

RESOLUTION NO. 4922

A RESOLUTION AUTHORIZING THE CITY MANAGER TO EXECUTE AN AGREEMENT WITH THE ENERGY TRUST OF OREGON FOR SUPPLEMENTAL FUNDING OF THE CITY OF ALBANY HYDROELECTRIC RE-START PROJECT.

WHEREAS, the City of Albany applied to the Energy Trust of Oregon for assistance in funding the repair, rehabilitation, and re-starting of the closed hydroelectric generating facilities at the Albany Water Treatment Plant; and

WHEREAS, the Energy Trust of Oregon is a non-profit foundation empowered by the State of Oregon to collect and expend public purpose monies that are collected on electric bills within the service areas covered by Pacific Power and Portland General Electric; and

WHEREAS, the Energy Trust of Oregon Board of Directors has determined that the City of Albany Hydroelectric Re-Start project is an environmentally sound renewable power production project in keeping with the stated goals of the people and government of Oregon to produce more renewable power; and

WHEREAS, the Energy Trust further finds that this project is a worth recipient of supplemental funding from public purpose monies and will benefit all the people of Oregon.

NOW, THEREFORE, BE IT RESOLVED that the City Council authorizes the City Manager to enter into an agreement with the Energy Trust of Oregon in compliance with the terms and conditions presented to this Council for the purpose of receiving funding from the Energy Trust of Oregon.

DATED THIS 14<sup>TH</sup> DAY OF JANUARY 2004.

  
\_\_\_\_\_  
Mayor

ATTEST:

  
\_\_\_\_\_  
City Clerk

## GRANT AGREEMENT

**THIS GRANT AGREEMENT** ("Agreement") is made and entered into on the \_\_\_\_\_ day of \_\_\_\_\_ {2003} [2004] (the "Effective Date"), by the Energy Trust of Oregon, Inc., an Oregon nonprofit corporation ("Trust"), and the City of Albany, a municipal corporation ("City").

### RECITALS

- A. The City commissioned a feasibility study performed by Harza Engineering Company ("Harza"). Based upon the Harza report and the results of a cost-benefit analysis, the City will refurbish one of the two existing turbine generators at the hydroelectric power generation facility which is owned by the City and located at 300 Vine Street SW, Albany, Oregon (the "Facility"). The City will utilize the second turbine generator for parts. The City intends that all repairs, replacements, and other work shall be completed, and that the Facility will become operational, by October 1, 2006.
- B. The anticipated work to reactivate the power generation at the Facility includes engineering [and] design, the replacement of the existing turbine runner, the replacement of the existing turbine governor, the refurbishment of the existing generator, the replacement of existing switchgear and controls, the repair of the existing building, the installation of an automatic trash rake at the Penstock intake, the installation of necessary equipment connecting the Facility to the PacifiCorp local distribution system, the installation of metering equipment, and other contingencies that may arise (the "Project"). The City estimates the total expected installation and financing costs for the Project at \$1,190,000.
- C. The Trust agrees to fund certain above market costs associated with the Project on the terms and conditions set forth in this Agreement. In return, the City will transfer to the Trust the rights to all Green Tags, Green Tag Reporting Rights, and Environmental Attributes (as such terms are defined below), and their associated property rights for a period of 20 years from the date of the completion of the Project. The Trust intends to initially transfer such rights to PacifiCorp for the benefit of their Oregon customers.
- D. The City anticipates that the refurbished Facility will be able to produce a maximum of 511 kilowatts (KW) of power capacity and in excess of 250,000 megawatt hours (MWh) of annual energy generation. The City will seek approval from the Federal Energy Regulatory Commission ("FERC") for the Facility's production capability of 511 {~~kWh~~} [KW] which represents an overage of 11 {~~kWh~~} [KW] from the 500 {~~kWh~~} [KW] authorized by the FERC license. The City believes that the anticipated production capability is generally consistent with the FERC license and it expects to obtain approval for the additional capacity through a notification letter process with FERC after operational tests verify the actual production capacity in 2006.

- E. On October 15, 2003, the City sold 2003 Water Revenue Bonds (the "Bonds") which provide funding for this Project and other projects being pursued by the City.
- F. The City has entered into a separate power purchase agreement ("PPA") with PacifiCorp governing the sale of power generated by the Facility to PacifiCorp. A copy of the executed PPA is attached to this Agreement as Exhibit A.

## **AGREEMENT**

In consideration of their mutual promises and the consideration set forth herein, the parties agree as follows:

### **ARTICLE 1: TERM OF AGREEMENT**

The term of this Agreement ("Term") shall commence on the Effective Date and continue in effect for a period of 20 years commencing on the date the Facility is fully operational and produces electricity that is purchased by and delivered to PacifiCorp pursuant to the PPA (the "Commercial Operation Date"), unless the parties agree in writing to extend the Term, or unless this Agreement is ~~{earlier}~~ terminated [earlier] in accordance with Article 7. The Term of this Agreement shall not be affected by any termination or expiration of the PPA or [any] successor power purchase agreement.

### **ARTICLE 2: PROJECT MANAGEMENT & OPERATION**

- A. The City is responsible for all contractors, subcontractors, Project financing, Project contingencies, and any and all items related to the construction, operation and maintenance of the Facility.
- B. The City will construct, operate, and maintain the Facility to produce approximately 250,000 MWh of energy per year and in compliance with all applicable laws and regulations, including but not limited to, environmental laws and regulations.
- C. The City will obtain and maintain all government approvals, permits, and licenses, and enter into all other agreements necessary to construct, operate, and maintain the Facility. Upon the Trust's written request, the City will provide the Trust with copies of such approvals and agreements, including any amendments thereto.
- D. The City will complete the installation of the Facility in accordance with PacifiCorp's interconnection requirements and permit access by the Trust to all metering and billing data collected or produced in connection with energy generated by the Facility. The City will provide the Trust with copies of monthly invoices and reports received from PacifiCorp for electricity generated by the Facility.

- E. The City will permit inspection of the Facility by the Trust and its agents and cooperate with the efforts of the Trust staff and contractors in Project evaluations during the Term of the Agreement and thereafter.
- F. The City will use its best efforts to operate the Facility in a manner to enable qualification of the electricity produced by the Facility as renewable energy under any certification requirements required by an applicable government authority or independent certification board that may be commonly used to assess the Green Tags, Green Tag Reporting Rights, or Environmental Attributes.
- G. At the same time as the City provides its Bond holders, Bond issuer, or Bond insurer with any information regarding the Facility, including all financial reports and data, the City will simultaneously provide the Trust with the same information. In addition, the City will provide the Trust with other information relating to the Facility as the Trust may reasonably request from time to time.
- H. Subject to the provisions ~~{in}~~ set forth in Article 3.C below, the City will not sell or dismantle the Facility or any equipment or property used therein, in part or in whole, ~~{with the Funds (as defined below)}~~ and will maintain the Facility at an operational level with production capability of at least 500 KW and generation capability of 250,000 MWh per year for a period of at least 20 years following the Commercial Operation Date.

**ARTICLE 3: PAYMENT BY THE TRUST; REPAYMENT OF FUNDS TO THE TRUST**

- A. Within 10 business days of execution of this Agreement, the Trust will deposit \$475,000 (the "Funds") into an escrow account with ~~{\_\_\_\_\_}~~ **[Bank of America, N.A.]** ("Escrow Agent")~~[,]~~ pursuant to an escrow agreement ("Escrow Agreement") by and among the City, the Trust, and Escrow Agent. In the event that the Commercial Operation Date does not occur by January 1, 2007, all Funds deposited pursuant to the Escrow Agreement will be returned to the Trust~~{, including any interest earned,}~~ and this Agreement will automatically terminate. The Escrow Agent will release the Funds to the City upon receipt of (i) written certification by the City Engineer that construction of the Project has been completed and the Facility is operating and producing electricity, and has a capacity of at least 500 KW and an operating potential of 250,000 MWh per year, (ii) written confirmation from PacifiCorp that PacifiCorp has purchased power generated by the Facility under the PPA, and (iii) at the option of the Trust and at its expense (provided the Trust notifies Escrow Agent in writing that it elects such option) a written certification by an independent engineer selected by the Trust that the Facility is operating and producing electricity, has capacity of at least 500 KW, and has an operating potential of 250,000 MWh per year. Any interest earned on the Funds ~~{after deduction}~~ **[shall accrue and be paid to the Trust in accordance with the terms]** of the Escrow ~~{Agent's}~~ **[Agreement. The Trust will be responsible for the costs and]** expenses ~~{shall be disbursed to}~~ **[of opening and maintaining]** the ~~{Trust at}~~ **[escrow account under]** the ~~{same time the Funds are disbursed to the City}~~ **[Escrow Agreement]**.

- B. After the Commercial Operation Date, except as provided for in subsection C below, if the Facility is sold, assigned, transferred, repossessed, or permanently shutdown, or does not produce electricity for 270 days in a given calendar year, the City will immediately repay a portion of the Funds to the Trust, or its successor, in the amount calculated below:

"\$475,000 multiplied by the fraction of (20 minus the number of anniversaries of the Commercial Operation Date that have occurred divided by 20)."

If the City sells the BETC credit related to the Facility as described in subsection D below to a tax-paying partner, the \$475,000 amount will be reduced by the amount received by the City for the BETC credit.

- C. After the Commercial Operation Date, if changes in environmental laws or regulations that relate to the operation of the Facility (i) make it impossible to continue operating the Facility or (ii) require substantial modifications to continue operating the Facility or the waterway where the Facility is located and the cost of such modifications would be Economically Impracticable (as defined below), the City may shutdown the Facility upon giving the Trust 90 days prior written notice. In addition, if the Facility is materially damaged or destroyed by an unforeseeable act of God such that the cost of repair or replacement of the Facility or the waterway where the Facility is located is beyond that covered by insurance and would be Economically Impracticable, the City may shutdown the Facility upon giving the Trust written notice.

"Economically Impracticable" means the costs associated with modification, repair, or replacement of the Facility ("Modifications") required to respond to an event or occurrence described in the paragraph above, not including costs covered by insurance, would exceed the amount of revenue expected to be generated from the Facility's anticipated generation and sale of electricity over the ten-year period following the date the Modifications on the Facility are completed or the remaining life of the Facility, whichever is less (the "Period"), as determined by a certified public accountant jointly selected by the City and the Trust (or in the absence of a joint agreement, by the presiding judge of the Circuit Court of Multnomah County), after (a) taking into account the then-current and anticipated electricity prices for the Period as defined by applicable retail tariffs for the utility serving the City of Albany or as determined by the Oregon Public Utility Commission if the City of Albany serves as its own power provider, (b) taking into account the anticipated operating costs of the Facility for the Period as determined by an independent engineer agreed to by both parties, (c) taking into account the cost of borrowing funds to make such Modifications for the Period as determined by the City's interest rate for revenue bonds that are issued by the City at such time, and (d) taking into account the payments due under the Bond financing for the Period.

- D. The City, with assistance from the Trust, is currently pursuing, and will continue to pursue an Oregon Business Energy Tax Credit ("BETC") [for the Facility].

As of the date of this Agreement, the City has been unable to find a tax-paying partner to buy ~~out~~ the ~~credit~~ **[BETC]** estimated ~~at~~ [to be worth] more than \$285,000. If the City ultimately secures a BETC tax ~~paying partner~~ before or on the date the Funds are disbursed to the City under the Escrow Agreement, the City will give written notice to the Trust and Escrow Agent at least ten business days before the BETC tax investment is scheduled to close and the Escrow Agent will refund a portion of the Funds ~~provided by~~ deposited in the escrow account to the Trust in an amount equal to the amount of funds the City receives for transfer of the BETC credit associated with the Facility from the tax-paying partner (the "BETC Funds") within five business days of Escrow Agent receiving written notice from both the City and the Trust that the City has received the BETC Funds. If the City alternatively secures a BETC tax-paying partner after the date the Funds are disbursed to the City under the Escrow Agreement, the City will refund an amount equal to the amount of the BETC Funds to the Trust within five business days of the date the City receives ~~for~~ the ~~Project~~ **[BETC Funds]** from the tax-paying partner. In the event that the City does secure more than one BETC tax-paying partner at different times, the provisions set forth above shall apply to each sale of any BETC credit.

#### **ARTICLE 4: TRANSFER OF GREEN TAGS AND ENVIRONMENTAL ATTRIBUTES**

- A. In exchange for the Trust providing the Funds described above, the City hereby transfers for the Term all present and future right, title and interest of the City in Green Tags, Green Tag Reporting Rights, and any other marketable Environmental Attributes associated with the Facility as such Green Tags, Green Tag Reporting Rights, and Environmental Attributes are created through generation of electricity by the Facility.
- B. "Green Tag" means the Environmental Attributes associated with the power generated from the Facility, together with the Green Tag Reporting Rights associated thereto. ~~One~~ [Green Tag also includes any tradeable or other credits for renewable resource generation attributable to the Facility, including without limitation any credits for meeting portfolio or other standards requiring renewable resource content now or in the future. Green Tags are accumulated on a kWh basis or equivalent basis and one] Green Tag represents the Environmental Attributes ~~made available by the~~ [associated with actual or deemed] generation of one ~~megawatt-hour~~ [MWh] of electricity generated by the Facility , or the claimed displacement of power.
- C. "Green Tag Reporting Rights" means the right of a Green Tag purchaser to report ownership of Green Tags in compliance with federal or state law, if applicable, and to a federal or state agency, or other parties at the Green Tag purchaser's discretion, and include those accruing under Section 1605(b) of the Energy Policy Act of 1992, any [present or future] renewable credit compliance requirements [or program], or under any present or future domestic, international, or foreign emissions trading program.

- D. "Environmental Attributes" means any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, resulting from the avoidance of the emission of any gas, chemical, or other substance to the air, soil, or water attributable to the Facility ~~{, and}~~ which are deemed of value by a Green Tag purchaser, and any credits or benefits for renewable resources that are attributable to the Facility. Environmental Attributes include but are not limited to: (1) any avoided emissions of pollutants to the air, soil, or water such as (subject to the foregoing) sulfur oxides (SOx), nitrogen oxides (NOx), carbon monoxide (CO), and other pollutants; (2) any avoided emissions of carbon dioxide (CO2), methane (CH4), and other greenhouse gases (GHGs) that have been determined by the United Nations Intergovernmental Panel on Climate Change to contribute to the actual or potential threat of altering the Earth's climate by trapping heat in the atmosphere; and (3) the Green Tag Reporting Rights to these avoided emissions. Subject to the foregoing, Environmental Attributes do not include any energy, capacity, reliability, or other power attributes from the Facility ~~{nor}~~ [or any] production tax credits associated with the construction or operation of the Facility.
- E. Any termination of the PPA shall not affect (i) the Trust's right, title, and interest in the Green Tags, Green Tag Reporting Rights, or Environmental Attributes, or (ii) the other rights and obligations of the parties under this Agreement.

#### **ARTICLE 5: SECURITY INTEREST AND FINANCING STATEMENT**

- A. The City hereby grants a primary security interest in all present and future Green Tags, Green Tag Reporting Rights and any other Environmental Attributes, arising from or related to the electrical energy generated by the Facility. The security interest granted herein is to secure performance of the City's obligations under this Agreement.
- B. Throughout the Term, the City will fully cooperate with the Trust to register or otherwise perfect the Trust's rights in the Green Tags, Green Tag Reporting Rights, and any other Environmental Attributes arising from or related to the electrical energy generated by the Facility. The Trust may file one or more financing statements to perfect this security interest and any amendments related thereto in order to continue the perfection of such security interest.
- C. The security interest granted to the Trust herein shall not be subordinated to a security interest granted by the City to any other person.

#### **ARTICLE 6: REPRESENTATIONS, WARRANTIES, AND COVENANTS**

- A. The City has full right, power, and capacity to execute, deliver, and perform this Agreement and to sell, assign, transfer, and deliver the Green Tags, Green Tag Reporting Rights and Environmental Attributes to the Trust under this Agreement. This Agreement is the valid and binding agreement of the City enforceable against the City in accordance with its terms, except as such

enforcement may be limited by the effect of bankruptcy, reorganization, insolvency, and other similar creditors' rights laws generally and by equitable principles regardless of whether the proceeding is brought at law or in equity. The execution, delivery, and performance of this Agreement by the City has been duly and validly authorized by the city council of the City of Albany.

- B. The Trust has full right, power, and capacity to execute, deliver, and perform this Agreement and to deliver the Funds to the City under this Agreement. This Agreement is the valid and binding agreement of the Trust enforceable against the Trust in accordance with its terms, except as such enforcement may be limited by the effect of bankruptcy, reorganization, insolvency, and other similar creditors' rights laws generally and by equitable principles regardless of whether the proceeding is brought at law or in equity. The execution, delivery, and performance of this Agreement by the Trust has been duly and validly authorized by the board of directors of the Trust per the board resolution adopted on March 5, 2003, which is attached to this Agreement as Exhibit B.
- C. The City represents that on October 15, 2003, that it sold Bonds which provide funding for this Project and other projects being pursued by the City. The City represents and warrants that it has sufficient funds to pay the expenses of the Project if the Trust delivers the Funds to the City pursuant to the terms of this Agreement. The City represents and warrants that it has received written assurances from the Northwest Power Planning Council's Protected Areas Program that this Project qualifies for an exemption to the general limits on hydro projects within protected areas because the Facility qualifies an exempted facility and covenants that it will continue to qualify the Facility as an exempted facility[ throughout the Term of this Agreement].
- D. The City covenants that it will implement, at its own expense and separate from the costs associated with the Project, improvements to the City diversion dam and installation of fish screen on the diversion canal to improve environmental protection of fish and wildlife.
- E. The City represents and warrants that it has entered into the PPA with PacifiCorp and that such agreement is valid and binding and no breach or event of default has occurred or with the passage of time will occur. The City covenants that it will not breach or be in default under the PPA during the Term of this Agreement.

#### **ARTICLE 7: TERMINATION**

- A. This Agreement may be terminated by the Trust upon delivering written notice to the City in the event that:
  - (i) The City breaches this Agreement and fails to cure the breach within 30 days of written notice thereof;
  - (ii) The City abandons the Project or fails to complete the Project by January 1, 2007; or



(iii) PacifiCorp terminates the PPA following a breach by the City.

- B. If this Agreement is terminated by the Trust pursuant to this Article, the City shall pay to the Trust the amount calculated in Article 3.B above and such amount shall be immediately due and payable to the Trust in cash.

#### **ARTICLE 8: CONFLICT OF INTEREST/DISCLOSURE**

The City has disclosed in Exhibit C all known actual or potential conflicts of interest of the City or the City's personnel with the Trust. If during the Term the City becomes aware of an actual or potential conflict of interest between it or the City's personnel and the Trust, the City shall promptly notify the Executive Director of the Trust in writing. A "conflict of interest" is defined as any situation in which any person associated with a party has or may be reasonably construed to have a direct or indirect personal or financial interest in any business affairs of the Trust, including in connection with a proposed contract or transaction to which the Trust may be a party.

#### **ARTICLE 9: CONFIDENTIALITY, INDEMNIFICATION, INSURANCE, LIMITATION ON LIABILITY AND WORK PRODUCT**

- A. The City will not disclose any proprietary or confidential information of [the] Trust both during the Term of the Agreement and thereafter, provided that the City may disclose such information if required by judicial order without liability to the Trust. The City will use reasonable efforts to maintain the confidentiality of any confidential or proprietary information of the Trust. Notwithstanding the above, the Trust acknowledges that the City is a public entity and that all contracts and records pertaining to this Agreement are public documents available for review by anyone so requesting.
- B. To the fullest extent permitted under the Oregon Constitution, the Oregon Tort Claims Act, and the Charter of the City of Albany, the City will indemnify and defend the Trust and its directors, officers, employees, agents, representatives, and affiliates (the "Indemnified Parties") and hold them harmless from and against any and all losses, liabilities, damages, demands, claims, suits, actions, judgments, assessments, costs, and expenses, including interest and penalties, and reasonable attorney fees and expenses incurred in investigating, preparing, or defending against any litigation, commenced or threatened, or any claim whatsoever, and any and all amounts paid in settlement of any claim or litigation asserted against, imposed on, or incurred or suffered by any of them, directly or indirectly, as a result of or arising from (i) the negligent or wrongful acts or omissions of the City or the City's personnel, (ii) a breach of this Agreement, or (iii) construction, operation, or maintenance of the Project. However, the City does not agree, or incur any obligation by this Agreement, to defend or indemnify the Trust for any liability arising out of the negligence of the Trust or the Trust's officers, employees, or agents.

- C. Prior to commencing work on the Project the City will obtain and during the Term of this Agreement maintain ~~{casualty}~~ [general liability] insurance coverage for the Project ~~{-and general liability coverage for}~~ [.] the City~~[.]~~ and ~~{its}~~ [the City's] agents, employees, and contractors, with coverage levels that are equivalent to the insurance coverage levels maintained with respect to material City properties and projects generally and that are otherwise reasonably acceptable to the Trust. Attached to this Agreement as Exhibit D are copies of the [City's] current certificates of insurance ~~{-for casualty and general liability}~~. The City will provide the Trust with certificates of insurance at least annually and upon the written request of the Trust. The City will also provide the Trust with certificates of insurance within 10 days after the City amends or enters into any new policy insuring the Project or insuring the general liability of the City and its agents, employees, and contractors. If the Trust determines in its reasonable discretion that the type of insurance or levels of coverage or both are inadequate, the Trust may give written notice thereof to the City. The City and the Trust will negotiate in good faith to resolve any issues relating to insurance described in this section. The Trust agrees to not require unreasonable or unattainable levels of insurance. If the City is unable or declines to obtain and maintain adequate types of insurance and adequate levels of coverage, then the City shall be in breach of this Agreement and the Trust may terminate this Agreement in accordance with Article 7 above. The termination will be deemed to be equivalent to a sale of the Facility, and the City shall be obligated to make the payment set forth in Article 3(B). The Trust will be named as an additional insured on all insurance policies related to the Project or general liability of the City.
- D. Neither the Trust nor its officers, directors, employees, and agents shall be liable to the City or any other person for any injury, damage (including any consequential damages or loss of profits), or death to any person or property arising from or relating to the transactions or operations contemplated under this Agreement, and the City releases any and all such claims for such injuries, damages, or death that it has or may have against the Trust.
- E. The Trust will be the sole and exclusive owner of all work product and intellectual property rights prepared or developed by the Trust in connection with the Project.
- F. The City will be the sole and exclusive owner of all work product, facilities, equipment, intellectual property rights, real property and tangible personal property consistent with the refurbishment, improvement and operation of the hydroelectric Project and related appurtenances and the Facility.

#### ARTICLE 10: GENERAL PROVISIONS

- A. Assignment. Neither this Agreement nor any of the rights, interests, or obligations under this Agreement may be assigned by any party without the prior written consent of the other party, except that the Trust, at any time, may assign its rights under this Agreement when requested to do so by the Public Utilities

Commission of Oregon under the Grant Agreement between the Trust and the Public Utilities Commission of Oregon dated November 20, 2001, as amended. This Agreement will be binding on, and will inure to the benefit {øf}[of], the parties and their respective successors and permitted assigns. All successors and permitted assigns of the City shall assume all outstanding obligations of the City under this Agreement, and upon request of the Trust, shall acknowledge the assumption of such obligations in writing.

- B. Severability. Should any provision in this Agreement be held by a tribunal of competent jurisdiction to be invalid or unenforceable, the remainder of the Agreement will remain in full force and effect.
- C. Survival. Articles 7.B, 9.A, and 9.B, together with any obligations that accrue prior to termination of this Agreement, shall survive termination of this Agreement.
- D. Counterparts. This Agreement may be executed in one or more counterparts, all of which taken together will constitute one and the same agreement.
- E. Integration and Amendment. This Agreement supersedes all other agreements between the parties and contains their entire understanding as to its subject matter. No amendment to this Agreement will be effective unless it is in writing and duly executed by authorized representatives of the parties. This Agreement will not be varied, supplemented, qualified or interpreted by any prior course of dealing between the parties or by any usage of trade.
- F. Headings. The headings in this Agreement are for reference only and shall not affect the meaning, construction, or interpretation of this Agreement.
- G. No Third Party Beneficiaries. This Agreement is made and entered into the sole protection and legal benefit of the parties, and no other person shall be a direct or indirect legal beneficiary of, or have any direct or indirect cause of action or claim in connection with this Agreement.
- H. Non-Waiver. The failure or refusal of a party to enforce any breach or violation of any provision of this Agreement will not be a waiver of, consent to, or excuse for any other, different or subsequent breach or violation of the same or any other provision.
- I. Arbitration. Except for proceedings seeking injunctive or other equitable relief, all disputes arising under or relating to this Agreement shall be decided by arbitration. The arbitration shall be final and binding and shall be held in Portland, Oregon, before a tribunal appointed by Arbitration Services of Portland, Inc. ("ASP"). The arbitration will be conducted according to ASP rules, provided, however, that, if the arbitration involves claims totaling less than \$50,000, it shall be before a single arbitrator. This arbitration provision shall provide the exclusive means for dispute resolution (after good faith negotiation and mediation), provided, however, that neither party shall be prohibited from proceeding in a

court to obtain specific performance of this Agreement or provisional relief auxiliary to arbitration. [Any arbitration award shall be treated as confidential information under the terms of this Agreement.]

- J. Governing Law and Venue. This Agreement will be interpreted and enforced according to the laws of the state of Oregon without regard to principles of conflicts of laws. Any proceeding to enforce this Agreement or enjoin its breach shall be brought in the Multnomah County Circuit Court of the state of Oregon and each of the parties consents to the jurisdiction of such court (and of the appropriate appellate courts) in any such action or proceeding and waives any objection to such venue.
- K. Attorney Fees and Costs. In the event that any party initiates proceedings to enforce this Agreement or enjoin its breach, the prevailing party will be awarded its reasonable attorney fees and costs at arbitration, trial and on any appeal as set by the trier of fact, including any bankruptcy proceedings. For purposes of this Agreement, the "prevailing party" means the party that prevails (whether affirmatively or by means of a successful defense) with respect to the claims having the greatest value or importance as reasonably determined by the court or arbitrator considering the matter.
- L. Time of the Essence. Time is of the essence with respect to all dates and time periods set forth or referred to in this Agreement.
- M. Notices. Notices required by this Agreement will be deemed effective upon receipt, if delivered personally, or three days after being mailed by U.S. Certified Mail, return receipt requested, or when a confirmation of successful transmission is generated by the transmitting machine if sent by facsimile, to the person and addresses or numbers listed below or to such other persons and addresses or numbers as may be designated by a party through written notice to the other party.

If to Energy Trust of Oregon, Inc.:

Energy Trust of Oregon, Inc.  
733 S.W. Oak Street, Suite 200  
Portland, Oregon 97205  
Attention: {Margie Harris, Executive Director} [Office of General Counsel]  
Phone: (503) 493-8888  
Fax: (503) 546-6862

If to the City of Albany:

City of Albany

\_\_\_\_\_

Attention: \_\_\_\_\_

Phone: \_\_\_\_\_

Fax: \_\_\_\_\_

This Agreement is executed by the parties as of the date first indicated above.

ENERGY TRUST OF OREGON, INC.

THE CITY OF ALBANY

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

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

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Approved by the City Council of the City of Albany  
at its regular meeting on \_\_\_\_\_, 2003,  
pursuant to Council Resolution no. 2003-  
\_\_\_\_\_.

**EXHIBIT A**  
**POWER PURCHASE AGREEMENT**

## EXHIBIT B

### ENERGY TRUST OF OREGON, INC., BOARD RESOLUTION



## Board Decision City of Albany Small-Scale Municipal Hydroelectric Project

March 5, 2003

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### Purpose

This resolution authorizes Energy Trust staff to fund up to \$475,000 for 511 kilowatts of hydroelectric generation at the City of Albany's downtown water treatment facility. The resolution further directs staff to negotiate final contract terms after the bond financing by the city is approved. The request for the funding came through the renewable energy Open Solicitation Program.

### Background

In the 1870's early pioneers dug an 18-mile canal from the Santiam River near Lebanon to Albany to create a lucrative transportation link. While the use of the canal as a transportation route failed, it quickly became a source of drinking water and power generation. By 1878, 14 mills were using canal water to power water wheels. In 1892 a hydro generation and steam plant began operation at the current site of the City of Albany's water facilities. The first of the existing structures at the current water facility was built in 1912, and the complex is listed on the National Register of Historic Places.

The City of Albany acquired the generating capacity in 1984 when the entire water system was purchased from PacifiCorp. Along with the purchase came the senior water rights. In 1991 the city was forced to shut down hydropower generation when a ruling from the Federal Energy Regulatory Commission (FERC) stated that the city needed to secure a license to continue operations. The city applied for a FERC license in 1994 and was granted a 50-year license by FERC in 1998 for a 500 kilowatt plant.

### DESCRIPTION OF PROPOSED PROJECT

The current hydro generation facility consists of two turbine-generators installed around 1924. A study by Harza Engineering Company determined that reactivating the facility was feasible by



upgrading the power controls and interconnections to modern standards, refurbishing one turbine-generator and utilizing the other for parts. Given average flows and operational losses, the study concluded that the city should expect 2,561,000 kilowatt hours of annual power production.<sup>1</sup>

To be eligible for Energy Trust funding per SB 1149, proposed new hydro projects cannot be in protected stretches of rivers as identified by federal law in place on the effective date of SB 1149 (July 23, 1999). The relevant protections for this project are established by the Northwest Power Planning Council's (NWPPC) Protected Areas Program. This program lists the South Santiam River as protected for "anadromous only." According to Peter Paquet, Wildlife & Resident Fish Manager for NWPPC, the project is exempt from the protected areas program because it utilizes an existing facility.<sup>2</sup>

The project is eligible for an Oregon Business Energy Tax Credit (BETC), but is unable to find a tax-paying partner to use the credit. The size of the project, the limitations of BETC and the overall state of the economy all make finding a match problematic for the city. PacifiCorp is considering whether to provide a BETC pass-through.

If a BETC pass-through partner is found, funding from the Energy Trust would be reduced in proportion. As proposed by the city, the Energy Trust would take the "risk" that no BETC pass-through partner materializes.

The city is a customer of PacifiCorp, and will interconnect the facility locally. PacifiCorp will credit the city for the delivered power at wholesale rates. If approved by the city and the Energy Trust, the project would come on line as early as the first quarter of 2005.

### **Proposed Payment**

The city proposes an up-front commitment from the Energy Trust to lower the amount it will need to borrow for the capital improvements and restoration of the equipment. Actual payments from the Energy Trust would be contingent on project completion and operation.

At the level requested by the city, the project will have slight losses in the initial two years and modest, positive cash flows

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<sup>1</sup> The study examined average daily water flows from 1968 to 1991 on the South Santiam River, the site of the city's intake facility. These examinations indicated that the facility will be operational at full capacity for less than 70% of an average year. Factoring in operational and interconnection losses, the average capacity for the facility would be 57%.

<sup>2</sup> E-mail communication July 23, 2002.

thereafter.<sup>3</sup> Revenues from the generation will come from the sale of the power to PacifiCorp.<sup>4</sup> The actual transfer of money from PacifiCorp will be handled as a billing credit.

### **Relation to Strategic Plan/Action Plan/Budget**

This project meets Strategic Goal 2, by providing over 2.5 million kilowatt hours of energy per year from a renewable resource and encouraging distributed generation; and Goal 5, by helping creating sustainable improvements that benefit Oregonians directly and indirectly, as well as creating new awareness of renewable energy applications serving municipalities.

It addresses the renewable resources Open Solicitation Program element, Action Plan IIA. By diversifying the Energy Trust's emerging portfolio of resources, it addresses Action Plan element IIC. Funds for the project are included in the approved FY '03 budget within the amount set aside to fund unsolicited proposals.

Over the 20-year minimum expected life of this hydro facility, it will help avoid 35,000 tons of CO2 emissions.

The city has to approve the project as part of a larger bond-financing package to be issued in mid-2003. The commitment of funding by the Energy Trust will determine whether the project advances as part of the package. If the Energy Trust supports the funding request, the city will take up final consideration of the hydro project at the City Council meeting on March 10, 2003. The Energy Trust would own all green tags from the power generation.

The city's request for \$475,000 is 73% of the above market costs, if the comparison is based on the modeling estimates from Aurora and Procost. From the project perspective, the funds requested would cover 99% of the above market costs.<sup>5</sup>

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<sup>3</sup> The city's return on investment will average 1.4% per year over 20 years.

<sup>4</sup> As part of the original of the purchase the water system in 1984, the city has the equivalent of a contractual power purchase agreement with PacifiCorp.

<sup>5</sup> Projected costs over 20 years total to a net present value of \$1,579,689. Using Aurora and Procost, the modeled market valuation of the same type of power, with the same assumptions over the same number of years, indicates the project's power has a net present value of \$929,643. The Energy Trust's approved methodology is to rely on Aurora and Procost to define the range of above market costs. Data from PacifiCorp's Draft Integrated Resource Plan and staff estimates suggest the market valuation may have a net present value of about \$1,100,078 (project perspective).

## Committee/Public Review

Staff analyzed the project during summer and fall 2002. The City of Albany presented the project to the Renewable Advisory Committee (RAC) on December 19, 2002. Staff brought RAC its completed analysis on February 19, 2003, with a recommendation of support for up to the full amount of the funding requested. The RAC concurred in staff's recommendation.

## Recommendation

Effectively, the city proposes a partnership in which the city borrows over \$715,000 to more than match the amount requested from the Energy Trust. The city has a clear incentive to perform, to pay back the loan and to create a new source of revenue.

This project would be the Energy Trust's first hydro resource and would set an example for other communities. By restoring an historic resource to its earlier purpose, the project opens new avenues for others to consider. The project expands the resource diversity and size of the projects funded under the Open Solicitation process.

Staff recommends funding the project, contingent on the City of Albany demonstrating that its share of financing is assured.

## Resolution

**BE IT RESOLVED:** That Energy Trust of Oregon, Inc., Board of Directors approves up to \$475,000 to support the redevelopment of the City of Albany's Small-Scale Hydroelectric Facility. The Board of Directors authorizes staff to negotiate a final contract, following the Energy Trust's approved contracting process, provided the City of Albany approves bond financing and the project is successfully financed.

Moved by: {\_\_\_\_\_} [John Reynolds]; Seconded by: {\_\_\_\_\_} [Rick Applegate]

Vote: {\_\_\_\_} [7] in favor[;] {\_\_\_\_} [0] opposed[;] {\_\_\_\_} [0] abstained

Adopted on {(date)\_\_\_\_\_} [March 5, 2003,] by the Energy Trust of Oregon, Inc., Board of Directors.



**EXHIBIT C**

**CONFLICT OF INTEREST DISCLOSURE**

(If none, so state)

**EXHIBIT D**  
**CERTIFICATES OF INSURANCE**

Document comparison done by DeltaView on Tuesday, January 13, 2004 16:41:14

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