

## PROTECTIVE AGREEMENT

This Protective Agreement (“Agreement”) is entered into this \_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ by and between \_\_\_\_\_ (“Applicant”) and \_\_\_\_\_ (“Intervenor”), and shall govern the use of all Privileged Materials produced by Applicant to Intervenor, or vice versa, in connection with the proceeding before the Federal Energy Regulatory Commission (the “Commission”) in Docket No. \_\_\_\_\_. Applicant and Intervenor are sometimes referred to herein individually as a “Party” or jointly as the “Parties.”

1. Applicant filed in the above-referenced proceeding Privileged Material and/or Critical Energy/Electric Infrastructure Information (“CEII”), as those terms are defined herein. Intervenor is a Participant in such proceeding, as the term Participant is defined in 18 C.F.R. Section 385.102(b), or has filed a motion to intervene or a notice of intervention in such proceeding. Applicant and Intervenor enter into this Agreement to govern the use of Privileged Material and/or CEII produced by, or on behalf of, Applicant and/or Intervenor in the above-referenced proceeding. Notwithstanding any order terminating such proceeding, this Agreement shall remain in effect unless and until specifically modified or terminated by the Commission or a court of competent jurisdiction.

2. The Commission’s regulations<sup>1</sup> and its policy governing the labelling of controlled unclassified information (“CUI”),<sup>2</sup> establish and distinguish the respective designations of Privileged Material and CEII. As to these designations, this Agreement provides that a Party:

- A. *may* designate as Privileged Material any material which customarily is treated by that Party as commercially sensitive or proprietary or material subject to a legal privilege, which is not otherwise available to the public, and which, if disclosed, would subject that Party or its customers to risk of competitive disadvantage or other business injury; and
- B. *must* designate as CEII, any material that meets the definition of that term as provided by 18 C.F.R. §§ 388.113(a), (c).

3. For the purposes of this Agreement, the listed terms are defined as follows:

- A. Party and Parties: As defined above.
- B. Privileged Material:<sup>3</sup>

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<sup>1</sup> Compare 18 C.F.R. § 388.112 with 18 C.F.R. § 388.113.

<sup>2</sup> *Notice of Document Labelling Guidance for Documents Submitted to or Filed with the Commission or Commission Staff*, 82 Fed. Reg. 18632 (Apr. 20, 2017) (issued by Commission Apr. 14, 2017).

<sup>3</sup> The Commission’s regulations state that “[f]or the purposes of the Commission’s filing requirements, non-CEII subject to an outstanding claim of exemption from disclosure under FOIA, . . . , will be referred to as privileged material.” 18 C.F.R. § 388.112(a). The regulations further state that “[f]or material filed in proceedings set for trial-

- i. Material (including depositions) provided by a Party in response to discovery requests or filed with the Commission, and that is designated as Privileged Material by such Party;<sup>4</sup>
- ii. Material that is privileged under federal, state, or foreign law, such as work-product privilege, attorney-client privilege, or governmental privilege, and that is designated as Privileged Material by such Party;<sup>5</sup>
- iii. Any information contained in or obtained from such designated material;
- iv. Any other material which is made subject to this Agreement by a Presiding Administrative Law Judge (“Presiding Judge”) or the Chief Administrative Law Judge (“Chief Judge”) in the absence of a Presiding Judge or where no presiding judge is designated, the Commission, any court, or other body having appropriate authority, or by agreement of the Parties (subject to approval by the relevant authority);
- v. Notes of Privileged Material (memoranda, handwritten notes, or any other form of information (including electronic form) which copies or discloses Privileged Material);<sup>6</sup> or
- vi. Copies of Privileged Material.
- vii. Privileged Material does not include:
  - a. Any information or document that has been filed with and accepted into the public files of the Commission, or contained in the public files of any other federal or state agency, or any federal or state court, unless the information or document has been determined to be privileged by such agency or court;
  - b. Information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this Agreement; or

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type hearing or settlement judge proceedings, a participant’s access to material for which privileged treatment is claimed is governed by the presiding official’s protective order.” 18 C.F.R. § 388.112(b)(2)(v).

<sup>4</sup> See *infra* P 11 for the procedures governing the labeling of this designation.

<sup>5</sup> The Commission’s regulations state that “[a] presiding officer may, by order . . . restrict public disclosure of discoverable matter in order to . . . [p]reserve a privilege of a participant. . . .” 18 C.F.R. § 385.410(c)(3). To adjudicate such privileges, the regulations further state that “[i]n the absence of controlling Commission precedent, privileges will be determined in accordance with decisions of the Federal courts with due consideration to the Commission’s need to obtain information necessary to discharge its regulatory responsibilities.” 18 C.F.R. § 385.410(d)(1)(i).

<sup>6</sup> Notes of Privileged Material are subject to the same restrictions for Privileged Material except as specifically provided in this Agreement.

- c. Any information or document labeled as “Non-Internet Public” by a Party, in accordance with Paragraph 30 of Commission Order No. 630.<sup>7</sup>
- C. Critical Energy/Electric Infrastructure Information (“CEII”): As defined at 18 C.F.R. §§ 388.113(a), (c).
- D. Non-Disclosure Certificate: The certificate attached to this Agreement, by which persons granted access to Privileged Material and/or CEII must certify their understanding that such access to such material is provided pursuant to the terms and restrictions of this Agreement, and that such persons have read the Agreement and agree to be bound by it. All executed Non-Disclosure Certificates must be provided to the Parties.
- E. Reviewing Representative: A person who has signed a Non-Disclosure Certificate and who is:
  - i. Commission Trial Staff designated as such in this proceeding;
  - ii. An attorney who has made an appearance in this proceeding for a Party;
  - iii. Attorneys, paralegals, and other employees associated for purposes of this case with an attorney who has made an appearance in this proceeding on behalf of a Party;
  - iv. An expert or an employee of an expert retained by a Party for the purpose of advising, preparing for, submitting evidence or testifying in this proceeding;
  - v. A person designated as a Reviewing Representative by order of a Presiding Judge, the Chief Judge, or the Commission; or
  - vi. Employees or other representatives of Parties appearing in this proceeding with significant responsibility for this docket.

4. Privileged Material and/or CEII shall be made available under the terms of this Agreement only to Parties and only to their Reviewing Representatives as provided in Paragraphs 6-10 of this Agreement. The contents of Privileged Material, CEII, or any other form of information that copies or discloses such materials shall not be disclosed to anyone other than in accordance with this Agreement and shall be used only in connection with this specific proceeding.

5. All Privileged Material and/or CEII must be maintained in a secure place. Access to those materials must be limited to Reviewing Representatives specifically authorized pursuant to Paragraphs 7-9 of this Agreement.

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<sup>7</sup> FERC Stat. & Reg. ¶31,140.

6. Privileged Material and/or CEII must be handled by each Party and by each Reviewing Representative in accordance with the Non-Disclosure Certificate executed pursuant to Paragraph 9 of this Agreement. Privileged Material and/or CEII shall not be used except as necessary for the conduct of this proceeding, nor shall they (or the substance of their contents) be disclosed in any manner to any person except a Reviewing Representative who is engaged in this proceeding and who needs to know the information in order to carry out that person's responsibilities in this proceeding. Reviewing Representatives may make copies of Privileged Material and/or CEII, but such copies automatically become Privileged Material and/or CEII. Reviewing Representatives may make notes of Privileged Material, which shall be treated as Notes of Privileged Material if they reflect the contents of Privileged Material.

7. If a Reviewing Representative's scope of employment includes any of the activities listed under this Paragraph 7, such Reviewing Representative may not use information contained in any Privileged Material and/or CEII obtained in this proceeding for a commercial purpose (*e.g.*, to give a Party or competitor of any Party a commercial advantage):

- A. Energy marketing;
- B. Direct supervision of any employee or employees whose duties include energy marketing; or
- C. The provision of consulting services to any person whose duties include energy marketing.

8. In the event that a Party wishes to designate a person not described in Paragraph 3.E above as a Reviewing Representative, the Party must seek agreement from the Party providing the Privileged Material and/or CEII. If an agreement is reached, the designee shall be a Reviewing Representative pursuant to Paragraph 3.D of this Agreement with respect to those materials. If no agreement is reached, the matter must be submitted to a Presiding Judge, the Chief Judge, or the Commission for resolution.

9. A Reviewing Representative shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to Privileged Material and/or CEII pursuant to this Agreement until three business days after that Reviewing Representative first has executed and served a Non-Disclosure Certificate.<sup>8</sup> However, if an attorney qualified as a Reviewing Representative has executed a Non-Disclosure Certificate, any participating paralegal, secretarial and clerical personnel under the attorney's instruction, supervision or control need not do so. Attorneys designated Reviewing Representatives are responsible for ensuring that persons under their supervision or control comply with this Agreement, and must take all reasonable precautions to ensure that Privileged Material and/or CEII are not disclosed to unauthorized persons. All executed Non-Disclosure Certificates must be served on the Parties.

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<sup>8</sup> During this three-day period, a Party may file an objection with the other Party, a Presiding Judge or the Commission contesting that an individual qualifies as a Reviewing Representative, and the individual shall not receive access to the Privileged Material and/or CEII until resolution of the dispute.

10. Any Reviewing Representative may disclose Privileged Material and/or CEII to any other Reviewing Representative as long as both Reviewing Representatives have executed a Non-Disclosure Certificate. In the event any Reviewing Representative to whom Privileged Material and/or CEII are disclosed ceases to participate in this proceeding, or becomes employed or retained for a position that renders him or her ineligible to be a Reviewing Representative under Paragraph 3.D of this Agreement, access to such materials by that person shall be terminated. Even if no longer engaged in this proceeding, every person who has executed a Non-Disclosure Certificate shall continue to be bound by the provisions of this Agreement and the Non-Disclosure Certificate for as long as the Agreement is in effect.<sup>9</sup>

11. All Privileged Material and/or CEII in this proceeding filed with the Commission, submitted to a Presiding Judge, or submitted to any Commission personnel, must comply with the Commission's *Notice of Document Labelling Guidance for Documents Submitted to or Filed with the Commission or Commission Staff*.<sup>10</sup> Consistent with those requirements:

- A. Documents that contain Privileged Material must include a top center header on each page of the document with the following text: CUI//PRIV. Any corresponding electronic files must also include this text in the file name.
- B. Documents that contain CEII must include a top center header on each page of the document with the following text: CUI//CEII. Any corresponding electronic files must also include this text in the file name.
- C. Documents that contain both Privileged Material and CEII must include a top center header on each page of the document with the following text: CUI//CEII//PRIV. Any corresponding electronic files must also include this text in the file name.
- D. The specific content on each page of the document that constitutes Privileged Material and/or CEII must also be clearly identified. For example, lines or individual words or numbers that include both Privileged Material and CEII shall be prefaced and end with "BEGIN CUI//CEII//PRIV" and "END CUI//CEII//PRIV".

12. [Reserved]

13. If either Party desires to include, utilize, or refer to Privileged Material or information derived from Privileged Material in testimony or other exhibits during the hearing in this proceeding in a manner that might require disclosure of such materials to persons other than Reviewing Representatives, that Party first must notify both counsel for the disclosing Party and any Presiding Judge, and identify all such Privileged Material. Thereafter, use of such Privileged Material will be governed by procedures determined by the Parties or, if applicable, the Presiding Judge.

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<sup>9</sup> See *infra* P21.

<sup>10</sup> 82 Fed. Reg. 18632 (Apr. 20, 2017) (issued by Commission Apr. 14, 2017).

14. Nothing in this Agreement shall be construed as precluding any Party from objecting to the production or use of Privileged Material and/or CEII on any appropriate ground.

15. Nothing in this Agreement shall preclude any Party from requesting a Presiding Judge (or the Chief Judge in a Presiding Judge's absence or where no presiding judge is designated), the Commission, or any other body having appropriate authority, to find this Agreement should not apply to all or any materials previously designated Privileged Material pursuant to this Agreement. A Presiding Judge (or the Chief Judge in a Presiding Judge's absence or where no presiding judge is designated), the Commission, or any other body having appropriate authority may alter or amend this Agreement as circumstances warrant at any time during the course of this proceeding.

16. Each Party governed by this Agreement has the right to seek changes in it as appropriate from a Presiding Judge (or the Chief Judge in a Presiding Judge's absence or where no presiding judge is designated), the Commission, or any other body having appropriate authority.

17. Subject to Paragraph 18, a Presiding Judge (or the Chief Judge in a Presiding Judge's absence or where no presiding judge is designated), or the Commission shall resolve any disputes arising under this Agreement pertaining to Privileged Material according to the following procedures. Prior to presenting any such dispute to a Presiding Judge, the Chief Judge, or the Commission, the Parties to the dispute shall employ good faith best efforts to resolve it.

- A. Any Party that contests the designation of material as Privileged Material shall notify the Party that provided the Privileged Material by specifying in writing the material for which the designation is contested.
- B. In any challenge to the designation of material as Privileged Material, the burden of proof shall be on the Party seeking protection. If a Presiding Judge, the Chief Judge, or the Commission finds that the material at issue is not entitled to the designation, the procedures of Paragraph 18 shall apply.
- C. The procedures described above shall not apply to material designated by a Party as CEII. Material so designated shall remain subject to the provisions of this Agreement, unless a Party requests and obtains a determination from the Commission's CEII Coordinator that such material need not retain that designation.

18. The designator will have five (5) days in which to respond to any pleading filed with a Presiding Judge, the Chief Judge, or the Commission requesting disclosure of Privileged Material. Should such Presiding Judge, the Chief Judge, or the Commission, as appropriate, determine that the information should be made public, such Presiding Judge, the Chief Judge, or the Commission will provide notice to the designator no less than five (5) days prior to the date on which the material will become public. This Agreement shall automatically cease to apply to such material on the sixth (6th) calendar day after the notification is made unless the designator files a motion with such Presiding Judge, the Chief Judge, or the Commission, as appropriate, with supporting affidavits, demonstrating why the material should continue to be privileged. Should such a motion be filed, the material will remain confidential until such time as the

interlocutory appeal or certified question has been addressed by the Motions Commissioner or Commission, as provided in the Commission's regulations, 18 C.F.R. §§ 385.714, 385.715. No Party waives its rights to seek additional administrative or judicial remedies after a Presiding Judge or Chief Judge decision regarding Privileged Material or the Commission's denial of any appeal thereof or determination in response to any certified question. The provisions of 18 C.F.R. §§ 388.112 and 388.113 shall apply to any requests under the Freedom of Information Act (5 U.S.C. § 552) for Privileged Material and/or CEII in the files of the Commission.

19. Privileged Material and/or CEII shall remain available to Parties until the later of 1) the date an order terminating this proceeding no longer is subject to judicial review, or 2) the date any other Commission proceeding relating to the Privileged Material and/or CEII is concluded and no longer subject to judicial review. After this time, the Party that produced the Privileged Material and/or CEII may request (in writing) that all other Parties return or destroy the Privileged Material and/or CEII. This request must be satisfied with within fifteen (15) days of the date the request is made. However, copies of filings, official transcripts and exhibits in this proceeding containing Privileged Material, or Notes of Privileged Material, may be retained if they are maintained in accordance with Paragraph 5 of this Agreement. If requested, each Party also must submit to the Party making the request an affidavit stating that to the best of its knowledge it has satisfied the request to return or destroy the Privileged Material and/or CEII. To the extent Privileged Material and/or CEII are not returned or destroyed, they shall remain subject to this Agreement.

20. Nothing in this Agreement shall be deemed to preclude either Party from independently seeking through discovery in any other administrative or judicial proceeding information or materials produced in this proceeding under this Agreement. Neither Party waives the right to pursue any other legal or equitable remedies that may be available in the event of actual or anticipated disclosure of Privileged Material and/or CEII.

IN WITNESS WHEREOF, the Parties each have caused this Agreement to be signed by their respective duly authorized representatives as of the date first set forth above.

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

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

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

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

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

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

Representing Applicant

Representing Intervenor

NON-DISCLOSURE CERTIFICATE

I hereby certify my understanding that access to Privileged Material and/or Critical Energy/Electric Infrastructure Information (CEII) is provided to me pursuant to the terms and restrictions of the Agreement dated \_\_\_\_\_, 20\_\_ by and between [Applicant] and [Intervenor] concerning materials in Federal Energy Regulatory Commission Docket No. \_\_\_\_\_ (the "Agreement"), that I have been given a copy of and have read the Agreement, and that I agree to be bound by it.

I understand that the contents of Privileged Material and/or CEII, any notes or other memoranda, or any other form of information that copies or discloses such materials, shall not be disclosed to anyone other than in accordance with the Agreement. I acknowledge that a violation of this certificate constitutes a violation of an order of the Federal Energy Regulatory Commission.

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

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

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

Representing: \_\_\_\_\_

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