

STAFF REPORT

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04/29/20

PRC 9510.1

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G. Asimakopoulos

**AMENDMENT OF LEASE AND AN
AGREEMENT AND CONSENT TO ENCUMBER LEASE**

LESSEE:

Nautilus Data Technologies, Inc., a Delaware corporation

SECURED PARTY-LENDER:

Orion Energy Partners Investment Agent, LLC, a Delaware Limited Liability Company

AREA, LAND TYPE, AND LOCATION:

0.15± acre of proprietary land in the San Joaquin River located within the Port of Stockton, at Rough and Ready Island, adjacent to Assessor's Parcel Number 162-030-07, near Stockton, San Joaquin County.

AUTHORIZED USE:

Installation, use, and maintenance of a barge-mounted, water-cooled data center.

LEASE TERM:

Beginning October 18, 2018; ending September 20, 2023.

CONSIDERATION:

\$2,164 per year, with an annual Consumer Price Index adjustment.

PROPOSED AMENDMENT:

The amendment is conditioned upon the Commission's approval of an Agreement and Consent to Encumber Lease, effective the later of April 29, 2020, or the close of escrow, but no later than December 31, 2020.

The following sections of the lease are proposed to be amended:

- **Section 1, Basic Provisions, Term:**

Extend the term of the lease to September 20, 2038.

STAFF REPORT NO. **37** (CONT'D)

- **Section 2, Special Provisions, Paragraph 4 is deleted in its entirety and replaced with the following:**

In the first year of data center operations, Lessee shall monitor the daily average Fahrenheit temperature of the water at the discharge point to compare with reference points upstream and downstream and provide this data to Lessor in quarterly reports on a calendar basis. Lessee shall also conduct quarterly monitoring of river water temperature at points 250 feet and 500 feet from the discharge point of the cooling system and provide this data to Lessor in the quarterly reports. If the river water temperature at the 500 foot radius of the discharge point is greater than the 0.2 degree Fahrenheit maximum increase predicted by the modeling, Lessee must consult with Lessor, California Department of Fish and Wildlife, U.S. Fish and Wildlife Services, National Marine Fisheries Services, and Central Valley Regional Water Quality Control Board (Agencies). After the first year of data center operations, Lessor will determine the frequency of water temperature monitoring and reporting. At no time shall the surface water temperature ~~of the water at the discharge point exceed~~ rise greater than 5 degrees Fahrenheit over intake temperature above the natural temperature of the receiving water. ~~If it is not possible to reduce the temperature exceedance to less than a 5-degree Fahrenheit increase, operations must cease immediately. Lessor may terminate this lease if, in its discretion and after consulting with Agencies, Lessor determines termination is necessary to protect the environment. If data center operations require exceeding either temperature threshold described in this paragraph, Lessee shall submit an application for a lease amendment. Lessee acknowledges that any lease amendment will be subject to the California Environmental Quality Act.~~

- **Section 2, Special Provisions, Paragraph 5c is deleted in its entirety and replaced with the following:**

Up to two Remotely Operated Underwater Vehicle (ROV) surveys of the hull of the barge per year for the remainder of the lease.

All other terms and conditions of the lease shall remain in effect without amendment.

STAFF ANALYSIS AND RECOMMENDATION:

Authority:

Public Resources Code sections 6005, 6216, 6301, 6501.1, and 6503;
California Code of Regulations, title 2, sections 2000 and 2003.

STAFF REPORT NO. 37 (CONT'D)

State's Best Interests Analysis:

On October 18, 2018, the Commission authorized a General Lease – Industrial Use to Nautilus Data Technologies, Inc., a Delaware Corporation, for the installation, use, and maintenance of a barge-mounted, water-cooled data center to be located at the Port of Stockton (Port) ([Item C50, October 18, 2018](#)). The current lease is on State-owned proprietary land, not sovereign land. That lease will expire on September 20, 2023. The Lessee is now applying for an amendment of lease and approval of an encumbrance agreement. Staff recommends amending the lease to extend the term of the lease, amend the lease provisions related to monitoring the operation of the barge-mounted data center, and approve the encumbrance agreement.

The Lessee is in the process of obtaining project financing from Orion Energy Partners Investment Agent, LLC, a Delaware Limited Liability Company, the Secured Party-Lender, with a loan amount not to exceed \$100,000,000. The financing will be provided in two separate installments. The first installment of \$45,000,000 will support the construction of the data center facility and all shoreside infrastructure required to operate the data center facility, and the initial 18 months of operations. The second installment of \$55,000,000 will provide financing for the proposed construction and operation of a second data center project to be located at the Port. If any portion of the second project will take place on sovereign or proprietary land under the jurisdiction of the Commission, a separate authorization will be required. As a condition of the loan, the Secured Party-Lender is requiring the Lessee to pledge their interest in Lease No. PRC 9510.1 as additional security, which requires a total lease term of 20 years.

The encumbrance of the lease would be implemented through the document, "Agreement and Consent to Encumber Lease," (Agreement) that includes protections for the State land associated with the lease. This encumbrance will allow the Secured Party-Lender to step into the role of the Lessee for the lease premises under certain circumstances. These protections include the following requirements:

1. No subsequent encumbrance of the lease shall be allowed without prior written consent of the Commission.
2. Any transfer of the lease to a third party shall be subject to prior written approval and consent of the Commission.

STAFF REPORT NO. **37** (CONT'D)

3. If the Secured Party-Lender forecloses on the lease, it shall be bound by all terms and conditions of the lease.
4. The duration of the encumbrance agreement is limited to the term of the lease.

In approving the Agreement, the Commission, through a delegation to the Executive Officer, retains the right to approve any transfer of the lease from the lending institution to a prospective lessee, should any foreclosure of the loan occur. The proposed Agreement provides that the Commission's Executive Officer make certain approvals as provided in the Agreement, including the approval of purchasers during a foreclosure sale.

The Lessee and the Port had previously executed a 5-year lease for the upland parcel, beginning September 21, 2018, and ending on September 20, 2023. On March 2, 2020, the Port Commissioners approved an amendment to their lease with the Lessee, removing the initial 5-year constraint and granting Nautilus control of the site through September 20, 2048.

The existing Commission lease was authorized during preliminary construction of the data center barge at the Mare Island Naval Shipyard (Shipyard) in Vallejo, Solano County, and was a condition precedent to the Lessee securing financing to move to the next stage of fully refurbishing, constructing, and installing all of the mechanical systems in the data center barge and designing and constructing the necessary civil works to support the Project at the Port. The refurbishment of the barge took longer than anticipated, adding 3 months to the original 12-month schedule to leave the Shipyard. Taking that into account, the delivery of the data center barge from the Shipyard to its berthing location at the Port had long been scheduled for the end of March 2020, and the Shipyard had been tracking well toward that objective, with about 2 weeks of work left to complete.

On March 18, 2020, the Solano County Department of Public Health issued a Health Order and Directive in response to COVID-19, which brought the remaining work on the data center barge to a halt. And on March 19, 2020, the County of San Joaquin issued a revised order in Response to COVID-19, implementing the Executive Order issued by the Governor on March 19, 2020, which has also brought work on the Lessee's upland site at the Port to a halt. Accordingly, taking into account the time it will take to re-mobilize workers, the Lessee anticipates the

STAFF REPORT NO. 37 (CONT'D)

worst-case date for the installation of the barge-mounted data center at the Port will be 3 to 4 weeks after the shelter-in-place directives are lifted for Solano and San Joaquin counties.

Another consequence of the COVID-19 pandemic is that closure of the loan agreement between the Lessee and the Secured Party-Lender has been delayed. The Parties had expected to close before Commission consideration at the end of April 2020. The Parties still expect to proceed in the next weeks or months but not before Commission action. As a result, staff recommends authorizing encumbrance of the lease at the later of April 29, 2020, or close of escrow, but no later than December 31, 2020. If the loan does not close by the end of the year, staff recommends that the authorization expire.

The existing lease includes certain provisions protecting the lease area by requiring the Lessee to obtain necessary permits for the project. The lease does not alienate the State's fee simple interest, and does not grant the Lessee exclusive rights to the lease premises. The lease requires the Lessee to insure the lease premises and indemnify the State for any liability incurred as a result of the Lessee's activities thereon. The lease requires the Lessee to conduct all repair and maintenance work safely. The lease also requires the payment of annual rent to compensate the people of the State for the occupation of the public land involved.

The data center barge is expected to withstand seismic events and to help meet regional needs for data center services, including serving the Port's data needs. The data center barge can also be deployed to other shoreside locations in an emergency.

The data center is expected to help support statewide goals to reduce energy consumption, reduce greenhouse gas emissions and criteria air pollutants, and eliminate use of potable water, wastewater, water treatment chemicals, and chemical refrigerants that are potent greenhouse gas and stratospheric ozone-depleting substances.

Climate Change:

Climate change impacts, including sea-level rise, more frequent and intense storm events, and increased flooding and erosion, affect both open coastal areas and inland waterways in California. The subject facilities are located on the San Joaquin River, in a tidally influenced site vulnerable to flooding at current sea levels, and will be at higher risk of flood exposure given projected scenarios of sea-level rise. The facilities

STAFF REPORT NO. 37 (CONT'D)

within the lease premises will consist of a barge-mounted, water-cooled data center.

The California Ocean Protection Council updated the State of California Sea-Level Rise Guidance in 2018 to provide a synthesis of the best available science on sea-level rise projections and rates. Commission staff evaluated the “high emissions,” “medium-high risk aversion” scenario to apply a conservative approach based on both current emission trajectories and the lease location and structures. The San Francisco tide gauge was used for the projected sea-level rise scenario for the region as listed in Table 1.

Table 1. Projected Sea-Level Rise for San Francisco¹

Year	Projection (feet)
2030	0.8
2040	1.3
2050	1.9
2100	6.9

Source: Table 13, State of California Sea-Level Rise Guidance: 2018 Update

Note: ¹ Projections are with respect to a 1991 to 2009 baseline.

This effect could increase the San Joaquin River’s inundation levels within the lease area. In addition, as stated in *Safeguarding California Plan: 2018 Update* (California Natural Resources Agency 2018), climate change is projected to increase the frequency and severity of natural disasters related to flooding, fire, drought, extreme heat, and storms (especially when coupled with sea-level rise). In rivers, creeks, and tidally influenced waterways, more frequent and powerful storms can result in increased flooding conditions and damage from storm-created debris as well as decreased bank stability and structure. Conversely, climate-change induced droughts could decrease river levels and flow for extended periods of time. Climate change and sea-level rise will further influence riverine areas by changing erosion and sedimentation rates. Flooding and storm flow, as well as runoff, will likely increase scour and decrease bank stability at a faster rate.

The combination of these projected conditions could increase the likelihood of damage and affect access to structures within the lease premises during the term of the lease. The floating barge-mounted data center is adaptable to variable water levels, allowing it to rise and fall with storms and droughts and increasing its resiliency to some climate change

STAFF REPORT NO. 37 (CONT'D)

impacts, but may require more frequent maintenance to ensure continued function during and after storm seasons and to avoid dislodgement.

The existing lease is a 5-year General Lease – Industrial Use that commenced on October 18, 2018, is proposed to be extended to September 20, 2038, and may be subject to the climate change effects of the projected sea-level rise scenario provided above. Regular maintenance, as required by the terms of the lease, will help reduce the likelihood of severe structural degradation and dislodgement. Pursuant to the lease, the Applicant acknowledges that the lease premises and adjacent upland (not within the lease area) are located in an area that may be subject to effects of climate change, including sea-level rise.

Conclusion:

For the reasons stated above, staff believes approval of the proposed lease amendment and encumbrance agreement is in the best interests of the State.

OTHER PERTINENT INFORMATION:

1. Approval or denial of the application for the proposed lease amendment and encumbrance agreement is a discretionary action by the Commission. Each time the Commission approves or rejects a use of proprietary land, it exercises legislatively delegated authority and responsibility as trustee of the State's lands as authorized by law. If the Commission denies the application, the Applicant's existing lease would not be amended and the Agreement would not be approved. Upon expiration or prior termination of the lease, the Lessee also has no right to a new lease or to renewal of any previous lease, including but not limited to extending the lease term.
2. This proposed action is consistent with Strategy 1.1 of the Commission's Strategic Plan to deliver the highest levels of public health and safety in the protection, preservation, and responsible economic use of the lands and resources under the Commission's jurisdiction.
3. A Mitigated Negative Declaration (MND), State Clearinghouse No. 2016062010, was prepared for this project by the Port and adopted on September 21, 2018. Staff has reviewed this document. A Mitigation Monitoring Program (MMP) was adopted by the Port. The previous lease authorization for the project was approved by the Commission on October 18, 2018 ([Item C50, October 18, 2018](#)), and relied on the adopted MND and MMP. The Commission adopted the MMP, on file at the Sacramento Office of the Commission, at the October 18, 2018, meeting, and it remains in full force.

STAFF REPORT NO. 37 (CONT'D)

4. This activity involves lands identified as possessing significant environmental values pursuant to Public Resources Code section 6370 et seq. At the time the Commission considered the MND in 2018, staff concluded that such activity would not affect those significant lands and the Commission found the activity to be consistent with their use classification pursuant to Public Resources Code section 6370 et seq.

EXHIBITS:

- A. Land Description
- B. Site and Location Map

RECOMMENDED ACTION:

It is recommended that the Commission:

CEQA FINDING:

Find that a Mitigated Negative Declaration, State Clearinghouse No. 2016062010, and MMP were prepared by Port and adopted on September 21, 2018, for this Project and that the Commission has reviewed and considered the information contained therein; that in the Commission's independent judgment, the scope of activities to be carried out under the lease amendment to be issued by this authorization have been adequately analyzed; that none of the events specified in Public Resources Code section 21166 or the State CEQA Guidelines section 15162 resulting in any new or substantially more severe significant impact has occurred; and, therefore no additional CEQA analysis is required.

The previously adopted MMP, on file at the Sacramento Office of the Commission, remains in full force.

STATE'S BEST INTERESTS:

Find that the proposed lease amendment and approval of an encumbrance agreement is in the best interests of the State.

AUTHORIZATION:

1. Authorize the amendment of Lease No. PRC 9510.1, a General Lease – Industrial Use, of proprietary land as described in Exhibit A, Land Description, and shown on Exhibit B, Site and Location Map, (for reference purposes only) attached and by this reference made a part hereof, effective on the same date as the "Agreement and Consent to Encumber Lease", to modify Lease Section 1, Basic Provisions, to extend the term of the lease to September 20, 2038; to delete and replace Lease Section 2, Special Provisions,

STAFF REPORT NO. **37** (CONT'D)

Paragraph 4, and Lease Section 2, Special Provisions, Paragraph 5c; all other terms and conditions of the lease will remain in effect without amendment. The amendment of the Lease shall only be executed in concert with execution of the "Agreement and Consent to Encumber Lease" described below.

2. Authorize the Executive Officer or her designee to execute the document titled "Agreement and Consent to Encumber Lease," allowing the Lessee's right, title, and interest in Lease No. PRC 9510.1 to be pledged as partial security for a loan in the principal amount not to exceed \$100,000,000 in favor of the Secured Party-Lender in substantially the same form as that on file in the Sacramento office of the Commission, effective at the later of April 29, 2020, or close of escrow, and to execute, acknowledge, accept, and record all related documents as may be reasonably necessary to complete the transaction; this authorization to expire on December 31, 2020, if escrow has not yet closed.
3. Delegate to the Executive Officer or her designee the authority to approve prospective purchasers during a foreclosure sale and make any other approvals required of the Commission under the Agreement.

EXHIBIT A

PRC 9510.1

LAND DESCRIPTION

A parcel of State owned land, situate in the City of Stockton, being a portion of that parcel of land (Parcel 7-B) acquired by the State as part of the Stockton Deep Water Channel (SDWC) Project (San Joaquin River) approved by the California State Legislature in Chapter 517, Statutes of 1927 and described in Book of Official Records, Vol. 251, Page 1, recorded June 27, 1928 San Joaquin County Records, State of California, and more particularly described as follows:

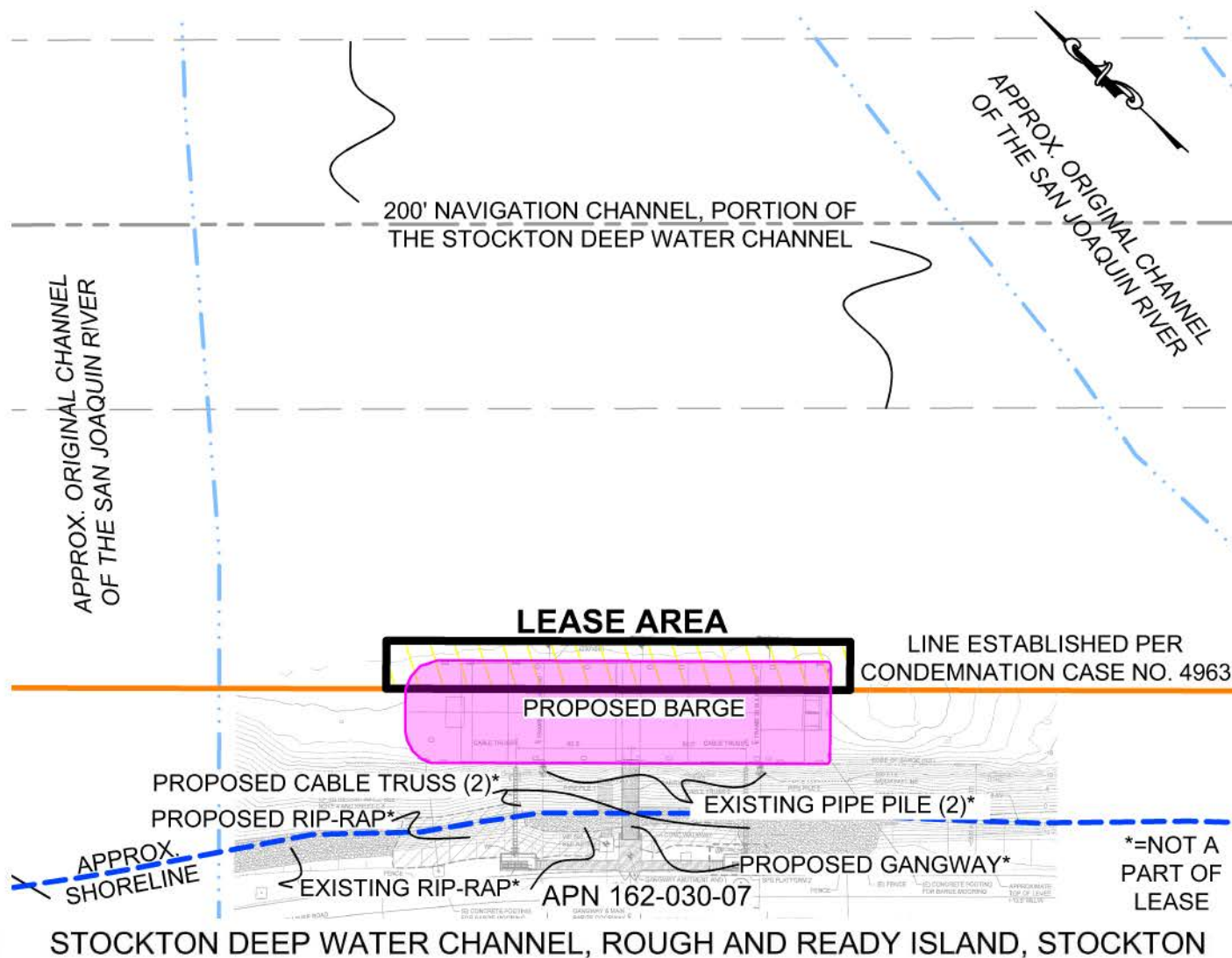
COMMENCING at a point designated as "Boundary Point No. 122" as described in Condemnation Case No. 4963 "Final Judgment as to the Interest of the State of California" filed Jun 16, 1952 in the District Court of the United States in and for the Northern District of California, Northern Division, and also being a point on the north line of the South Levee Right of Way of the SDWC, from which a point designated as "Boundary Point No. 1" per said Condemnation Case bears North 50°53' West 255.24 feet; thence along said line per said Condemnation Case and said Right of Way line South 42°57' East 524.63 feet to the POINT OF BEGINNING; thence leaving said lines North 47°03' East 26.00 feet; thence South 42°57' East 251.00 feet; thence South 47°03' West 26.00 feet to said line per said Condemnation Case and said Right of Way line; thence along said line per said Condemnation Case and said Right of Way line North 42°57' West 251.00 feet to the POINT OF BEGINNING.

END OF DESCRIPTION

PREPARED 3/16/2020 BY THE CALIFORNIA STATE LANDS COMMISSION BOUNDARY UNIT



SITE



LOCATION



THIS EXHIBIT IS SOLELY FOR PURPOSES OF GENERALLY DEFINING THE LEASE PREMISES, IS BASED ON UNVERIFIED INFORMATION PROVIDED BY THE LESSEE OR OTHER PARTIES AND IS NOT INTENDED TO BE, NOR SHALL IT BE CONSTRUED AS, A WAIVER OR LIMITATION OF ANY STATE INTEREST IN THE SUBJECT OR ANY OTHER PROPERTY.

EXHIBIT B

PRC 9510.1
NAUTILUS DATA
TECHNOLOGIES, INC.
APN 162-030-07
GENERAL LEASE -
INDUSTRIAL USE
SAN JOAQUIN COUNTY



MJF 3/16/2020