



THE CITY OF SAN DIEGO  
**REPORT TO THE CITY COUNCIL**

DATE ISSUED:

REPORT NO:

ATTENTION: Rules, Open Government and Intergovernmental Relations Committee

SUBJECT: Contract Agreements with Capital Power (US Holdings) Inc. and  
Charter Section 219 Voter Authorization for Long-Term Lease

REFERENCE: Community and Economic Development Strategy and Charter Section  
219 Pueblo Lands

REQUESTED ACTION: Approve the Contracts, Approve a Resolution for a Memorandum  
of Understanding, and Approve an Ordinance to Place a Proposal  
on the November 6<sup>th</sup>, 2012 Ballot

STAFF RECOMMENDATION: Approve Actions as Requested

SUMMARY:

**Overview**

Since 2007 the Mayor's Office of Economic Growth Services (EGS) and the City's Real Estate Assets Department (READ) has received unsolicited inquiries from power companies regarding various City properties near the 805 Freeway which they believe might be suitable for power plant sites. In 2010 the City issued an RFP for the only site which was not needed for future City facilities, an excess portion of the North City Water Reclamation Plant site. The City has concluded that RFP process, and is awarding the long-term lease opportunity to Capital Power (US Holdings) Inc., which offered the best overall value to the City.

The requested actions involve approval of Option and Lease Agreements, approval of a Memorandum of Understanding relating to the continuation of ongoing discussions for the sale of reclaimed water to the proposed Optionee/Lessee, and approval of an ordinance for voter ratification of the proposed Lease Agreement. The Option Agreement, if ratified by the electorate in accordance with City Charter Section 219, would enable Capital Power (US Holdings) Inc. to have site control of approximately 50 acres of excess City property south of the North City Water Reclamation Plant. Site control of the property would make it feasible for Capital Power to pursue a license and related land use and other approvals to construct and operate a combined cycle natural gas power plant on the site. The City's Sewer Revenue Fund would receive approximately \$400,000 to \$600,000 annually during the Option period for up to 10 years. If Capital Power were to obtain all of the necessary approvals and financing for the

plant, it could then execute the Lease Agreement for a term of 25-45 years. If built, the City would receive guaranteed lease revenue of approximately \$1 million to \$1.5 million annually (depending on plant capacity) during this time period, as well as General Fund revenues from property taxes and gas franchise fees estimated at approximately \$1.7 million annually. The project would create approximate 425 high-wage union-scale construction jobs for approximately two years, and 25 high-wage operations jobs during the lease term of 25-45 years. In addition, the project would enhance energy reliability for the entire region and could create environmental benefits associated with the possible early retirement of nearby ocean water-cooled power plants.

## **Background**

### **Current Status of the Real Property**

The undeveloped approximately 50 acre utility site to be leased to Capital Power is not needed by the City's Public Utilities Department. The property is part of a much larger Pueblo Lands grant which has been owned in fee simple since San Diego became a city. In 1994 the Public Utilities Department paid \$8.6 million to the United States of America to remove the property from a larger land exchange negotiated between the City and the United States Navy (USN). That land exchange was negotiated pursuant to a ballot proposition ("Proposition B") which authorized the City Manager to exchange city property for Navy property to further the interests of both parties. The USN sought to "square off" its Naval Air Station Miramar boundaries along the 805 and 52 Freeways and the City sought USN property for public utilities purposes. The Department thus purchased approximately 120 acres of undeveloped and unentitled property which comprised portions of several Pueblo Lots located between the 805 Freeway and the western boundary of MCAS Miramar, for the purpose of constructing public utilities related to its "Clean Water Program." The Department, as an Enterprise Fund, has owned the property in fee simple since that time. The requested action would not permit a change of ownership, and no change of ownership is contemplated as part of this action.

In 1998 the Public Utilities Department completed the North City Water Reclamation Plant ("NCWRP") on approximately 34 acres of the property as part of the Department's overall efforts to comply with the applicable provisions of the federal Clean Water Act and Ocean Pollution Reduction Act of 1994. The federal Environmental Protection Agency ("EPA") negotiated with the Department to provide a modification to the National Pollutant Discharge Elimination System permit for the discharge of treated effluent into the Pacific Ocean from the outfall pipeline connected to the Department's Point Loma Wastewater Treatment Plant ("PLWTP"). NCWRP has the capacity to treat up to 30 million gallons per day ("MGD") of sewer effluent to secondary and tertiary standards, but currently treats flows of up to 12 MGD to either secondary or tertiary standards based on seasonal demand.

The northernmost part of the NCWRP site, approximately 10 acres, is being reserved by the Department for construction of the North City Advanced Water Treatment Plant (NCAWTP) in the event that the City Council authorizes the construction of a production and distribution system associated with the proposed "Indirect Potable Reuse Program" ("IPR") an effort to treat



sewer effluent to levels of purity well beyond tertiary levels to augment raw water supplies in City reservoirs.

The southernmost part of the site, below the NCWRP, is bifurcated by the more recently constructed extension of Nobel Drive from its 805 Freeway interchange to its terminus at the intersection with Miramar Road. The NCWRP property south of Miramar Road is not needed by the Department for any contemplated water treatment facilities and has been held for “mitigation purposes” subsequent to the decision in the mid 1990’s to locate NCWRP and NCAWTP on those northerly portions of the site described above.

#### Power Company Interest in the Site

Over the course of the last several years, various power companies have expressed interest in locating a power plant adjacent to NCWRP since this site is the only one in SDG&E service territory which already contains all of the necessary infrastructure for a highly efficient water-cooled, natural gas-fired power plant – close proximity to all of the following: (1) reclaimed water, (2) a 30” high-pressure natural gas pipeline, and (3) 230 Kv power lines. Such sites are rare within California, particularly in areas where the addition of new power generation assets do not require the local retail electric utility to upgrade expensive circuit breakers at nearby power substations. Proposed power plant sites which do not require the construction of “linears” (pipelines and high-voltage transmission lines) across, under, over, or through public or private property are considered “low-impact” sites by the California Energy Commission (CEC) since construction activity will be generally limited to the plant site and not disruptive to traffic or to adjacent properties. Such sites also have limited “visual impacts” to surrounding properties as well. Since the site is located entirely within a military-industrial area well separated from residential, commercial, and sensitive institutional uses, the permitting and licensing process is more predictable and less likely to be challenged on the basis of creating or contributing to perceived land use conflicts.

#### The City’s Request for Proposals

In the summer of 2009 the Chief Operating Officer directed the Business Expansion Attraction & Retention (BEAR) Team and the Purchasing & Contracting Department to prepare a Request for Proposals (RFP) which was to be publicly advertised and sent to power companies believed to have an interest in producing power for the San Diego energy market. The RFP offered a long-term ground lease on approximately 80 acres of NCWRP which are not needed by the Public Utilities Department for water or sewer treatment facilities. The RFP specified, among other things, an objective of a minimum of 200 megawatts of capacity and use of reclaimed water for cooling, and also indicated that technical merit would be awarded to proposals that incorporated modern efficient technologies, and substantial landscaping features, given its prominent location. The RFP clearly specified that the power company proposer would be responsible for all costs of development, construction, and operations, and that the City would have no ownership interests in the power plant. The RFP was completed and advertised in the San Diego Daily Transcript and the City’s web-site on May 21<sup>st</sup>, 2010.

The City received two proposals. Both proposals were evaluated by a Technical Evaluation Committee (TEC) and a Price Evaluation Committee (PEC) each committee having the same five City staff members. The TEC and PEC included the City's Chief Operating Officer, the Assistant Director of the Public Utilities Department, the Department's Senior Mechanical Engineer, the City's Energy Administrator, and the City's Business Development Manager.

#### The Selection of Capital Power Corporation

Capital Power Corporation was announced as the selected bidder on January 12<sup>th</sup>, 2011 based on its proposal to build an 850 MW combined cycle power plant using the the latest General Electric "Rapid Response" (or equivalent) clean gas technology. For a variety of reasons detailed in the TEC and PEC evaluation reports (**See Attachment 1: Technical and Price Evaluation Committee Reports**) the Capital Power proposal was deemed to have "the best value and in the best interest of the City." (**See Attachment 2: Procurement Award Recommendation Letter to Capital Power Corp. )**

#### Negotiation and Contract Preparation

Over the course of the next 16 months the City negotiated exclusively with Capital Power Corporation to structure the company's proposal into contract agreements. The two agreements include an Option Agreement and a Lease Agreement (**See Attachment 3: Option and Lease Agreements and Implementing Ordinances**). The Option Agreement allows Capital Power to have site control of the southernmost approximately 66 acres of the NCWRP site (aka the "Nobel Drive Site") while it pursues a license to build and operate the power plant from the California Energy Commission, all additional approvals and permits as may be required by local, state, and federal agencies, power sales contracts, and financing. At any point during that ten year option period, if it has achieved certain milestones ("Conditions Precedent"), it can then exercise its option to Lease the specified portion of the NCWRP site for 25 years. The Lease Agreement permits Capital Power to extend the term of the lease for an additional 10 - 20 years. At the end of the terms (no more than 55 years in total) Capital Power will be required to remove all of its equipment and leasehold improvements and the Public Utilities Department will have full access to and use of the site. In exchange for use of a portion of the NCWRP site Capital Power will provide to the Public Utilities Department:

- "Option Consideration" of \$400,000 - \$4,600,000 (\$400,000 to \$600,000 annually) during the 1-10 year option period prior to execution of the Lease
- Rent of approximately \$26 - \$67 million (\$1 million to \$1.5 million annually) during the Lease term of 25-45 years;

A Memorandum Of Understanding (MOU) between Capital Power Corp. and the City (**See Attachment 4: MOU and Resolution Regarding Sale of Water to Capital Power Corp.**) sets the basis for further discussions regarding:



- An as yet-to-be-determined long-term fixed price for up to 7 million gallons per day (MGD) of secondary or tertiary treated effluent to from NCWRP to supply the power plant's cooling towers, steam turbine, and Heat Recovery Steam Generators (HRSG's).
- The provision of electricity at below market rates to operate onsite Public Utilities Department reclamation and treatment plants and related facilities
- Water delivery requirements, points of connection, and other operational and design considerations

### Lease of Pueblo Lands – Voter Ratification Requirements

In 1834, Mexico recognized San Diego as “pueblo” or “public,” making the lands that comprised San Diego public lands. Mexico ceded California to the United States under the 1848 Treaty of Guadalupe Hidalgo. The treaty required that property rights granted under Mexican Rules were to be “inviolately respected.” The original public (pueblo) lands were defined by survey and constitute the Pueblo Lands of the City of San Diego. San Diego Charter section 219 restricts the sale of such Pueblo Lands by requiring voter ratification of a sale of any Pueblo Lands or any lease of Pueblo Lands having a term longer than fifteen years.

The real property which is the subject of this report was released by the voters from its Pueblo Lands status in via a majority vote in favor of Proposition B in 1984. However, the City Attorney's Office has opined that Proposition B and the Ordinance it ratified, O-16173, limited the sale, lease, or exchange of the real property to the “United States of America only” and that a sale, lease, or exchange to anyone else would require a subsequent (additional) voter ratification. The City Attorney's Office provided an official memorandum on the subject, and later clarified that the voters could authorize a long term lease as well as a sale or exchange, consistent with previous Pueblo Lands long term lease agreements. **(See Attachment 5: Documents and Proposed Ordinance Regarding Pueblo Lands)**

In addition to approval of the contracts discussed below, execution of the Lease Agreement would require that the City Council place a proposition on the November 6<sup>th</sup>, 2012 ballot which would permit the City to lease the subject property to Capital Power according to the terms and conditions specified that proposed agreement.

### Discussion

“Energy Independence” is an explicit City policy objective as described in Chapter IV of the existing “Community and Economic Development Strategy” which states: *“Continue to pursue the application of Enterprise Zone and business development incentives under City Council Policy 900-12 to encourage new sources of electrical generating capacity in the region”* Other partner organizations in the business community share this policy objective. BIOCUM, a local trade association for biotech manufacturers and research firms has made it clear that energy reliability is of paramount importance, stating in its *Issues and Principles Agenda* that:

*“An uninterrupted supply of electricity is critical to both the research and manufacturing processes of life science companies, as even a brief loss of service could destroy years of research or compromise the quality of a drug or diagnostic test. A dependable, stable, and competitively priced energy supply is an important factor in a company’s decision to locate and grow within the San Diego region. BIOCOT strongly supports initiatives designed to improve electricity reliability through increased generation and transmission capabilities while respecting and mitigating environmental impacts using best practices.”*

Other San Diego business organizations, such as the San Diego Regional Chamber of Commerce and the Industrial Environmental Association (IEA) have emphasized the need for energy reliability and have expressed support for construction of new generation and transmission assets such as the proposed expansion of Encina Power Plant and the construction of the Sunrise Power Link. The California Independent System Operator (CAISO) and the California Energy Commission (CEC) have also repeatedly stressed the need for new fast dispatch generation assets to ensure local energy reliability as increasing amounts of intermittent renewable energy resources are integrated into the power grid and older ocean front power plants are retired pursuant to the California Water Resources Board’s *“Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling.”* The recent extended electricity black-out (power outage) in 2011 renewed and invigorated a civic discussion about the need for local energy reliability in the San Diego basin.

### Clean Gas Technologies

Capital Power’s proposed *North City Power Plant* will be a highly efficient combined cycle power plant fueled exclusively using clean-burning natural gas as fuel. Although not technically a “renewable” power source such as solar, wind, and hydroelectric power, combined cycle technology incorporates the use of Heat Recovery Steam Generators (HRSG’s) to capture waste heat from the gas turbines used in modern power plants. This normally wasted heat energy is then used to heat water to produce steam which is then fed to a steam turbine which in turn produces additional electricity without the combustion of any additional fossil fuels. Most of southern California’s combined cycle natural gas power plants have been built during the last 10 years. Palomar Power Plant in the City of Escondido and Otay Mesa Power Plant in the unincorporated area of San Diego County are two recent examples where this new technology has been employed.

These new high technology power plants generate electric power at thermal efficiency rates of 54% to 60%, far cleaner and more efficient than the older steam “boiler” units commonly found along the coastline. Unlike the older coastal power plants, which use ocean water for cooling, combined cycle power plants typically use reclaimed sewer effluent for cooling. The newest combined cycle plants use a “decoupler” between the gas turbines and the steam turbine so that they can be dispatched by CAISO within 10 minutes, making them ideal for “peaking,” and “load following,” as well as “baseload” generation. These “Rapid Response” combined cycle plants represent the most technologically advanced and “flexible” generation assets, ideal for the integration of intermittent renewable generation assets such as the massive solar and wind farms found in remote locations, or “rooftop” distributed generation.



### Job Creation and Related Economic Stimulus

In addition to the public benefit associated with energy reliability discussed above, and the significant fiscal benefits discussed under “Fiscal Considerations” below, the plant would provide other important public benefits as well. The project is projected to create up to 400 full and part-time construction jobs (200 full-time equivalent positions) during the 2 year construction period. These construction jobs are highly skilled union and union-scale (“prevailing wage”) jobs for plumbers, pipe-fitters, electricians, welders, and steel workers. The payroll expenditures will generate increased sales at retail and service sector establishments elsewhere in the City, providing additional stimulus to the local economy during the construction period. Following the construction period, the plant will be manned by 10 - 25 permanent operations personnel, thereby generating a smaller, but nevertheless important source of new job opportunities for local residents for a much longer time period.

### Land Use and Environmental Issues

The NCWRP site is located within a military-industrial area. Immediately to the east is the Marine Corps Air Station Miramar (MCAS Miramar). Further to the northwest is an exclusively industrial area comprised of distribution centers, manufacturing plants, and contractor/service yards. On the west side of the 805 Freeway (which directly abuts NCWRP) is a series of industrial parks which are exclusively developed for, and occupied by, high technology and biotechnology manufacturing plants and research laboratories. There are no sensitive receptor or residential land uses within 1,000 feet of the proposed power plant site on Nobel Dr. All of the NCWRP (including the Nobel Dr site) retains its original single family residential zoning from a 1932 pre-zoning ordinance, however the “Open Space” designation in the Community Plan, and two overlay zones (CPIOZ and AEOZ) preclude the development of the property (other than by the City itself) until and unless an actual entitlement were to be obtained.

That portion of the property south of Miramar Rd. and north of Nobel Dr. where the power plant is proposed, has been included in the Multiple Habitat Preservation Area (MHPA) which limits development of the site to no more than 25% of the total site area. Development of a larger power plant would most likely require Capital Power to mitigate the loss of any biological impacts, including the loss of any vernal pools, and may also require the approval of an MHPA Boundary Line Adjustment (BLA)

The NCWRP site is also governed by the MCAS Miramar Airport Land Use Compatibility Plan (ALUCP) and the MCAS Miramar Air Installations Compatible Use Zones (AICUZ) which limit the allowable land uses and development intensities on certain properties and also limits the design features where there may be some potential for hazards to flight. The Nobel Dr. site is not located in an Accident Potential Zone (APZ) in either plan document. In the ALUCP a portion of the Nobel Dr. site is located in the “Transition Zone.” Power plants are deemed conditionally compatible in the “Transition Zone” of the MCAS Miramar if the airport operator (in this case the USMC) and the Airport Land Use Commission determine that there will be no

peterochemical storage and that the plant will not “generate smoke, heat, or visibility hazards that could interfere with the safety of flight.”

On April 27<sup>th</sup>, 2011 Capital Power and the City met with the USMC to present the project concept and to listen to the concerns of air operations officers and their civilian advisors. The USMC indicated that they were not opposed to the concept of a power plant on the NCWRP site, and that a utility use was compatible with airbase operations, but that they would withhold any final determination regarding the potential for interference with safety of flight pending a USMC review of detailed studies regarding the potential for visible plumes of steam, electromagnetic interference, or atmospheric effects of heat from the natural gas combustion process.

The requested action, approval of the proposed contracts and placement of a proposition on the November 2012 ballot, is exempt from the California Environmental Quality Act (CEQA) pursuant to Public Resources Code § 21080(b)(6) which states that: *“This division does not apply to any of the following activities:*

*(6) Actions undertaken by a public agency relating to any thermal powerplant site or facility, including the expenditure, obligation, or encumbrance of funds by a public agency for planning, engineering, or design purposes, or for the conditional sale or purchase of equipment, fuel, water (except groundwater), steam, or power for a thermal powerplant, if the powerplant site and related facility will be the subject of an environmental impact report, negative declaration, or other document, prepared pursuant to a regulatory program certified pursuant to Section 21080.5, which will be prepared by the State Energy Resources Conservation and Development Commission, by the Public Utilities Commission, or by the city or county in which the powerplant and related facility would be located if the environmental impact report, negative declaration, or document includes the environmental impact, if any, of the action described in this paragraph.”*

The “State Energy Resources Conservation and Development Commission” is the formal name of the state agency more commonly known as the “California Energy Commission.” Pursuant to the Warren-Alquist Act, the California Energy Commission has exclusive jurisdiction over the licensing of power plants with capacity in excess of 50 MW, and as part of that licensing process prepares a “CEQA-equivalent” environmental document known as a “Final Staff Assessment” to analyze all potentially significant environmental and socioeconomic impacts. The Final Staff Assessment (FSA) includes a detailed assessment of the plant’s projected impact on water resources, air resources, traffic, natural resources, land use compatibility, visual impacts, and socio-economic impacts, among others. No power plant of 50 MW or larger can be built or operated in California without a license.

If the ballot measure is approved by the voters thus ratifying the Option and Lease Agreements, Capital Power would then have the ability to pursue all of the necessary approvals and permits for the project. The principal approval required to build and operate a power plant is a license issued by the California Energy Commission (CEC). The licensing process typically takes 2 years but more recent licensing cases have taken longer, with one recent case (Encina Power Plant - Units 6 and 7) taking almost 5 years. Concurrently with the licensing process, Capital



Power would seek land use approvals (a rezoning ordinance, a Community Plan Amendment, a Site Development Permit, and possibly an MHPA Boundary Line Adjustment) from the City of San Diego in order to meet what the CEC calls “compliance with all Local Ordinances Regulations and Standards (LORS). This would require Capital Power to obtain City Council approval of these “Process Five” land use approvals prior to final action by the CEC. Additional county, state, and even federal permits and other approvals may also be required. A list of all approvals for this project is included. **(See Attachment 6: Approvals Required to Construct North City Power Plant).**

As stated above, the addition of a third highly efficient combined cycle power plant to the San Diego County “load pocket” would likely contribute to the early retirement of less efficient coastal steam plants such as Encina Power Plant’s Units 1-5 which operate at about 35% thermal efficiency, well below the projected 55% thermal efficiency of the proposed North City Power Plant. Encina Units 1-5 use millions of gallons of ocean water for cooling each day (“once through cooling” or “OTC”) which results in the untimely death of millions of fish and other sea creatures due to “impingement and entrainment” at the plant’s intake screens. Additional environmental benefits could result from an overall reduction of emissions associated with the current combustion of natural gas at existing less efficient power plants in the San Diego air basin. The proposed power plant would be much more efficient and would incorporate Best Available Control Technologies (BACT) to reduce emissions. Because of its greater efficiency, North City Power Plant would likely displace in the dispatch order those older less efficient and less flexible generation assets currently in use such as Encina’s units 1-5, Cabrillo Power Plant in Kearny Mesa and other pure “peaker” plants. The 2,200 MW San Onofre Generating Station is currently shut down due to equipment failure, and if restarted in the future, may be limited to running at partial load. Its license expires in 2023 and is also scheduled for an expensive OTC phase-out retrofit in that same year, leading some to speculate that it may be commercially infeasible for SDG&E and Southern California Edison to continue to operate this plant past that year.

#### Summary of Public Benefits

North City Power Plant would provide a wide range of public benefits including the creation of 400+ high-wage construction and operations jobs, economic stimulus, lease, tax, and fee revenue to fund City operations and general services, and potential environmental benefits. In addition to providing the City with an estimated \$3.2 million annually in fiscal benefits to City ratepayers and taxpayers, construction and operation of the plant would provide approximately \$3.4 million annually in property tax revenue to San Diego Unified School District (SDUSD), approximately \$800,000 annually to the County of San Diego, and “one-time” sales tax revenues of approximately \$3 million to the San Diego Association of Governments’ (SANDAG) TRANSNET district, and approximately \$36 million to the State of California. **(See Attachment 7: Estimate of Public Benefits).**

#### FISCAL CONSIDERATIONS:

Capital Power will be solely responsible for project costs including the costs of placing the Pueblo Lands proposition on the ballot and the cost of obtaining all approvals to construct the

plant. If the ballot measure is approved, Capital Power will begin making annual “Option Consideration” payments of \$400,000 annually to the Public Utilities Department Enterprise Fund. If Capital Power is successful in obtaining a license to build and operate the power plant, and power sales contracts and financing to build it, the company will most likely exercise its option to enter into the long-term lease and begin making annual rent payments of \$1 million to \$1.5 million annually for the next 25-45 years resulting in an estimated approximately \$26 - \$67 million in total for the Sewer Revenue Fund.

Upon completion of the plant (2 years is a typical construction period) Capital Power will begin purchasing secondary or tertiary effluent from the Public Utilities Department. During the construction period and to a lesser extent thereafter, the City, County, State and the San Diego Association of Governments will realize sales and use taxes from the purchase of expensive taxable power plant machinery and equipment. Once the plant is completed, Capital Power will begin paying property tax on the value of the plant as a whole which will provide a very significant stream of tax revenue to the City, the County, and the San Diego Unified School District. Additionally, the City would receive gas franchise fees from the sale or consumption of natural gas supplied to the plant. **(See Attachment 7: Estimate of Public Benefits).**

#### PREVIOUS COUNCIL and/or COMMITTEE ACTION:

No previous actions have been taken with respect to the execution of contracts with Capital Power Corporation. In 1984 the City Council authorized placement of a proposition on the ballot to sell, lease or exchange the entire North City site (120 acres) to the United States of America, as discussed above, pursuant to City Charter Section 219.

#### COMMUNITY PARTICIPATION AND PUBLIC OUTREACH EFFORTS:

On September 14<sup>th</sup>, 2010, the Mayor’s Office of Economic Growth Services gave a presentation on the RFP to the University Community Planning Group (UCPG) and answered questions from community members. No further outreach has been done since that time due to the confidential nature of the procurement process, which precludes the release of information related to specific bidders, the number of bidders, and the specifics of any proposals being reviewed or negotiations being conducted. As discussed above, City staff reached out to the adjacent property owner, the USMC, the party most likely to be affected by the construction and operation of new facilities on the NCWRP site.

#### KEY STAKEHOLDERS AND PROJECTED IMPACTS:

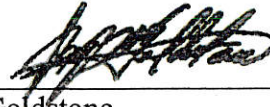
NCWRP is located in Council District 7, adjacent to MCAS Miramar, in the University Community. As described above, key stakeholders include the nearest property owner, the USMC, and the residents of the nearest community, University. However, if the land is released from its Pueblo land status, and Capital Power ultimately constructs and operates a clean natural gas technology power plant on the NCWRP site, the key stakeholders would certainly include all of the residents of the City of Diego who would be the beneficiaries of the significant tax and lease revenues to be generated, the environmental benefits, and the job opportunities and



associated economic stimulus. **The projected positive fiscal, economic, and environmental impacts are further detailed in Attachment 7: Estimate of Public Benefits.**



Aimee Faucett  
Deputy Chief of Staff  
Office of the Mayor



Jay M. Goldstone  
Chief Operating Officer

- Attachments(s):
1. Technical and Price Evaluation Committee Reports
  2. Procurement Award Recommendation Letter to Capital Power Corp.
  3. Option and Lease Agreements with Implementing Ordinances
  4. MOU and Resolution Regarding Sale of Water to Capital Power Corp.
  5. Documents and Proposed Ordinance Regarding Pueblo Lands
  6. Approvals Required to Construct North City Power Plant
  7. Estimate of Public Benefits





# Attachment 1: Technical and Price Evaluation Committee Reports

## ATTACHMENT B - Consensus Technical Evaluation Form – Summary



THE CITY OF SAN DIEGO  
MAYOR JERRY SANDERS

### M E M O R A N D U M

DATE: January 10, 2011

TO: Hildred Pepper, Director, Purchasing & Contracting  
via William Broderick, CPPB, C.P.M. Procurement Specialist

FROM: Evaluation Committee, Chairman Russ Gibbon, and 4 members,

SUBJECT: Summary Report of Technical Evaluations, Request for Proposal (RFP) No.:  
10007363-10-W, RFP – Land Lease, Long Term for North City Power Plant

The Technical Evaluation Committee (TEC) completed a comprehensive review of the technical proposals submitted in response to the subject solicitation. In accordance with the solicitation, the criteria used by the TEC for the technical evaluation of the proposals are listed below in decreasing order of importance:

1. Executive/Management Summary, and Response to Specifications;
2. Qualifications and Experience
3. Past Performance as indicated by References; and
4. Optional oral presentation, interview and establishment of rapport with key personnel

The TEC assigned Proposers an overall rank and rating, based on the individual ratings associated with each of the evaluation criteria noted above. The Consensus Technical Evaluation Forms (Attachment B individual) includes the TEC's ratings, strengths and/or weaknesses and provides the justification for the overall ranking and adjectival rating as listed in the table below:

#### Summary of TEC's Overall Technical Rating and Ranking

<u>Name of Proposer</u>	<u>Overall Adjectival Rating</u>	<u>Overall Rank</u>
Capital Power Corp.	Exceptional	1
Competitive Power Ventures	Acceptable	2

## ATTACHMENT B - Consensus Technical Evaluation Form – Summary

RFP No.: 10007363-10-W, RFP – Land Lease, Long Term for North City Power Plant

Evaluator: Technical Evaluation Committee

Proposer: Capital Power Corp

Date: January 10, 2011

**EVALUATION FACTOR 1:** Executive/Management Summary, and Response to Specifications

RATING: Exceptional

*Exceptional (Exceeds requirements in a beneficial way to the City; has a high probability of satisfying the requirement; no significant weaknesses and no deficiencies) because:*

### STRENGTHS:

#### Executive/Management Summary

Capital Power Corporation is an established, publicly-traded independent power producer headquartered in Edmonton Canada. It owns and operates 31 power plants in North America with generating capacity of approximately 3,500 MW. The company has approximately 1,100 employees, of which 39 are located at its San Diego office. The San Diego office operates 3 small power plants in San Diego and one in Oxnard (totaling 182 MW) through a subsidiary called Applied Energy LLC. All four plants have power purchase agreements (PPA's) to sell their electric output to SDG&E and SCE respectively. The three San Diego facilities are located on US Navy/USMC property and Capital Power sells steam to those military commands. The repowering of these plants has provided Capital Power with ownership of 30+ tons of NOx ERC's which can reportedly be used to offset NOx emissions at other new proposed power plants.

Capital Power Corporation and Capital Power LP are majority owned (but not controlled) by EPCOR Utilities, Inc. the public utility for the City of Edmonton, Alberta (Canada). Capital Power Corp and its affiliates build, own, and operate a diversified portfolio of generation assets including coal, clean coal, hydroelectric, natural gas, and wind power facilities. Capital Power LP (an affiliate of Capital Power) has a BBB bond rating ("investment grade") from S&P and DBRS and is the entity which would guarantee this proposer's obligations to the City in connection with any proposed lease agreement.

#### Response to Specifications

Capital Power Corporation is proposing an 850 MW combined cycle power plant which would use 3 General Electric Frame 7FA "Rapid Response" combustion turbine generators (CTG's) + one steam turbine to provide investor-owned utilities with base load, load-following, and peaking generation capacity. These types of electrical generating plants are increasingly used to meet California Independent Systems Operator ("CAISO") required local generation capacity as well as providing grid stability to allow the "Investor-owned Utilities" ("IOU's") to meet 33% renewable portfolio standards (RPS). Renewable generating resources are "intermittent" in nature which requires the local IOU's to have access to "quick-start" generating assets which can



## ATTACHMENT B - Consensus Technical Evaluation Form – Summary

be brought on-line within minutes as well as “load-following” assets which can be efficiently ramped up or down to follow variable electricity demands cost-effectively. Capital Power’s proposal would also provide “base load” capacity to replace older less efficient “boiler units” such as NRG’s Encina Power Plant (Units 1-5 totaling 960 MW) which must be phased out by 2017 in accordance with State mandates to cease the use of ocean water for power plant cooling (aka “once through cooling or “OTC”).

The overall public benefits associated with power plants (jobs + tax revenue to state and local governments and schools) has a direct, almost linear relationship to the size of the plant, its efficiency, and its “capacity factor.” More megawatts of capacity requires more labor (construction jobs + operations jobs). More megawatts of capacity requires the purchase and use of more and larger pieces of equipment which in turn generates greater amounts of sales, use, and property tax revenue for all taxing jurisdictions. Importantly for the City of San Diego, a combined cycle power plant is more efficient (mmbtus/kwh) meaning that, as compared to a simple cycle generator (a pure “peaker” plant) it will have a much higher “capacity factor.” The “capacity factor” roughly equates to the amount of time the plant is run or “dispatched” to provide power to the grid. More run time equals more natural gas consumed as fuel. The City of San Diego charges a 3% “gas franchise fee” to the local utility (SDG&E) for all natural gas sold within the city limits. Although technically a fee, the gas franchise fee functions more like a sales tax since increased consumption leads to a higher taxable measure. The tax is paid by the power generation company but collected by the local utility and remitted to (in this case) the City of San Diego. Thus a combined cycle power plant run at an 80% capacity factor can generate easily 2 ½ times as much gas franchise fees as a simple cycle power plant. Overall, the public benefits of a 850 MW combined cycle power plant exceed the public benefits of the RFP’s minimum specifications by more than 3 to 1.

Power generation companies responding to RFP #10007363-10-W were required to commit to constructing a power plant which would use reclaimed water from the City’s on-site North City Water Reclamation Plant (NCWRP) for cooling and to construct a power plant of ***“no less than 200 megawatts (gross) of electrical generating capacity.”*** Capital Power’s proposal greatly exceeds the City’s minimum requirements. Although Capital Power acknowledged that its proposal to the City exceeded the current maximum of 400 MW which San Diego Gas & Electric (SDG&E) is authorized by the Public Utilities Commission (PUC) to procure pursuant to its current Long Term Procurement Plan (LTPP), Capital Power expressed confidence that the electricity market in southern California would support this much generating capacity. The Ventryx Energy study included in the proposal supports this contention, as do outside sources (such as California Independent Systems Operator “CAISO”) evaluated by the TEC. Capital Power amended its proposal to provide a guaranteed minimum plant size of 350 MW in a combined cycle configuration (one CTG plus one steam turbine), run at a capacity factor of 80%, in the event that the local market would not support the full 850 MW combined cycle proposal. Although a highly efficient combined cycle power plant with a high capacity factor was not specified as a minimum requirement, specifications 2(b)(4) through 2(b)(8) clearly implied that the City would more favorably consider such a facility, everything else being equal.

Power generation companies responding to RFP #10007363-10-W were required to accept all costs of the project including the costs of connection to water, sewer, gas, and electrical output utility infrastructure, costs of licensing and all permit and development approvals including off-site mitigation of impacts if required. Capital Power’s proposal, as amended, included



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acceptance of these costs.

Capital Power provided a well detailed proposal which included, among other things:

- (a) An engineering site plan (to scale) of the power plant on the Nobel Dr. site showing a design which would result in the least disturbance/impact to vernal pools as required in specification (2)(b)(8). The TEC felt that the engineering drawing, although not orthographic, exceeded the RFP's minimum requirement to provide a "layout" or "footprint of the power plant on the site" and provided a superior level of detail for evaluative purposes
- (b) A detailed full-color 3-dimensional artist's rendering of the proposed power plant as requested in specification (2)(b)(8)
- (c) A detailed development schedule as requested in specification (2)(b)(10)
- (d) Two three-dimensional photo-simulations of the proposed plant as it would be seen by motorists coming off the 805 FWY and at a key observation point on Nobel Dr. (as requested by TEC in letter to Capital Power Corp. 12/7/10 and incorporated as an amendment to the proposal)
- (e) A detailed 9-page site-specific "Environmental Constraints Analysis" prepared by URS Corp. which listed the approvals that would/might be required from federal, state, and local regulatory agencies, and discussed those approval requirements in the context of: "Air Quality," "Biological Resources," "Cultural Resources," "Geologic and Geotechnical Considerations," "Land Use," "Visual Resources," and an "Environmental Constraints Summary" as required in specification (2)(b)(10)
- (f) Although not required by the RFP, Capital Power voluntarily provided a 10 page "Analysis of SDG&E's Future Capacity Requirements and Miramar Site" prepared by Ventryx Energy LLC to support the viability of its attractive 850 MW combined cycle proposal.
- (g) Although not required by the RFP, Capital Power voluntarily provided a site-specific 4-page interconnection analysis entitled "HV Electrical Interconnection for City of San Diego Power Plant at Miramar Road" prepared by an electrical engineer to further support the viability of its attractive 850 MW combined cycle proposal.
- (h) A detailed 11-page description of the proposed power plant itself, including the proposed advanced technology CTG's to be equipped with efficiency options such as duct burners and inlet foggers, Best Available Control Technologies (BACT) for emissions reductions, water use requirements, sewer discharge, storm water discharge prevention measures, waste handling measures and other useful information to evaluate the plant's potential to support and complement existing and potential future operations of the Public Utilities Department which owns the site.

### WEAKNESSES/DEFICIENCIES:

None



## ATTACHMENT B - Consensus Technical Evaluation Form – Summary

RFP No.: 10007363-10-W, RFP – Land Lease, Long Term for North City Power Plant

Evaluator: Technical Evaluation Committee

Proposer: Capital Power Corp.

Date: January 10, 2011

### EVALUATION FACTOR 2: Qualifications and Experience

RATING: Acceptable

*Acceptable (Meets requirements; has acceptable probability of satisfying the requirement; any weaknesses can be readily corrected. Acceptable indicates no exceptional merit that could prove to be beneficial; no significant weaknesses; no deficiencies) because:*

#### STRENGTHS:

Capital Power Corporation is an established, publicly-traded independent power producer headquartered in Edmonton Canada. Directly and through subsidiaries and affiliates such as Capital Power LP, Capital Power Income LP, and Applied Energy LP, it owns and operates 31 power plants in North America with generating capacity of approximately 3,500 MW. The company has approximately 1,100 employees, of which 39 are located at its San Diego office.

Capital Power Corporation and its affiliates as corporate entities are fairly “young” having been established in 2009 as a “spin-off” from its parent entity, EPCOR Utilities, Inc. which still holds a majority, though not controlling, interest in it. EPCOR Utilities, Inc. is a municipal utility which provides electric, water and wastewater treatment service to the metropolitan area of Edmonton, the capital city of Alberta, a Canadian province known for energy development and high-tech industry. EPCOR Utilities has developed a major water reuse facility, Gold Bar Wastewater Treatment Plant which supplies reclaimed water to nearby industrial plants. Capital Power Corp. builds and operates the large power plants serving the City of Edmonton as well as those serving many other cities and towns throughout North America. Capital Power’s stated objectives include the development of new energy markets throughout North America, particularly the American southwest.

Capital Power Corp and its affiliates build, own, and operate a diversified portfolio of generation assets including coal, clean coal, hydroelectric, natural gas, and wind power facilities. The San Diego office operates 3 small power plants in San Diego and one in Oxnard (totaling 182 MW) through a subsidiary called Applied Energy LLC. All four plants have power purchase agreements (PPA’s) to sell their electric output to SDG&E and SCE respectively. The three San Diego facilities are located on US Navy/USMC property and Capital Power sells steam to those military commands.



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### WEAKNESSES/DEFICIENCIES:

Section 2(a) "Power Generation Company Experience and Capabilities." in paragraph 3 on page 14 of 54 states: *"The power generation company selected must demonstrate the experience and the resources needed to obtain development approvals, licensing, and construction of the proposed North City Power Plant. In evaluating the proposals, important factors in considering the most qualified respondents will be: direct extensive prior experience in the development of new gas-fired power plants in California, effective community relations skills, current financial capacity or access to financial resources, and demonstrated ability to construct environmentally superior projects that can be constructed in a timely manner."* [Emphasis added]

Although Capital Power has no experience in the permitting process through the California Energy Commission (CEC) for large power plants (50 MW and larger) as contemplated for North City Power Plant (200 MW +), the company has considerable experience of this type in Canada and throughout the United States. Capital Power's wholly-owned San Diego-based subsidiary Applied Energy LLC does have experience in the development of smaller combined heat and power (CHP) power plants with three USN/USMC facilities in San Diego as well as one at Oxnard in Ventura County. For this proposal, Capital Power has retained URS, a professional engineering, construction, and technical consulting firm which provides development services to large industrial concerns as well as government agencies such as CalTrans. URS has provided these services for over 300 clean gas technology generating units worldwide. This lack of experience in the development of a major power plant in California was a concern of the TEC, however detailed answers provided orally and in writing during the formal proposer interview satisfied the TEC that Capital Power Corp. could still satisfy the regulatory agencies and still obtain the necessary approvals in a timely manner.

Section 2(a) "Power Generation Company Experience and Capabilities." in paragraph 3 on page 14 of 54 states: *"Demonstrated ability to obtain power purchase agreements with California retail utility providers is considered an important qualification."*

The RFP did not specify, or in any way require, proposers to have first obtained a Power Purchase Agreement (PPA) or other procurement contract with SDG&E or any other IOU for North City Power Plant (NCPP), since site control is typically a prerequisite for such contracts. However, the ability of a power generation company to obtain PPA's for the sale of generating capacity to electricity retailers such as IOU's is important in terms of making it easier for power companies to obtain financing for the power plant itself, and is a good overall indicator of a power company's financial and management capacity as well as a particular project's feasibility.

Capital Power confirmed that it did not submit an offer to SDG&E in connection with that utility's 2009 Request for Offers (RFO). SDG&E's 2009 RFO required a minimum of 100 MW of "peaking and intermediate capacity." If Capital Power had submitted an offer, or had previously begun meaningful sales discussions with SDG&E, that would have strengthened the feasibility of its proposal to the city as well as its own credibility as a "player" in the San Diego energy marketplace. This was identified by the TEC as the most significant concern with respect to Capital Power's proposal, however it is a relatively minor weakness which could be cured through a direct negotiations with California's three IOU's which are entering into PPA's with power companies for simple cycle and combined cycle "quick-start" generating capacity. When asked by the TEC why Capital Power did not make an offer to SDG&E pursuant to its 2009 offer, Capital Power executive stated that they did not know that the Public Utility Department's Nobel Dr. site was potentially available for power generation use. The NCPP RFP was not



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publicly released until May 21, 2010, approximately 9 months after the August 10, 2009 closing date of SDG&E's 2009 RFO.

However, Capital Power apparently does have three Power Purchase Agreements (PPA's) with SDG&E and Southern California Edison (SCE) for its smaller power plants discussed above. Additionally, it is clear that SDG&E also procures power via direct negotiation and unsolicited offers from power companies in addition to solicitations via its RFO process. It is reasonable to conclude that SCE and Pacific Gas & Electric (PG&E) may also procure generating capacity through both the RFO process as well as direct negotiations.

Finally, Capital Power does have its west coast marketing and administrative offices in the City of San Diego, an indicator that this proposer has at least the intention of developing more capacity in the Southern California marketplace, San Diego in particular.

Although the absence of CEC licensing and land use development experience and the failure of Capital Power Corp. to submit an offer to SDG&E were identified as weaknesses by the TEC, these weaknesses were determined to be non-significant weaknesses which could easily be remedied through retention of qualified consultants and initiation of power purchase discussions and offers to SDG&E and the state's other two IOU's.

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RFP No.: 10007363-10-W, RFP – Land Lease, Long Term for North City Power Plant  
Evaluator: Technical Evaluation Committee  
Proposer: Capital Power Corporation  
Date: January 10, 2011

EVALUATION FACTOR 3: Past Performance as indicated by References

RATING: Exceptional

*Exceptional (Exceeds requirements in a beneficial way to the City; has a high probability of satisfying the requirement; no significant weaknesses and no deficiencies) because:*

STRENGTHS:

Capital Power Corp. supplied 3 pages of references representing seven (7) different entities/organizational types:

A California Investor Owned Utility (regarding PPA's for 103 MW for 30 years)

A California air district (regarding air permits)

An equipment supplier (regarding a recent purchase of combustion turbine generators)

California Independent System Operator ("CAISO") (regarding a power contract)

A Fortune 100 company (regarding a joint venture)

A trade association of power companies (reason not specified)

A law firm (regarding representation before the California Public Utilities Commission)

WEAKNESSES/DEFICIENCIES:

None



## ATTACHMENT B - Consensus Technical Evaluation Form – Summary

RFP No.: 10007363-10-W, RFP – Land Lease, Long Term for North City Power Plant  
Evaluator: Technical Evaluation Committee  
Proposer: Capital Power Corporation  
Date: January 10, 2011

**EVALUATION FACTOR 4:** Optional oral presentation, interview and establishment of rapport with key personnel

**RATING:** Exceptional

*Exceptional (Exceeds requirements in a beneficial way to the City; has a high probability of satisfying the requirement; no significant weaknesses and no deficiencies) because:*

**STRENGTHS:**

Capital Power Corp. was presented with a list of questions designed to clarify certain aspects of its proposal relating to electricity market support for a large combined cycle power plant, permitting challenges specific to the site, power plant design and site specific photo simulations, and water and sewer capacity requirements. Capital Power Corp. chose to present its written answers to the TEC's questions during the oral interview. Capital Power Corp. brought their permitting/land use expert from URS to discuss MHPA and Vernal Pool mitigations issues as well as the company's in-house engineering experts (clean gas technology, water quality/cooling) electricity contracts manager, and their business development managers.

The Capital Power team was subjected to a battery of detailed questions from the TEC during the two-hour interview which focused on the specifics of Capital Power Corp's North City Power Plant Proposal. Capital Power effectively engaged in detailed discussions regarding each of the following:

- (a) Selection of clean gas technology equipment which would likely meet the requirements of California's IOU's especially SDG&E.
- (b) The availability of PPA's and the San Diego/Southern California energy market particularly in terms of the ability to sell 850 MW of capacity.
- (c) The design of the plant itself relative to known biological resources on the Noble Dr site and the potential need for off-site mitigation
- (d) The availability of emission reduction credits (ERC's) in the San Diego air basin
- (e) The design of a power plant which would effectively support and complement the efforts of the City's Public Utilities Department which could continue to treat secondary effluent to Title 22 reclaimed water quality levels or possibly implement a future indirect potable reuse program.
- (f) The design of a modern high-technology power plant which would include sight-

## ATTACHMENT B - Consensus Technical Evaluation Form – Summary

obscuring walls, square vent stacks, substantial landscaping, and possibly murals or other design features typical of power plants located in or near trendy/upscale communities such as Redondo Beach.

- (g) The potential of Capital Power Corp's proposed power plant to purchase and use small quantities of landfill gas in the future if the City were to have excess quantities available for sale.
- (h) Capital Power Corp's existing business relationship to the USN/USMC and a willingness to recognize USMC concerns regarding airspace around MCAS Miramar

The TEC was able to establish a rapport with Capital Power's design/marketing team in what became almost like a brainstorming session as Capital Power engineers responded creatively to different water quality/conveyance scenarios presented by members of the TEC. The TEC was clearly left with the impression that Capital Power Corp. could use almost any water product (reclaimed water, "side-flows," RO reject water, and RO water) provided by the Public Utilities Dept. and that it would increase the size of storage tanks on site to minimize water demand during peak water use times/seasons. The TEC felt that Capital Power was willing to be more than just a water customer and lessee of the Public Utilities Dept. but that it was willing to design and integrate North City Power Plant into the overall North City utility site in a way that was complementary and maximized the site's potential. Capital Power Corp's written responses to the TEC's written questions were incorporated into its proposal.

### WEAKNESSES/DEFICIENCIES:

None



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RFP No.: 10007363-10-W, RFP – Land Lease, Long Term for North City Power Plant  
Evaluator: Technical Evaluation Committee  
Proposer: Competitive Power Ventures, Inc.  
Date: January 10, 2011

**EVALUATION FACTOR 1:** Executive/Management Summary, and Response to Specifications

**RATING:** Acceptable

*Acceptable (Meets requirements; has acceptable probability of satisfying the requirement; any weaknesses can be readily corrected. Acceptable indicates no exceptional merit that could prove to be beneficial; no significant weaknesses; no deficiencies) because:*

### **STRENGTHS:**

#### **Executive/Management Summary**

Competitive Power Ventures (CPV) is a North American energy project development and asset management company established in 1999 headquartered in Silver Spring, Maryland. It is developing in excess of 17,000 MW of solar, wind and clean natural gas technology generating assets in North America. CPV also has offices in Braintree Massachusetts, Toronto, Ontario, and San Francisco, California.

Recent efforts have been focused on four major power plants in California in addition to exploratory efforts in San Diego. It has completed most of the development process for a 660 MW combined cycle power plant in Colusa the development rights to which were sold to Pacific Gas & Electric Co. (PG&E). Through a subsidiary called E&L Westcoast it obtained a Power Purchase Agreement (PPA) for that plant. It has obtained a long-term ground lease from the City of Vacaville for a similar combined cycle plant in that city and has submitted an Application For Certification (AFC) to the California Energy Commission (CEC) to obtain a license to construct that plant. CPV has also been pursuing a large 800 MW simple cycle power plant in Desert Hot Springs called CPV Sentinel. That plant has recently received a license from the CEC and obtained its emission reduction credits (ERC's) through novel legislation which made credits available where none were previously available. Importantly, CPV obtained two Power Purchase Agreements (PPA's) for sale of 800 MW of the licensed and proposed 800 MW. It has also been pursuing a 100 MW wind project near the City of Ridgecrest called CPV Saltdale. Recent efforts have also included due diligence on the City of San Diego's Nobel Dr. site held by the City's Public Utilities Dept. (Metropolitan Wastewater Division) during and prior to this RFP. CPV has apparently engaged in discussions with SDG&E seeking a PPA for this site possibly in connection with an offer submitted to SDG&E pursuant to that utility's 2009 RFO.

#### **Response to Specifications**

Competitive Power Ventures is proposing a 300 MW simple cycle power plant which would use three (3) General Electric LMS 100 combustion turbine generators (CTG's) to provide investor-owned utilities with load-following and peaking generation capacity. Quick-start power plants



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(whether simple cycle or combined cycle) are highly desired by California IOU's to stabilize an electrical grid which will have to rely on intermittent solar and wind base load generators which are increasingly being used to meet 33% renewable portfolio standards (RPS). Renewable generating resources are "intermittent" in nature which requires the local IOU's to have access to "quick-start" generating assets which can be brought on-line within minutes as well as "load-following" assets which can be efficiently ramped up or down to follow variable electricity demands cost-effectively.

The greatest strength of the CPV proposal is its "head start" in terms of having an improved likelihood of obtaining a Power Purchase Agreement (PPA) from SDG&E. Orally and in writing, CPV claimed that it had already made an offer to SDG&E pursuant to that utility's 2009 Request for Offers ("RFO") and that an agreement for sale of power was well underway.

Power generation companies responding to RFP #10007363-10-W were required to commit to constructing a power plant which would use reclaimed water from the City's on-site North City Water Reclamation Plant (NCWRP) for cooling and to construct a power plant of ***"no less than 200 megawatts (gross) of electrical generating capacity."*** CPV's proposal exceeds the City's minimum requirements. Power generation companies responding to RFP #10007363-10-W were required to accept all costs of the project including the costs of connection to water, sewer, gas, and electrical output utility infrastructure, costs of licensing and all permit and development approvals including off-site mitigation of impacts if required. CPV's proposal included acceptance of these costs.

CPV provided an acceptable proposal which included, among other things:

- (a) A fairly simple drawing of its proposed power plant pasted onto an aerial photo (two-dimensional) of the Nobel Dr. site. The aerial overlay did however, meet the minimum standards as required in specification (2)(b)(8)
- (b) A detailed development schedule as required in specification (2)(b)(10)
- (c) One photo of an existing GE LMS 100 CTG, presumably similar if not identical to the equipment which would be used in CPV's proposal to construct NCPP as a 3 x GE LMS 100 power plant. The photo appears to be a snap shot of the Groton Generating Station located in an agricultural area of South Dakota. The photo does not depict any landscaping or sight-obscuring walls.
- (d) A three (3) page narrative describing in fairly general terms the process for obtaining approvals that would/might be required from federal, state, and local regulatory agencies as required in specification (2)(b)(10). The narrative essentially repeated (but did embellish) much of the information which was provided in the RFP.

### WEAKNESSES/DEFICIENCIES:

As stated above, CPV is proposing a 300 MW simple cycle power plant which exceeds the fairly low minimum standards required pursuant to the RFP (200 MW simple cycle, clean gas technology, reclaimed water-cooled). However, because of the relative inefficiency of simple cycle power plants (even those using GE LMS 100's) CPV's proposal would not likely provide cost-effective "base load" capacity. CPV's proposed capacity factor is capped at 30% essentially



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limiting the proposed plant to peaking and load-following capacity. As such it would likely not provide a competitive alternative to the repowering of older less efficient “boiler units” such as NRG’s Encina Power Plant (Units 1-5 totaling 960 MW) which must be phased out by 2017 in accordance with State mandates to cease the use of ocean water for power plant cooling (aka “once through cooling or “OTC”).

The City of San Diego is a net importer of electricity. The Public Utilities Department’s “Nobel Dr. site” is the only site in San Diego County which is directly adjacent to a water reclamation plant, a high pressure gas line, and 230 kv transmission lines. The 230 kV lines and the North City Water Reclamation Plant both currently have excess capacity. The TEC is concerned that underutilization of the site would foreclose the City’s last best chance to dramatically reduce importation of electricity from other cities such as Carlsbad. Energy independence is a clearly stated goal of the City’s current Community & Economic Development Strategy and was clearly stated as a quantifiable evaluative criterion in the RFP. This was an area of concern for the TEC. Although a highly efficient combined cycle power plant with a high capacity factor was not specified as a minimum requirement, specifications 2(b)(4) through 2(b)(8) clearly implied that the City would more favorably consider such a facility, everything else being equal.

The overall fiscal public benefits associated with power plants (jobs + tax revenue to state and local governments and schools) have a direct, almost linear relationship to the size of the plant, its efficiency, and its “capacity factor.” More megawatts of capacity requires more labor (construction jobs + operations jobs). More megawatts of capacity requires the purchase and use of more and larger pieces of equipment which in turn generates greater amounts of sales, use, and property tax revenue for all taxing jurisdictions. Importantly for the City of San Diego, a combined cycle power plant is more efficient (mmbtus/kwh) meaning that, as compared to a simple cycle generator (a pure “peaker” plant) it will have a much higher “capacity factor.” The “capacity factor” roughly equates to the amount of time the plant is run or “dispatched” to provide power to the grid. More run time equals more natural gas consumed as fuel.

The City of San Diego charges a 3% “gas franchise fee” to the local utility (SDG&E) for all natural gas sold for consumption within the city limits. Although technically a fee, the gas franchise fee functions more like a sales tax since increased consumption leads to a higher taxable measure. The tax is paid by the power generation company but collected by the local utility and remitted to (in this case) the City of San Diego. Thus a simple cycle power plant run at a 30% capacity factor is likely to generate much less than half as much gas franchise fees as a combined cycle power plant of the same nominal output capacity which could easily run at a capacity factor of 80%. Overall, the benefits of a 300 MW simple cycle power plant exceed the public benefits of the RFP’s minimum specifications (220 MW in simple cycle) but only by 50%.

The specifics of the power plant proposal itself was yet another area of concern for the TEC. CPV’s proposal was extremely light on detail. The site plan was not drawn to scale or prepared by a licensed architect or engineer. No “elevation” drawings or artists renderings of the proposed power plant were included in the proposal document submitted by CPV. A photo of an existing power plant (possibly Groton Generating Station in South Dakota) using what appears to be GE LMS 100 technology was the only other visual representation of CPV’s proposal. Groton Generating Station is located in a largely uninhabited rural area. The North City Power Plant site at Nobel Dr. is located adjacent to San Diego’s wealthiest neighborhood. The TEC asked CPV

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when it would provide “adequate drawings to evaluate the proposed concept” in a letter dated 11/19/10. CPV replied that it would provide the “drawings and simulations” as part of its Application for Certification (AFC) during the California Energy Commission (CEC) licensing process. This issue was discussed again during the oral interview on November 23, 2010 and CPV replied that it would “work with the community” to come up with a design. An artist’s rendering of its proposed Vacastation Power Plant was submitted to the Purchasing Department by CPV a few days later. Vacastation Power Plant, if built by CPV, will be located in a largely uninhabited rural area. The TEC was attempting to understand CPV’s commitment to constructing a Class A power plant and to get some sort of understanding of what the plant would look like. The lack of documentation made that part of the evaluation very difficult.

Specification 2(b)(8) required submission of a layout or “footprint” of the proposed power plant to evaluate land use considerations, particularly the relationship of proposed equipment placement near known biological resources such as vernal pools. Surprisingly, the overlay indicated no attempt was going to be made to avoid impacts to two of the vernal pools known to exist on the site. The process for obtaining permission to disturb or eliminate vernal pools requires mitigation and is known to be difficult and expensive. If the pools contain the endangered fairy shrimp, the process requires a lengthy “consultations” and ultimate approval from the state and federal “Wildlife Agencies” in addition to other requirements.



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RFP No.: 10007363-10-W, RFP – Land Lease, Long Term for North City Power Plant

Evaluator: Technical Evaluation Committee

Proposer: Competitive Power Ventures, Inc.

Date: January 10, 2011

### EVALUATION FACTOR 2: Qualifications and Experience

RATING: Acceptable

*Acceptable (Meets requirements; has acceptable probability of satisfying the requirement; any weaknesses can be readily corrected. Acceptable indicates no exceptional merit that could prove to be beneficial; no significant weaknesses; no deficiencies) because:*

#### STRENGTHS:

Section 2(a) "Power Generation Company Experience and Capabilities," in paragraph 3 on page 14 of 54 states: *"The power generation company selected must demonstrate the experience and the resources needed to obtain development approvals, licensing, and construction of the proposed North City Power Plant. In evaluating the proposals, important factors in considering the most qualified respondents will be: direct extensive prior experience in the development of new gas-fired power plants in California, effective community relations skills, current financial capacity or access to financial resources, and demonstrated ability to construct environmentally superior projects that can be constructed in a timely manner."* [Emphasis added]

According to its website, CPV, Inc. is owned by Warburg Pincus a New York-based private equity firm as well as individual investors and management. Clearly CPV has experienced management and significant "green field" power plant development experience. CPV's greatest strength appears to be its ability to obtain development permits and licenses to construct new simple and combined cycle natural gas power plants in locations which face significant obstacles in terms of water resources, emissions reduction credits, and similar challenges frequently faced by power companies attempting to construct new power plants or "repower" existing sites using advanced technologies. The TEC felt that CPV actually excelled in this area.

#### WEAKNESSES/DEFICIENCIES:

Section 2(a) "Power Generation Company Experience and Capabilities," in paragraph 3 on page 14 of 54 states: *"The power generation company selected must demonstrate the experience and the resources needed to obtain development approvals, licensing, and construction of the proposed North City Power Plant. In evaluating the proposals, important factors in considering the most qualified respondents will be: direct extensive prior experience in the development of new gas-fired power plants in California, effective community relations skills, current financial capacity or access to financial resources, and demonstrated ability to construct environmentally superior projects that can be constructed in a timely manner."* [Emphasis added]

An area of concern for the TEC was CPV's ability to financially guarantee its obligations to the City and to obtain financing for the construction of the project. CPV is not an "investment-grade" rated entity. Although CPV has apparently closed a financing for a 100 MW wind

## ATTACHMENT B - Consensus Technical Evaluation Form – Summary

project, CPV supplied no evidence that it had any history of closing any financings for major thermal power plants which are extremely capital-intensive projects. Although CPV managers themselves have a great deal of financial and power plant development and operations experience, CPV as a corporate entity, has yet to actually break ground on a major thermal power plant. While this was not regarded as a "significant weakness" CPV must nevertheless be viewed as a "start-up" in the realm of power generation companies which have developed, financed, constructed, and are currently operating thermal (typically fossil-fueled) power plants.



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Evaluator: Technical Evaluation Committee  
Proposer: Competitive Power Ventures, Inc.  
Date: January 10, 2011

EVALUATION FACTOR 3: Past Performance as indicated by References

RATING: Acceptable

*Acceptable (Meets requirements; has acceptable probability of satisfying the requirement; any weaknesses can be readily corrected. Acceptable indicates no exceptional merit that could prove to be beneficial; no significant weaknesses; no deficiencies) because:*

STRENGTHS:

None

WEAKNESSES/DEFICIENCIES:

Competitive Power Ventures supplied only the minimum required 3 references representing three (3) different political offices, two mayors and a county supervisor where the company has proposed or gained CEC-approval of three power plants

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RFP No.: 10007363-10-W, RFP – Land Lease, Long Term for North City Power Plant  
Evaluator: Technical Evaluation Committee  
Proposer: Competitive Power Ventures, Inc.  
Date: January 10, 2011

**EVALUATION FACTOR 4:** Optional oral presentation, interview and establishment of rapport with key personnel

**RATING:** Acceptable

*Acceptable (Meets requirements; has acceptable probability of satisfying the requirement; any weaknesses can be readily corrected. Acceptable indicates no exceptional merit that could prove to be beneficial; no significant weaknesses; no deficiencies) because:*

### **STRENGTHS:**

CPV was presented with a list of questions designed to clarify certain aspects of its proposal primarily relating to financial capacity, permitting, and specifics of its power plant proposal. CPV chose to present its written answers to the TEC's questions during the oral interview. CPV brought their public relations consultant, its project engineer, and its Senior Vice President. The CPV team was subjected to a battery of detailed questions from the TEC during the two-hour interview which focused on the specifics of CPV's North City Power Plant Proposal. CPV effectively engaged in detailed discussions regarding each of the following:

- (a) Selection of clean gas technology equipment which would likely to meet the requirements of SDG&E and California's other IOU's.
- (b) The availability of PPA's and the San Diego/Southern California energy market particularly in terms of the ability to sell 300 MW of capacity.
- (c) The design of the plant itself relative to known biological resources on the Noble Dr site and the potential need for off-site mitigation
- (d) The availability of emission reduction credits (ERC's) in the San Diego air basin, which CPV claimed were not going to be needed for a plant which would be limited (by license) to run at a capacity factor of no more than 30%
- (e) The plant's requirements for reclaimed water and sewer capacity.
- (f) The design of a power plant to be located near the City's wealthiest community – still no details provided.
- (g) The potential of CPV's proposed power plant to purchase and use small quantities of landfill gas in the future if the City were to have excess quantities available for sale (no potential)



## ATTACHMENT B - Consensus Technical Evaluation Form – Summary

The TEC was generally satisfied with the discussion and most of the answers given. CPV's written responses to the TEC's questions were incorporated into its proposal.

### WEAKNESSES/DEFICIENCIES:

The TEC was somewhat frustrated with the "trust us" approach CPV took when questioned about the look and architectural features of the design of the power plant proposal. The Redondo Beach Power Plant was discussed as an example of AES Corp's commitment to, and apparently good relationship with, an upscale coastal community. CPV seemed noncommittal with regard to what it was actually willing to do other than "meet with the community" and "understand their desires" etc. Working with the community is standard operating procedure for any development proposal that will require a long series of discretionary actions by appointed and elected decision-makers, starting with a long-term lease agreement.


As stated above, the TEC did not feel any need to micromanage a design at this point in time, but rather to get a feel for how CPV might operate with City staff during future phases of the development if its proposal were to be selected. The TEC did not get a sense that CPV was willing to commit to anything that was not already included in its written proposal and that architectural and design issues or other concerns of the City would be dealt with during the CEC licensing phase later in 2011. The TEC was clearly looking for more specifics from this proposer and received only enough to meet the minimum standards.

ATTACHMENT B - Consensus Technical Evaluation Form - Summary

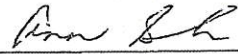
Re: 10007363-10-W, RFP - Land Lease, Long Term for North City Power Plant

Consensus Technical Evaluation Summary Report - Dated 1/10/11

Approved by Technical Evaluation Committee:

By: \_\_\_\_\_  
Signature


Jay Goldstone, Chief Operating Officer

By: \_\_\_\_\_  
Signature

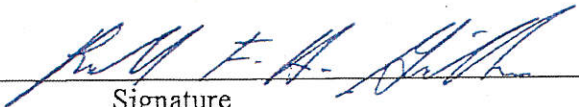
Ann Sasaki, Assistant Director, Public Utilities Dept.

By: \_\_\_\_\_  
Signature

Tom Alspaugh, Senior Mechanical Engineer, Public Utilities Dept.

By: \_\_\_\_\_  
Signature

Tom Blair, Energy Administrator, Environmental Services Dept.

By: \_\_\_\_\_  
Signature

Russell F. H. Gibbon, Business Development Manager  
Mayor's Office of Economic Growth Services  
Chairman, Technical Evaluation Committee





THE CITY OF SAN DIEGO

MEMORANDUM

DATE: January 19, 2011

TO: Hildred Pepper, Director, Purchasing & Contracting  
via William Broderick, CPPB, C.P.M. Procurement Specialist

FROM: Price Evaluation Committee Chairman Russ Gibbon and 4 members

SUBJECT: Recommendation for Award of RFP No. 10007363-10-W  
"Land Lease, Long Term for North City Power Plant"

The technical evaluation committee completed a comprehensive review of the technical proposals and the price proposals submitted in response to the subject solicitation. The technical evaluation was completed first without the pricing (ground lease) proposals. In accordance with the solicitation, technical merit (including overall public benefits) was given a greater weight than price. The technical criteria used by the committee for the technical evaluation of the proposals are the following, listing in descending order of importance.

1. Executive Summary and Specifications; and
2. Qualifications and Experience; and
3. Past Performance as indicated by References; and
4. Completed Oral Presentation, Interview and Establishment of Rapport with Key Personnel

The technical evaluation and recommendation is delineated in the narrative summary report dated January 10, 2011, which was previously submitted and approved. The following summarizes price proposal evaluation and composite rank for technical and price proposals.

Name of Vendor	Technical Rank	Price (Ground Lease) Rank	Composite Rank
Capital Power Corp.	(1) Exceptional	(2) \$39,500,000	(1)
Competitive Power Ventures	(2) Acceptable	(1) \$42,489,662	(2)
	(#)	(#) \$	(#)
	(#)	(#) \$	(#)

Summary Rationale and Determination for Capital Power Corp: Second Price Ranking:

Competitive Power Ventures' overall technical rating was "Acceptable." An "Acceptable" rating means that Competitive Power Ventures has an "acceptable probability of satisfying the requirements of the RFP and that any weaknesses can be readily corrected, but indicates no exceptional merit that could prove to be beneficial to the City." However, despite this proposer's marginally higher first price ranking based on the total amount of its ground lease payments to the Public Utilities Enterprise Fund, its composite ranking was diminished due to its comparative failure to provide the overall best value to the City. Overall best value to the City was offered by a competing proposal from Capital Power Corp. which proposed a substantially larger combined cycle power plant of 350-850 megawatts with an 80 % capacity factor. A facility of this magnitude would likely provide comparatively 2 to 4 times as much estimated net General Fund tax revenue (estimated at \$206 Million) as well as superior local economic benefits due to higher payroll expenditures and local sourcing of parts and materials during and after construction. Capital Power Corp's BBB "investment grade" bond rating indicates a superior ability to guarantee its potential lease obligations to the City as well as its financial capacity to finance and construct the project in a timely manner.

Therefore, although Competitive Power Ventures' overall price rating (based on ground lease revenue offered) was #1, the evaluation committee determined that Competitive Power Ventures' proposal does not represent best overall value to the City.

Conclusion

Upon conclusion of its review and evaluation, the committee concludes that Capital Power Corp was determined to be responsible, providing overall best value to the City, considering all of the evaluation factors in the RFP. The TEC recommends that the award be made to Capital Power Corp.



Approved by Price Evaluation Committee:

By: \_\_\_\_\_  
Signature


Jay Goldstone, Chief Operating Officer

By: \_\_\_\_\_  
Signature


Ann Sasaki, Assistant Director, Public Utilities Dept.

By: \_\_\_\_\_  
Signature

Tom Alspaugh, Senior Mechanical Engineer

By: \_\_\_\_\_  
Signature

Tom Blair, Energy Administrator, Environmental Services Dept.

By: \_\_\_\_\_  
Signature

Russell F. H. Gibbon  
Mayor's Office of Economic Growth Services  
Chairman, Price Evaluation Committee







THE CITY OF SAN DIEGO

January 12, 2011

Mr. Bryan DeNeve, Vice President, Business Development  
Capital Power Operations (USA) Inc.  
8835 Balboa Ave. #B  
San Diego, CA 92123

Dear Mr. DeNeve:

Subject: RFP 10007363-10-W Long Term Ground Lease with City for Gas Fred Power Plant

Thank you for your response to the subject Request for Proposal, RFP 10007363-10-W Long Term Ground Lease with City for Gas Fred Power Plant. The City of San Diego has completed its review of the Proposals received from Capital Power and is recommending award to your Company, Capital Power which was determined to be the responsible, best value and in the best interest of the City. Final award is subject to approval by City Council.

Please note that other Bidder's have the opportunity to protest this award recommendation in writing to the Purchasing Agent no later than 5:00 p.m. on January 27, 2011.

Please do not hesitate to contact William Broderick at (619) 236-6653 or via email to [WBroderick@sandiego.gov](mailto:WBroderick@sandiego.gov) with any questions you may have.

Sincerely,

A handwritten signature in cursive script, appearing to read "William Broderick".

William Broderick, CPPB, C.P.M.  
Procurement Specialist

cc: Hildred Pepper, File, TEC Chair,



Purchasing & Contracting Department  
Business Office & Support Services

1200 Third Avenue, Suite 200 • San Diego, CA 92101

Tel (619) 236-6000 Fax (619) 236-5904





**Attachment 3: Option and Lease Agreements with Implementing Ordinances**





ORDINANCE NUMBER O-\_\_\_\_\_ (NEW SERIES)

DATE OF FINAL PASSAGE \_\_\_\_\_

AN ORDINANCE OF THE SAN DIEGO CITY COUNCIL  
AUTHORIZING THE OPTION AGREEMENT TO CAPITAL  
POWER (US HOLDINGS) INC. OF PORTIONS OF PUEBLO  
LOTS 1304, 1305, AND 1306 OF THE PUEBLO LANDS OF  
THE CITY OF SAN DIEGO.

WHEREAS, the Council of the City of San Diego desires to provide to Capital Power (US Holdings) Inc. (Capital Power) and option to lease portions of Pueblo Lots 1304, 1305, and 1306 of the Pueblo Lands of the City of San Diego; and

WHEREAS, the proposed option to Capital Power shall be for the exclusive right and option to lease to Capital Power for the entitlement, erection, development, construction, use, operation, repair, maintenance and restoration of a power plant with a generating facility capacity of approximately 850 Megawatts, but not less than 350 Megawatts, for an initial term of five years with five options to extend the initial term for an additional one year per option, for a total of five years beyond the expiration of the initial term; and

WHEREAS, San Diego Charter section 219 prohibits a lease of Pueblo Lands owned by the City of San Diego for a period of time exceeding one year, but not exceeding fifteen years, unless first authorized by the City Council by ordinance; NOW THEREFORE,

BE IT ORDAINED, by the Council of the City of San Diego, as follows:

Section 1. That the Mayor is authorized to execute an Option Agreement between the City and Capital Power (US Holdings) Inc. regarding portions of Pueblo Lots 1304, 1305, and 1306 of the Pueblo Lands of the City of San Diego, which portions cumulatively constitute approximately fifty acres which lie between Interstate 805 to the west, the existing western boundary of Marine Corps Air Station

Miramar to the east, and Miramar Road to the north, and which portions of the Pueblo Lands are more specifically described in Document No. OO-\_\_\_\_\_ on file in the office of the City Clerk.

Section 2. That a full reading of this ordinance is dispensed with prior to its passage, a written or printed copy having been available to the City Council and the public prior to the day of its passage.

Section 3. That this ordinance shall take effect and be in force on the thirtieth day from and after its final passage.

APPROVED: JAN I. GOLDSMITH, City Attorney

By \_\_\_\_\_  
Hilda R. Mendoza  
Deputy City Attorney

HRM:as  
06/19/12  
Or.Dept:Mayor

I hereby certify that the foregoing Ordinance was passed by the Council of the City of San Diego, at its meeting of \_\_\_\_\_.

ELIZABETH S. MALAND  
City Clerk

By \_\_\_\_\_  
Deputy City Clerk

Approved: \_\_\_\_\_  
(date)

\_\_\_\_\_  
JERRY SANDERS, Mayor

Vetoed: \_\_\_\_\_  
(date)

\_\_\_\_\_  
JERRY SANDERS, Mayor



---

**OPTION AGREEMENT**

**DATED AS OF \_\_\_\_\_, 20\_\_**

**BY AND BETWEEN**

**THE CITY OF SAN DIEGO,  
A CALIFORNIA MUNICIPAL CORPORATION, AS OWNER**

**AND**

**CAPITAL POWER (US HOLDINGS) INC.,  
A DELAWARE CORPORATION, AS OPTIONEE**

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## **OPTION AGREEMENT**

This OPTION AGREEMENT (this “**Agreement**”) dated as of \_\_\_\_\_, 20\_\_ (the “**Effective Date**”), by and between THE CITY OF SAN DIEGO, a California municipal corporation (“**Owner**”), and CAPITAL POWER (US HOLDINGS) INC., a Delaware corporation (“**Optionee**”) (Owner and Optionee are sometimes referred to herein individually as a “**Party**” and collectively, as the “**Parties**”), provides as follows:

### **AGREEMENT**

NOW THEREFORE, for and in consideration of the premises, the agreements herein, and in reliance upon the representations and warranties herein, Owner and Optionee do hereby adopt and incorporate all exhibits, attachments, and/or schedules attached hereto, and do further agree as follows:

### **ARTICLE 1 DEFINITIONS; INTERPRETATION**

Section 1.1. Definitions. Capitalized terms used in this Agreement and not defined in the attached Annex A shall have the meanings specified in the main body of this Agreement.

Section 1.2. Interpretation. In this Agreement, unless a clear contrary intention appears: (a) the singular includes the plural and vice versa; (b) a reference to any Person includes such Person’s successors and permitted assigns but, in the case of a Party, only if such successors and assigns are permitted by this Agreement; (c) reference to any gender includes each other gender; (d) reference to any agreement (including this Agreement), document, instrument or tariff means such agreement, document, instrument or tariff as amended or modified and in effect from time to time in accordance with the terms thereof and, if applicable, the terms hereof; (e) reference to any Governmental Rule means such Governmental Rule as amended, modified, codified or reenacted, in whole or in part, and in effect from time to time, including, if applicable, rules and regulations promulgated thereunder; (f) reference to any Section means such Section of this Agreement, and references in any Section or definition to any clause means such clause of such Section or definition; (g) “hereunder”, “hereof”, “hereto” and words of similar import shall be deemed references to this Agreement as a whole and not to any particular Section or other provision hereof or thereof; (h) “including” (and with correlative meaning “include”) means including without limiting the generality of any description preceding such term; and (i) relative to the determination of any period of time, “from” or “after” means “from and including,” “to” means “to but excluding” and “through” means “through and including.”

Section 1.3. Titles and Headings. Article, Section, Annex, Exhibit and Schedule titles and headings in this Agreement are inserted for convenience of reference only and are not intended to be a part of, or to affect the meaning or interpretation of, this Agreement.

## ARTICLE 2 GRANT OF OPTION

Section 2.1. Option. Owner hereby grants to Optionee the exclusive right and option (the “**Option**”) to lease from Owner pursuant to the “Lease Agreement” (as herein defined) that certain real property situated in the City of San Diego, San Diego County, California as more particularly described on Exhibit “2.1(a)” attached hereto (the “**Property**”), upon and subject to the provisions and conditions set forth herein. Appurtenant to the leasehold interest created pursuant to the Lease Agreement and included within the scope of the Option shall be those certain existing easements of record encumbering the Property described on Exhibit 2.1(b) attached hereto and those certain easement rights to be granted to Optionee (or an Affiliate of Optionee) by Owner (or an Affiliate of Owner) described on Exhibit 2.1(c) attached hereto (collectively, the “**Easements**”).

Section 2.2. Permitted Encumbrances. The Property is encumbered by those certain matters of record described on Exhibit “2.2” attached hereto (collectively, the “**Permitted Encumbrances**”). Optionee hereby approves the Permitted Encumbrances. Except for the Easements, Owner shall not record or otherwise place any additional documents of record against the Property without the express prior written consent of Optionee, when consent shall be in Optionee’s sole and absolute discretion.

Section 2.3 Governmental Approvals. Notwithstanding anything to the contrary in this Agreement, by entering into this Agreement, neither Owner nor the San Diego City Council is (or shall be deemed to be) obligating itself to any governmental agent, board, commission or agency with regard to any other discretionary action relating to Optionee’s occupancy, use, development, maintenance or restoration of the Property. “Discretionary action” includes without limitation re-zonings, variances, environmental clearances, and all other required governmental approvals, entitlements and permits.

## ARTICLE 3 OPTION CONSIDERATION

Section 3.1. Initial Consideration. As initial consideration for the execution by Owner of this Agreement and Owner’s performance hereunder, Optionee shall pay to Owner upon the Effective Date the cash amount of One Hundred Dollars (\$100) (the “**Initial Consideration**”).

Section 3.2. Option Consideration. Effective as of the Resolution Date, Optionee shall pay to Owner cash in the amount of Four Hundred Thousand Dollars (\$400,000) per year during the duration of the Option Term (collectively, the “**Option Consideration**,” subject to adjustment as set forth below). Optionee shall pay the Option Consideration in equal quarterly installments, commencing on the first day of the month following the Resolution Date and on the first day of each fourth (4<sup>th</sup>) month thereafter. Notwithstanding anything to the contrary contained herein, if Optionee exercises its right to extend the Option Term pursuant to the provisions and conditions of Section 4.1 hereof, then the amount of the Option Consideration payable shall increase by Forty Thousand Dollars (\$40,000) each year that the Option Term is extended beyond the initial five (5) year period.



Section 3.3. Application of Option Consideration. The Option Consideration shall NOT be credited to any rent payable by Optionee under the Lease Agreement. Except as provided in Article 11 hereof regarding Optionee's termination of this Agreement due to a taking, the Option Consideration shall be nonrefundable and deemed fully earned when paid.

Section 3.4. Recognition, Non-Disturbance, Subordination and Attornment Agreement. To the extent that the Property is encumbered by any secured debt, then upon the Effective Date, Owner, Optionee and each holder of such debt shall execute a Recognition, Non-Disturbance, Subordination and Attornment Agreement in the form of Exhibit "3.4" attached hereto.

Section 3.5. Payments. All payments to be paid by Optionee under this Agreement shall be made by electronic funds transfer or made payable to "City Treasurer" and mailed with appropriate reference to:

San Diego City Treasurer  
P.O. Box 122289  
San Diego, California 92112-4165

or hand delivered to:

The Office of the City Treasurer  
Civic Center Plaza  
1200 Third Avenue, First Floor  
San Diego, California 92101

Section 3.6. Delinquent Payments. If Optionee fails to make any payment under this Agreement when due, such unpaid amounts may be referred to the San Diego City Treasurer for collection, and shall be subject to San Diego Municipal Code section 22.1707, as may be amended from time to time. Optionee shall pay to Owner any collection-referral fee and all other fees and charges plus interest as may then be charged by the San Diego City Treasurer under authority of the San Diego Municipal Code. Acceptance of late charges and any portion of the late payment by Owner shall neither constitute a waiver of Optionee's breach or default with respect to the late payment nor prevent Owner from exercising any other rights and remedies available at law or in equity. As required by law, Optionee is hereby notified that a negative credit report may be submitted to a credit reporting agency if amounts due Owner are not paid when due.

#### **ARTICLE 4 OPTION TERM**

Section 4.1. Term. The time period during which the Option may be exercised shall commence upon the Resolution Date and shall expire at midnight Pacific Time five (5) years after the Effective Date (the "**Option Term**"). If the Option is not exercised in accordance with the provisions and conditions hereof during the Option Term, then the Option shall expire.

4.1.1 Extension of Option Term after Final Staff Assessment. Notwithstanding the foregoing Section 4.1, if Optionee has obtained a Final Staff Assessment from the California Energy Commission for the Plant, but Optionee is either unable or unwilling to exercise the Option for reasons beyond Optionee's control, including without limitation delays in obtaining the Approvals, including possible appeals, delays in meeting applicable regulatory requirements, delays in securing a power purchase agreement for the output of the Plant, litigation, general economic conditions, changes in applicable law and the occurrence of a Force Majeure Event, Optionee shall have the right, upon written notice to Owner at any time prior to the expiration of the Option Term, to extend the Option Term annually for up to an additional five (5) years. The application of this Section 4.1.1 shall not in any event extend the Option Term beyond ten (10) years without San Diego City Council approval.

4.1.2 Extension of Option Term prior to Final Staff Assessment. Notwithstanding the foregoing Section 4.1, if Optionee has not obtained a Final Staff Assessment from the California Energy Commission for the Plant, and Optionee's failure to obtain the Final Staff Assessment for the Plant is, as determined by Owner in its reasonable discretion, due to litigation, changes in applicable law, or the occurrence of a Force Majeure Event, then Optionee shall have the right, upon written notice to Owner at any time prior to the expiration of the Option Term, to extend the Option Term annually for up to an additional five (5) years. The application of this Section 4.1.2 shall not in any event extend the Option Term beyond ten (10) years without San Diego City Council approval.

4.1.3 Additional Right to Extend Option Term. Notwithstanding the foregoing Section 4.1, Optionee shall have the right, upon written request to Owner at any time prior to the expiration of the Option Term, to extend the Option Term annually for up to an additional five (5) years for any reason not set forth in Sections 4.1.2 or 4.1.2 with Owner's prior written consent, which consent may be withheld in Owner's sole and absolute discretion. The application of this Section 4.1.3 shall not in any event extend the Option Term beyond ten (10) years without San Diego City Council approval.

Section 4.2 Exercise of Option. Subject to Owner's legal authority to lease the Property under the terms of the Lease Agreement, specifically in compliance with the applicable requirements of San Diego City Charter Section 219 and in compliance with the easement recorded as Document No. 1994-0437549 in the Official Records of the County of San Diego Office of the Recorder (the "**Navy Easement**"), Optionee shall have the right, but not the obligation, to exercise the Option at any time during the Option Term by providing Owner with written notice (the "**Exercise Notice**") of its election to so exercise the Option. Notwithstanding anything to the contrary contained herein, upon the exercise of the Option, Optionee shall have no further obligation to pay the Option Consideration on and after the delivery of the Exercise Notice in accordance with the provisions and conditions of this Section 4.2.

Section 4.3 Lease Agreement. If Optionee elects to exercise the Option, then Optionee and Owner shall promptly (but in no event more than thirty (30) days after delivery of the Exercise Notice) execute and deliver the Lease Agreement attached hereto as Exhibit "4.3" (the "**Lease Agreement**"). The Lease Agreement sets forth the provisions and conditions pursuant to which Owner shall lease the Property to Optionee.

## ARTICLE 5 COVENANTS

Section 5.1. Right of Access. During the Option Term, Optionee shall have the right to enter upon the Property (utilizing Optionee's consultants, engineers, contractors, agents, employees and/or designees, as applicable) and to undertake inspection, testing, due diligence, planning and preconstruction activities, including without limitation any engineering, environmental, soils and/or other studies and testing of the Property. In no event shall Optionee perform any construction on the Property, as determined in the sole discretion of the Owner.

5.1.1 No Reliance. Subject to the provisions and conditions of Section 8.2 of this Agreement regarding environmental conditions on the Property, Optionee represents and warrants that it is not relying on any representation by Owner as to the condition of the Property or its suitability for any use whatsoever, and that Optionee shall rely solely on its own and independent inspections, tests, investigations and observations of the Property in entering into this Agreement and exercising the Option. Except as herein provided, Optionee accepts the Property in its current condition as of the Effective Date, and acknowledges and agrees that Owner has fulfilled all obligations it may have had to improve, modify, repair, replace, alter or otherwise develop the Property prior to the Effective Date.

5.1.2 Insurance. Prior to any activity on the Property, Optionee shall deliver to Owner's Real Estate Assets Department a current certificate of insurance and relevant endorsements for:

- (a) Commercial General Liability Insurance, providing coverage on the Property for bodily injury, including death, personal injury, and property damage with limits of at least One Million Dollars (\$1,000,000) per occurrence, subject to an annual aggregate of at least Two Million Dollars (\$2,000,000);
- (b) Automobile Liability Insurance, providing coverage on the Property for all bodily injury and property damage, with a limit of at least One Million Dollars (\$1,000,000) per occurrence. Such insurance shall cover liability arising out of any vehicle (including owned, hired, and non-owned vehicles) operated in performing any and all work pursuant to this Agreement. Coverage shall be written on *ISO form CA 00 01 12 90*, or a substitute form providing equivalent liability coverage; and
- (c) Workers' Compensation Insurance, as required by the laws of the State of California for all of Optionee's employees who are subject to this Agreement, with Employers' Liability coverage with a limit of at least One Million Dollars (\$1,000,000).

5.1.2.1 Additional Insureds. Pursuant to a separate endorsement [CG2010 (11/85) or equivalent form], "The City of San Diego, its elected officials, officers, employees, representatives, and agents" shall be named as additional insureds in all policies.

5.1.2.2 Primary & Non-Contributory. Insurance policies shall be endorsed such that the coverage is primary and non-contributory to any coverage carried or maintained by Owner.



5.1.2.3 Qualified Insurer(s). All insurance required by the terms of this Agreement must be provided by insurers licensed to do business in the State of California which are rated at least "A-, VI" by the current AM Best Ratings Guide and which are acceptable to Owner. Non-admitted surplus lines insurers may be accepted provided they are included on the most recent list of California eligible surplus lines insurers (LESLI list) and otherwise meet Owner requirements.

5.1.2.4 Deductibles/Retentions. All deductibles and self-insured retentions on any insurance policy are the sole responsibility of Optionee and must be disclosed and acceptable to Owner at the time evidence of insurance is provided.

5.1.2.5 Continuity of Coverage. All policies shall be in effect on or before the first day of the Option Term, except "course of construction fire insurance" shall be in force on commencement of all authorized construction, and full applicable fire insurance coverage shall be effective upon completion of each insurable improvement. The policies shall be kept in force for the duration of the Option Term. At least thirty (30) days prior to the expiration of each insurance policy, Optionee shall furnish a certificate(s) and relevant endorsements showing that a new or extended policy has been obtained which meets the requirements of this Agreement. Optionee shall make available to Owner and Owner shall have an opportunity to review proof of continuing insurance at least annually during the Option Term. If insurance lapses or is discontinued for any reason, Optionee shall immediately notify Owner and obtain replacement insurance as soon as possible.

5.1.2.6 Modification. To assure protection from and against the kind and extent of risk existing with the Property or Optionee's occupancy or use of the Property, Owner, at its discretion, may require the revision of amounts and coverage at any time during the Option Term by giving Optionee thirty (30) days prior written notice. Optionee shall also obtain any additional insurance required by Owner for new improvements, changed circumstances, or Owner's reasonable re-evaluation of risk levels related to the Agreement Use or the Property.

5.1.2.7 Accident Reports. Except to the extent in violation of applicable law, Optionee shall promptly report to Owner any accident causing property damage or injury to persons and related to the Property or Optionee's occupancy or use of the Property and such report shall contain the names and addresses of the involved parties, a statement of the circumstances, the date and hour of the accident, the names and addresses of any witnesses, and other pertinent information.

5.1.2.8 Causes of Loss - Special Form Property Insurance. Optionee shall obtain and maintain, at its sole cost, Causes of Loss - Special Form Property Insurance on all of Optionee's insurable property related to the Property or Optionee's occupancy or use of the Property in an amount to cover one hundred percent (100%) of the replacement cost. Optionee shall make available to Owner's Real Estate Assets Department and Owner's Real Estate Assets Department shall have an opportunity to review a certificate of such insurance.

Section 5.2. Owner Documents. During the Option Term, Owner shall provide Optionee with complete copies of any documents and information concerning the Property in Owner's possession and control within thirty (30) days of Optionee's written request.

Section 5.3. Pueblo Lands. Owner and Optionee acknowledge and agree that: (i) the Property consists of original Pueblo Lands; (ii) certain restrictions exist with respect to the leasing and conveyance of the Property pursuant to San Diego City Charter Section 219; and (iii) a ballot measure (the "**Ballot Measure**") will be required to lease the Property for a period of more than fifteen (15) years. Optionee agrees to pay for all actual and direct cost of the services performed by the Registrar of Voters of the County of San Diego for the City in connection with the Ballot Measure. Owner shall process and consider the Ballot Measure in a timely manner, with a goal of placing the Ballot Measure on the November 2012 ballot.

Section 5.4. Cooperation Regarding Approvals. Owner shall not unreasonably interfere with Optionee's efforts to obtain the Approvals, including without limitation Owner's activities with respect to the Ballot Measure described in Section 5.3 above. Owner shall process in a timely manner any applications or other documents required in connection with the Approvals over which it has jurisdiction. Owner shall provide reasonable assistance to Optionee in obtaining the Approvals. When deemed appropriate by Owner, in its sole discretion, Owner shall provide reasonable indications of support for the Approvals as they are reviewed, considered or evaluated by other governmental or quasi-governmental agencies, including without limitation the California Energy Commission, the California Independent Systems Operator ("**CAISO**"), the San Diego County Air Pollution Control District, and if applicable depending on project requirements, other local, state and federal agencies, such as the San Diego County Airport Authority, the California Department of Fish and Game, the United States Fish & Wildlife Service, the United States Army Corps of Engineers and the United States Marine Corps.

Section 5.5. Transfer. During the Option Term, Owner shall not sell, transfer or encumber the Property to any Person or enter into any negotiations or agreements with any Person to do so.

Section 5.6. Restriction on Grants. Prior to Optionee obtaining all of the Approvals and except as necessary to create the Easements, Owner shall not grant any easements, licenses or leases with respect to the Property, or agree to the dedication of any portion of the Property or otherwise record any restrictive covenants against the Property, without Optionee's written consent, which may be withheld, conditioned or delayed in Optionee's sole and absolute discretion, unless the San Diego City Council by resolution determines that the granting of such rights in and to the Property is reasonably necessary for the public good and will not unreasonably substantially interfere with Optionee's rights in and to the Property or interfere with Optionee's ability to obtain the Approvals. On the date Optionee obtains all of the Approvals and thereafter, except as necessary to create the Easements, Owner shall not grant any easements, licenses or leases with respect to the Property, or agree to the dedication of any portion of the Property or otherwise record any restrictive covenants against the Property, without Optionee's written consent, which may be withheld, conditioned or delayed in Optionee's reasonable discretion, unless the San Diego City Council by resolution determines that the granting of such rights in and to the Property is reasonably necessary for the public good

and will not unreasonably substantially interfere with Optionee's rights in and to the Property or interfere with any of the Approvals.

**Section 5.7 Changes to Plant Capacity and Design.** Notwithstanding the description of the Plant in Section 7.1.1 below, Optionee may, in its sole discretion, after having first received a determination of Data Adequacy from the California Energy Commission with respect to its Application for Certification for licensing of the Plant, reduce the generating facility capacity of the Plant, for any reason, to an amount not less than 350 MW and consisting of one or two General Electric 7FA Rapid Response gas turbine(s) or equivalent technology in combined cycle configuration. Notwithstanding the description of the Plant in Section 7.1.1 below, in the event that Optionee has first obtained a Final Staff Assessment from the California Energy Commission in connection with Optionee's pursuit of a license for the Plant in accordance with the provisions and conditions of Section 5.8 of this Agreement, but Optionee is unable to obtain a contract on reasonable terms for the sale of power generated by, or capacity of a combined cycle power plant as described above, Optionee may, with the prior approval of the Mayor and the City Council by ordinance passed with the same number of votes as shall be required to amend the San Diego Municipal Code (and not by resolution), redesign the plant to a simple cycle configuration of not less than 400 MW, having thermal efficiency of at least forty-three percent (43%) (LHV), new and clean at ISO conditions.

**Section 5.8 Schedule of Development Activities.** Optionee shall use commercially reasonable efforts to secure all of the Approvals in a timely manner and to initiate the following specific development-related activities on or before the dates indicated below:

- (a) File application no later than January 31, 2014, with CAISO for an interconnection agreement;
- (b) File application no later than March 31, 2013, with the California Energy Commission for certification of the Plant;
- (c) File applications no later than January 1, 2014, with Owner for a boundary line adjustment, site development permit, community plan amendment, and to re-zone the Property;
- (d) File application no later than June 30, 2013, with the San Diego County Air Pollution Control District for a permit to construct the Plant;
- (e) Respond in a timely manner to any and all Requests for Offers from San Diego Gas & Electric Company, Southern California Edison, and/or Pacific Gas & Electric for new local generation products or ancillary services which could be provided by the Plant;
- (f) On an unsolicited basis, submit offers no later than June 30, 2013, to San Diego Gas & Electric Company, Southern California Edison, and/or Pacific Gas & Electric Company to sell the output from the Plant; and
- (g) No later than January 31, 2014, initiate the process for procuring NOx emission reduction credits from third-party entities.



Owner and Optionee shall use commercially reasonable efforts to secure any and all applicable approvals, agreements or determinations in compliance with the covenants running with the land pursuant to the Navy Easement.

Optionee shall, in any and each instance, deliver a written notice to Owner within thirty (30) days after a formal suspension of an approval process for a period of thirty (30) days or more. Optionee shall make available to Owner and Owner shall have an opportunity to review such formal suspension or a reasonably detailed explanation of the suspension upon written request to do so. Notwithstanding anything to the contrary contained herein, Owner and Optionee acknowledge and agree that the dates set forth in this Section 5.8 shall be subject to the provisions and conditions of Section 15.15 hereof regarding the occurrence of a Force Majeure Event.

## **ARTICLE 6 TERMINATION**

Section 6.1. Optionee's Right to Terminate. Optionee may terminate this Agreement by written notice delivered to Owner at any time prior to the expiration of the Option Term or delivery to Owner of the Exercise Notice. Upon the expiration of the Option Term or the earlier termination of this Agreement, (i) Optionee shall be responsible for the pro-rated amount of the Option Consideration for that year up to the date of termination and thereafter shall have no further obligation to pay the Option Consideration pursuant to the provisions and conditions of Section 3.2 of this Agreement; and/or (ii) Owner shall reimburse Optionee for any excess Option Consideration paid in advance for that year and thereafter shall have no further right to collect the Option Consideration pursuant to the provisions and conditions of Section 3.2 of this Agreement.

Section 6.2. Owner's Right to Terminate. Except as further provided in Section 9.2.1, Owner may terminate this Agreement by written notice delivered to Optionee: (i) if the Ballot Measure is not approved by the electorate at the November 2012 election; or (ii) if Optionee elects to extend the Option Term or the Parties otherwise agree to extend the Option Term in accordance with Sections 4.1.1 through 4.1.3, but the Parties fail to secure all applicable approvals, agreements or determinations as required in Section 7.1.2.

## **ARTICLE 7 CONDITIONS PRECEDENT**

Section 7.1. Conditions Precedent. The right and ability to exercise the Option shall be expressly conditioned upon the satisfaction or waiver (in writing by both Owner and Optionee) on or before the expiration of the Option Term of the following conditions precedent:

7.1.1 Subject to Optionee's right to modify the generating facility capacity and/or the design of the Plant pursuant to the provisions and conditions of Section 5.7 hereof, Optionee shall have obtained, at its sole cost and expense, all of the approvals, entitlements and permits necessary for the development and construction of a combined cycle natural gas fired power plant using General Electric 7FA Rapid Response or equivalent technology with a generating facility capacity of approximately 850 MW (the "**Plant**") on the Property

(collectively, the “**Approvals**”). The Plant shall be designed as an enclosed facility comparable in quality, finish and design to the adjacent North City Water Reclamation Plant and shall be known as “North City Energy Center,” “North City Power Plant,” or such other name that is mutually agreeable to Owner and Optionee. Optionee shall consult with the United States Marine Corps and/or the United States Navy to ensure that the Plant complies with any and all applicable laws and the Permitted Encumbrances, including, without limitation, the Navy Easement. For purposes of this Agreement, Optionee shall be deemed to have obtained the Approvals when: (a) each and every Governmental Authority and agency which is empowered to issue the Approvals, including Owner, has issued or provided the final, irrevocable action necessary for such Approvals; (b) any period(s) within which appeals and/or protests from the governmental authorities’ and agencies’ actions may be filed have expired and no such appeals and/or protests may be lawfully filed or taken or if such appeals and/or protests have been filed or taken, then after the date that the same are resolved to the satisfaction of Optionee, as determined by Optionee in its sole and absolute discretion; and (c) the successful approval by the electorate of the Ballot Measure.

7.1.2 The Parties have secured all applicable approvals, agreements or determinations (if any) in compliance with the covenants running with the land pursuant to the Navy Easement.

7.1.3 Optionee shall have obtained sufficient financing or have sufficient financial capacity to develop and construct the Plant on the Property and shall make available to Owner and Owner shall have the opportunity to review Optionee’s reasonable evidence of such financing or financial capacity within ten (10) days of written request therefore, or such period as the parties may reasonably require; provided, however, Owner shall maintain the confidentiality of any documentation or information made available by Optionee pursuant to the provisions and conditions of this Section 7.1.2 to the fullest extent of the law.

7.1.4 Optionee shall have entered into a mutually acceptable long-term contract with Owner for Owner (or an affiliate of Owner) to deliver a continuing supply of water to the Plant and to accept the discharge of wastewater from the Plant (the “**Water Agreement**”).

7.1.5 If required in order to obtain the Approvals, Optionee shall have acquired environmental mitigation property and upon terms and conditions reasonably acceptable to Optionee. Owner shall use commercially reasonable efforts to identify and offer to sell environmental mitigation property to Optionee upon reasonable and otherwise mutually agreeable terms, which sale shall be subject to the San Diego City Council’s prior approval and authorization, which may or may not be granted. Owner shall not be obligated for any loss, financial or otherwise, which may be incurred by Optionee as a result of the City Council’s withholding of such approval. Optionee expressly waives any claim for expense or loss which Optionee might incur if such City Council approval is not granted.

7.1.6 Optionee shall have received a commitment to issue an ALTA Form B Owner’s Policy of Title Insurance (the “**Title Commitment**”) from Chicago Title Company, to be dated as of the “Commencement Date” of the Lease Agreement, insuring Tenant’s leasehold interest in the Property pursuant to the Lease Agreement and the appurtenant Easements, with extended coverage, in an amount acceptable to the Parties. The Title Commitment shall contain

such exceptions to title and such additional endorsements as may be approved/required by Optionee, in its sole discretion.

7.1.7 Owner shall cooperate with Optionee in its efforts to satisfy the conditions precedent set forth in this Section 7.1. Owner shall not intentionally, by act or omission, hinder Optionee's efforts to satisfy such conditions precedent.

## **ARTICLE 8**

### **ENVIRONMENTAL COVENANTS AND ENVIRONMENTAL INDEMNIFICATION**

Section 8.1. Environmental Covenants of Owner. Owner shall not intentionally, by act or omission, cause any Environmental Conditions or Environmental Noncompliance in, on, under or from the Property, and shall not allow and, unless caused by Optionee's act or omission, shall promptly remedy the existence of any known Environmental Conditions or known Environmental Noncompliance in, on, under or from the Property which could reasonably be expected to lead to any Environmental Claim or Environmental Expense asserted against or incurred by Optionee or its Affiliates. Without reasonable cause to do so, Owner shall have no obligation to inspect the Property for the purposes of this Section 8.1.

Section 8.2. Existing Environmental Conditions. Notwithstanding anything to the contrary contained herein, this Section 8.2 shall set forth the rights and obligations of Owner and Optionee with respect to (i) any and all Environmental Conditions existing in, on, under or from the Property as of the Effective Date, regardless of whether or not such Environmental Conditions constitute an Environmental Noncompliance; and (ii) any and all Environmental Conditions existing outside the boundaries of the Property that arose as a result of the release of any Hazardous Materials in, on, under or from the Property prior to the Effective Date, regardless of whether or not such Environmental Conditions constitute an Environmental Noncompliance (collectively, "**Existing Environmental Conditions**").

8.2.1 Optionee shall have the right (but not the obligation) to identify and cause the cleanup, remediation and/or removal of any Existing Environmental Conditions to the satisfaction of each governmental agency having authority, including without limitation DEH, and in accordance with all applicable laws, rules and regulations of governmental authorities. Prior to the commencement of any cleanup, remediation and/or removal of any Existing Environmental Conditions, Optionee shall make available to Owner and Owner shall have an opportunity to review and approve in writing (i) a description of the Existing Environmental Conditions; (ii) a description of the cleanup, remediation and/or removal to be performed; (iii) the name of the contractor(s) who will perform the cleanup, remediation and/or removal of the Existing Environmental Conditions; (iv) the anticipated cost to perform the cleanup, remediation and/or removal of the Existing Environmental Conditions; and (iv) the anticipated schedule to complete the cleanup, remediation and/or removal of the Existing Environmental Conditions. Any contractor who performs the cleanup, remediation and/or removal of the Existing Environmental Conditions shall be qualified and licensed to perform such work. Notwithstanding anything to the contrary contained herein, Owner's approval pursuant to this Section 8.2.1 shall not be unreasonably withheld, conditioned, or delayed and shall be delivered to Optionee within forty-five (45) days after Optionee has made such information and documentation available to Owner pursuant to this Section 8.2.1, or such earlier date as Optionee is required to commence



such cleanup, remediation and/or removal pursuant to any applicable laws, rules and regulations of Governmental Authorities.

8.2.2 Subject to the provisions and conditions of Section 8.2.3 below, Owner shall be liable for fifty percent (50%) of any and all Environmental Claims or Environmental Expenses resulting from the identification, cleanup, remediation and/or removal of any Existing Environmental Conditions pursuant to the provisions and conditions of Section 8.2.1; provided, however, Owner's aggregate liability under this Section 8.2.2 shall be pursuant to Section 8.2.3 and shall not exceed Five Million Dollars (\$5,000,000).

8.2.3 Optionee (or any successor lessee) shall receive a credit first against the Option Consideration due and payable under this Option Agreement, then against the annual base rent next due and payable under the Lease Agreement ("**Base Rent**") if Optionee elects to exercise the Option, for any and all amounts for which Owner is liable under Section 8.2.2 above. Notwithstanding anything to the contrary herein, in no event shall Owner's liability under Section 8.2.2 result in a cash payment by Owner to Optionee, and any and all liability by Owner to Optionee under Section 8.2.2 shall be in the form of a credit to Optionee pursuant to the provisions and conditions of this Section 8.2.3. For example, if Owner is liable for an amount equal to Two Million Five Hundred Thousand Dollars (\$2,500,000) pursuant to the provisions and conditions of Section 8.2.2 of this Agreement, and the then current Base Rent due and payable under the Lease Agreement is One Million Five Hundred Thousand Dollars (\$1,500,000), then Optionee (or any successor lessee) shall receive a credit against Base Rent in the amount of One Million Five Hundred Thousand Dollars (\$1,500,000) in the first year after Owner becomes liable for such amount pursuant to the provisions and conditions of Section 8.2.2 of this Agreement and a credit against Base Rent in the amount of One Million Dollars (\$1,000,000) in the second year after Owner becomes liable for such amount pursuant to the provisions and conditions of Section 8.2.2 of this Agreement.

Section 8.3. Hazardous Materials during Option Term. Optionee shall not allow the illegal installation, storage, utilization, generation, sale or release of hazardous or otherwise regulated substances in, on, under or from the Property. Optionee shall, prior to initiating any operations, obtain all required permits from applicable regulatory agencies, including without limitation the San Diego County Department of Environmental Health, local fire agencies, the San Diego County Department of Weights and Measures, the San Diego County Air Pollution Control District, and the San Diego Regional Water Quality Control Board. Installing, utilizing, storing, or any other presence of Hazardous Materials includes boxes, bags, bottles, drums, cylinders, above or below ground tanks, equipment with tanks or any other type of container, equipment or device which holds or incorporates any Hazardous Materials. Notwithstanding anything to the contrary contained herein, during the Option Term, Optionee shall have the right to legally install, store, utilize, generate and/or release in, on, under or from the Property the Hazardous Materials normally associated with the use described in Section 7.1.1 hereof.

8.3.1 Release. For the purposes of this provision, a release shall include without limitation any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or otherwise disposing of Hazardous Materials.

8.3.2 Remediation. If Optionee's occupancy, use, development, maintenance or restoration of the Property results in a release of any Hazardous Materials, Optionee shall pay all costs of remediation and removal of such Hazardous Materials to the satisfaction of DEH or other governmental agency having authority and the satisfaction of Owner, which satisfaction shall not be unreasonably withheld, conditioned, or delayed, and in accordance with all applicable laws, rules and regulations of governmental authorities. Notwithstanding anything to the contrary contained herein, Optionee shall not be responsible for the remediation and/or removal of Environmental Conditions existing in, on or under the Property or existing outside the Property that arose on or after the Effective Date, but only to the extent caused by Owner, Owner's Related Parties or the holder of a Permitted Encumbrance.

8.3.3 Removal. Optionee and/or Optionee's contractor or agent shall remove all Hazardous Materials in any type of container, equipment or device from the Property immediately upon or prior to the expiration or earlier termination of this Agreement. Owner reserves the right to conduct inspections of the Property at reasonable times during the Option Term and/or request documentation demonstrating the legal removal and/or disposal of the Hazardous Materials and containers, equipment or devices from the Property. Optionee shall be liable for any and all costs incurred by Owner to remove any Hazardous Materials, container, equipment or device requiring disposal or removal as required by this provision, except to the extent Owner, Owner's Related Parties or the holder of any Permitted Encumbrance is responsible for such disposal or removal pursuant to the provisions and conditions of this Agreement.

8.3.4 Indemnity. Optionee shall protect, defend, indemnify, and hold Owner and its Related Parties harmless from any and all Environmental Claims or Environmental Expenses resulting from Optionee's occupancy, use, development, maintenance or restoration of the Property during the Option Term. Owner shall protect, defend, indemnify, and hold Optionee and its Related Parties harmless from any and all Environmental Claims or Environmental Expenses related to the acts or omissions of Owner or its Related Parties during the Option Term.

8.3.5 Notice of Release. If either Party knows or has reasonable cause to believe that any Hazardous Materials have been released on, from or beneath the Property, such Party shall immediately notify the other Party and any appropriate regulatory or reporting agency per California Administrative Code Title 19 and any other applicable laws or regulations. The notifying Party shall deliver a written report thereof to the other Party within three (3) days after receipt of the knowledge or cause for belief and submit any required written reports to regulatory or reporting agencies as required by regulation or law. If the notifying Party knows or has reasonable cause to believe that such substance is an imminent release or is an imminent substantial danger to public health and safety, the notifying Party shall take all actions necessary to alleviate the danger. The notifying Party shall immediately notify the other Party in writing of any violation, notice to comply or notice of violation received or the initiation of environmental actions or private suits related to the Property.

8.3.6 Environmental Assessment. Upon reasonable cause to believe that Optionee's occupancy, use, development, maintenance or restoration of the Property ("Optionee's Operations"), resulted in any Hazardous Materials being unlawfully released on,

from or beneath the Property, Owner may cause an environmental assessment under regulatory oversight by DEH of the suspect area to be performed by a professional environmental consultant registered with the State of California as a Professional Engineer, Certified Engineering Geologist or Registered Civil Engineer. If, and only if, the environmental assessment concludes that Hazardous Materials have been unlawfully released as a result of Optionee's Operations on, in, from or under the Property in quantities greater than allowed by city, county, state or federal laws, statutes, ordinances or regulations, then (i) Optionee shall cause, at its sole cost and expense, the remediation and/or removal of the Hazardous Materials as recommended by DEH such that compliance with applicable environmental law and regulations is achieved; and (ii) Optionee shall pay all costs and expenses associated with the environmental assessment. Notwithstanding anything to the contrary contained herein, in the event that Optionee fails to cause the remediation and/or removal of the Hazardous Materials recommended by DEH within a reasonable period of time, as determined by Owner in its sole discretion, then Owner shall have the right to cause, at Optionee's sole cost and expense, the remediation and/or removal of the Hazardous Materials as recommended by DEH.

Section 8.4. Cooperation Regarding Claims. If a Party receives notice or has knowledge of any Claim, then the provisions of Section 9.2.2 shall be applicable.

## ARTICLE 9 COMPLIANCE WITH LAWS, INDEMNITIES

Section 9.1. Compliance With Governmental Rules. Each Party shall comply with all Government Rules as they pertain to this Agreement.

Section 9.2. Indemnification and Limitations of Liability.

9.2.1 Indemnification. Each Party (an "**Indemnifying Party**") shall protect, defend, indemnify and hold the other Party and its Related Parties (an "**Indemnitee**") harmless from and against all third party actions, causes of actions, damages, costs, liabilities, claims, losses, judgments, penalties and expenses of every type and description, including without limitation attorneys' fees and costs (hereafter collectively referred to as a "**Claim**") arising out of or in connection with the performance by the Indemnifying Party of any provision or condition of this Agreement; provided, however, that an Indemnifying Party's duty to indemnify and hold harmless pursuant to the provisions and conditions of this Section 9.2.1 shall not include any Claims arising solely from the acts and omissions of an Indemnitee.

Notwithstanding anything to the contrary herein, Optionee shall protect, defend, indemnify and hold Owner and its Related Parties harmless from and against all third party Claims arising out of or in connection with Owner's selection of Optionee's proposal in response to Request For Proposal No. 10007363-10-W or award of this Agreement to Optionee (hereafter collectively referred to as "**Agreement Claims**"); provided, however, the Parties agree to each pay fifty percent (50%) of all fees and costs for any and all services approved by Owner, in its sole and absolute discretion, to defend Agreement Claims, including, but not limited to outside counsel, special counsel, and expert witnesses ("**Contract Services**"), up to \$1,000,000. Once costs for Contract Services exceed \$1,000,000, Optionee shall be responsible for all fees and costs for the Contract Services. If, for any reason, Optionee fails to pay such costs or fees, Owner, in its sole



and absolute discretion, may terminate this Agreement. Each Party shall be responsible for their respective costs and expenses for other than Contract Services, including, but not limited to, in-house counsel and staff, arising out of Agreement Claims.

9.2.2 Cooperation Regarding Claims. If a Party becomes aware of a Claim made, threatened or reasonably anticipated to be made against such Party or any of its Related Parties, the Party shall, as promptly as is reasonably practicable, deliver notice thereof to the other Party, and shall make available to the other Party and for the other Party's review: (a) a reasonably detailed description of the facts and circumstances relating to the Claim; (b) a reasonably detailed description of the basis for the potential demand for indemnification with respect thereto; and (c) a complete copy of all notices, pleadings and other papers related thereto; provided that failure to promptly give such notice or to make available such information and documents shall not relieve the Indemnifying Party of any indemnification obligation it may have under this Agreement, unless such failure shall materially diminish the Indemnifying Party's ability to respond to or to defend against the Claim as a result of such failure to give such notice. The Indemnifying Party shall consult and cooperate with the Indemnitee regarding the response to and the defense of any Claim, and shall promptly defend and/or represent the interests of the Indemnitee regarding such Claim, including selecting legal counsel and consultants reasonably satisfactory to the Indemnitee, and proposing, accepting or rejecting offers of settlement, all at the Indemnifying Party's sole cost; provided that no settlement shall be made without the written consent of the Indemnitee, which may not be unreasonably withheld or delayed; and provided further that if the Claim is settled without the Indemnifying Party's consent, the Indemnitee shall be deemed to have waived all rights hereunder against the Indemnifying Party for damages arising out of such Claim. Nothing herein shall prevent the Indemnitee from retaining its own counsel and participating in its own defense and at its own cost and expense. The Parties shall cooperate with each other in any notifications to insurers.

Section 9.3. Brokers and Finders. Each Party shall protect, defend, indemnify and hold the other Party harmless from and against any and all claims by each Party's broker, finder or agent for expenses, commissions, fees or other forms of compensation payable by such Party in connection with this Agreement and the consummation of the transactions contemplated herein.

Section 9.4. No Release of Insurers. The provisions of this Article 9 shall not be construed so as to relieve any insurer of its obligation to pay any insurance proceeds in accordance with the provisions and conditions of valid and enforceable insurance policies.

Section 9.5. Representatives. No officer, director, manager, agent, attorney, employee or other individual representative of any Party shall be personally liable for any loss under this Agreement. Nothing herein shall relieve either Party of any liability to make any payment expressly required to be made by such Party pursuant to this Agreement.

Section 9.6. Limitation of Liability. Notwithstanding anything in this Agreement to the contrary, neither a Party nor its Related Parties, shall have any liability to the other Party or its Related Parties for any special, indirect, incidental or consequential loss or damages arising out of or in connection with this Agreement or the occupancy, use, development, maintenance or

restoration of the Property, including without limitation lost profits or lost investment opportunity, even if advised in advance that such damages could occur.

## **ARTICLE 10 ASSIGNMENTS**

Section 10.1. Successors and Assigns. This Agreement shall be binding upon and shall inure to the benefit of the Parties and their successors and allowed assigns.

Section 10.2. Assignment. Neither Party may assign or transfer any right or obligation under this Agreement without the prior written consent of the other Party, which consent may not be unreasonably withheld or delayed; provided, however, that the consent of Owner shall not be required in connection with: (a) Optionee's assignment of this Agreement to an Affiliate of Optionee, provided that such Affiliate is wholly-owned by the Parent Company or Capital Power Corporation, a Canadian corporation; (b) Optionee's assignment of this Agreement to a purchaser or transferee of substantially all of the assets of Optionee, but only upon assumption by such purchaser or transferee of all of such Party's obligations under this Agreement; (c) the sale or transfer of all or substantially all of the shares or ownership interests of Optionee or any parent company of Optionee; or (d) the merger (or similar transaction) of Optionee or the Parent Company. Notwithstanding the foregoing, Owner does not waive the requirements of San Diego City Charter section 225 regarding the mandatory disclosure of business interests, and Optionee shall deliver to Owner prior written notice of any and all of its assignments of rights and/or obligations under this Agreement, which notice shall include the disclosure required by Charter section 225. If Optionee assigns any or all of its obligations under this Agreement, Optionee shall remain liable for all such obligations, unless expressly released by Owner in writing.

## **ARTICLE 11 CONDEMNATION**

Section 11.1. Parties, Rights and Obligations. If during the Option Term there is any taking of all or any part of the Property by Condemnation, the rights and obligations of the Parties shall be determined by this Article 11.

### Section 11.2. Taking by Owner.

11.2.1 If Owner or any other governmental, quasi governmental, judicial, public or statutory instrumentality, authority, body, agency, department, bureau or entity under the control of Owner takes the totality of the Property by eminent domain for the public health, safety or general welfare during the Option Term, then this Agreement shall automatically terminate on a date sixty (60) days after the date of approval of a resolution of necessity by Owner ("**Date of Condemnation**") and Owner shall pay to Optionee the sum of the following: (i) any and all Option Consideration paid to and received by Owner; and (ii) reasonable out-of-pocket costs and expenses incurred by Optionee, during the Option Term through the Date of Condemnation, in connection with the Property and the contemplated development and construction of the Plant thereon, including those amounts incurred by Optionee incident to (a) applying for, processing and obtaining the Approvals, (b) acquiring and(or) procuring environmental mitigation property and emission credits, and (c) performing any inspection,

testing, due diligence, planning and preconstruction activities for the Property, including engineering, environmental, soils and/or other studies and testing (collectively, the "**Taking Compensation**"). Optionee reserves the right to challenge Owner's right to take the totality of the Property by eminent domain as authorized by California Code of Civil Procedure sections 1250.360 and 1250.370, by filing a complaint in superior court in the County of San Diego, Central Division, on or before the Date of Condemnation. If Optionee fails to file a complaint in superior court in the County of San Diego, Central Division, by the Date of Condemnation, Optionee agrees on behalf of itself, its successors, assigns, Lenders and Representatives, to waive any and all rights to challenge in any judicial or court action or proceeding Owner's right to take as authorized by law, including, but not limited to, California Code of Civil Procedure sections 1250.360 and 1250.370.

Notwithstanding anything to the contrary herein, Optionee agrees on behalf of itself, its successors, assigns, Lenders and Representatives, to waive any and all rights to challenge in any judicial or court action or proceeding the following: (1) compliance with the statutory scheme to negotiate the amount of just compensation for the totality of the taking of the Property, including, but not limited to, California Government Code sections 7260 et seq.; and (2) the Taking Compensation is the just compensation for the totality of the taking of the Property. Notwithstanding anything to the contrary contained herein, Owner and Optionee hereby reserve the right to bring a cause of action relating to a dispute or disagreement between the parties as to the amount of the Taking Compensation. Any dispute or claim by or between Owner and Optionee as to the amount of the Taking Compensation shall be subject to the dispute resolution procedures set forth in Sections 15.1 and 15.2 of this Agreement.

11.2.2 If Owner or any other governmental, quasi governmental, judicial, public or statutory instrumentality, authority, body, agency, department, bureau or entity under the control of Owner takes any portion of the Property by eminent domain for the public health, safety or general welfare during the Option Term and the remaining portion of the Property renders the development or construction of the Plant commercially unviable, infeasible, impossible, or impracticable, in Optionee's sole discretion, then Optionee shall have the right, but not the obligation, to terminate this Agreement by written notice delivered to Owner not later than sixty (60) days after the Date of Condemnation and Owner shall pay to Optionee the Taking Compensation. If Optionee elects to terminate this Agreement, Optionee reserves the right to challenge Owner's right to take the portion of the Property by eminent domain as authorized by California Code of Civil Procedure sections 1250.360 and 1250.370, by filing a complaint in superior court in the County of San Diego, Central Division, on or before sixty (60) days after the Date of Condemnation. If Optionee fails to file a complaint in superior court in the County of San Diego, Central Division, on or before sixty (60) days after the Date of Condemnation, Optionee agrees on behalf of itself, its successors, assigns, Lenders and Representatives, to waive any and all rights to challenge in any judicial or court action or proceeding Owner's right to take as authorized by law, including, but not limited to, California Code of Civil Procedure sections 1250.360 and 1250.370. If Optionee elects not to terminate this Agreement upon the occurrence of a taking of any portion of the Property by eminent domain in accordance with the provisions and conditions of this Section 11.2.2, then Optionee shall not be entitled to any award, including, but not limited to, the Taking Compensation, as a result of the partial taking of the Property by eminent domain and agrees on behalf of itself, its successors, assigns, Lenders and Representatives, to waive any and all rights to challenge in any judicial or court action or



proceeding Owner's right to take as authorized by law, including, but not limited to, California Code of Civil Procedure sections 1250.360 and 1250.370.

Notwithstanding anything to the contrary herein, Optionee agrees on behalf of itself, its successors, assigns, Lenders and Representatives, to waive any and all rights to challenge in any judicial or court action or proceeding the following: (1) compliance with the statutory scheme to negotiate the amount of just compensation for the taking of any portion of the Property, including, but not limited, to California Government Code sections 7260 et seq.; and (2) the Taking Compensation is the just compensation for the taking of any portion of the Property. Notwithstanding anything to the contrary contained herein, Owner and Optionee hereby reserve the right to bring a cause of action relating to a dispute or disagreement between the parties as to the amount of the Taking Compensation. Any dispute or claim by or between Owner and Optionee as to the amount of the Taking Compensation shall be subject to the dispute resolution procedures set forth in Sections 15.1 and 15.2 of this Agreement.

### Section 11.3. Taking by Other than Owner.

If all or part of the Property is taken through condemnation proceedings or under threat of condemnation by any public authority, other than Owner or any other governmental, quasi governmental, judicial, public or statutory instrumentality, authority, body, agency, department, bureau or entity under the control of Owner, with the power of eminent domain ("**Condemning Public Authority**"), the interests of Owner and Optionee shall be as follows:

11.3.1 Full Taking. If the entire Property is taken, then this Agreement shall terminate on the date of the transfer of title or possession to the Condemning Public Authority, whichever first occurs.

11.3.2 Partial Taking - Remainder Usable. If a partial taking of the Property occurs, and in the opinion of Optionee, the remaining part of the Property is suitable for continued Lease operation, then this Agreement shall terminate in regard to the portion taken on the date of the transfer of title or possession to the Condemning Public Authority, whichever first occurs, but shall continue for the portion not taken.

11.3.3 Partial Taking - Remainder Unusable. If a partial taking of the Property occurs, and in the opinion of Optionee, the remaining part of the Property is not suitable for continued Lease operation or the remaining portion of the Property renders the development or construction of the Plant commercially unviable, infeasible, impossible, or impractical, in Optionee's sole discretion, then this Agreement shall terminate on the date of the transfer of title or possession to the Condemning Public Authority, whichever first occurs.

11.3.4 Award. Upon any taking by condemnation pursuant to this Section 11.3, (i) Optionee shall be entitled to that part of any award attributable to the taking of, or damages to Optionee's then remaining Option interest from the Condemning Public Authority ("**Optionee's Condemnation Award**"); and (ii) Owner shall be entitled to receive that part of any award attributable to the value of Owner's fee interest in the Property, including, but not limited to, the diminution of the value of Owner's fee interest in the Property, and any award not otherwise included in Optionee's Condemnation Award. The Condemning Public Authority shall be

responsible for providing the award of each Parties' interests. Owner shall have no liability to Optionee for any award not provided by the Condemning Public Authority.

11.3.4 Transfer. Owner has the right to transfer Owner's interests in the Property in lieu of condemnation to any authority entitled to exercise the power of eminent domain.

Section 11.4. No Inverse Condemnation. Notwithstanding anything to the contrary herein, the exercise of any Owner right under this Agreement shall not be interpreted as an exercise of the power of eminent domain and shall not impose any liability upon Owner for inverse condemnation.

Section 11.5. Notification. During the Option Term, Owner shall promptly notify Optionee in writing of any threatened taking of all or any portion of the Property.

## **ARTICLE 12**

### **REPRESENTATIONS AND WARRANTIES**

Section 12.1. Representations and Warranties of Optionee. Optionee hereby represents and warrants each of the following to Owner:

12.1.1 Optionee is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware and has the legal power and authority to own its properties, to carry on its business as now being conducted and to enter into this Agreement and carry out the transactions contemplated hereby and perform and carry out all covenants and obligations on its part to be performed under and pursuant to this Agreement.

12.1.2 Optionee's execution, delivery and performance of this Agreement is duly authorized by all necessary corporate action, and do not and will not require any further consent, approval or authorization of Optionee.

12.1.3 Optionee's execution, delivery and performance of this Agreement do not and will not conflict with or constitute a breach of or a default under any other legal obligation of Optionee.

12.1.4 This Agreement constitutes the legal, valid and binding obligation of Optionee enforceable in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization or similar laws relating to or affecting the enforcement of creditors' rights generally or by general equitable principles, regardless of whether such enforceability is considered in a proceeding in equity or at law.

12.1.5 There is no pending or, to the knowledge of Optionee, threatened action or proceeding affecting Optionee before any Governmental Authority which purports to affect the legality, validity or enforceability of this Agreement.

12.1.6 Optionee has obtained all approvals of Governmental Authorities necessary for it to enter into this Agreement.

Section 12.2. Representations and Warranties of Owner. Owner hereby represents and warrants each of the following to Optionee:

12.2.1 Owner is a municipal corporation duly organized, validly existing and in good standing under the laws of the State of California and has the legal power and authority to own its properties, to carry on its business as now being conducted and to enter into this Agreement and carry out the transactions contemplated hereby and perform and carry out all covenants and obligations on its part to be performed under and pursuant to this Agreement.

12.2.2 Owner's execution, delivery and performance of this Agreement have been duly authorized by all necessary official action (evidence of which has been or shall be delivered to Optionee), and do not and will not require any further consent, approval or authorization of Owner's City Council.

12.2.3 Owner's execution, delivery and performance of this Agreement do not and will not conflict with or constitute a breach of or a default under any other legal obligation of Owner.

12.2.4 This Agreement constitutes the legal, valid and binding obligation of Owner enforceable in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization or similar laws relating to or affecting the enforcement of creditors' rights generally or by general equitable principles, regardless of whether such enforceability is considered in a proceeding in equity or at law.

12.2.5 There is no pending or, to the knowledge of Owner, threatened action or proceeding affecting Owner before any Governmental Authority, which purports to affect the legality, validity or enforceability of this Agreement.

12.2.6 Owner has obtained all approvals of Governmental Authorities necessary for it to enter into this Agreement.

12.2.7 Subject to the Permitted Encumbrances, Owner is the fee title owner of the Property.

12.2.8 There are no existing or pending contracts of sale, leases or options to purchase or rights of first refusal (or the like) with respect to the Property.

12.2.9 As of the Effective Date, to the actual knowledge without inquiry of Owner's Real Estate Assets Department, there currently exist no material adverse subsurface conditions affecting the Property.

12.2.10 As of the Effective Date, to the actual knowledge without inquiry of Owner's Real Estate Assets Department, there has been no discharge of Hazardous Materials at, upon, under, within or from the Property.



**ARTICLE 13**  
**MEMORANDUM OF AGREEMENT**

Section 13.1. Memorandum. Promptly after the Effective Date, Owner and Optionee shall execute, acknowledge and cause to be recorded in the Official Records of San Diego County a Memorandum of Option Agreement in the form of Exhibit "13.1" attached hereto ("**Memorandum of Option Agreement**").

**ARTICLE 14**  
**NOTICES**

Section 14.1. Notices. All notices, requests, demands and other communications which are required or may be given under this Agreement shall be in writing and shall be deemed to have been duly given when received by the applicable Party hereto if personally delivered; when transmitted by the applicable Party hereto if transmitted by telecopy, electronic or digital transmission method, subject to the sender's facsimile machine or other device receiving the correct answerback of the addressee and confirmation of uninterrupted transmission by a transmission report or the recipient confirming by telephone to sender that he has received the message; and when received by the applicable Party hereto, if sent for next day delivery to a domestic address by recognized overnight delivery service or if sent by certified or registered mail, return receipt requested.

THE CITY OF SAN DIEGO  
Attn: Real Estate Assets Department  
1200 Third Avenue, Suite 1700  
M. S. 51A  
San Diego, CA 92101

*With a copy by First Class Mail to:*      SAN DIEGO CITY ATTORNEY  
Attn: Real Property Section  
1200 Third Avenue, Suite 1100  
San Diego, California 92101-4106

CAPITAL POWER (US HOLDINGS) INC.  
9255 Towne Centre Drive, Suite 900  
San Diego, California 92121  
Fax: (858) 202-1545

*With a copy by First Class Mail to:*

Associate General Counsel  
Capital Power Corporation  
700 Commerce Drive, Suite 160  
Oakbrook, Illinois 60523  
Fax: (630) 586-0315

James R. Dawe, Esq.

Seltzer Caplan McMahon Vitek  
A Law Corporation  
750 B Street, Suite 2100  
San Diego, California 92101  
Fax: (619) 702-6807

Any party entitled or required to receive notice under this Agreement may, by like notice, designate a different address to which notices shall be sent.

## **ARTICLE 15**

### **GENERAL**

Section 15.1. Mediation. Any dispute or claim by or between Owner and Optionee relating to this Agreement which cannot be settled informally shall first be submitted to mediation under the Commercial Mediation Rules of the American Arbitration Association before resorting to litigation. Optionee and Owner shall each pay one half of the cost of such mediation. Notwithstanding the foregoing, nothing in this Section shall preclude a Party from filing an action in the courts, or taking other necessary legal action to protect that Party's legal rights, either prior to or during the mediation process and such action shall not be considered a waiver or breach of the right or obligation to mediate, provided the Party filing the action proceeds with mediation as required herein. No dispute or claim by or between Owner and Optionee relating to this Agreement or otherwise shall be submitted to binding arbitration under any circumstance.

Section 15.2. Court Action. In any court action relating to this Agreement, Optionee may request in writing that Owner agree to a court-appointed referee to hear the case pursuant to California Code of Civil Procedure section 638 et seq. Owner, in its sole discretion, may, but is not obligated, agree to the court-appointed referee. If the Parties agree to a court-appointed referee, they shall request that the referee be a retired California Superior Court judge. Pending resolution of the dispute, the Parties shall continue their performances under this Agreement to the extent reasonably practicable. The Parties shall request the court to instruct the referee to make the ruling consistent with the express requirements of this Agreement. Considering the Parties' need for prompt resolution of the dispute, the Parties agree that delays and continuances shall be requested and granted only in exigent circumstances. All discovery shall be completed no later than ten (10) days before the first hearing date established by the referee; provided that the court or referee may extend such period in the event of a Party's refusal or failure to provide requested discovery. Each Party shall be responsible for their respective costs and expenses, including, but not limited to, attorneys' fees and costs, and referee fees and costs.

Section 15.3. No Third-Party Beneficiary. This Agreement and all rights hereunder are intended for the sole benefit of the Parties hereto, and to the extent expressly provided, for the benefit of the Lenders or any other Person, and shall not imply or create any rights on the part of, or obligations to, any other Person.

Section 15.4. Governing Law. This Agreement shall be construed in accordance with, and governed by, the laws of the State of California without regard to its conflict of laws provisions.

Section 15.5. Partial Invalidity. If any term, covenant, condition, or provision of this Agreement is found invalid, void or unenforceable by a court of competent jurisdiction, the remaining provisions shall remain in full force and effect.

Section 15.6. Waivers. The failure of either Party to enforce at any time any provision or condition of this Agreement shall not be construed to be a waiver of such provision or condition contained herein or a waiver of any subsequent breach or violation of the same or any other provision or condition, nor in any way to affect the validity of this Agreement or any part hereof or the right of a Party to thereafter enforce each and every such provision or condition. A waiver under this Agreement must be in writing and state that it is a waiver. No waiver of any breach of this Agreement shall be held to constitute a waiver of any other or subsequent breach.

Section 15.7. Entire Agreement and Amendments. This Agreement (including the Exhibits, Schedules and Annex hereto which are integral parts of this Agreement) supersedes all previous representations, understandings, negotiations and agreements either written or oral between the Parties or their Representatives. This Agreement may not be modified except by the written agreement executed and delivered by Owner and Optionee.

Section 15.8. Counterparts. This Agreement may be signed in multiple originals and/or using counterpart signature pages. All such multiple originals shall constitute one and the same document.

Section 15.9. Decision-Making by Parties. Except where this Agreement expressly provides for a different standard, whenever this Agreement provides for determination, decision, permission, consent or approval of a Party, the Party shall make such determination, decision, grant or withholding of permission, consent or approval in a timely and commercially reasonable manner. Any denial of consent required to be made in a commercially reasonable manner shall include in reasonable detail the reason for denial or aspect of the request that was not acceptable.

Section 15.10. No Recourse to Affiliate. This Agreement is solely and exclusively between Owner and Optionee, and any obligations created herein shall be the sole obligations of the Parties. No Party shall have recourse to any parent, member, shareholder, subsidiary, partner joint venture, Affiliate, director or officer of the other Party for performance of said obligations unless the obligations are assumed in writing by the Person against whom recourse is sought.

Section 15.11. Further Assurances. Owner and Optionee shall cooperate in all reasonable respects necessary to consummate the transactions contemplated by this Agreement and each shall take all reasonable actions within its authority to secure the cooperation of its Affiliates.

Section 15.12. Survival. The provisions and conditions of this Agreement that relate to the enforcement of rights and obligations accruing before the end of the Option Term shall survive termination of this Agreement to the extent necessary to enforce such rights and obligations.

Section 15.13. No Affiliation. Nothing contained in this Agreement shall be deemed or construed to create a partnership, joint venture or other affiliation between Owner and



Optionee or between Owner and any other entity or party, or cause Owner to be responsible in any way for the debts or obligations of Optionee or any other party or entity.

Section 15.14. Force Majeure Event. Performance by either Party under this Agreement shall not be deemed, or considered to be in default, where any such default is due to the occurrence of a Force Majeure Event. Any Party claiming a Force Majeure Event shall notify the other Party: (a) within ten (10) days after such Party knows of any such Force Majeure Event; and (b) within five (5) days after such Force Majeure Event ceases to exist. The extension of time for a Force Majeure Event shall commence on the date the condition causing the Force Majeure Event commences and shall continue until the end of the condition causing the Force Majeure Event. The Party claiming an extension of time to perform due to a Force Majeure Event shall exercise its reasonable efforts to cure the condition causing the Force Majeure Event within a reasonable time.

Section 15.15. Default. If either party fails to perform any of its obligations under this Agreement, then the non-defaulting party shall give the defaulting party written notice of the breach and allow the defaulting party thirty (30) days from the date of receipt of the notice to correct the breach, or, if the breach is not correctible within thirty (30) days, to commence to correct the breach and diligently pursue the correction to completion. If the defaulting party fails to so correct the breach, the defaulting party shall be in default of this Agreement, and the non-defaulting party may thereafter terminate this Agreement immediately upon delivery of a written notice of termination to the defaulting party.

Section 15.16. Cumulative Remedies. All rights and remedies of either Party are cumulative of each other and of every other right or remedy such Party may otherwise have at law or in equity, and the exercise of one or more rights or remedies shall not prejudice or impair the concurrent or subsequent exercise of other rights or remedies.

Section 15.17. Exhibits. Each of the following described Exhibits is attached hereto and incorporated herein by this reference:

<u>Exhibit</u>	<u>Description</u>
Annex A	Definitions
2.1(a)	Legal Description for the Property
2.1(b)	Description of Existing Easements
2.1(c)	Description of Easements to be Granted
2.2	Permitted Encumbrances
3.4	Recognition Agreement
4.3	Lease Agreement

Section 15.18. Legal Representation of Parties. This Agreement was negotiated by the Parties with the benefit of legal representation and any rule of construction or interpretation requiring this Agreement to be construed or interpreted against any Party shall not apply to any construction or interpretation of this Agreement.

Section 15.19. Confidentiality. Except for the provisions and conditions disclosed in the Memorandum of Option, each Party agrees that it will not and shall direct its respective employees, officers, agents and representatives not to, directly or indirectly, release or cause or permit to be released to the public any press notices, publicity (oral or written) or advertising promotion relating to the execution of this Agreement, or otherwise publicly announce or disclose or cause or permit to be publicly announced or disclosed, in any manner whatsoever, the terms, conditions or substance of this Agreement or the transactions contemplated herein, without first obtaining the consent of the other Party. The Parties acknowledge and agree that the foregoing shall not: (a) preclude any Party from discussing the substance or any relevant details of the transactions contemplated in this Agreement on a confidential basis with any of its partners, attorneys, officers, directors, employees, accountants, professional consultants, financial advisors, rating agencies, potential lenders or potential partners, as the case may be (the "**Representatives**"), provided that such Representatives have been informed of the applicable Party's obligations hereunder; or (b) prevent a Party from complying with applicable laws, including without limitation governmental, regulatory, disclosure, tax and reporting requirements, including without limitation the California Public Records Act ("**CPRA**," Government Code §6250 et seq.). Owner shall determine, in its sole discretion, whether information provided to Owner by Optionee pursuant to this Agreement is or is not a public record subject to disclosure under the CPRA. Optionee shall hold Owner, its elected officials, officers and employees harmless for Owner's reasonable determination that such information is a public record subject to disclosure under the CPRA, and Owner's disclosure of such public record in response to a request for information under the CPRA.

*[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]*

SIGNATURE PAGE TO OPTION AGREEMENT

IN WITNESS WHEREOF, the Parties have executed this Agreement to be effective as of the Effective Date.

CAPITAL POWER (US HOLDINGS) INC., a  
Delaware corporation

BY: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

THE CITY OF SAN DIEGO, a California  
municipal corporation

BY: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

*Approved as to form:*

JAN I. GOLDSMITH, City Attorney

BY: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

## **Annex A**

### **Defined Terms**

**"Affiliate"** of a specified Person means any other Person that directly or indirectly through one or more intermediaries, controls, is controlled by or is under common control with the specified Person. As used in this definition, "control," "controlled by" and "under common control with" means ownership, directly or indirectly, or the power to direct or cause the direction of management or policies of such Person (whether through ownership of securities or other partnership or ownership interests, by contract or otherwise).

**"Agreement"** has the meaning specified in the introductory section of this Option Agreement.

**"Agreement Claims"** has the meaning specified in Section 9.2.1.

**"Approvals"** has the meaning specified in Section 7.1.1.

**"Ballot Measure"** has the meaning specified in Section 5.3.

**"Base Rent"** has the meaning specified in Section 8.2.3.

**"Claim"** has the meaning specified in Section 9.2.1.

**"Condemnation"** means (a) the exercise of any governmental power, whether by legal proceedings or otherwise, by a Condemnor, and (b) a voluntary sale or transfer by Owner or Optionee to any Condemnor, either under threat of condemnation or while legal proceedings for Condemnation are pending.

**"Condemning Public Authority"** has the meaning specified in Section 11.3.

**"Condemnor"** means any public or quasi-public authority, or private corporation or individual, having the power of Condemnation.

**"Contract Services"** has the meaning specified in Section 9.2.1.

**"County"** means San Diego County, California.

**"Date of Condemnation"** has the meaning specified in Section 11.2.1.

**"DEH"** means the County of San Diego Department of Environmental Health.

**"Easements"** has the meaning specified in Section 2.1.

**"Effective Date"** means the date this Agreement is executed by the City Attorney in accordance with San Diego Charter section 40 as set forth in the introductory section of this Agreement.



**“Environmental Claims”** means all claims, demands, suits, causes of action for personal injury or property damage, including without limitation actual or threatened damages to natural resources; claims for the recovery of response costs, or administrative or judicial orders directing the performance of investigations, removal, remedial or other response actions under any Environmental Laws; a requirement to implement “corrective action” pursuant to any order or permit issued pursuant to the Resource Conservation and Recovery Act (“RCRA”); claims for restitution, contribution or equitable indemnity from third parties or any Governmental Authority; fines, penalties, liens against property; claims for injunctive relief or other orders or notices of violation from any Governmental Authority; any requirement to install pollution control equipment to comply with any Environmental Laws; and, with regard to any present or former employees or other natural persons, exposure to or injury from Environmental Conditions or Environmental Noncompliance.

**“Environmental Conditions”** means (i) any environmental conditions, circumstances or other matters of fact, pertaining to, relating to or otherwise affecting the environment, including any natural resources (including flora and fauna), soil, surface water, ground water, any present or potential drinking water supply, subsurface strata or the ambient air, and relating to or arising out of the presence, use, handling, storage, treatment, recycling, generation, transportation, release, spilling, leaking, pumping, pouring, emptying, discharging, injecting, escaping, leaching, disposal (including, without limitation, the abandonment or discarding of barrels, containers and other closed receptacles containing any Hazardous Materials), dumping or threatened release (as such term is used in the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) or other similar Environmental Laws) of Hazardous Materials, and (ii) the exposure of any persons (including any present or former employee to Hazardous Materials within any workplace within the Property, or the exposure of other natural persons within or outside the boundaries of the Property to Hazardous Materials related to or otherwise arising from operations, acts, omissions or other conduct at the Property.

**“Environmental Expenses”** means all liabilities, losses, costs and expenses arising out of Environmental Conditions or Environmental Noncompliance, including without limitation costs of investigation, cleanup, remedial, removal or other response action, the costs associated with posting financial assurances for the completion of response, remedial or corrective actions, the preparation of any closure or other necessary or required plans or analyses, other reports or analyses submitted to or prepared by Governmental Authorities, including the cost of health risk assessments, epidemiological studies and the like, retention of engineers or other expert consultants, legal counsel, capital improvements (including without limitation costs to install any pollution control equipment to comply with any Environmental Laws), operation and maintenance testing and monitoring costs, power and utility costs and pumping taxes or fees, and administrative, oversight and other costs incurred by Governmental Authorities; provided, however, that “Environmental Expenses” shall only include those Environmental Expenses which are reasonably necessary and are in reasonable amounts in view of the then existing circumstances giving rise to such Environmental Expenses.

**“Environmental Laws”** means any law, regulation, rule or ordinance now or hereafter in effect relating to Environmental Conditions, including, without limitation, CERCLA, the Toxic Substances Control Act of 1976 (“TSCA”), the RCRA, the Clean Water Act (“CWA”), the Clean Air Act (“CAA”), the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), the

Atomic Energy Act ("AEA"), the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"), the Safe Drinking Water Act, the Hazardous Materials Transportation Act, the Oil Pollution Act of 1990, the Occupational Health and Safety act, and the Pollution Prevention Act; State Environmental Laws; any amendments thereto now or hereafter adopted or that otherwise become effective; any plans, rules, regulations or ordinances adopted (including without limitation fire, land use, zoning, and other codes and regulations relating to Environmental Conditions), any permits and licenses issued pursuant to any of the foregoing, or other guidelines, guidance or policies promulgated pursuant to the foregoing; and any common law principles (including without limitation decisions by or orders of courts, agencies, boards of appeals or similar bodies with mandatory or persuasive authority) relating to the Environmental Conditions.

**"Environmental Noncompliance"** means any violation of Environmental Laws including, without limitation: (i) the discharge, emission, release or threatened release (as such term issued in CERCLA, the CWA, the CAA or other similar Environmental laws) of any Hazardous Materials in violation of any Environmental Laws; (ii) any noncompliance with Environmental Laws regarding the construction, modification, operation and maintenance of physical structures, equipment, processes or facilities; (iii) any noncompliance with federal, state or local requirements governing occupational safety and health related to Hazardous Materials; (iv) any facility operations, procedures, designs, or other matters which do not conform to the statutory or regulatory requirements of Environmental Laws, including the CAA, the CWA, the TSCA and the RCRA; (v) the failure to have obtained or to maintain in full force and effect permits, variances or other authorizations necessary for the legal operation of any equipment, process, facility or any other activity, to the extent required for compliance with Environmental Laws; or (vi) the operation of any facility, process or equipment in violation of any permit, condition, schedule of compliance, administrative or court order, to the extent required for compliance with Environmental Laws.

**"Exercise Notice"** has the meaning specified in Section 4.2.

**"Existing Environmental Conditions"** has the meaning specified in Section 8.2.

**"Force Majeure Event"** means an act, condition, event or circumstances which prevents one Party from performing its obligations under this Agreement, which act, condition, event or circumstances is not within the reasonable control of, and without fault or negligence of, the Party claiming the occurrence of a Force Majeure Event. A Force Majeure Event includes without limitation sabotage, strikes or other labor difficulties, riots or civil disturbance, acts of God, acts of a public enemy, drought, earthquakes, floods, abnormally severe storms, explosions or fires, lightning, landslides, or similarly cataclysmic occurrence. A Force Majeure Event also includes condemnation, taking, seizure, involuntary conversion or requisition of title to or use of the Plant or the Easements or any material portion thereof by action of the federal or state government. A Force Majeure Event also includes a disruption in the financial markets. A Force Majeure Event shall not mean any act or event to the extent resulting from the fault or negligence of any person claiming a Force Majeure Event, or the financial inability of any person to perform its obligations under this Agreement.

**“Governmental Authority”** means any national, state or local government (whether domestic or foreign), and political subdivision thereof or any other governmental, quasi-governmental, judicial, public or statutory instrumentality, authority, body, agency, department, bureau or entity (including without limitation any zoning authority, the United States Securities and Exchange Commission, the Federal Energy Regulatory Commission, the California Public Utilities Commission, the California Energy Commission or any comparable authority).

**“Governmental Rule”** means any law, rule, regulation, ordinance, order, code, permit, interpretation, judgment, decree, directive, guideline, policy or similar form of decision of any Governmental Authority having the effect and force of law, including without limitation any Environmental Laws.

**“Hazardous Materials”** means hazardous wastes, hazardous substances, hazardous constituents, air contaminants or toxic substances, whether solids, liquids or gases, including substances defined or otherwise regulated as “hazardous substances,” “pollutants,” “reproductive toxins,” “radioactive materials,” “toxic chemicals,” or other similar designations in, or otherwise subject to regulation under, any Environmental Laws, including without limitation petroleum hydrocarbons, asbestos-containing materials, urea formaldehyde foam insulation, polychlorinated biphenyls and radio nuclides.

**“Indemnitee”** has the meaning specified in Section 9.2.1.

**“Indemnifying Party”** has the meaning specified in Section 9.2.1.

**“Initial Consideration”** has the meaning specified in Section 3.1.

**“Lease Agreement”** has the meaning specified in Section 4.3.

**“Lenders”** means providers of debt financing, owners of debt instruments and their respective successors and assigns, including transferees of debt instruments, and any trustee, collateral agent or other fiduciary or nominee acting on behalf of any of the foregoing Persons.

**“Memorandum of Option Agreement”** has the meaning specified in Section 13.1.

**“MW”** means Megawatts.

**“Navy Easement”** has the meaning specified in Section 4.2.

**“Option”** has the meaning specified in Section 2.1.

**“Option Consideration”** has the meaning specified in Section 3.2.

**“Option Term”** has the meaning specified in Section 4.1.

**“Optionee”** has the meaning specified in the introductory section of this Agreement, and any successor or permitted assignee thereof.

**“Optionee’s Condemnation Award”** has the meaning specified in Section 11.3.4.

**“Optionee’s Operations”** has the meaning specified in Section 8.3.6.

**“Owner”** has the meaning specified in the introductory section of this Agreement.

**“Owner Documents”** has the meaning specified in Section 5.2.

**“Parent Company”** means Capital Power, L.P., an Ontario limited partnership.

**“Party” and “Parties”** have the meaning specified in the introductory section of this Agreement.

**“Permitted Encumbrances”** has the meaning specified in Section 2.2.

**“Person”** means any natural person, corporation, partnership, firm, association, trust, unincorporated organization, Governmental Authority or any other legal entity whether acting in an individual, fiduciary or other capacity.

**“Plant”** has the meaning specified in Section 7.1.1.

**“Property”** has the meaning specified in Section 2.1.

**“Related Parties”** means (as applicable) a Party’s elected officials, successors, assigns, officers, directors, shareholders, members, participants, partners, affiliates, beneficiaries, trustees, subsidiaries, employees, representatives, agents or lenders.

**“Representative”** has the meaning specified in Section 15.19.

**“Resolution Date”** means the effective date of final passage of the City of San Diego resolution declaring the results of the election with a positive vote of the Ballot Measure.

**“State Environmental Law”** means any state or local law, regulation, rule or ordinance now or hereafter in effect relating to Environmental Conditions including any amendments thereto now or hereafter adopted or that otherwise become effective; and plans, rules, regulations, orders or ordinances adopted (including, without limitation fire, land use, zoning and other codes and regulations relating to Environmental Conditions), or other guidance or policies promulgated pursuant to the preceding laws; and local laws, ordinances, codes or regulations pertaining to or otherwise addressing Environmental Conditions; or any terms or conditions in state or local permits, licenses or other authorizations relating to Environmental Conditions; and common law principles (including without limitation decisions by or orders of courts, agencies, boards of appeal or similar bodies with mandatory or persuasive authority) relating to Environmental Conditions.

**“Taking Compensation”** has the meaning specified in Section 11.2.

**“Title Commitment”** has the meaning specified in Section 7.1.6.

**“Water Agreement”** has the meaning specified in Section 7.1.4.





**EXHIBIT "2.1(a)"**  
**(Legal Description)**

**The land referred to herein is situated in the State of California, County of San Diego, City of , and described as follows:**

**Parcel 1:**

That portion of Pueblo Lot 1306 of the Pueblo Lands of San Diego, in the City of San Diego, County of San Diego, State of California, according to Map thereof made by James Pascoe in 1870, a copy of which was filed in the office of the County Recorder on November 14, 1921, and is now known as Miscellaneous Map No. 36; lying easterly, southeasterly, and northeasterly of the northeasterly boundary line of that certain Grant Deed from the City of San Diego, a Municipal Corporation to the State of California, recorded January 8, 1971 as file no. 3902 of Official Records; and southerly of the southerly boundary line of Miramar Road.

APN: 345-021-02-00

Note: The above described legal description is for informational purposes only, and does not constitute a legal description by definition of the Subdivision Map Act.

**Parcel 2:**

That portion of Pueblo Lot 1304 of the Pueblo Lands of San Diego, in the City of San Diego, County of San Diego, State of California, according to Map thereof made by James Pascoe in 1870, a copy of which was filed in the office of the County Recorder on November 14, 1921, and is now known as Miscellaneous Map No. 36; lying easterly, and northeasterly of the northeasterly boundary line of that certain Grant Deed from the City of San Diego, a Municipal Corporation to the State of California, recorded January 8, 1971 as file no. 3902 of Official Records; and lying easterly and northeasterly of the northeasterly boundary line of that certain Grant Deed from the City of San Diego, a Municipal Corporation to the State of California, recorded October 10, 2007 as file no. 2007-0653178 of Official Records. APN: 345-021-03-00 Note: The above described legal description is for informational purposes only, and does not constitute a legal description by definition of the Subdivision Map Act.

**Parcel 3:**

That portion of Pueblo Lots 1305 and 1276 of the Pueblo Lands of San Diego, in the City of San Diego, County of San Diego, State of California, according to Map thereof made by James Pascoe in 1870, a copy of which was filed in the office of the County Recorder on November 14, 1921, and is now known as Miscellaneous Map No. 36; lying northerly and northeasterly of the northerly and northeasterly boundary line of Parcel 1A of that certain Final Order of Condemnation in favor of the State of California, recorded February 16, 1970 as file no. 28406 of Official Records; and lying easterly, and northeasterly of the northeasterly boundary line of that certain Grant Deed from the City of San Diego, a Municipal Corporation to the State of California, recorded January 8, 1971 as file no. 3902 of Official Records; and lying easterly and northeasterly of the northeasterly boundary line of that certain Grant Deed from the City of San Diego, a Municipal Corporation to the State of California recorded October 10, 2007 as file no. 2007-0653178 of Official Records.

Excepting from the above described Parcel No. 3, that portion of land as conveyed in that certain Grant Deed from the City of San Diego, a Municipal Corporation to the Atchison, Topcka, and Santa Fe Railway Company, a Kansas Corporation, recorded April 16, 1969 as file no. 66016 of Official Records.

APN: 348-021-03-00

Note: The above described legal description is for informational purposes only, and does not constitute a legal description by definition of the Subdivision Map Act.

**EXHIBIT "2.1(b)"**

**(Description of Existing Easements)**



**EXHIBIT "2.1(c)"**

**(Description of Easements to be Granted)**

**EXHIBIT “2.2”**

**(Permitted Encumbrances)**

**EXHIBIT "3.4"**

**(Recognition Agreement)**

RECORDING REQUESTED BY AND  
WHEN RECORDED RETURN TO:

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

(SPACE ABOVE THIS LINE FOR RECORDER'S USE)

**RECOGNITION, NON-DISTURBANCE, SUBORDINATION AND ATTORNMENT  
AGREEMENT**

THIS RECOGNITION, NON-DISTURBANCE, SUBORDINATION AND ATTORNMENT AGREEMENT ("**Agreement**") is entered into as of \_\_\_\_\_, 20\_\_\_\_, by and among THE CITY OF SAN DIEGO, a California municipal corporation (the "**Owner**"), and CAPITAL POWER (US HOLDINGS) INC., a Delaware corporation (the "**Optionee**"), and \_\_\_\_\_, a \_\_\_\_\_ ("**Lender**"), who agree as follows:

**ARTICLE 1  
Recitals**

Section 1.1. Owner owns certain real property located in San Diego, California, more particularly described on Exhibit "A" attached hereto and incorporated herein by this reference ("**Property**").

Section 1.2. Lender is the beneficiary under that certain Deed of Trust described on Exhibit "B" attached hereto and incorporated herein by this reference (the "**Deed of Trust**"), which encumbers the Property

Section 1.3. Owner and Optionee are parties to that certain Option Agreement, dated \_\_\_\_\_, 20\_\_\_\_, which provides, without limitation, Optionee is granted an Option to Lease the Property ("**Option Agreement**").

Section 1.4. Optionee wants to assure that it has the opportunity to receive all of its rights, title and interest under the Option Agreement in the event Lender or any other person exercises its "Remedies" and becomes a "Successor Owner" (as such terms are defined below).

Section 1.5. Owner, Optionee and Lender want to set forth their agreement with respect to the Option Agreement as provided herein. All parties agree that they will benefit from the execution and recordation of this Agreement.

## ARTICLE 2

### Foreclosure and Sale

Section 2.1. If Lender or any other party or person exercising the rights of Lender (a **"Successor Owner"**) shall obtain title to the Property and thereby become a successor in interest to Owner as owner of the Property either (a) through or in lieu of the exercise by Lender of any of its remedies pursuant to the Deed of Trust (**"Remedies"**), or (b) in any other manner permitted under the Deed of Trust and/or applicable law, then Lender and Optionee agree that, if the Option Agreement has not been terminated on or before the date Successor Owner obtains title to the Property (**"Transfer Date"**), all of the provisions and conditions of this Section 2 shall apply to Optionee and Lender and Successor Owner.

Section 2.2. Lender or any Successor Owner shall succeed to the interest of Owner under the Option Agreement. Lender or such Successor Owner shall be bound to Optionee pursuant to the Option Agreement.

Section 2.3. Although Lender may join Optionee in any summary or foreclosure proceedings, if required under applicable law for Lender to exercise its Remedies, Lender and any Successor Owner shall recognize and not disturb Optionee's rights pursuant to the Option Agreement.

Section 2.4. The rights of Optionee under the Option Agreement shall remain in full force and effect and shall not be terminated or disturbed. Lender hereby waives the provisions of any statute or rule of law now or hereafter in effect which may give or purport to give Lender or any Successor Owner any right or election to terminate or otherwise adversely affect the Option Agreement and the obligations of Lender or any Successor Owner thereunder by reason of the exercise of such Remedies.

Section 2.5. Optionee shall and hereby does attorn to Lender and to any Successor Owner and their successors and assigns and shall perform and be bound under all of the provisions, covenants and conditions of the Option Agreement for the balance of the term remaining and shall recognize Lender and such Successor Owner as succeeding to the rights of Owner under the Option Agreement.

Section 2.6. Optionee and Lender shall execute and deliver to the other party such further assurance and other documents including new agreements upon the same provisions and conditions as the Option Agreement, confirming the foregoing as Optionee, Lender or such Successor Owner may reasonably request.

Section 2.7. Lender acknowledges that: (i) Optionee has paid and will pay to Owner the **"Option Consideration"** (as defined in the Option Agreement), (ii) no further deposits are due and payable under the provisions and conditions of the Option Agreement, and (iii) Lender or any Successor Owner may be responsible for the repayment of the Option Consideration in accordance with the provisions and conditions of the Option Agreement.

Section 2.8. Consistent with the foregoing, Lender hereby subordinates the lien and charge of the Deed of Trust to the provisions and conditions of the Option Agreement.



**ARTICLE 3**  
**Failure to Perform**

Section 3.1. In the event Owner shall fail to perform or observe any of the provisions or conditions in the Deed of Trust or the note secured thereby prior to the Transfer Date, Lender shall give written notice thereof to Optionee concurrently with its notice to Owner and Optionee shall have the right (but not the obligation) to cure such failure within the same time period provided to Owner, if any.

**ARTICLE 4**  
**Delivery of Property**

Section 4.1. Nothing contained herein shall limit Owner's obligations under the Option Agreement to deliver the Property to Optionee free and clear of the lien of any encumbrances, including without limitation, the Deed of Trust.

**ARTICLE 5**  
**Notices**

Section 5.1. All notices, requests, demands and other communications which are required or may be given under this Agreement shall be in writing and shall be deemed to have been duly given when received by the applicable Party hereto if personally delivered; when transmitted by the applicable Party hereto if transmitted by telecopy, electronic or digital transmission method, subject to the sender's facsimile machine or other device receiving the correct answerback of the addressee and confirmation of uninterrupted transmission by a transmission report or the recipient confirming by telephone to sender that he has received the message; and when received by the applicable Party hereto, if sent for next day delivery to a domestic address by recognized overnight delivery service or if sent by certified or registered mail, return receipt requested.

If to Owner, to:

THE CITY OF SAN DIEGO  
Attn: Real Estate Assets Department  
1200 Third Avenue, Suite 1700  
M. S. 51A  
San Diego, CA 92101

*With a copy by First Class Mail to:*

SAN DIEGO CITY ATTORNEY  
Attn: Real Property Section  
1200 Third Avenue, Suite 1100  
San Diego, California 92101-4106

If to Optionee, to:

CAPITAL POWER (US HOLDINGS) INC.  
9255 Towne Centre Drive, Suite 900  
San Diego, California 92121  
Fax: (858) 202-1545

With a copy to:

James R. Dawe, Esq.  
Seltzer Caplan McMahon Vitek  
A Law Corporation  
750 B Street, Suite 2100  
San Diego, California 92101  
Fax: (619) 702-6807

Any party entitled or required to receive notice under this Agreement may, by like notice, designate a different address to which notices shall be sent.

## ARTICLE 6 General Provisions

Section 6.1. This Agreement may only be amended by a written document signed by both Optionee and Owner that refers specifically to this Agreement. This Agreement (and the Exhibits attached hereto and other documents and instruments referenced herein) contains the entire agreement between the parties relating to the transactions contemplated by this Agreement and all prior or contemporaneous agreements, understandings, representations or statements, oral or written, are superseded.

Section 6.2. If any party brings an action or proceeding against another party under this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party all reasonable costs and expenses thereof, including without limitation reasonable attorneys' fees and costs. The "prevailing party" shall be that party who obtains substantially the result sought, whether by settlement, dismissal, or judgment. If, as a result of an action brought by or against a Party in connection with this Agreement, the other Party becomes a party (or is made a party) thereto, the Party against whom such action was brought shall pay all of the other Party's costs and expenses thereof, including without limitation reasonable attorneys' fees and costs.

Section 6.3. All provisions and conditions of this Agreement shall be binding upon and inure to the benefit of the parties and their respective administrators or executors, successors and assigns. No individual or entity not a party to this Agreement shall have the right to enforce this Agreement or be considered a third-party beneficiary of any covenants or conditions hereunder.

Section 6.4. If any material covenant, condition or provision herein contained is held to be invalid, void or unenforceable by a final judgment of any court of competent jurisdiction, this Agreement shall become rescinded unless the party benefited by such covenant, condition or provision delivers to the other party (and escrow holder, if any) within ten (10) days after the

judgment becomes final, a written waiver of the covenant, condition or provision, in which case the remainder of this Agreement will be enforceable.

Section 6.5. This Agreement may be executed in any number of counterparts, each of which will be deemed to be an original, but all of which together will constitute one instrument.

Section 6.6. This Agreement will be construed and enforced in accordance with the laws of the State of California.

*[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]*

Section 6.7. Time is of the essence of each covenant and condition in this Agreement for which a date of performance is specified.

OWNER:

THE CITY OF SAN DIEGO, a California  
municipal corporation

BY: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

*Approved as to form:*

JAN I. GOLDSMITH, City Attorney

BY: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

OPTIONEE:

CAPITAL POWER (US HOLDINGS) INC., a  
Delaware corporation

BY: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

BY: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

LENDER:

\_\_\_\_\_,  
a \_\_\_\_\_

BY: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_



STATE OF CALIFORNIA   )  
COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_ before me, \_\_\_\_\_ Notary  
Public, personally appeared \_\_\_\_\_, who  
proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are  
subscribed to the within instrument and acknowledged to me that he/she/they executed the same  
in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument  
the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that  
the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature \_\_\_\_\_ (Seal)

STATE OF CALIFORNIA   )  
COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_ before me, \_\_\_\_\_ Notary  
Public, personally appeared \_\_\_\_\_, who  
proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are  
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in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument  
the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that  
the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature \_\_\_\_\_ (Seal)

STATE OF CALIFORNIA   )  
COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_ before me, \_\_\_\_\_ Notary  
Public, personally appeared \_\_\_\_\_, who  
proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are  
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in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument  
the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that  
the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature \_\_\_\_\_ (Seal)

STATE OF CALIFORNIA   )  
COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_ before me, \_\_\_\_\_ Notary  
Public, personally appeared \_\_\_\_\_, who  
proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are  
subscribed to the within instrument and acknowledged to me that he/she/they executed the same  
in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument  
the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that  
the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature \_\_\_\_\_ (Seal)

## **EXHIBIT "A"**

### **(Legal Description)**

**The land referred to herein is situated in the State of California, County of San Diego, City of , and described as follows:**

#### **Parcel 1:**

That portion of Pueblo Lot 1306 of the Pueblo Lands of San Diego, in the City of San Diego, County of San Diego, State of California, according to Map thereof made by James Pascoe in 1870, a copy of which was filed in the office of the County Recorder on November 14, 1921, and is now known as Miscellaneous Map No. 36; lying easterly, southeasterly, and northeasterly of the northeasterly boundary line of that certain Grant Deed from the City of San Diego, a Municipal Corporation to the State of California, recorded January 8, 1971 as file no. 3902 of Official Records; and southerly of the southerly boundary line of Miramar Road.

APN: 345-021-02-00

Note: The above described legal description is for informational purposes only, and does not constitute a legal description by definition of the Subdivision Map Act.

#### **Parcel 2:**

That portion of Pueblo Lot 1304 of the Pueblo Lands of San Diego, in the City of San Diego, County of San Diego, State of California, according to Map thereof made by James Pascoe in 1870, a copy of which was filed in the office of the County Recorder on November 14, 1921, and is now known as Miscellaneous Map No. 36; lying easterly, and northeasterly of the northeasterly boundary line of that certain Grant Deed from the City of San Diego, a Municipal Corporation to the State of California, recorded January 8, 1971 as file no. 3902 of Official Records; and lying easterly and northeasterly of the northeasterly boundary line of that certain Grant Deed from the City of San Diego, a Municipal Corporation to the State of California, recorded October 10, 2007 as file no. 2007-0653178 of Official Records. APN: 345-021-03-00 Note: The above described legal description is for informational purposes only, and does not constitute a legal description by definition of the Subdivision Map Act.

#### **Parcel 3:**

That portion of Pueblo Lots 1305 and 1276 of the Pueblo Lands of San Diego, in the City of San Diego, County of San Diego, State of California, according to Map thereof made by James Pascoe in 1870, a copy of which was filed in the office of the County Recorder on November 14, 1921, and is now known as Miscellaneous Map No. 36; lying northerly and northeasterly of the northerly and northeasterly boundary line of Parcel 1A of that certain Final Order of Condemnation in favor of the State of California, recorded February 16, 1970 as file no. 28406 of Official Records; and lying easterly, and northeasterly of the northeasterly boundary line of that certain Grant Deed from the City of San Diego, a Municipal Corporation to the State of California, recorded January 8, 1971 as file no. 3902 of Official Records; and lying easterly and northeasterly of the northeasterly boundary line of that certain Grant Deed from the City of San Diego, a Municipal Corporation to the State of California recorded October 10, 2007 as file no. 2007-0653178 of Official Records.

Excepting from the above described Parcel No. 3, that portion of land as conveyed in that certain Grant Deed from the City of San Diego, a Municipal Corporation to the Atchison, Topeka, and Santa Fe Railway Company, a Kansas Corporation, recorded April 16, 1969 as file no. 66016 of Official Records.

APN: 348-021-03-00

Note: The above described legal description is for informational purposes only, and does not constitute a legal description by definition of the Subdivision Map Act.



**EXHIBIT "B"**

**(Deed of Trust)**

**EXHIBIT "4.3"**

**(Lease Agreement)**

EXHIBIT "13.1"

(Memorandum of Option Agreement)  
*[TO FOLLOW BEHIND THIS PAGE]*

RECORDING REQUESTED BY:

Chicago Title Company

AND WHEN RECORDED MAIL TO:

James R. Dawe, Esq.  
Seltzer Caplan McMahon Vitek  
A Law Corporation  
750 B Street, Suite 2100  
San Diego, California 92101

(SPACE ABOVE THIS LINE FOR RECORDER'S USE)

### MEMORANDUM OF OPTION AGREEMENT

THIS MEMORANDUM OF OPTION AGREEMENT ("**Memorandum**") is made and entered into as of \_\_\_\_\_, 20\_\_\_\_, by and between THE CITY OF SAN DIEGO, a California municipal corporation, ("**Owner**"), and CAPITAL POWER (US HOLDINGS) INC., a Delaware corporation, ("**Optionee**"), who agree as follows:

1. Owner is the fee owner of that certain real property in the City of San Diego, County of San Diego, State of California more particularly described on Exhibit "A" attached hereto and incorporated herein by this reference ("**Property**").

2. Owner and Optionee have entered into that certain Option Agreement, dated \_\_\_\_\_, 20\_\_\_\_ ("**Option Agreement**"), whereby Owner grants to Optionee the right and option to lease the Property.

3. The time period during which the "Option" (as defined in the Option Agreement) may be exercised by Optionee commences on \_\_\_\_\_, 20\_\_\_\_, and expires at midnight Pacific Time on the date five (5) years thereafter; provided, however, the Option Agreement allows for the extension of the Option Term under certain circumstances described therein.

4. This Memorandum is being recorded to give notice to the public that the Property is subject to the provisions and conditions of the Option Agreement.

5. This Memorandum is intended to summarize certain of the provisions and conditions of the Option Agreement, but in no way changes, modifies or otherwise affects any of the provisions and conditions of the Option Agreement.

*[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]*

6. In the event of any conflict between this Memorandum and the Option Agreement, the provisions and conditions of the Option Agreement shall prevail.

IN WITNESS WHEREOF, Owner and Optionee have executed this Memorandum of Option Agreement as of the day and year above written.

OWNER:

THE CITY OF SAN DIEGO, a California  
municipal corporation

BY: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

*Approved as to form:*

JAN I. GOLDSMITH, City Attorney

BY: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

OPTIONEE:

CAPITAL POWER (US HOLDINGS) INC., a  
Delaware corporation

BY: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

BY: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_



STATE OF \_\_\_\_\_ )  
 ) ss  
COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_ before me, \_\_\_\_\_ Notary  
Public, personally appeared \_\_\_\_\_, who proved to me on the  
basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within  
instrument and acknowledged to me that he/she/they executed the same in his/her/their  
authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or  
the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that  
the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature \_\_\_\_\_ (Seal)

STATE OF \_\_\_\_\_ )  
 ) ss  
COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_ before me, \_\_\_\_\_ Notary  
Public, personally appeared \_\_\_\_\_, who proved to me on the  
basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within  
instrument and acknowledged to me that he/she/they executed the same in his/her/their  
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the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature \_\_\_\_\_ (Seal)

STATE OF \_\_\_\_\_ )  
 ) ss  
COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_ before me, \_\_\_\_\_ Notary Public, personally appeared \_\_\_\_\_, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature \_\_\_\_\_ (Seal)

## EXHIBIT "A"

### (Legal Description)

The land referred to herein is situated in the State of California, County of San Diego, City of , and described as follows:

#### **Parcel 1:**

That portion of Pueblo Lot 1306 of the Pueblo Lands of San Diego, in the City of San Diego, County of San Diego, State of California, according to Map thereof made by James Pascoe in 1870, a copy of which was filed in the office of the County Recorder on November 14, 1921, and is now known as Miscellaneous Map No. 36; lying easterly, southeasterly, and northeasterly of the northeasterly boundary line of that certain Grant Deed from the City of San Diego, a Municipal Corporation to the State of California, recorded January 8, 1971 as file no. 3902 of Official Records; and southerly of the southerly boundary line of Miramar Road.

APN: 345-021-02-00

Note: The above described legal description is for informational purposes only, and does not constitute a legal description by definition of the Subdivision Map Act.

#### **Parcel 2:**

That portion of Pueblo Lot 1304 of the Pueblo Lands of San Diego, in the City of San Diego, County of San Diego, State of California, according to Map thereof made by James Pascoe in 1870, a copy of which was filed in the office of the County Recorder on November 14, 1921, and is now known as Miscellaneous Map No. 36; lying easterly, and northeasterly of the northeasterly boundary line of that certain Grant Deed from the City of San Diego, a Municipal Corporation to the State of California, recorded January 8, 1971 as file no. 3902 of Official Records; and lying easterly and northeasterly of the northeasterly boundary line of that certain Grant Deed from the City of San Diego, a Municipal Corporation to the State of California, recorded October 10, 2007 as file no. 2007-0653178 of Official Records. APN: 345-021-03-00 Note: The above described legal description is for informational purposes only, and does not constitute a legal description by definition of the Subdivision Map Act.

#### **Parcel 3:**

That portion of Pueblo Lots 1305 and 1276 of the Pueblo Lands of San Diego, in the City of San Diego, County of San Diego, State of California, according to Map thereof made by James Pascoe in 1870, a copy of which was filed in the office of the County Recorder on November 14, 1921, and is now known as Miscellaneous Map No. 36; lying northerly and northeasterly of the northerly and northeasterly boundary line of Parcel 1A of that certain Final Order of Condemnation in favor of the State of California, recorded February 16, 1970 as file no. 28406 of Official Records; and lying easterly, and northeasterly of the northeasterly boundary line of that certain Grant Deed from the City of San Diego, a Municipal Corporation to the State of California, recorded January 8, 1971 as file no. 3902 of Official Records; and lying easterly and northeasterly of the northeasterly boundary line of that certain Grant Deed from the City of San Diego, a Municipal Corporation to the State of California recorded October 10, 2007 as file no. 2007-0653178 of Official Records.

Excepting from the above described Parcel No. 3, that portion of land as conveyed in that certain Grant Deed from the City of San Diego, a Municipal Corporation to the Atchison, Topeka, and Santa Fe Railway Company, a Kansas Corporation, recorded April 16, 1969 as file no. 66016 of Official Records.

APN: 348-021-03-00

Note: The above described legal description is for informational purposes only, and does not constitute a legal description by definition of the Subdivision Map Act.





ORDINANCE NUMBER O-\_\_\_\_\_ (NEW SERIES)

DATE OF FINAL PASSAGE \_\_\_\_\_

AN ORDINANCE OF THE SAN DIEGO CITY COUNCIL  
AUTHORIZING THE LEASE TO CAPITAL POWER (US  
HOLDINGS) INC. OF PORTIONS OF PUEBLO LOTS 1304,  
1305, AND 1306 OF THE PUEBLO LANDS OF THE CITY OF  
SAN DIEGO.

WHEREAS, the Council of the City of San Diego desires to lease to Capital Power (US Holdings) Inc. (Capital Power) portions of Pueblo Lots 1304, 1305, and 1306 of the Pueblo Lands of the City of San Diego; and

WHEREAS, the proposed lease to Capital Power shall be for the entitlement, erection, development, construction, use, operation, repair, maintenance and restoration of a power plant with a generating facility capacity of approximately 850 Megawatts, but not less than 350 Megawatts, for an initial term of twenty-five years with two options to extend the initial term for an additional ten years per option, for a total of twenty years beyond the expiration of the initial term; and

WHEREAS, San Diego Charter section 219 prohibits a lease of Pueblo Lands owned by the City of San Diego for a period of time exceeding fifteen years unless first authorized by the electors of the City of San Diego; NOW THEREFORE,

BE IT ORDAINED, by the Council of the City of San Diego, as follows:

Section 1. The City of San Diego is authorized to lease to Capital Power (US Holdings) Inc. portions of Pueblo Lots 1304, 1305, and 1306 of the Pueblo Lands of the City of San Diego, which portions cumulatively constitute approximately fifty acres that lie between Interstate 805 to the west, the existing western boundary of Marine Corps Air Station Miramar to the east, and Miramar Road to the

north, and which portions of the Pueblo Lands are more specifically described in Document No. OO-  
\_\_\_\_\_ on file in the Office of the City Clerk.

Section 2. This ordinance shall become effective only if and after it is affirmatively approved by a majority vote of the qualified electors of the City of San Diego voting at a Municipal Special Election to be held in the City of San Diego on November 6, 2012, at which election this ordinance shall be submitted to the voters for ratification.

APPROVED: JAN I. GOLDSMITH, City Attorney

By \_\_\_\_\_  
Hilda R. Mendoza  
Deputy City Attorney

HRM:as  
06/19/12  
Or.Dept:Mayor

I hereby certify that the foregoing Ordinance was passed by the Council of the City of San Diego, at its meeting of \_\_\_\_\_.

ELIZABETH S. MALAND  
City Clerk

By \_\_\_\_\_  
Deputy City Clerk

Approved: \_\_\_\_\_  
(date)

\_\_\_\_\_  
JERRY SANDERS, Mayor

Vetoed: \_\_\_\_\_  
(date)

\_\_\_\_\_  
JERRY SANDERS, Mayor

---

**CITY OF SAN DIEGO**  
**GROUND LEASE AGREEMENT**

**BY AND BETWEEN**

**THE CITY OF SAN DIEGO,**  
**A CALIFORNIA MUNICIPAL CORPORATION, AS GROUND LESSOR**

**AND**

**CAPITAL POWER (US HOLDINGS) INC.,**  
**A DELAWARE CORPORATION, AS GROUND Lessee**

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## **CITY OF SAN DIEGO GROUND LEASE AGREEMENT**

THIS CITY OF SAN DIEGO GROUND LEASE AGREEMENT (this "**Lease**") dated as of \_\_\_\_\_, 20\_\_ ("**Commencement Date**"), is made by and between THE CITY OF SAN DIEGO, a California municipal corporation ("**City**"), as ground lessor, and CAPITAL POWER (US HOLDINGS) INC., a Delaware corporation (the "**Lessee**"), as ground lessee, (City and Lessee are sometimes referred to herein individually as a "**Party**" and collectively, as the "**Parties**"), as follows:

### **AGREEMENT**

FOR VALUABLE CONSIDERATION, the sufficiency of which is acknowledged, the Parties hereby adopt and incorporate all of the Exhibits and the Addendum attached hereto, and further agree as follows:

#### **1. DEFINITIONS; INTERPRETATION**

- 1.1 Definitions. Capitalized terms used in this Lease and not defined in the attached Addendum "A" shall have the meanings specified in the main body of this Lease.
- 1.2 Interpretation. In this Lease, unless a clear contrary intention appears: (a) the singular includes the plural and vice versa; (b) a reference to any Person includes such Person's successors and assigns, but in the case of a Party, only if and as such successors and assigns are allowed by this Lease; (c) reference to any gender includes the other gender; (d) reference to any agreement (including this Lease), document, instrument or tariff means such agreement, document, instrument or tariff as amended or modified and in effect from time to time in accordance with the terms thereof and, if applicable, the terms hereof; (e) reference to any Governmental Rule means such Governmental Rule as amended, modified, codified or reenacted, in whole or in part, and in effect from time to time, including, if applicable, rules and regulations promulgated thereunder; (f) reference to any Section means such Section of this Lease, and references in any Section or definition to any clause means such clause of such Section or definition; (g) "hereunder", "hereof", "hereto" and words of similar import shall be deemed references to this Lease as a whole and not to any particular Section or other provision hereof or thereof; (h) "including" (and with correlative meaning "include") means including without limiting the generality of any description preceding such term; and (i) relative to the determination of any period of time, "from" or "after" means "from and including," "to" means "to but excluding" and "through" means "through and including."
- 1.3 Titles and Headings. Titles and headings in this Lease are inserted for convenience of reference only and are not intended to be a part of, or to affect the meaning or interpretation of, this Lease.

## 2. LEASE

- 2.1 Lease of Leased Premises. Subject to the terms and conditions of this Lease, City hereby leases to Lessee, and Lessee hereby leases from City, that certain land situated in the City of San Diego, San Diego County, California, as is more particularly described on Exhibit "2.1(a)" attached hereto (the "**Leased Premises**"), subject to the matters set forth in Exhibit "2.1(b)" attached hereto (collectively, the "**Permitted Encumbrances**").
- 2.2 Plat Showing Leased Premises. Attached hereto as Exhibit "2.2" is a plat depicting the Leased Premises.
- 2.3 Grant of Easements. Appurtenant to the leasehold interest created pursuant to this Lease shall be those certain existing easements of record encumbering the Leased Premises described on Exhibit 2.3(a) attached hereto and those certain easement rights to be granted to Lessee by City (or an Affiliate of Lessee) described on Exhibit 2.3(b) attached hereto.
- 2.4 Guaranty of Lease. The obligations and agreements of Lessee under this Lease shall be guaranteed by Guarantor. Concurrently with the joint execution of this Lease, Guarantor shall execute and deliver a Guaranty of Lease in the form of Exhibit "2.4" attached hereto ("**Guaranty of Lease**").
- 2.5 City's Consent, Discretion. City's consent or approval under this Lease shall mean the written consent or approval of the Mayor of San Diego, or his or her designee ("**Mayor**"), unless otherwise expressly provided. City's discretionary acts hereunder shall be made in the Mayor's discretion, unless otherwise expressly provided.
- 2.6 Reservation of Rights.
- 2.6.1 Mineral Rights. Subject to the provisions and conditions of Section 2.6.3 below, City reserves all rights, title and interest in and to any and all subsurface natural gas, oil, minerals and water on or within the Leased Premises.
- 2.6.2 Repairs. Upon at least forty-eight (48) hours notice to Lessee, City may enter upon the Leased Premises for the purpose of making repairs to the existing municipal resources and services located on the Leased Premises described on Exhibit "2.6.2" attached hereto.
- 2.6.3 Noninterference. City shall not interfere with Lessee's use of the Leased Premises, and shall repair or reimburse Lessee for reasonable costs incurred by Lessee to repair any physical damages to the Leased Premises or Lessee's personal property directly caused by City exercising any of its rights reserved under this Section 2.6. City shall pay the costs of maintenance and repair of all City installations made pursuant to these reserved rights.



- 2.7 Political Activities. Lessee shall not use the Leased Premises to promote, endorse, or campaign for the nomination or election of any individual to any public office, be it partisan or nonpartisan; however, Lessee may allow the use of the Leased Premises as a forum for open public debate.

### 3. LEASE TERM

- 3.1 Term. The initial term of this Lease (the “**Initial Term**”) shall be twenty-five (25) years, commencing on the Commencement Date and expiring at 11:59 p.m. Pacific Time on the last day of the Initial Term.
- 3.1.1 Renewal Options. Provided Lessee is not then in default of this Lease (beyond the expiration of any applicable cure periods), Lessee shall have two (2) options to extend the Initial Term for an additional ten (10) years per option, for a total of twenty (20) years beyond the expiration of the Initial Term (each, a “**Renewal Option**” and collectively, the “**Renewal Options**”). Each Renewal Option shall be exercisable by Lessee upon no less than six (6) months prior written notice to City. The Initial Term and the Renewal Options shall collectively be referred to herein as the “**Term**”.
- 3.1.2 Lease Year. As used in this Lease, “**Lease Year**” shall mean each twelve (12) month period during the Term, commencing on the Commencement Date.
- 3.2 Memorandum of Lease. Contemporaneously herewith, the Parties shall execute a single original Memorandum of Lease in the form of Exhibit “3.2” hereto (the “**Memorandum of Lease**”). Lessee, at its sole cost and expense, shall cause the recordation of the Memorandum of Lease in the Office of the San Diego County Recorder with other documents or instruments which may be required for recording the same.
- 3.3 Holdover. Any holding over by Lessee after the expiration or earlier termination of this Lease shall not be considered a renewal or extension of this Lease. The occupancy of the Leased Premises after the expiration or earlier termination of this Lease shall constitute a month-to-month tenancy at will, and all other terms and conditions of this Lease shall continue in full force and effect.

### 4. ALLOWED USE

- 4.1 Allowed Use. Subject to Lessee’s right to modify the generating facility capacity and(or) the design of the Plant pursuant to the provisions and conditions of Section 4.3 hereof, Lessee may use the Leased Premises for the entitlement, erection, development, construction, use, operation, repair, maintenance and restoration of a combined cycle natural gas fired power plant using General Electric 7FA Rapid Response or equivalent technology with a generating facility capacity of approximately 850 MW (the “**Plant**”), and any additions or modifications thereto allowed pursuant to this Lease, and for all purposes

incidental thereto or to Lessee's operations. The Plant shall be designed as an enclosed facility comparable in quality, finish and design to the adjacent North City Water Reclamation Plant and shall be known as "North City Energy Center," "North City Power Plant," or such other name that is mutually agreeable to City and Lessee. Lessee shall consult with the United States Marine Corps and(or) the United States Navy to ensure that the Plant complies with any and all applicable laws and the Permitted Encumbrances, including, without limitation, the easement recorded as Document No. 1994-0437549 in the Official Records of the County of San Diego Office of the Recorder (the "**Navy Easement**"). Attached hereto as Exhibit "4.1" is a description of the entitlements obtained with respect to the Plant. The final scope, configuration and capacity of the Plant shall be determined by Lessee so long as it is consistent with the terms of the Lease. Lessee reserves the right to develop and construct the Plant in phases. Lessee may not use the Leased Premises for any other purpose without City's prior written consent.

- 4.2 Title to Plant. The Parties acknowledge that the title to the Plant is and shall remain the property of Lessee during the Term, regardless of the manner of installation or affixation of the Plant to the Leased Premises. It is the express intention and agreement of the Parties that the separation of the title to the Leased Premises from the title to the Plant is to remain so separated throughout the Term.
- 4.3 Changes to Plant Capacity. Notwithstanding the description of the Plant in Section 4.1, Lessee may, in its sole discretion, after having first received a determination of Data Adequacy from the California Energy Commission with respect to its Application for Certification for licensing of the Plant, reduce the generating facility capacity of the Plant, for any reason, to an amount not less than 350 MW and consisting of one or two General Electric 7FA Rapid Response gas turbine(s) or equivalent technology in combined cycle configuration. Notwithstanding the description of the Plant in Section 4.1, in the event that Lessee has first obtained a Final Staff Assessment from the California Energy Commission in connection with Lessee's pursuit of a license to construct and operate the Plant as a combined cycle power plant as described above, but Lessee is unable to obtain a contract on reasonable terms for the sale of energy and(or) the capacity of the Plant in a combined cycle configuration, Lessee may, with the prior approval of the Mayor and City Council by ordinance (and not by resolution), redesign the Plant to a simple cycle configuration of not less than 400 MW, having a thermal efficiency of at least forty-three percent (43%) (LHV), new and clean at ISO conditions.
- 4.4 Security During Construction Period. Within ten (10) days of Lessee's issuance of a notice to proceed for the construction of the Plant on the Leased Premises, Lessee shall deposit the Security ("**Construction Security**") with City pursuant to the provisions and conditions of this Section 4.4. The amount of the Construction Security shall be determined by a reputable engineering firm acceptable to the Parties, based upon the estimated cost to remove the Plant and restore the Leased Premises to the same condition as they were immediately prior to the commencement of construction as described in this Section 4.4, net of the salvage

of all equipment and material remaining on site. Upon the occurrence of an uncured default by Lessee during the construction of the Plant on the Leased Premises and where City has elected to terminate the Lease and all rights of Lessee hereunder pursuant to the provisions and conditions of Section 14.2 of this Lease, City shall be entitled to realize upon the Construction Security if (and only if), in the City's sole discretion, Lessee does not restore the Leased Premises to substantially the same condition as they were immediately prior to the commencement of such construction. Upon the completion of the construction of the Plant on the Leased Premises, City shall release the Construction Security. For purposes of this Section 4.4, "completion of the construction of the Plant" shall mean the issuance of a certificate of occupancy or similar certification issued by City or any other governmental authority indicating that the construction of the Plant on the Leased Premises is complete. If Lessee has not entered into a contract to sell the energy and(or) the capacity of the Plant at the time Lessee is required to deposit the Security pursuant to the provisions and conditions of this Section 4.4, then Lessee shall be responsible for the cost of the Construction Security. If Lessee has entered into a contract to sell the energy and(or) the capacity of the Plant at the time Lessee is required to deposit the Security pursuant to the provisions and conditions of this Section 4.4, then City shall be solely liable for the cost of the Construction Security. In lieu of payment in cash, Lessee shall receive a credit for any and all amounts for which City is liable under Section 4.4 against Base Rent due and payable by Lessee under this Lease. Notwithstanding anything to the contrary contained herein, the amount of the Construction Security deposited with the City shall not exceed Forty Million Dollars (\$40,000,000).

- 4.5 Security Following Construction Period. Beginning three (3) years prior to the expiration of any contract to sell the energy and(or) the capacity of the Plant, or at the beginning of any period of time during which there is no contract in effect for the sale of energy and(or) the capacity of the Plant, whichever comes first, Lessee shall again deposit the Security ("**Post-construction Security**") with the City pursuant to the provisions and conditions of this Section 4.5, and Lessee shall be responsible for the cost of the Post-construction Security. The amount of the Post-construction Security shall be determined by a reputable engineering firm acceptable to the Parties, based upon the estimated cost to remove the Plant and restore the Leased Premises to the same condition as they were immediately prior to the commencement of construction as described in Section 4.4, net of the salvage of all equipment and material remaining on site. If and when Lessee enters into or extends a contract to sell the energy and(or) the capacity of the Plant where such contract has a term of five (5) years or longer, City shall release the Post-construction Security. If however, Lessee fails to restore the Leased Premises to substantially the same condition as they were immediately prior to the commencement of construction as described in Section 4.4 upon the expiration or earlier termination of this Lease, City may realize upon the Post-construction Security in order to effect the removal of the Plant and the restoration of the Leased Premises to such condition. Lessee's failure to deposit the Post-construction Security with City in accordance with this Section 4.5 shall

constitute a breach of this Lease and (upon the expiration of any applicable cure periods) City shall have the right to pursue all of its rights and remedies under Section 14.2 hereof.

- 4.6 Utilities. Lessee shall order, obtain, and pay for all utilities and service and installation charges in connection with the operation of the Leased Premises.

## 5. RENT

### 5.1 Base Rent.

#### 5.1.1 Payment of Base Rent.

5.1.1.1 From and including the Commencement Date until the Commercial Operations Date, Lessee shall pay to City annual base rent for each applicable Lease Year in an amount equal to the projected annual base rent for the first year after the Commercial Operations Date. The calculation of the projected annual rent for the first year after the Commercial Operations Date shall use Lessee's projection of the generating facility capacity for the Plant (which projection shall have been made within thirty (30) days prior to the Commencement Date and subject to City's reasonable approval) as the "generating facility capacity" referenced in Section 5.1.1.2.

5.1.1.2 From and after the Commercial Operations Date and until the last day of the Term, Lessee shall pay to City annual base rent for each applicable Lease Year as follows: (i) if the generating facility capacity is 350 MW, then Lessee shall pay to City annual base rent in the amount of One Million Fifty Thousand Dollars (\$1,050,000); (ii) if the generating facility capacity is more than 350 MW and less than 500 MW, then Lessee shall pay to City annual base rent in the amount of One Million Fifty Thousand Dollars (\$1,050,000) PLUS Three Thousand Dollars (\$3,000) for each MW over 350 MW; and (iii) if the generating facility capacity is 500 MW or more, or the Plant will utilize a simple cycle configuration, then Lessee shall pay to City annual base rent in the amount of One Million Five Hundred Thousand Dollars (\$1,500,000). The annual base rent for each Lease Year shall be determined based upon the generating facility capacity of the Plant on January 1<sup>st</sup> of each such Lease Year.

5.1.1.3 The annual base rent payable pursuant to this Section 5.1.1 is hereinafter referred to as the "**Base Rent.**"

5.1.2 Timing of Base Rent. The Base Rent shall be payable in advance on the first day of each calendar quarter in four (4) equal installments.

5.1.3 Proration of Base Rent. If the Term shall terminate on a date other than the last day of a calendar quarter, then Base Rent shall be prorated on a per diem basis.

5.1.4 Net Lease. This Lease shall be a “net lease.” Lessee shall pay, prior to delinquency that could create a material risk of forfeiture or give rise to a penalty and as additional rent, each and every item of expense of every kind and nature whatsoever related to or arising from the Leased Premises, or by reason of or in any manner connected with or arising from Lessee’s operation, maintenance, repair, use or occupancy of the property comprising the Leased Premises or any portion thereof at any time. Notwithstanding anything to the contrary contained in this Lease, Lessee shall not be required to pay any of the following: (a) depreciation, amortization, financing or refinancing costs incurred by City with respect to the Leased Premises and/or any City-owned improvements thereon; (b) consulting, legal, staff and other similar costs incidental to City’s ownership of the Leased Premises, except City’s cost-recovery fees properly charged to Lessee; (c) any costs arising from or pursuant to any instrument or agreement affecting the Leased Premises that is not a Permitted Lien and to which City is a party and Lessee is not a party; and (d) except as may have been caused by Lessee’s acts and/or omissions, any cost or expense arising directly or indirectly from any conditions existing on, at or with respect to the Leased Premises before the Commencement Date.

5.2 Payment of Impositions.

5.2.1 Real Estate Taxes. During the Term, Lessee shall pay all real estate taxes, special assessments and other governmental charges and impositions, general or special, ordinary or extraordinary, foreseen or unforeseen, of any kind and nature relating to this Lease, the Leased Premises or the improvements thereon owned, leased or subleased by Lessee, or similar tax or charge which is now or hereafter levied, assessed, or imposed upon City or Lessee by the State of California, or by any political subdivision thereof, or which City or Lessee is now or hereafter otherwise required by the State of California, or any political subdivision thereof to pay, with respect to the Lease, the use or occupancy of the Leased Premises or City’s fee ownership of the Leased Premises (such taxes, assessments, charges and impositions are individually an “**Imposition**” and collectively, “**Impositions**”); provided, however, that Lessee shall not be required to pay any such Imposition during any period that Lessee shall in good faith contest the validity or the amount of any such Imposition. Notwithstanding anything to the contrary contained herein, City shall not apply any Imposition against Lessee on a discriminatory basis.

5.2.2 Sales and Use Taxes. During the Term, Lessee shall pay any sales and use taxes associated with the purchase and use of tangible personal property



placed into service or otherwise consumed on the Leased Premises, and shall use commercially reasonable efforts to report to City any Bradley-Burns Uniform Local Sales and Use Taxes paid or payable by Lessee. Commencing on the Commencement Date and continuing throughout the Lease Term, Lessee shall pay any sales and use taxes associated with the purchase and use of tangible personal property placed into service or otherwise consumed on the Leased Premises, and shall use commercially reasonable efforts to report to City any Bradley-Burns Uniform Local Sales and Use Taxes paid or payable by Lessee.

5.2.3 Franchise Fees.

5.2.3.1 During negotiations with a prospective public utility purchaser of power generated on the Leased Premise, Lessee shall propose transaction structures that preserve City's opportunity to collect franchise fees pursuant to either Public Utility Code Section 6231 ("**Franchise Fees**") or municipal surcharge fees pursuant to Public Utility Code Section 6351 ("**Municipal Surcharge Fees**").

5.2.3.2 If Lessee enters into any transaction for the sale of power generated on the Leased Premises to any California public utility that is a party to an existing franchise agreement with City, and as a result of the structure of such transaction neither Franchise Fees nor Municipal Surcharge Fees (to which City otherwise would be entitled) are payable to City with respect to such transaction, Lessee shall, after the end of each calendar year of the delivery term of such transaction, pay to City an alternate fee amount (to be prorated for any partial year) equal to the result of the following formula:

**AFA = Surcharge Rate \* GUG\* Aspot**, where:

"AFA" is the alternative fee amount in US\$;

"Surcharge Rate" is 0.075%;

"GUG" is the total amount of gas used to generate power on the Leased Premises that is sold to a utility during such year; and

"Aspot" is the average cost of natural gas published by "Gas Daily" (or a successor publication) for the "SoCal Gas, city-gate point" for such year.

5.2.4 Taxes on Rentals and/or Plant Income. Notwithstanding anything contained in this Lease to the contrary, Lessee shall have no liability or obligation with respect to the payment of any tax or imposition charged or levied upon the rentals payable by Lessee under this Lease. City shall have no liability or obligation with respect to the payment of any tax or

imposition charged or levied upon any income of Lessee resulting from the operation or ownership of the Plant.

5.2.5 Imposition Payable in Installments. If, by law, any Imposition is or may be payable in installments, Lessee may pay the Imposition in installments (with any accrued interest) as they become due and before incurring any additional charges. With respect to any Imposition, Lessee shall pay only that portion of an Imposition that accrues during the Term.

5.2.6 Proration of Imposition. Any Imposition accruing during a tax period during which the Term shall end shall be adjusted between City and Lessee as of the end of the Term, so that Lessee shall pay only an amount which bears the same relation to the total Imposition as the part of such tax period included within the Term bears to the entire tax period.

5.2.7 City's Right to Pay Impositions. If at any time during the Term, Impositions payable by Lessee as provided herein are not paid when due and payable, then City, upon thirty (30) days' notice to Lessee, or with such notice (if any) as is reasonably practicable under the circumstances in the case of an emergency, shall have the right, but not the obligation, to pay the same and be reimbursed therefore by Lessee as set forth in Section 5.2.8; provided that City shall have no right to pay any such Imposition during any period that Lessee shall in good faith be contesting the validity or the amount of the Imposition.

5.2.8 Additional Rent; Impositions Paid by City. If at any time during the Term, City shall have paid any Impositions payable by Lessee hereunder, the amount of such payment shall be deemed additional rent due and payable immediately upon and as of the date paid by City.

5.3 Payments. All payments to be paid by Lessee under this Lease shall be made by electronic fund transfer or payable to "City Treasurer" and mailed with appropriate reference to:

San Diego City Treasurer  
P.O. Box 122289  
San Diego, California 92112-4165

Or hand delivered to:

The Office of the City Treasurer  
Civic Center Plaza  
1200 Third Avenue, First Floor  
San Diego, California 92101

City may change the place of payment at any time upon thirty (30) days written notice to Lessee. Mailed payments shall be deemed paid upon the date the payment is postmarked

by the postal authorities. If postmarks are illegible, the payment shall be deemed received only upon actual receipt.

5.4 Delinquent Payments. Amounts due City under this Lease and not paid when due will be referred to the San Diego City Treasurer for collection, and Lessee shall pay to City interest on the unpaid amount at the rate of twelve percent (12%) per year. Acceptance of interest charges and any portion of the interest charges by City shall neither constitute a waiver of Lessee's default with respect to late payment nor prevent City from exercising any other rights and remedies available at law or in equity.

5.5 Tax Notices. Promptly upon receipt, each Party shall furnish to the other any tax assessment notices that it receives related to the Leased Premises.

## **6. QUIET ENJOYMENT**

6.1 Quiet Enjoyment. Lessee, performing the covenants and agreements in this Lease, shall at all times during the Term peaceably and quietly have, hold, and enjoy the Leased Premises. If Lessee is temporarily dispossessed through action or claim of a title superior to City's, this Lease shall not be voidable nor shall City be liable to Lessee for any loss or resulting damages. City shall indemnify, defend and hold harmless Lessee and its Related Parties in their peaceable, quiet and undisputed enjoyment of the Leased Premises (subject to the Permitted Liens) against any and all claims, demands, liabilities and expenses (including attorneys' fees and costs) of all persons claiming by, through or under City. City represents and warrants that it is not in default of any of its obligations under the Permitted Liens.

## **7. ACCESS RIGHTS**

7.1 City's Rights of Access. Lessee may quietly enjoy the Leased Premises, free from material interference by City, except as reasonably required in emergency situations. During such an emergency, City, its contractors, employees, agents and invitees may at all times enter and inspect the Leased Premises and the operations conducted on the Leased Premises. For all non-emergency situations, City, its contractors, employees, agents and invitees may at all reasonable times enter and inspect the Leased Premises and the operations conducted on the Leased Premises, subject to Lessee's prior consent, which consent shall not be unreasonably withheld or delayed.

7.2 Non-Interference. Neither Party shall undertake or engage in any activities which unreasonably interfere with the operation of the Plant.

## **8. LIENS**

8.1 City's Discharge of Liens. City shall not directly or indirectly do, or omit to do, any act which shall give rise to any Lien on or with respect to the Lessee's Leasehold Improvements, title thereto or any interest therein, except those Liens

included in the Permitted Liens; provided, however, that City shall not be responsible or liable for, nor be deemed to have breached its obligations hereunder as a result of, any Liens upon the Leased Premises or the Lessee's Leasehold Improvements resulting from Lessee's acts or omissions. City shall not amend any of the Permitted Liens if any such amendment would affect the Leased Premises or the Lessee's Leasehold Improvements or any addition or modification thereto unless City shall first notify Lessee of such proposed amendment and obtain Lessee's written consent thereto, which consent shall not be unreasonably withheld or delayed. If any Lien not excepted above shall arise at any time, City shall within thirty (30) days of notice of the filing thereof, at its sole cost and expense, take such action as may be necessary to discharge or eliminate (or bond in a manner reasonably satisfactory to Lessee) any such Lien. Except as otherwise provided in this Lease, including without limitation Section 5.2, City shall pay or cause to be paid on or before the time or times prescribed by law (after giving effect to any applicable grace period) any Impositions imposed on City or the Leased Premises that, if unpaid, might result in any Lien prohibited herein.

- 8.2 Lessee's Discharge of Liens. Except for Liens arising under any Financing Document by, through, or under Lessee, Lessee shall keep, or cause to be kept, the Leased Premises, title thereto or any interest therein, free and clear of mechanics', laborers' or material men's liens and other liens of a similar nature which may arise in connection with work of any character performed by or at the direction of Lessee ("**Lessee-Caused Liens**"). Lessee shall not be responsible or liable for, nor be deemed to have breached its obligations hereunder as a result of, any Liens resulting from City's acts or omissions. Within thirty (30) days after notice of the filing of a Lessee-Caused Lien (except for Liens arising under any Financing Document), Lessee shall, at Lessee's sole cost and expense, take such action as may be necessary to discharge or eliminate (or bond in a manner reasonably satisfactory to City) each such Lessee-Caused Lien; provided, however, that Lessee shall not be required to discharge any such Lessee-Caused Lien during any period that Lessee shall in good faith contest the validity or the amount of the Lessee-Caused Lien.
- 8.3 Discharge by Other Party. Upon either Party's discovery of a Lien required to be discharged by it under this Article 8, such Party shall promptly give written notice thereof to the other Party. If such Party shall fail to discharge any such Lien or post a bond within the period allotted for such discharge hereunder (including such time during which the Lien may be contested in good faith), then in addition to any other right or remedy of the other Party, the other Party may, but shall not be obligated to, procure the discharge of the same by paying the amount claimed to be due or by applying the amount claimed to be due by deposit in court or bonding, and concurrently with such discharge deliver notice of such discharge to the other Party. Any amount paid or deposited by the other Party for any of the aforesaid purposes, and all costs and other expenses of the other Party, including reasonable attorneys' fees and costs, in defending any such action or in procuring the discharge of such Lien, with all necessary disbursements in connection

therewith, together with simple interest thereon at an annual rate of interest equal to the lesser of (a) six percent (6%) per annum, or (b) the maximum interest rate allowed by applicable law from the date of the payment or deposit, shall be payable by such Party to the other Party within fifteen (15) days after demand.

- 8.4 No Authority to Bind City. Lessee shall have no power or authority to make any contract which shall bind City or which may create or be the foundation for any lien or claim upon or against City's interest in the Leased Premises. Lessee shall protect, defend, indemnify, and hold City harmless from and against any claim that Lessee or any of Lessee's Related Parties, or any contractor, subcontractor, supplier, material man, workman or other Person who engages in or participates in any construction of or any improvements to the Plant or any additions, alterations, changes or replacements thereto, has or shall have had any power or authority to make any contract binding City, or which may create or be the foundation of any lien or claim upon or against City's interest in the Leased Premises. Unless bound by a written contract executed and delivered by City, City shall have no responsibility or liability to any Person who engages in or participates in any such construction, improvement, addition, alteration, change or replacement.
- 8.5 No Authority to Bind Lessee. City shall have no power or authority to make any contract which shall bind Lessee or which may create or be the foundation for any lien or claim upon or against Lessee's interest in the Leased Premises or the Lessee's Leasehold Improvements. City shall protect, defend, indemnify, and hold Lessee and its Related Parties harmless from and against any claim that City or any of City's Related Parties has or shall have had any power or authority to make any contract binding Lessee, or which may create or be the foundation of any lien or claim upon or against Lessee's interest in the Leased Premises the Lessee's Leasehold Improvements.

## **9. ENVIRONMENTAL COVENANTS AND ENVIRONMENTAL INDEMNIFICATION**

- 9.1 Environmental Covenants of City. City shall not intentionally by act or omission cause any Environmental Conditions or Environmental Noncompliance in, on, under, or from the Leased Premises, and shall not permit and shall promptly remedy the existence of any known Environmental Conditions or known Environmental Noncompliance in, on, under, or from the Leased Premises which could reasonably be expected to lead to any Environmental Claim or Environmental Expense asserted against or incurred by Lessee or its Affiliates. Without reasonable cause to do so, City shall have no obligation to inspect the Leased Premises for the purposes of this Section 9.1.
- 9.2 Existing Environmental Conditions. Notwithstanding anything to the contrary contained herein, this Section 9.2 shall set forth the rights and obligations of City and Lessee with respect to (i) any and all Environmental Conditions existing in, on, under, or from the Leased Premises as of the Commencement Date, regardless



of whether or not such Environmental Conditions constitute an Environmental Noncompliance; and (ii) any and all Environmental Conditions existing outside the boundaries of the Leased Premises that arose as a result of the release of any Hazardous Materials in, on, under, or from the Leased Premises prior to the Commencement Date, regardless of whether or not such Environmental Conditions constitute an Environmental Noncompliance (collectively, "**Existing Environmental Conditions**").

9.2.1 Lessee shall have the right (but not the obligation) to identify and cause the cleanup, remediation and(or) removal of any Existing Environmental Conditions to the satisfaction of each governmental agency having authority, including, without limitation, the DEH, and in accordance with all applicable laws, rules, and regulations of Governmental Authorities. Prior to the commencement of any cleanup, remediation and/or removal of any Existing Environmental Conditions, Lessee shall make available to City and City shall have an opportunity to review and approve in writing (i) a description of the Existing Environmental Conditions; (ii) a description of the cleanup, remediation and/or removal to be performed; (iii) the name of the contractor(s) who will perform the cleanup, remediation and/or removal of the Existing Environmental Conditions; (iv) the anticipated cost to perform the cleanup, remediation and/or removal of the Existing Environmental Conditions; and (iv) the anticipated schedule to complete the cleanup, remediation and/or removal of the Existing Environmental Conditions. Any contractor who performs the cleanup, remediation and/or removal of the Existing Environmental Conditions shall be qualified and licensed to perform such work. Notwithstanding anything to the contrary contained herein, City's approval pursuant to this Section 9.2.1 shall not be unreasonably withheld, conditioned, or delayed and shall be delivered to Lessee within forty-five (45) days after Lessee has made such information and documentation available to City pursuant to this Section 9.2.1, or such earlier date as Lessee is required to commence such cleanup, remediation and/or removal pursuant to any applicable laws, rules and regulations of Governmental Authorities.

9.2.2 Subject to the provisions and conditions of Section 9.2.3 below, City shall be liable for fifty percent (50%) of any and all Environmental Claims or Environmental Expenses resulting from the identification, cleanup, remediation and(or) removal of any Existing Environmental Conditions pursuant to the provisions and conditions of Section 9.2.1; provided, however, City's aggregate liability under this Section 9.2.2 shall not exceed Five Million Dollars (\$5,000,000).

9.2.3 Lessee shall receive a credit against Base Rent next due and payable under this Lease for any and all amounts for which City is liable under Section 9.2.2. For example, if City is liable for an amount equal to Two Million Five Hundred Thousand Dollars (\$2,500,000) pursuant to the provisions

and conditions of Section 9.2.2 of this Lease, and the then current Base Rent due and payable under this Lease is One Million Five Hundred Thousand Dollars (\$1,500,000), then Lessee shall receive a credit against Base Rent in the amount of One Million Five Hundred Thousand Dollars (\$1,500,000) in the first year after City becomes liable for such amount pursuant to the provisions and conditions of Section 9.2.2 of this Lease and a credit against Base Rent in the amount of One Million Dollars (\$1,000,000) in the second year after City becomes liable for such amount pursuant to the provisions and conditions of Section 9.2.2 of this Lease.

9.3 Hazardous Materials during Term. Lessee shall not allow the illegal installation, storage, utilization, generation, sale or release of hazardous or otherwise regulated substances in, on, under, or from the Leased Premises. Lessee shall, prior to initiating any operations, obtain all required permits from applicable regulatory agencies, including without limitation the San Diego County Department of Environmental Health, local fire agencies, the San Diego County Department of Weights and Measures, the San Diego County Air Pollution Control District, and the San Diego Regional Water Quality Control Board. Installing, utilizing, storing, or any other presence of any Hazardous Materials includes boxes, bags, bottles, drums, cylinders, above or below ground tanks, equipment with tanks, or any other type of container, equipment, or device which holds or incorporates any Hazardous Materials. Notwithstanding anything to the contrary contained herein, City acknowledges and agrees that Lessee shall have the right to install, store, utilize, generate and(or) release in, on, under, or from the Leased Premises at all times during the Term the Hazardous Materials normally associated with the use described in Section 4.1 hereof.

9.3.1 Release. For the purposes of this provision, a release shall include without limitation any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or otherwise disposing of Hazardous Materials.

9.3.2 Remediation. If Lessee's occupancy, use, development, maintenance, or restoration of the Leased Premises results in a release of any Hazardous Materials, Lessee shall pay all costs of remediation and removal of such substances to the satisfaction of the DEH or other governmental agency having authority, and in accordance with all applicable laws, rules, and regulations of governmental authorities. Notwithstanding anything to the contrary contained herein, Lessee shall not be responsible for the remediation and(or) removal of any Environmental Condition existing in, on, or under the Leased Premises, or any Environmental Condition existing outside the Leased Premises that arose subsequent to the Commencement Date, but only to the extent caused by City, City's Related Parties, the holder of any Permitted Encumbrance, or any third party.

- 9.3.3 Removal. Lessee and/or Lessee's contractor or agent shall remove all Hazardous Materials and hazardous wastes in any type of container, equipment, or device from the Leased Premises immediately upon or prior to the expiration or earlier termination of this Lease. City reserves the right to conduct inspections of the Leased Premises at reasonable times during the Term and/or request documentation demonstrating the legal removal and/or disposal of the hazardous materials, wastes or other containers, equipment, or devices from the Leased Premises. Lessee shall be responsible for any and all costs incurred by City to remove any container, equipment, or device requiring disposal or removal as required by this provision, except to the extent City is responsible for the disposal or removal pursuant to the provisions and conditions hereof.
- 9.3.4 Indemnity. Lessee shall protect, defend, indemnify, and hold City and its Related Parties harmless from any and all Environmental Claims or Environmental Expenses resulting from Lessee's occupancy, use, development, maintenance, or restoration of the Leased Premises during the Term. City shall protect, defend, indemnify, and hold Lessee and its Related Parties harmless from any and all Environmental Claims or Environmental Expenses related to the acts or omissions of City or its Related Parties during the Term.
- 9.3.5 Notice of Release. If either Party knows or has reasonable cause to believe that any Hazardous Materials have been unlawfully released on, from, or beneath the Leased Premises, such Party shall immediately notify the other Party and any appropriate regulatory or reporting agency per California Administrative Code Title 19 and any other applicable laws or regulations. The notifying Party shall deliver a written report thereof to the other Party within three (3) days after receipt of the knowledge or cause for belief and submit any required written reports to regulatory or reporting agencies as required by regulation or law. If the notifying Party knows or has reasonable cause to believe that such substance is an imminent release or is an imminent substantial danger to public health and safety, the notifying Party shall take all actions necessary to alleviate the danger. The notifying Party shall immediately notify the other Party in writing of any violation, notice to comply, or notice of violation received or the initiation of environmental actions or private suits related to the Leased Premises.
- 9.3.6 Environmental Assessment. Upon reasonable cause to believe that Lessee's occupancy, use, development, maintenance, or restoration of the Leased Premises ("**Lessee's Operations**"), resulted in any Hazardous Materials being unlawfully released on, from or beneath the Leased Premises, City may cause an environmental assessment under regulatory oversight by DEH of the suspect area to be performed by a professional environmental consultant registered with the State of California as a Professional Engineer, Certified Engineering Geologist, or Registered

Civil Engineer. If, and only if, the environmental assessment concludes that Hazardous Materials have been unlawfully released as a result of Lessee's Operations on, in, from or under the Leased Premises in quantities greater than allowed by city, county, state, or federal laws, statutes, ordinances, or regulations, then (i) Lessee shall cause, at its sole cost and expense, the remediation and/or removal of the Hazardous Materials as recommended by DEH such that compliance with applicable environmental law and regulations is achieved; and (ii) Lessee shall pay all costs and expenses associated with the environmental assessment. Notwithstanding anything to the contrary contained herein, in the event that Lessee fails to cause the remediation and/or removal of the Hazardous Materials recommended by DEH within a reasonable period of time, as determined by City in its sole discretion, then City shall have the right to cause, at Lessee's sole cost and expense, the remediation and/or removal recommended by DEH.

9.4 Cooperation Regarding Claims. If a Party receives notice or has knowledge of any Claim, then the provisions of Section 10.2.2 shall be applicable.

## 10. COMPLIANCE WITH LAW; INDEMNIFICATION; LIMITATION OF LIABILITY

10.1 Compliance with Governmental Rules. Each Party shall comply with all Government Rules as they pertain to this Lease and the Leased Premises.

10.2 Indemnification.

10.2.1 Indemnification. Each Party (an "**Indemnifying Party**") shall protect, defend, indemnify, and hold the other Party and its Related Parties (an "**Indemnitee**") harmless from and against all third party actions, causes of actions, damages, costs, liabilities, claims, losses, judgments, penalties and expenses of every type and description, including, without limitation, attorneys' fees and costs (hereafter collectively referred to as a "**Claim**") arising out of or in connection with the performance by the Indemnifying Party of any provision or condition of this Lease; provided, however, that an Indemnifying Party's duty to indemnify and hold harmless pursuant to the provisions and conditions of this Section 10.2.1 shall not include any Claims arising solely from the acts and omissions of an Indemnitee.

10.2.2 Cooperation Regarding Claims. If a Party becomes aware of a Claim made, threatened or reasonably anticipated to be made against such Party or any of its Related Parties, the Party shall, as promptly as is reasonably practicable, deliver notice thereof to the Indemnifying Party, including: (a) a reasonably detailed description of the facts and circumstances relating to the Claim; (b) a reasonably detailed description of the basis for

the potential demand for indemnification with respect thereto; and (c) a complete copy of all notices, pleadings and other papers related thereto; provided that failure to promptly give such notice or to provide such information and documents shall not relieve the Indemnifying Party of any indemnification obligation it may have under this Lease, unless such failure shall materially diminish the Indemnifying Party's ability to respond to or to defend against the Claim as a result of such failure to give such notice. The Indemnifying Party shall consult and cooperate with the Indemnatee regarding the response to and the defense of any Claim, and shall promptly defend and/or represent the interests of the Indemnatee regarding such Claim, including selecting legal counsel and consultants reasonably satisfactory to the Indemnatee, and proposing, accepting or rejecting offers of settlement, all at the Indemnifying Party's sole cost; provided that no settlement shall be made without the written consent of the Indemnatee, which may not be unreasonably withheld or delayed; and provided further that if the Claim is settled without the Indemnifying Party's consent, the Indemnatee shall be deemed to have waived all rights hereunder against the Indemnifying Party for damages arising out of such Claim. Nothing herein shall prevent the Indemnatee from retaining its own counsel and participating in its own defense and at its own cost and expense. The Parties shall cooperate with each other in any notifications to insurers.

- 10.3 Brokers and Finders. Each Party shall protect, defend, indemnify, and hold the other Party harmless from and against any and all claims by the Indemnifying Party's broker, finder or agent for expenses, commissions, fees or other forms of compensation payable by the Indemnifying Party in connection with this Lease and the consummation of the transactions contemplated herein.
- 10.4 No Release of Insurers. The provisions of this Article 10 shall not be construed so as to relieve any insurer of its obligation to pay any insurance proceeds in accordance with the provisions and conditions of valid and enforceable insurance policies.
- 10.5 Representatives. No officer, director, manager, agent, attorney, employee or other individual representative of any Party shall be personally liable for any loss under this Lease. Nothing herein shall relieve either Party of any liability to make any payment expressly required to be made by such Party pursuant to this Lease.
- 10.6 Limitation of Liability. Notwithstanding anything in this Lease to the contrary, neither a Party nor its Related Parties, shall have any liability to the other Party or its Related Parties for any special, indirect, incidental or consequential loss or damages arising out of or in connection with this Lease or the occupancy, use, development, maintenance, or restoration of the Leased Premises, including without limitation lost profits or lost investment opportunity, even if advised in advance that such damages could occur.



## 11. INSURANCE

- 11.1 Insurance. Lessee shall not occupy or commence work on the Leased Premises unless and until all insurance coverage required by this Lease has been procured by Lessee.
- 11.1.1 Additional Insureds. Pursuant to a separate endorsement [CG2010 (11/85) or equivalent form], "The City of San Diego, its elected officials, officers, employees, representatives, and agents" shall be named as additional insureds in all policies.
- 11.1.2 Primary & Non-Contributory. Insurance policies shall be endorsed such that the coverage is primary and non-contributory to any coverage carried or maintained by City.
- 11.1.3 Qualified Insurer(s). All insurance required by the terms of this Lease must be provided by insurers licensed to do business in the State of California which are rated at least "A-, VI" by the current AM Best Ratings Guide and which are acceptable to City. Non-admitted surplus lines insurers may be accepted provided they are included on the most recent list of California eligible surplus lines insurers (LESLI list) and otherwise meet City requirements.
- 11.1.4 Deductibles/Retentions. All deductibles and self-insured retentions on any insurance policy are the sole responsibility of Lessee and must be disclosed and acceptable to City at the time evidence of insurance is provided.
- 11.1.5 Continuity of Coverage. All policies shall be in effect on or before the first day of the Term, except "course of construction fire insurance" shall be in force on commencement of all authorized construction, and full applicable fire insurance coverage shall be effective upon completion of each insurable improvement. The policies shall be kept in force for the duration of the Term. At least thirty (30) days prior to the expiration of each insurance policy, Lessee shall furnish a certificate(s) showing that a new or extended policy has been obtained which meets the requirements of this Lease. Lessee shall provide proof of continuing insurance at least annually during the Term. If insurance lapses or is discontinued for any reason, Lessee shall immediately notify City and obtain replacement insurance as soon as possible.
- 11.1.6 Modification. To assure protection from and against the kind and extent of risk existing with the Leased Premises and/or Lessee's use thereof, City, at its discretion, may require the revision of amounts and coverage at any time during the Term by giving Lessee thirty (30) days prior written notice. Lessee shall also obtain any additional insurance required by City for new improvements, changed circumstances, or City's reasonable

re-evaluation of risk levels related to the Leased Premises and/or Lessee's use thereof.

11.1.7 Causes of Loss - Special Form Property Insurance. Lessee shall obtain and maintain, at its sole cost, Causes of Loss - Special Form Property Insurance on all of Lessee's insurable property on the Leased Premises in an amount to cover one hundred percent (100%) of the replacement cost. Lessee shall deliver to City a certificate of such insurance.

11.2 Required Insurance Coverages. Lessee shall procure and maintain in full force and effect throughout the Term all of the policies of insurance described in this Section 11.2.

11.2.1 Commercial General Liability. Commercial general liability insurance, including contractual liability, personal injury liability, products/completed operations, and independent contractors, all applicable to personal and bodily injury and property damage, including the cost of defense of any action for bodily injury, death, personal injury and property damage which may arise out of the operations of Lessee on the Leased Premises. Limits of coverage shall be a combined single limit of at least Two Million Dollars (\$2,000,000) for each occurrence and at least Four Million Dollars (\$4,000,000) in the aggregate annually.

11.2.2 Automobile Liability. Automobile Liability insurance covering any loss, including the cost of defense of any action for bodily injury, death, personal injury and property damage which may arise out of the operation, maintenance or use of any vehicle whether or not owned by Lessee, on or off the Leased Premises. The policy shall provide a minimum combined single limit of One Million Dollars (\$1,000,000) per accident. This insurance shall provide contractual liability covering all motor vehicles and mobile equipment to the extent coverage may be excluded from general liability insurance.

11.2.3 Umbrella Liability. Umbrella or Excess Liability insurance with a minimum limit of Five Million Dollars (\$5,000,000) per occurrence and in the aggregate excess shall provide coverage at least as broad as specified for underlying coverages and covering those insured in the underlying policies. Coverage shall be "pay on behalf," with defense costs payable in addition to policy limits. There shall be no cross liability exclusion of claims or suits by one insured against another.

11.2.4 Workers Compensation. Workers' compensation insurance in accordance with the laws of the State of California and Employers' Liability Insurance in the amount of One Million Dollars (\$1,000,000) per accident or disease with respect to any work on or about the Leased Premises or the Lessee's Leasehold Improvements. A waiver of subrogation endorsement must accompany the policy.

- 11.2.5 Pollution Liability. Pollution (environmental impairment) liability insurance that shall be written on a Contractor's Pollution Liability form or other form acceptable to City, providing coverage for liability arising out of sudden, accidental and gradual pollution and remediation. The policy limits shall be no less than Five Million Dollars (\$5,000,000) per claim and in the aggregate. Lessee shall renew this policy at the end of the policy term (that is, each coverage year), with substantially the same provisions and conditions and limits of liability no less than those stated herein.
- 11.2.6 Business Interruption. Business interruption insurance with respect to Lessee's Operations on the Leased Premises on an "all risk" basis, in an amount not less than the sum of twelve (12) months gross revenues less any non-continuing expenses.

## 12. ASSIGNMENT, SUBLETTING, ENCUMBRANCE

- 12.1 Assignment and Subletting. Neither Party may assign or transfer any right or obligation under this Lease without the prior written consent of the other Party, which consent may not be unreasonably withheld or delayed; provided, however, that the consent of City shall not be required in connection with (a) Lessee's assignment of this Lease to an Affiliate of Lessee, provided that such Affiliate is wholly-owned by Guarantor or Capital Power Corporation, a Canadian corporation, (b) Lessee's assignment of this Lease to a purchaser or transferee of substantially all of the assets of Lessee, but only upon assumption by such purchaser or transferee of all of such Party's obligations under this Lease, (c) the sale or transfer of all or substantially all of the shares or ownership interests of Lessee or any parent company of Lessee, or (d) the merger (or similar transaction) of Lessee or Guarantor. If Lessee assigns any or all of its obligations under this Lease, Lessee shall remain liable for all such obligations, unless expressly released by City in writing.
- 12.2 Encumbrance. Lessee shall not encumber this Lease, its leasehold estate, or any improvements on the Leased Premises by deed of trust, mortgage, chattel mortgage, or other security instrument without City's prior written consent.
- 12.3 Collateral Assignments. Notwithstanding the foregoing, without the prior consent of the City, Lessee may assign its rights and interest under this Lease and in and to the Leased Premises (collectively, the "**Leasehold Interest**") to (a) any Lenders to Lessee (and any direct or indirect wholly-owned subsidiary of Lessee) providing construction, interim or long term financing for the Plant (including a leveraged lease or any other refinancing thereof), and (b) any equity investors of Lessee, including, without limitation, holders of the ownership interests in Lessee and any direct or indirect wholly-owned subsidiary of Lessee, in each case as collateral security for the obligations of Lessee (and any direct or indirect wholly-owned subsidiary of Lessee). City shall reasonably cooperate with Lessee (and any direct or indirect wholly-owned subsidiary of Lessee) and their

respective Lenders and equity investors from time to time, including, without limitation, the furnishing of such information and documentation as such Lender or equity investors reasonably requests from City, or an opinion of counsel addressed to any such Lender or equity investor concerning such matters, as such Lenders and equity investors may reasonably request, and in connection with any such collateral assignment, City shall enter into a consent and agreement (an "**Estoppel and Consent**") with such Lenders or equity investors on such terms as may be customary under the circumstances and as shall be reasonably required by such Lenders or equity investors, provided that the foregoing undertaking shall not obligate City to change any of its rights or benefits, or impose or increase any of its burdens, liabilities, or obligations, under this Lease.

12.4 Rights of Leasehold Mortgagee. Lessee may from time to time, without the prior consent of City, grant one or more Mortgages (including one or more additional deeds of trust) on its leasehold interest in this Lease (a "**Leasehold Mortgage**"), in addition to, or in substitution of, such grants under the Financing Documents; provided that at the time any such grant is made Lessee retains its obligations hereunder. Any holders of a Leasehold Mortgage, including Lenders, and any assignee of or other successor to the right, title and interest of such a holder in, to and under a Leasehold Mortgage, shall be deemed a "**Leasehold Mortgagee**" for the purposes of this Lease. Concurrently with or immediately after Lessee grants a Leasehold Mortgage, City, Lessee and Leasehold Mortgagee shall enter to an agreement substantially in the form of Exhibit "12.5" attached hereto (the "**Leasehold Mortgage Agreement**").

12.5 Fee Mortgages. City acknowledges that as of the Commencement Date, the fee interest in the Leased Premises is free and clear of any and all monetary items and encumbrances, other than the lien for non-delinquent real property taxes and assessments. City covenants and agrees that it shall not hereafter grant any Mortgage encumbering all or any portion of the Leased Premises (whether alone or as part of a larger portion of the Leased Premises being encumbered by such Mortgage) (such a Mortgage, a "**Fee Mortgage**") unless such Fee Mortgage (a) expressly states that it is subject and subordinate to this Lease (as this Lease may be modified, supplemented or otherwise amended after the date of such Fee Mortgage, which amendments may be effected without the consent of the grantee of such Fee Mortgage) and to any and all Leasehold Mortgages, and (b) contains the covenant of the holder of that Mortgage, on behalf of itself and its successors, not to disturb the Lien of any Leasehold Mortgage. At the request of Lessee or any Leasehold Mortgagee, City shall cause each Person having a Fee Mortgage to acknowledge in writing that this Lease and Lessee's and the Leasehold Mortgage(s) right of quiet enjoyment hereunder are superior to and shall not be disturbed by such Fee Mortgage.

### 13. TERMINATION

13.1 Termination. This Lease shall terminate only upon the expiration of the Term, by mutual agreement of City and Lessee, or as otherwise expressly provided herein,

and shall not otherwise terminate, nor shall Lessee's interest be extinguished, lost, conveyed or otherwise impaired, or be merged into or with any other interest or estate in the Leased Premises or any other property interest, in whole or in part, by any other cause or for any other reason whatsoever, whether similar or dissimilar to any of the foregoing.

#### **14. DEFAULT AND REMEDIES**

14.1 Lessee Default. Lessee shall be in default of this Lease if any of the following occurs:

14.1.1 Lessee fails to make any payment required under this Lease within thirty (30) days following written notice thereof from City;

14.1.2 Lessee breaches any of its obligations under this Lease, other than those requiring payment to City, and fails to cure the breach within thirty (30) days following written notice thereof from City, or if not curable within thirty (30) days, fails to commence to cure the breach within thirty (30) days and diligently pursue the cure to completion;

14.1.3 Lessee voluntarily files or involuntarily has filed against it any petition under any bankruptcy or insolvency act or law, provided, Lessee shall not be deemed to be in default of this Lease if Lessee shall effect a full dismissal of an involuntary petition within thirty (30) days following written notice thereof from City;

14.1.4 Lessee is adjudicated a bankrupt; or

14.1.5 Lessee makes a general assignment for the benefit of creditors.

14.2 Remedies. Upon Lessee's default and the expiration of any applicable cure period(s), City may, at its option, give Lessee, or any person claiming rights through Lessee, a written "Three Day Notice to Pay or Quit," or City may terminate the Lease and all rights of Lessee, and all persons claiming rights through Lessee, to the Leased Premises or to possession of the Leased Premises. Upon termination, City may enter and take possession of the Leased Premises, and may recover from Lessee the sum of:

14.2.1 The worth at the time of award of any unpaid rent that was due at the time of termination;

14.2.2 The worth at the time of award of the amount by which the unpaid rent that would have been earned after termination until the time of award exceeds the amount of rental loss, if any, that Lessee affirmatively proves could have been reasonably avoided;

14.2.3 The worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award exceeds the amount of

rental loss, if any, that Lessee affirmatively proves could be reasonably avoided;

14.2.4 Any other amount necessary to compensate City for all the detriment proximately caused by Lessee's breach and default, or that in the ordinary course of things, would be likely to result; and

14.2.5 All other amounts in addition to or in lieu of those previously stated as may be permitted from time to time by California law.

As used in Sections 14.2.1 and 14.2.2, above, the "worth at the time of award" is computed by allowing interest at the rate of ten percent (10%) per annum. As used in clause 14.2.3, above, the "worth at the time of award" is computed by discounting that amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus two percent (2%). As used in this Section 14.2, the term "rent" shall include rent and any other amounts payable by Lessee under this Lease.

Upon the occurrence of a Lessee default and the expiration of any applicable cure periods pursuant to the provisions and conditions of Section 14.1, City shall use commercially reasonable efforts to mitigate damages and re-lease the Leased Premises.

Notwithstanding anything to the contrary contained herein, City and Lessee acknowledge and agree that City's recovery from Lessee upon the occurrence of a Lessee default pursuant to the provisions and conditions of this Section 14.2 shall not exceed an amount equal to one (1) time the then applicable Base Rent.

Notwithstanding anything to the contrary contained herein, if Lessee is determined to have breached or otherwise violated the provisions and conditions of Section 20.21, Section 20.22, Section 20.23, Section 20.24, Section 20.25, Section 20.26, or Section 20.27 hereof, then City shall have the right to exercise all of its rights and remedies under this Section 14.2, except for the rights to terminate this Lease and(or) enter and take possession of the Leased Premises.

14.3 Default if Leasehold is Encumbered. In the event that there exists a Leasehold Mortgage upon the occurrence of a Lessee default pursuant to the provisions and conditions of Paragraph 14.1 hereof, City acknowledges and agrees that its rights and remedies under this Lease shall be subject to the rights and obligations of Lessee and the Leasehold Mortgagee under the provisions and conditions of the Leasehold Mortgage Agreement.

14.4 City Default. City shall be in default of this Lease if any of the following occurs:

14.4.1 City fails to make any payment required under this Lease within thirty (30) days following written notice thereof from Lessee; or

14.4.2 City breaches any of its obligations under this Lease, other than those requiring payment to Lessee, and fails to cure the breach within thirty (30) days following written notice thereof from Lessee, or if not curable within



thirty (30) days, fails to commence to cure the breach within thirty (30) days and diligently pursue the cure to completion.

14.4.3 City breaches any of its obligations under the Water Agreement and fails to cure said breach within the cure periods set forth therein.

14.5 Waiver. Any waiver by a Party of a breach or default by the other Party shall not be a waiver of any other breach or default. No waiver shall be valid and binding unless in writing and executed by the non-breaching Party. The non-defaulting Party's delay or failure to enforce a right or remedy shall not be a waiver of that or any other right or remedy under this Lease. The enforcement of a particular right or remedy for a breach or default shall not waive any other right or remedy for the same breach or default, or for any other or later breach or default. The non-defaulting Party's acceptance of any rents shall not be a waiver of any default preceding such payment. Lessee acknowledges that the Leased Premises is publicly-owned property held in trust for the benefit of the citizens of the City of San Diego, and that any failure by City to discover a breach or default, or take prompt action to require the cure of any breach or default, shall not result in an equitable estoppel, but City shall at all times, have the legal right to require the cure of any breach or default. City's acceptance of a partial payment of rent shall not constitute a waiver of the balance of the rent payment due.

## 15. CONDEMNATION

15.1 Parties, Rights and Obligations. If during the Lease Term there is any taking of all or any part of the Leased Premises by Condemnation, the rights and obligations of the Parties shall be determined by this Article 15.

15.1.1 Total Taking. If the Leased Premises is totally and permanently taken by Condemnation, this Lease shall terminate on the Date of Taking or such earlier date as Lessee elects and neither Party shall have any further liability hereunder or thereunder except as specifically provided herein or therein.

15.1.2 Partial Taking. If a portion of the Leased Premises is taken by Condemnation, this Lease shall remain in effect if such partial Condemnation does not materially and adversely affect Lessee's rights hereunder. Otherwise, Lessee may, but shall have no obligation to, terminate this Lease upon thirty (30) days' notice to City delivered to City not later than thirty (30) days after the Date of Taking, which termination shall be effective on the later of (a) the Date of Taking and (b) thirty (30) days after delivery of such termination notice to City, and neither Party shall have any further liability hereunder or thereunder except as specifically provided herein or therein.

15.2 Award Distribution. Upon any taking by Condemnation pursuant to Sections 15.1.1 or 15.1.2, (i) City (or City's mortgagee(s), if applicable) shall be entitled to

receive that part of any award (“Award”) attributable to the value of the Leased Premises (exclusive of the Lessee’s Leasehold Improvements and Lessee’s interest in this Lease) taken and any award not otherwise included in Lessee’s Condemnation Award as defined in this Section 15.2; and (ii) Lessee shall be entitled to receive, subject to the rights of the Leasehold Mortgagees, that part of any Award attributable to the value of the Lessee’s Leasehold Improvements, the Leasehold Interest and Lessee’s business goodwill, if any, each to the extent taken (“**Lessee’s Condemnation Award**”). The condemning authority shall be responsible for providing the award of each Parties’ interests. City shall have no liability to Lessee for any award not provided by the condemning authority.

- 15.3 Temporary Taking. The taking of the Leased Premises, or any part thereof, by military or other public authority shall constitute a taking by Condemnation only when the use and occupancy by the taking authority has continued for longer than twelve (12) months. During any such twelve (12) month period, which shall be a temporary taking, whether or not such temporary taking affects the Leased Premises and/or the Lessee’s Leasehold Improvements, all the provisions of this Lease shall remain in full force and effect.
- 15.4 No Inverse Condemnation. Notwithstanding anything to the contrary herein, the exercise of any City right under this Lease shall not be interpreted as an exercise of the power of eminent domain and shall not impose any liability upon City for inverse condemnation.

## **16. IMPROVEMENTS; SURRENDER**

### **16.1 Ownership of Improvements; Removal of Improvements and Personal Property.**

16.1.1 Improvements. At all times, Lessee shall own the Lessee’s Leasehold Improvements. Lessee shall remove the Lessee’s Leasehold Improvements and restore the Leased Premises to substantially the same condition as they were as of the Commencement Date upon the expiration or earlier termination of this Lease, or as soon as practicable thereafter, but in no event later than twelve (12) months after the expiration or earlier termination of this Lease. Notwithstanding anything to the contrary herein, if Lessee fails to remove any of the Lessee’s Leasehold Improvements as required herein, City may, at its option either: (1) remove the Lessee’s Leasehold Improvements at Lessee’s sole cost and expense; or (2) take ownership and possession of the Lessee’s Leasehold Improvements

16.1.2 Personal Property. At all times, Lessee shall own the Lessee’s Personal Property. Lessee shall remove all Lessee-owned machines, appliances, equipment, trade fixtures, and other items of personal property (collectively, “**Lessee’s Personal Property**”) upon the expiration or earlier termination of this Lease, or as soon as practicable thereafter, but in no event later than twelve (12) months after the expiration or earlier termination of this Lease. Notwithstanding anything to the contrary herein,

if Lessee fails to remove any of Lessee's Personal Property as required herein, City may, at its option, either: (1) remove Lessee's Personal Property at Lessee's sole cost and expense; or (2) take ownership and possession of the Lessee's Personal Property. Lessee, at its sole cost and expense, shall be responsible for the repair of any and all damage resulting from the removal of the Lessee's Personal Property from the Leased Premises.

- 16.2 Surrender. Subject to the provisions and conditions of Section 16.1 above, upon the expiration or earlier termination of this Lease, Lessee shall deliver the Leased Premises to City: (i) in its then current condition and state of repair, and (ii) free and clear of all Liens caused in any way by Lessee, its agents, contractors, employees, sublessees, successors or assigns, other than such Liens to which City shall have expressly consented to in writing to remain in effect on or after such expiration or termination.

## **17. CONDITION OF THE LEASED PREMISES; ALTERATIONS AND MAINTENANCE**

- 17.1 As-Is, Where-Is. Lessee is leasing the Leased Premises in its present "AS-IS, WHERE-IS CONDITION WITH ALL FAULTS." City has not made and makes no representation or warranty as to the condition or suitability of the Leased Premises for Lessee's intended use, and shall have no obligation to alter, improve or maintain the Leased Premises. Lessee has relied solely on its own independent investigations of the condition and suitability of the Leased Premises, and is satisfied with the condition thereof.

## **18. REPRESENTATIONS, WARRANTIES AND COVENANTS**

- 18.1 Representations and Warranties of Lessee. Lessee hereby makes the following representations and warranties to City:
- 18.2.1 Lessee is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware and has the legal power and authority to own its properties, to carry on its business as now being conducted and to enter into this Lease and carry out the transactions contemplated hereby and perform and carry out all covenants and obligations on its part to be performed under and pursuant to this Lease.
- 18.2.2 The execution, delivery and performance by Lessee of this Lease has been duly authorized by all necessary corporation action, and does not and will not require any consent or approval of Lessee other than that which has been obtained (evidence of which shall be, if it has not heretofore been, delivered to City).
- 18.2.3 The execution and delivery of this Lease, the consummation of the transactions contemplated hereby and the fulfillment of and compliance with the provisions of this Lease, do not and will not conflict with or

constitute a breach of or a default under, any of the terms, conditions or provisions of any legal requirements, or any organizational documents, agreement, deed of trust, mortgage, loan agreement, other evidence of indebtedness or any other agreement or instrument to which Lessee is a party or by which it or any of its property is bound, or result in a breach of or a default under any of the foregoing.

18.2.4 This Lease constitutes the legal, valid and binding obligation of Lessee enforceable in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization or similar laws relating to or affecting the enforcement of creditors' rights generally or by general equitable principles, regardless of whether such enforceability is considered in a proceeding in equity or at law.

18.3 Representations and Warranties of City. City hereby makes the following representations and warranties to Lessee:

18.4.1 City is a municipal corporation duly organized, validly existing and in good standing under the laws of the State of California and has the legal power and authority to own its properties, to carry on its business as now being conducted and to enter into this Lease and carry out the transactions contemplated hereby and perform and carry out all covenants and obligations on its part to be performed under and pursuant to this Lease.

18.4.2 The execution, delivery and performance by City of this Lease have been duly authorized by all necessary official action, and do not and will not require any consent or approval of City's City Council other than that which has been obtained (evidence of which shall be, if it has not heretofore been, delivered to Lessee).

18.4.3 The execution and delivery of this Lease, the consummation of the transactions contemplated hereby and the fulfillment of and compliance with the provisions of this Lease do not and will not conflict with or constitute a breach of or a default under, any of the terms, conditions or provisions of any legal requirements, or its articles of incorporation or bylaws, or any deed of trust, mortgage, loan agreement, other evidence of indebtedness or any other agreement or instrument to which City is a party or by which it or any of its property is bound, or result in a breach of or a default under any of the foregoing.

18.4.4 This Lease constitutes the legal, valid and binding obligation of City enforceable in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization or similar laws relating to or affecting the enforcement of creditors' rights generally or by general equitable principles, regardless of whether such enforceability is considered in a proceeding in equity or at law.

18.4.5 Subject to the Permitted Encumbrances, City owns the Leased Premises.

18.5 Cooperation Regarding Approvals.

18.5.1 City shall not unreasonably interfere with Lessee's efforts to obtain approvals necessary for the development, construction and operation of the Plant on the Leased Premises ("**Approvals**"). City shall provide reasonable assistance to Lessee in obtaining the Approvals. When deemed appropriate by City, in its sole discretion, City shall provide reasonable indications of support for the Approvals as they are reviewed, considered or evaluated by other governmental or quasi-governmental agencies, including without limitation the California Energy Commission, the California Independent Systems Operator ("**CAISO**"), the San Diego County Air Pollution Control District, and if applicable depending on project requirements, other local, state and federal agencies, such as the San Diego County Airport Authority, the California Department of Fish and Game, the United States Fish & Wildlife Service, the United States Army Corps of Engineers and the United States Marine Corps.

19. **NOTICES**

19.1 Notices. All notices, requests, demands and other communications which are required or may be given under this Lease shall be in writing and shall be deemed to have been duly given when received by the applicable Party hereto if personally delivered; when transmitted by the applicable Party hereto if transmitted by telecopy, electronic or digital transmission method, subject to the sender's facsimile machine or other device receiving the correct answerback of the addressee and confirmation of uninterrupted transmission by a transmission report or the recipient confirming by telephone to sender that he has received the message; and when received by the applicable Party hereto, if sent for next day delivery to a domestic address by recognized overnight delivery service or if sent by certified or registered mail, return receipt requested.

THE CITY OF SAN DIEGO  
Attn: Real Estate Assets Department  
1200 Third Avenue, Suite 1700  
M.S. 51A  
San Diego, CA 92101

*With a copy by First Class Mail to:*

SAN DIEGO CITY ATTORNEY  
Attn: Real Property Section  
1200 Third Avenue, Suite 1100  
San Diego, California 92101-4106

CAPITAL POWER (US HOLDINGS) INC.

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With a copy to:

Associate General Counsel  
Capital Power Corporation  
700 Commerce Drive, Suite 160  
Oakbrook, Illinois  
60523  
Fax: (630)586-0315

Any party entitled or required to receive notice under this Lease may, by like notice, designate a different address to which notices shall be sent.

## **20. GENERAL**

- 20.1 Mediation. Any dispute or claim by or between City and Lessee relating to this Lease which cannot be settled informally shall first be submitted to mediation under the Commercial Mediation Rules of the American Arbitration Association before resorting to litigation. Lessee and City shall each pay one half of the cost of such mediation. Notwithstanding the foregoing, nothing in this Section 20.1 shall preclude a Party from filing an action in the courts, or taking other necessary legal action to protect that Party's legal rights, either prior to or during the mediation process and such action shall not be considered a waiver or breach of the right and obligation to mediate, provided the Party filing the action proceeds with mediation as required herein. No dispute or claim by or between City and Lessee relating to this Lease or otherwise shall be submitted to binding arbitration under any circumstance.
- 20.2 Court Action. In any court action relating to this Agreement, Lessee may request in writing that City agree to a court-appointed referee to hear the case pursuant to California Code of Civil Procedure section 638 et seq. City, in its sole discretion, may, but is not obligated, agree to the court-appointed referee. If the Parties agree to a court-appointed referee, they shall request that the referee be a retired California Superior Court judge. Pending resolution of the dispute, the Parties shall continue their performances under this Agreement to the extent reasonably practicable. The Parties shall request the court to instruct the referee to make the ruling consistent with the express requirements of this Agreement. Considering the Parties' need for prompt resolution of the dispute, the Parties agree that delays and continuances shall be requested and granted only in exigent circumstances. All discovery shall be completed no later than ten (10) days before the first hearing date established by the referee; provided that the court or referee may extend such period in the event of a Party's refusal or failure to provide requested discovery. Each Party shall be responsible for their respective costs and expenses, including, but not limited to, attorneys' fees and costs, and referee fees and costs.



- 20.3 Successors and Assigns. Except as otherwise provided in this Lease, all of the terms, covenants, and conditions of this Lease shall apply to, benefit, and jointly and severally bind the successors and assigns of the respective parties.
- 20.4 No Third Party Beneficiary. This Lease and all rights hereunder are intended for the sole benefit of the Parties hereto, and to the extent expressly provided, for the benefit of the Lenders or any other Person, and shall not imply or create any rights on the part of, or obligations to, any other Person.
- 20.5 Governing Law. This Lease shall be construed in accordance with, and governed by, the laws of the State of California without regard to its conflict of laws provisions.
- 20.6 Time of the Essence. Time is of the essence of each term, covenant, and condition of this Lease.
- 20.7 Partial Invalidity. If any term, covenant, condition, or provision of this Lease is found invalid, void or unenforceable by a court of competent jurisdiction, the remaining provisions shall remain in full force and effect.
- 20.8 Waivers. The failure of either Party to enforce at any time any provision or condition of this Lease shall not be construed to be a waiver of such provision or condition contained herein or a waiver of any subsequent breach or violation of the same or any other provision or condition, nor in any way to affect the validity of this Lease or any part hereof or the right of a Party to thereafter enforce each and every such provision or condition. A waiver under this Lease must be in writing and state that it is a waiver. No waiver of any breach of this Lease shall be held to constitute a waiver of any other or subsequent breach.
- 20.9 Entire Agreement. This Lease (including the Exhibits, Schedules and Addendum hereto which are integral parts of this Lease) supersedes all previous representations, understandings, negotiations and agreements either written or oral between the Parties or their Representatives. This Lease may not be modified except by the written agreement executed and delivered by City and Lessee.
- 20.10 Joint and Several Liability. If Lessee is comprised of more than one person or legal entity, such persons and entities, and each of them, shall be jointly and severally liable for the performance of each and every obligation of Lessee under this Lease.
- 20.11 Counterparts. This Lease may be signed in multiple originals and/or using counterpart signature pages. All such multiple originals shall constitute one and the same document.
- 20.12 Decision-Making by Parties. Except where this Lease expressly provides for a different standard, whenever this Lease provides for determination, decision, permission, consent or approval of a Party, the Party shall promptly make such determination, decision, grant or withholding of permission, consent or approval

in a commercially reasonable manner. Any denial of consent required to be made in a commercially reasonable manner shall include in reasonable detail the reason for denial or aspect of the request that was not acceptable.

- 20.13 No Recourse to Affiliates. This Lease is solely and exclusively between City and Lessee, and any obligations created herein shall be the sole obligations of the Parties. No Party shall have recourse to any parent, member, shareholder, subsidiary, partner joint venture, Affiliate, director or officer of the other Party for performance of said obligations unless the obligations are assumed in writing by the Person against whom recourse is sought.
- 20.14 Further Assurances. City and Lessee shall cooperate in all reasonable respects necessary to consummate the transactions contemplated by this Lease and each shall take all reasonable actions within its authority to secure the cooperation of its Affiliates.
- 20.15 Survival. The provisions and conditions of this Lease that relate to the enforcement of rights and obligations accruing before the end of the Term shall survive the expiration or termination of this Lease to the extent necessary to enforce such rights and obligations.
- 20.16 No Affiliation. Nothing contained in this Lease shall be deemed or construed to create a partnership, joint venture or other affiliation between City and Lessee or between City and any other entity or party, or cause City to be responsible in any way for the debts or obligations of Lessee or any other party or entity.
- 20.17 Cumulative Remedies. All rights and remedies of either Party are cumulative of each other and of every other right or remedy such Party may otherwise have at law or in equity, and the exercise of one or more rights or remedies shall not prejudice or impair the concurrent or subsequent exercise of other rights or remedies.
- 20.18 Force Majeure Event. Performance by either Party under this Lease shall not be deemed, or considered to be in default, where any such default is due to the occurrence of a Force Majeure Event. Any Party claiming a Force Majeure Event shall notify the other Party: (a) within ten (10) days after such Party knows of any such Force Majeure Event; and (b) within five (5) days after such Force Majeure Event ceases to exist. The extension of time for a Force Majeure Event shall commence on the date the condition causing the Force Majeure Event commences and shall continue until the end of the condition causing the Force Majeure Event. The Party claiming an extension of time to perform due to a Force Majeure Event shall exercise its reasonable efforts to cure the condition causing the Force Majeure Event within a reasonable time.
- 20.19 Estoppel Certificates. Within thirty (30) days after receipt of a written request, the receiving Party shall deliver a written statement to the other stating whether this Lease is unmodified and in full force and effect, whether the other Party is in

compliance with this Lease and any other matters that may be reasonably requested.

- 20.20 Equal Opportunity. Lessee shall comply with Title VII of the Civil Rights Act of 1964, as amended; Executive Orders 11246, 11375, and 12086; the California Fair Employment Practices Act; and any other applicable federal and state laws and regulations. Lessee shall not discriminate against any employee or applicant for employment based on race, religion, color, ancestry, age, gender, sexual orientation, disability, medical condition, or place of birth. Upon City's request, Lessee shall submit a current Workforce Report and, if required, an Equal Opportunity Plan which set forth the actions Lessee will take to achieve the City's goals for the employment of African Americans, Native Americans, Asians, Latinos, women, and people with disabilities. Lessee shall cause the foregoing provisions to be inserted in all subleases and all contracts for any work covered by this Lease so that such provisions will be binding upon each sublessee and contractor. Lessee acknowledges that failure to comply with the requirements of this section and/or submitting false information in response to these requirements may result in termination of this Lease and debarment from participating in City contracts for a period of not less than one (1) year.
- 20.21 Equal Benefits. Lessee shall comply with San Diego Municipal Code sections 22.4301-22.4308, which require lessees of City-owned property to offer the same employment benefits to employees with spouses and employees with domestic partners. Lessee shall certify that it will maintain such equal benefits throughout the term of this Lease. Lessee's failure to maintain equal benefits shall be a default of this Lease.
- 20.22 Disabled Access Compliance. Lessee shall comply with the California Government Code, Sections 11135-11139.5; the Federal Rehabilitation Act of 1973, Section 504, Title V; the Americans with Disabilities Act of 1990 (ADA); and any other applicable state and federal laws and regulations hereafter enacted protecting the rights of people with disabilities. Lessee's compliance shall include but not necessarily be limited to the following:
- 20.22.1 Lessee shall not discriminate against qualified persons with disabilities in any aspects of employment, including recruitment, hiring, promotions, conditions and privileges of employment, training, compensation, benefits, discipline, layoffs, and termination of employment.
- 20.22.2 No qualified individual with a disability may be excluded on the basis of disability from participation in, or be denied the benefits of, services, programs, or activities of Lessee.
- 20.22.3 Lessee shall post a statement addressing the requirements of the ADA in a prominent place at the work site.

- 20.22.4 Where required by law, any improvements made to the Premises by Lessee shall comply with municipal disabled access requirements by bringing up to code and making accessible any areas of the Premises which deny access to disabled persons. All improvements and alterations shall be at the sole cost of Lessee.
- 20.22.5 Lessee shall include language in each sublease agreement which indicates the sublessee's agreement to abide by the requirements of this Section 20.23. Lessee and sublessees shall be individually responsible for their own ADA employment programs.
- 20.22.6 Lessee understands that failure to comply with the above requirements and/or submitting false information in response to these requirements shall constitute a default under this Lease.
- 20.23 Drug-free Workplace. Lessee shall abide by the omnibus drug legislation passed by Congress on November 18, 1988, by adopting and enforcing a policy to maintain a drug-free workplace by doing all of the following:
- 20.23.1 Publish a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of controlled substances are prohibited on the Leased Premises and specifying the actions that will be taken against employees for violations of the prohibition; and
- 20.23.2 Establish a drug-free awareness program to inform employees about all of the following:
- 20.23.2.1 The dangers of drug abuse in the workplace;
- 20.23.2.2 Lessee's policy of maintaining a drug-free workplace;
- 20.23.2.3 Any available drug counseling, rehabilitation, and employee assistance programs; and
- 20.23.2.4 The penalties that may be imposed upon employees for drug abuse violations.

Lessee shall include in each of its sublicenses and contracts related to this Lease language obligating each sub-licensee and contractor to comply with the provisions of this Section 20.24 to maintain a drug-free workplace. Lessee, and each of its sub-licensees and contractors, shall be individually responsible for their own drug-free workplace program.

- 20.24 Local Business and Employment. Lessee acknowledges that City seeks to promote employment and business opportunities for local residents and firms in all City contracts. For work associated with this Lease and to the extent legally

possible, Lessee shall use its best efforts to solicit applications for employment and bids and proposals for contracts from local residents and firms as opportunities occur. Lessee shall use its best efforts to hire qualified local residents and firms whenever practicable.

20.25 Water Quality Assurances. Lessee shall comply with San Diego Municipal Code Article 3, Division 3: Stormwater Management and Discharge Control (the “**Stormwater Code**”), and employ “Best Management Practices” including a “Storm Water Pollution Prevention Plan” as those terms are defined by the Stormwater Code (collectively, “**Prevention Plan**”) and as approved by City under its Stormwater Management Program. Within the first thirty (30) days of the Term, Lessee shall submit a Prevention Plan satisfactory to City that will control erosion and reduce the amount of “Pollutants,” as defined by the Stormwater Code, and other sediments discharged from the Premises. City may review the Prevention Plan periodically. Within thirty (30) days after written notice from City requesting an update of the Prevention Plan, Lessee shall submit an updated Prevention Plan to City’s satisfaction. Lessee shall implement all changes to the Prevention Plan as required by City and to ensure compliance with all applicable laws, ordinances, and regulations. Lessee shall inform its employees, contractors, subcontractors, agents and vendors of the Prevention Plan and ensure their compliance therewith.

20.26 City Employee Participation Policy. City may unilaterally and immediately terminate this Lease if Lessee employs an individual who, within the twelve (12) months immediately preceding such employment did, in his/her capacity as a City officer or employee, participate in negotiations with or otherwise have an influence on a recommendation made to the San Diego City Council related to the selection of Lessee for this Lease. It is not the intent of this policy that these provisions apply to members of the City Council.

20.27 Exhibits. Each of the following described Exhibits are attached hereto and incorporated herein by this reference:

<u>Exhibit</u>	<u>Description</u>
Annex A	Definitions
2.1(a)	Leased Premises
2.1(b)	Permitted Encumbrances
2.2	Plat
2.3(a)	Description of Existing Easements
2.3(b)	Description of Easements to be Granted
2.4	Guaranty of Lease
2.6.2	Existing Municipal Resources and Services
3.2	Memorandum of Lease
4.1	Description of Entitlements
12.5	Leasehold Mortgage Agreement

20.28 Legal Representation of Parties. This Lease was negotiated by the Parties with the benefit of legal representation and any rule of construction or interpretation requiring this Lease to be construed or interpreted against any Party shall not apply to any construction or interpretation of this Lease.

20.29 Confidentiality. Except for the provisions and conditions disclosed in the Memorandum of Option, each Party agrees that it will not and shall direct its respective employees, officers, agents and representatives not to, directly or indirectly, release or cause or permit to be released to the public any press notices, publicity (oral or written) or advertising promotion relating to the execution of this Lease, or otherwise publicly announce or disclose or cause or permit to be publicly announced or disclosed, in any manner whatsoever, the terms, conditions or substance of this Lease or the transactions contemplated herein, without first obtaining the consent of the other Party. It is understood that the foregoing shall not: (a) preclude any Party from discussing the substance or any relevant details of the transactions contemplated in this Lease on a confidential basis with any of its partners, attorneys, officers, directors, employees, accountants, professional



consultants, financial advisors, rating agencies, or potential lenders, as the case may be (the “**Representatives**”) provided that such Representatives have been informed of the applicable Party’s obligations hereunder; or (b) prevent it from complying with applicable laws, including without limitation governmental regulatory, disclosure, tax and reporting requirements, including, but not limited to, the California Public Records Act (Government Code §6250 *et seq.*).

- 20.30 Authority to Contract. Each individual executing this Lease on behalf of another person or legal entity represents and warrants that they are authorized to execute and deliver this Lease on behalf of such person or entity in accordance with duly adopted resolutions or other authorizing actions which are necessary and proper and under such legal entity’s articles, charter, bylaws, or other written rules of conduct or governing agreement, and that this Lease is binding upon such person or entity in accordance with its terms. Each person executing this Lease on behalf of another person or legal entity represents and warrants such entity is a valid, qualified corporation, limited liability company, partnership, or other unincorporated association in good standing in its home state and that such entity is qualified to do business in California.

*[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]*

IN WITNESS WHEREOF, the Parties have executed this Lease to be effective as of the Commencement Date.

CAPITAL POWER (US HOLDINGS) INC., a  
Delaware corporation

BY: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

BY: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

THE CITY OF SAN DIEGO, a California  
municipal corporation

BY: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

*Approved as to form:*

JAN I. GOLDSMITH, City Attorney

BY: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

## **Addendum "A"**

### **DEFINED TERMS**

**"Affiliate"** of a specified Person means any other Person that directly or indirectly through one or more intermediaries, controls, is controlled by or is under common control with the specified Person. As used in this definition, "control," "controlled by" and "under common control with" means ownership, directly or indirectly, or the power to direct or cause the direction of management or policies of such Person (whether through ownership of securities or other partnership or ownership interests, by contract or otherwise).

**"Approvals"** has the meaning specified in Section 18.5.1.

**"Award"** has the meaning specified in Section 15.2.

**"Base Rent"** has the meaning specified in Section 5.1.1.3.

**"City"** has the meaning specified in the introductory paragraph of this Lease.

**"Claim"** has the meaning specified in Section 10.2.1.

**"Commencement Date"** has the meaning specified in the introductory paragraph of this Lease.

**"Commercial Operations Date"** means the date upon which the Plant becomes commercially operable according to generally accepted industry standards.

**"Construction Security"** means cash, a letter of credit, a corporate surety bond, or other security satisfactory to City and Lessee.

**"DEH"** means the County of San Diego Department of Environmental Health.

**"Environmental Claims"** means all claims, demands, suits, causes of action for personal injury or property damage, including without limitation actual or threatened damages to natural resources; claims for the recovery of response costs, or administrative or judicial orders directing the performance of investigations, removal, remedial or other response actions under any Environmental Laws; a requirement to implement "corrective action" pursuant to any order or permit issued pursuant to the Resource Conservation and Recovery Act ("RCRA"); claims for restitution, contribution or equitable indemnity from third parties or any Governmental Authority; fines, penalties, liens against property; claims for injunctive relief or other orders or notices of violation from any Governmental Authority; any requirement to install pollution control equipment to comply with any Environmental Laws; and, with regard to any present or former employees or other natural persons, exposure to or injury from Environmental Conditions or Environmental Noncompliance.

**"Environmental Conditions"** means (i) any environmental conditions, circumstances or other matters of fact, pertaining to, relating to or otherwise affecting the environment, including any natural resources (including flora and fauna), soil, surface water, ground water, any present or potential drinking water supply, subsurface strata or the ambient air, and relating to or arising out

of the presence, use, handling, storage, treatment, recycling, generation, transportation, release, spilling, leaking, pumping, pouring, emptying, discharging, injecting, escaping, leaching, disposal (including, without limitation, the abandonment or discarding of barrels, containers and other closed receptacles containing any Hazardous Materials), dumping or threatened release (as such term is used in the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") or other similar Environmental Laws) of Hazardous Materials, and (ii) the exposure of any persons (including any present or former employee to Hazardous Materials within any workplace within the Leased Premises, or the exposure of other natural persons within or outside the boundaries of the Leased Premises to Hazardous Materials related to or otherwise arising from operations, acts, omissions or other conduct at the Leased Premises.

**"Environmental Expenses"** means all liabilities, losses, costs and expenses arising out of Environmental Conditions or Environmental Noncompliance, including without limitation costs of investigation, cleanup, remedial, removal or other response action, the costs associated with posting financial assurances for the completion of response, remedial or corrective actions, the preparation of any closure or other necessary or required plans or analyses, other reports or analyses submitted to or prepared by Governmental Authorities, including the cost of health risk assessments, epidemiological studies and the like, retention of engineers or other expert consultants, legal counsel, capital improvements (including without limitation costs to install any pollution control equipment to comply with any Environmental Laws), operation and maintenance testing and monitoring costs, power and utility costs and pumping taxes or fees, and administrative, oversight and other costs incurred by Governmental Authorities; provided, however, that "Environmental Expenses" shall only include those Environmental Expenses which are reasonably necessary and are in reasonable amounts in view of the then existing circumstances giving rise to such Environmental Expenses.

**"Environmental Laws"** means any law, regulation, rule or ordinance now or hereafter in effect relating to Environmental Conditions, including, without limitation, CERCLA, the Toxic Substances Control Act of 1976 ("TSCA"), the RCRA, the Clean Water Act ("CWA"), the Clean Air Act ("CAA"), the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), the Atomic Energy Act ("AEA"), the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"), the Safe Drinking Water Act, the Hazardous Materials Transportation Act, the Oil Pollution Act of 1990, the Occupational Health and Safety act, and the Pollution Prevention Act; State Environmental Laws; any amendments thereto now or hereafter adopted or that otherwise become effective; any plans, rules, regulations or ordinances adopted (including without limitation fire, land use, zoning, and other codes and regulations relating to Environmental Conditions), any permits and licenses issued pursuant to any of the foregoing, or other guidelines, guidance or policies promulgated pursuant to the foregoing; and any common law principles (including without limitation decisions by or orders of courts, agencies, boards of appeals or similar bodies with mandatory or persuasive authority) relating to the Environmental Conditions.

**"Environmental Noncompliance"** means any violation of Environmental Laws including, without limitation: (i) the discharge, emission, release or threatened release (as such term issued in CERCLA, the CWA, the CAA or other similar Environmental laws) of any Hazardous Materials in violation of any Environmental Laws; (ii) any noncompliance with Environmental Laws regarding the construction, modification, operation and maintenance of physical structures,

equipment, processes or facilities; (iii) any noncompliance with federal, state or local requirements governing occupational safety and health related to Hazardous Materials; (iv) any facility operations, procedures, designs, or other matters which do not conform to the statutory or regulatory requirements of Environmental Laws, including the CAA, the CWA, the TSCA and the RCRA; (v) the failure to have obtained or to maintain in full force and effect permits, variances or other authorizations necessary for the legal operation of any equipment, process, facility or any other activity, to the extent required for compliance with Environmental Laws; or (vi) the operation of any facility, process or equipment in violation of any permit, condition, schedule of compliance, administrative or court order, to the extent required for compliance with Environmental Laws.

**“Estoppel and Consent”** has the meaning specified in Section 12.3.

**“Existing Environmental Conditions”** has the meaning specified in Section 9.2.

**“Fee Mortgage”** has the meaning specified in Section 12.5.

**“Force Majeure Event”** means an act, condition, event or circumstances which prevents one Party from performing its obligations under this Lease, which act, condition, event or circumstances is not within the reasonable control of, and without fault or negligence of, the Party claiming the occurrence of a Force Majeure Event. A Force Majeure Event includes without limitation sabotage, strikes or other labor difficulties, riots or civil disturbance, acts of God, acts of a public enemy, drought, earthquakes, floods, abnormally severe storms, explosions or fires, lightning, landslides, or similarly cataclysmic occurrence. A Force Majeure Event also includes condemnation, taking, seizure, involuntary conversion or requisition of title to or use of the Plant or the Easements or any material portion thereof by action of the federal or state government. A Force Majeure Event also includes a disruption in the financial markets. A Force Majeure Event shall not mean any act or event to the extent resulting from the fault or negligence of any person claiming a Force Majeure Event, or the financial inability of any person to perform its obligations under this Lease.

**“Franchise Fees”** has the meaning specified in Section 5.2.3.1.

**“Governmental Authority”** or **“Governmental Authorities”** mean any national, state or local government (whether domestic or foreign), and political subdivision thereof or any other governmental, quasi-governmental, judicial, public or statutory instrumentality, authority, body, agency, department, bureau or entity (including without limitation any zoning authority, the United States Securities and Exchange Commission, the Federal Energy Regulatory Commission, the California Public Utilities Commission, the California Energy Commission or any comparable authority).

**“Governmental Rule”** means any law, rule, regulation, ordinance, order, code, permit, interpretation, judgment, decree, directive, guideline, policy or similar form of decision of any Governmental Authority having the effect and force of law, including without limitation any Environmental Laws.

**“Guarantor”** means Capital Power L.P., an Ontario limited partnership, or the parent company of Lessee or any successor tenant under this Lease that executes a Guaranty of Lease.

**“Guaranty of Lease”** has the meaning specified in Section 2.4.

**“Hazardous Materials”** means hazardous wastes, hazardous substances, hazardous constituents, air contaminants or toxic substances, whether solids, liquids or gases, including substances defined or otherwise regulated as “hazardous substances,” “pollutants,” “reproductive toxins,” “radioactive materials,” “toxic chemicals,” or other similar designations in, or otherwise subject to regulation under, any Environmental Laws, including without limitation petroleum hydrocarbons, asbestos-containing materials, urea formaldehyde foam insulation, polychlorinated biphenyls and radio nuclides.

**“Imposition”** or **“Impositions”** has the meaning specified in Section 5.2.1.

**“Indemnifying Party”** has the meaning specified in Section 10.2.1.

**“Indemnitee”** has the meaning specified in Section 10.2.1.

**“Initial Term”** has the meaning specified in Section 3.1.

**“Lease”** has the meaning specified in the introductory paragraph of this Lease.

**“Lease Year”** has the meaning specified in Section 3.1.2.

**“Leased Premises”** has the meaning specified in Section 2.1.

**“Leasehold Interest”** has the meaning specified in Section 12.3.

**“Leasehold Mortgage”** has the meaning specified in Section 12.4.

**“Leasehold Mortgage Agreement”** has the meaning specified in Section 12.4.

**“Leasehold Mortgagee”** has the meaning specified in Section 12.4.

**“Lenders”** means providers of debt financing directly related to Lessee’s use of the Leased Premises, or owners of any debt instruments evidencing the same, and their respective successors and assigns, including transferees of debt instruments and any trustee, collateral agent or other fiduciary or nominee acting on behalf of any of the foregoing Persons.

**“Lessee”** has the meaning specified in the introductory paragraph of this Lease, and any successor or allowed assign thereof.

**“Lessee-Caused Liens”** has the meaning specified in Section 8.2.

**“Lessee’s Condemnation Award”** has the meaning specified in Section 15.2.

**“Lessee’s Leasehold Improvements”** means the shell building structure of the Plant and any other structures constructed or installed by Lessee on the Leased Premises at any time and from time to time. Notwithstanding anything to the contrary contained herein, City and Lessee acknowledge and agree that the Lessee’s Leasehold Improvements shall not include any of Lessee’s Personal Property.



**“Lessee’s Operations”** has the meaning specified in Section 9.3.6.

**“Lessee’s Personal Property”** has the meaning specified in Section 16.1.2.

**“Lien”** means any mortgage, lien, claim, pledge, option, charge, easement, security interest, right-of-way, encroachment, building or use restriction, conditional sales agreement, encumbrance or other third-party right, whether voluntarily incurred or arising by operation of law, and includes without limitation any agreement to give any of the foregoing in the future, and any contingent sale or other title retention agreement or lease in the nature thereof.

**“Mayor”** has the meaning specified in Section 2.5.

**“Memorandum of Lease”** has the meaning specified in Section 3.2.

**“Municipal Surcharge Fees”** has the meaning specified in Section 5.2.3.1.

**“MW”** means Megawatts.

**“Navy Easement”** has the meaning specified in Section 4.1.

**“Party”** or **“Parties”** has the meaning specified in the introductory paragraph of this Lease.

**“Permitted Encumbrances”** has the meaning specified in Section 2.1.

**“Permitted Lien”** means: (a) Liens for Taxes that are not delinquent or that are being contested in good faith by appropriate proceedings; (b) such other Liens as, in the aggregate, (i) are not substantial in amount, (ii) do not materially detract from the value of the Lessee’s Leasehold Improvements and (iii) do not materially interfere with the ability to operate the Plant; (c) Liens arising in connection with or under Lessee’s or its Affiliates’ financing documents; and (d) Permitted Encumbrances.

**“Person”** means any natural person, corporation, partnership, firm, association, trust, unincorporated organization, Governmental Authority or any other legal entity whether acting in an individual, fiduciary or other capacity.

**“Plant”** has the meaning specified in Section 4.1.

**“Post-construction Security”** has the meaning specified in Section 4.5.

**“Prevention Plan”** has the meaning specified in Section 20.25.

**“Representatives”** has the meaning specified in Section 20.29.

**“Related Parties”** means (as applicable) a Party’s elected officials, successors, assigns, officers, directors, shareholders, members, participants, partners, affiliates, beneficiaries, trustees, subsidiaries, employees, representatives, agents or lenders.

**“Renewal Option”** and **“Renewal Options”** have the meaning specified in Section 3.1.1.

**“State Environmental Law”** means any state or local law, regulation, rule or ordinance now or hereafter in effect relating to Environmental Conditions including any amendments thereto now or hereafter adopted or that otherwise become effective; and plans, rules, regulations, orders or ordinances adopted (including, without limitation fire, land use, zoning and other codes and regulations relating to Environmental Conditions), or other guidance or policies promulgated pursuant to the preceding laws; and local laws, ordinances, codes or regulations pertaining to or otherwise addressing Environmental Conditions; or any terms or conditions in state or local permits, licenses or other authorizations relating to Environmental Conditions; and common law principles (including without limitation decisions by or orders of courts, agencies, boards of appeal or similar bodies with mandatory or persuasive authority) relating to Environmental Conditions.

**“Stormwater Code”** has the meaning specified in Section 20.25.

**“Taxes”** means all federal, state, local and other net income, gross income, gross receipts, sales, use, ad valorem, transfer, franchise, profits, withholding, payroll, employment, excise, property, customs, duties or other taxes, fees, assessments or charges of any kind whatsoever, together with any interest and any penalties, additions to tax or additional amount with respect thereto:

**“Term”** has the meaning specified in Section 3.1.1.

**“Water Agreement”** means that certain Effluent and Potable Water Services Agreement, dated \_\_\_\_\_, 20\_\_\_\_, between City and Lessee.

## EXHIBIT "2.1(a)"

### (Legal Description)

**The land referred to herein is situated in the State of California, County of San Diego, City of , and described as follows:**

#### **Parcel 1:**

That portion of Pueblo Lot 1306 of the Pueblo Lands of San Diego, in the City of San Diego, County of San Diego, State of California, according to Map thereof made by James Pascoe in 1870, a copy of which was filed in the office of the County Recorder on November 14, 1921, and is now known as Miscellaneous Map No. 36; lying easterly, southeasterly, and northeasterly of the northeasterly boundary line of that certain Grant Deed from the City of San Diego, a Municipal Corporation to the State of California, recorded January 8, 1971 as file no. 3902 of Official Records; and southerly of the southerly boundary line of Miramar Road.

APN: 345-021-02-00

Note: The above described legal description is for informational purposes only, and does not constitute a legal description by definition of the Subdivision Map Act.

#### **Parcel 2:**

That portion of Pueblo Lot 1304 of the Pueblo Lands of San Diego, in the City of San Diego, County of San Diego, State of California, according to Map thereof made by James Pascoe in 1870, a copy of which was filed in the office of the County Recorder on November 14, 1921, and is now known as Miscellaneous Map No. 36; lying easterly, and northeasterly of the northeasterly boundary line of that certain Grant Deed from the City of San Diego, a Municipal Corporation to the State of California, recorded January 8, 1971 as file no. 3902 of Official Records; and lying easterly and northeasterly of the northeasterly boundary line of that certain Grant Deed from the City of San Diego, a Municipal Corporation to the State of California, recorded October 10, 2007 as file no. 2007-0653178 of Official Records. APN: 345-021-03-00 Note: The above described legal description is for informational purposes only, and does not constitute a legal description by definition of the Subdivision Map Act.

#### **Parcel 3:**

That portion of Pueblo Lots 1305 and 1276 of the Pueblo Lands of San Diego, in the City of San Diego, County of San Diego, State of California, according to Map thereof made by James Pascoe in 1870, a copy of which was filed in the office of the County Recorder on November 14, 1921, and is now known as Miscellaneous Map No. 36; lying northerly and northeasterly of the northerly and northeasterly boundary line of Parcel 1A of that certain Final Order of Condemnation in favor of the State of California, recorded February 16, 1970 as file no. 28406 of Official Records; and lying easterly, and northeasterly of the northeasterly boundary line of that certain Grant Deed from the City of San Diego, a Municipal Corporation to the State of California, recorded January 8, 1971 as file no. 3902 of Official Records; and lying easterly and northeasterly of the northeasterly boundary line of that certain Grant Deed from the City of San Diego, a Municipal Corporation to the State of California recorded October 10, 2007 as file no. 2007-0653178 of Official Records.

Excepting from the above described Parcel No. 3, that portion of land as conveyed in that certain Grant Deed from the City of San Diego, a Municipal Corporation to the Atchison, Topeka, and Santa Fe Railway Company, a Kansas Corporation, recorded April 16, 1969 as file no. 66016 of Official Records.

APN: 348-021-03-00

Note: The above described legal description is for informational purposes only, and does not constitute a legal description by definition of the Subdivision Map Act.

**EXHIBIT “2.1(b)”**

**(Permitted Exceptions)**

*[TO FOLLOW BEHIND THIS PAGE]*

**EXHIBIT “2.2”**

**(Plat)**

*[TO FOLLOW BEHIND THIS PAGE]*



**EXHIBIT "2.3(a)"**

**(Description of Existing Easements)**

*[TO FOLLOW BEHIND THIS PAGE]*

**EXHIBIT “2.3(b)”**

**(Description of Easements to be Granted)**

*[TO FOLLOW BEHIND THIS PAGE]*

**EXHIBIT “2.4”**

**(Guaranty of Lease)**

*[TO FOLLOW BEHIND THIS PAGE]*

## GUARANTEE

This Guarantee (the "Guarantee"), dated as of \_\_\_\_\_, 20\_\_ is made and entered into by Capital Power, L.P., an Ontario limited partnership ("Guarantor").

### **WITNESSETH:**

WHEREAS \_\_\_\_\_, a \_\_\_\_\_, an affiliate of Guarantor ("Company"), and The City Of San Diego, a California municipal corporation ("Beneficiary"), have entered into that certain City Of San Diego Ground Lease Agreement, dated as of \_\_\_\_\_, 20\_\_, as may from time to time be modified, amended and supplemented, shall be referred to herein as the "Contract"); and

WHEREAS Guarantor will directly or indirectly benefit from the Contract between Beneficiary and Company.

NOW THEREFORE, in consideration of Beneficiary entering into the Contract, Guarantor hereby covenants and agrees as follows:

#### 1. GUARANTEE

Subject to the provisions of this Guarantee and, in particular, Section 1(b), Guarantor hereby irrevocably and unconditionally guarantees the timely payment when due of the obligations of Company (the "Obligations") to Beneficiary under the Contract. This Guarantee shall constitute a guarantee of payment and not of collection. The liability of Guarantor under this Guarantee shall be subject to the following:

(a) Guarantor's liability hereunder shall be and is specifically limited to payments expressly required to be made under the Contract (even if such payments are deemed to be damages) and, except to the extent specifically provided in the Contract or in this Guarantee, in no event shall Guarantor be subject hereunder to consequential, exemplary, equitable, loss of profits, punitive, tort, or any other damages or costs.

(b) Guarantor's aggregate liability hereunder in respect of any and all Payment Demands (as defined below) shall not exceed USD \$ \_\_\_\_\_ (\_\_\_\_\_ dollars, United States currency).

#### 2. TERM

Guarantor may terminate this Guarantee by providing written notice of such termination to Beneficiary and upon the effectiveness of such termination, Guarantor shall have no further liability hereunder, except as provided in the last sentence of this paragraph. No such termination shall be effective until thirty (30) days after receipt by Beneficiary of such termination notice. No such termination shall affect Guarantor's liability with respect to any Transaction (as defined in any of the Contract) entered into prior to the time the termination

is effective, which Transaction shall remain guaranteed pursuant to the terms of this Guarantee.

### 3. DEMANDS AND NOTICE

Upon the occurrence and during the continuance of an Event of Default as defined in any of the Contract, if Company fails or refuses to pay any Obligations after the expiration of any applicable cure period and Beneficiary has elected to exercise its rights under this Guarantee, Beneficiary shall make a demand upon Guarantor (hereinafter referred to as a "Payment Demand"). A Payment Demand shall be in writing and shall reasonably and briefly specify in what manner and what amount Company has failed to pay and an explanation of why such payment is due, with a specific statement that Beneficiary is calling upon Guarantor to pay under this Guarantee. A Payment Demand satisfying the foregoing requirements shall be required with respect to Obligations before Guarantor is required to pay such Obligations hereunder and shall be deemed sufficient notice to Guarantor that it must pay the Obligations within five (5) Business Days (as defined in the Contract) after its receipt of the Payment Demand. A single written Payment Demand shall be effective as to any specific default during the continuance of such default, until Company or Guarantor has cured such default, and additional written demands concerning such default shall not be required until such default is cured.

### 4. REPRESENTATIONS AND WARRANTIES

Guarantor represents and warrants that:

- (a) it is a limited partnership duly formed and registered under the laws of the Province of Ontario and has the necessary power and authority to execute and deliver this Guarantee, and to carry out the terms and provisions of this Guarantee;
- (b) the execution, delivery and performance of this Guarantee by Guarantor have been duly authorized by all necessary partnership action and approvals;
- (c) no authorization, approval, consent or order of, or registration or filing with, any court or other governmental body having jurisdiction over Guarantor is required on the part of Guarantor for the execution and delivery of this Guarantee; and
- (d) this Guarantee has been duly executed and delivered by Guarantor and constitutes a valid and legally binding agreement of Guarantor enforceable in accordance with its terms, except as the enforceability of this Guarantee may be limited by the effect of any bankruptcy, insolvency, reorganization, moratorium or similar laws affecting creditors' rights generally and by general principles of equity applicable to Guarantor.

### 5. DEFENSES

The liability of Guarantor hereunder shall be irrevocable, continuing, absolute and unconditional and shall not be affected by, and Guarantor hereby waives, to the fullest extent

permitted by law any defenses arising from or pertaining to: (a) any lack of validity, legality or enforceability of the Contract; (b) any amendment to or change in any of the Obligations or the terms and conditions of the Contract agreed to by Beneficiary and Company; (c) the bankruptcy, winding-up, liquidation, dissolution or insolvency of Company, including any discharge of any of the Obligations resulting therefrom; (d) any lack or limitation of power, incapacity or disability on the part of Company or any of its partners, directors, officers or agents, or any other irregularity, defect or informality on the part of Company in relation to any Obligation; (e) the existence of any claim, set-off or other rights which Guarantor may have at any time against Beneficiary in connection with any matter unrelated to the Contract; (f) any defense arising by reason of any failure of Beneficiary to make any presentment, demand for performance, notice of non-performance, protest, or any other notice, except as expressly set forth herein; or (g) any change in the existence, structure, constitution, name, objects, powers, business, control or ownership of Guarantor, Company or Beneficiary. The Guarantor reserves the right to assert any defenses which the Company may have to payment of any Obligation under the terms of the Contract other than defenses expressly waived in this Guarantee.

#### 6. AMENDMENT OF GUARANTEE

No term or provision of this Guarantee shall be amended, modified, altered, waived or supplemented except in writing signed by Guarantor and Beneficiary.

#### 7. WAIVERS

Guarantor hereby waives (a) notice of acceptance of this Guarantee; (b) presentment and demand concerning the liabilities of Guarantor, except as expressly set forth in Section 3 above; and (c) any right to require that any action or proceeding be brought against Company or any other person to require that Beneficiary seek enforcement of any performance against Company or any other person, prior to any action against Guarantor under the terms hereof. Except as to applicable statutes of limitation, no delay

of Beneficiary in the exercise of, or failure to exercise, any rights hereunder shall operate as a waiver of such rights, a waiver of any other rights or a release of Guarantor from any obligations hereunder. Guarantor consents to the renewal, compromise, extension, acceleration or other changes in the time of payment of or other changes in the terms of the Obligations, or any part thereof, or any changes or modifications to the terms of the Contract.

#### 8. SUBROGATION

Guarantor will not exercise any rights which it may acquire by way of subrogation under this Guarantee by any payment made hereunder or otherwise, until all the Obligations guaranteed hereunder have been paid in full or otherwise satisfied. If any amount shall be paid to Guarantor on account of such subrogation rights at any time when all the Obligations guaranteed hereunder shall not have been paid in full or otherwise satisfied, such amount shall be held in trust by Guarantor for the benefit of Beneficiary and shall forthwith be paid to Beneficiary, to be credited and applied to the Obligations guaranteed hereunder.



## 9. EXPENSES

Guarantor shall pay for or reimburse Beneficiary for any and all out-of-pocket expenses (including, without limitation all reasonable fees and disbursements of legal counsel) incurred in connection with the successful enforcement of its rights under this Guarantee.

## 10. NOTICE

Any Payment Demand, notice, request, instruction, correspondence or other document to be given hereunder by any party to another (herein collectively called "Notice") shall be in writing and delivered personally or mailed by registered mail, postage prepaid and return receipt requested, or by telegram or telecopier, as follows:

To

Beneficiary:

To Guarantor: Capital Power L.P.

Suite 1200, 10423-101 St.  
NW

Edmonton, AB T5H 0E9

Attn:

Attn: Treasury - Credit

Fax No:

Fax No: (780) 392-5152

With copy to: Capital Power L.P.

Suite 1200, 401 - 9<sup>th</sup> Ave  
SW

Calgary, AB T2P 3C5

Attn: Treasury - Credit

Fax No: (403) 717-8954

Notice given by personal delivery shall be deemed to have been received on the date of actual delivery. Notice given by registered mail (as aforesaid) shall be deemed to have been given on the date of mailing and received on the third Business Day following the date of mailing. Transmittal of any Notice given by telecopier shall be confirmed by the sender's telecopier and shall be deemed to have been given and received on the day it was sent (if received prior to 4:00 p.m. local time on a Business Day) and otherwise such Notice shall be deemed to have been received on the Business Day next following the date of sending. Any party may change its address or telecopier number to which Notice is to be given by giving the other party Notice of such change of address or telecopier number as provided above.

## 11. MISCELLANEOUS

This Guarantee shall in all respects be governed by, and construed in accordance with, the laws of the Province of Alberta and the laws of Canada applicable therein, without regard to principles of conflicts of laws. This Guarantee shall be binding upon Guarantor and its successors and inure to the benefit of and be enforceable by Beneficiary, and its successors and permitted assigns. Neither party shall assign any of its rights, interest or obligations hereunder to any other person or entity without the prior written consent of the other party (which consent shall not be unreasonably delayed or withheld) and any purported assignment absent such consent is void; provided however, that Beneficiary may, without the consent of Guarantor, assign its entire interest in this Guarantee to a person or entity who is contemporaneously taking an assignment of Beneficiary's entire interest in the Contract in accordance with the terms of the Contract. This Guarantee embodies the entire agreement and understanding between Guarantor and Beneficiary and supersedes all prior agreements and understandings relating to the subject matter hereof. The headings in this Guarantee are for purposes of reference only, and shall not affect the meaning hereof.

IN WITNESS WHEREOF, Guarantor has executed this Guarantee in the City of Edmonton, Alberta on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_ but it is effective as of the date first above written.

**Capital Power L.P., by its general partner, Capital Power GP Holdings Inc.**

By: \_\_\_\_\_  
Name: Stuart Lee  
Title: Sr. Vice President and Chief Financial Officer

By: \_\_\_\_\_  
Name: Yale Loh  
Title: Treasurer

**EXHIBIT “2.6.2”**

**(Existing Municipal Resources and Services)**

**EXHIBIT "3.2"**

**(Memorandum of Lease Agreement)**

*[TO FOLLOW BEHIND THIS PAGE]*

Recording requested by:

CHICAGO TITLE COMPANY

and when recorded mail to:

James R. Dawe, Esq.  
Seltzer Caplan McMahon Vitek  
A Law Corporation  
750 B Street, Suite 2100  
San Diego, California 92101

(SPACE ABOVE THIS LINE FOR RECORDER'S USE)

### **MEMORANDUM OF LEASE AGREEMENT**

THIS MEMORANDUM OF LEASE AGREEMENT ("**Memorandum**") is made as of \_\_\_\_\_, 20\_\_ (the "**Memorandum Effective Date**"), by THE CITY OF SAN DIEGO, a California municipal corporation, (the "**City**"), as lessor, and CAPITAL POWER (US HOLDINGS) INC., a Delaware corporation (the "**Lessee**"), as lessee, as follows:

1. City is the fee owner of that certain real property in the City of San Diego, County of San Diego, State of California, as more particularly described on Exhibit "A" attached hereto and incorporated herein by this reference ("**Leased Premises**").

2. City and Lessee have entered into that certain City of San Diego Ground Lease Agreement, dated \_\_\_\_\_, 20\_\_ ("**Lease**"), whereby City has leased to Lessee, and Lessee has leased from City, the Leased Premises.

3. The term of the Lease ("**Term**") commenced on \_\_\_\_\_, 20\_\_ (the "**Commencement Date**"), and shall expire on a date that is twenty-five (25) years after the Commencement Date.

4. Lessee has two (2) options to extend the Term for an additional ten (10) years per option, for a total of twenty (20) years beyond the initial Term.

5. This Memorandum is being recorded to give notice to the public that the Leased Premises is subject to the provisions and conditions of the Lease.

6. This Memorandum is intended to summarize certain of the provisions and conditions of the Lease, but in no way changes, modifies or otherwise affects any of the terms or conditions of the Lease.

*[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]*

7. In the event of any conflict between this Memorandum and the Lease, the terms and conditions of the Lease shall prevail.

IN WITNESS WHEREOF, this Memorandum is executed to be effective as of the Memorandum Effective Date.

CAPITAL POWER (US HOLDINGS) INC., a  
Delaware corporation

BY: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

BY: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

THE CITY OF SAN DIEGO, a California  
municipal corporation

BY: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

*Approved as to form:*

JAN I. GOLDSMITH, City Attorney

BY: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_



STATE OF \_\_\_\_\_ )  
 ) ss  
COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_ before me, \_\_\_\_\_ Notary Public, personally appeared \_\_\_\_\_, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature \_\_\_\_\_ (Seal)

STATE OF \_\_\_\_\_ )  
 ) ss  
COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_ before me, \_\_\_\_\_ Notary Public, personally appeared \_\_\_\_\_, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature \_\_\_\_\_ (Seal)

## EXHIBIT "A"

### (Legal Description)

The land referred to herein is situated in the State of California, County of San Diego, City of , and described as follows:

#### **Parcel 1:**

That portion of Pueblo Lot 1306 of the Pueblo Lands of San Diego, in the City of San Diego, County of San Diego, State of California, according to Map thereof made by James Pascoe in 1870, a copy of which was filed in the office of the County Recorder on November 14, 1921, and is now known as Miscellaneous Map No. 36; lying easterly, southeasterly, and northeasterly of the northeasterly boundary line of that certain Grant Deed from the City of San Diego, a Municipal Corporation to the State of California, recorded January 8, 1971 as file no. 3902 of Official Records; and southerly of the southerly boundary line of Miramar Road.

APN: 345-021-02-00

Note: The above described legal description is for informational purposes only, and does not constitute a legal description by definition of the Subdivision Map Act.

#### **Parcel 2:**

That portion of Pueblo Lot 1304 of the Pueblo Lands of San Diego, in the City of San Diego, County of San Diego, State of California, according to Map thereof made by James Pascoe in 1870, a copy of which was filed in the office of the County Recorder on November 14, 1921, and is now known as Miscellaneous Map No. 36; lying easterly, and northeasterly of the northeasterly boundary line of that certain Grant Deed from the City of San Diego, a Municipal Corporation to the State of California, recorded January 8, 1971 as file no. 3902 of Official Records; and lying easterly and northeasterly of the northeasterly boundary line of that certain Grant Deed from the City of San Diego, a Municipal Corporation to the State of California, recorded October 10, 2007 as file no. 2007-0653178 of Official Records. APN: 345-021-03-00 Note: The above described legal description is for informational purposes only, and does not constitute a legal description by definition of the Subdivision Map Act.

#### **Parcel 3:**

That portion of Pueblo Lots 1305 and 1276 of the Pueblo Lands of San Diego, in the City of San Diego, County of San Diego, State of California, according to Map thereof made by James Pascoe in 1870, a copy of which was filed in the office of the County Recorder on November 14, 1921, and is now known as Miscellaneous Map No. 36; lying northerly and northeasterly of the northerly and northeasterly boundary line of Parcel 1A of that certain Final Order of Condemnation in favor of the State of California, recorded February 16, 1970 as file no. 28406 of Official Records; and lying easterly, and northeasterly of the northeasterly boundary line of that certain Grant Deed from the City of San Diego, a Municipal Corporation to the State of California, recorded January 8, 1971 as file no. 3902 of Official Records; and lying easterly and northeasterly of the northeasterly boundary line of that certain Grant Deed from the City of San Diego, a Municipal Corporation to the State of California recorded October 10, 2007 as file no. 2007-0653178 of Official Records.

Excepting from the above described Parcel No. 3, that portion of land as conveyed in that certain Grant Deed from the City of San Diego, a Municipal Corporation to the Atchison, Topcka, and Santa Fe Railway Company, a Kansas Corporation, recorded April 16, 1969 as file no. 66016 of Official Records.

APN: 348-021-03-00

Note: The above described legal description is for informational purposes only, and does not constitute a legal description by definition of the Subdivision Map Act.

**EXHIBIT "4.1"**

**(Description of Entitlements)**

*[TO FOLLOW BEHIND THIS PAGE]*

**EXHIBIT "12.5"**

**(Leasehold Mortgage Agreement)**

*[To follow behind this page]*

## **AGREEMENT**

THIS AGREEMENT ("**Agreement**") is entered into as of \_\_\_\_\_, 20\_\_\_\_, by and among THE CITY OF SAN DIEGO, a California municipal corporation (the "**City**"), and CAPITAL POWER (US HOLDINGS) INC., a Delaware corporation (the "**Lessee**"), and \_\_\_\_\_, a \_\_\_\_\_ ("**Leasehold Mortgagee**"), who agree as follows:

### **ARTICLE 1**

#### **Recitals**

1.1 City owns certain real property located in San Diego, California, more particularly described on Exhibit "A" attached hereto and incorporated herein by this reference ("**Leased Premises**").

1.2 City and Lessee are parties to that certain City of San Diego Ground Lease Agreement, dated \_\_\_\_\_, 20\_\_\_\_ (the "**Lease**").

1.3 Leasehold Mortgagee is the beneficiary under that certain leasehold mortgage described on Exhibit "B" attached hereto and incorporated herein by this reference (the "**Leasehold Mortgage**"), which encumbers Lessee's leasehold interest in the Leased Premises (the "**Leasehold Interest**").

1.4 City, Lessee and Leasehold Mortgagee desire to set forth their agreement with respect to the Lease and Leasehold Mortgagee's rights and remedies upon the occurrence of a default under the Lease, upon and subject to the provisions and conditions of this Agreement.

### **ARTICLE 2**

#### **Foreclosure and Sale**

2.1 Obligations of Leasehold Mortgagees. The provisions of this Agreement are for the benefit of each Leasehold Mortgagee, as well as of Lessee, and shall be enforceable by any of them. City hereby agrees that Leasehold Mortgagee shall not be obligated to perform any obligation or be deemed to incur any liability or obligation provided under the Lease on the part of Lessee unless Leasehold Mortgagee forecloses its Leasehold Mortgage and takes possession of the Leased Premises.

#### **2.2 Leasehold Mortgagee Rights and Protections.**

2.2.1 When Liability of Leasehold Mortgagee Accrues. Leasehold Mortgagee, in the exercise of its rights under this Agreement, shall not be deemed to be an assignee or transferee or mortgagee in possession of the Leasehold Interest so as to require Leasehold Mortgagee to assume or otherwise be obligated to perform any of Lessee's obligations under this Agreement except when Leasehold Mortgagee has obtained "Control of the Leased Premises" (as herein defined). No Leasehold Mortgagee or purchaser at a foreclosure sale held pursuant to Leasehold Mortgage shall be liable under the Lease unless and until such time as it becomes, and then only for so long as it remains, the owner of the Leasehold Interest.

2.2.2 Modifications Requested By a Leasehold Mortgagee. If Leasehold Mortgagee shall require any modification(s) of this Agreement (including clarifications and supplementations), Leasehold Mortgagee shall deliver to Lessee and City such instruments in recordable form effecting such modifications(s) as Leasehold Mortgagee shall reasonably require, and City and Lessee shall execute such instruments; provided, however, that City shall not be required to execute such instruments if such modification(s) will adversely affect any of City's rights in any material respect or increase City's obligations under the Lease.

2.2.3 Foreclosure or Transfer In Lieu of Foreclosure. Notwithstanding anything to the contrary in this Agreement, any sale of the Lease and of the Leasehold Interest in any proceedings for foreclosure of any Leasehold Mortgage, or any assignment, transfer or conveyance in lieu of such foreclosure, or any assignment of the Lease and of the Leasehold Interest by Leasehold Mortgagee, shall not be deemed to violate the Lease or this Agreement.

2.2.4 Commencement and Termination of Leasehold Mortgagee Protections. If Leasehold Mortgagee is entitled to the Leasehold Mortgagee protections provided for under this Agreement, then such entitlement shall not terminate unless and until (a) such time as the Leasehold Mortgage shall have been satisfied and discharged of record as evidenced by the recording of a satisfaction and cancellation of the Leasehold Mortgage in the land records for San Diego County, California, or (b) the expiration of or, subject to the provisions of this Agreement, the termination of this Lease.

2.3 Leasehold Mortgagee Protections. The Leasehold Mortgagee shall be entitled to the protections provided for under this Agreement:

2.3.1 Leasehold Mortgagee Consent. Except as otherwise provided in this Agreement, Lessee's cancellation, termination (including Lessee's termination of the Lease pursuant to any express right of termination provided for in the Lease), surrender, abandonment, material amendment, or modification of the Lease shall not bind Leasehold Mortgagee or affect the lien of any Leasehold Mortgage unless Leasehold Mortgagee has given its prior written consent to such cancellation, termination, abandonment, material amendment, or modification. Leasehold Mortgagee's prior written consent shall not be required for any non-material amendment of the Lease.

2.3.2 Notice to Leasehold Mortgagee. If City shall give any notice to Lessee (including any notice of default and any notice of termination of the Lease for any reason), then City shall at the same time and by the same means give a copy of such notice to Leasehold Mortgagee. No event of default under the Lease ("**Lease Event of Default**") or termination of the Lease predicated upon the giving of notice to Lessee shall be deemed to have occurred unless like notice shall have been so given to Leasehold Mortgagee at the same time and by the same means, which notice shall describe in reasonable detail the alleged Lease Event of Default or other grounds for termination.

2.3.3 Right of Leasehold Mortgagee to Perform for Lessee. Leasehold Mortgagee shall have the right, but not the obligation, to perform any obligation of Lessee under the Lease and to remedy any default by Lessee as set forth herein. City shall accept performance by or at the instigation of Leasehold Mortgagee in fulfillment of Lessee's obligations, for the



account of Lessee and with the same force and effect as if performed by Lessee. No such performance by Leasehold Mortgagee shall cause Leasehold Mortgagee to become a "mortgagee in possession" or otherwise cause Leasehold Mortgagee to be deemed in possession of the Leased Premises or bound by the Lease.

2.3.4 Additional Time for Leasehold Mortgagee to Exercise Cure Rights. If a default by Lessee occurs under the Lease and such default shall not be remedied within the cure period allotted under the Lease, City shall give Leasehold Mortgagee additional written notice of the default, and shall allow Leasehold Mortgagee the additional time provided for below within which to take (if Leasehold Mortgagee so elects) whichever of the actions set forth below shall apply with respect to the default described in such notice of default (such actions, "**Mortgagee's Cure,**" and Leasehold Mortgagee's rights to take such actions, "**Mortgagee's Cure Rights**").

(a) Default That Can Be Cured Without Possession. In the case of a "Monetary Default" (as defined in the Lease) or a "Non-Monetary Default" (as defined in the Lease) that Leasehold Mortgagee is reasonably capable of curing without obtaining possession of the Leased Premises within the cure period allowed to Lessee under the Lease, Leasehold Mortgagee shall be entitled (but not required) to cure such default within a cure period consisting of Lessee's cure period under this Agreement plus thirty (30) days.

(b) Default That Cannot Be Cured Without Possession or That Cannot Be Cured By Leasehold Mortgagee. In the case of a Non-Monetary Default that is not reasonably susceptible of being cured by Leasehold Mortgagee without obtaining possession of the Leased Premises, or that is otherwise not reasonably susceptible of being cured by Leasehold Mortgagee, then Leasehold Mortgagee shall be entitled (but not required) to do the following, so long as, with respect to any defaults other than those referred to in this Section 2.3.4(b), Leasehold Mortgagee has exercised or is exercising the applicable Mortgagee's Cure Rights as defined in this Agreement:

(1) Within a period consisting of Lessee's cure period for such Non-Monetary Default plus thirty (30) days, advise City of Leasehold Mortgagee's intention to take all reasonable steps necessary to remedy such Non-Monetary Default.

(2) At any time during the cure period, if any, that applies to Lessee plus thirty (30) days thereafter, Leasehold Mortgagee shall be entitled to institute proceedings, and diligently prosecute the same to completion, subject to the occurrence of any "Force Majeure Event" (as defined in the Lease), to obtain possession of the Leased Premises as a mortgagee, or to acquire the Leasehold Interest by foreclosure proceedings or otherwise, including delivery or an assignment in lieu of foreclosure (the obtaining of such possession or the completion of such acquisition, "**Control of the Leased Premises**").

(3) Upon obtaining Control of the Leased Premises, Leasehold Mortgagee shall be required to duly commence the cure of such Non-Monetary Default and thereafter diligently prosecute to completion (to the full extent it is able to do so) on or before the one hundred eightieth (180th) day after the date that Leasehold Mortgagee obtains Control of the Leased Premises.

2.3.5 Failure to Cure. If any Leasehold Mortgagee commences to cure a Lease Event of Default pursuant to Section 2.3.4, including its sub-parts, but fails to cure such default within the time periods allowed under Section 2.3.4 and its sub-parts, City may at the expiration of such cure periods (except for such defaults that, by their very nature, are not susceptible of being cured by Leasehold Mortgagee) proceed to enforce its remedies under the Lease.

2.3.6 No Obligation to Continue to Obtain Control of Leased Premises. Leasehold Mortgagee shall not be required to continue to exercise its Mortgagee's Cure Rights or otherwise proceed to obtain or to exercise Control of the Leased Premises if and when the default that Leasehold Mortgagee was attempting to cure shall have been cured. Upon such cure and the cure of any other defaults in accordance with this Agreement, the Lease shall continue in full force and effect as if no default(s) had occurred.

2.3.7 Cure Period Limitation on City's Remedies. So long as the time period of Leasehold Mortgagee to exercise its Mortgagee Cure Rights with respect to a Non-Monetary Default by Lessee has not expired (and provided that all Monetary Defaults are cured within Leasehold Mortgagee's cure period provided for under this Agreement), City shall not (i) re-enter the Leased Premises (except as permitted under the Lease or this Agreement), (ii) serve a notice of election to terminate the Lease, or (iii) bring a proceeding on account of such default to (a) dispossess Lessee and/or other occupants of the Leased Premises, (b) re-enter the Leased Premises, (c) terminate the Lease or the Leasehold Interest, or (d) otherwise exercise any rights or remedies under the Lease by reason of such default. Nothing in the Leasehold Mortgagee protections provided for in this Agreement shall be construed to extend the "Lease Term" (as defined in the Lease) beyond the "Lease Termination Date" (as defined in the Lease) that would have applied if no default had occurred.

2.3.8 Entry to Effectuate a Mortgagee Cure. City and Lessee authorize each Leasehold Mortgagee to enter the Leased Premises to effect the Leasehold Mortgagee's Cure and to take any action(s) reasonably necessary to effect the Leasehold Mortgagee's Cure. A Leasehold Mortgagee's rights under this paragraph shall not constitute Control of the Leased Premises or otherwise be construed to mean that Leasehold Mortgagee has possession of the Leased Premises.

2.3.9 City to Recognize Purchaser of Leasehold Interest at Foreclosure. If Leasehold Mortgagee or its nominee or a purchaser at a foreclosure sale shall acquire Control of the Leased Premises, then City shall recognize any purchaser of the Leasehold Interest pursuant to a foreclosure sale under Leasehold Mortgage, or any transferee of the Leasehold Interest under an assignment in lieu of foreclosure, or, if the Leasehold Mortgagee should be such purchaser or assignee, the Leasehold Mortgagee and any assignee of the Leasehold Mortgage, as the Lessee hereunder; provided, however, that any such Person shall be obligated to timely cure all Monetary Defaults and promptly proceed and diligently continue to exercise Mortgagee's Cure Rights within the time periods herein allowed.

2.3.10 Limitation on Liability of Leasehold Mortgagee and New Tenant. Notwithstanding anything to the contrary in this Agreement, no Leasehold Mortgagee, no New Tenant, and no one acting for or on behalf of Leasehold Mortgagee or a New Tenant shall have any liability under or with respect to the Lease (or the New Lease) except during such period as

such person is the tenant under the Lease (or the New Lease), and, subject to the provisions and conditions of this Agreement, such liability shall in any event terminate upon such person's assignment of the Lease (or the New Lease).

2.3.11 City Obligations To Enter Into New Lease. If the Lease shall terminate for any reason before the last day of the Lease Term, then (in addition to any other or previous notice required to be given by City to Leasehold Mortgagee), City shall, within thirty (30) days of such termination, give notice of such termination to Leasehold Mortgagee. Leasehold Mortgagee may request, in writing within thirty (30) days of such notice, that City enter into a new lease of the Leased Premises with Leasehold Mortgagee or its nominee (the "**New Tenant**"), effective as of such termination date, for the remainder of the Lease Term on the same terms and provisions contained in the Lease, including all rights or privileges of Lessee under the Lease, but excluding any requirements that have already been performed or no longer apply (a "**New Lease**"). The closing for the execution and delivery of the New Lease shall occur within ten (10) Business Days of Leasehold Mortgagee's request to enter the New Lease. At or before the closing for the New Lease, Leasehold Mortgagee shall: (i) pay to City any and all sums then due under the Lease as if the Lease had not been terminated; and (ii) commence and diligently prosecute the cure of any other default hereunder that remains uncured at that time, to the extent such default is susceptible of being cured by Leasehold Mortgagee. If Leasehold Mortgagee or its nominee enters into a New Lease, then Leasehold Mortgagee shall pay all reasonable expenses, including reasonable attorneys' fees, court costs and disbursements, incurred by City in connection with Lessee's default and the termination of the Lease, the recovery of possession of the Leased Premises, and the preparation, execution and delivery of the New Lease. The following provisions shall apply to any New Lease:

(a) City and Leasehold Mortgagee or its nominee shall, contemporaneously with the execution and delivery of the New Lease, execute, acknowledge and deliver duplicate originals of a recordable memorandum of lease agreement with respect to the New Lease. Such memorandum shall (a) be in form and substance reasonably satisfactory to both parties and (b) contain such information as may be legally required to be contained in a memorandum of lease. Following such execution, acknowledgement and delivery, the Leasehold Mortgagee, at its sole cost and expense, may submit such memorandum and any other documents or instruments which may be required for recording the same in the land records of San Diego County, California.

(b) The New Lease shall not be subject to any rights, liens, or interests other than those to which the Lease was subject at the time of its termination. The provisions of the immediately preceding sentence shall be self-executing.

(c) City shall, if requested, execute and deliver such resolutions and other documents as shall be reasonably necessary to enable the New Tenant to obtain title insurance with respect to the New Lease, at such New Tenant's expense.

(d) Upon execution of a New Lease, City shall assign to New Tenant all of City's right, title and interest in and to (a) all moneys, if any, then held by, or payable to, City that Lessee would have been entitled to receive but for the termination of the Lease, and (b) all subleases of the Leased Premises.

(e) Between the date on which the Lease was terminated and the date of execution and delivery of a New Lease, if Leasehold Mortgagee shall have requested a New Lease in accordance with the terms hereof, City shall not cancel any permitted sublease of the Leased Premises, or accept any cancellation, termination or surrender of any such sublease, without the consent of Leasehold Mortgagee.

2.3.12 No Merger of Estates. Without the written consent of City, Lessee, and Leasehold Mortgagee, the Leased Premises and the Plant and the Leasehold Interest shall remain distinct and separate estates and shall not merge for so long as City is obligated to enter into a New Lease pursuant to the provisions and conditions hereof, notwithstanding the acquisition of both the Leased Premises and the Leasehold Interest by City, Lessee, Leasehold Mortgagee, or any other person, whether by purchase or otherwise.

### ARTICLE 3

#### Notices

3.1 Any notice or other communication required or permitted to be given shall be in writing and addressed to the respective party as set forth below. Notices shall be effective: (i) three (3) days after the date such notice is mailed, (ii) on the next business day if sent by a nationally recognized overnight courier service, (iii) on the date of delivery by personal delivery; and (iv) on the date of transmission if sent by facsimile transmission during business hours on a business day (otherwise on the next business day) (with receipt of confirmation). Notice shall be addressed as follows:

If to City, to:

The City of San Diego

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

Attn: \_\_\_\_\_

Facsimile: \_\_\_\_\_

If to Lessee, to:

Capital Power (US Holdings) Inc.

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

Attn: \_\_\_\_\_

Facsimile: \_\_\_\_\_

If to Leasehold Mortgagee, to:

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

Attn: \_\_\_\_\_

Facsimile: \_\_\_\_\_

Any party may change the address at which it is to receive notices to another address in the United States at which business is conducted (and not a post-office box or other similar receptacle), by giving notice of such change of address in accordance with the foregoing. This provision shall not invalidate or impose additional requirements for the delivery or effectiveness of any notice: (i) given in accordance with applicable statutes or rules of court; or (ii) by service of process in accordance with applicable law.

#### **ARTICLE 4**

##### **General Provisions**

4.1 This Agreement may only be amended by a written document signed by Leasehold Mortgagee, Lessee and City that refers specifically to this Agreement. This Agreement (and the Exhibits attached hereto and other documents and instruments referenced herein) contains the entire agreement between the parties relating to the transactions contemplated by this Agreement and all prior or contemporaneous agreements, understandings, representations or statements, oral or written, are superseded.

4.2 All provisions and conditions of this Agreement will be binding upon and inure to the benefit of the parties and their respective administrators or executors, successors and assigns. No individual or entity not a party to this Agreement shall have the right to enforce this Agreement or be considered a third party beneficiary of any covenants or conditions hereunder.

4.3 If any material covenant, condition or provision herein contained is held to be invalid, void or unenforceable by a final judgment of any court of competent jurisdiction, this Agreement shall become rescinded unless the party benefited by such covenant, condition or provision delivers to the other party and Escrow Holder, within ten (10) days after the judgment becomes final, a written waiver of the covenant, condition or provision, in which case the remainder of this Agreement will be enforceable.

4.4 This Agreement may be executed in any number of counterparts, each of which will be deemed to be an original, but all of which together will constitute one instrument.

4.5 This Agreement will be construed and enforced in accordance with the laws of the State of California.

4.6 Time is of the essence of each covenant and condition in this Agreement for which a date of performance is specified.

LEASEHOLD MORTGAGEE:

\_\_\_\_\_, a \_\_\_\_\_

BY: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

LESSEE:

CAPITAL POWER (US HOLDINGS) INC., a  
Delaware corporation

BY: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

BY: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

CITY:

THE CITY OF SAN DIEGO, a California  
municipal corporation

BY: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

*Approved as to form:*

JAN I. GOLDSMITH, City Attorney

BY: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**EXHIBIT "A"**  
**(Legal Description)**

**The land referred to herein is situated in the State of California, County of San Diego, City of , and described as follows:**

**Parcel 1:**

That portion of Pueblo Lot 1306 of the Pueblo Lands of San Diego, in the City of San Diego, County of San Diego, State of California, according to Map thereof made by James Pascoe in 1870, a copy of which was filed in the office of the County Recorder on November 14, 1921, and is now known as Miscellaneous Map No. 36; lying easterly, southeasterly, and northeasterly of the northeasterly boundary line of that certain Grant Deed from the City of San Diego, a Municipal Corporation to the State of California, recorded January 8, 1971 as file no. 3902 of Official Records; and southerly of the southerly boundary line of Miramar Road.

APN: 345-021-02-00

Note: The above described legal description is for informational purposes only, and does not constitute a legal description by definition of the Subdivision Map Act.

**Parcel 2:**

That portion of Pueblo Lot 1304 of the Pueblo Lands of San Diego, in the City of San Diego, County of San Diego, State of California, according to Map thereof made by James Pascoe in 1870, a copy of which was filed in the office of the County Recorder on November 14, 1921, and is now known as Miscellaneous Map No. 36; lying easterly, and northeasterly of the northeasterly boundary line of that certain Grant Deed from the City of San Diego, a Municipal Corporation to the State of California, recorded January 8, 1971 as file no. 3902 of Official Records; and lying easterly and northeasterly of the northeasterly boundary line of that certain Grant Deed from the City of San Diego, a Municipal Corporation to the State of California, recorded October 10, 2007 as file no. 2007-0653178 of Official Records. APN: 345-021-03-00 Note: The above described legal description is for informational purposes only, and does not constitute a legal description by definition of the Subdivision Map Act.

**Parcel 3:**

That portion of Pueblo Lots 1305 and 1276 of the Pueblo Lands of San Diego, in the City of San Diego, County of San Diego, State of California, according to Map thereof made by James Pascoe in 1870, a copy of which was filed in the office of the County Recorder on November 14, 1921, and is now known as Miscellaneous Map No. 36; lying northerly and northeasterly of the northerly and northeasterly boundary line of Parcel 1A of that certain Final Order of Condemnation in favor of the State of California, recorded February 16, 1970 as file no. 28406 of Official Records; and lying easterly, and northeasterly of the northeasterly boundary line of that certain Grant Deed from the City of San Diego, a Municipal Corporation to the State of California, recorded January 8, 1971 as file no. 3902 of Official Records; and lying easterly and northeasterly of the northeasterly boundary line of that certain Grant Deed from the City of San Diego, a Municipal Corporation to the State of California recorded October 10, 2007 as file no. 2007-0653178 of Official Records.

Excepting from the above described Parcel No. 3, that portion of land as conveyed in that certain Grant Deed from the City of San Diego, a Municipal Corporation to the Atchison, Topeka, and Santa Fe Railway Company, a Kansas Corporation, recorded April 16, 1969 as file no. 66016 of Official Records.



APN: 348-021-03-00

Note: The above described legal description is for informational purposes only, and does not constitute a legal description by definition of the Subdivision Map Act.

**EXHIBIT "B"**  
**(Leasehold Mortgage)**

P:\15\15132\66509\Trans\City Documents\City Lease.doc



**Attachment 4: MOU and Resolution Regarding Sale of Water to Capital Power Corp.**



RESOLUTION NUMBER R-\_\_\_\_\_

DATE OF FINAL PASSAGE \_\_\_\_\_

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN  
DIEGO AUTHORIZING THE MAYOR TO EXECUTE A  
MEMORANDUM OF UNDERSTANDING WITH CAPITAL  
POWER (US HOLDINGS) INC. REGARDING THE  
POTENTIAL USE OF COOLING AND PROCESS WATER FOR  
A NATURAL GAS-FIRED ELECTRIC GENERATING POWER  
PLANT.

BE IT RESOLVED, by the Council of the City of San Diego, that the Mayor or his  
designee is authorized to execute, for and on behalf of the City, the Memorandum of  
Understanding with Capital Power (US Holdings) Inc., which is on file in the Office of the City  
Clerk as Document No. RR- \_\_\_\_\_, regarding the potential use of cooling and process  
water for a natural gas-fired electric generating power plant.

APPROVED: JAN I. GOLDSMITH, City Attorney

By \_\_\_\_\_  
Hilda R. Mendoza  
Deputy City Attorney

HRM:hm  
06/19/2012  
Or.Dept:Mayor



I hereby certify that the foregoing Resolution was passed by the Council of the City of San Diego, at this meeting of \_\_\_\_\_.

ELIZABETH S. MALAND  
City Clerk

By \_\_\_\_\_  
Deputy City Clerk

Approved: \_\_\_\_\_  
(date)

\_\_\_\_\_  
JERRY SANDERS, Mayor

Vetoed: \_\_\_\_\_  
(date)

\_\_\_\_\_  
JERRY SANDERS, Mayor

## MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding regarding the potential use of cooling and process water for a natural gas-fired electric generating power plant is entered into by and between the City of San Diego (City), a California municipal corporation, whose mailing address is 202 C Street, San Diego, California 92101, and Capital Power Inc. (CPC), a Delaware corporation, whose mailing address is 9255 Towne Centre Drive, Suite 900, San Diego, California 92121.

### RECITALS

- A. The City and CPC are parties to an Option Agreement, on file in the Office of the City Clerk as Document No. RR-\_\_\_\_\_ whereby the City grants to CPC the exclusive right and option to lease from the City certain real property adjacent to the North City Water Reclamation Plant (NCWRP), as more particularly described in the Option Agreement, for the potential construction and operation of a natural gas-fired electric generating power plant (Power Plant).
- B. The Power Plant will need a reliable source of up to seven million gallons of water per day (mgd) for industrial cooling and processing at the Plant during operation, the actual amount being dependent on the size of the Power Plant and the frequency and duration of operation.
- C. The City owns and operates the NCWRP which is capable of treating up to 30 mgd of municipal wastewater per day to secondary treatment standards, and further treating the effluent to tertiary standards suitable for irrigation. The City is not currently utilizing the full capacity of the NCWRP due to the lack of sufficient recycled water customers, and therefore only receives and treats a portion of the wastewater flow needed to serve recycled water customers.
- D. The City is currently investigating the feasibility of treating wastewater at the NCWRP to potable water standards (IPR Project) to supplement the region's water supply and to beneficially reuse wastewater that is being diverted and treated at the Point Loma Wastewater Treatment Plant. The City has not decided whether to pursue construction and operation of an IPR Project.
- E. The City could provide treated wastewater from the NCWRP for industrial cooling and processing at the Power Plant, as generally shown in the schematic attached hereto as Exhibit A.
- F. If the Power Plant is built, it could provide backup power to the NCWRP and supply the additional power necessary to operate an IPR Project, potentially at rates lower than the retail energy market due the proposed location of the Power Plant adjacent to the NCWRP.
- G. The City and CPC desire to explore different cost structures for treated wastewater and to investigate operational methods such that the Power Plant and an IPR Project can be designed and developed to optimize the potential advantages of both projects.
- H. Although actions taken by a public agency to supply water to a power plant are statutorily exempt from the California Environmental Quality Act pursuant to California Public Resources Code Section 21080(b)(6), the City and CPC anticipate an equivalent environmental review

process to occur at the State level as CPC pursues State approval to construct and operate the proposed Power Plant. Environmental considerations could impact discussions between the City and CPC on how to coordinate operation of the Power Plant and the NCWRP.

I. The City and CPC desire to continue discussions and negotiations on cost effective, efficient, and equitable ways for the City to supply treated wastewater to the proposed Power Plant while preserving or enhancing the City's ability to pursue an IPR Project in the future if the City decides to do so.

#### MUTUAL UNDERSTANDING

1. The City and CPC will continue discussions and negotiations of how to provide industrial cooling and process water to the proposed Power Plant consistent with the goals and objectives set forth in the recitals above.

2. The City and CPC will also explore the possible advantages of the Power Plant providing backup power to the NCWRP and supplying the power needed to operate a potential IPR Project.

3. The City and CPC will engage in such discussions and negotiations until November 30, 2012, or until an agreement is reached on the terms of providing industrial cooling and process water to the Power Plant, whichever occurs first, after which either party may discontinue discussions and negotiations at that party's sole discretion.

4. This Memorandum of Understanding shall not obligate the City or CPC to enter into any contract between the parties and shall not have any binding effect, other than to continue discussions and negotiations to find mutually agreeable terms for providing industrial cooling and process water to the proposed Power Plant.

[remainder of page intentionally blank]

IN WITNESS WHEREOF, this Agreement is executed by the City of San Diego pursuant to Resolution No. R - \_\_\_\_\_ authorizing such execution, and Capital Power Corporation acting by and through its authorized officers.

CAPITAL POWER CORPORATION

THE CITY OF SAN DIEGO

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

I HEREBY APPROVE the form and legality of the foregoing agreement this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

JAN I. GOLDSMITH, City Attorney

By: \_\_\_\_\_  
Deputy City Attorney



**Attachment 5: Documents and Proposed Ordinance Regarding Pueblo Lands**

**Office of  
The City Attorney  
City of San Diego**

**MEMORANDUM  
MS 59**

**(619) 533-5800**

**DATE:** October 12, 2010

**TO:** Russ Gibbon, Business Development Manager  
City Planning & Community Investment Department

**FROM:** City Attorney

**SUBJECT:** Sale or Lease of Pueblo Lands – Nobel Drive East of Interstate 805

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The Office of the City Attorney has reviewed an e-mail sent to you on November 18, 2008 from a former deputy city attorney in this Office regarding the "Availability for Sale or Lease of Land located at I-805 and Nobel Drive." We have concluded that the legal advice provided to you in that e-mail is incorrect and correct the record below so that your department can comply with the law.

**BACKGROUND**

In 1834, Mexico recognized San Diego as "pueblo" or "public," making the lands that comprised San Diego public lands. Mexico ceded California to the United States under the 1848 Treaty of Guadalupe Hidalgo. The treaty required that property rights granted under Mexican Rules were to be "inviolately respected." The original public (pueblo) lands were defined by survey and constitute the Pueblo Lands of the City of San Diego. San Diego Charter section 219 restricts the sale of such Pueblo Lands by requiring voter ratification of a sale, and restricts the duration of any lease of Pueblo Lands to fifteen years.

Charter section 219 reads as follows:

No sale of Pueblo Lands owned by the City of San Diego which are situated North of the North line of the San Diego River shall ever be valid and binding upon said City unless such sale shall have been first authorized by an ordinance duly passed by the Council and thereafter ratified by the electors of the City of San



Diego at any special or general municipal election. The City Manager shall have authority to lease Pueblo Lands, provided that any lease for a term exceeding one year shall not be valid unless first authorized by ordinance of the Council. No lease shall be valid for a period of time exceeding fifteen years.

In compliance with Charter section 219, the San Diego City Council adopted Ordinance No. O-16173 (New Series) (Ordinance) on February 27, 1984, that states in pertinent part:

Section 1. That the City of San Diego be, and it is hereby authorized and empowered to exchange, sell or lease to the United States of America, portions of Pueblo Lots 1276, 1304, 1305, 1306, 1318 and 1319 of the Pueblo Lands of the City of San Diego, which portions cumulatively constitute approximately 120 acres which lie between Interstate 805 and the existing western boundary of Miramar Naval Air Station, and which portions of the Pueblo Lands are more specifically described in Document No. OO-16173 on file in the office of the City Clerk.

San Diego Ordinance O-16173 (Feb. 27, 1984).

City voters subsequently approved Proposition B in the June 5, 1984 election, ratifying the Ordinance. Despite this, the sale of Pueblo Lands to the United States that had been authorized by voter approval of Proposition B never occurred.

In 2008, you asked this Office if Charter section 219 restricts the City's ability to sell or lease the same land authorized for sale by Proposition B (Subject Property) to a party other than the United States. A former deputy city attorney in this Office responded by e-mail on November 18, 2008 (2008 E-mail) regarding the "Availability for Sale or Lease of Land located at I-805 and Nobel Drive." The 2008 E-mail concluded the Subject Property was not restricted by Charter section 219 because City electors had approved Proposition B.

The City recently issued a Request for Proposal (Proposal No. 10007363-10-W) (RFP) seeking power generation companies to develop and operate a natural gas-fired power plant on the Subject Property. The RFP included the 2008 E-mail as "the City Attorney's legal opinion" regarding sale or lease of the Subject Property. This memorandum re-evaluates the conclusion stated in the 2008 E-mail.

### ANALYSIS

Although City electors of the City of San Diego ratified the exchange, sale, or lease of the Subject Property, that approval was limited to a transaction with the United States of America only, and did not otherwise release such Pueblo Lands from the restrictions of Charter section 219. The language of the Ordinance is self-limiting, clear, and unambiguous. It states that the City is "authorized and empowered to exchange, sell or lease to the United States of America"



the Subject Property. The words "to the United States of America" limit the authority granted to a specific transaction with a specific buyer. Under the "plain meaning rule," words used in a statute should be given the meaning they bear in ordinary use, and if the language is clear and unambiguous, there is no need for construction, nor is it necessary to resort to indicia of legislative intent. *Lungren v. Deukmejian*, 45 Cal. 3d 727, 735 (1988).

Although not necessary to the conclusion reached herein, the "Argument in Favor of Proposition B" (Argument) provided to voters in the ballot pamphlet for the June 5, 1984 election sheds light on voters' intent in ratifying the Ordinance. Initiative ballot pamphlet arguments are the equivalent of the legislative history of a legislative enactment. *Brosnahan v. Brown*, 32 Cal. 3d 236, 267 n.7 (1982). No argument against the proposition was filed or published in the voter materials. The published Argument stated, "Approval of this proposition will enable the City to exchange City-owned land . . . for excess Navy-owned lands." The Argument went on to state, "With voter approval, details of the exchange will be negotiated." The Argument discusses only the exchange transaction with the Navy. Based on the only information provided to voters in the voter pamphlet, voter intent must have been limited to approving the exchange of the Subject Property for Navy-owned land.

The plain meaning of the Ordinance, supported by evidence of the intent of the voters gleaned from the only information provided them in the ballot pamphlet, is that the voters' authorization to sell the Subject Property is limited to a sale to the United States of America only. Any other transaction involving the Subject Property must first be authorized by an ordinance of the City Council and later ratified by City electors, in compliance with Charter section 219.

Charter section 219 allows the City to lease Pueblo Lands for one year without City Council authorization, and for up to fifteen years if authorized by ordinance of the Council. No lease of Pueblo Lands may exceed fifteen years.

### CONCLUSION

We confirm that the legal advice provided to you by a former deputy city attorney in this Office, stated in the 2008 E-mail regarding the "Availability for Sale or Lease of Land located at I-805 and Nobel Drive" and referred to as "the City Attorney's legal opinion," is incorrect. Its inclusion in the Request for Proposal must be corrected.

It is true that City electors, by approving Proposition B on June 5, 1984, authorized the sale of portions of Pueblo Lots 1276, 1304, 1305, 1306, 1318 and 1319 of the Pueblo Lands of the City of San Diego located east of I-805 at Nobel Drive comprising approximately 120 acres, and more specifically described in Document No. OO-16173 on file in the Office of the City Clerk. This sale, however, was limited to a sale to the United States of America only. This authorization did not otherwise release the Subject Property from the restrictions of Charter section 219. A sale of the Subject Property to anyone other than the United States of America must first be authorized by an ordinance of the City Council and later ratified by City electors, or it will violate the City Charter.

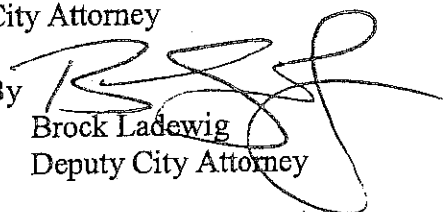
Moreover, Charter section 219 allows the City to lease the Subject Property for one year without City Council authorization, and for up to fifteen years if authorized by ordinance of the Council. No lease of Pueblo Lands may exceed fifteen years.

**RECOMMENDED ACTION**

To comply with the San Diego City Charter, the Request for Proposal must be reissued, with the Subject Property correctly described as "Pueblo Lands of the City of San Diego" and subject to the restrictions contained in Charter section 219. The property may be sold or leased only if the requirements of Charter section 219 are satisfied.

JAN I. GOLDSMITH  
City Attorney

By

  
Brock Ladewig  
Deputy City Attorney

BLL:mmm

## If Sale Ok, Lease Ok; Court Rules For City

A lawsuit by Howard DeYoung and the Citizens for Recreational Use of Pueblo Lands, to block construction of a 400-room Sheraton Hotel and conference center on 15 acres at Torrey Pines, has been dealt a knockout punch by the Fourth District Court of Appeal.

DeYoung and the citizens' group sued the City of San Diego to gain a court order to block a long-term lease for acreage near Torrey Pines Municipal Golf Course. Sheraton Corp. and the Equitable Life Assurance Society of the United States seek the site for a \$50 million hotel project.

The complaint contended that city charter section 219, adopted in 1931, prohibits leasing of pueblo lands north of the San Diego River for more than 15 years.

The charter section states:

*"No sale of pueblo lands owned by the City of San Diego which are situated north of the north line of the*

*San Diego River shall ever be valid and binding upon said city unless such sale shall have been first authorized by an ordinance duly passed by the council and thereafter ratified by the electors of the City of San Diego at any special or general municipal election.*

*"The city manager shall have authority to lease pueblo lands, provided that any lease for a term exceeding one year shall not be valid unless first authorized by ordinance of the council. No lease shall be valid for a period of time exceeding 15 years."*

The city developed the golf course in the 1950s and in 1961 provided a 50-year lease for construction of the Torrey Pines Inn. The voters in 1964 approved sale of some pueblo lands in the Torrey Pines area.

Authorized by a city council resolution, officials last year asked

(Continued on Page 4A)

## Torrey Pines Lease Ok—

(Continued from Page 1A)

proposals for development of the 15 acres at Torrey Pines, which include portions of three pueblo lots.

Proposals were reviewed by the Public Facilities and Recreation Committee and the city council — with the council selecting the Sheraton Corp. proposal.

Included is to be a 400-room resort hotel, a 70,000-square-foot executive conference center and an aerobics center to be operated by Scripps Clinic and Research Foundation. The hotel is to have two

restaurants and include a 9,600-square-foot entertainment center.

The project has been designed by Welton Becket Associates of Los Angeles with Hendrick & Mock of San Diego as architectural consultants. Dillingham Construction will be building contractor.

Alleged in the lawsuit against the city was that the "plain meaning rule" as applied to the last sentence of section 219 of the charter mandates that pueblo lands north of the river cannot be leased for more than 15 years, even when approved by the voters.

Superior Court Judge Daniel C. Leedy disagreed and refused to enjoin the city from proceeding with arrangements for the resort project. DeYoung and the "citizens" group then appealed.

"Granted, when reading the last sentence of section 219 in isolation, it appears to clearly forbid all leases of pueblo lands in excess of 15 years," the appeal court said.

TRANSCRIPT.

Monday, Sept.  
17, 1983

"However, sentences of a statutory provision must be read and construed in context."

The appeal court found that, upon reading the section in its entirety, it becomes unclear whether it intends to forbid all leases over 15 years or just those leases not ratified by the electorate (as accomplished in 1964 in the case in question).

"Accordingly, we construe the charter provision in light of the character of the document it is within and relevant settled rules of statutory construction," the court said in an opinion by Justices Don Work and Robert O. Staniforth and Acting Justice Anthony Joseph.

The justices found that the charter, although prohibiting leases on pueblo lands for more than a certain term of years, is "noticeably silent" on the power of the city to lease such lands upon voter ratification.

"A limitation of the latter cannot be implied, especially where the lands are in trust for a public constitutionally empowered by majority vote to adopt the charter, amend it and oversee city politics," the court said.

The appeal court found that the city's and trial court's interpretation of section 219 to permit leasing of pueblo lands for more than 15 years after voter approval was reasonable, practical and consistent with historical application and the underlying power of the electorate.

"We find it unreasonable to believe the electorate provided for the sale of pueblo lands with voter approval but prohibited long-term leases approved by the same voters," the court concluded.

— By Bill Burris



PUBLIC UTILITIES DEPARTMENT  
NORTH CITY SITE

NCAWTP

NEWRP

NCPP

805

GLENVIEW



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ORDINANCE NUMBER O-\_\_\_\_\_ (NEW SERIES)

DATE OF FINAL PASSAGE \_\_\_\_\_

AN ORDINANCE SUBMITTING TO THE QUALIFIED VOTERS OF THE CITY OF SAN DIEGO AT THE MUNICIPAL SPECIAL ELECTION CONSOLIDATED WITH THE CALIFORNIA STATE GENERAL ELECTION TO BE HELD ON NOVEMBER 6, 2012, ONE PROPOSITION RATIFYING AN ORDINANCE AUTHORIZING THE LEASE TO CAPITAL POWER (US HOLDINGS) INC. OF PORTIONS OF PUEBLO LOTS 1304, 1305, AND 1306 OF THE PUEBLO LANDS OF THE CITY OF SAN DIEGO.

WHEREAS, by Ordinance No. O-\_\_\_\_\_, introduced and adopted on \_\_\_\_\_, 2012, the Council of the City of San Diego has called a Municipal Special Election to be consolidated with the California State General Election on November 6, 2012, for the purpose of submitting to the qualified voters of the City one or more ballot propositions; and

WHEREAS, the City Council desires to submit to the voters at the Municipal Special Election one proposition ratifying an ordinance authorizing the lease to Capital Power (US Holdings) Inc. (Capital Power) of portions of Pueblo Lots 1304, 1305, and 1306 of the Pueblo Lands of the City of San Diego; and

WHEREAS, the proposed lease to Capital Power shall be for the entitlement, erection, development, construction, use, operation, repair, maintenance and restoration of a power plant with a generating facility capacity of approximately 850 Megawatts, but not less than 350 Megawatts, for an initial term of twenty-five years with two options to extend the initial term for an additional ten years per option, for a total of twenty years beyond the expiration of the initial term; and

WHEREAS, San Diego Charter section 219 prohibits a lease of Pueblo Lands owned by the City of San Diego for a period of time exceeding fifteen years unless first authorized by the electors of the City of San Diego; and

WHEREAS, by Ordinance No. O-\_\_\_\_\_, introduced and adopted on \_\_\_\_\_, 2012, the City Council authorized the lease to Capital Power, contingent upon the affirmative approval by a majority vote of the qualified electors of the City of San Diego voting at a Municipal Special Election to be held in the City of San Diego on November 6, 2012; and

WHEREAS, the City Council is now submitting Ordinance No. O-\_\_\_\_\_ to the qualified electors of the City of San Diego for a vote; NOW, THEREFORE,

BE IT ORDAINED, by the Council of the City of San Diego, as follows:

Section 1. That one proposition proposing the ratification of an ordinance authorizing the lease of certain Pueblo Lands for a term in excess of fifteen years, is approved by the Council and submitted to the qualified voters at the Municipal Special Election to be held on November 6, 2012, and consolidated with the California State General Election to be held on the same date, with the proposition to read as follows:

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### **PROPOSITION**

AN ORDINANCE OF THE SAN DIEGO CITY COUNCIL  
AUTHORIZING THE LEASE TO CAPITAL POWER (US  
HOLDINGS) INC. OF PORTIONS OF PUEBLO LOTS 1304,  
1305, AND 1306 OF THE PUEBLO LANDS OF THE CITY OF  
SAN DIEGO.

WHEREAS, the Council of the City of San Diego desires to lease to Capital Power (US Holdings) Inc. (Capital Power) portions of Pueblo Lots 1304, 1305, and 1306 of the Pueblo Lands of the City of San Diego; and

WHEREAS, the proposed lease to Capital Power shall be for the entitlement, erection, development, construction, use, operation, repair, maintenance and restoration of a power plant with a generating facility capacity of approximately 850 Megawatts, but not less than 350 Megawatts, for an initial term of twenty-five years with two options to extend the initial term for an additional ten years per option, for a total of twenty years beyond the expiration of the initial term; and

WHEREAS, San Diego Charter section 219 prohibits a lease of Pueblo Lands owned by the City of San Diego for a period of time exceeding fifteen years unless first authorized by the electors of the City of San Diego; NOW THEREFORE,

BE IT ORDAINED, by the Council of the City of San Diego, as follows:

Section 1. The City of San Diego is authorized to lease to Capital Power (US Holdings) Inc. portions of Pueblo Lots 1304, 1305, and 1306 of the Pueblo Lands of the City of San Diego, which portions cumulatively constitute approximately fifty acres that lie between Interstate 805 to the west, the existing western boundary of Marine Corps Air Station Miramar to the east, and Miramar Road to the north, and which portions of the Pueblo Lands are more specifically described in Document No. OO-\_\_\_\_\_ on file in the Office of the City Clerk.

Section 2. This ordinance shall become effective only if and after it is affirmatively approved by a majority vote of the qualified electors of the City of San Diego voting at a Municipal Special Election to be held in the City of San Diego on November 6, 2012, at which election this ordinance shall be submitted to the voters for ratification.

**END OF PROPOSITION**

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Section 2. The proposition shall be presented and printed upon the ballot and submitted to the voters in the manner and form set out in Section 3 of this ordinance.

Section 3. On the ballot to be used at this Municipal Special Election, in addition to any other matters required by law, there shall be printed substantially the following:

<b>PROPOSITION ____ . RATIFICATION OF ORDINANCE NO. O-_____.</b>	YES	
Shall Ordinance No. O-_____, adopted by the City Council, which authorizes the long-term lease to Capital Power (US Holdings) Inc. of approximately fifty acres of City Pueblo Lands bounded to the west by Interstate 805, to the east by the Marine Corps Air Station Miramar, and to the north by Miramar Road, for the construction and operation of a natural gas power plant generating approximately 350 - 850 Megawatts, be ratified?	NO	

Section 4. An appropriate mark placed in the voting square after the word "Yes" shall be counted in favor of the adoption of this proposition. An appropriate mark placed in the voting square after the word "No" shall be counted against the adoption of the proposition.

Section 5. Passage of this proposition requires the affirmative vote of a majority of those qualified electors voting on the matter at the Municipal Special Election.

Section 6. The City Clerk shall cause this ordinance to be published once in the official newspaper following this ordinance's adoption by the City Council.

Section 7. Pursuant to San Diego Municipal Code section 27.0402, this measure will be available for public examination for no fewer than ten calendar days prior to being submitted for printing in the sample ballot. During the examination period, any voter registered in the City may seek a writ of mandate or an injunction requiring any or all of the measure to be amended or deleted. The examination period will end on the day that is 75 days prior to the date set for the election. The Clerk shall post notice of the specific dates that the examination period will run.

Section 8. This ordinance may be passed by the Council on the date of introduction pursuant to San Diego Charter section 275(c) and shall take effect upon final passage pursuant to San Diego Charter sections 295(a) and 295(d).

APPROVED: JAN I. GOLDSMITH, City Attorney

By \_\_\_\_\_  
Hilda R. Mendoza  
Deputy City Attorney

HRM:as  
06/19/12  
Or.Dept:Mayor

I hereby certify that the foregoing Ordinance was passed by the Council of the City of San Diego, at its meeting of \_\_\_\_\_.

ELIZABETH S. MALAND  
City Clerk

By \_\_\_\_\_  
Deputy City Clerk

Approved: \_\_\_\_\_  
(date)

\_\_\_\_\_  
JERRY SANDERS, Mayor

Vetoed: \_\_\_\_\_  
(date)

\_\_\_\_\_  
JERRY SANDERS, Mayor



## Attachment B: POWER PLANT PERMIT MATRIX - NOBEL DRIVE, SAN DIEGO, CA

PERMITS	TYPE OF PERMIT	APPROVING AGENCY	REVIEW PERIOD (Weeks)	REQUIREMENTS	COMMENTS
<b>Federal</b>					
Prevention of Significant Deterioration (PSD) Permit	Air Quality Permit	US Environmental Protection Agency, Region 9 Air Division, 75 Hawthorne Street, San Francisco, CA 94105 Tel: 415-947-8000	43-52	Prevents violation of Clean Air Act. Required only if maximum potential emissions would exceed 100 tons per year, or more of any criteria pollutant for the specific source categories listed in the PSD regulations. If a facility does not fall into one of the listed source categories, a threshold of 250 tons per year applies. This permit is typically submitted to the local County Air Pollution Control District (APCD) (see local matrix)	This will most likely be required for greenhouse gases.
Permit to Construct	Construction Permit	US Environmental Protection Agency, Region 9 Air Division, 75 Hawthorne Street, San Francisco, CA 94105 Tel: 415-947-8000	43-52	This permit is required when construction, modification or operation of a facility or equipment that might emit criteria pollutants and/or toxic air contaminants from a stationary source into the atmosphere. This permit is typically submitted to the local County Air Pollution Control District (see local matrix)	
Permit to Operate/ Authority to Operate	Operational Permit	US Environmental Protection Agency, Region 9 Air Division, 75 Hawthorne Street, San Francisco, CA 94105 Tel: 415-947-8000	43-52	This permit is typically submitted to the local county air pollution control district one year after commencement of operations (see local matrix)	
Maximum Achievable Control Technology (MACT) Permit	Operational Permit	US Environmental Protection Agency, Region 9 Air Division, 75 Hawthorne Street, San Francisco, CA 94105 Tel: 415-947-8000	43-52	Applicable MACT standards would be triggered if the project has the potential to emit more than 10 tons of any one hazardous air pollutant (HAP), or more than 25 tons per year of any combination of HAPs. This permit is dependent upon having a valid Title V permit	This is most likely not applicable to the Nobel Drive Project.
Federal Title V	Operational Permit	US Environmental Protection Agency, Region 9 Air Division, 75 Hawthorne Street, San Francisco, CA 94105 Tel: 415-947-8000	43-52	This permit is typically submitted to the local county air pollution control district (see local matrix). Application must be submitted within one year after commencing operations.	
Federal Title IV (Acid Rain)	Emissions Permit	US Environmental Protection Agency, Region 9 Air Division, 75 Hawthorne Street, San Francisco, CA 94105 Tel: 415-947-8000	43-52	This permit is typically submitted to the local county air pollution control district (see local matrix). This permit may apply if the facility's natural gas emissions are higher than that of the sulfur emissions	
Incidental Take Permits	Federal Fish and Wildlife License	US Fish and Wildlife Service Agency, Region 1, Local Office - 6010 Hidden Valley Road, Carlsbad, CA 92009 Tel: 760-431-9440 David Zoutendyk	16-26	This permit is required if encroachment to threatened, endangered species (plant and animal) and critical habitat occurs. There are Vernal Pool issues at the project site that could be difficult to work through. The Vernal Pool issues are handled at a Federal level, however the City of San Diego are also involved and have a list of species covered under their MSCP (see local matrix)	
Application for Transportation and Utility Systems and Facilities on Federal Lands (SF 299)	Right-of-Way Grant	Bureau of Land Management (BLM) Palm Springs S. Coast Field Office, 1201 Bird Center Drive, Palm Springs, CA 92262 Tel: 760-833-7100		This permit is necessary if transmission lines or the project is located on Federal land	This is not applicable to the Nobel Drive Project
Environmental Assessment (EA) or Environmental Impact Statement (EIS)	Environmental Review	Bureau of Land Management (BLM) Palm Springs S. Coast Field Office, 1201 Bird Center Drive, Palm Springs, CA 92262 Tel: 760-833-7100	52	If transmission lines or the project is located on Federal land, this permit will be necessary - either an Environmental Assessment (EA) with a Finding of No Significant Impact (FONSI) and/or an Environmental Impact Statement (EIS) with a Record of Decision (ROD)	This is not applicable to the Nobel Drive Project
Cultural Resources Study/Review	Cultural	Bureau of Land Management (BLM) Palm Springs S. Coast Field Office, 1201 Bird Center Drive, Palm Springs, CA 92262 Tel: 760-833-7100	16	Archaeological and historical review will more than likely be necessary for the project site. The BLM Field Office will coordinate, as needed with the State Historic Preservation Office (SHPO)	This is not applicable to the Nobel Drive Project
Paleontological Resource Use Permit	Paleontological	Bureau of Land Management (BLM) Palm Springs S. Coast Field Office, 1201 Bird Center Drive, Palm Springs, CA 92262 Tel: 760-833-7100	12	Paleontological surveys will be necessary if project falls on BLM land	This is not applicable to the Nobel Drive Project
Land Use Application and Permit		Bureau of Land Management (BLM) Palm Springs S. Coast Field Office, 1201 Bird Center Drive, Palm Springs, CA 92262 Tel: 760-833-7100	6	For geotechnical investigations that may be necessary on the project area	This is not applicable to the Nobel Drive Project
Fieldwork Authorization Permit		Bureau of Land Management (BLM) Palm Springs S. Coast Field Office, 1201 Bird Center Drive, Palm Springs, CA 92262 Tel: 760-833-7100	6	Assuming cultural resource surveys need to be conducted on BLM land, this permit would be necessary	This is not applicable to the Nobel Drive Project
Section 404 Permit	Discharge of Water	US Army Corps of Engineers (USACE) 8775 Aero Drive, San Diego, CA 92123 Tel: 858-569-5238	12	Section 404 of the Clean Water Act regulates the discharge of dredged, excavated or fill material in wetlands, streams, rivers and other US waters. The US Army Corps of Engineers (USACE) is the Federal agency authorized to issue Section 404 permits. Depending on the scope of the project, and method of construction, certain activities may require this permit. E.g. water resource projects, highways, airports, mining projects, etc.	
Determination of No Hazard to Navigable Airspace		Federal Aviation Authority Airports Western Pacific Region, 15000 Aviation Blvd., Room 3024, Lawndale, CA 90261 Tel: 310-725-6849	12 (prior to construction)	If power towers or other structures are constructed or altered and exceed 200 feet, a notice of proposed construction or alteration form will need to be completed with the FAA	
Certification of Qualifying Facility (QF) Status for Small Power Production or Cogeneration Facility		Federal Energy Regulatory Commission (FERC), 888 First Street NE, Washington DC, 20426 Tel: 202-502-6088	6	Form 556 will need to be filed electronically (using the eFiling system through the FERC website - <a href="https://ferconline.ferc.gov/Login.aspx">https://ferconline.ferc.gov/Login.aspx</a> ) for any generating facility with a net power production capacity greater than 1MW (1000kW). The company must file a self-certification or an application for Commission certification of QF status, which includes the Form 556.	This is not applicable to the Nobel Drive Project
Department of Labor, Occupational Health and Safety Administration Noise Exposure	Consultation Services	Cal-OSHA Field Office, 7575 Metropolitan Drive, San Diego, CA 92108 Tel: 619-767-2060	Varies	Employer is responsible for occupational health, physical labor health and safety requirements on the construction site as well as during operations. Noise exposure guidelines and monitoring of noise is handled by the local area office	
National Pollutant Discharge Elimination System - Notice of Intent (NOI)	Federal Storm Water General Construction Permit	US Environmental Protection Agency, Region 9, 75 Hawthorne Street, San Francisco, CA 94105 Tel: 415-947-8000	6		
<b>State</b>					
Application for Certification (AFC)	Environmental Review	California Energy Commission	52-100	The California Energy Commission has the statutory responsibility for licensing thermal power plants that are 50 Megawatts (MW) or larger and the plants related facilities such as transmission lines, fuel supply lines, water pipelines, etc. This one-stop permitting process is a certified regulatory program under the California Environmental Quality Act (CEQA), and includes opportunities for public participation. This certification subsumes all requirements of state, local, and regional agencies otherwise required before a plant is newly constructed	
Review of USFWS permits	to conform with the California Endangered Species Act of 1984	California Department of Fish and Game, Region 5, 4949 Viewridge Avenue, San Diego, CA 92123 Tel: 858-467-4261	26	Potential harm to California's rare, threatened and endangered species (see USFWS above in Federal matrix)	



## Attachment B: POWER PLANT PERMIT MATRIX - NOBEL DRIVE, SAN DIEGO, CA

PERMITS	TYPE OF PERMIT	APPROVING AGENCY	REVIEW PERIOD (Weeks)	REQUIREMENTS	COMMENTS
Environmental Impact Report	Environmental Review	California Department of Fish and Game, Region 5, 4949 Viewridge Avenue, San Diego, CA 92123 Tel: 858-467-4261	26	If facility is placed within ecological preserves, wildlife refuges, estuaries and unique irreplaceable wildlife habitats of scientific or educational value, the facility triggers the California Environmental Quality Act and either a negative declaration or environmental impact report will be filed	The AFC submitted to the CEC satisfies this requirement.
Incidental Take Permit	Mitigation Measures	California Department of Fish and Game, Region 5, 4949 Viewridge Avenue, San Diego, CA 92123 Tel: 858-467-4261	26	Mitigation measures need to be implemented to avoid the take of animals, birds, reptiles and fish that are classified or listed as fully protected, threatened or endangered species. The same type of permit would be required for the take or needless destroying of birds nests, including bird prey and migratory non-game birds	
Streambed Alteration Agreement		California Department of Fish and Game, Region 5, 4949 Viewridge Avenue, San Diego, CA 92123 Tel: 858-467-4261	12	The Streambed Alteration Agreement is prepared along with the Federal Section 404 permit (see Federal matrix above). If the facility diverts, obstructs, or changes the natural flow or bed, channel or bank of any river, stream, or lake designated by the CDFG that benefits existing fish and wildlife resources, this permit is necessary. If the facility is on BLM lands, this permit may not be applicable	
Cal-Accidental Release Prevention Program (ARP) Risk Management Plan (RMP)		California Department of Toxic Substances Control (DTSC) local field office -9174 Sky Park Court, Suite 150, San Diego, CA 92123 Tel: 858-637-5531	6	If a business handles, treats or stores more than a threshold quantity of a regulated hazardous substance, a RMP would be required. A RMP is a detailed engineering analysis of the potential accidental factors present at a business and the mitigation measures that can be implemented to reduce the potential for a substance (that can cause substantial harm) to be released to the environment or to the general public	This most likely will apply to Nobel Drive Project.
Construction/Operations Waste Management Plan		California Department of Toxic Substances Control (DTSC) local field office -9174 Sky Park Court, Suite 150, San Diego, CA 92123 Tel: 858-637-5531	6	plant or during construction of a plant, a Waste Management Plan will need to be prepared and submitted to the local DTSC office. An EPA ID number will be needed ahead of time (see below) as well as manifests to transport the waste off-site and records filed	
Hazardous Material Business Plan (HMBP)		County of San Diego Hazardous Materials Division, 1600 Pacific Highway, San Diego, CA 29101 Tel: 619-338-2251 Email: hmdutyeh@sdcounty.ca.gov	2	Prepare and file a HMBP with the local county Certified Unified Protection Agency (CUPA) for any facility that stores or uses hazardous materials (see Local matrix)	
Report of Waste Discharge (ROWD)		State Water Resources Control Board, (SWRCB) 1001 I Street, Sacramento, CA 95814 Tel: 916-341-5538	4	During construction, any discharge of wastes to the State's waters, brine ponds, mud sumps (waste water discharge other than injection wells) would require this permit	
Industrial Activities Storm Water General Permit	Industrial General Permit; NOI	State Water Resources Control Board, (SWRCB) 1001 I Street, Sacramento, CA 95814 Tel: 916-341-5538	4	This permit is required by an industrial facility that discharges waste to the state's waters. The permit requires facilities to perform monitoring of storm water discharges and authorized non-storm water discharges. A SWPPP accompanies this permit which is typically reviewed by the local agency	
Storm Water General Construction Permit (NOI)	State Storm Water Permit	State Water Resources Control Board, (SWRCB) 1001 I Street, Sacramento, CA 95814 Tel: 916-341-5538	4	If construction occurs on a plot of land that is greater than one acre, this construction permit is necessary. This permit requires the preparation and implementation of a SWPPP which is typically reviewed by the local agency	
Section 401 Water Quality Certification	Water Quality	California Regional Water Quality Control Board (RWQCB) San Diego Region, 9174 Sky Park Court, San Diego, CA 92123 Tel: 858-467-2952	12	Section 401 of the Clean Water Act requires that the RWQCB certify water quality before issuing a Section 404 permit (see Federal matrix). Implementation of construction and operational water quality BMPs for the project are required as part of the application	
California State Parks Office of Historic Preservation (SHPO) Consultation		Office of Historic Preservation California Department of Parks and Recreation 1416 9th Street, Suite 1442-7, Sacramento, CA 94296 Tel: 916-653-6624	Varies	Initial cultural resource analysis and possible field surveys will identify potential issues and likelihood of SHPO consultation - if cultural resources are present at the project site or are within linear facilities, the SHPO may need to be consulted	
Standard Encroachment Permit	Right-of-Way	California Department of Transportation (Caltrans) District 11, San Diego and Imperial Counties, 4050 Taylor Street, San Diego, CA 92110, Tel: 619-688-6699	6	If work is going to occur within a State Highway or cross a State Highway, a standard encroachment permit is necessary	
Compliance with General Order 167 - Electrical Generation (no permit needed)		Commission (CPUC) Electric Generation Performance Branch (EGPB), Los Angeles Office, 320 West 4th Street, Suite 500, Los Angeles, CA 90013, Tel: 213-576-7000	N/A	As part of the Electrical Generation Performance Branch at the CPUC, auditors regularly conduct compliance audits at power plants through performance data analysis, record review, field inspection and plant staff interviews. It is worth noting otherwise that the CPUC regulates natural gas utility service throughout California	
Hearing Conservation Program Risk Management and Injury and Illness Prevention Plans	Health and Safety	California Department of Industrial Relations, Division of Occupational Safety and Health (DOSH) Cal-OSHA Field Office, 7575 Metropolitan Drive, San Diego, CA 92108 Tel: 619-767-2060	4	Equivalent to the Federal OSHA standards (see Federal matrix) and occupational noise triggers. It is worthwhile checking with the local field office for risk management plans and other reports that may be necessary as standard workplace requirements	
Construction Activity Permit	Health and Safety	California Department of Industrial Relations, Division of Occupational Safety and Health (DOSH) Cal-OSHA Field Office, 7575 Metropolitan Drive, San Diego, CA 92108 Tel: 619-767-2060	4	Construction activities, such as constructing trenches, buildings, structures, scaffolding or falsework more than three stories high requires a Construction Activity Permit. A copy of the Illness and Injury Prevention plan should be submitted along with the permit	
Tower Crane Permit and Certification	Health and Safety	California Department of Industrial Relations, Division of Occupational Safety and Health (DOSH) Cal-OSHA Field Office, 7575 Metropolitan Drive, San Diego, CA 92108 Tel: 619-767-2060	4	Permits are required for fixed and mobile tower cranes at the facility construction site and certifications are needed for operating cranes with a rated capacity of over 3 tons	
Pressure Vessel Permit	Health and Safety	California Department of Industrial Relations, Division of Occupational Safety and Health (DOSH) Cal-OSHA Field Office, 7575 Metropolitan Drive, San Diego, CA 92108 Tel: 619-767-2060	4	Permits are required for air tanks, LPG propane storage tanks (over 125 gals) and high pressure boilers over 15 psig steam. Permitting exceptions depend on vessel capacity and operating pressures	
Helicopter Operations Activity Permit	Health and Safety	California Department of Industrial Relations, Division of Occupational Safety and Health (DOSH) Cal-OSHA Field Office, 7575 Metropolitan Drive, San Diego, CA 92108 Tel: 619-767-2060	4	Generally the FAA has jurisdiction over helicopter operations (see Federal matrix or contact the FAA office for exact requirements)	



## Attachment B: POWER PLANT PERMIT MATRIX - NOBEL DRIVE, SAN DIEGO, CA

PERMITS	TYPE OF PERMIT	APPROVING AGENCY	REVIEW PERIOD (Weeks)	REQUIREMENTS	COMMENTS
Interconnection System Impact Report		California Independent System Operator Corporation (CA ISO), PO Box 639014, Folsom, CA 95763 Tel: 916-351-4400	16	Large generator interconnection procedures (LGIP) apply to proposed generating facilities that are more than 20 MW. A scoping meeting sets the stage for the development of the study plan and feasibility study agreement between the ISO and interconnection customer	CAISO has recently changed the way these are processed. Several projects are grouped together into "clusters" so the schedule is delayed a bit. CEC understands this and works with the applicant on the timing.
<b>Local</b>					
		Lead Agency: City of San Diego Development Services, 1222 First Avenue, MS 301, San Diego, CA 92101-4154 Tel: 619-446-5300 ("book for appointment")		The City of San Diego Development Services department assists with all project permits, plans, zoning information, building codes and regulations, notices for public hearings and other project related permitting issues	For this project the CEQA lead agency would be the CEC. The City will play a key role in the process. After certification, much of the building permits, etc will be obtained through the City.
Shell of Building	Building Permit	City of San Diego Development Services, 1222 First Avenue, MS 301, San Diego CA 92101-4154 Tel: 619-446-5000	26	This is the first step in the permitting process locally. The Building permit package will be submitted to the City's Development Services Department and a planner will be assigned to the project throughout the entire permitting process. They are required for any project authorizing new construction, alterations, or additions to any building or structure. More than likely a Discretionary Review and Council Hearing will be required for such a project (depending on the findings and plans submitted for the project).	
Coastal Development Permit (CDP)	Development & Policy Approvals Permit	City of San Diego Development Services 1222 First Avenue, MS 301, San Diego CA 92101-4154 Tel: 619-446-5000 (This permit is overseen by the California Coastal Commission - local office: 7575 Metropolitan Drive, Suite 103, San Diego, CA 92108 Tel: 619-767-2370 Sherilyn Sarb or Deborah Lee)	26	The City of San Diego Development Services department assists in the application process of the CDP, according to the California Coastal Commission. However, this permit will follow after the Council Hearing process and Building Permit process have been satisfied.	The Nobel Drive site is not located within the coastal zone.
Grading and Public Right-of-Way	Construction Permit	City of San Diego Development Services 1222 First Avenue, MS 301, San Diego CA 92101-4154 Tel: 619-446-5000/ 619-446-5300 for appointments	8	This permit is necessary when grading (excavating, cutting, clearing, grubbing, stockpiling, filling) occurs within City owned space and if the facility alters the existing drainage pattern. A permit is also needed if grading were occurring as part of a development permit	
Encroachment in the Right of Way - Storm Drain	Encroachment Permit	City of San Diego Development Services 1222 First Avenue, MS 301, San Diego CA 92101-4154 Tel: 619-446-5000	8	This permit would be required if encroachment onto public roadways occur	
Traffic Control Right-of-Way Permit	Public Right-of-Way Permit	City of San Diego Development Services 1222 First Avenue, MS 301, San Diego CA 92101-4154 Tel: 619-446-5000	8	This permit would be necessary if there is any encroachment onto public roadways, during construction or operation of the facility	
Safety Permit (for Project)	OSHA Project Permit	Cal-OSHA Field Office, 7575 Metropolitan Drive, San Diego, CA 92108 Tel: 619-767-2060	1	Project permit ONLY; must apply for OSHA activities permit. Contact local field office	
Water and Sewer Plan Check	Water and Sewer Service Permit	City of San Diego Public Utilities (Water Department), 600 B Street, San Diego, CA 92101, Tel: 619-515-1500	8	Must submit copy of OSHA permit along with application	
Storm Water Pollution Prevention Plan (SWPPP)	Storm Water Plan	City of San Diego Development Services 1222 First Avenue, MS 301, San Diego CA 92101-4154 Tel: 619-446-5000	4	The applicant needs to be prepared and available for review, if requested by the State Water Resources Control Board (SWRCB) or City of San Diego Development Services. This is tied to the grading permit	
Storm Water Connection	Construction Permit	City of San Diego Development Services 1222 First Avenue, MS 301, San Diego CA 92101-4154 Tel: 619-446-5000	8	Must submit SWPPP with package	
Discharge of Extracted Groundwater to Sewer (Dewatering Permit)	Wastewater Permit	City of San Diego Metropolitan Wastewater Department (MWWWD), Industrial Wastewater Control Program, 9192 Topaz Way, San Diego, CA 92123, Tel: 858-654-4100	4	This permit would be necessary should site dewatering occur, in order to lower and control groundwater levels and hydrostatic pressures, when excavating or constructing during dry conditions	
Discharge of Ground Water to Sewer (Sewer Fees)	Wastewater Fees	City of San Diego Metropolitan Wastewater Department (MWWWD), Industrial Wastewater Control Program, 9192 Topaz Way, San Diego, CA 92123, Tel: 858-654-4100	4	This permit would require estimates in terms of how many gallons a minute of wastewater (in an 8 hour day) for a period of x months and x years are being discharged into the sewer. This permit is tied to the dewatering permit (above)	
Standard Urban Storm Water Mitigation Plan (SUSMP)	Municipal Storm Water Permit	County of San Diego Department of Public Works, 5555 Overland Avenue, Suite 2260, San Diego, CA 92123 Tel: 858-514-4990	2	The SUSMP only addresses land development and capital improvement projects and is focused on project design requirements and related post-construction requirements, not on the construction process itself. In coordination with the SWPPP and stormwater management plan (at initial application, as required by ordinance). The SUSMP must have a design level detailed plan and drainage report, that includes pre-development drainage patterns and discharge rates for the project site. There must also be landscaping plans and Best Management Practices (BMPs) proposed as part of the SUSMP	
Prevention of Significant Deterioration (PSD) Permit	Air Quality Permit	San Diego County Air Pollution Control District (APCD) 101024 Old Grove Road, San Diego, CA 92131 Tel: 858-586-2600	43-52	This permit is required only if maximum potential emissions would exceed 100 tons per year or more of any criteria pollutant for the specific source categories listed in the PSD regulations. If a plant does not fall into one of the listed source categories, a threshold of 250 tons per year applies. The US EPA typically is involved in the initial stages of this permit, however the local County APCD will be privy to the process and will be involved at some stage in the process	This will most likely be required for greenhouse gases. It is unknown if the regulated air pollutants will trigger PSD.
Permit to Construct	Air Quality Permit	San Diego County Air Pollution Control District (APCD) 101024 Old Grove Road, San Diego, CA 92131 Tel: 858-586-2600	43-52	The authority to construct application is submitted via the local County APCD (see Federal matrix), if not US EPA	
Operating Permit	Air Quality Permit	San Diego County Air Pollution Control District (APCD) 101024 Old Grove Road, San Diego, CA 92131 Tel: 858-586-2600	43-52	This must incorporate Title V requirements and would be submitted no later than one year after commencement of operations, should a facility emit air pollutants (which is determined based upon the type and amount of emissions and in some cases, the severity of air pollution problems in the area where the facility is located)	
Equipment Emissions Permit	Air Quality Permit	San Diego County Air Pollution Control District (APCD) 101024 Old Grove Road, San Diego, CA 92131 Tel: 858-586-2600	8 - 24	Pumps, Generators, light plants, air compressors over 40KW	

## Attachment B: POWER PLANT PERMIT MATRIX - NOBEL DRIVE, SAN DIEGO, CA

PERMITS	TYPE OF PERMIT	APPROVING AGENCY	REVIEW PERIOD (Weeks)	REQUIREMENTS	COMMENTS
Fuel Tank Set Up	Hazardous Material Permit	City of San Diego Fire-Rescue Department 1010 Second Avenue, Suite 400, San Diego, CA 92101 Tel: 619-446-5440	3 - 4	For fuel station setup for up to 3 tanks; tank and system installations require permits/plan submittals from the San Diego Fire-Rescue Department.	
Fuel Tank Set Up	Certified Unified Program Agency Facility Permit	County of San Diego Department of Environmental Health (DEH), Hazardous Materials Division, 1600 Pacific Highway, San Diego, CA 92101 Tel: 619-338-2251 Email: hmdutyeh@sdcounty.ca.gov	3 - 4	All Aboveground Petroleum Storage Tank Facility Statements must be on file with the County of San Diego DEH	
Hazardous Material Business Plan (HMBP)	Certified Unified Program Agency Facility Permit	County of San Diego Department of Environmental Health (DEH), Hazardous Materials Division, 1600 Pacific Highway, San Diego, CA 92101 Tel: 619-338-2251 Email: hmdutyeh@sdcounty.ca.gov	2	Prepare and file an HMBP with the local county Certified Unified Protection Agency (CUPA) for any facility that stores or uses hazardous materials	
Vernal Pool Management	Biological	City of San Diego Planning (and Community Investment) Department, 202 C Street, MSSA, San Diego, CA 92101 Tel: 619-235-5200; Betsy Miller, Biologist Tel: 619-685-1314	16	At the project site, there are two vernal pools and some rut pools, in addition to vernal pools along the transmission line row that will require buffering. The City has a list of species that are covered under the Multi-Species Conservation Program (MSCP) as well as guidelines for impacts to such species and Vernal Pool Management Plan. Call the Biologist, Betsy Miller at the City for more info	
<b>Notes/Acronyms:</b> AFC = Application for Certification APCD = Air Pollution Control District BLM = Bureau of Land Management BMP = Best Management Practice CA ISO = California Independent System Operator Corporation Cal-ARP = California Accidental Release Program Cal-OSHA = California Occupational Safety and Health Act CDP = Coastal Development Permit CDFG = California Department of Fish and Game CEC = California Energy Commission CEQA = California Environmental Quality Act CPUC = California Public Utilities Commission CUPA = Certified Unified Protection Agency DEH = Department of Environmental Health DOSH = Division of Occupational Safety and Health DTSC = Department of Toxic Substance Control EA = Environmental Assessment EIS = Environmental Impact Statement EGPB = Electric Generation Performance Branch EPA = Environmental Protection Agency FAA = Federal Aviation Administration FERC = Federal Energy Regulatory Commission FONSI = Finding of No Significant Impact HAP = Hazardous Air Pollutant HMBP = Hazardous Material Business Plan LGIP = Large Generator Interconnection Procedures MACT = Maximum Achievable Control Technology MW = megawatts MWWD = Metropolitan Wastewater Department MSCP = Multi-Species Conservation Program NOI = Notice of Intent PSD = Prevention of Significant Deterioration QF = Qualifying Facility RCRA = Resource Conservation and Recovery Act RMP = Risk Management Plan ROD = Record of Decision ROWD = Report of Waste Discharge RWQCB = Regional Water Quality Control Board SHPO = State Historic Preservation Office SUSMP = Standard Urban Storm Water Mitigation Plan SWPPP = Storm Water Pollution Prevention Plan SWRCB = State Water Resources Control Board USACE = US Army Corps of Engineers USFWS = US Fish and Wildlife Services					



**Attachment 7: Estimate of Public Benefits**

**Projected Fiscal Benefits<sup>1</sup>**

**City of San Diego**

Source of Funds	Receiving Fund	Time Period	Annually	Totals
Option Consideration	Sewer Revenue Fund	2013-2017	\$400,000	\$1.6 million
Annual Rent	Sewer Revenue Fund	2017-2042	\$1,500,000	\$37.5 million
Sales/Use Tax	General Fund	2014-2016	n/a	\$6 million
Property Tax	General Fund	2017-2042	\$954,000	\$24 million
Gas Franchise Fees	General Fund	2017-2042	\$800,000	\$20 million
All Sources	All Funds	2013-2042	\$3,254,000 <sup>2</sup>	\$89 million

**San Diego Unified School District**

Source of Funds	Receiving Fund	Time Period	Annually	Totals
Property Tax	General Fund	2017-2042	\$3,366,000	\$84 million

**County of San Diego**

Source of Funds	Receiving Fund	Time Period	Annually	Totals
Sales/Use Tax	General Fund	2014-2016	n/a	\$1.5 million
Property Tax	General Fund	2017-2042	\$785,400	\$20 million

**San Diego Association of Governments**

Source of Funds	Receiving Fund	Time Period	Annually	Totals
Sales/Use Tax	TransNet Fund	2014-2016	n/a	\$3 million

**State of California**

Source of Funds	Receiving Fund	Time Period	Annually	Totals
Sales/Use Tax	General Fund	2014-2016	n/a	\$36 million

<sup>1</sup> Estimates are based on data taken from the State Board of Equalization (State Assessed Property Tax), data from California Energy Commission licensing cases, Capital Power Corp's bid proposal, and other sources deemed reliable by the City of San Diego. Estimates assume a \$561 million-valuation on a combined-cycle power plant of 850 MW (\$400 million taxable equipment) consuming 42 mmbtu/annually at a cost of \$2.50/mmbtu.

<sup>2</sup> Lease, tax, and fee revenue during the lease term.

## **Projected Local Economic Benefits**

**425 mostly union construction jobs with estimated construction payroll of \$60 million+ (2015-2016)**

**25 permanent operations jobs with estimated annual payroll likely to exceed \$2 million annually (2017-2042)**

## **Projected Environmental Benefits**

**Possible early retirement of Encina Power Plant (Units 1-5) resulting in end to 857 MGD of ocean water used for “once through cooling” as required by SWRCB and also reduced air emissions (Encina Units 1-5 run at 35% efficiency)**

**Possible early retirement of San Onofre Power Plant (Units 1-3) resulting in end to 2,384 MGD of ocean water used for “once through cooling”**

**Facilitates integration of renewable energy sources into SDG&E portfolio, energy reliability through grid stabilization inside San Diego “Load Pocket”**