



City of Grand Island

Tuesday, October 27, 2009

Council Session

Item G8

#2009-279 - Approving Confidentiality Agreement Between the City of Grand Island, Utilities Department and Midwest Wind Energy Development Group

Staff Contact: Gary R. Mader

Council Agenda Memo

From: Gary R. Mader, Utilities Director
Wesley Nesor, Asst. City Attorney/Purchasing

Meeting: October 27, 2009

Subject: Confidentiality Agreement with Midwest Wind Energy
Development Group

Item #'s: G-8

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

Background

The Utilities Department has made efforts to be involved in developing technologies regarding renewable energy. Presently, the most cost effective form of renewable energy is wind energy. Since 1998, the City's Utilities Department has participated with other of the state's utilities in Wind Turbine projects.

Springview Project:

Grand Island first became involved with wind energy in 1998 with the development of the "Nebraska Distributed Wind Generation Project" or NDWG, often referred to as the "Springview Project" because of its proximity to that community in north central Nebraska. The project included two 750 kilowatt wind turbines installed near Springview, Nebraska. Half of the cost of the project was funded by a grant from the Electric Power Research Institute/Department of Energy-Turbine Verification Program. NDWG is a joint project among Nebraska utilities that includes Auburn Utilities, Grand Island Utilities, KBR Power District, Lincoln Electric System, the Municipal Energy Agency of Nebraska and Nebraska Public Power District. Grand Island has received an average of six megawatt hours of energy per month from NDWG. This is enough energy to supply approximately six houses for one month. Due to rising maintenance costs, increasing equipment failures and unit downtime, this facility was decommissioned in August of this year. Including the salvage value of the turbines, the final production cost was approximately \$23/megawatt hour. Currently, there are discussions underway to develop a project to install two new turbines at the Springview site.

Ainsworth Project:

In addition to NDWG, Grand Island is also a participant in the Ainsworth Wind Energy Farm (AWEF) near Ainsworth, NE. This facility was constructed in 2005 and consists of

thirty-six 1.65 megawatt turbines for a total project output of 59.4 megawatts. Grand Island has a one megawatt participation level in AWEF. AWEF is another joint project that is operated by Nebraska Public Power District, and includes participation by Omaha Public Power District, the Municipal Energy Agency of Nebraska, Grand Island Utilities, and JEA of Jacksonville, Florida. Since the start of AWEF, Grand Island has received an average of 293 megawatt hours of energy per month. This is enough energy to supply approximately 293 houses for one month. Currently, the total production cost of power received from AWEF is in the \$45 to \$55 per megawatt hour range.

Elkhorn Ridge Wind Farm:

On March 16th, 2009, Grand Island began receiving power from the Elkhorn Ridge Wind Farm located near Bloomfield, Nebraska. Grand Island Utilities receives 1.25% of the output of this facility. Grand Island has received an average of 186 megawatt hours of energy per month. This is a privately owned facility with power purchase agreements in place for the energy produced.

Discussion

The use of fossil fuels for electricity production is coming under increasing scrutiny at the national level and more restrictions and regulations are likely to be placed upon fossil fuels, particularly coal. With the City's primary energy supply being produced from coal, the overall rate impact from a carbon emission tax or other environmental regulations could be significant.

It is the recommendation of City Administration that the Utilities Department stay involved with the various renewable energy projects as they develop in the state. Two additional projects are in the evaluation stage of development for completion in the near future. The two new projects include a proposed 80 megawatt facility near Petersburg, NE and an 80 megawatt facility near Broken Bow, NE. Grand Island staff has had preliminary discussions with NPPD and other potential participants in the development of these facilities. The parties proposing to construct these facilities wish to maintain confidentiality concerning the details of the engineering design and financing of the project. To that end, the attached Confidentiality Agreement is required of parties interested in continuing participation in project development.

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 a future date
4. Take no action on the issue

Recommendation

City Administration recommends that the Confidentiality Agreement be signed to allow continued involvement in the two proposed wind energy facilities in Nebraska.

Sample Motion

Move to approve the Confidentiality Agreement with Midwest Wind Energy Development Group.

CONFIDENTIALITY AGREEMENT

This Confidentiality Agreement (the "Agreement"), dated as of October 27, 2009, is entered into by and between Midwest Wind Energy Development Group, on behalf of itself and its subsidiaries ("Midwest Wind") and City of Grand Island ("Grand Island") (each, a "Party", and collectively, the "Parties").

WITNESSETH:

WHEREAS, the Parties wish to enter into discussions either directly, or indirectly through Nebraska Public Power District ("NPPD"), concerning the purchase and sale of renewable energy from one or more wind power projects to be contracted with NPPD on a long term power purchase agreement (the "Potential Transaction"). Therefore, Midwest Wind will provide to Grand Island either directly, or indirectly through NPPD, and Grand Island will provide to Midwest Wind, certain information that is either non-public, confidential or proprietary in nature.

NOW THEREFORE, for good and valuable consideration, including Midwest Wind's provision of such information to Grand Island, and Grand Island's provision of such information to Midwest Wind, the Parties agree as follows:

1. This Agreement shall cover any information (the "Information") provided by either Party ("Disclosing Party") to the other Party ("Receiving Party") regarding the Potential Transaction, including, without limitation, information with regard to current or projected assets, business strategies or projected financial information. Analyses, presentations or other materials prepared by a Party regarding the Potential Transaction shall be deemed to be Information provided by the other Party to the extent they contain Information provided by the other Party. Neither Party is obligated under this Agreement to provide Information to the other Party.
2. A Receiving Party may transmit the Information it received from the Disclosing Party to its subsidiaries and their respective employees, agents, partners, lenders, officers, directors and advisors (including, without limitation, attorneys, accountants, consultants and rating agencies) ("Representatives") provided such Representatives (i) need to know the Information for the sole purpose of evaluating the Potential Transaction and (ii) will preserve the confidentiality of the Information in accordance with the terms and provisions of this Agreement.
3. Unless otherwise agreed to herein, a Receiving Party shall not, unless authorized by the Disclosing Party, (i) distribute or disclose to any person, firm, entity, or corporation (other than its Representatives) any of the Information provided by the Disclosing Party (ii) permit any third party (other than its Representatives) to have access to such Information; or (iii) use such Information for any purpose other than for the purpose of pursuing the activities as contemplated herein.

4. In the event that a Receiving Party is requested in any proceeding to disclose any Information provided by a Disclosing Party, the Receiving Party will, to the extent permitted by law, give the Disclosing Party prompt notice of such request so that the Disclosing Party may seek an appropriate protective order, including any appeals at the expense of the Disclosing Party. If, in the absence of a protective order, the Receiving Party is nonetheless advised by its counsel reasonably that disclosure of the Information is required, the Receiving Party may disclose such Information without liability hereunder, provided that the Receiving Party promptly notifies, to the extent permitted by law, the Disclosing Party of any such disclosure.
5. This Agreement shall not restrict the release of any Information that the receiving Party can demonstrate:
 - a. has come within the public domain and is readily available through no fault or action by the receiving Party; or
 - b. was readily and lawfully available to the receiving Party on a non-confidential basis prior to the disclosure hereunder to the receiving Party; or
 - c. was developed independently by the receiving Party without reliance on the Information.
6. This Agreement does not obligate either Party to enter into any further agreements. This Agreement is not intended to create, and shall not be construed to create a partnership or other binding legal obligations between the Parties except with respect to the confidentiality of the Information as described herein.
7. All parties hereto agree that money damages would not be a sufficient remedy for any breach of this Agreement and that a disclosing party shall be entitled to injunctive or other equitable relief to remedy or prevent any breach or threatened breach of this Agreement. Such remedy shall not be the exclusive remedy for any breach of this Agreement, but shall be in addition to all other rights and remedies available at law or in equity. In the event of litigation or arbitration relating to this Agreement, if a court or arbitration panel of competent jurisdiction determines that a receiving party has breached this Agreement, such party shall be liable to the disclosing party for the amount of the reasonable legal fees incurred in connection with such litigation, including any appeal therefrom.
8. The Parties agree that if any provision of this Agreement is found to be unenforceable, the remaining provisions shall remain in full force and effect.
9. Any amendment to this Agreement must be in writing and approved by both Parties.
10. This Agreement shall be governed by the laws of the state of Nebraska, without giving effect to the provisions thereof relating to conflict of laws.

11. This Agreement shall be binding on all successors and assigns of each of the Parties and shall inure to the benefit of the respective successors and assigns of each Party. Nothing in this Agreement shall be deemed to create rights in or benefits for any third parties, however, no assignment, sale, or encumbrance of either Party's position with regard to this Agreement shall be made without the prior written approval of the other Party.
12. Titles or captions of paragraphs or subparagraphs contained in this Agreement are inserted only as a matter of convenience and for reference, and in no way define, limit, extend, or describe the scope of this Agreement or the intent of any provision hereof.
13. All notices with regard to this Agreement should be forwarded, if intended for Midwest Wind, to:

Midwest Wind Energy Development Group, LLC

Attn: Stefan A. Noe

Address : 211 E. Ontario Street, Suite 1720
Chicago, IL 60611

Telephone: (312) 787-6080

Fax: (312) 787-6096

e-mail: noe@midwestwind.com

If intended for Grand Island, to:

City of Grand Island

Attn: Travis Burdett, Assistant Utilities Director

Address : P.O. Box 1968
Grand Island, NE 68802-1968

Telephone: (308) 385-5466

Fax: (308) 385-5449

14. This Agreement may be signed in counterpart, each of which when taken together shall constitute one and the same instrument.
15. The terms and conditions and the existence of this agreement shall remain confidential unless and until mutually agreed otherwise by the Parties.
16. This Agreement shall expire two years from the date hereof.
17. This Agreement contains the entire agreement of the parties hereto with respect to its subject matter.

18. Notwithstanding any other provision contained herein, each Party (and their respective Representatives) may disclose to any persons, without limitation of any kind, the tax treatment and tax structure of the transaction and all materials of any kind (including opinions and other tax analyses) that are provided to the taxpayer relating to such tax treatment and tax structure; provided that, with respect to any document or similar item that contains information concerning the tax treatment or tax structure of the transaction as well as other information, this sentence shall only apply to such portions of the document or similar item that relate to the tax treatment or tax structure of the transactions, and provided further, that each Party recognizes that the obligation or privilege each has to maintain, in its sole discretion, the confidentiality of a communication relating to the transaction, including a confidential communication with its attorney or a confidential communication with a federally authorized tax practitioner under Section 7525 of the Internal Revenue Code, is not intended to be affected by the foregoing. To the extent not inconsistent with the immediately preceding sentence, neither Party may disclose (except as required by law or pursuant to the tax shelter regulations under Internal Revenue Code sections 6011, 6111 or 6112) to any person or entity (other than its Representatives) (a) the existence and status of any ongoing negotiations between the Parties concerning a possible transaction; (b) any specific pricing information in connection with the transaction; (c) any of the specific properties or assets involved in the transaction (other than generic properties or assets relating to the structure of the transaction) and (d) the identity of any participants in the transaction.
19. Within a reasonable time following the receipt of a written request from the Disclosing Party, the Receiving Party shall deliver to the Disclosing Party or destroy all Information the Receiving Party received from the Disclosing Party, together with a certificate attesting to such return or destruction if so requested by the Disclosing Party.
20. Any waiver shall be only effective for the particular instance for which it is granted and shall not constitute a waiver of a subsequent occurrence of the waived event nor constitute a waiver of any other provision hereof, at the same time or subsequently.

IN WITNESS WHEREOF, each of the Parties has caused this Agreement to be executed by its respective duly authorized representative as of the date first noted above.

Midwest Wind Energy Development Group, LLC

By: _____

Name: Stefan A. Noe

Title: President

City of Grand Island

By: _____

Name: Margaret Hornady

Title: Mayor

RESOLUTION 2009-279

WHEREAS, since 1998, the Grand Island Utilities Department has participated in Wind Turbine Electric Generation Projects to secure the most cost effective form of renewable energy; and

WHEREAS, it is in the best interests of the City to continue participation of various renewable energy projects as they develop; and

WHEREAS, two additional projects are in the evaluation stage of development for completion in the near future; and

WHEREAS, in order to secure the information exchanged, and to comply with the National Electric Reliability Council's standards prohibiting the disclosure of information that may be used to gain an unfair advantage in electric power markets, it is recommended that a confidentiality agreement be entered into between the parties; and

WHEREAS, the confidentiality agreement would authorize NPPD, the City's Utility Department and Midwest Wind Energy Development Group to disclose to one another as well as their Reliability Coordinator, as required under applicable National Electric Reliability Council reliability standards, real-time power system reliability data for all points; and

WHEREAS, the proposed agreement has been reviewed and approved by the City Attorney.

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE CITY OF GRAND ISLAND, NEBRASKA, that the Confidentiality Agreement between the City of Grand Island, Nebraska Public Power District and Midwest Wind Energy Development Group is hereby approved; and the Mayor is hereby authorized and directed to execute such agreement on behalf of the City of Grand Island.

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Adopted by the City Council of the City of Grand Island, Nebraska, October 27, 2009

Margaret Hornady, Mayor

Attest:

Approved as to Form	☐ _____
October 22, 2009	☐ City Attorney

RaNae Edwards, City Clerk