



City of Grand Island

Tuesday, January 26, 2010

Council Session

Item G12

**#2010-33 - Approving the Power Sales and Marketing Agreements
between the City of Grand Island and Omaha Public Power District**

Staff Contact: Gary R. Mader

Council Agenda Memo

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

Meeting: January 26, 2010

Subject: Power Sale and Marketing Agreements between the City of Grand Island, Utilities Dept. and Omaha Public Power District

Item #'s: G-12

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

Background

The nation's electric utilities are interconnected by a high voltage transmission grid that provides greatly increased stability and reliability for all electric users. The interconnections allow utilities to provide reserves, address emergency conditions and to routinely buy and sell power as market conditions allow. Within the national electric grid, major transmission owner/operators are assigned responsibilities for control of the transmission in their service areas and are required to balance the generation, load and power interchanges within their areas. Those areas of responsibility are termed Control Areas. For most of the area of the State of Nebraska, the major transmission owner/operator is the Nebraska Public Power District (NPPD) and that utility has responsibility for the Control Area in which Grand Island's power plants are located. In accordance with a number of agreements over the years, Grand Island Utilities accesses regional transmission service via its interconnections with NPPD. Additionally, the sale of power to other utilities by Grand Island is accomplished in accordance with agreements with NPPD, as NPPD has responsibility for the Control Area in which the City's generation is located.

In May of 2009, the Utilities Department began receiving power from the Omaha Public Power District (OPPD) Nebraska City Unit #2 (NC2). NC2 is a 670 MW coal-fired power plant located along the Missouri River, south of Omaha. Grand Island is one of multiple participants in this major addition of base load capacity in the state. The NC2 plant is located outside of the NPPD Control Area, in the OPPD Control Area. The physical location of NC2 opens opportunities for power sales directly from that Control Area. The Utilities Department has approached both NPPD and OPPD regarding the potential of power sales directly from the NC2 plant from the OPPD Control Area.

Discussion

Discussions began with OPPD and NPPD to determine the best route to take in order to establish an agreement that would not dramatically change the normal operations with NPPD but would allow Grand Island the option of using OPPD as a marketer of Grand Island's NC2 generation share. NPPD drafted an operational procedure that defines the changes in responsibilities of each entity under this arrangement. OPPD then provided a Power Purchase and Sale Agreement. This agreement defines the terms and conditions for various power transactions and is OPPD's standard Power Sale Agreement used to conduct business with other utilities. A copy of this standard agreement is attached. Additionally, this agreement contains exhibits, forms and supplements that are considered confidential by OPPD.

Also, OPPD provided a Joint Marketing/Services Agreement. This is a detailed agreement that applies solely to Grand Island's NC2 generation and specifies each party's responsibilities in detail. OPPD also considers the Marketing/Services Agreement confidential. The confidential attachments to the Power Purchase and Sale Agreement, and the Joint Marketing/Services Agreement are provided to the Council under separate cover.

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 the Power Purchase and Sale Agreement and the Joint Marketing/Services Agreement with Omaha Public Power District.

Sample Motion

Move to approve the Power Purchase and Sale Agreement and the Joint Marketing/Services Agreement with Omaha Public Power District.

POWER PURCHASE AND SALE AGREEMENT

This Agreement made and entered into this 26 day of January, 2010. By and between OMAHA PUBLIC POWER DISTRICT ("OPPD"), a public corporation and political subdivision of the State of Nebraska, and CITY of GRAND ISLAND UTILITIES DEPARTMENT, NEBRASKA ("CITY"), hereby agree as follows:

1. **Certain Definitions.** For purposes of this Agreement, the following terms are defined:
 - (a) "Affiliate" shall mean any Person controlling, controlled by, or under common control with another Person.
 - (b) "Authorized Representative(s)" shall mean those OPPD and CITY personnel authorized to both purchase and sell Power on behalf of each respective party.
 - (c) "Control Area Services" shall mean the exercise of operating control of the resources necessary to meet the requirements for a Transaction within a party's control area on an instantaneous and continuous basis.
 - (d) "Facilities" shall mean all generation, transmission, distribution, communication, and other equipment utilized by either party in connection with a Transaction.
 - (e) "Incremental Cost" shall mean, with respect to a Transaction:
 1. The cost of the fuel, operating labor and maintenance required to generate the energy necessary to supply (i) the scheduled delivery to the receiving party, plus (ii) the incremental losses incurred on the supplying party's system, plus (iii) the energy supplied to any intervening system or systems as compensation for losses.
 2. The cost of starting and operating any generating units that must be started as a result of supplying such energy.
 3. The supplying party's cost of purchased energy if the purchase is made as a result of supplying such energy. The incremental cost per kilowatt-hour for any particular transaction shall be the total of such costs divided by the kilowatt-hours scheduled for delivery to the receiving party either directly by the supplying party or through an intervening system or systems.
 - (f) "Person" shall mean any individual, association, partnership, corporation or other legally recognized entity.
 - (g) "Power" shall mean energy and/or capacity for sale to, or purchase by, a party in accordance with this Agreement.
 - (h) "Prudent Utility Practice" shall mean any of the practices, methods and acts at a particular time, which, in the exercise of reasonable judgment in the light of the facts, including but not limited to the practices, methods and acts engaged in or approved by a significant portion of the electric utility industry prior thereto, known at the time the decision was made, would have been expected to accomplish the

desired result at the lowest reasonable cost consistent with reliability, safety and expediency. In applying the standard of Prudent Utility Practice to any matter under this Agreement, equitable consideration should be given to the circumstances, requirements and obligations of each of the parties. It is recognized that Prudent Utility Practice is not intended to be limited to a single best practice, method or act to the exclusion of all others, but rather can be within a spectrum of possible practices, methods or acts that could reasonably have been expected to accomplish the desired result.

- (i) "Regulatory Authority" shall mean any federal, state or local governmental or regulatory body (excluding OPPD), or any agency or instrumentality thereof, having competent jurisdiction over either party or such party's Facilities.
- (j) "Transaction(s)" shall mean the sale or purchase of Power by the parties in accordance with this Agreement.

2. **Scope.** The parties may engage in Transactions for the purchase or sale of Power in accordance with the following terms and conditions; provided, however that this Agreement shall not obligate either party to engage in any such Transactions.

- (a) At any time during the Term of this Agreement, the parties may notify each other that Power is available for purchase or sale. Sales of Power by CITY to OPPD shall be pursuant to Electric Rate Schedule No. 1, attached hereto as Exhibit A. Sales of Power by OPPD to CITY shall be at the rates established in an applicable service schedule, approved by the OPPD Board of Directors, and attached hereto as Exhibits "B" through "D", inclusive. OPPD may from time to time revise these service schedules by written notice to CITY and, upon sending such notice, the revised service schedules shall be incorporated into this Agreement and shall supersede any previous version thereof.
- (b) OPPD will deliver Power to or receive Power from CITY at the points of interconnection as shown in Supplement 1, which may be revised from time to time.
- (c) Each Transaction shall include, at a minimum, the following terms and conditions:
 - (i) the period of delivery, (ii) the delivery point(s), including Control Area Services necessary to carry out any Transaction and the point of interconnection for the Transaction, (iii) the price of Power pursuant to the attached Service Schedules, (iv) the quantity of Power, (v) the inclusion of and reimbursement for any applicable loss repayment procedures, which in no event shall be less than three percent (3%) of the Power applicable to the Transaction, and (vi) if the Transaction is Firm, it shall also include any conditions or prior obligations which may affect the delivery or acceptance of Power under such Transaction. CITY expressly understands and agrees to abide by any present or future regional emergency procedure(s), which OPPD is obligated to obey.
- (d) The Authorized Representatives for each party shall execute and deliver by facsimile a written confirmation of the terms and conditions of each Transaction using the form attached hereto as Form 1 ("Transaction Form"). Upon receipt of a facsimile Transaction Form by both parties, the Transaction shall become effective and the Transaction Form shall constitute an integral part of this Agreement. Any

conflict, not reasonably capable of reconciliation, between this Agreement and the Transaction Form shall be resolved in favor of this Agreement.

(e) In the event of an emergency curtailment or interruption of energy, the party experiencing or affected by such emergency shall immediately notify the other party's Authorized Representative.

(f) All Transactions shall be conducted in accordance with Prudent Utility Practice.

3. **Term.** This Agreement shall become effective when executed by the parties (and accepted for filing by any Regulatory Authority, including FERC) and shall remain in effect until terminated by either party upon thirty (30) day's prior written notice, or otherwise in accordance with this Agreement; provided, however, that Transactions confirmed in writing, as provided herein, prior to the date of a termination notice shall be completed in accordance with this Agreement.

4. **Billing and Payments.**

(a) Each Transaction shall be accounted for on the basis of scheduled hourly quantities. The accounting period for any Transaction shall be one (1) calendar month. The Authorized Representatives involved in any Transaction shall maintain records of hourly schedules for accounting and operating purposes. Any discrepancy between (i) the amount scheduled by the parties and (ii) the amount scheduled with an interconnecting utility shall be resolved by the party responsible for the discrepancy. Any discrepancy between actual and scheduled deliveries or receipts as recorded by OPPD and as recorded by an interconnecting utility, shall be resolved by OPPD and such interconnecting utility without affecting CITY, provided that CITY's schedule with the interconnecting utility is not disputed.

(b) Invoices shall be submitted monthly within ten (10) days following the last day of the month in which Transactions occurred and shall be paid by each party by the earlier of the tenth (10th) day after the statement was received or the twentieth (20th) day of the calendar month in which the statement was received, and if such day is not a business day, the next business day.

(c) Amounts not paid on or before the due date shall be payable with interest accrued daily at the rate of 18% per annum or at the prime rate of interest per annum established by the Morgan Guaranty Trust Company of New York, or its successor, on the last business day of the month in which service was rendered, plus one and one-half percent (1½%) per annum, whichever is greater. If the total balance due including interest, is not paid by the 30th day following the date of the invoice, the interest rate becomes 21% per annum on the 31st day following the date of the invoice, and continues at 21% until the amount of the invoice and total accrued interest is paid in full. In no event will the interest rate herein be greater than the maximum interest rate permitted by Nebraska law.

(d) In the event any portion of an invoice is in dispute, the undisputed amount shall be paid when due. The parties shall endeavor to cooperate and use best efforts to amicably and promptly resolve such disputes. Upon determination of the correct amount, whether by agreement or otherwise, the proper adjustment shall be paid or

refunded promptly after such determination with interest accrued in accordance with Section 4(c) and computed from the date payment was due to the date the adjustment is made.

- (e) All invoices shall be sent to the following addresses:

Omaha Public Power District
444 S. 16th St. Mall, 10E/EP-1
Omaha, NE, 68102-2247
Attn: Energy Marketing & Trading

City of Grand Island, Nebraska
100 East First Street
Grand Island, Nebraska 68802-1968
Attn: Travis Burdett, Assistant Utilities
Director

- (f) All payments shall be wire transferred to the following accounts:

Account Information on File.
For Omaha Public Power District

Account Information on File.
For City of Grand Island, Nebraska

5. **Authorized Representatives.** Each party shall designate one or more Authorized Representative(s) who shall be authorized to act on its behalf with respect to matters contained hereunder, which are the functions and responsibilities of the Authorized Representatives. Within thirty (30) days after execution of this Agreement, each party shall give written notice to the other party of its designation, and shall promptly notify the other party of any subsequent changes in such designation. The Authorized Representatives shall have no authority to modify any of the provisions of this Agreement.
6. **Representations and Covenants.** Each party represents to and covenants with the other as follows:
- (a) that it has the necessary corporate and/or legal authority to enter into this Agreement and any Transactions which it agrees to hereunder, and to perform each and every duty and obligation imposed by this Agreement, and that this Agreement represents a valid, binding and legally enforceable obligation of such party. Each individual affixing a signature to this Agreement represents and warrants that he or she has been duly authorized to execute this Agreement on behalf of the party he or she represents, and that by signing the Agreement, a valid, binding and enforceable legal obligation of said party has been created; and
- (b) that there are no pending, or to its knowledge, threatened, claims, actions, suits, audits, investigations or proceedings by or against such party which could have a material adverse effect on its ability to perform the obligations under this Agreement.
7. **Creditworthiness.** In the event that either Party's creditworthiness, financial responsibility or performance viability become unsatisfactory to the other Party with regard to any transaction pursuant to this Agreement, the dissatisfied Party (the "First Party") may require the other Party (the "Second Party") to provide, at the Party's option (but subject to the First Party's acceptance), either (1) the posting of a Letter of Credit, (2) a cash prepayment, (3) the posting of other acceptable collateral or security by the Second Party, (4) a Guarantee Agreement executed by a creditworthy entity; or (5) some other mutually agreeable method of satisfying the First Party. The Second Party's obligations shall be limited to a reasonable estimate of the damages to the First Party if the Second Party were to fail to perform its

obligations. Events, which may trigger the First Party questioning the Second Party's creditworthiness, financial responsibility, or performance viability, include, but are not limited to, the following:

- (a) The First Party has knowledge that the Second Party (or its Guarantor if applicable) is failing to perform or defaulting under other contracts.
- (b) The Secondary Party has exceeded any credit or trading limit established by the First Party.
- (c) The Second Party or its Guarantor has debt that is rated as investment grade and that debt falls below the investment grade rating by at least one nationally recognized rating agency.
- (d) Other material adverse changes in the Party or its Guarantor's financial condition occur.

If the Second Party or its Guarantor fails to provide such reasonably satisfactory assurances of its ability to perform a transaction hereunder within three (3) business days of demand there, that will be considered an Event of Default under this Agreement and the First Party shall have the right to exercise any of the remedies provided for below.

8. **Default of Transactions under this Agreement and Confirmation Agreements.**

(a) Events of Default

An "Event of Default" shall mean with respect to a Party ("Defaulting Party"):

- 1) The failure by the Defaulting Party to make, when due, any payment required pursuant to this Agreement or Confirmation Agreement if such failure is not remedied within two (2) Business Days after written notice of such failure is given to the Defaulting Party by the other Party ("the Non-Defaulting Party"). The Non-Defaulting Party shall provide the notice by facsimile to the designated contact person for the Defaulting Party and also shall send the notice by overnight delivery to such contact person; or
- 2) The institution, with respect to the Defaulting Party, by the Defaulting Party or by another person or entity of a bankruptcy, reorganization, moratorium, liquidation or similar insolvency proceeding or other relief under any bankruptcy or insolvency law affecting creditor's rights or a petition is presented or instituted for its winding-up or liquidation; or
- 3) The failure by the Defaulting Party to provide adequate assurances of its ability to perform all of its outstanding material obligations to the Non-Defaulting Party under the Agreement or Confirmation Agreement pursuant to Section 7 of this Agreement or any substitute or modified provision in the Confirmation Agreement.
- 4) Seller Failure. If Seller fails to schedule and/or deliver all or part of the Product pursuant to a Transaction, and such failure is not excused under the

terms of the Product or by Buyer's failure to perform, then Seller shall pay Buyer, within five (5) Business Days of invoice receipt, an amount for such deficiency equal to the positive difference, if any, obtained by subtracting the Contract Price from the Replacement Price. The invoice for such amount shall include a written statement explaining in reasonable detail the calculation of such amount.

- 5) **Buyer Failure.** If Buyer fails to schedule and/or receive all or part of the Product pursuant to a Transaction and such failure is not excused under the terms of the Product or by Seller's failure to perform, then Buyer shall pay Seller, within five (5) Business Days of invoice receipt, an amount for such deficiency equal to the positive difference, if any, obtained by subtracting the Sales Price from the Contract Price. The invoice for such amount shall include a written statement explaining in reasonable detail the calculation of such amount.

- 6) With respect to its Guarantor, if any:

- i) if a material representation or warranty made by a Guarantor in connection with this Agreement, or any transaction entered into hereunder, is false or misleading in any material respect when made or when deemed made or repeated; or
- ii) the failure of a Guarantor to make any payment required or to perform any other material covenant or obligation in any guarantee made in connection with this Agreement, including any transaction entered into hereunder, and such failure shall not be remedied within three (3) Business Days after written notice, or
- iii) the institution, with respect to the Guarantor, by the Guarantor or by another person or entity of a bankruptcy, reorganization, moratorium, liquidation or similar insolvency proceeding or other relief under any bankruptcy or insolvency law affecting creditor's rights or a petition is presented or instituted for its winding-up or liquidation; or
- iv) the failure, without written consent of the other Party, of a Guarantor's guarantee to be in full force and effect for purposes of this Agreement (other than in accordance with its terms) prior to the satisfaction of all obligations of such Party under each transaction to which such guarantee shall relate; or
- v) a Guarantor shall repudiate, disaffirm, disclaim, or reject, in whole or in part, or challenge the validity of, any guarantee.

9. **Remedies of Default.** If an Event of Default occurs, the Non-Defaulting Party shall possess the right to terminate all transactions between the Parties under this Agreement upon written notice (by facsimile or other reasonable means) to the Defaulting Party, such notice or termination to be effective immediately upon receipt. If the Non-Defaulting Party fails to exercise this right of termination with thirty (30) days following the time when the

Event of Default becomes known (or more than thirty days if the Non-Defaulting and Defaulting Parties agree to an extension), then such right of termination shall no longer be available to the Non-Defaulting Party as a remedy for the Event(s) of Default; provided, however, this thirty day requirement for exercising termination rights shall not apply to defaults pursuant to Sections 8.a.2 and 8.a.4.iii. The Non-Defaulting Party terminating transaction(s) may do so without making a filing at the Federal Energy Regulatory Commission (FERC). Upon termination, the Non-Defaulting Party shall liquidate all transactions as soon as practicable. The payment associated with termination ("Termination Payment") shall be calculated in accordance with this Section 9 and Section 10. The Termination Payment shall be the sole and exclusive remedy for the Non-Defaulting Party for each terminated transaction ("Terminated Transaction") for the period beginning at the time notice of termination under this Section 9 is received. Prior to receipt of such notice of termination by the Defaulting Party, the Non-Defaulting Party may exercise any remedies available to it at law or otherwise.

Upon termination, the Non-Defaulting Party may withhold any payments it owes the Defaulting Party for any obligations incurred prior to termination under this Agreement or Confirmation Agreement(s) until the Defaulting Party pays the Termination Payment to the Non-Defaulting Party. The Non-Defaulting Party shall possess the right to set-off the amount due it under Sections 8 and 9 by any such payments due the Defaulting Party as provided in Section 10(d).

10. **Liquidation Calculation Options.** The Non-Defaulting Party shall calculate the Termination Payment as follows:

- (a) The Gains and Losses shall be determined by comparing the value of the remaining term, transaction quantities, and transaction prices under each Terminated Transaction had it not been terminated to the equivalent quantities and relevant market prices for the remaining term either quoted by a bona fide third-party offer or which are reasonably expected to be available in the market under a replacement contract for each Terminated Transaction. To ascertain the market prices of a replacement contract, the Non-Defaulting Party may consider, among other valuations, quotations from Dealers in energy contracts, any or all of the settlement prices of the NYMEX power futures contracts (or NYMEX power options contracts in the case of Physically-Settled Options) and other bona fide third party offers, all adjusted for the length of the remaining term and differences in transmission. It is expressly agreed that the Non-Defaulting Party shall not be required to enter into replacement transactions in order to determine the Termination Payment.
- (b) The Gains and Losses calculated under paragraph (a) shall be discounted to present value using the Present Value Rate as of the time of termination (to take account to the period between the time notice of termination was effective and when such amount would have otherwise been due pursuant to the relevant transaction). The "Present Value Rate" shall mean the sum of 0.50% plus the yield reported on page "USD" of the Bloomberg Financial Markets Services Screen (or, if not available, any other nationally recognized trading screen reporting on-line intraday trading in United States government securities) at 11:00 a.m. (New York City, New York time) for the United States government securities having a maturity that matches the average remaining term of the Terminated Transactions, and

- (c) The Non-Defaulting Party shall set off or aggregate, as appropriate, the Gains and Losses (as calculated in Section 10(a)) and Costs and notify the Defaulting Party. If the Non-Defaulting Party's aggregate Losses and Costs exceed its aggregate Gains, the Defaulting Party shall, within three (3) Business Days of receipt of such notice, pay the Termination Payment to the Non-Defaulting Party, which amount shall bear interest at the Present Value rate from the time notice of termination was received until paid. If the Non-Defaulting Party's aggregate Gains exceed its aggregate Losses and Costs, the Non-Defaulting Party, after any set-off as provided in paragraph (d), shall pay the remaining amount to the Defaulting Party within three (3) Business Days of the date notice of termination was received including interest at the Present Value from the time notice of termination was received until the Defaulting Party receives payment.
- (d) The Non-Defaulting Party shall aggregate or set-off, as appropriate, at its election, any or all other amounts owing between the Parties (discounted at the Present Value Rate) under this Agreement and any Confirmation Agreements against the Termination Payment so that all such amounts are aggregated and/or netted to a single liquidated amount. The net amount due from any such liquidation shall be paid within three (3) Business Days following the date notice of termination is received.
- (e) 1) If the Non-Defaulting Party owes the Defaulting Party monies under this Section 10, then notwithstanding the three Business Day payment requirement detailed above, the Non-Defaulting Party may elect to pay the Defaulting Party the monies owed under this Section 10 over the remaining life of the contract(s) being terminated. The Non-Defaulting Party may make this election by providing written notice to the Defaulting Party within three Business Days of the notice being provided to terminate and liquidate under this Section 10. The Non-Defaulting Party shall provide the Defaulting Party with the details on the method for recovering the monies owed over the remaining life of the contract(s). That method shall ensure that the Defaulting Party receives a payment each month through the end of the term of each contract which allows it to receive the monies which would have been due it under sections 10(c) and (d) in total (to be recovered over the term of the contract(s) to replicate as closely as possible the payment streams under such contract(s)) provided that the discounting using the Present Value Rate referenced in Section 10(b) shall not be reflected in determining the amounts to be recovered under this provision.
- 2) This Section 10(e) and the rights and obligations under it shall survive termination of any applicable transactions or agreements.
- 3) The Party owed monies under this Section 10(e) shall have the right to request credit assurances consistent with Section 7 even after termination of any contract or transaction.
- 4) If the Party owing money defaults on its payment obligations consistent with Section 8.a or defaults with regard to providing credit assurances consistent with Section 8.a.3, then the other Party shall have the right (by written notice) at any time after the Party owing money defaults to require that Party to pay

all monies owed under all of the contracts subject to this Section 10(e) within three (3) Business Days of receipt of the written notice. The monies to be paid under this accelerated payment provision shall be the remaining amounts to be paid under the contract(s) reflecting a discount using the Present Value Rate from the date of the written notice.

For the purposes of this Section 10:

- (f) "Gains" means the economic benefit (exclusive of Costs), if any, resulting from the termination of the Terminated Transactions, determined in a commercially reasonable manner as calculated in accordance with this Section 10;
- (g) "Losses" means the economic loss (exclusive of Costs), if any, resulting from the termination of the Terminated Transactions, determined in a commercially reasonable manner as calculated in accordance with this Section 10;
- (h) "Costs" means brokerage fees, commissions, and other similar transaction costs and expenses reasonably incurred in terminating any specifically related arrangements which replace a Terminated Transaction, transmission and ancillary service costs associated with Terminated Transactions, and reasonable attorneys' fees, if any, incurred in connection with the Non-Defaulting Party enforcing its rights with regard to the Terminated Transactions. The Non-Defaulting Party shall use reasonable efforts to mitigate or eliminate these costs.
- (i) In no event, however, shall a Party's Gains, Losses, or Costs include any penalties or similar charges imposed by the Non-Defaulting Party.

11. **Insurance.** During the Term, each party shall maintain and keep in effect, to the reasonable satisfaction of the other party, evidence of self-insurance or the following minimum insurance requirements.

- (a) commercial general liability insurance with a combined single limit with respect to each occurrence of not less than \$1,000,000, insuring such party (and naming the other party as an additional insured) against loss, damage, cost, expense, or liability for any damage to any property or injury, illness or death of any Person occurring or arising as a result of the negligence of such party in connection with the performance of its rights and obligations under this Agreement or any Transaction; and
- (b) worker's compensation insurance as required by law.

12. **Indemnification.** Each party hereby indemnifies and agrees to hold harmless the other party from and against any and all loss, damage, cost, expense, or liability to the extent it arises or results from the negligence or willful misconduct of such party in connection with performance of its rights and obligations under this Agreement, any Transaction, or otherwise from any Default. In no event shall either party be liable for any punitive, consequential, incidental, special damages or lost profits incurred or alleged to have been incurred by anyone. Any party seeking indemnification hereunder ("Indemnitee") shall promptly notify the other party ("Indemnitor") of the nature and amount of such claim and the method and means proposed by the Indemnitee for defending or satisfying such claim.

The Indemnitee shall consult with the Indemnitor respecting the defense and satisfaction of such claim, including the selection of and directions to legal counsel, and the Indemnitee shall not pay or settle any such claim without the prior written consent of the Indemnitor, which consent shall not be unreasonably withheld. In the event OPPD is the Indemnitor, OPPD's liability for indemnification under this section 12 shall be limited to the maximum amount for which a political subdivision may be held liable under the Nebraska Political Subdivisions Tort Claims Act, now and as amended in the future. In the event the Indemnitor is a municipality [political subdivision] under Nebraska law, such Indemnitor's liability for indemnification under this section 12 shall be limited to the maximum amount for which a municipality [political subdivision] may be held liable under the Nebraska Tort Claims Act.

13. **Financial Review.** This Agreement shall not take effect until the completion of OPPD's review and approval, in its sole discretion, of CITY's creditworthiness and financial condition. CITY shall cooperate with OPPD's initial financial review and with any subsequent review requested by OPPD as to an individual Transaction under this Agreement. CITY may, as an alternative to this financial review, provide OPPD with either a letter of credit or a surety bond in an amount and from a provider satisfactory to OPPD.
14. **Assignment.** Neither party shall assign this Agreement or its rights hereunder without the prior written consent of the other party. Notwithstanding the foregoing, either party may, without the need for consent from the other party (and without relieving itself from liability hereunder), (a) transfer, pledge, or assign this Agreement as security for any financing; (b) transfer or assign this Agreement to an Affiliate of such party, or (c) transfer or assign this Agreement to any Person succeeding to all or substantially all of the assets of such party; provided, however, that any such assignee shall agree to be bound by the terms and conditions hereof.
15. **Uncontrollable Forces.** The time for performance of any duty or obligation hereunder (except with respect to the payment of compensation) shall be extended for the period during which performance was delayed or impeded by reason of uncontrollable forces. The term "uncontrollable forces" shall mean storm, flood, lightning, earthquake, fire, explosion, failure of Facilities not due to lack of proper care or maintenance, civil disturbance, labor disturbance, sabotage, war, national emergency, restraint by court order or public authority (whether valid or invalid), and action or non-action by or inability to obtain or keep the necessary authorizations or approvals from any Regulatory Authority, or other causes beyond the control of the party affected which such party could not have been reasonably expected to avoid by exercise of due diligence and foresight. Either party unable to fulfill any obligation by reason of uncontrollable forces shall give prompt written notice to the other party and shall exercise due diligence to remove such disability with reasonable dispatch, but such obligation shall not require the settlement of a labor dispute except in the sole discretion of the party experiencing such labor dispute. No party shall, however, be relieved of liability for failure of performance if such failure is due to causes arising out of its own negligence or due to removable or remediable causes, which it fails to remove or remedy within a reasonable time.
16. **Taxes.** Each party shall use reasonable efforts to implement the provisions of and to administer this Agreement in accordance with their intent to minimize taxes, so long as neither party is materially adversely affected by such efforts. Either party, upon written request of the other, shall provide a certificate of exemption or other reasonably satisfactory

evidence of exemption if either party is exempt from taxes, and shall use reasonable efforts to obtain and cooperate with obtaining any exemption from or reduction of tax. Each party shall be responsible for all taxes or other similar charges imposed or levied by any Regulatory Authority based on or arising from such party's performance of this Agreement or any Transaction.

17. **Title**. All right, title and interest in OPPD's Facilities and associated equipment of, or used by, OPPD in connection with the performance of this Agreement shall at all times remain vested in OPPD. Similarly, all right, title and interest in CITY's Facilities and associated equipment of, or used by, CITY in connection with the performance of this Agreement shall at all times remain vested in CITY.
18. **Notices**. With the exception of billing invoices pursuant to Section 4, all notices or other communications which are required or permitted herein shall be in writing and sufficient if delivered personally, sent by facsimile transmission followed by written confirmation of receipt, sent by overnight commercial air courier (such as Federal Express), or sent by registered or certified mail, postage prepaid, return receipt requested, to the parties at their addresses or facsimile numbers set forth below or to such other address or facsimile number as the party to whom notice is to be given may have furnished to the other party in writing in accordance herewith. Any such communication shall be deemed to have been given when delivered if delivered personally, the same day as facsimile transmission (or the first business day thereafter if faxed on a Saturday, Sunday or legal holiday), on the first business day after dispatch if sent by overnight commercial air courier, or on the fifth business day after posting if sent by mail, and properly addressed.

If to OPPD: Omaha Public Power District
444 South 16 Street Mall 10E/EP 1
Omaha NE 68102-2247
Attn: Division Manager - Energy Marketing and Trading
Phone: (402)514-1025
Fax: (402)514-1035

If to CITY: City of Grand Island, Nebraska
100 East First Street
Grand Island, Nebraska 68802-1968
Attn: Travis Burdett, Assistant Utilities Director
Phone: (308)385-5466
Fax: (308)385-5449

19. **No Partnership**. The parties acknowledge and agree that this Agreement does not create a partnership between, or a joint venture of OPPD and CITY.
20. **Regulatory Filing**. Each Party to this Agreement shall be responsible for its own Regulatory Authority filing requirements pertaining to this Agreement.
21. **Non-Waiver of Defaults**. No waiver by either party of any Default of the other party under this Agreement shall operate as a waiver of a future Default whether of a like or different character.

22. **Choice of Laws.** This Agreement shall be governed by and construed in accordance with the laws of the State of Nebraska without giving effect to the principles of conflicts of laws. Any action at law, suit in equity or judicial proceeding initiated by either party arising out of this Agreement or any Transaction shall be instituted only in the courts of the State of Nebraska.
23. **Binding Effect.** The terms and provisions of this Agreement, and the respective rights and obligations hereunder of each party, shall be binding upon, and inure to the benefit of, its successors and assigns.
24. **Entire Agreement.** This Agreement constitutes the entire agreement between the parties relating to the subject matter hereof and supersedes any other agreements, written or oral, between the parties concerning such matter.
25. **Written Amendments.** No modification of the terms and provisions of this Agreement shall be or become effective except by written amendment executed by the parties.
26. **Severability and Renegotiation.** Should any provision of this Agreement for any reason be declared invalid or unenforceable by final nonappealable order of any court or Regulatory Authority having jurisdiction, such decision shall not affect the validity of the remaining portions, and the remaining portions shall remain in full force and effect as if this Agreement had been executed without the invalid portion. In the event any provision of this Agreement is declared invalid, the parties shall promptly renegotiate to restore this Agreement as near as possible to its original intent and effect.
27. **Survival.** Any provision(s) of this Agreement that expressly or by implication comes into or remains in force following the termination or expiration of this Agreement shall survive the termination or expiration of this Agreement.

IN WITNESS WHEREOF, and intending to be legally bound hereby, the parties have executed this Agreement this 26 day of January, 2010.

For Omaha Public Power District:

By: _____
Title: Division Manager
Energy Marketing and Trading

For City of Grand Island, Nebraska

By: _____
Title: Mayor

RESOLUTION 2010-33

WHEREAS, in May of 2009, the Utilities Department began receiving power from the Omaha Public Power District (OPPD) Nebraska City Unit #2 (NC2); and

WHEREAS, the City of Grand Island is one of multiple participants in this major addition of base load capacity in the state; and

WHEREAS, the Nebraska City Unit #2 is located inside the OPPD Control Area, and the Utilities Department has approached OPPD regarding the potential of power sales to the regional electric grid directly from the NC2 plant from the OPPD Control Area; and

WHEREAS, an agreement has been drafted that would allow Grand Island the option of using OPPD as a marketer of Grand Island's NC2 generation share; and

WHEREAS, the agreement defines the terms and conditions for various power transactions and is OPPD's standard Power Purchase and Sale Agreement used to conduct business with other utilities; and

WHEREAS, OPPD also provided a Joint Marketing/Services Agreement that applies solely to Grand Island's NC2 generation and specifies each party's responsibilities in detail; and

WHEREAS, the Power Purchase and Sale Agreement requires each party to designate an Authorized Representative to act on its behalf with respect to matters included in the contract.

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE CITY OF GRAND ISLAND, NEBRASKA, that the Mayor is hereby authorized, on behalf of the City, to execute the Power Purchase and Sale Agreement and the Joint Marketing/Services Agreement between the City of Grand Island and Omaha Public Power District, in accordance with the terms and conditions generally described above, and does authorize the Utilities Director to appoint an Authorized Representative as required by the Power Purchase and Sale Agreement contract terms and conditions.

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Adopted by the City Council of the City of Grand Island, Nebraska, January 26, 2010

Margaret Hornady, Mayor

Attest:

Approved as to Form	☐ _____
January 21, 2010	☐ City Attorney

RaNae Edwards, City Clerk