



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Scott P. Johnson

**SUBJECT:** SEE BELOW

**DATE:** July 18, 2011

Approved

Date

7/25/11

**COUNCIL DISTRICT:** Citywide

**SUBJECT: APPROVAL OF CONDUIT FINANCING FOR UTS SJ-1, LLC -- TEFRA HEARING**

## RECOMMENDATION

- a. Hold a Tax Equity and Fiscal Responsibility Act ("TEFRA") Hearing for the issuance of an aggregate amount not to exceed \$24,000,000 of tax-exempt 501(c)(3) revenue bonds by the California Municipal Finance Authority ("CMFA") to finance and refinance certain renewable energy facilities in the City of San José.
- b. Adopt a resolution approving the issuance of Tax-Exempt Revenue Bonds, by the CMFA in an aggregate principal amount not to exceed \$24,000,000 (the "Bonds") to be used to (1) finance and refinance the acquisition, construction, improvement and equipping of a facility for the treatment of anaerobic digester gas, one or more fuel cell power plants and related facilities (collectively, the "IEUA Project") to be located at the Inland Empire Utility Agency Regional Water Recycling Plant #1, at 2662 East Walnut Street, Ontario, CA 91761; (2) finance and refinance the acquisition, construction, improvement and equipping of a facility for the treatment of anaerobic digester gas, one or more fuel cell power plants and related facilities (collectively, the "San José Project") to be located at the San José/Santa Clara Water Pollution Control Plant, at 700 Los Esteros Road, San José, CA 95134; (3) fund a debt service reserve fund for the Bonds; and (4) pay certain expenses incurred in connection with the issuance of the Bonds.

## OUTCOME

Approval of this recommendation will allow UTS SJ-1, LLC, the owner and/or operator of the San José Project to move forward with their current financing plan.

## **BACKGROUND**

CMFA was established in 2004 under the California Government Code as a statewide Joint Powers Authority to provide local governments and private industry access to tax-exempt low-interest financing to achieve public benefit goals. CMFA is unique in that it shares a portion of its fees directly with its member communities.

Pursuant to the TEFRA, where a project to be located in the City is to be financed by the sale of certain tax exempt bonds, a noticed public hearing must be held by the City Council to receive public comment on the proposed issuance of bonds and the location and nature of the facilities to be financed.

Federal tax law limits the types of projects that may be funded with tax-exempt bond proceeds since the interest earned on such bonds is exempt from federal taxation. The purpose of a TEFRA public hearing is to identify a project which may subsequently receive funding from the sale of private activity tax-exempt bonds. A hearing will also provide interested individuals or parties the opportunity to provide testimony on any matters related to such potential bond issues, including the nature and location of the project.

As described above, a portion of the Bonds to be issued by CMFA will finance or refinance the San José Project which includes the acquisition, construction and improvement of certain renewable energy facilities to be located at the San José/Santa Clara Water Pollution Control Plant at 700 Los Esteros Road, San José, CA 95134. The San José Project will be owned and/or operated by UTS SJ-1, LLC, a Delaware limited liability company, or an affiliate thereof. The project entities are owned by UTS BioEnergy. UTS BioEnergy develops, owns and operates alternative energy projects. The company engages in biogas production and conversion to electricity and heat through silage, sludge, manure, food waste, green municipal wastes. UTS BioEnergy was founded in 2009 and is based in Encinitas, California. UTS BioEnergy is an affiliate of UTS Biogastechnik GmbH which has over 1500 reference biogas plants.

On October 27, 2010, the City entered into a power purchase agreement ("PPA") with UTS SJ-1, LLC. Under the terms of the PPA, UTS SJ-1, LLC, will design, build, finance, own, operate and maintain a 1.4MW fuel cell power system on WPCP land, at an anticipated annual cost of \$1,260,000. The fuel cell power system will utilize the Plant's digester gas, allowing for less dependence on the PG&E power grid to meet total power demand. Ground work has begun and the target completion date is December 31, 2011. The expected operation date is January 31, 2012.

## **ANALYSIS**

The Board of Directors of the California Foundation for Stronger Communities ("CFSC"), a California non-profit public benefit corporation, acts as the Board of Directors for CMFA. CMFA shares a portion of its issuance fees with its member communities and donates a portion

of issuance fees to the Foundation for the support of local charities. The City is expected to receive 25% of the issuance fee attributable to the San José Project, or approximately \$5,000, upon closing of the bonds which is expected to occur in October 2011.

Pursuant to certain provisions of the Internal Revenue Code (the "Code"), the issuance of the Bonds by CMFA requires the City's approval because one of the projects to be financed or refinanced by the Bonds is located within the territorial limits of the City. The proposed Bonds are classified as private activity bonds for purposes of the Code. In order for the interest on the Bonds to be excluded from the gross income of the owner of the bonds (i.e. tax-exempt), an "applicable elected representative" of the government unit must approve the issuance of the bonds after a public hearing ("TEFRA hearing"), which is scheduled to be held as part of the action items on the August 9, 2011 Council Agenda, following reasonable public notice.

Because CMFA's Board of Directors is not an elected body, the Code provides that a governmental unit with elected representatives and jurisdiction over the area in which the project to be financed is located, in this case, the City Council of San José, acts as an "applicable elected representative" with respect to the TEFRA hearing for the San José Project to be financed or refinanced by the Bonds. The public hearing notice will be published in the *San Jose Mercury News*, announcing the time and location of the public hearing on or about July 26, 2011. A separate TEFRA hearing related to the IEUA Project to be located at the Inland Empire Utility Agency Regional Water Recycling Plant is scheduled to be held on August 9, 2011, by the County of San Bernardino Board of Supervisors, the applicable legislative body for that project.

## **PUBLIC OUTREACH**

The TEFRA hearing to be held as part of the action items on the August 9, 2011 Council Agenda is a method of notifying the community of CMFA's intent to issue tax-exempt private activity bonds for these projects. The public hearing notice will be published on or before July 26, 2011 in the *San Jose Mercury News*, announcing the time and location of the public hearing.

- Criteria 1:** Requires Council action on the use of public funds equal to \$1 million or greater. **(Required: Website Posting)**
- Criteria 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
- Criteria 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

HONORABLE MAYOR AND CITY COUNCIL

08-09-2011

**Subject: Approval of Conduit Financing for UTS SJ-1, LLC Project -- TEFRA Hearing**

Page 4

### **COORDINATION**

This memorandum has been prepared by the Finance Department in coordination with the Environmental Services Department and the City Attorney's Office.

### **COST IMPLICATIONS**

The tax-exempt bonds issued by CMFA will be secured solely by the respective projects' revenues. There are no City funds in these projects. The City is expected to receive 25% of the issuance fee attributable to the San José Project, or approximately \$5,000, upon closing of the bonds which is expected to occur in October 2011.

### **CEQA**

File No. PP11-030. Under the provisions of Section 15301(a) & (b) and 15329(a) of the State Guidelines for Implementation of the California Environmental Quality Act (CEQA) and San José Municipal Code Section 21.05.120(A), this project is found to be exempt from the environmental review requirements of Title 21 of the San José Municipal Code, implementing the California Environmental Quality Act of 1970, as amended.

/s/

SCOTT P. JOHNSON  
Director, Finance Department

For questions please contact Arn Andrews, Treasury Division Manager, at (408) 535-7041.

**STATEMENT OF EXEMPTION**

|                                 |  |
|---------------------------------|--|
| <b>FILE NO.</b>                 | PP11-030   |
| <b>LOCATION OF PROPERTY</b>     | 700 Los Esteros Road (WPCP)  |
| <b>PROJECT DESCRIPTION</b>      | Fuel Cell Foundation Platform and Utility Interconnections Design-Build Project for the installation of a concrete platform and fencing for a 50-ft x 70-ft 1.4 MW fuel cell system and the installation of utility interconnections (water line, sewer line, etc.) between the new 1.4 MW fuel cell system and the WPCP's existing utility lines. No trees will be removed by the project with the exception of one landscape tree, to be replaced as required by the City of San Jose Arborist. The project will not cause violations of applicable state or federal air quality or water quality standards; and construction will not occur in the vicinity of any endangered, rare, or threatened species. Applicant shall work with all agencies having jurisdiction over the WPCP to obtain any and all necessary permits prior to installation. |
| <b>ASSESSOR'S PARCEL NUMBER</b> | 015-31-024 and -044  |

**CERTIFICATION**

Under the provisions of Section 15301(a) & (b) and 15329(a) of the State Guidelines for Implementation of the California Environmental Quality Act (CEQA) and San Jose Municipal Code Section 21.05.120(A) as stated below, this project is found to be exempt from the environmental review requirements of Title 21 of the San José Municipal Code, implementing the California Environmental Quality Act of 1970, as amended.

**15301. Existing Facilities**

Class 1 consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination. The types of "existing facilities" itemized below are not intended to be all-inclusive of the types of projects which might fall within Class 1. The key consideration is whether the project involves negligible or no expansion of an existing use. Examples include but are not limited to:

(a) Interior or exterior alterations involving such things as interior partitions, plumbing, and electrical conveyances.

(b) Existing facilities of both investor and publicly-owned utilities used to provide electric power, natural gas, sewerage, or other public utility services.

**15329. Cogeneration Projects at Existing Facilities**

Class 29 consists of the installation of cogeneration equipment with a capacity of 50 megawatts or less at existing facilities meeting the conditions described in this section.

(a) At existing industrial facilities, the installation of cogeneration facilities will be exempt where it will:

- (1) Result in no net increases in air emissions from the industrial facility, or will produce emissions lower than the amount that would require review under the new source review rules applicable in the county, and
- (2) Comply with all applicable state, federal, and local air quality laws.

**21.05.120. Minor Alterations to Land**

The following specific activities are added by the Environmental Clearance Ordinance (Title 21) to those activities listed in Section 15304 of the CEQA Guidelines:

(A) The installation, maintenance, repair, restoration, reconditioning, relocation, replacement, removal or demolition of pipeline which is less than one mile in length and within a public right-of-way. "Pipeline" includes only subsurface facilities.

Joseph Horwedel, Director  
Planning, Building and Code Enforcement

Date: March 14, 2011



Deputy

Project Manager: Bernard Tong, ESD, WPCP