



City of Grand Island

Tuesday, September 09, 2008

Council Session

Item G6

**#2008-239 - Approving Non Disclosure Agreement between the
City of Grand Island and Northwestern Energy**

Staff Contact: Gary R. Mader;Dale Shotkoski

Council Agenda Memo

From: Gary R. Mader, Utilities Director
Dale Shotkoski, City Attorney

Meeting: September 9, 2008

Subject: NONDISCLOSURE AGREEMENT between the City of Grand Island and NorthWestern Energy

Item #'s: G-6

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

Background

Historically, Grand Island Utilities has relied on the regional natural gas transmission system for gas fuel supply to the Burdick Station power plant. In late 2006 a current contract was expiring and specifications for continued gas supply to the power plant were developed. The specifications were advertised in early 2007. Bids were solicited from all five known regional gas marketers serving central Nebraska markets. At that time it became very evident that the regional pipelines were at full capacity. To the future, service would be limited in availability, and the price would be substantially above historic levels. From the early 2007 bid solicitation, the price for continued natural gas service, at the same level as was previously available, went from \$175,200 annually to over \$1,000,000 annually.

Recognizing that the regional natural gas system had nearly reached its full capacity, the Department began to explore options to assure the availability and pricing of future fuel supply to Burdick Station. Investigations of securing supply from other gas marketers were conducted, with little success. The Department also began conversations with the City's Local Distribution Company, North Western Energy (NWE). NWE also relies on the regional transmission pipelines for its fuel supply and had experienced problems similar to the Department's when looking to the future for continued supply from the now limited pipeline capacity in the region. Since 2007, City staff and representatives of NWE have had a number of meetings to evaluate the possibilities of developing a joint project to benefit both entities by providing reliable pipeline capacity for the future. There is an inherent compatibility in a joint venture project in that the Utilities Department's high demand season for gas fuel is in the summer months for electric load peaking, and NWE's is in the winter months to serve heating load.

Discussion

The evaluation of a potential joint project with the City of Grand Utilities and NWE working together to assure future natural gas supply to the City has now progressed to the point of detailed engineering and cost analyses of options. NWE, being a private corporation, advises that this detailed information and joint evaluation in concert with the City, a public entity, poses a risk to their business, in that it requires the use of information considered to be trade secrets, confidential or proprietary. In order to assure that confidential information which might harm NWE's business position is not compromised as a result of working with the City of Grand Island, it is requested that the City enter into a NONDISCLOSURE AGREEMENT with North Western Energy. A copy of the proposed agreement is attached.

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 Council approve acceptance of the NONDISCLOSURE AGREEMENT in order to continue pursuit of the joint project with NorthWestern Energy.

Sample Motion

Move to approve the Agreement between the City of Grand Island and NorthWestern Energy.

NONDISCLOSURE AGREEMENT

This Agreement is hereby made this ___ day of September, 2008, by and between NorthWestern Corporation d/b/a NorthWestern Energy, a Delaware corporation (“NorthWestern”), and the City of Grand Island, a municipal corporation (“City”) (collectively, the “Parties” and each individually a “Party”).

WITNESSETH:

WHEREAS, the Parties, desire to voluntarily negotiate the terms of a natural gas service proposal (said negotiations hereinafter referred to as the “Negotiations”);

WHEREAS, the Parties agree and acknowledge that during the course of Negotiations, they may disclose to each other trade secrets or other confidential, proprietary or commercial information;

WHEREAS, the Parties agree and acknowledge that the disclosure of any trade secrets or other confidential, proprietary or commercial information related to the Negotiations may provide a demonstrated advantage to specified business competitors and would serve no public purpose if released; and

WHEREAS, the Parties desire to enter into this Agreement to facilitate the Negotiations by permitting such disclosure without jeopardizing its confidential, proprietary or trade secret status.

NOW, THEREFORE, in consideration of the promises, mutual promises and covenants set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree and covenant as follows:

1. Capitalized terms used but not otherwise defined herein have the following meanings:
 - A. “Confidential Information” means all information (i) that is exchanged between the Parties from time to time during the Negotiations, whether exchanged orally, visually or in writing and regardless of the form of media in which such information is provided, and (ii) that either (a) is stamped, labeled, or otherwise clearly designated as “CONFIDENTIAL”, or (b) may be reasonably understood from the nature of such information or from the circumstances of such exchange to be confidential, commercial, or proprietary to the Disclosing Party, or (c) constitutes trade secrets of the Disclosing Party.
 - B. “Person” means an individual, corporation, association, partnership, limited partnership, limited liability partnership, limited liability company, trust or other organization.
 - C. “Disclosing Party” means a Party disclosing Confidential Information to the other.

- D. "Receiving Party" means a Party receiving Confidential Information from the other.
2. The Receiving Party: (i) shall not disclose Confidential Information of the Disclosing Party except as authorized under the terms and conditions of this Agreement and shall acknowledge the same by executing Exhibit A affixed hereto; (ii) shall take reasonable action to protect and safeguard the Disclosing Party's Confidential Information from unauthorized use or disclosure, including, at a minimum, any reasonable action that the Receiving Party takes to protect the confidentiality of its own Confidential Information; and (iii) shall maintain such Confidential Information in confidence and disclose it only to the Receiving Party's employees, attorneys, consultants or agents who have a need to know it for purposes of the Negotiations and whom have been informed of and agree to abide by the Receiving Party's obligations under this Agreement.
3. Any other provision of this Agreement notwithstanding:
- A. The obligation of the Receiving Party to protect the confidentiality of any Confidential Information shall automatically terminate to the extent such Confidential Information, or any portion thereof: (i) is or becomes public knowledge through no action or omission of the Receiving Party; (ii) is disclosed publicly by or with the consent of the Disclosing Party; (iii) is lawfully obtained by the Receiving Party from a third party without violation of this Agreement; (iv) is independently developed by the Receiving Party from sources or through persons that the Receiving Party can demonstrate had no access to the Confidential Information; or (v) is lawfully known by the Receiving Party at the time of disclosure other than by reason of discussions with or disclosure by the Disclosing Party.
- B. Either Party may disclose any of the other Party's Confidential Information pursuant to subpoena, to court order, or to any other valid judgment, rule, order, decree, directive, or other determination issued by any competent federal, state, regulatory or judicial tribunal having jurisdiction over the Parties; provided, however, the Receiving Party shall notify the Disclosing Party in writing of any such judgment, rule, order, decree, directive or determination promptly after becoming aware of the applicability of same; and provided, further, that the Receiving Party, upon written request of the Disclosing Party, shall cooperate with the Disclosing Party in seeking a protective order with respect to such Confidential Information.
- C. The Parties' respective counsel of record in the Negotiations (i) may use the other Party's Confidential Information for purposes of rendering advice to said Parties, (ii) may generally examine and rely upon said Confidential Information in their representation of said Parties on condition that neither attorney disclose said Confidential Information to any third party in breach of this Agreement; and (iii) shall not be precluded by virtue of this Agreement from any representation whatsoever of

the Parties or of any third party (and neither party shall seek such preclusion) except where such representation would be a breach of this Agreement or constitute a conflict of interest under applicable state law or code of professional responsibility.

4. The Receiving Party shall use the Confidential Information only for the Negotiations and for no other purpose whatsoever.
5. Confidential Information provided by the Disclosing Party to the Receiving Party is to be deemed at all times the property of the Disclosing Party. The Receiving Party, upon written request of the Disclosing Party, shall promptly either (i) return to the Disclosing Party, by courier or certified U.S. mail (return receipt requested) all Confidential Information of the Disclosing Party, or (ii) with the consent of the Disclosing Party, destroy said Confidential Information, and, within twenty (20) days of such destruction, certify in writing to the Disclosing Party that it has satisfied its obligations under this Section 6 of this Agreement.
6. If any provision of this Agreement is held invalid or unenforceable, such provision shall be deemed deleted from this Agreement and this Agreement is to be construed in such manner as to give effect, to the fullest extent permitted by law, to the Parties' intent in agreeing to the original provision. The remaining provisions of this Agreement shall continue in full force and effect.
7. Each Party represents and warrants that execution and delivery of this Agreement has been duly authorized by all requisite corporate action. The City shall adopt a resolution, similar in form to Exhibit B attached hereto, authorizing the mayor to execute this Agreement.
8. As a violation by the Receiving Party of any of its nondisclosure obligations under this Agreement could cause irreparable injury to the Disclosing Party and as there is no adequate remedy at law for such violation, the Disclosing Party shall have the right, in addition to any other remedies available to it at law or in equity, to enjoin the Receiving Party in a court of equity from violating or threatening to violate its nondisclosure obligations. The Parties agree that, in the event of a breach of this Agreement, the non-breaching Party, upon written notice to the other, in addition to any other available remedy, shall be entitled to recover any and all Confidential Information from the breaching Party and shall not be obligated as part of the Negotiations to provide the breaching Party any additional Confidential Information until and unless the Parties agree upon a remedy for said breach and any future breaches.
9. This Agreement, the negotiations pursuant hereto, and the disclosure and receipt of Confidential Information do not create or imply (i) any agreement with respect to the sale, purchase or pricing of any product or service; (ii) any right conferred, by license or otherwise, in any Confidential Information or in any patent, trademark, service mark, copyright or other intellectual property; or (iii) a waiver, relinquishment or release of any rights or exemptions, that may be applicable or available under the Act or other applicable

laws.

10. This Agreement, together with its preamble and recitals, constitutes the entire agreement and understanding between the Parties with respect to the subject matter hereof, superseding all prior and contemporaneous communications, agreements and understandings, whether written or oral, relating thereto. The provisions of this Agreement may not be modified, amended, or waived, except by a written instrument duly executed by both Parties.
11. This Agreement is to be governed by, and construed in accordance with, the laws of the state of Nebraska.
12. This Agreement is to be deemed binding upon, will inure to the benefit of, and is enforceable by, the Parties and their respective successors and permitted assigns. This Agreement is to be deemed automatically assigned to the Parties' respective successors in interest created by merger, acquisition, divestiture or other reorganization without the need for a signed writing or other instrument. Neither Party may otherwise assign this Agreement without the written consent of the other.
13. Neither Party will be deemed to have waived any of its rights, powers or remedies hereunder unless such waiver is in writing and signed by said Party. Nor is any delay or omission by either Party in exercising any of said rights, powers or remedies to be deemed a waiver hereof. Nor is a waiver signed by either Party of any breach of the covenants, conditions or obligations binding on the other Party on one occasion be construed as a waiver or consent to such breach on any future occasion or a waiver of any other covenant, condition, or obligation contained herein.
14. Unless stated otherwise, all remedies provided for in this Agreement shall be cumulative, nonexclusive and in addition to, but not in lieu of, any other remedies available to either Party at law, in equity, or otherwise.
15. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original and all of which taken together shall constitute one and the same Agreement.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed as of the dates written below:

NorthWestern Corporation d/b/a NorthWestern Energy

By: _____

Name _____

Title: _____

Date: _____

City of Grand Island

By: _____

Name: _____

Title: _____

Date: _____

EXHIBIT A

STATE OF _____)

COUNTY OF _____)

CERTIFICATE OF AUTHORIZED REVIEWING REPRESENTATIVE

BEFORE ME , the undersigned authority, duly Commissioned and qualified in and for the State and County aforesaid, personally came and appeared _____ who, being by me first duly sworn, deposed and said as follows:

I certify my understanding that Confidential Information is being provided to me pursuant to the terms and restrictions of the foregoing Agreement, that I have been given a copy of and have read the Agreement, and that I agree to be bound by it as the Party by whom I am employed or have been retained is bound by it. I understand that the contents of "Confidential Information," and any notes, memoranda, or any other form of information regarding or derived from Confidential Information shall not be disclosed to anyone other than in accordance with the Agreement and shall be used only for the purposes of the Negotiations.

Signature:

Date of Execution: _____

(Type or Print below)

Name: _____

Title: _____

Company: _____

Address: _____

SWORN TO AND SUBSCRIBED BEFORE ME on this _____ day of _____, 2008.

EXHIBIT B

RESOLUTION 2008-__

A RESOLUTION TO ENTER A NONDISCLOSURE AGREEMENT WITH NORTHWESTERN CORPORATION WITH RESPECT TO VOLUNTARY NEGOTIATIONS BETWEEN NORTHWESTERN AND THE CITY REGARDING A NATURAL GAS SERVICE PROPOSAL.

WHEREAS, the Parties, desire to voluntarily negotiate the terms of a natural gas service proposal (said negotiations hereinafter referred to as the "Negotiations");

WHEREAS, the Parties agree and acknowledge that during the course of Negotiations, they may disclose to each other trade secrets or other confidential, proprietary or commercial information;

WHEREAS, the Parties agree and acknowledge that the disclosure of any trade secrets or other confidential, proprietary or commercial information related to the Negotiations may provide a demonstrated advantage to specified business competitors and would serve no public purpose if released; and

WHEREAS, the Parties desire to enter into a Nondisclosure Agreement to facilitate the Negotiations by permitting such disclosure without jeopardizing the confidential, proprietary or trade secret status.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF GRAND ISLAND, NEBRASKA, THAT:

The Mayor is hereby authorized to, on behalf of the City, execute the nondisclosure agreement in accordance with the terms and conditions generally described above.

DATED this ____ day of September, 2008.

CITY OF GRAND ISLAND, NEBRASKA

By: _____
Margaret Hornady, Mayor

Attest:

RESOLUTION 2008-239

WHEREAS, the City of Grand Island and NorthWestern Corporation (the Parties) desire to voluntarily negotiate the terms of a natural gas service proposal (said negotiations hereinafter referred to as the "Negotiations"); and

WHEREAS, the Parties agree and acknowledge that during the course of Negotiations, they may disclose to each other trade secrets or other confidential, proprietary or commercial information; and

WHEREAS, the Parties agree and acknowledge that the disclosure of any trade secrets or other confidential, proprietary or commercial information related to the Negotiations may provide a demonstrated advantage to business competitors and would serve no public purpose if released; and

WHEREAS, the Parties desire to enter into a Nondisclosure Agreement to facilitate the Negotiations by permitting such disclosure without jeopardizing the confidential, proprietary or trade secret status.

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE CITY OF GRAND ISLAND, NEBRASKA, that the Mayor is hereby authorized to, on behalf of the City, execute the Nondisclosure Agreement in accordance with the terms and conditions generally described above.

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Adopted by the City Council of the City of Grand Island, Nebraska, September 9, 2008.

Margaret Hornady, Mayor

Attest:

RaNae Edwards, City Clerk

Approved as to Form ☐ _____
September 4, 2008 ☐ City Attorney