



## CITY OF LODI COUNCIL COMMUNICATION

**AGENDA TITLE:** Adopt resolution authorizing the City Manager to execute a Master Energy Purchase and Sale Agreement with PPM Energy of Portland, Oregon (EUD)

**MEETING DATE:** September 5, 2007

**PREPARED BY:** Electric Utility Director

**RECOMMENDED ACTION:** Adopt resolution authorizing the City Manager to execute a Master Energy Purchase and Sale Agreement with PPM Energy of Portland, Oregon.

**BACKGROUND INFORMATION:** On July 12, 2007, the Lodi Electric Utility Department (EUD) received bids for the sale of electric power for portions of fiscal year 2007-08. As a result of this process, electric power was purchased from two firms and related "master agreements" were consummated with these entities to enable the purchases.

One of the unsuccessful bidders, PPM Energy, has solicited the City's interest in signing an "umbrella" enabling agreement to facilitate possible future transactions between PPM Energy and the City. This would enable the organizations to forego future contract development work in the event EUD desires to procure additional energy from the marketplace in the future.

Staff feels that it is appropriate and efficient to sign the proposed agreement with PPM Energy given (i) the time spent by the two organizations (as well as the Northern California Power Agency) to develop the agreement and (ii) the relatively high likelihood that EUD will seek to make additional purchases from the energy market in the future.

**FISCAL IMPACT:** There is no cost to executing the recommended agreement.

**FUNDING:** Not applicable.

**Funding Approval:** \_\_\_\_\_  
Kirk Evans, Budget Manager

\_\_\_\_\_  
George F. Morrow  
Electric Utility Director

GFM/lst

**APPROVED:** \_\_\_\_\_  
Blair King, City Manager

**MASTER ENERGY PURCHASE AND SALE AGREEMENT  
BETWEEN PPM ENERGY, INC. AND CITY OF LODI**

This Master Energy Purchase and Sale Agreement (this "Agreement") is entered into by and between PPM Energy, Inc. ("Counterparty") and the City of Lodi, California ("Lodi") this 12<sup>th</sup> day of July, 2007, and incorporates by this reference the Western Systems Power Pool ("WSPP") Agreement as the same as in effect on the date of any particular transaction hereunder (the "WSPP Agreement") and as the WSPP Agreement is revised hereby sets forth the entire agreement between Counterparty and Lodi with respect to its subject matter.

**WHEREAS**, the Parties desire to purchase and sell, from time to time and at the sole option and election of the Parties, agreed upon amounts of energy, pursuant to the terms and conditions of this Agreement;

**NOW THEREFORE**, in consideration of the mutual consents and agreements contained herein and for other good and valuable consideration, the sufficiency of which is hereby acknowledged, Counterparty and Lodi agree to the following terms and conditions.

**ARTICLE ONE**

1. Incorporation by Reference. Notwithstanding that as of the date hereof Lodi is not a member of the WSPP, Counterparty and Lodi incorporate by reference as though fully set forth herein the WSPP Agreement to have these provisions apply to all Confirmations and transactions between Counterparty and Lodi. The WSPP Agreement, as modified, supplemented and amended as in effect of the date of the most recent Confirmation. Terms used but not defined herein shall have the meanings ascribed to them in the WSPP Agreement. In the event of any conflict between the terms of this Agreement and the WSPP Agreement, the terms of this Agreement shall control.

2. Effect of Lodi WSPP Membership. Upon Lodi becoming a member of the WSPP, all transactions and Confirmations hereunder will be deemed to have been entered into under the WSPP Agreement as amended by Article Two hereof directly as if a master confirmation agreement, all subject to netting and setoff with any and all present and future transactions hereunder or under the WSPP Agreement with Lodi as a member thereof, as under one integrated agreement between the Parties. All outstanding payment obligations between the Parties arising under any one or more of this Agreement, the WSPP Agreement, all Confirmations, Service Schedules A, B, or C, or other agreements entered into in connection therewith shall form a single integrated agreement between the Parties, and be subject to set-off and recoupment. Nothing herein shall require either Party to execute Exhibit A to the WSPP.

3. Powers and Authorities. Lodi represents and warrants to Counterparty, as a material inducement to Counterparty to enter hereinto and for each transaction and Confirmation hereunder, which representations are repeated as of each transaction and Confirmation, that (a) Lodi has all requisite authority to enter hereinto, and this Agreement and each transaction and Confirmation hereunder are entered into in conformity with the accepted transaction types and other provisions of the City of Lodi Energy Risk Management Policies or successor document as the same are adopted and in effect from time to time, (b) the transactions and Confirmations contemplated by the Parties on proximate date herewith for the acquisition of energy for 2007 or 2008 are authorized by Resolution No. 2006-204, is a procurement of energy to reduce Lodi's open position to meet load-serving obligations for fiscal year 2007-08 in accordance with Lodi's Risk Management Policies, and is a purchase made through the procurement activities of the Northern California Power

Agency, (c) all future purchases and sales of energy by Lodi will be authorized by applicable resolutions of the Lodi City Council, which may from time to time be referenced in the applicable Confirmation, (d) this agreement and each transaction hereunder do not constitute any kind of investment or action by Lodi that is proscribed by any constitution, charter, law, rule, regulation, government code, constituent or governing instrument, resolution, guideline, ordinance, order, writ, judgment, decree, charge, or ruling to which Lodi (or any of its officials in their respective capacities as such) or its property is subject, (e) the execution and delivery by Lodi of this Agreement, each Confirmation and any other documentation relating hereto, and the performance by Lodi of its obligations hereunder and thereunder, are in furtherance, and not in violation, of the public purposes for which Lodi is organized pursuant to the laws of California, (f) all acts necessary to the valid execution, delivery and performance of this Agreement, including without limitation, competitive bidding, public notice, election, referendum, prior appropriation or other required procedures has or will be taken and performed as required under applicable law and Lodi's ordinances, bylaws or other regulations, (g) all persons making up the governing body of Lodi are the duly elected or appointed incumbents in their positions and hold such positions in good standing in accordance with applicable law, and (h) Lodi's obligations to make payments hereunder are unsubordinated obligations and such payments are not subject to any prior claim and are available from an authorized source of payment.

4. Payment Netting. If payments are due from each Party to each other on the same day, then the amounts owing shall be offset so that only the net amount owing on that day shall be paid by the Party owing the larger amount. The Parties may from time to time, by mutual agreement, put in place between them procedures for the netting of payments due within a month; provided that any such procedures in place between the Parties on the date hereof shall continue in effect until terminated by either Party.

5. Netting and Set-Off. Upon an event of default or termination event under this Agreement, in addition to and not in limitation of any other right or remedy under contract or applicable law (including any right to set-off, counterclaim, or otherwise withhold payment), the non-defaulting Party may at its option set-off, against any amounts owed to the defaulting Party, any amounts owed by the defaulting Party under any contract or agreement between the Parties. The obligations of the Parties shall be deemed satisfied and discharged to the extent of any such set-off. The non-defaulting Party shall give the defaulting Party written notice of any set-off, but failure to give such notice shall not affect the validity of the set-off.

6. Without Prejudice. This Agreement shall be without prejudice and in addition to any right of set-off, recoupment, combination of accounts, lien or other right which either Party has at any time, by operation of law, contract or otherwise. Each Party reserves to itself all rights, set-offs, counterclaims, and other remedies and defenses arising out of this Agreement or otherwise. Nothing herein shall abrogate the rights of the parties pursuant to Section 2609 of the Uniform Commercial Code to demand adequate assurances of future performance.

7. Agency of the Northern California Power Agency. Lodi advises Counterparty that the Northern California Power Agency ("NCPA") is its agent for the procurement, scheduling, and other matters respecting energy, and hereby ratifies and adopts all actions now or hereafter taken by NCPA that NCPA represents to Counterparty as taken by or on behalf of Lodi. Lodi indemnifies and holds

Counterparty harmless from and against any action by Counterparty taken at the instruction of NCPA that Counterparty believes in good faith to have been acting on behalf of Lodi.

8. Waiver of Rights. To the fullest extent permitted by applicable law, each party waives all rights under Section 205 or 206 of the Federal Power Act to seek or support, and each party further agrees that it will not seek from FERC or otherwise support, any order changing or granting any refunds with respect to the rate, price, charge or classification hereof, based on any theory or allegations, including without limitation claims that the same is anything other than just and reasonable or that the market was not competitive or fully functional on or about the date hereof. The standard of review for any changes proposed by a party, a non-party or FERC acting sua sponte shall be the strictest standard of review permissible to preserve the intent of the Parties to uphold the sanctity of contract without modification, which will in no event be lower than the "public interest" standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Comm. v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

## ARTICLE TWO

The WSPP Agreement is amended as follows:

### SECTION 4 DEFINITIONS

- (a) Section 4.1c of the WSPP Agreement is modified by including "CAISO" as an equivalent abbreviated form of the defined term "California ISO" such that the definition now reads: "4.1c California ISO (or CAISO) ..."
- (b) A new Section 4.1g shall be added in Section 4 as follows: "4.1g CAISO Firm Transaction: a transaction under Service Schedule C in which the Seller shall sell and the Purchaser shall purchase a quantity of electric energy equal to the hourly quantity, without Ancillary Services (as defined in the CAISO Tariff) that is or will be scheduled as a schedule coordinator to schedule coordinator transaction pursuant to the CAISO Tariff, for which the only excuse for failure to deliver or receive is an "Uncontrollable Force" (as defined in the CAISO Tariff) called by the CAISO in accordance with the CAISO Tariff. "
- (c) A new Section 4.1h shall be added in Section 4 as follows: "4.1h CAISO Tariff: the FERC approved tariff of CAISO, including all CAISO protocols, as the same may be amended from time to time."

### SECTION 10 UNCONTROLLABLE FORCES

Section 10 of the WSPP Agreement is modified by adding at the beginning of the section, the words "Except in connection with scheduling, delivery or receipt under a CAISO Firm Transaction,".

**SECTION 21**  
**LIABILITY AND DAMAGES**

- (a) The fourth sentence of Section 21.1 of the WSPP Agreement shall be modified by adding "21.2," before the text "21.3".
- (b) Section 21.3(a)(4) of the WSPP Agreement shall be modified by replacing the language beginning with "within the billing period" through the end of the sentence, with the following: "within three (3) Business Days from the date that an invoice for such amount is received. The Performing Party may invoice the Non-Performing Party at any time following the Performing Party having incurred an amount under this Section 21.3, but no more than once a month and subject to the two-year limitation as specified in Section 9.4."
- (c) Section 21.3(d) of the WSPP Agreement shall be modified by deleting the phrase "as required by Section 9 of this Agreement" and by deleting the second and third sentences of the Section in their entirety and replacing them with "Upon resolution of the dispute, any excess amount of bills which may have been overpaid shall be returned by the owing Party upon determination of the correct amount, with interest accrued at the rate set forth in Section 9.4, prorated by days from the date of overpayment to the date of refund."

**SECTION 22**  
**DEFAULT**

- (a) A new Section 22.1(f) is added to Section 22 of the WSPP Agreement as follows: "An Event of Default shall also include the failure by the Defaulting Party to schedule, deliver, or receive electric capacity, energy, Ancillary Services or other products sold and purchased under a specified Confirmation for three (3) consecutive calendar days and such failure is not excused pursuant to the product definition, this Agreement or under the terms of the specified Confirmation."
- (b) A new Section 22.2a is added to Section 22 of the WSPP Agreement as follows:

"22.2a Upon any Event of Default or Potential Event of Default, the Non-Defaulting Party may, in addition to any other remedies available hereunder, suspend performance under this Agreement and under any Confirmation, *provided, however,* in no event shall any such suspension continue for longer than ten (10) Business Days with respect to any single Confirmation unless a termination date shall have been declared and notice thereof pursuant to Section 22.2 given. "Potential Event of Default" means an event which, with notice or passage of time or both, would constitute an Event of Default, provided that the failure to comply with any requirement of this Agreement, including the requirements of Section 27, or a Confirmation, before the expiration of the time period expressly specified for such compliance in this Agreement or the Confirmation (but not including any period that is provided as a cure-period for what would otherwise constitute an Event of Default), if any, shall not be considered a Potential Event of Default unless and until the applicable time period has expired without compliance."
- (c) Section 22.3(c) of the WSPP Agreement shall be modified by deleting, in the third sentence, the language beginning with "shall pay the remaining amount" through the end

of that sentence and inserting in its place the words “shall make no payment to the other Party, and notwithstanding anything in this Agreement to the contrary, the amount by which such Gain exceeds the Losses and Costs for the purpose of this Agreement shall be deemed to be zero (0).”

- (d) Section 22.3(e) of the WSPP Agreement shall be modified by deleting subsections 22.3(e)(i), 22.3(e)(ii), and 22.3(e)(iii) in their entirety and by deleting the first paragraph of subsection 22.3(e)(iv) such that the subsection begins with the language: “If the Defaulting Party disagrees with the calculation...” and ends with the language “...or similar charges imposed by the Non-Defaulting Party.”

#### **SECTION 24** **GOVERNING LAW**

Section 24 of the WSPP Agreement is deleted and replaced with the following:

“This Agreement and any Confirmation shall be governed by and construed in accordance with the laws of the State of California, without regard to the conflicts of laws rules thereof. EACH PARTY WAIVES ITS RESPECTIVE RIGHT TO ANY JURY TRIAL WITH RESPECT TO ANY LITIGATION ARISING UNDER OR IN CONNECTION WITH THIS AGREEMENT. If this predispute waiver of jury trial is unenforceable, then each controversy, dispute or claim between the Parties arising out of or relating hereto, which controversy, dispute or claim is not settled in writing within 30 days after the “Claim Date” (defined as the date on which a Party gives written notice to the other Party that a controversy, dispute or claim exists), will be adjudicated by a reference proceeding in California in accordance with the provisions of Sections 638 et seq. of the California Code of Civil Procedure (“CCP”). The referee will be a retired Judge of the Court selected by mutual agreement of the Parties, and if they cannot so agree within forth-five days after the Claim Date, the referee will be promptly selected by the Presiding Judge of the Court of San Francisco County. The referee will (a) set the matter for hearing within sixty days after the date of his or her selection and (b) try any and all issues of law or fact and report a statement of decision upon them, if possible, within ninety days of the Claim Date. Any decision rendered by the referee will be final, and judgment will be entered thereon pursuant to CCP §644 in any court in the State of California having jurisdiction. The referee will be required to determine all issues in controversy. The rules of evidence applicable to proceedings at law in the State of California will apply. The referee will be empowered to enter equitable as well as legal relief. The referee will issue a single judgment at the close of the reference proceeding which will dispose of all of the claims of the Parties, which will be subject to appeal. The Parties expressly reserve the right to contest or appeal from the final judgment or any appealable order or appealable judgment entered by the referee. The Parties expressly reserve the right to findings of fact, conclusions of law, a written statement of decision, and the right to move for a new trial or a different judgment, which new trial, if granted, will also be a reference proceeding hereunder.”

#### **SECTION 35** **FORWARD CONTRACTS AND OTHER REPRESENTATIONS**

Section 35 of the WSPP Agreement is modified by (i) inserting, after the words “the Parties are” and before the phrase “forward contract merchants”, the phrase “, or shall be deemed to be,” and (ii) by inserting the following new sentences in between the first and second sentences: “The parties

acknowledge and agree that each Party's ability to liquidate and accelerate payment under transactions entered into pursuant to any Confirmations hereunder (as provided in Section 22.3) as forward contract under Section 556 of the United States Bankruptcy Code is a material inducement supporting such party's entry into this Agreement and such transactions. The Parties agree further that each Party's business consists in whole or in part of entering into forward contracts as or with merchants in electric energy, capacity, and other related products and/or services, which is presently the subject of dealing in the forward contract trade. No Party shall assert before any court or other governmental authority that another Party is not, or shall not be treated as a forward contract merchant under the United States Bankruptcy Code.

### ARTICLE THREE

1. Waiver of Sovereign Immunity. Lodi warrants and covenants that with respect to its contractual obligations hereunder and performance thereof, it will not claim immunity on grounds of sovereignty or similar grounds with respect to itself or its surplus revenues from (a) suit, (b) jurisdiction of court (including a court located outside the jurisdiction of its organization, subject to the law of proper venue), (c) relief by way of injunction, order for specific performance or attachment or recovery of property, or (d) execution or enforcement of any valid judgment.

2. Billing Addresses. The billing address for Lodi for the purpose of Section 9 of the WSPP Agreement shall be:

All Notices:

Lodi:  
City of Lodi  
1331 S. Ham Lane  
Lodi, CA 95242  
Attn: George Morrow,  
Electric Utility Director  
Phone: (209) 333-6828  
Facsimile: (209) 333-6839  
Duns: 02-000-4552  
Federal Tax ID Number: 94-6000361

All Notices:

Counterparty:  
PPM Energy, Inc.  
1125 NW Couch, Suite 700  
Portland, OR 97209

With Additional Notices to (NCPA):

Attn: Contract Administration  
Phone: (916) 781-4296  
Facsimile: (916) 783-7693

With Additional Notices to:

Attn. Contract Director  
Phone: (503) 796-7034  
Facsimile: (503) 478-6394

Invoices/Payments/Credit & Collections (NCPA):

Power Accounts Administrator  
Phone: (916) 781-4224/3636  
Facsimile: (916) 781-4255

Invoices/Payments/Credit & Collections:

Back Office/Month-End  
Phone: (503) 796-6917/6959  
Facsimile: (503) 796-6908

Wire Transfer (NCPA):

ABA Routing: 121122676  
Bank: US Bank

Wire Transfer:

ABA Routing: 021000021  
Bank: JPMorgan Chase Bank, Chicago, IL

For Deposit to (NCPA):  
Northern California Power Agency  
Acct No: 1-534-0216-2744  
Attention: NCPA  
US Bank  
680 8<sup>th</sup> Street, Suite 1100  
Sacramento, CA 95814  
Phone: (916) 552-1864  
Facsimile: (916) 448-6518

For Deposit to:  
PPM Energy, Inc.  
Acct No. 9432825

Pre-scheduling (NCPA):  
Phone: (916) 786-0123/0124  
Facsimile: (916) 786-781-4239

Pre-scheduling:  
Phone: (503) 796-7139  
Facsimile: (503) 796-6903

Real-time/Dispatch (NCPA):  
Phone: (916) 786-3518/3519  
Facsimile: (916) 781-4226

Real-Time Trading:  
Phone: (503) 796-7013  
Facsimile: (503) 796-6903

Schedule Coordinator (NCPA):  
Phone: (916) 781-4237  
Facsimile: (916) 781-4226

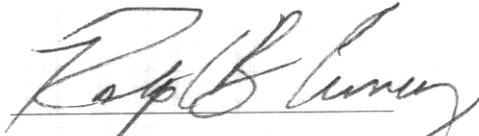
Schedule Coordinator:  
Phone: (503) 796-7139  
Facsimile: (503) 796-6903

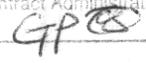
The billing address for either Party may be changed by such Party upon written notice to the other Party.

3. No Further Amendment. No further amendment or modification to the WSPP Agreement shall be enforceable unless reduced to writing and executed by both Parties. Except as expressly amended, supplemented, or modified in a written instrument executed by both Parties, all other provisions of the WSPP Agreement are hereby agreed to by the Parties. In the event the WSPP Agreement is modified pursuant to its governing terms following the date hereof, the Parties agree to meet and confer and in good faith make such amendments hereto as would be required to maintain the benefits and burdens between the Parties.

In WITNESS WHEREOF, the Parties have caused this Agreement to be duly executed by its authorized officers or agents effective as of the date first above written.

**PPM Energy, Inc.**

By:   
Name: Ralph B. Currey  
Title: Senior Vice President

PPM  
Contract Administration  


**The City of Lodi, California**

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

Name: George Morrow  
Title: Electric Utility Director

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

Name: Blair King  
Title: City Manager

Approved as to form: \_\_\_\_\_  
City Attorney

Attest: \_\_\_\_\_

Name: Randi Johl  
Title: City Clerk

RESOLUTION NO. 2007-\_\_\_\_\_

A RESOLUTION OF THE LODI CITY COUNCIL AUTHORIZING THE  
CITY MANAGER TO EXECUTE A MASTER ENERGY PURCHASE  
AND SALE AGREEMENT WITH  
PPM ENERGY, OF PORTLAND, OREGON

=====

NOW, THEREFORE, BE IT RESOLVED that the Lodi City Council does hereby authorize the City Manager to execute a Master Energy and Purchase and Sale Agreement with PPM Energy, of Portland, Oregon.

Dated: September 5, 2007

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I hereby certify that Resolution No. 2007- was passed and adopted by the City Council of the City of Lodi in a regular meeting held September 5, 2007, by the following vote:

- AYES: COUNCIL MEMBERS –
- NOES: COUNCIL MEMBERS –
- ABSENT: COUNCIL MEMBERS –
- ABSTAIN: COUNCIL MEMBERS –

RANDI JOHL  
City Clerk