



## FOLLOWING FORM EXCESS FIDUCIARY AND EMPLOYEE BENEFIT LIABILITY INDEMNITY POLICY

**Policy No:** Sample-23FL

**THIS IS A FOLLOWING FORM EXCESS FIDUCIARY AND EMPLOYEE BENEFIT LIABILITY INDEMNITY "CLAIMS-FIRST-MADE" POLICY. PLEASE READ THE ENTIRE POLICY AND THE UNDERLYING FOLLOWED POLICY DESIGNATED IN ITEM 7 OF THE DECLARATIONS CAREFULLY.**

This Insurance Agreement (the "Policy") is made by and between the Member Insured and Energy Insurance Mutual Limited, a Barbadian mutual company with limited liability (the "Company").

In consideration of the mutual terms, covenants and conditions contained herein and in the Followed Policy, and in reliance on the Application (as defined in the Followed Policy) and any other materials submitted to the Company in connection with underwriting this Policy, the parties hereto do hereby agree as follows:

### **I. Indemnity Agreement**

The Company agrees, subject to the provisions hereof, to provide the Insureds with coverage in conformance with the warranties, terms, conditions, definitions and exclusions (except as regards those matters expressly set forth herein) contained in the Followed Policy as submitted to the Company within thirty (30) days after inception of this Policy. Unless otherwise agreed to in writing by the Company, coverage hereunder shall not be affected by (a) any difference between the form of the Followed Policy submitted to the Company and the Followed Policy actually in effect, or (b) any modification of the Followed Policy, by endorsement or otherwise, subsequent to its submission to the Company.

This Policy does not apply to any Losses which arise from any Wrongful Act done or attempted by the Insured prior to the Retroactive Date stated in Item 6 of the Declarations or after expiration of the Policy Period.

### **II. Attachment and Limit of Liability**

Liability under this Policy shall attach to the Company only after the insurers of the Underlying Policies, the Insureds, any foreign policy insurer or any other source pay in legal currency loss equal to the full amount of the Attachment Point, provided all such loss is covered under the Underlying Policies or reduces the limit of liability under an Underlying Policy. The Company's maximum aggregate liability for all Losses covered under this Policy shall be the Limit of Liability stated in Item 3 of the Declarations.

Notwithstanding any of the terms of this Policy which might be construed otherwise, this Policy shall drop down in and only in the event of reduction or exhaustion of the aggregate limits of liability of Underlying Policies due to payment of loss covered thereunder as provided above and shall not drop down for any other reason including, but not limited to, uncollectability (in whole or in part) of any Underlying Policy. The risk of uncollectability of such an Underlying Policy (in whole or in part), whether because of financial impairment or insolvency of an underlying insurer or for any other reason, is expressly retained by the Insureds and is not in any way or under any circumstances insured or assumed by the Company.

### III. Conditions

(A) Cooperation

The Company shall not be called upon to assume charge of the settlement or defense of any Claim, but the Company shall have the right and shall be given the opportunity to effectively associate with the Insured or the underlying insurers in the defense and settlement of any Claim which involves or may involve the Company. At all times, the Insured and the Company shall cooperate in the defense and settlement of such Claim.

(B) Governing Law and Interpretation

In view of the diverse locations of the parties purchasing insurance from the Company and the desirability of unified regulation, the parties agree that the Policy shall be construed and enforced in accordance with and governed by the internal law of the State of New York, except insofar as such law may prohibit payment in respect of punitive damages hereunder.

(C) Dispute Resolution

The Company and the Member Insured mutually acknowledge that the form, terms, and conditions of the Policy have been formulated by representatives of the participating members in order to provide insurance coverage which is vital to all participants. It was desired to have the Company serve as a financially stable and reliable entity, responsive to the coverage needs of its participants, and providing coverage fairly and equitably as to each insured, but taking equally into account fairness and equity as to all insureds as a group.

While every effort has been made to define with clarity and precision the scope of coverage, the Company and the Member Insured mutually acknowledge that situations may arise where the availability of coverage for a Claim under the Policy is disputed.

In light of the foregoing, the Company and the Member Insured agree that:

(1) the following principles shall govern the interpretation of the Policy:

- (a) Even-handedness and fairness to both parties;
- (b) The intentions of the parties, including any extrinsic evidence of intent;
- (c) The practice of the parties in interpreting and applying the Policy;
- (d) The cooperative rather than adversarial relationship between the parties;
- (e) No recourse to rules of construction which apply specifically to the interpretation of policy language in contracts of insurance but not to contractual language in general; and
- (f) The maintenance of the Company's solvency in light of its limited resources.

(2) (a) In the event of any dispute between the Insured and the Company as to any matters arising out of or relating to any provision of this Policy, the parties shall attempt to resolve the dispute by use of a mini-trial. The disputing party shall give the other party written notice of its intent to proceed with a mini-trial. This notice shall include a summary of the dispute and may include the evidence and arguments underlying the dispute.

- (b) The mini-trial shall be conducted not more than 120 days after the disputing party's transmission of notice of the dispute and shall last not more than three (3) business days. The mini-trial shall proceed before a panel composed of a senior executive officer from each party with authority to settle the dispute and one neutral advisor, unless both parties agree to proceed without a neutral advisor. In the event a neutral advisor is required, he shall be selected in accordance with paragraph (c) below. The parties may also have present at the mini-trial their counsel, technical experts (in-house or retained) and fact witnesses. The mini-trial shall be conducted in the City of New York.

- (c) In the event a neutral advisor is required, the parties shall exchange names of potential advisors and select from this pool a mutually acceptable candidate. If the parties cannot agree on the selection of a neutral advisor, the president of the Center for Public Resources or his designee shall select a neutral advisor from the Judicial Panel of the Center for Public Resources.
  - (d) The neutral advisor is not to mediate or effect a compromise of the dispute. The neutral advisor is to issue a nonbinding opinion to the parties on any issue or issues requested by either party. Either party may also request a nonbinding opinion addressing the merits of any claim and assessing which party is likely to prevail on such claim, so that the parties can determine whether and on what basis the dispute may be resolved without resort to arbitration. The neutral advisor's opinion shall be issued thirty (30) days after the conclusion of the mini-trial if an opinion has been requested and the parties are unable to resolve the dispute after the conclusion of the mini-trial.
  - (e) The parties shall promptly agree on the ground rules which will govern the conduct of the parties before, during and after the mini-trial. These ground rules shall include:
    - (i) a schedule for the exchange of documents and short narrative statements summarizing each party's respective position on the dispute;
    - (ii) if the parties mutually agree that discovery is necessary to prepare for the mini-trial, an expedited schedule for such discovery; and
    - (iii) the format of the mini-trial.The parties shall seek the advice and assistance of the neutral advisor, if one has been appointed, in order to resolve any disagreement which may arise regarding the ground rules of the mini-trial.
  - (f) If the parties are unable to agree on the ground rules of the mini-trial, either party may make a demand in writing for arbitration upon the other party.
  - (g) The senior executive officers who are on the mini-trial panel shall meet immediately after the conclusion of the mini-trial to attempt to resolve the dispute. If they do not resolve the dispute within thirty (30) days of the conclusion of the mini-trial, the neutral advisor, if one has been appointed, will submit to the parties, if so requested, the nonbinding opinion referred to in paragraph (d) above. Within ten (10) days after the receipt of such opinion, the senior executive officers shall meet at least one more time to attempt to resolve the dispute.
  - (h) If the parties, in good faith, are unable to resolve the dispute after the meeting(s) of the parties' senior executive officers required in paragraph (g) above, either party may make a demand in writing for arbitration upon the other party. The party submitting the demand for arbitration may not make the demand until ten (10) days after the last meeting of the senior executive officers.
  - (i) The fees and expenses of the neutral advisor and the mini-trial shall be apportioned equally to each party. However, in the event the dispute is not settled and instead proceeds to arbitration, these costs shall be assessed against the party who loses in arbitration or, in the event neither party is deemed wholly responsible for the claim or controversy, the costs shall be apportioned between the parties in relation to their responsibility.
- (3) Any claim or controversy between the Insured and the Company not settled in accordance with Section (2) above, shall be submitted to arbitration in New York City by three arbitrators at the request of either the Insured or the Company. The Insured shall appoint one arbitrator and the Company another; the two so appointed shall select a third. If the two arbitrators fail to agree on a third arbitrator for a period of sixty calendar days from the date of their first attempt to select the third arbitrator, then on request of the Insured or the Company such third arbitrator shall be selected by the then President of the Association of the Bar of the City of New York. The Insured and the Company may by express agreement determine the arbitral procedures to be followed; in the event the parties do not agree, New York law, as provided above, shall govern all such matters of arbitral procedure.

- (4) To the extent that any claim or controversy between the Insured and the Company hereunder is not subject to arbitration for any reason whatsoever, the United States District Court for the Southern District of New York shall have exclusive jurisdiction thereof. For such purpose the Insured agrees to accept, without objection to form or manner, service of process by registered mail directed to:

Sample Member Name  
Sample Member Street  
Sample Member City, State ZIP Code

For such purpose the Company agrees to accept without objection to form or manner, service of process by registered mail directed to: Energy Insurance Mutual Limited, 3600 Midtown Drive, Suite 1100, Tampa, FL 33607-4907. The foregoing consents to service of process are not intended to nor shall they be construed to extend to any claim, controversy, cause of action, or other matter other than as stated in this paragraph.

(D) Reduction of Attachment Point

If any Underlying Policy contains a specific grant of coverage that is subject to a sublimit of liability, then coverage under this Policy shall not apply to any Loss which is otherwise subject to such grant of coverage. However, any such Loss paid under the Underlying Policy shall reduce or exhaust the limit of liability of such Underlying Policy for purposes of liability attachment to this Policy.

(E) Recovery

Any amount recovered by or on behalf of the Insureds after payment under this Policy, less the cost of obtaining the recovery, shall be applied first to amounts paid in excess of this Policy, then to amounts paid under this Policy, and then to amounts paid within the limits of liability and retention under the Underlying Policies.

(F) Claims

Any notice to the Company under this Policy shall be given at the same time and in the same manner required by the terms and conditions of the Followed Policy and shall be given at the address shown in the Declarations. Any notice to the insurer of any Underlying Policy shall not constitute notice to the Company unless also given to the Company as provided above.

(G) Discovery Period

The Insureds shall be entitled to elect a discovery period or extended reporting period under this Policy at such time and in such manner as provided in the Followed Policy. The terms and conditions of such election and the coverage afforded during such discovery period or extended reporting period shall be in conformance to such terms and conditions in the Followed Policy.

(H) Membership

As a prerequisite for becoming a Member of the Company, an Application for Membership must be submitted by the Member Insured and accepted by the Company. Such Application is hereby incorporated into and made a part of this Policy.

The Member Insured becomes a Member of the Company as part of obtaining insurance from the Company and as such is entitled to the privileges and benefits of, and by entering into this Policy agrees to be subject to, and to be bound by, the obligations and duties of Membership as are more fully set forth in the Company's Certificate of Incorporation and any amendments thereto and in the by-laws and any amendments thereto which are hereby incorporated into and made a part of this Policy. In no event shall any amendment to the Company's Certificate of Incorporation or the by-laws increase the amount of premium payable hereunder.

**IV. Definitions**

- (A) The term "Insured" shall mean the entities, benefit plans or programs, and natural persons insured by the Followed Policy.
- (B) The term "Losses" shall have the meaning attributed to it and comparable terms, such as Ultimate Net Loss, in the Followed Policy.
- (C) The terms "Member Insured", "Policy Period", "Limit of Liability", "Attachment Point", "Premium", "Retroactive Date", "Underlying Policies", "Followed Policy", "Directors and Officers Retention", "Corporate Reimbursement Retention", shall have the meaning attributed to them on the Declarations Page.
- (D) The terms "Application", "Claim" and "Wrongful Act" shall have the meaning attributed to them in the Followed Policy.

IN WITNESS WHEREOF, the Company has caused this Policy to be executed and attested.

Tampa, Florida

ENERGY INSURANCE MUTUAL LIMITED

Attest:

By: