**Appendix A**

**Confidentiality Agreement for All-Requirements Retail Electric Power Supply for Municipal and Government Accounts**

**between**

**THE CAPE LIGHT COMPACT**

**and**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ [Company]*[[1]](#footnote-1)***

for

This Confidentiality Agreement (“Agreement”) is entered into by and between the Cape Light Compact (“Compact”) and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, a \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ [**insert jurisdiction and state of organization**] (the “Company”) and is effective as of the date of execution by the Company as set forth below.

WHEREAS, pursuant to G. L. c. 40, § 4A, the towns of Aquinnah, Barnstable, Bourne, Brewster, Chatham, Chilmark, Dennis, Edgartown, Eastham, Falmouth, Harwich, Mashpee, Oak Bluffs, Orleans, Provincetown, Sandwich, Tisbury, Truro, West Tisbury, Wellfleet, and Yarmouth, and the counties of Barnstable and Dukes County (collectively, the “Members”) entered into an inter-governmental agreement to act together as the Cape Light Compact (“Compact”);

WHEREAS, the Compact, issued a request for proposals (the “RFP”) for all-requirements competitive retail electric power supply for the municipal accounts of the Members of the Compact and for certain other government rate electric accounts located within the members of the Compact (collectively, the “RFP Participants”);

WHEREAS, the Compact, acting as agent for the Participants in issuing the RFP, desires to supply certain confidential information to the Company so that the Company may submit a proposal in response to the RFP;

WHEREAS, the Company may also disclose certain confidential information in its proposal; and

WHEREAS, the parties desire to maintain the confidentiality of such information to the greatest extent allowed by law.

NOW THEREFORE, the parties hereby agree and state as follows:

1. *Confidential Information.* The term “Confidential Information” means all trade secrets, or confidential, competitively sensitive or other proprietary information provided by either party in connection with the RFP and/or the execution or performance of the Municipal Competitive Electric Supply Agreement that the parties may enter into (the “Purpose”), whether disclosed directly or indirectly, in writing or orally, and which, if in tangible form, is marked by the disclosing party with the words “Confidential” or “Proprietary” or marking of similar import, or if disclosed orally, is identified as confidential at the time of disclosure and in a written notice delivered to the non-disclosing party promptly following disclosure. Confidential Information also includes customer account load data which is being made available to the Company from the Compact’s current supplier and/or NSTAR Electric Company d/b/a Eversource Energy in connection with the RFP (the “Confidential Load Data”) Confidential Information does not include:

(i) information already in the possession of the non-disclosing party at the time of disclosure by the disclosing party, as long as such information was not provided by the disclosing party;

(ii) information that is now or later becomes publicly available, unless such information becomes publicly available as a result of any action or inaction on the part of the non-disclosing party;

(iii) information received by the non-disclosing party from a third party, unless such third party was under a duty of confidentiality with respect to such information;

(iv) information for which disclosure is required under the Massachusetts Public Records Act, including, without limitation, G.L. c. 4, §7, cl. 26 and G.L. c. 66, §10; or

(v) information that is not designated or identified by the disclosing party as “Confidential” or “Proprietary” at the time of its initial submission. Such information shall be presumptively subject to disclosure under the Public Records Act.

2. *Use of Confidential Information*. The parties shall use the Confidential Information exclusively in connection with the Purpose. Each party shall receive all Confidential Information in strict confidence and shall protect the Confidential Information against disclosure using the same degree of care, but no less than a reasonable degree of care, that each party uses to protect its own confidential information.

3. *Disclosure to Third Parties.* The non-disclosing party agrees that it will not disclose any Confidential Information to any third party without the prior written consent of the disclosing party. After having obtained the written consent of the disclosing party, the non-disclosing party agree(s) that it will: (i) advise the third party of the terms of this Agreement; (ii) advise such party that it will be bound by the terms of this Agreement; and (iii) have such party execute a Non-Disclosure Certificate in the form attached to this Agreement as Exhibit A. The non-disclosing party may disclose Confidential Information only to consultants and contractors and other agents of the non-disclosing party who execute Non-Disclosure Certificates.

1. *Ownership of Confidential Information; No Implied License or Warranty*. Each party

acknowledges that it has no ownership or proprietary rights in the disclosing party’s Confidential Information, and that the Confidential Information is the sole property of the disclosing party. Nothing in this Agreement will be construed as granting as rights to the receiving party by license or otherwise, to any of the disclosing party’s Confidential Information, except as specifically stated in this Agreement. Neither party makes any warranty or guaranty as to the accuracy of Confidential Information disclosed hereunder, nor is any assurance provided that Confidential Information is fit for any particular intended use or purpose. Each party shall rely on Confidential Information only at its own risk.

5. *Notes, Copies and Abstracts*. To the extent necessary to carry out the Purpose, the receiving party may make notes, copies or abstracts of the Confidential Information, provided that all such notes, copies and abstracts themselves are marked as confidential and provided that the receiving party maintains a written record of the distribution of all such copies and abstracts.

6. *Return of Confidential Information*. Within fourteen (14) days of receiving notice that it is not the winning bidder, the Company will return to the Compact all copies of Confidential Information, and will destroy all notes, copies, abstracts, documents, computer files and other media that contain Confidential Information, and will provide to the Compact a written certification of an officer of the receiving party that it has done so. If the Company is the winning bidder, within fourteen (14) days after the Company has ceased to provide services to the Compact, the Company will return to the Compact all copies of Confidential Information, and will destroy all notes, copies, abstracts, documents, computer files and other media that contain Confidential Information, and will provide to the Compact a written certification of an officer of the receiving party that it has done so. If requested in writing, the Compact will return any Confidential Information received from the Company upon expiration of the relevant document retention period under Massachusetts Law. Each party agrees that upon the return of the Confidential Information, it shall continue to be bound by the terms of this Agreement.

7. *Scope of Agreement*. This Agreement is binding upon the employees, officers, directors, agents, representatives, attorneys, contractors and consultants and affiliates of each party. The Company understands and agrees that certain Confidential Information disclosed by the Compact may be owned by the Participants and that the Compact is disclosing such information in its role as agent for the Participants. The Company understands and agrees that such information shall be entitled be treated as Confidential Information under this Agreement.

8. *Consent of the Disclosing Party.* As to any instance under this Agreement whereby the non-disclosing party is required to obtain the consent of the disclosing party prior to taking certain actions, the disclosing party reserves the right to withhold consent for any reason.

9. *Term.* This Agreement shall become effective when executed by both parties and shall continue in effect until either: (i) in the event that the Company is the successful bidder, two (2) years after the Company has ceased to provide services to the Compact, or until sooner terminated by the written agreement of both parties hereto, or (ii) the event that the Company is not the successful bidder, two (2) years after termination of the solicitation process. The obligations of confidentiality contained herein shall survive and continue following the expiration or termination of this Agreement, unless otherwise agreed to in writing by both parties hereto.

10. *Required Disclosures.* Anything in this Agreement to the contrary notwithstanding, the non-disclosing party may disclose Confidential Information to the extent that it is required to do so by law, a court, or other governmental or regulatory authorities; provided, however, that the non-disclosing party shall give the disclosing party written notice of such a required disclosure prior to making such disclosure so that the disclosing party may seek a protective order or other relief with respect to such Confidential Information, and shall limit the disclosure to the minimum required to comply with the law, court order, or governmental or regulatory authority. Company acknowledges that the Compact and the Participants are subject to public records laws, including without limitation, G. L. c. 4, §7, cl. 26 and G. L. c. 66, §10.

1. *Representations and Warranties*.

(a) The Compact hereby represents and warrants to the Company as follows:

(i) the Compact shall use the Confidential Information only in connection with the Purpose;

(ii) this Agreement constitutes the legal, valid and binding obligation of the Compact enforceable in accordance with its terms; and

1. the Compact has taken all necessary action to authorize and approve the execution and delivery of this Agreement and the performance of the obligations hereunder.

(b) The Company hereby represents and warrants to the Compact as follows:

(i) the Company shall use the Confidential Information only in connection with the Purpose;

(ii) this Agreement constitutes the legal, valid and binding obligation of the Company enforceable in accordance with its terms; and

(iii) the Company has taken all necessary action to authorize and approve the execution and delivery of this Agreement and the performance of the obligations hereunder.

The representations and warranties contained in this Agreement shall survive execution and delivery of this Agreement.

12. *Governing Law; Enforcement; Liquidated Damages for Certain Breaches.* The validity, construction and performance of this Agreement shall be governed by the laws of the Commonwealth of Massachusettswithout regard to its choice of law rules. The parties agree that venue for judicial enforcement of this Agreement shall be Barnstable County Superior Court. The parties acknowledge and agree that the extent of damage to the disclosing party in the event of a breach by the non-disclosing party of any of the covenants contained in this Agreement will be difficult or impossible to ascertain and that there may be no adequate remedy at law available to the disclosing party. The parties therefore agree that, in the event of such breach, the disclosing party, in addition to receiving damages for breach, shall be entitled to enforce any and all of the covenants contained in this Agreement by injunctive or other equitable relief. In addition, in the event of disclosure of Confidential Load Information in violation of this Agreement, the Company shall pay the Compact fifty thousand dollars ($50,000.00) as liquidated damages. The sum is agreed upon as liquidated damages and not as a penalty. The parties hereto have computed, estimated, and agreed upon the sum as an attempt to make a reasonable forecast of probable actual loss of the Compact’s competitive advantage because of the difficulty of estimating with exactness the damages which will result.

13. *Notices.*  Except for any notice required by law to be given in another manner, all notices, waivers, demands, or other communications required or permitted by this Agreement to be effective shall be in writing, properly addressed, and shall be given by: (i) personal delivery; (ii) established overnight commercial courier delivery service, with charges prepaid or duly charged by the sender; or (iii) registered or certified mail, return receipt requested, first class, postage prepaid and addressed as follows:

FOR THE COMPACT:

Margaret T. Downey, Administrator and Chief Procurement Officer

Cape Light Compact

P.O. Box 427

3195 Main Street

Open Cape Building

Barnstable, MA 02630

(508) 375-6636 (phone)

(774) 330-3018 (facsimile)

mdowney@barnstablecounty.org (email)

FOR THE COMPANY:

**[insert contact information]**

With a copy to:

[**insert contact information**]

Any party may additionally provide notice by electronic mail, facsimile, or telephone communication, but this shall not relieve the party of the obligation to provide notice as specified above.

14. *Waiver.* No waiver of any provision of this Agreement shall be effective unless in writing and signed by the party against whom such waiver is sought to be enforced. No failure or delay by any party to insist upon strict compliance with any term of this Agreement shall be deemed a waiver of such term. No waiver or relinquishment of any right under this Agreement at any one or more times shall be deemed as a waiver or relinquishment of such power or right at any other time.

15. *Assignment; Successors and Assigns.* No party may assign any of its rights or delegate any of its obligations under this Agreement to any third party without the prior written consent of the other party. This Agreement shall be binding upon and inure to the benefit of the successors and permitted assigns of the parties hereto.

16. *Entire Agreement; Amendments*. This Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes all prior oral or written agreements and understandings between the parties relating to the subject matter hereof. This Agreement may only be amended or modified by a written instrument signed by both parties hereto.

17. *Further Agreements*. Nothing contained in this Agreement shall be deemed, by implication or otherwise, to convey to the non-disclosing party any rights in any Confidential Information, nor shall this Agreement be deemed a commitment of any kind by the Compact or the Company to enter into any further agreements with respect to any Confidential Information.

18. *Severability.*  If any of the provisions of this Agreement shall be adjudged by a court of competent jurisdiction to be void or unenforceable for any reason, the same shall in no way affect the validity or enforceability of any other provision of this Agreement to the maximum extent permissible by law.

19. *No Joint Venture*. Nothing in this Agreement is intended or shall be deemed to make the Compact a partner or joint venturer of the Company.

20. *Counterpart Execution; Scanned Copy*. This Agreement may be executed in several counterparts, each of which, when executed, shall be deemed to be an original, but all of which together shall constitute one and the same instrument.  The parties agree that a scanned or electronically reproduced copy or image of this Agreement bearing the signatures of the parties hereto shall be deemed an original and may be introduced or submitted in any action or proceeding as competent evidence of the execution, terms and existence of this Agreement notwithstanding the failure or inability to produce or tender an original, executed counterpart of this Agreement and without the requirement that the unavailability of such original, executed counterpart of this Agreement first be proven.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the dates written below.

FOR THE COMPACT: FOR THE COMPANY:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Margaret T. Downey Name:

Administrator/Chief Procurement Officer Title:

Dated: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Dated: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

EXHIBIT A

NON-DISCLOSURE CERTIFICATE

I hereby certify my understanding that the Confidential Information, as that term is defined in the Confidentiality Agreement for All-Requirements Retail Electric Power Supply for Municipal and Government Accounts between the Cape Light Compact and the [Company] dated \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 2016 (the “Agreement”), is being provided to me pursuant to the terms and restrictions of the Agreement. I also certify that I have been given a copy of the Agreement, have read its terms and conditions, and agree to be bound by them. I understand that the contents of the Confidential Information and any parts of notes, abstracts, memoranda, or any other form of information that contains such Confidential Information shall not be disclosed to anyone nor copied other than in accordance with the Agreement, and shall be used only for the limited purposes stated therein. I also agree to protect the confidential and proprietary nature asserted for the Confidential Information.

I further acknowledge that, in the event that my role as a \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ of [the Company] ceases, I shall return all copies of Confidential Information and destroy all parts of notes, memoranda, and other documents that contain such material in accordance with the Agreement, and I shall continue to be bound by the terms and conditions of the Agreement.

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

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

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

Organization:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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

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

1. Bidders: Please type in your company name and other company information where appropriate. [↑](#footnote-ref-1)