

FOR BOARD ACTION

Agenda Item # 6

Meeting Date:

10/27/09

SUBJECT: Termination of Fuel Purchase Orders and Right of First Refusal
(Avoca-Bement Corporation)

PREPARED BY: Rob Dunnette, Manager Power Resources

ITEM DESCRIPTION:

Purchase Orders #4500032435 and #4500032436 were opened in May 2008 with Avoca-Bement Corporation for 2009/2010 Silver Lake Plant coal supply. Pricing and volume were based upon generation projections provided by Avant Energy using then-current wholesale market indicators. The subsequent downturn of wholesale electrical market factors resulted in a significant reduction in fuel use and, consequently, an inventory which, according to operating permit conditions, precludes the receipt of coal scheduled for delivery under those purchase orders. The supplier was notified of the circumstances and discussion initiated. The result of those discussions is an agreement for purchase order termination, coupled with a right-of-first refusal on future fuel procurement. (See attached agreement.)

UTILITY BOARD ACTION REQUESTED:

Staff recommends that the Board approve the Termination of Fuel Purchase Orders and Right of First Refusal Agreement with Avoca-Bement Corporation.

Larry Koshine
General Manager *Kaw*

10-23-09
Date

ROCHESTER PUBLIC UTILITIES

**Agreement for the Termination of Fuel Purchase Orders
And
Right of First Refusal**

This agreement confirms and documents the desire of the Avoca Bement Corporation ("Avoca Bement" or "Seller") and the City of Rochester ("City" or "Buyer") to terminate Purchase Order(s) #4500032435 and #4500032436 and to execute this Right of First Refusal ("RFR") as provided for herein.

1. **Right of First Refusal.** Avoca Bement shall have a Right of First Refusal on any City non-test quantity coal purchases from bona fide third parties beginning January 1, 2009 through December 31, 2015 for use in the City's Rochester Public Utility's Silver Lake Plant ("SLP"). Provided, however, it is understood by the parties that the City is contemplating a program to test non-traditional coals in the SLP. As such, purchase quantities are relatively minor and require special arrangements for delivery and handling and are not suitable for providing Rights of First Refusal.

Prior to finalizing any non-test quantity coal purchases, the City will provide to Avoca Bement, the delivered price per MMBtu and general quality information, i.e., BTU/lb, sulfur, ash, volatile, and moisture contents and HGI and other pertinent delivery terms that a third party has offered to supply the coal and in which the City is willing to accept. If such purchases are the result of a competitive solicitation through a request for proposal ("RFP") process, the City will provide Avoca Bement with the RFP at the same time it is issued to other third parties. Avoca Bement shall respond within ten (10) business days from the date that the City provides Avoca Bement with the third party offer(s) as to whether Avoca Bement is electing to match the price on a per MMBtu basis to a delivery point specified by the City) and the delivery terms. Avoca Bement may elect to match with either a similar quality coal or with a coal of type and specifications that the City has successfully used in the past provided that sub-bituminous coal may not replace bituminous coals unless the City agrees to the substitution.

It is understood by the parties that some purchases made by the City may be for an extended term, or subsequent renewal terms, and Avoca Bement will only be given the right to match the offer(s) in their entirety, i.e., for the full term including the renewal terms. If Avoca Bement elects to exercise its right to match, Avoca Bement will then be obligated for the full tons and term of the proposed purchase.

The Right of First Refusal shall not expire prior to December 31, 2015 unless (1) the parties agree; or (2) the full requirements for SLP have been purchased pursuant to a multi-year agreement through 2015 under terms that Avoca Bement declined to match.

2. **Swap Agreements; Right of the City.** Notwithstanding any provision to the contrary, it is understood by the parties that the City may enter into swaps with third parties for all or a portion of coal that the City has already purchased from Avoca Bement being supplied by COALSALES. Swaps with third parties are expressly excluded from this agreement.

3. **Right of Resell.** The parties hereto agree that the City reserves the right to resell and may resell any coal purchased from Avoca Bement.

4. Coal Supply Agreement. In the event that Avoca Bement exercises any Right of First Refusal pursuant to this letter agreement, the parties shall negotiate in good faith a mutually agreeable coal supply agreement. In the event that the parties cannot agree upon a mutually agreeable coal supply agreement within sixty (60) days, the RFR shall terminate without further recourse by either party.

5. Termination of Purchase Orders. Avoca Bement Corporation and the City hereby agree that, effective as of the last date of the execution of this letter agreement, Purchase Order(s) 4500032435 and 4500032436 are terminated without further recourse by either party, and that the parties shall release each other from any liability that might result from the termination of those Purchase Orders.

6. Consent to Assignment. The City hereby consents to the assignment of the RFR to COALSALES, LLC upon the assignment by Avoca Bement and acceptance of COALSALES, LLC of the terms and conditions of this letter agreement, as related to the RFR. Upon assignment and acceptance, any reference to Avoca Bement shall be deemed to mean COALSALES, LLC as related to the RFR.

ROCHESTER PUBLIC UTILITIES

By: _____
General Manager
Date: _____

AVOCA BEMENT CORPORATION

By: _____
Its: _____
Date: 10/13/09

CITY OF ROCHESTER

By: _____
Its: _____
By: _____
Mayor
Date: _____

Attest: _____
City Clerk
Date: _____

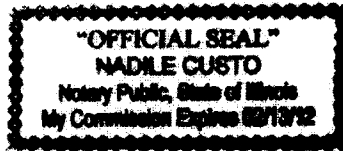
Approved as to form:
By: _____
City Attorney
Date: _____

ACKNOWLEDGMENT OF CORPORATION
AUTHORIZED SIGNATURE

STATE OF ILLINOIS

COUNTY OF COOK

On this 13 day of OCTOBER 2009, before me appeared
THOMAS A. DELANEY (name of officer) to me personally known, who,
being by me duly sworn did say that he/she is the PRESIDENT (title)
of AVON BEMENT CORPORATION (name of corporation) a corporation; and that
said instrument was executed in behalf of said corporation by authority of its Board of
Directors; and that said THOMAS A. DELANEY (name of officer)
acknowledged said instrument to be the free act and deed of said corporation.



Notary Public Nadile Custo

County COOK

My Commission Expires 02-13-2012



RESOLUTION

BE IT RESOLVED by the Public Utility Board of the City of Rochester, Minnesota, to approve the Termination of Fuel Purchase Orders and Right of First Refusal Agreement with Avocament Corporation according to the terms and conditions stated.

Purchase Orders #4500032435 and 4500032436

Passed by the Public Utility Board of the City of Rochester, Minnesota, this 27th day of October 2009.

President

Secretary