

# CITY OF BATAVIA

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**DATE:** April 12, 2013  
**TO:** Public Utilities Committee  
**FROM:** Gary Holm  
**SUBJECT:** Resolution #13-60-R Authorizing Certain Elected Officials and City Staff to Receive Confidential Information Related to Prairie State

In 2006 the City executed a Power Sales Agreement with NIMPA to purchase power from what was proposed to be the Prairie State project. In 2007 the City granted final approvals for NIMPA to issue bonds and participate in the project. NIMPA subsequently executed several different project agreements including a Participation Agreement.

The Participation Agreement defines project owners, including NIMPA, as “Participants”. In Accordance with the Participation Agreement, a Management Committee was established to oversee strategic matters on behalf of the various Participants. Each Participant has a representative and an alternate appointed to the Management Committee. In accordance with the Agreement, certain confidential information is required to be transmitted to Participant’s Management Committee representatives each month.

The Participation Agreement also requires the transmittal of confidential information to other Participant “Representatives”. Up until this point, the confidential information consisted of summarized monthly reports which were transmitted, via attorney-client privileged communications, to the NIMPA member communities. At the urging of Batavia, additional detailed confidential documentation will now be available to each community “Representative”. In order to receive the additional information, “Representatives” will be required to execute a Confidentiality Agreement as specified in the Participation Agreement.

The Participation Agreement defines confidential information as:

“All information and material furnished by or on behalf of NIMPA to the Member Representative pertaining to PSEC or PSGC (including all confidential or proprietary documents provided to NIMPA's representatives on the PSEC Management Committee; reports, memoranda, analyses, completions, or summaries regarding PSEC or PSGC furnished to NIMPA's representatives by its attorneys, project management consultants at Indiana Municipal Power Agency, or other designated NIMPA agents; Trade Secrets; PSEC-related design drawings; scientific, engineering, technical, commercial, financial, legal, organizational, administrative or economic data or information of any kind pertaining to PSGC or PSEC; information regarding PSGC or PSEC-related expenses or operating and maintenance history; preliminary drafts, notes, recommendations, memoranda or other records pertaining to PSGC or PSEC-related research, business, operational, environmental or public relations strategy; or confidential information of or concerning a third party pertaining to PSEC or PSGC), whether any such information is furnished or learned before or after the date hereof, and regardless of the manner or form in which it is furnished or learned, together with all notes, memoranda, summaries, analyses, compilations and other writings relating thereto or based thereon prepared by the Member Representative.”

In addition, the Participation Agreement states that

“unless otherwise agreed to in writing by NIMPA, Member Representative agrees (a) except as required by law, rule, applicable regulation, interrogatories, subpoenas, civil investigative demands or other similar legal process or disclosure requirement of a governmental authority or agency, (collectively, “Law”), to keep all Confidential Information confidential and not to (i) disclose or reveal any Confidential Information to any member of the public or media outlet; or disclose or reveal any Confidential Information to any elected official or representative of member's governing body or applicable utility committee, other than in a properly noticed executive session of such body or committee, and in a manner that adheres to such member's standard confidentiality protocols. Member Representative shall be responsible for any violation of the terms of this Agreement.”

City Staff is recommending that due to the sensitivity of the confidential information, only certain Elected Officials and Staff members be authorized to receive it. **Staff is recommending approval of Resolution 13-60-R authorizing the following individuals to receive confidential information contingent upon execution of a Confidentiality Agreement:**

- Mayor
- City Clerk
- City Council
- City Attorney
- City Administrator
- Assistant City Administrator
- Public Works Director
- Finance Director
- Superintendent of Electric

**CITY OF BATAVIA, ILLINOIS  
RESOLUTION 13-60-R**

**AUTHORIZING CERTAIN ELECTED OFFICIALS AND STAFF TO RECEIVE  
CONFIDENTIAL INFORMATION RELATED TO PRAIRIE STATE**

**WHEREAS**, the City of Batavia owns and operates an electric utility whereby it purchases wholesale power from the Prairie State project via a Power Sales Agreement with NIMPA; and

**WHEREAS**, in 2007 NIMPA was authorized by the City to execute a Participation Agreement for the Prairie State project; and

**WHEREAS**, the Participation Agreement contemplates the transmittal of confidential information to certain Participant Representatives; and

**WHEREAS**, the City of Batavia Staff and full City Council, together with the Mayor, have discussed the sensitivity of the confidential information and have determined that its distribution should be limited.

**NOW, THEREFORE, BE IT RESOLVED**, by the Mayor and City Council of the City of Batavia, Kane and DuPage Counties, Illinois, as follows:

**SECTION 1:** The distribution of confidential information shall be limited to the individuals identified in Exhibit A and shall be contingent upon the execution of a Confidentiality Agreement by each individual in accordance with Exhibit B.

CITY OF BATAVIA, ILLINOIS RESOLUTION 13-60-R

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**PRESENTED** to and **PASSED** by the City Council of the City of Batavia, Illinois, this \_\_\_\_ day of May, 2013.

**APPROVED** by me as Mayor of said City of Batavia, Illinois, this \_\_\_\_ day of May, 2013.

\_\_\_\_\_  
Jeffery D. Schielke, Mayor

Ward	Aldermen	Ayes	Nays	Absent	Abstain	Aldermen	Ayes	Nays	Absent	Abstain
1	O'Brien					Sparks				
2	Dietz					Wolff				
3	Jungles					Chanzit				
4	Volk					Stark				
5	Frydendall					Thelin Atac				
6	Liva					Clark				
7	Tenuta					Brown				
Mayor Schielke										
<b>VOTE:</b>		Ayes	Nays	Absent	Abstention(s)					
Total holding office:		Mayor and 14 aldermen								

ATTEST:

\_\_\_\_\_  
Heidi Wetzal, City Clerk

**Resolution #13-60-R**  
**EXHIBIT A**

The following individuals are authorized to receive confidential information from the Prairie State project contingent upon execution of a Confidentiality Agreement:

- Mayor
- City Clerk
- City Council
- City Attorney
- City Administrator
- Assistant City Administrator
- Public Works Director
- Finance Director
- Superintendent of Electric

**CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT  
FOR TRANSMITTAL OF  
CONFIDENTIAL PRAIRIE STATE INFORMATION**

THIS AGREEMENT, made and entered into this \_\_\_ day of \_\_\_\_\_, 2013 ("Effective Date"), by and between \_\_\_\_\_, ("Member Representative") and Northern Illinois Municipal Power Agency ("NIMPA"), (each a "Party" and collectively, the "Parties");

WITNESSETH:

WHEREAS, designated representatives of NIMPA's members have a desire to obtain confidential information pertaining to Prairie State Energy Campus ("PSEC") and Prairie State Generating Company ("PSGC") which is otherwise regularly transmitted only to NIMPA's PSGC Management Committee representatives;

WHEREAS; such designated representatives are entitled to obtain such confidential information under section 18.4 of the PSEC Participation Agreement, dated September 28th, 2007 ("Participation Agreement"), as long as they agree to maintain confidentiality of such information;

WHEREAS, as a condition to NIMPA furnishing Confidential Information (as defined below) to the undersigned designated Member Representative, the Parties agree, as of the date set forth above (the "Effective Date"), to be bound by the terms and conditions of this confidentiality agreement (this "Agreement");

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, the Parties agree as follows:

1. "Confidential Information" shall mean: all information and material furnished by or on behalf of NIMPA to the Member Representative pertaining to PSEC or PSGC (including all confidential or proprietary documents provided to NIMPA's representatives on the PSEC Management Committee; reports, memoranda, analyses, completions, or summaries regarding PSEC or PSGC furnished to NIMPA's representatives by its attorneys, project management consultants at Indiana Municipal Power Agency, or other designated NIMPA agents; Trade Secrets (as defined below); PSEC-related design drawings; scientific, engineering, technical, commercial, financial, legal, organizational, administrative or economic data or information of any kind pertaining to PSGC or PSEC; information regarding PSGC or PSEC-related expenses or operating and maintenance history; preliminary drafts, notes, recommendations, memoranda or other records pertaining to PSGC or PSEC-related research, business, operational, environmental or public relations strategy; or confidential information of or concerning a third party pertaining to PSEC or PSGC), whether any such information is furnished or learned before or after the date hereof, and regardless of the manner or form in which it is furnished or learned, together with all notes, memoranda, summaries, analyses, compilations and other writings relating thereto or based thereon prepared by the Member Representative.

2. The Parties further agree that the term Confidential Information shall not include, however, information which (a) is or becomes generally available to the public other than as a result of a disclosure by any Member Representative in breach of this Agreement, (b) was available to the Member Representative on a nonconfidential basis prior to its disclosure by NIMPA, or (c) becomes available to the Member Representative on a nonconfidential basis from a person other than NIMPA, provided that in

the case of (b) and (c) above, the source of such information was not known by the Member Representative to be bound by a confidentiality agreement with or other legal obligation of confidentiality to the Member Representative with respect to such information.

3. As used in this Agreement: (a) "NIMPA" means NIMPA's agents, including legal counsel and its managing consultants at the Indiana Municipal Power Agency, as well as NIMPA's designated representatives on the PSEC Management Committee; and (b) "Trade Secrets" means that portion of the Confidential Information that constitutes trade secrets, as defined by applicable law, including confidential computer programs, software, designs, processes, procedures, equipment, data, reports, product specifications, formulas, improvements, on-line terminal designs, software applications and specialized knowledge, whether copyrightable or not.

4. Subject to the immediately succeeding paragraph, unless otherwise agreed to in writing by NIMPA, Member Representative agrees (a) except as required by law, rule, applicable regulation, interrogatories, subpoenas, civil investigative demands or other similar legal process or disclosure requirement of a governmental authority or agency, (collectively, "Law"), to keep all Confidential Information confidential and not to (i) disclose or reveal any Confidential Information to any member of the public or media outlet; or disclose or reveal any Confidential Information to any elected official or representative of member's governing body or applicable utility committee, other than in a properly noticed executive session of such body or committee, and in a manner that adheres to such member's standard confidentiality protocols. Member Representative shall be responsible for any violation of the terms of this Agreement.

5. The Parties agree that in the event that Member Representative is required or requested by Law to disclose any Confidential Information, Member Representative shall, to the extent practical and permitted by Law, provide NIMPA with prompt written or electronic notice of such request or requirement in order to enable NIMPA (a) to seek an appropriate protective order or other remedy, (b) to consult with Member Representative with respect to NIMPA taking steps to resist or narrow the scope of such request or legal process, or (c) to waive compliance, in whole or in part, with the terms of this Agreement. In any such event, Member Representative shall use best efforts to ensure that all Confidential Information that is so disclosed shall be accorded confidential treatment and shall furnish only that portion of the Confidential Information that is legally required to be disclosed.

6. At the written request of NIMPA, Member Representative shall, at its election, promptly (but in any event within 10 business days following such request) (a) return all copies of Confidential Information in the possession of Member Representative, or (b) destroy all copies of Confidential Information in the possession of Member Representative; provided that Member Representative shall not be required to destroy any Confidential Information or to take any action pursuant to this paragraph to the extent otherwise required by Law. Upon written request of NIMPA, Member Representative shall promptly (but in any event within 10 business days following such request) certify the Member Representative's compliance with its obligations under this paragraph.

7. Notwithstanding the return or destruction of the Confidential Information, Member Representative shall continue to be bound by his or her confidentiality and other obligations under this Agreement for the entire term of this Agreement. The term of this Agreement shall begin as of the Effective Date written above and extend through the term of the PSEC Participation Agreement (i.e. until PSEC is retired from service). For clarity, Member Representative shall continue to be bound by this Agreement regardless of any change of Member Representative's status with respect to service on the NIMPA Board of Directors or service to the member itself as an employee, staff member or elected official.

8. Member Representative recognizes and acknowledges the competitive value of the Confidential Information and the damage that could result to NIMPA and its members if the Confidential Information were used or disclosed by Member Representative except as authorized under this Agreement. Accordingly, Member Representative agrees that money damages would not be a sufficient remedy for any breach of this Agreement, and that, in addition to any other rights and remedies otherwise available to NIMPA at law or in equity, NIMPA shall be entitled to equitable relief by way of specific performance, injunction, or otherwise if the Member Representative breaches or threatens to breach any provision of this Agreement. In the event of any legal proceedings to enforce or protect any rights under this Agreement, NIMPA shall be entitled to recover its costs (including reasonable attorneys' fees) incurred in connection therewith. Notwithstanding any provision to the contrary, neither Party shall be liable to the other Party for any punitive, exemplary, consequential or special damages arising out of or relating to this Agreement, regardless of whether such damages are based on tort, warranty, contract or any other legal theory.

9. If any provision of this Agreement is held by a court of competent jurisdiction to be invalid, illegal or unenforceable, the remaining provisions of this Agreement shall remain in full force and effect. The Parties shall endeavor by good faith negotiations to replace any invalid, illegal or unenforceable provision with a valid, legal and enforceable provision, the effect of which comes as close as possible to that of the invalid, illegal or unenforceable provision.

10. This Agreement is solely for the benefit of the Parties, and shall not be deemed to confer upon or give to any other person any remedy, claim of liability or reimbursement, cause of action or other right. This Agreement shall be binding on and inure to the benefit of the Parties and their respective successors and permitted assigns. Any assignment of this Agreement, in whole or in part, by either Party without the other Party's prior written consent (in its sole discretion) shall be null and void.

11. This Agreement constitutes the entire agreement between and among the Parties concerning the subject matter hereof and supersedes any other agreement or instrument, whether written or oral, that may have been made or entered into between the Parties concerning the subject matter hereof. Without limitation of the foregoing, there are no representations, warranties, agreements or commitments by or between the Parties concerning the subject matter hereof except as expressly set forth herein.

12. No amendment, supplement or other modification of this Agreement, or any waiver of the terms hereof, shall be binding upon the Parties unless (a) in the case of any such amendment, supplement or modification, approved in a writing signed by each of the Parties and (b) in the case of any waiver, evidenced by a writing executed by the Party purportedly granting the waiver (it being understood that no failure or delay by a Party in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any right, power or privilege hereunder).

13. Any notice, consent or other formal communication required or permitted to be given by a Party pursuant to the terms of this Agreement shall be in writing and shall be deemed delivered (a) when delivered personally or by verifiable facsimile transmission, unless such delivery is made (i) on a day that is not a business day in the place of receipt or (ii) after 5:00 p.m. local time on a business day in the place of receipt, in either of which cases such delivery will be deemed to be made on the next succeeding business day, (b) on the next business day after timely delivery to a reputable overnight courier and (c) on the business day actually received if deposited in the U.S. mail (postage prepaid), addressed as follows:



If to Member Representative:

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

Attention: \_\_\_\_\_

Facsimile No.: \_\_\_\_\_

If to NIMPA:

Northern Illinois Municipal Power Agency

c/o Rochelle Municipal Utilities

333 Lincoln Highway

P.O. Box 456

Rochelle, Illinois 61068

Fax: (815) 562-5861

With a copy to:

Richard Heinemann

Boardman & Clark, LLP

1 South Pinckney Street, Fourth Floor

P.O. Box 927

Madison, WI 53701-0927

Fax: (608) 283-1709

14. This Agreement shall be governed by and construed in accordance with the laws of the State of Illinois (without regard to principles of conflict of laws thereof).

15. This Agreement may be executed in counterparts, each of which shall be an original, but all of which together shall constitute one and the same agreement. Any counterpart may be delivered by facsimile transmission or by electronic communication in portable document format (.pdf), and the Parties agree that their electronically transmitted signatures shall have the same effect as manually transmitted signatures.

Accepted and Agreed as of the Effective Date

Member Representative

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

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

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

Northern Illinois Municipal Power Agency

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

Name: Mike Buffington, President