Information required to be provided by it pursuant to this Disclosure Agreement and that it complies with the applicable requirements of this Disclosure Agreement. In each case, the Annual Financial Information may be submitted as a single document or as a set of documents, and all or any part of such Annual Financial Information may be provided by specific cross-reference to other documents previously provided to each NRMSIR and the SID, if any, or filed with the Securities and Exchange Commission and, if such a document is a final official statement within the meaning of the Rule, available from the Municipal Securities Rulemaking Board. The Audited Financial Statements, if any, may, but are not required to be, provided as a part of the Annual Financial Information.

If not provided as part of the Annual Financial Information, the Participant shall, or, upon furnishing such Audited Financial Statements to the Dissemination Agent shall cause the Dissemination Agent to, provide Audited Financial Statements when and if available while any Bonds are Outstanding to each then existing NRMSIR and the SID, if any.

If by 15 Business Days prior to a Participant Report Date the Dissemination Agent has not received a copy of the Annual Financial Information, the Dissemination Agent shall contact the Participant to give notice that the Dissemination Agent has not received the Annual Financial Information and that such information must be provided to the NRMSIRs and SID, if any, by the applicable Participant Report Date.

The Dissemination Agent shall:

- (i) determine prior to the Participant Report Date the name and address of each NRMSIR and each SID, if any; and
- (ii) to the extent the Participant has provided the Annual Financial Information to the Dissemination Agent and required such information be sent to each NRMSIR or SID, file a report with the Participant certifying that the Annual Financial Information has been provided by the Dissemination Agent to each NRMSIR and SID, if any, pursuant to this Disclosure Agreement, stating the date it was provided and listing each then existing NRMSIR and the SID, if any, to which it was provided.

If the Dissemination Agent does not receive the Annual Financial Information from the Participant required by clause (a) of this Section by the applicable Participant Report Date, the Dissemination Agent shall, without further direction or instruction from the Participant, provide to the Municipal Securities Rulemaking Board and to the SID, if any, notice of any such failure to provide to the Dissemination Agent Annual Financial Information by the applicable Participant Report Date. For the purposes of determining whether information received from the Participant is Annual Financial Information, the Dissemination Agent shall be entitled conclusively to rely on the written representation made by the Participant pursuant to this Section.

Any filing under this agreement may be made solely by transmitting such filing to the Texas Municipal Advisory Council (the "MAC") as provided at www.disclosureusa.org unless the United States Securities and Exchange Commission has withdrawn the interpretative advice in its letter to the MAC dated September 7, 2004.

Section 4. Termination of Reporting Obligation. The Participant's, and the Dissemination Agent's and the Issuer's obligations under this Disclosure Agreement shall automatically terminate once the Bonds are no longer Outstanding.

Section 5. Dissemination Agent. The Issuer may, from time to time, with written notice to the Participant, appoint or engage a third-party Dissemination Agent to assist it in carrying out its obligations under this Disclosure Agreement, and may discharge any such Dissemination Agent, with or without appointing a successor Dissemination Agent, upon notice to the Dissemination Agent. The initial Dissemination Agent shall be the Issuer. To the extent any Dissemination Agent engaged by the Issuer requires payment of a fee, or the Issuer incurs any expenses in discharging its obligations hereunder, the Participant shall promptly reimburse the Issuer for its pro rata portion of such fees (determined in such manner as pro rata payments are determined under the Participation Agreement).

Section 6. Amendment; Waiver. Notwithstanding any other provision of this Disclosure Agreement, the Participant, the Dissemination Agent and the Issuer may amend this Disclosure Agreement and any provision of this Disclosure Agreement may be waived by the parties hereto, if such amendment or waiver is supported by an opinion of counsel expert in federal securities laws, acceptable to the Participant and the Issuer, to the effect that such amendment or waiver would not, in and of itself, cause the undertakings herein to violate the Rule if such amendment or waiver had been effective on the date hereof but taking into account any subsequent change in or official interpretation of the Rule, provided that the Participant shall have provided notice of such delivery and of the amendment to each then existing NRMSIR or the MSRB and the SID, if any, provided that neither the Trustee nor the Dissemination Agent shall be obligated to agree to any amendment that modifies the duties or liabilities of the Dissemination Agent or the Trustee without their respective consent thereto. Any such amendment shall satisfy, unless otherwise permitted by the Rule, the following conditions:

(i) The amendment may only be made in connection with a change in circumstances that arises from a change in legal requirements, change in law or change in the identity, nature or status of the obligated person or type of business conducted;

(ii) This Disclosure Agreement, as amended, would have complied with the requirements of the Rule at the time of the primary offering, after taking into account any amendments or interpretations of the Rule, as well as any change in circumstances; and

(iii) The amendment does not materially impair the interests of Beneficial Owners and Holders of any of the Bonds, as determined either by parties unaffiliated with the Participant (such as counsel expert in federal securities laws), or by approving vote of Bondholders pursuant to the terms of the Resolution at the time of the amendment. The initial Annual Financial Information after the amendment shall explain,

in narrative form, the reasons for the amendment and the effect of the change, if any, in the type of operating data or financial information being provided.

Section 7. Additional Information. Nothing in this Disclosure Agreement shall be deemed to prevent the Participant from disseminating any other information, using the means of dissemination set forth in this Disclosure Agreement or any other means of communication, or including any other information in any Annual Financial Information or other disclosure, in addition to that which is required by this Disclosure Agreement. If the Participant chooses to include any information in any Annual Financial Information or other disclosure in addition to that which is specifically required by this Disclosure Agreement, the Participant shall have no obligation under this Disclosure Agreement to update such information or include it in any future Annual Financial Information.

Section 8. Default. In the event of a failure of the Participant, the Dissemination Agent or the Issuer to comply with any provision of this Disclosure Agreement, the Issuer, may, on its own behalf, or at the written direction of a Participating Underwriter, the Insurer or the Holders of at least 25% in aggregate principal amount of Outstanding Bonds, shall, but only to the extent the Issuer receives indemnification to its satisfaction, or any Beneficial Owner or Holder of any of the Bonds may, seek mandate or specific performance by court order, to cause the Participant, the Dissemination Agent or the Issuer, as the case may be, to comply with its obligations under this Disclosure Agreement; provided that neither the Participant, the Dissemination Agent nor the Issuer shall be liable for monetary damages or any other monetary penalty or payment for breach of any of its obligations under this Section or unless, in the case of the Participant, such breach shall have been willful or reckless. A default under this Disclosure Agreement shall not be deemed an Event of Default under the Resolution or Participation Agreement, and the rights and remedies provided by the Resolution or Participation Agreement upon the occurrence of an "Event of Default" shall not apply to any such failure. The sole remedy under this Disclosure Agreement in the event of any failure of the Participant, the Dissemination Agent or the Issuer to comply with this Disclosure Agreement shall be an action to compel performance.

Section 9. Duties, Immunities and Liabilities of Issuer and Dissemination Agent. The Dissemination Agent (if other than the Issuer or the Issuer in its capacity as Dissemination Agent) and the Issuer shall have only such duties as are specifically set forth in this Disclosure Agreement. The Dissemination Agent and Issuer shall be paid compensation by the Participant for its services provided hereunder and all expenses, legal fees and advances made or incurred by the Dissemination Agent hereunder. Neither the Dissemination Agent nor the Issuer shall have any duty or obligation to review any information provided to it by the Participant hereunder or shall be deemed to be acting in a fiduciary capacity for the Participant, the Holders or Beneficial Owners of the Bonds or any other party. The obligations of the Participant under this Section shall survive resignation or removal of the Dissemination Agent or Issuer.

Section 10. Beneficiaries. This Disclosure Agreement shall inure solely to the benefit of the Participant, the Issuer, the Participating Underwriters and the Beneficial Owners and Holders of any Bonds and shall create no rights in any other person or entity.

Section 11. Interpretation. It being the intention of the Participant and the Issuer that there be full and complete compliance with the Rule, this Disclosure Agreement shall be construed in accordance with the written guidance and no-action letters published from time to time by the Securities and Exchange Commission and its staff with respect to the Rule.

Section 12. Governing Law. This Disclosure Agreement shall be governed by the laws of the State of Nebraska.

Section 13. Counterparts. This Disclosure Agreement may be executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.

[Remainder of Page Left Blank Intentionally]

CITY OF GRAND ISLAND, NEBRASKA

By: _____
Name: _____
Title: _____

ATTEST:

By: _____
Name: _____
Title: _____

OMAHA PUBLIC POWER DISTRICT

By: _____
Name: _____
Title: _____

ATTEST:

By: _____
Name: _____
Title: _____

CERTIFICATE OF PARTICIPANT

\$112,000,000
OMAHA PUBLIC POWER DISTRICT (NEBRASKA)
SEPARATE ELECTRIC SYSTEM REVENUE BONDS (NEBRASKA CITY 2)
2005 SERIES A

The undersigned (the "Participant") hereby certifies as follows:

1. As of the date hereof, there is no action, suit, proceeding, inquiry or investigation, at law or in equity, before or by any court, government agency, public board or body, pending against the Participant or, to the best knowledge of the Participant, threatened against the Participant, affecting the corporate existence of the Participant or the titles of its officers and directors to their respective offices, or affecting or seeking to prohibit, restrain or enjoin the performance of the Participant of its obligations under the Participation Power Agreement dated as of January 15, 2004 (the "Participation Agreement"), between the Participant and the Omaha Public Power District (the "District") or contesting or affecting as to the Participant the validity or enforceability of the Participation Agreement, or contesting powers of the Participant or the execution and delivery by the Participant of the Participation Agreement, nor, to the best knowledge of the Participant, is there any basis for any such action, suit, proceeding, inquiry or investigation, wherein an unfavorable decision, ruling or finding would materially adversely affect the corporate existence or authority of the Participant or the authorization, execution, delivery or performance by the Participant under the Participation Agreement.

2. As of the date hereof, there exists no default under the Participation Agreement nor has any event occurred which, with the passage of time or the giving of notice or both, would become a default under the Participation Agreement.

3. The Participant has all necessary right, power and authority to execute and deliver the Continuing Disclosure Agreement dated as of December 1, 2005 by and between the Participant and the District.

4. The Participant acknowledges and agrees that the Participation Agreement has become effective in accordance with the requirements set forth in Section 23.10 and 23.11 of the Participation Agreement, and that the Participation Agreement constitutes the legal, valid and binding obligation of Participant, enforceable in accordance with its terms. Without limiting the foregoing, the Participant agrees and acknowledges that LB 969 was passed by the 2004 Nebraska Legislature and that the Participant therefor represents and warrants in accordance with Sections 2.2.4 and 23.12 that the step-up provisions contained in Section 17.3 of the Participation Agreement are the legal, valid and binding obligation of the Participant, enforceable in accordance with their terms.

5. With respect to the Preliminary Official Statement dated November 2, 2005 (the "Preliminary Official Statement") and the Official Statement dated November 17, 2005 (the "Official Statement") issued in connection with the above referenced bonds (the "Bonds"), the information contained in Exhibit A thereof pertaining to the Participant did not as of its date, and

does not as of the date hereof, contain any untrue statement of a material fact relating to the Participant or omit to state a material fact necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading.

The following certification applies only if the Participant is not Nebraska Public Power District:

6. The Participant, in accordance with Section 2.2.6 of the Participation Agreement, hereby represents and warrants that all payments for Operation and Maintenance Costs (as defined in the Participation Agreement) made by the Participant under the Participation Agreement will at all times be deemed ordinary and necessary operational costs of Participant, which will be paid on an equal basis with other ordinary and necessary operational costs of the Participant and prior to the payment of any financed debt of the Participant.

The following certification applies only if the Participant is NPPD:

7. The Participant, in accordance with Section 2.2.6 of the Participation Agreement, hereby covenants to provide the District with a surety covering its share of the ongoing Operation and Maintenance Costs in accordance with Section 16.2 of the Participation Agreement.

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DATED: December 1, 2005

CITY OF GRAND ISLAND, NEBRASKA

By: _____

Name: _____

Title: _____

R E S O L U T I O N 2005-329

WHEREAS, the City of Grand Island has entered into a Participation Power Agreement with the Omaha Public Power District (OPPD) dated January 15, 2004 to acquire 5% or approximately 30 megawatts of the capacity of OPPD's Nebraska City Power Plant addition referred to as NC2; and

WHEREAS, subsequent to the date of this agreement, the City of Grand Island has determined that the City's best option for financing the City's portion of Omaha Public Power District's NC2 power plant is through the issuance by OPPD of Separate Electric System Revenue Bonds (OPPD Bonds); and

WHEREAS, as part of the process of arranging financing for the OPPD Bonds, the Omaha Public Power District has requested that the City execute a Continuing Disclosure Agreement and a Certificate of Participant.

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE CITY OF GRAND ISLAND, NEBRASKA, that:

1. The Mayor and Council hereby find and determine that the City has entered into a Participation Power Agreement (the "Agreement") with Omaha Public Power District ("OPPD") with respect to the purchase of power from a coal fueled generating unit to be constructed at OPPD's Nebraska City, Nebraska, plant location; that for purposes of carrying out its obligations under the Agreement, OPPD is currently issuing its Separate Electric System Revenue Bonds (Nebraska City), 2005 Series A, (the "OPPD Bonds") and has requested that the City execute and deliver a Continuing Disclosure Agreement for purposes of assisting OPPD and its underwriters in carrying out their obligations under Rule 15c2-12 of the Securities and Exchange Commission and for the City to deliver certain certifications to OPPD in connection with its issuance of the OPPD Bonds; and that documents for approval by the Mayor and Council have been prepared and presented as follows:

- (a) Continuing Disclosure Agreement between the City and OPPD (in the separate capacity of Dissemination Agent) to be dated as of December 1, 2005; and
- (b) Certificate of Participant, to be dated the date of issuance of the OPPD Bonds (the documents described in (a) and (b) are referred to as the "City Closing Documents");

and that the City Closing Documents are in acceptable form and should be approved and their execution and delivery authorized.

2. The Agreement is hereby ratified and confirmed in all respects and the Mayor (or in his absence the Present of the Council) is hereby authorized to execute and deliver the Closing Documents on behalf of the City.

Approved as to Form ✕ _____ November 16, 2005 ✕ City Attorney
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3. This resolution is hereby determined to be a measure necessary to carry out the obligations of the City under the Agreement and shall be in force and effect immediately upon its passage and approval.

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PASSED AND APPROVED by the City Council of the City of Grand Island, Nebraska, November 22, 2005.

Jay Vavricek, Mayor

ATTEST:

RaNae Edwards, City Clerk