

**ORDINANCE NO. 869**

**AN ORDINANCE APPROVING A CONTRACT WITH SIMEC D/B/A  
SOUTHERN ILLINOIS MUNICIPAL ELECTRIC COOPERATIVE  
TO SERVE AS THE VILLAGE OF COBDEN'S EXCLUSIVE CONSULTANT FOR ITS  
ELECTRIC AGGREGATION PROGRAM AND FOR ENGAGEMENT OF  
THE LOWEST COST ELECTRIC WHOLESALE SUPPLIER**

Adopted by the  
Village Board of Trustees  
Of the  
Village of Cobden  
on this 6<sup>TH</sup> day of August, 2012

Published in pamphlet form by the authority of the Village Board of Trustees of the  
Village of Cobden, Union County, Illinois, on this 7<sup>TH</sup> day of August, 2012

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**WHEREAS**, the City Council for the Village of Cobden finds as follows:

A. As a result of deregulation, electricity is purchased based on market price and, as a result, competitive market forces dictate the price of electricity.

B. On January 1, 2010, the Illinois Power Agency Act, Chapter 20, Illinois Compiled Statutes, Act 3855, was amended to include Section 1-92 entitled Aggregation of Electrical Load by Municipalities and Counties (Hereinafter referred to as the "Act").

C. Under the Act, if the Village of Cobden seeks to operate an aggregation program as an opt-out program for residential and small commercial retail customers, then prior to adoption of an ordinance to establish a program, the Village of Cobden must first submit a referendum to its residents to determine whether or not the aggregation program shall operate as an opt-out program for residential and small commercial retail customers. If the majority of the electors voting on the question vote in the affirmative, then the Village of Cobden may implement an opt-out aggregation program for residential and small commercial retail customers.

D. An aggregation program would give the Village the authority to enter into an electric supply power contract on behalf of residents and small businesses in the Village of Cobden who have not opted out of said program with the intent to secure a lower rate for electric service, yielding reduced electric bills for its residents and small businesses.

E. Municipalities and county governments across the State of Illinois have engaged third parties to serve as consultants and brokers for them which have the knowledge and experience to manage an aggregation program and to seek bids from the various electric wholesale suppliers.

F. The President's Office for the Village of Cobden recommends that SIMEC, LLC d/b/a Southern Illinois Municipal Electric Cooperative ("SIMEC") serve as the Village of Cobden's consultant and broker related to the acquisition of electric energy, due to SIMEC's experience, strategy, and reasonable pricing structure.

G. If the Village of Cobden chooses SIMEC, its fee will be built into the prices bid by electric wholesale providers, resulting in no direct payments made to SIMEC by the Village of Cobden.

H. It has been recommended by the President's Office that the Village of Cobden execute the Consulting Services Agreement attached hereto as Exhibit A with SIMEC.

I. Given the unique nature of the professional consulting services to be offered by SIMEC, it has been determined that the Consulting Services Agreement attached hereto as Exhibit A is not subject to competitive bidding.

J. That because of the nature of the bidding process related to the procurement of electricity from electric wholesale providers, the Village of Cobden requires the authority to sign a contract with the lowest cost electric wholesale provider within hours of the bids being received by SIMEC; and

**WHEREAS**, it is in the best interest of the Village of Cobden to engage SIMEC as its electric supply consultant and broker and to execute the Consulting Services Agreement attached hereto as Exhibit A;

**NOW, THEREFORE, BE IT ORDAINED**, by the Village Council of the Village of Cobden, Union County, Illinois, that SIMEC is hereby appointed as the Village of Cobden's electric consultant and broker, and the Consulting Services Agreement attached hereto as Exhibit A is hereby approved, and the President's Office is hereby directed to take all actions necessary to establish said consulting and broker relationship, including the execution of the Consulting Services Agreement.

**BE IT FURTHER ORDAINED** that, in light of the time constraints applicable to the acceptance of a competitive bid for a supply of electricity from an electric wholesale supplier, once the bids are received by SIMEC, the Village of Cobden is hereby authorized to sign the contract with the lowest bidder, with the President's Office being hereby directed to place said contract on the first available Village Council meeting following the execution thereof by the President's Office, for ratification by the Village Council of the Village of Cobden.

**ADOPTED** this 6<sup>th</sup> day of August, 2012, pursuant to a roll call vote as follows:

**AYES:** 6 - Brumleve, Eddington, Gomez, Maze, Stewart, Swedlund

**NAYS:** 0 - None

**ABSENT:** 0 - None

**APPROVED** by me this 6<sup>th</sup> day of August, 2012.

  
Molly Beckley, Village President

ATTEST:

  
Karen M. Winzenburger  
Village Clerk

## Exhibit A

### CONSULTING SERVICES AGREEMENT

This Consulting Services Agreement ("Agreement") is made and entered into and effective on this 7<sup>th</sup> day of August, 2012 ("Effective Date") by and between the Village of Cobden, Illinois ("Client"), an Illinois Municipal Corporation, with offices located at P.O. Box 146 Cobden, IL 62445 and SIMEC, LLC d/b/a Southern Illinois Municipal Electric Company, a Delaware Limited Liability Company ("Service Provider"), with its office and principal place of business located at 3200 Fishback Road, Carbondale, IL 62901. (Client and Service Provider may be collectively referred to herein as the "Parties.")

### Recitals

WHEREAS, Client desires to engage Service Provider as its exclusive provider of certain consulting and procurement services related to the residential and small commercial electric accounts in the Village of Cobden, Illinois, as more fully defined herein.

WHEREAS, Client desires, pursuant to 20 ILCS 3855/1-92 (the "Act"), to operate an electric aggregation opt-out program for residential and small commercial retail customers, by submitting a referendum to its residents to determine whether or not the aggregation program shall operate as an opt-out program for residential and small commercial retail customers. If the majority of the electors voting on the referendum vote in the affirmative, then Client may implement an opt-out aggregation program for residential and small commercial retail customers ("Aggregation Program").

WHEREAS, an Aggregation Program would give Client the authority to enter into an electric supply power contract on behalf of residents and small businesses with an electric wholesale supplier in the Village of Cobden who have not opted out of said program with the intent to secure a lower rate for electric service, yielding reduced electric bills for its residents and small businesses ("Governmental Contract").

WHEREAS, Client desires for Service Provider to assist Client with its effort to place a referendum on the ballot, its Aggregation Program, in soliciting bids, and in executing a Governmental Contract.

WHEREAS, Service Provider desires to perform the Services and desires to be so engaged.

NOW, THEREFORE, in consideration of the foregoing and of the covenants and agreements herein contained, the parties, intending to be legally bound, agree as follows:

## **Agreement**

### **I. Obligations of Service Provider.** (The services provided by Service Provider as detailed in this section may thereafter be referred to as the “Services.”)

- A. Service Provider shall provide the following services to Client to assist Client with its effort to place a referendum on the ballot, its Aggregation Program, in soliciting bids, and in executing a Governmental Contract:
  - 1. Residential and small commercial electric account opt-out and electricity aggregation consulting services;
  - 2. Marketing services for the opt-out electricity aggregation programs and any associated awareness campaigns;
  - 3. Consulting services related to any necessary compliance issues with the Illinois Commerce Commission;
  - 4. Personal attendance at private meetings and public hearings in support of the Aggregation Program;
  - 5. Consulting services related to bid creation and negotiation with multiple electric wholesale suppliers, and final selection of an electric wholesale supplier;
  - 6. Consulting and negotiation services with electric wholesale suppliers to negotiate their rate to Client and fee to Service Provider; and
  - 7. Consulting and support services related to the delivery of the Aggregation Program and obligations under a Governmental Contract.
- B. Service Provider shall promptly notify Client if Service Provider discovers any material defects in the Aggregation Program or any breach of a Governmental Contract.
- C. All work product prepared by Service Provider pursuant hereto including, but not limited to, reports, plans, designs, calculations, work drawings, studies, photographs, models and recommendations shall be the property of Client and shall be delivered to Client upon request of Client; provided, however, that Service Provider may retain copies of such work product for its records.

### **II. Obligations of Client.**

Client shall:

- A. Provide access to all necessary information and documentation as required by Service Provider in support of the effort to place a referendum on the ballot, its Aggregation Program, in soliciting bids, and in executing a Governmental Contract;
- B. Use best efforts to secure access to all necessary information and documentation as required by Service Provider in support of the effort to place a referendum on

the ballot, its Aggregation Program, in soliciting bids, and in executing a Governmental Contract which is not in the custody or control of Client;

- C. Use best efforts to secure access for entry upon public and private property as required to perform the Services of Service Provider; and
- D. Promptly notify Service Provider if Client discovers any material defects in the Aggregation Program or any breach of the Governmental Contract.

### **III. Term and Termination.**

This Agreement shall commence on the \_\_\_<sup>th</sup> day of \_\_\_\_\_, 2012 and shall terminate:

- A. Twelve (12) months following the date stated above if a referendum is placed on the ballot twice within the twelve (12) month period and both fail to obtain passage; or
- B. Twelve (12) months following Client's decision to not execute a presented Governmental Contract for any reason; or
- C. At the conclusion of a Governmental Contract provided that Client sends written notice of its desire to terminate this Agreement at least ninety (90) days prior to the conclusion of the Governmental Contract, otherwise, this Agreement will stay in full force and effect for the renewal period of the Governmental Contract; or
- D. Upon the written agreement of the Parties.

In the event this Agreement is terminated prior to its natural expiration for any reason other than those reasons listed in this section, Service Provider shall be paid its fee commission for the term of electricity purchased through the Governmental Contract resulting from the Aggregation Program.

### **IV. Payment.**

Client agrees that after a competitive bidding process and execution of a Governmental Contract that Service Provider will be paid by the selected electric wholesale supplier per kWh (volumetrically) as a commission fee for electricity purchased during the duration of the Governmental Contract. The commission fee paid by the electric wholesale supplier will be consistent with common industry standards considering the Services performed by Service Provider and the number of residential and small commercial retail customers subject to the Governmental Contract. Client shall not be obligated to pay any other fees or reimburse any expenses to Service Provider, but Client is required to only accept bids for electric supply from electric wholesale suppliers who pay commission fee rates acceptable in the industry and to Service Provider.

### **V. Relationship of the Parties.**

Service Provider acknowledges and agrees that Service Provider is an independent contractor and not an agent or employee of Client. Service Provider has sole discretion to determine when, during what hours, and at what location Service Provider will perform services for the benefit of Client, as well as the methods and techniques that will best accomplish the services to be provided under this Agreement. However, Service Provider warrants that such methods and techniques will be in accordance with ethical and reputable business practices and that Service Provider has the requisite expertise, ability, and skill to render the services required by this Agreement. Service Provider further agrees to supply all tools, equipment, and materials required to perform these services.

## **VI. Indemnification.**

To the fullest extent permitted by law, Service Provider agrees to and shall indemnify, defend and hold harmless Client, its officers, employees, agents, boards and commissions from and against any and all claims, suits, judgments, costs, attorneys fees, damages or other relief, including, but not limited to, workers' compensation claims, in any way resulting from or arising out of negligent actions or omissions of Service Provider in connection herewith, including negligence or omissions of employees or agents of Service Provider arising out of the performance of this Agreement. In the event of any action against Client, its officers, employees, agents, boards or commissions, covered by the foregoing duty to indemnify, defend and hold harmless such action shall be defended by legal counsel of Client's choosing. The provisions of this paragraph shall survive any expiration, completion and/or termination of this Agreement.

## **VII. Insurance.**

- A. Service Provider shall secure and maintain, at its own expense, errors and omissions insurance in an amount not less than One Million Dollars (\$1,000,000.00) per claim/annual aggregate to protect itself from any claim arising out of the performance of Services and caused by negligent acts, omissions or negligent acts for which Service Provider may be legally negligent. Service Provider shall maintain said coverage for the term of this Agreement and for one year after completion of the Services performed under this Agreement
- B. In addition to errors and omissions insurance, Service Provider shall also secure and maintain, at its own expense, insurance for protection from claims under Worker's Compensation acts, claims for damages because of bodily injury including personal injury, sickness or disease or death of any and all employees or of any person other than such employees, and from damages because of injury to or destruction of property including loss of use resulting therefrom, and any other insurance prescribed by laws, rules, regulations, ordinances, codes or orders.
- C. Service Provider shall secure and maintain, at its own expense, General Liability insurance in an amount not less than One Million Dollars (\$1,000,000.00) per occurrence.
- D. Service Provider shall secure and maintain, at its own expense, Property

Insurance for protection from claims or damages because of damage to or destruction of property including loss of use resulting therefrom in an amount not less than Five Hundred Thousand Dollars (\$500,000.00). Client shall be held harmless for any damage to Service Provider's property and/or equipment during the course of performance under this Agreement.

#### **VIII. Compliance with the Law.**

Notwithstanding any other provision of this Agreement it is expressly agreed and understood that in connection with the performance of this Agreement that Service Provider shall comply with all applicable federal, state, city and other requirements of law, including, but not limited to, any applicable requirements regarding prevailing wages, minimum wage, workplace safety and legal status of employees. Without limiting the foregoing, Service Provider hereby certifies, represents and warrants to Client that all of Service Provider's employees and/or agents who will be providing products and/or services with respect to this Agreement shall be legal residents of the United States. Service Provider shall also at its expense secure all permits and licenses, pay all charges and fees and give all notices necessary and incident to the due and lawful prosecution of the work, and/or the products and/or services to be provided for in this Agreement. Client shall have the right to audit any records in the possession or control of Service Provider to determine Service Provider's compliance with the provisions of this paragraph. In the event Client proceeds with such an audit, Service Provider shall make available to Client Service Provider's relevant records at no cost to Client. Service Provider shall pay any and all costs associated with any such audit.

#### **IX. Taxes.**

Service Provider is subject to and responsible for all applicable federal, state, and local taxes. Client represents that it is a tax-exempt entity and evidence of this tax-exempt status shall be provided to Service Provider upon written request. Service Provider hereby further agrees to withhold all municipal income taxes due or payable under its ordinances for wages, salaries and commissions paid to its employees and further agrees that any of its subcontractors shall be required to agree to withhold any such municipal income taxes due under such chapter for Services performed under this Agreement.

#### **X. Nonwaiver.**

The failure of either party at any time to require the performance by the other party of any provision of this Agreement shall in no way affect that party's right to subsequently enforce that provision.

#### **XI. Knowledge.**

The Parties hereby represent that each have been represented by competent counsel of their choice in the negotiation and execution of this Agreement and all other documents associated with the contemplated transaction; that each have read and fully understood the terms hereof; that each Party and their counsel have been afforded an opportunity to review, negotiate and modify the terms of each document, and that each intends to be bound hereby.

**XII. Construction.**

The Parties have participated jointly in the negotiation and drafting of this Agreement. In the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the Parties and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Agreement.

**XIII. Assignment.**

The Parties may not assign this Agreement without obtaining express, written consent from the other party prior to assignment.

**XIV. Recitals / Entire Agreement / Amendment.**

The recitals are fully incorporated into this Agreement as if each were fully restated herein. This Agreement embodies the entire agreement between the parties with respect to its subject matter, and it supersedes all prior agreements, whether written or oral. No amendment of this Agreement shall be effective unless in writing and signed by both parties.

**XV. Exclusive Agreement.**

Client agrees that during the term of this Agreement, it shall not directly or indirectly, solicit, initiate or encourage submission of further proposals or offers from, enter into any agreements with, or accept the services of, any person or entity, for professional services that are substantially similar to the Services to be performed by Service Provider pursuant to this Agreement. Service Provider shall serve as Client's exclusive provider of the Services during the term of this Agreement.

**XVI. Non-Discrimination.**

In all hiring or employment made possible or resulting from this Agreement, there shall be no discrimination against any employee or applicant for employment because of sex, age, race, color, creed, national origin, marital status, of the presence of any sensory, mental or physical handicap, unless based upon a bona fide occupational qualification,

and this requirement shall apply to, but not be limited to, the following: employment advertising, layoff or termination, rates of pay or other forms of compensation and selection for training, including apprenticeship. No person shall be denied or subjected to discrimination in receipt of the benefit of any services or activities made possible by or resulting from this Agreement on the grounds of sex, race, color, creed, national origin, age except minimum age and retirement provisions, marital status or the presence of any sensory, mental or physical handicap.

#### **XVII. Disputes and Governing Law.**

The Parties intend that this Agreement may be enforced at law or by suit for specific performance. In the event that it becomes necessary to file suit in a court of law or chancery to enforce the terms of this Agreement, the prevailing party shall be awarded his or her reasonable attorneys' fees in pursuit of his or her claim. This Agreement shall be governed by and construed in accordance with the federal laws of the United States of America and internal laws of the State of Illinois applicable to contracts made and to be performed in such state (without regard to the principle of conflicts of law applicable under Illinois law). It is the intent of the parties that to the fullest extent permitted by law, the laws of the State of Illinois shall govern this Agreement.

#### **XVIII. Severability.**

If any provision of this Agreement is held to be invalid or unenforceable, that provision shall be severable, and the remaining provisions of this Agreement will be fully enforceable.

#### **XIX. Paragraph Headings.**

Paragraph headings are inserted in this Agreement for convenience only and are not to be used in interpreting this Agreement.

#### **AGREED:**

Village of Cobden, Illinois:

By: Molly Beckley

Date: August 7, 2012

SIMEC, LLC:

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

Date: \_\_\_\_\_

STATE OF ILLINOIS )

) )

# CERTIFICATE

I, Karen M. Winzenburger, certify that I am the duly elected and acting Village Clerk of the Village of Cobden, Union County, Illinois.

I further certify that on August 6, 2012, the Village Board of Trustees of the Village of Cobden, Illinois, passed and adopted ORDINANCE NO. 869 entitled **AN ORDINANCE APPROVING A CONTRACT WITH SIMEC D/B/A SOUTHERN ILLINOIS MUNICIPAL ELECTRIC COOPERATIVE TO SERVE AS THE VILLAGE OF COBDEN'S EXCLUSIVE CONSULTANT FOR ITS ELECTRIC AGGREGATION PROGRAM AND FOR ENGAGEMENT OF THE LOWEST COST ELECTRIC WHOLESALE SUPPLIER** which provided by its passage that it be published in pamphlet form.

The pamphlet form of Ordinance No. 869 including the ordinance and a cover sheet thereof, was prepared and a copy of such ordinance was posted in the Village Hall for a period of at least ten days commencing on the 7th day of August, 2012. Copies of such ordinance were also available for public inspection upon request in the office of the Village Clerk.

Dated at Cobden, Illinois, this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

Karen M. Winzenburger, RMC  
Village Clerk