



North American Energy Markets Association

**SAMPLE CONFIDENTIALITY AGREEMENT**

February 29, 2012

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## Confidentiality Agreement

This Confidentiality Agreement (the "Agreement") is entered into and effective as of \_\_\_\_\_, 20\_\_ (the "Effective Date") by and between \_\_\_\_\_ ("\_\_\_\_\_"); and \_\_\_\_\_ ("\_\_\_\_\_"). \_\_\_\_\_ and \_\_\_\_\_ are sometimes referred to herein individually as a "Party" and collectively as the "Parties".

WHEREAS, the Parties wish to discuss and evaluate potential energy and related product transactions; and

WHEREAS, the Parties recognize that in the course of such discussions and evaluation the Parties may need to exchange proprietary and/or confidential information; and

WHEREAS, the Parties desire to protect such proprietary and/or confidential information in accordance with the terms of this Agreement;

NOW, THEREFORE, in consideration of the mutual promises and agreements set forth herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. Confidential Information. Subject to the terms and conditions of this Agreement, a Party ("Disclosing Party") may disclose to the other Party ("Receiving Party") certain confidential and/or proprietary information specifically for the purpose of discussing, evaluating, negotiating and/or consummating one or more potential energy or related product transactions between the Parties ("Purpose"). For purposes of this Agreement, the term "Confidential Information" shall mean all data and information disclosed by the Disclosing Party to the Receiving Party orally, in writing, or by any other media (including, but not limited to, electronic communication) from the Effective Date and until the expiration of this Agreement which relates to the Purpose.

Confidential Information shall not include data and/or information that: (a) was known to the Receiving Party prior to the disclosure of that information by the Disclosing Party; (b) was independently developed by the Receiving Party outside the context of and unrelated to the Purpose without breach of this Agreement and by persons who have not had access or been exposed to the Confidential Information; (c) was publicly available and readily ascertainable in substantially the same form at the time of disclosure, or subsequently becomes publicly available and readily ascertainable in such form without breach of this Agreement; (d) was rightfully received by the Receiving Party from a third party and, to the best of the Receiving Party's knowledge after reasonable inquiry, was not subject to an obligation of confidentiality; or (e) was or is publicly disclosed by Disclosing Party.

2. Purpose of Disclosure; Limited Use and Disclosure. The Receiving Party shall use the Confidential Information solely in connection with the Purpose. The Receiving Party may disclose and permit access to the Confidential Information only to its employees, affiliates,

officers, directors, members, attorneys, accountants, consultants, auditors, agents, subcontractors, and independent contractors who have a need to know the Confidential Information in connection with the Purpose and have been informed of the confidential nature of such information (collectively, "Permitted Representatives"). Notwithstanding anything to the contrary in this Agreement, the Receiving Party shall be responsible and liable for the actions and/or inactions (including, but not limited to, any breach of this Agreement) of any of its Permitted Representative with respect to Confidential Information disclosed to such Permitted Representative.

3. Obligations of Receiving Party. The Receiving Party shall:

- (a) protect received Confidential Information from disclosure to third parties with at least the same degree of care, but no less than a reasonable degree of care, as it uses to protect its own proprietary and/or confidential information of like kind from unauthorized use or disclosure;
- (b) not disclose the Confidential Information to a third party without the prior written consent of the Disclosing Party, except with respect to disclosure to Permitted Representatives, as provided in Section 2 of this Agreement, or in the case of a Required Disclosure (as defined in Section 4 below), which disclosure shall be conducted in accordance with the terms and conditions of this Agreement;
- (c) use received Confidential Information only in furtherance of the Purpose; and
- (d) not reproduce received Confidential Information or incorporate it into derivative works or notes unless necessary to fulfill the Purpose, and in such case, only if that Confidential Information continues to be identified as Confidential Information of the Disclosing Party.

4. Required Disclosure. In the event the Receiving Party is required by law, regulation, order of a governmental or other regulatory authority of competent jurisdiction, or court order to disclose any of the Confidential Information ("Required Disclosure"), the Receiving Party shall promptly notify the Disclosing Party in writing of such Required Disclosure prior to making such disclosure. Upon receipt of a notice of Required Disclosure, the Disclosing Party may, at the Disclosing Party's sole expense, seek a protective order or other similar relief; provided, however, that if such protective order or other appropriate remedy is not sought by the Disclosing Party within the required timeframe established by the applicable law or regulation or appropriate judicial, administrative or regulatory body or if the Disclosing Party is not successful in obtaining such protective order or other appropriate remedy, then the Receiving Party shall furnish only that portion of the Confidential Information that, in the opinion of the Receiving Party's counsel, is legally required to be disclosed and will exercise reasonable efforts to obtain reliable assurances that confidential treatment will be accorded to the Confidential Information upon disclosure.

5. Return of Confidential Information. Except as may otherwise be required by applicable law, the Requesting Party shall, upon written request from the Disclosing Party, promptly return any and all printed or electronic documents or tangible things containing or embodying the Confidential Information received from the Disclosing Party, together with all copies or derivatives thereof, or certify in writing that all such Confidential Information has been destroyed. One archival copy of documents evidencing the Confidential Information may be retained by Receiving Party's counsel in a secure location for verification of ongoing confidentiality obligations only. The Parties acknowledge and agree that Confidential Information transferred and/or maintained electronically (including, but not limited to, emails) may be automatically archived and stored by the Receiving Party on electronic devices, magnetic tape, or other media for archival purposes and/or for the purpose of restoring data in the event of a system failure ("Electronic Archives"). Notwithstanding anything to the contrary in this Agreement, in no event shall Receiving Party be required to destroy Confidential Information stored on Electronic Archives; provided, however, that any Confidential Information stored on Electronic Archives that is not returned or destroyed shall be kept confidential for the duration of its existence in accordance with the terms and conditions of this Agreement.

6. No Transfer of Rights. Confidential Information remains the property of the Disclosing Party. The Receiving Party does not, either by executing this Agreement or by receiving Confidential Information, acquire any intellectual property rights of the Disclosing Party relating to the Confidential Information or any other rights with respect to the Confidential Information, except permission to use the Confidential Information to the limited extent necessary to carry out the Purpose.

7. No Future Business Obligations. Neither this Agreement nor the disclosure or receipt of Confidential Information shall create an obligation for either Party to make any further agreement or business arrangement to purchase, sell, license, transfer, otherwise dispose of, or practice any products, services, or information, or engage in any present or future activities. This Agreement imposes no obligation on the Disclosing Party to disclose Confidential Information to the Receiving Party or right of the Receiving Party to compel such disclosure.

8. Representations and Warranties. As a material inducement to entering into this Agreement, each Party represents and warrants to the other Party that:

(a) it is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation and is qualified to conduct its business in those jurisdictions necessary to perform this Agreement;

(b) the execution, delivery and performance of this Agreement are within its powers, have been duly authorized by all necessary action and do not violate any of the terms or conditions in its governing documents or any contract to which it is a Party or any law, rule, regulation, order, writ, judgment, decree or other legal or regulatory determination applicable to it;

(c) this Agreement constitutes a legal, valid and binding obligation of such Party enforceable against it in accordance with its terms;

(d) it has the right and authority to disclose any Confidential Information provided pursuant to this Agreement; and

(e) it is acting for its own account, has made its own independent decision to enter into this Agreement and as to whether this Agreement is appropriate or proper for it based upon its own judgment, is not relying upon the advice or recommendations of the other Party hereto in so doing, and is capable of assessing the merits of and understanding, and understands and accepts, the terms, conditions and risks of this Agreement.

9. Remedies, Limitation of Liability. The Receiving Party acknowledges and agrees that any injury due to the improper disclosure or use of Confidential Information by the Receiving Party and/or its Permitted Representatives may be irreparable. Accordingly, the Disclosing Party is entitled to seek an injunction to prevent the threatened or actual disclosure or improper use of Confidential Information by the Receiving Party and/or its Permitted Representatives in addition to any other remedies that may be available. Moreover, the Receiving Party hereby waives any requirement that the Disclosing Party post a bond in connection with seeking to obtain or obtaining any such injunctive relief. NEITHER PARTY SHALL BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES, LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES UNDER ANY CIRCUMSTANCE IN CONNECTION WITH SUCH PARTY'S PERFORMANCE OF OR FAILURE TO PERFORM THIS AGREEMENT. EACH PARTY'S LIABILITY RELATING THERETO SHALL BE LIMITED TO DIRECT ACTUAL DAMAGES ONLY AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED.

10. Term. Unless earlier terminated or extended, this Agreement shall remain in effect for a period of \_\_\_\_\_ (\_\_\_) years from the Effective Date provided the obligations assumed herein with respect to Confidential Information shall survive the expiration or termination of this Agreement for a period of \_\_\_\_\_ (\_\_\_) years following such expiration or termination. Either Party may terminate this Agreement at any time upon thirty (30) days written notice, provided that all obligations relating to or affecting the protection, use, or disclosure of Confidential Information disclosed prior to such termination shall survive such termination of this Agreement.

11. Disclaimer of Warranties. EXCEPT AS EXPRESSLY SET FORTH HEREIN, THERE IS NO WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND ANY AND ALL IMPLIED WARRANTIES ARE DISCLAIMED. All Confidential Information is disclosed "as is" and no warranty is made regarding its accuracy, completeness, utility, or fitness for a particular use.

12. Confidential Relationship/No Promotion. The subject matter, existence, and the terms of this Agreement, and any business relationship between the Parties related to the Purpose, shall be regarded as Confidential Information and not disclosed, except by mutual

written agreement of the Parties or as may otherwise be permitted in accordance with the terms and conditions of this Agreement. Neither Party shall use the name or trademarks of the other Party without full disclosure of the purpose for such use and the prior written consent of that Party.

13. Entire Agreement. This Agreement and the attachments hereto constitute the entire agreement between the Parties and parol or extrinsic evidence shall not be used to vary or contradict the express terms of this Agreement. This Agreement shall be binding upon and inure to the benefit of, each of the Parties hereto and its predecessors in interest, successors and permitted assigns.

14. Assignment. This Agreement may not be assigned or transferred by either Party without the prior written consent of the other Party, which consent shall not be unreasonably withheld, conditioned or delayed.

15. Notices. Unless otherwise specified in this Agreement, notices shall be in writing and may be delivered by hand delivery, United States mail, overnight courier service, or facsimile. Notices shall be effective upon receipt, if received during business hours on a business day, and otherwise shall be effective on the next business day. A Party may change its contact information below by providing notice of same to the other Party in accordance with the requirements of this Section 15.

**Notices to \_\_\_\_\_:**

Name: \_\_\_\_\_

Company Name: \_\_\_\_\_

Company Address: \_\_\_\_\_

City/State/Zip: \_\_\_\_\_

Facsimile: \_\_\_\_\_

**Notices to \_\_\_\_\_:**

Name: \_\_\_\_\_

Company Name: \_\_\_\_\_

Company Address: \_\_\_\_\_

City/State/Zip: \_\_\_\_\_

Facsimile: \_\_\_\_\_

16. Indemnification. Each Party shall indemnify, defend and hold harmless the other Party against any and all liability, costs (including, but not limited to, reasonable attorneys' fees and court costs) and damages resulting from any and all claims by third parties arising out of or in any way related to the breach of this Agreement by such Party or any other act or omissions of such Party in violation, or inconsistent with the requirements, of the terms and conditions of this Agreement.

17. Waiver. No failure or delay by either Party in exercising any right, power, or privilege under this Agreement or enforcing any provision of this Agreement shall operate as a waiver thereof, nor preclude either Party from any later exercise thereof or the exercise of any other right, power, or privilege under this Agreement, nor seeking enforcement or any available remedy.

18. Third-Party Beneficiaries. This Agreement is intended solely for the benefit of the Parties hereto, and nothing herein shall be construed to create any duty to or standard of care with reference to, or any liability to, any person not a Party hereto.

19. Amendment. This Agreement may only be amended or modified by the mutual written agreement of both Parties.

20. Relationship of the Parties. Nothing in this Agreement shall be deemed to create an association, joint venture, partnership or a principal/agent relationship between the Parties or to impose any such partnership on either Party.

21. Headings. The descriptive headings used for the various sections in this Agreement have been inserted for convenience and reference only and shall in no way affect the meaning or interpretation, or modify or restrict any of the terms and provisions hereof.

22. Counterparts. This Agreement may be executed and delivered in any number of counterparts (including facsimile transmission and/or other transmission/delivery methodologies mutually acceptable to the Parties), all of which taken together shall constitute one instrument.

*Optional Choice of Law Provision: Please check the preceding box if the following provision is applicable to this Agreement. In the event that the preceding box is not checked, the following Section 23 shall not apply to this Agreement and shall be of no force or effect as between the Parties.*

23. Governing Law. This Agreement shall be governed by, construed and enforced in accordance with the laws of \_\_\_\_\_ without regard to principles of conflicts of law.

*Optional Provision for Governmental and/or Public Power Entities: Please check the preceding box if the following provision is applicable to this Agreement. In the event that the preceding box is not checked, the following Section 24 shall not apply to this Agreement and shall be of no force or effect as between the Parties.*

24. Freedom of Information Law. Notwithstanding anything to the contrary in this Agreement, the Parties acknowledge and agree that \_\_\_\_\_ *[insert name of Party that is the Governmental and/or Public Power Entity]* is subject to and required to comply with the requirements of \_\_\_\_\_ (“Act”) *[insert reference to Freedom of Information Law/Open Record/Sunshine Law that the Governmental and/or Public Power Entity is subject to]* and shall not be deemed to breach or otherwise be in violation of the terms and conditions of this Agreement as a result of actions taken in compliance with the Act; provided, however that any disclosure of Confidential Information required by the Act shall be deemed a Required Disclosure and subject to the requirements of Section 4 of this Agreement.

*Optional Provision for Limiting/Clarifying the Scope of the Agreement: Please check the preceding box if the following provision is applicable to this Agreement. In the event that the preceding box is not checked, the following Section 25 shall not apply to this Agreement and shall be of no force or effect as between the Parties.*

25. Limitation of Scope. Notwithstanding anything to the contrary in this Agreement, the Parties acknowledge and agree that for purposes of this Agreement, the “Purpose” shall be defined solely to relate to the discussions, evaluation, negotiations and/or consummation of one or more potential energy or related product transactions between the Parties related to \_\_\_\_\_ *[insert description of specific contemplated transaction(s) to which the Agreement is intended to apply]*.



Optional Provision for Clarifying Applicability of NAEMA Tariff Confidentiality Provisions (Section 11.11 of the NAEMA Tariff): Please check the preceding box if the following provision is applicable to this Agreement. In the event that the preceding box is not checked, the following Section 26 shall not apply to this Agreement and shall be of no force or effect as between the Parties.

26. Section 11.11 of the NAEMA Tariff. Notwithstanding anything to the contrary in this Agreement, in the event that the Parties enter into any transaction pursuant to and governed by the North American Energy Markets Association Capacity and Energy Tariff (“NAEMA Tariff”), the confidentiality obligations with respect to any and all such transactions shall be as specified below; provided, however, that regardless of the election below, any and all such transactions shall be governed by the terms and conditions of the NAEMA Tariff. If this Section 26 is selected by the Parties to be applicable to this Agreement and no option is selected below, then Option 1 shall apply exclusively.

**Option 1:** The confidentiality obligations with respect to any and all such transactions shall be governed by Section 11.11 of the NAEMA Tariff.

**Option 2:** The confidentiality obligations with respect to any and all such transactions shall be governed by this Agreement and the terms and conditions of this Agreement shall supercede and replace Section 11.11 of the NAEMA Tariff with respect to any and all such transactions.

IN WITNESS WHEREOF, this Agreement has been executed by an authorized representative of each Party as of the date set forth beneath with effect as of the Effective Date.

\_\_\_\_\_

\_\_\_\_\_

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

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

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

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

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