



**CITY OF LODI
COUNCIL COMMUNICATION**

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AGENDA TITLE: Adopt Resolution Approving the Northern California Power Agency Agreement Regarding the Use and Non-Disclosure of Information for NCPA Projects and Authorizing Execution by the City Manager

MEETING DATE: May 1, 2013

PREPARED BY: Electric Utility Director

RECOMMENDED ACTION: Adopt a resolution approving the Northern California Power Agency Agreement Regarding the Use and Non-disclosure of Information for NCPA Projects and authorizing execution by the City Manager.

BACKGROUND INFORMATION: As a signatory to the NCPA Joint Powers Agreement and various NCPA generation project and service agreements, the City receives and NCPA provides a number of services that require the creation and administration of a wide range of commercially sensitive data and information. Through its participation in various NCPA services, the City is entitled to access this commercially sensitive data and information that pertains to the City's participation share of said services.

NCPA, acting under direction from the NCPA Commission, has collaborated with its members to create the attached NDA. The NDA is a means for NCPA and its members to supplement their "cultures of compliance" by: (i) formally acknowledging the commercially sensitive nature of the data and information NCPA creates and manages, (ii) formally acknowledging the prohibition and restrictions on sharing commercially sensitive data and information with third parties under applicable law, and (iii) mutually agreeing to treat commercially sensitive data and information as "Confidential Information" to the extent allowed under law.

The NDA will require administrative during its term. The City will need to select and maintain one staff person to act in an administrative role to coordinate all communications between the City and NCPA relating to the City's access to NCPA's secured web service (i.e. Data Portal). This activity would involve requesting access for new users, modifying access privileges for existing users, or deactivating user accounts. The NDA contains two exhibits. Exhibit A is to be signed by each employee of the City that accesses the Data Portal directly. Exhibit B is to be signed by each employee of a consultant under contract with the City that receives NCPA Confidential Information, either directly or indirectly.

FISCAL IMPACT: No additional funding is required.

FUNDING AVAILABLE: Not applicable.

Handwritten signature of Elizabeth A. Kirkley.

Elizabeth A. Kirkley
Electric Utility Director

EAK/MF/lst

APPROVED:

Handwritten signature of Konradt Bartlam.
Konradt Bartlam, City Manager

**NORTHERN CALIFORNIA POWER AGENCY
AGREEMENT REGARDING THE USE AND
NON-DISCLOSURE OF INFORMATION
FOR NCPA PROJECTS**

WHEREAS, pursuant to NCPA project power sale agreements, associated operating agreements, facility agreements, and other applicable service agreements (collectively referred to as "NCPA Project"), the Receiving Party, as a participant in one or more NCPA Projects, is entitled to receive certain Confidential Information from NCPA concerning the operation of NCPA Projects in which it holds an entitlement share, expressed as either a generation entitlement share or project participation percentage, to output from the NCPA Project; and

WHEREAS, NCPA intends to provide NCPA Project data, including Confidential Information, to the Receiving Party primarily through its Data Portal; and

WHEREAS, some of the Confidential Information provided includes data relating to the Receiving Party's entitlement share or project participation percentage of the NCPA Project including operations, bids and costs; and

WHEREAS, the parties recognize that NCPA Project data designated as Confidential Information has the potential to be misused for unlawful market purposes; and

WHEREAS, the parties have agreed to put procedures in place to prevent the use or disclosure of the Confidential Information in a manner that might be construed to violate federal or California law;

THEREFORE, in consideration of the mutual covenants in this Agreement, NCPA and the Receiving Party agree to contractual limits and protection concerning the disclosure and use of the Confidential Information, as follows:

1. Purpose, Scope and Definition. The purpose of this Agreement is to permit the Receiving Party to review and use the Confidential Information to which it is entitled pursuant to its generation entitlement share or project participation percentage in an NCPA Project, for any lawful purpose, subject to the restrictions on disclosure to Third Parties and uses set forth herein. Confidential Information under this Agreement consists of commercially sensitive information, which may include, but is not limited to, price, quantity, location or timing of electric industry marketing decisions, provided by NCPA to the Receiving Party, whether through the Data Portal or otherwise, pertaining to the Receiving Party's generation entitlement share or project participation percentage in NCPA Projects. Except as otherwise provided in Paragraphs 4 and 5, Confidential Information includes:

- (a) All written materials marked "Confidential" or "Proprietary" or "Sensitive" or other words of similar import provided by NCPA to the Receiving Party;
- (b) All observations of equipment or data, including computer screens, and oral disclosures that are indicated as "Confidential" or "Proprietary" or "Sensitive" or other words of similar import at the time of the observation or the disclosure; and

- (c) Notes, copies printouts or summaries of or regarding the Confidential Information prepared by the Receiving Party or its employees, agents, consultants, attorneys or members.

2. Non-Disclosure. Subject to Paragraph 4 below, the Receiving Party shall keep the Confidential Information in strict confidence and shall not disclose such information or otherwise make it available, in any form or manner, to any other person or entity (a “Third Party”) other than its employees, agents, consultants, attorneys, or members who are reasonably necessary to assist the Receiving Party with decisions regarding its interest in the NCPA Project. Employees, agents, consultants, attorneys and members shall be classified as follows:

- (a) Designated Reviewers are persons authorized by the Receiving Party Administrator to access the Data Portal. The Receiving Party shall cause any such Designated Reviewer who is an employee of the Receiving Party to execute Exhibit A to the Receiving Party’s Agreement prior to such employee receiving or viewing Confidential Information through the Data Portal. The Receiving Party shall cause any such Designated Reviewer who is a consultant of the Receiving Party to execute Exhibit B to the Receiving Party’s Agreement prior to such consultant receiving or viewing Confidential Information through the Data Portal.
- (b) Designated Recipients are persons who are not authorized to access the Data Portal, but who are authorized to view Confidential Information from the Data Portal as part of their work in assisting the Receiving Party with decisions regarding its interest in the NCPA Project. The Receiving Party shall cause any such Designated Recipient who is an employee of the Receiving Party to review this Agreement and shall take such measures as it deems prudent to ensure that the Designated Recipient understands both the Receiving Party’s and his or her responsibilities with regard thereto. The Receiving Party shall cause any such Designated Recipient who is a consultant to execute Exhibit B to this Agreement prior to such consultant receiving or viewing Confidential Information.
- (c) Decision Makers are persons who are members of the governing board, including, but not limited to, city council, governing board, and utility commissions, of the Receiving Party, executives of the Receiving Party or attorneys for the Receiving Party who are not authorized to access the Data Portal but who may review reports and recommendations summarizing aggregated data that may be based on Confidential Information, in the course of making or approving decisions related to the Receiving Party’s decisions about its NCPA Project interests. The Receiving Party shall take such measures as it deems prudent to ensure that Decision Makers understand the Receiving Party’s and their responsibilities with regard thereto.
- (d) A copy of each executed Exhibit A or B shall be provided to NCPA.

It is the ongoing responsibility of the Receiving Party to ensure that: (i) each Exhibit A and Exhibit B is accurate; (ii) each Exhibit A and Exhibit B permits access only to a current Designated Reviewer or Designated Recipient of the Receiving Party; (iii) each Designated Recipient or Designated Reviewer receiving the Confidential Information understands the scope of permissible use; and (iv) each new Exhibit A and Exhibit B, and any notice of cancellation of an Exhibit A or Exhibit B, is immediately submitted to NCPA. The Receiving Party shall immediately report to NCPA any unauthorized access to NCPA’s Data Portal or

other breach of this Agreement.

3. Use of Confidential Information.

- (a) It is understood and agreed by the Receiving Party that both parties have obligations under federal and California law to safeguard the Confidential Information against use or disclosure for purposes inconsistent with federal or California antitrust laws or for purposes of market manipulation.
- (b) The Receiving Party may use the Confidential Information received hereunder for any lawful purpose, provided that it does not disclose the Confidential Information to Third Parties other than Designated Reviewers, Designated Recipients, or Decision Makers as provided in Paragraph 2, and receives similar commitments as provided in Paragraph 2.
- (c) Receiving Party shall take all prudent measures to ensure that its Designated Reviewers, Designated Recipients and Decision Makers use the Confidential Information in compliance with this Agreement and with all laws and regulations, and safeguard its confidentiality.

4. Exceptions to Non-Disclosure. Notwithstanding Paragraph 2 above, a party to this Agreement shall not have breached any obligation under this Agreement if the Confidential Information is disclosed to a Third Party when the Confidential Information:

- (a) was in the public domain at the time of such disclosure or is subsequently made available to the public consistent with the terms of this Agreement; or
- (b) had been received by the Receiving Party prior to the time of disclosure through other means without restriction on its use, or had been independently developed by the Receiving Party without use of Confidential Information, as demonstrated through documentation; or
- (c) is subsequently disclosed to the Receiving Party by a Third Party without restriction on use imposed by the Third Party and without breach of any law, agreement or legal duty to the Third Party; or
- (d) subject to the provisions of Paragraph 5, is used or disclosed pursuant to statutory duty or an order, subpoena or other lawful process issued by a court or other governmental authority of competent jurisdiction.

5. Notice of Pending Third Party Disclosure.

- (a) In the event that a court or other governmental authority of competent jurisdiction issues an order, subpoena or other lawful process requiring the disclosure of the Confidential Information, the Receiving Party shall notify NCPA immediately upon receipt thereof to allow NCPA to be involved in such proceeding for the purpose of safeguarding the Confidential Information.
- (b) In the event that the Receiving Party is a federal, state, or local governmental entity

and/or is subject to public records law or regulation, including but not limited to the federal Freedom of Information Act (FOIA), U.S. Code Title 5, Section 552, as amended, or the California Public Records Act, California Governmental Code Sections 6250, et seq., the Receiving Party shall: (i) notify NCPA immediately upon receipt of a request for public records that include all or part of the Confidential Information; and (ii) subject to sub-paragraph (c), treat the requested Confidential Information as exempt from disclosure.

- (c) The Receiving Party shall not be in violation of this Agreement if it complies with an order of a court or governmental authority, or a public records law or regulation, requiring disclosure of the Confidential Information, after: (i) NCPA has unsuccessfully sought to maintain the confidentiality of such information as provided herein; (ii) NCPA has notified the Receiving Party in writing that it will take no action to maintain such confidentiality; or (iii) counsel for the Receiving Party has determined that disclosure is required under a public records law or regulation, the counsel for the Receiving Party has provided NCPA with three (3) business days written notice of such determination, and NCPA has not responded or sought an order restraining disclosure within such time period.

6. Term.

- (a) This Agreement shall remain in effect unless and until NCPA provides ten (10) days prior written notice to the Receiving Party of its termination. Termination shall not extinguish any claim, liability or cause of action under this Agreement existing at the time of termination.
- (b) Provisions Surviving Termination. The provisions of Paragraphs 2, 3, 4, and 5 shall survive the termination of this Agreement for a period of five (5) years.
- (c) Destruction of Documents. Nothing in this Agreement shall prevent the Receiving Party from otherwise lawful destruction of documents or files containing Confidential Information in the ordinary course of business, provided that the method of destruction safeguards the Confidential Information.

7. Notices.

- (a) Administrator(s) for Data Portal Access. Receiving Party shall designate one (1) person to act as Administrator on its behalf, and shall provide the name, street address, telephone number, facsimile number and email address of such Administrator to NCPA's Representative designated under sub-paragraph (b) prior to Receiving Party being granted access to the Data Portal. Either party may change the identity of its Administrator or the address for notice to its Administrator by providing notice to the other.

The Receiving Party's Administrator shall administer access to the Data Portal on behalf of Receiving Party's employees, agents, consultants, attorneys or members, including but not limited to making requests for new user accounts, maintenance and

administration of existing user accounts, and administration of digital security certificates. NCPA's Administrator shall administer on behalf of NCPA all such requests by Receiving Party's Administrator.

All communications, pursuant to this sub-paragraph, from Receiving Party's Administrator to NCPA's Administrator shall be in writing, via email, to the following address: dataportaladmin@ncpa.com.

- (b) **Representatives and Addresses.** All notices, requests, demands, and other communications required or permitted under this Agreement other than those between Administrators shall be in writing and shall be either: (i) delivered in person; (ii) sent by U.S. certified mail, postage prepaid; or (iii) sent by overnight delivery; addressed as follows:

Receiving Party:

Entity Name: CITY OF LODI

Name of Contact (person or position):

Elizabeth Kirkley, Electric Utility Director

Address: 1331 South Ham Lane, Lodi CA 95242

Telephone: 209-333-6828

Facsimile: 209-333-6839

Email: ekirkley@lodielectric.com

NCPA:

Dave Dockham
NCPA Assistant General Manager
651 Commerce Drive
Roseville, CA 95678-6411
Phone: 916.781.3636
Fax: 916.783.7693

and

Michael Dean
NCPA General Counsel
555 Capitol Mall, Suite 1200
Sacramento, California 95814
Phone: 916.556.1531
Fax: 916.556.1516

Changed Representatives and Addresses. A party hereto may from time to time change its representative or address for the purpose of notices to that party by notice specifying a new representative or address.

- (c) Effective Date of Notices. All notices and other communications required or permitted under this Agreement that are addressed as provided in this Paragraph 7 shall be effective upon delivery.

8. Complete Agreement; No Other Rights.

- (a) This Agreement contains the complete and exclusive agreement of the parties with respect to the subject matter thereof, and supersedes all discussions, negotiations, representations, warranties, commitments, offers, contracts, and writings prior to the date of this Agreement, with respect to its subject matter. No change to this Agreement shall be effective unless agreed to in writing by the parties hereto. Any conflict between the language of this Agreement and any mark, stamp, annotation or other language identifying something received hereunder as Confidential Information shall be resolved in favor of this Agreement.
- (b) This Agreement is not intended to create any right in or obligation of any party or Third Party other than those expressly stated herein.

9. No Warranties or Representations. Any Confidential Information disclosed by NCPA under this Agreement carries no warranty or representation of any kind, either express or implied. The Receiving Party shall not be entitled to rely on the accuracy, completeness or quality of the Confidential Information, even for the purpose stated in Paragraph 1.

10. Injunctive Relief. The Receiving Party agrees that, in addition to whatever other remedies may be available to NCPA under applicable law, NCPA shall be entitled to obtain injunctive relief with respect to any actual or threatened violation of this Agreement by the Receiving Party, its Designated Recipients or any Third Party to whom Receiving Party disclosed Confidential Information. The Receiving Party agrees that it shall bear all costs and expenses, including reasonable attorneys' fees, that may be incurred by NCPA in enforcing the provisions of this paragraph, only if NCPA prevails in the litigation.

11. Governing Law. This Agreement is made in the State of California and shall be governed by and interpreted in accordance with its laws.

12. Assignment. This Agreement shall be binding upon the parties, their successors, and assigns. The Receiving Party shall not assign this Agreement without NCPA's prior written consent.

13. Construction of Agreement. Ambiguities or uncertainties in the wording of this Agreement shall not be construed for or against any party, but shall be construed in the manner that most accurately reflects the parties' intent as of the date they executed this Agreement.

14. Signature Authority. Each person signing below warrants that he or she has been duly authorized by the party for whom he or she signs to execute this Agreement on behalf of that party.

15. Counterparts. This Agreement may be executed in two or more counterparts, all of which shall be considered one and the same Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement by their duly authorized representatives as of the date set forth above.

NORTHERN CALIFORNIA POWER AGENCY

By: _____

Name: Jim Pope

Title: General Manager

Date:

RECEIVING PARTY:

CITY OF LODI

By: _____

Name: Kondradt Bartlam

Title: City Manager

Date:

Attest:

RANDI JOHL
City Clerk

APPROVED AS TO FORM:

D. STEPHEN SCHWABAUER, City Attorney
JANICE D. MAGDICH, Deputy City Attorney

By: _____


EXHIBIT A

**INDIVIDUAL AGREEMENT TO BE BOUND BY NON-DISCLOSURE AND
USE OF INFORMATION AGREEMENT FOR NCPA PROJECTS**

The undersigned, _____ (print or type name),
employed as _____ (title) by the Receiving Party,
_____, hereby acknowledges that he or she in his/her official
capacity has received a copy of the NORTHERN CALIFORNIA POWER AGENCY
AGREEMENT REGARDING THE USE AND NON-DISCLOSURE OF INFORMATION
FOR NCPA PROJECTS in which the Receiving Party, _____, has
an entitlement interest, dated _____ between the Northern California Power
Agency and the Receiving Party designated therein ("Agreement"). The undersigned hereby
acknowledges that the undersigned has read the Agreement and understands the importance
of maintaining the confidentiality of Confidential Information (as defined in the
Agreement), the provisions of the Agreement relating to such confidentiality, and the
limitations on the use of Confidential Information. In consideration thereof, the undersigned
agrees to be bound by all of the provisions of the Agreement.

Dated: _____

Signed: _____

Print Name: _____

Telephone: _____

Email: _____

EXHIBIT B

**CONSULTANT STATEMENT FOR
NON-DISCLOSURE AND USE OF INFORMATION AGREEMENT FOR NCPA
PROJECTS**

Name of Consulting Entity: _____

Type of business and state in which business organization is formed (e.g. a California corporation): _____

Located At
(address of Consulting Entity): _____

Has been engaged to provide technical support and analysis to the following entity:

Consulting Entity hereby acknowledges that it has received a copy of the NORTHERN CALIFORNIA POWER AGENCY AGREEMENT REGARDING THE USE AND NON-DISCLOSURE OF INFORMATION FOR NCPA PROJECTS in which the Receiving Party, _____, has an entitlement interest, dated _____ between the Northern California Power Agency and the Receiving Party designated therein ("Agreement"). Consulting Entity hereby acknowledges and agrees that in order to access Confidential Information (as defined in the Agreement), Consulting Entity must comply with the provisions of the Agreement, and it agrees to do so.

Consulting Entity acknowledges and agrees that its review of Confidential Information is solely for the purpose of providing consultancy services to the Receiving Party and that its use of Confidential Information shall be limited to the same. To the extent that Consulting Entity provides technical support and analysis to parties who are not party to this Agreement, Consulting Entity agrees that disclosure of Confidential Information to such parties is prohibited by the terms and conditions of the Agreement.

The undersigned agrees that he or she is authorized by the Consulting Entity to execute this Consultant Statement to the Agreement.

Dated: _____

Consulting Entity: _____

By: (signature) _____

Print Name: _____

Telephone: _____

Email: _____

RESOLUTION NO. 2013-84

A RESOLUTION OF THE LODI CITY COUNCIL AUTHORIZING
THE CITY MANAGER TO APPROVE AND ADOPT THE
NORTHERN CALIFORNIA POWER AGENCY (NCPA)
AGREEMENT REGARDING THE USE AND NON-DISCLOSURE
OF INFORMATION FOR NCPA PROJECTS

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WHEREAS, the City of Lodi (City) is a signatory to the Northern California Power Agency (NCPA) Joint Powers Agreement and is a member of NCPA; and

WHEREAS, the City is a participant in several NCPA generation projects and is a signatory to NCPA service agreements; and

WHEREAS, in providing services to the City, NCPA creates and manages data and information that is of a commercially sensitive nature as defined and as practiced under various Federal and California laws and regulations; and

WHEREAS, the City is entitled to access and use data and information directly attributable to its proportionate participation share of NCPA generation and services; and

WHEREAS, NCPA makes this data available via a secured web-service commonly referred to as the NCPA Data Portal and through other means; and

WHEREAS, City staff has established individual user accounts to the NCPA Data Portal and has access to commercially sensitive data and information; and

WHEREAS, the information accessed via the NCPA Data Portal is vital to the business operations and financial accounting practices of the City; and

WHEREAS, NCPA, under the direction of its governing board, has adopted and approved The NCPA Agreement Regarding the Use and Non-Disclosure of Information for NCPA Projects (NDA) to contractually facilitate future access to the NCPA Data Portal and commercially sensitive data and information by its Members' staff and consultants; and

WHEREAS, NCPA, under the direction of its governing board, will not make commercially sensitive data and information available absent a fully executed non-disclosure agreement effective July 1, 2013; and

WHEREAS, executing the NDA would facilitate continued access to commercially sensitive data and information and mitigate potential service interruptions; and

WHEREAS, the NDA would require the City to establish one staff person to act in an administrative role whose duties would include establishing new users, modifying user account privileges, annually renewing accounts, and deactivating user accounts; and

WHEREAS, the NDA would require that each City employee that directly accesses the NCPA Data Portal to sign Exhibit A to the NDA.

WHEREAS, the NDA would require that each individual employed by a consultant under contract with the City that works with or otherwise receives commercially sensitive data or information related to NCPA Projects, as defined in the NDA, whether accessed directly or indirectly, to sign Exhibit B to the NDA; and

NOW, THEREFORE, BE IT RESOLVED that the Lodi City Council does hereby:

1. Adopt and approve the NDA by and between the City and the Northern California Power Agency (NCPA); and
2. Delegate authority to the City Manager to execute the NDA on behalf of the City; and
3. Delegate authority to the Electric Utility Director, or his/her designee, to select a Data Portal Administrator and update this selection as needed; and
4. Direct staff to evaluate access to the NCPA Data Portal and users of confidential information and execute the appropriate NDA Exhibits; and
5. Direct staff to evaluate the need to develop internal policies and procedures in accessing and using Confidential Information, as defined in the NDA.

Dated: May 1, 2013

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I hereby certify that Resolution No. 2013-84 was passed and adopted by the City Council of the City of Lodi in a regular meeting held May 1, 2013, by the following vote:

AYES: COUNCIL MEMBERS – Hansen, Katzakian, Mounce, and Mayor Nakanishi

NOES: COUNCIL MEMBERS – Johnson

ABSENT: COUNCIL MEMBERS – None

ABSTAIN: COUNCIL MEMBERS – None


RANDI JOHL
City Clerk