

FILE



**acclaim**  
ENERGY ADVISORS

11-0403-GA-AGG

88

January 19, 2011

RECEIVED - PUBLIC UTILITIES  
2011 JAN 24 AM 9:44  
PUCO

The Public Utilities Commission of Ohio  
Docketing Division  
13<sup>th</sup> Floor  
180 East Broad Street  
Columbus, Ohio 43215-3793

Re: Application for Natural Gas Broker License

To Whom It May Concern:

Please find enclosed one original and ten copies of the application package for Acclaim Energy, Ltd.

Contact me at any time should you have any questions in regards to the application package.

Thank you for your assistance.

Sincerely,

Richard L. Zdunkewicz  
Director, Principal Consultant  
Acclaim Energy Advisors

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Technician SUS Date Processed 1/24/11



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Date Received	Case No.	Page No.

## CERTIFICATION APPLICATION COMPETITIVE RETAIL NATURAL GAS BROKERS /AGGREGATORS

Please type or print all required information. Identify all attachments with an exhibit label and title (*Example: Exhibit A-16 - Company History*). All attachments should bear the legal name of the Applicant. Applicants should file completed applications and all related correspondence with the Public Utilities Commission of Ohio, Docketing Division, 13<sup>th</sup> Floor, 180 East Broad Street, Columbus, Ohio 43215-3793.

This PDF form is designed so that you may directly input information onto the form. You may also download the form by saving it to your local disk.

### SECTION A - APPLICANT INFORMATION AND SERVICES

#### A-1 Applicant intends to be certified as: (check all that apply)

☐ Retail Natural Gas Aggregator ☒ Retail Natural Gas Broker

#### A-2 Applicant information:

Legal Name ACCLAIM ENERGY, LTD  
Address 1221 LAMAR STREET, SUITE 510, HOUSTON, TEXAS 77010  
Telephone No. 713-524-0310 Web site Address [WWW.ACCLAIMENERGY.COM](http://WWW.ACCLAIMENERGY.COM)

#### A-3 Applicant information under which applicant will do business in Ohio:

Name ACCLAIM ENERGY ADVISORS  
Address 8044 Montgomery Road, Suite 700, Cincinnati, Ohio 45236  
Web site Address [WWW.ACCLAIMENERGY.COM](http://WWW.ACCLAIMENERGY.COM) Telephone No. 513-792-2794

#### A-4 List all names under which the applicant does business in North America:

ACCLAIM ENERGY ADVISORS ACCLAIM ENERGY MANAGEMENT, LLC  
ACCLAIM ENERGY, LTD LEGACY ENERGY SOLUTIONS  
LEGACY CMS, LTD

#### A-5 Contact person for regulatory or emergency matters:

Name RICHARD L. ZDUNKEWICZ Title DIRECTOR  
Business Address 1221 LAMAR STREET, SUITE 510, HOUSTON, TEXAS 77010  
Telephone No. 713-344-0297 Fax No. 713-524-0310 Email Address [rzdunkewicz@acclaimenergy.com](mailto:rzdunkewicz@acclaimenergy.com)

**A-6 Contact person for Commission Staff use in investigating customer complaints:**

Name RICHARD L. ZDUNKEWICZ Title DIRECTOR  
Business address 1221 LAMAR STREET, SUITE 510, HOUSTON, TEXAS 77010  
Telephone No. 713-344-0297 Fax No. 713-524-0310 Email Address [rdzunkewicz@aacclaimenergy.com](mailto:rdzunkewicz@aacclaimenergy.com)

**A-7 Applicant's address and toll-free number for customer service and complaints**

Customer service address 1221 LAMAR STREET, SUITE 510, HOUSTON, TEXAS 77010  
Toll-Free Telephone No. 888-453-7674 Fax No. 713-524-0310 Email Address [CLIENTSERVICES@aacclaimenergy.com](mailto:CLIENTSERVICES@aacclaimenergy.com)

**A-8 Provide "Proof of an Ohio Office and Employee," in accordance with Section 4929.22 of the Ohio Revised Code, by listing name, Ohio office address, telephone number, and Web site address of the designated Ohio Employee**

Name DEBI FRAZIER Title REPRESENTATIVE  
Business address 8044 Montgomery Road, Suite 700, Cincinnati, Ohio 45236  
Telephone No. 513-792-2794 Fax No. 866-586-1669 Email Address [debifrazier@gmail.com](mailto:debifrazier@gmail.com)

**A-9 Applicant's federal employer identification number 32-0072114**

**A-10 Applicant's form of ownership: (Check one)**

- |  |  |
|--|--|
| <input type="checkbox"/> Sole Proprietorship                 | <input checked="" type="checkbox"/> Partnership          |
| <input type="checkbox"/> Limited Liability Partnership (LLP) | <input type="checkbox"/> Limited Liability Company (LLC) |
| <input type="checkbox"/> Corporation                         | <input type="checkbox"/> Other                           |

**A-11 (Check all that apply) Identify each natural gas company service area in which the applicant is currently providing service or intends to provide service, including identification of each customer class that the applicant is currently serving or intends to serve, for example: *residential, small commercial, and/or large commercial/industrial (mercantile) customers*. (A mercantile customer, as defined in Section 4929.01(L)(1) of the Ohio Revised Code, means a customer that consumes, other than for residential use, more than 500,000 cubic feet of natural gas per year at a single location within the state or consumes natural gas, other than for residential use, as part of an undertaking having more than three locations within or outside of this state. In accordance with Section 4929.01(L)(2) of the Ohio Revised Code, "Mercantile customer" excludes a not-for-profit customer that consumes, other than for residential use, more than 500,000 cubic feet of natural gas per year at a single location within this state or consumes natural gas, other than for residential use, as part of an undertaking having more than three locations within or outside this state that has filed the necessary declaration with the Public Utilities Commission.)**

<input checked="" type="checkbox"/> Columbia Gas of Ohio	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<input checked="" type="checkbox"/> Dominion East Ohio	<input type="checkbox"/> Residential	<input checked="" type="checkbox"/> Small Commercial	<input checked="" type="checkbox"/> Large Commercial / Industrial
<input checked="" type="checkbox"/> Duke Energy Ohio	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<input checked="" type="checkbox"/> Vectren Energy Delivery of Ohio	<input type="checkbox"/> Residential	<input checked="" type="checkbox"/> Small Commercial	<input checked="" type="checkbox"/> Large Commercial / Industrial

**A-12** If applicant or an affiliated interest previously participated in any of Ohio's Natural Gas Choice Programs, for each service area and customer class, provide approximate start date(s) and/or end date(s) that the applicant began delivering and/or ended services.

☐ Columbia Gas of Ohio

<input type="checkbox"/> Residential				
<input type="checkbox"/> Small Commercial	Beginning Date of Service		End Date	
<input type="checkbox"/> Large Commercial	Beginning Date of Service			
<input type="checkbox"/> Industrial	Beginning Date of Service		End Date	

☐ Dominion East Ohio

<input type="checkbox"/> Residential				
<input type="checkbox"/> Small Commercial	Beginning Date of Service		End Date	
<input type="checkbox"/> Large Commercial	Beginning Date of Service			
<input type="checkbox"/> Industrial	Beginning Date of Service		End Date	

☐ Duke Energy Ohio

<input type="checkbox"/> Residential				
<input type="checkbox"/> Small Commercial	Beginning Date of Service		End Date	
<input type="checkbox"/> Large Commercial	Beginning Date of Service			
<input type="checkbox"/> Industrial	Beginning Date of Service		End Date	

☐ Vectren Energy Delivery of Ohio

<input type="checkbox"/> Residential				
<input type="checkbox"/> Small Commercial	Beginning Date of Service		End Date	
<input type="checkbox"/> Large Commercial	Beginning Date of Service			
<input type="checkbox"/> Industrial	Beginning Date of Service		End Date	

**A-13** If not currently participating in any of Ohio's four Natural Gas Choice Programs, provide the approximate start date that the applicant proposes to begin delivering services:

<input checked="" type="checkbox"/>	Columbus Gas		
<input checked="" type="checkbox"/>	Dominion East Ohio	Intended Start Date	03/01/2011
<input checked="" type="checkbox"/>	Duke Energy Ohio		
<input checked="" type="checkbox"/>	Vectren Energy Delivery of Ohio	Intended Start Date	03/01/2011

PROVIDE THE FOLLOWING AS SEPARATE ATTACHMENTS AND LABEL AS INDICATED.

- A-14 **Exhibit A-14 "Principal Officers, Directors & Partners,"** provide the names, titles, addresses and telephone numbers of the applicant's principal officers, directors, partners, or other similar officials.
- A-15 **Exhibit A-15 "Corporate Structure,"** provide a description of the applicant's corporate structure, including a graphical depiction of such structure, and a list of all affiliate and subsidiary companies that supply retail or wholesale natural gas or electricity to customers in North America.
- A-16 **Exhibit A-16 "Company History,"** provide a concise description of the applicant's company history and principal business interests.
- A-17 **Exhibit A-17 "Articles of Incorporation and Bylaws,"** if applicable, provide the articles of incorporation filed with the state or jurisdiction in which the applicant is incorporated and any amendments thereto.
- A-18 **Exhibit A-18 "Secretary of State,"** provide evidence that the applicant is currently registered with the Ohio Secretary of the State.

## **SECTION B - APPLICANT MANAGERIAL CAPABILITY AND EXPERIENCE**

PROVIDE THE FOLLOWING AS SEPARATE ATTACHMENTS AND LABEL AS INDICATED

- B-1 **Exhibit B-1 "Jurisdictions of Operation,"** provide a current list of all jurisdictions in which the applicant or any affiliated interest of the applicant is, at the date of filing the application, certified, licensed, registered, or otherwise authorized to provide retail natural gas service, or retail/wholesale electric services.
- B-2 **Exhibit B-2 "Experience & Plans,"** provide a current description of the applicant's experience and plan for contracting with customers, providing contracted services, providing billing statements, and responding to customer inquiries and complaints in accordance with Commission rules adopted pursuant to Section 4929.22 of the Revised Code and contained in Chapter 4901:1-29 of the Ohio Administrative Code.
- B-3 **Exhibit B-3 "Summary of Experience,"** provide a concise and current summary of the applicant's experience in providing the service(s) for which it is seeking to be certified to provide (e.g., number and types of customers served, utility service areas, volume of gas supplied, etc.).
- B-4 **Exhibit B-4 "Disclosure of Liabilities and Investigations,"** provide a description of all existing, pending or past rulings, judgments, contingent liabilities, revocations of authority, regulatory investigations, or any other matter that could adversely impact the applicant's financial or operational

status or ability to provide the services it is seeking to be certified to provide.

- B-5 Exhibit B-5 "Disclosure of Consumer Protection Violations,"** disclose whether the applicant, affiliate, predecessor of the applicant, or any principal officer of the applicant has been convicted or held liable for fraud or for violation of any consumer protection or antitrust laws within the past five years.

☒ No      ☐ Yes

If Yes, provide a separate attachment labeled as Exhibit B-5 "Disclosure of Consumer Protection Violations," detailing such violation(s) and providing all relevant documents.

- B-6 Exhibit B-6 "Disclosure of Certification Denial, Curtailment, Suspension, or Revocation,"** disclose whether the applicant or a predecessor of the applicant has had any certification, license, or application to provide retail natural gas or retail/wholesale electric service denied, curtailed, suspended, or revoked, or whether the applicant or predecessor has been terminated from any of Ohio's Natural Gas Choice programs, or been in default for failure to deliver natural gas.

☒ No      ☐ Yes

If Yes, provide a separate attachment, labeled as Exhibit B-6 "Disclosure of Certification Denial, Curtailment, Suspension, or Revocation," detailing such action(s) and providing all relevant documents.

## **SECTION C - APPLICANT FINANCIAL CAPABILITY AND EXPERIENCE**

PROVIDE THE FOLLOWING AS SEPARATE ATTACHMENTS AND LABEL AS INDICATED

- C-1 Exhibit C-1 "Annual Reports,"** provide the two most recent Annual Reports to Shareholders. If applicant does not have annual reports, the applicant should provide similar information, labeled as Exhibit C-1, or indicate that Exhibit C-1 is not applicable and why.
- C-2 Exhibit C-2 "SEC Filings,"** provide the most recent 10-K/8-K Filings with the SEC. If applicant does not have such filings, it may submit those of its parent company. If the applicant does not have such filings, then the applicant may indicate in Exhibit C-2 whether the applicant is not required to file with the SEC and why.
- C-3 Exhibit C-3 "Financial Statements,"** provide copies of the applicant's two most recent years of audited financial statements (balance sheet, income statement, and cash flow statement). If audited financial statements are not available, provide officer-certified financial statements. If the applicant has not been in business long enough to satisfy this requirement, it shall file audited or officer-certified financial statements covering the life of the business.
- C-4 Exhibit C-4 "Financial Arrangements,"** provide copies of the applicant's current financial arrangements to conduct competitive retail natural gas service (CRNGS) as a business activity (e.g., guarantees, bank commitments, contractual arrangements, credit agreements, etc.)
- C-5 Exhibit C-5 "Forecasted Financial Statements,"** provide two years of forecasted financial statements (balance sheet, income statement, and cash flow statement) for the applicant's CRNGS operation, along with a list of assumptions, and the name, address, email address, and telephone number of the preparer.

- C-6 **Exhibit C-6 "Credit Rating,"** provide a statement disclosing the applicant's current credit rating as reported by two of the following organizations: Duff & Phelps, Dun and Bradstreet Information Services, Fitch IBCA, Moody's Investors Service, Standard & Poors, or a similar organization. In instances where an applicant does not have its own credit ratings, it may substitute the credit ratings of a parent or affiliate organization, provided the applicant submits a statement signed by a principal officer of the applicant's parent or affiliate organization that guarantees the obligations of the applicant.
- C-7 **Exhibit C-7 "Credit Report,"** provide a copy of the applicant's current credit report from Experian, Dun and Bradstreet, or a similar organization.
- C-8 **Exhibit C-8 "Bankruptcy Information,"** provide a list and description of any reorganizations, protection from creditors, or any other form of bankruptcy filings made by the applicant, a parent or affiliate organization that guarantees the obligations of the applicant or any officer of the applicant in the current year or since applicant last filed for certification.
- C-9 **Exhibit C-9 "Merger Information,"** provide a statement describing any dissolution or merger or acquisition of the applicant since applicant last filed for certification.

#### **SECTION D - APPLICANT TECHNICAL CAPABILITY**

PROVIDE THE FOLLOWING AS SEPARATE ATTACHMENTS AND LABEL AS INDICATED.

- D-1 **Exhibit D-1 "Operations,"** provide a current written description of the operational nature of the applicant's business functions.
- D-2 **Exhibit D-2 "Operations Expertise,"** given the operational nature of the applicant's business, provide evidence of the applicant's current experience and technical expertise in performing such operations.
- D-3 **Exhibit D-3 "Key Technical Personnel,"** provide the names, titles, email addresses, telephone numbers, and background of key personnel involved in the operational aspects of the applicant's current business.

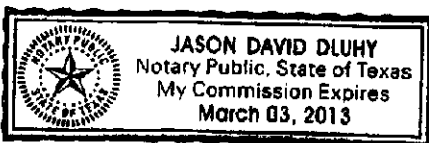
Applicant Signature and Title

Chief Executive Officer

Sworn and subscribed before me this 13<sup>th</sup> day of JANUARY Month 2011 Year

Signature of official administering oath

Print Name and Title



My commission expires on

MARCH 3, 2013



# The Public Utilities Commission of Ohio

Competitive Retail Natural Gas Service  
Affidavit Form  
(Version 1.07)

In the Matter of the Application of )

Acclaim Energy, Ltd. )

for a Certificate or Renewal Certificate to Provide )

Competitive Retail Natural Gas Service in Ohio. )

Case No.

-GA-AGG

County of HARRIS

State of TEXAS

Richard L. Zdunkewicz

[Affiant], being duly sworn/affirmed, hereby states that:

- (1) The information provided within the certification or certification renewal application and supporting information is complete, true, and accurate to the best knowledge of affiant.
- (2) The applicant will timely file an annual report of its intrastate gross receipts and sales of hundred cubic feet of natural gas pursuant to Sections 4905.10(A), 4911.18(A), and 4929.23(B), Ohio Revised Code.
- (3) The applicant will timely pay any assessment made pursuant to Section 4905.10 or Section 4911.18(A), Ohio Revised Code.
- (4) Applicant will comply with all applicable rules and orders adopted by the Public Utilities Commission of Ohio pursuant to Title 49, Ohio Revised Code.
- (5) Applicant will cooperate with the Public Utilities Commission of Ohio and its staff in the investigation of any consumer complaint regarding any service offered or provided by the applicant.
- (6) Applicant will comply with Section 4929.21, Ohio Revised Code, regarding consent to the jurisdiction of the Ohio courts and the service of process.
- (7) Applicant will inform the Public Utilities Commission of Ohio of any material change to the information supplied in the certification or certification renewal application within 30 days of such material change, including any change in contact person for regulatory or emergency purposes or contact person for Staff use in investigating customer complaints.
- (8) Affiant further sayeth naught.

Affiant Signature & Title

Richard L. Zdunkewicz

DIRECTOR

Sworn and subscribed before me this

18 day of JANUARY

Month

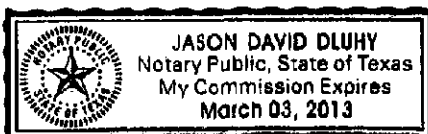
2011 Year

Signature of Official Administering Oath

[Signature]

Print Name and Title

JASON DLUHY



My commission expires on

MARCH 3, 2013

(CRNGS Broker/Aggregator -Version 1.07) Page 7 of 7



**State of Ohio**

**Certification Application for Retail Natural Gas Brokers/Aggregators**

**Applicant: Acclaim Energy, Ltd.**

**Exhibits**

- A-14 Principal Officers
- A-15 Corporate Structure
- A-16 Company History
- A-17 Articles of Incorporation and By-Laws
- A-18 Secretary of State Registration
  
- B-1 Jurisdiction of Operations
- B-2 Experience and Plans
- B-3 Summary of Experience
- B-4 Disclosure of Liabilities and Investigations
  
- C-1 Annual Reports
- C-2 SEC Filings
- C-3 Financial Statements
- C-4 Financial Arrangements
- C-5 Forecasted Financial Statements
- C-6 Credit Rating
- C-7 Credit Report
- C-8 Bankruptcy Information
- C-9 Merger Information
  
- D-1 Operations
- D-2 Operations Expertise
- D-3 Key Technical Personnel

A-14 Principal Officers

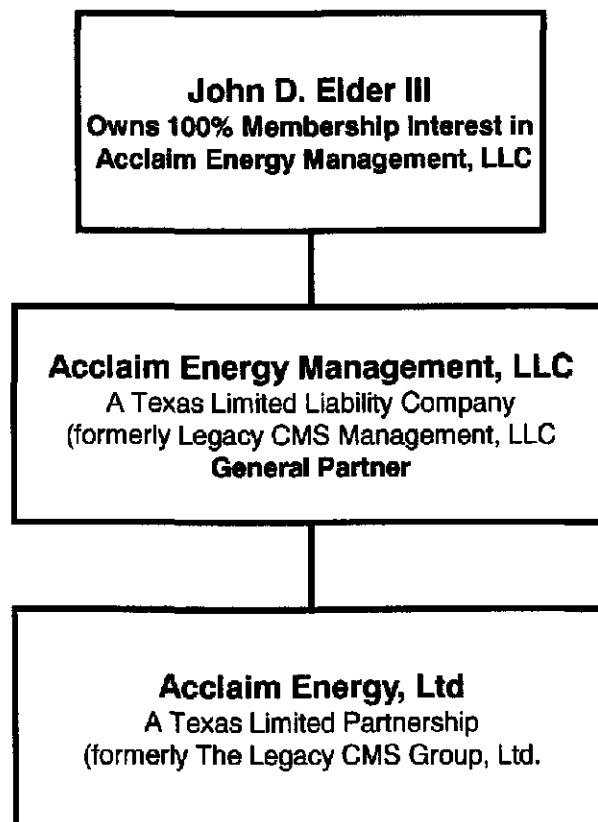
Name	Title	Address	Phone #
John D. Elder III	Chief Executive Officer	1221 Lamar, Suite 510, Houston, Texas 77010	713-524-0250
Dennis Vegas	Executive Vice President	1221 Lamar, Suite 510, Houston, Texas 77010	713-524-0250
Ryk Holden	Director	1221 Lamar, Suite 510, Houston, Texas 77010	713-524-0250

## A-15 - Corporate Structure

Please see the enclosed chart which describes the ownership structure of Acclaim Energy, Ltd. and its affiliate companies. Neither Acclaim Energy, Ltd. nor any of its affiliates supply retail or wholesale natural gas or electricity in North America. Acclaim Energy Ltd. acts exclusively as consultant and energy broker for the benefit of its clients.

# Acclaim Energy, Ltd

## Corporate Structure



## A-16 - Company History

Acclaim Energy, Ltd. was established in 2003 as Legacy CMS Group, Ltd. in 2003. The company was established to provide consulting services to institutional entities including cities, counties, municipal utility districts in Texas. In 2004 the company began providing services to commercial and industrial clients, primarily in the Texas market, including both natural gas and electricity consultation and brokerage. In 2005 the company began to acquire and represent clients outside of Texas.

The company changed its name to Acclaim Energy, Ltd. in 2009 and does business as Acclaim Energy Advisors. Today, the company serves nearly 400 clients and 7,000 locations nationwide, including commercial, industrial and institutional entities and organizations. The company is recognized as one of the top ten energy consulting firms in North America by KEMA, an industry monitoring and consulting firm.

**A-17 - Articles of Incorporation and By-Laws**

**Please see the enclosed.**

ARTICLES OF ORGANIZATION  
OF

FILED  
In the Office of the  
Secretary of State of Texas

LEGACY CMS MANAGEMENT, LLC

APR 14 2003

The undersigned, acting as the organizer of a limited liability company under the Texas Corporations Section Limited Liability Company Act (the "Act"), does hereby adopt the following Articles of Organization for LEGACY CMS MANAGEMENT, LLC (the "Company"):

ARTICLE ONE

The name of the limited liability company is LEGACY CMS MANAGEMENT, LLC.

ARTICLE TWO

The period of the Company's duration shall be perpetual, unless the Company dissolves in accordance with the terms of its regulations.

ARTICLE THREE

The purpose for which the Company is organized is the transaction of any or all lawful business for which limited liability companies may be organized under the Act.

ARTICLE FOUR

The address of the initial registered office of the Company is 3333 Eastside, Suite 290, Houston, Texas 77098, and the name of the Company's initial registered agent at such address is John D. Elder, III.

ARTICLE FIVE

The Company will not have managers. The names and addresses of the initial members of the Company are as follows:

<u>Name</u>	<u>Address</u>
John D. Elder, III	P. O. Box 130226 Houston, Texas 77219
Walter Thomas McAndrew	2950 North Loop West, Ste. 543 Houston, Texas 77092

## ARTICLE SIX

The name and address of the organizer of the Company is as follows:

Name

Address


Michael T. Norman

112 E. Pecan Street, Suite 1100  
San Antonio, Texas 78205

## ARTICLE SEVEN

No member of the Company shall be liable to the Company or any other member for monetary damages for an act or omission in such member's capacity as a member of the Company, except that this Article Seven does not eliminate or limit the liability of a member to the extent the member is found liable for (i) a breach of the member's duty of loyalty to the Company or its members; (ii) an act or omission not in good faith that constitutes a breach of duty of the member to the Company or an act or omission that involves intentional misconduct or a knowing violation of the law; (iii) a transaction from which the member received an improper benefit, whether or not the benefit resulted from an action taken within the scope of the member's office; or (iv) an act or omission for which the liability of a member is expressly provided by an applicable statute. Any repeal or amendment of this Article Seven shall be prospective only and shall not adversely affect any limitation on the liability of a member of the Company existing at the time of such repeal or amendment. In addition to the circumstances in which a member of the Company is not liable as set forth in the preceding sentences, a member shall not be liable to the fullest extent permitted by any provision of the statutes of the State of Texas hereafter enacted which further limit the liability of a member or manager of a limited liability company or of a director or officer of a corporation. The provisions of this Article shall not be deemed to limit or preclude indemnification, release or other limitations on the liability of a member by the Company for any liability which has not been eliminated or limited by the provisions of this Article.

IN WITNESS WHEREOF, these Articles of Organization have been executed on this 14th day of April, 2003 by the undersigned organizer.

  
Michael T. Norman, Organizer



**LEGACY CMS MANAGEMENT, LLC**

**ARTICLES OF AMENDMENT TO THE ARTICLES OF ORGANIZATION**

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**FILED**  
In the Office of the  
Secretary of State of Texas  
**MAY 08 2009**  
Corporations Section

Pursuant to the provisions of Article 3.06 of the Texas Limited Liability Company Act (the "TLLCA"), the undersigned limited liability company adopts the following Articles of Amendment to its Articles of Organization:

1. The name of the limited liability company is Legacy CMS Management, LLC.
2. Article One of the Articles of Organization is hereby deleted in its entirety and replaced with the following:  
  
"The name of the limited liability company is Acclaim Energy Management, LLC"
3. These Articles of Amendment were approved in accordance with Section G or H of Article 2.23 of the TLLCA or as otherwise provided in the articles of organization or regulations on May 8, 2009.

**[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]**

IN WITNESS WHEREOF, the limited liability company has caused these Articles of Amendment to be signed this 8<sup>th</sup> day of May, 2009.

Legacy CMS Management, LLC, its  
general partner

By: 

John D. Elder, III, Manager

MAY. 3. 2009 10:38AM

NO. 6105 P. 5

COX | SMITH

ATTORNEYS

May 8, 2009

Office of the Secretary of State  
Corporations Section  
P.O. Box 13697  
Austin, Texas 78711-3697

Re: Acclaim Energy, Ltd.

Dear Sir/Madam:

The undersigned corporation, which has reserved the name "Acclaim Energy, LLC" with the Office of the Secretary of State of the State of Texas, hereby consents to the use of the name "Acclaim Energy Management, LLC" by "Legacy CMS Management, LLC", a Texas limited liability company.

COX SMITH MATTHEWS INCORPORATED

By:

  
W. Todd Thetford, attorney

COX SMITH MATTHEWS INCORPORATED  
112 East Pecan Street | Suite 1000  
San Antonio, TX 78205  
210 584 5500 tel | 210 226 3925 fax  
coxsmith.com

AUSTIN DALLAS MCALLEN SAN ANTONIO

**THE LEGACY CMS GROUP, LTD.**

**AMENDMENT TO  
CERTIFICATE OF LIMITED PARTNERSHIP**

---

The undersigned, being the sole General Partner of The Legacy CMS Group, Ltd. (the "Partnership"), hereby executes this Amendment to Certificate of Limited Partnership (this "Amendment") which is being filed with the Secretary of State of the State of Texas in accordance with Section 2.02 of the Texas Revised Limited Partnership Act.

1. The name of the Partnership is The Legacy CMS Group, Ltd.
2. Section 1 of the Partnership's Certificate of Limited Partnership is amended to read in its entirety as follows:  
  
"1. The name of the limited partnership is Acclaim Energy, Ltd."
3. This Amendment has been approved in the manner required by the Texas Revised Limited Partnership Act and the governing documents of the Partnership.

**[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]**

IN WITNESS WHEREOF, the undersigned has hereunto set his hand to this Amendment  
this 8<sup>th</sup> day of May, 2009.

The Legacy CMS Group, Ltd.

By: Legacy CMS Management, LLC, its  
general partner

By: 

John D. Elder, III, Manager

**AMENDED AND RESTATED  
AGREEMENT OF LIMITED PARTNERSHIP**

**OF**

**THE LEGACY CMS GROUP, LTD.  
(a Texas Limited Partnership)**

THE SECURITIES REPRESENTED BY THIS DOCUMENT HAVE BEEN ACQUIRED FOR INVESTMENT AND HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR UNDER THE TEXAS SECURITIES ACT, AS AMENDED, OR UNDER THE SECURITIES LAWS OF ANY OTHER STATES. WITHOUT SUCH REGISTRATION, SUCH SECURITIES MAY NOT BE SOLD, PLEDGED, HYPOTHECATED OR OTHERWISE TRANSFERRED, EXCEPT UPON FURNISHING AN OPINION OF COUNSEL SATISFACTORY TO THE GENERAL PARTNER OF THIS LIMITED PARTNERSHIP THAT REGISTRATION IS NOT REQUIRED FOR SUCH TRANSFER OR THE SUBMISSION TO THE GENERAL PARTNER OF THIS LIMITED PARTNERSHIP OF SUCH OTHER EVIDENCE AS MAY BE SATISFACTORY TO THE GENERAL PARTNER OF THIS LIMITED PARTNERSHIP TO THE EFFECT THAT ANY SUCH TRANSFER SHALL NOT BE IN VIOLATION OF THE SECURITIES ACT OF 1933, AS AMENDED, THE TEXAS SECURITIES ACT, AS AMENDED, OR OTHER APPLICABLE STATE SECURITIES LAWS OR ANY RULE OR REGULATION PROMULGATED THEREUNDER. THE PARTNERSHIP DOES NOT HAVE ANY OBLIGATION TO REGISTER ANY OF THE SECURITIES REPRESENTED BY THIS DOCUMENT OR TO MAINTAIN PUBLICLY AVAILABLE ANY INFORMATION REGARDING THE PARTNERSHIP. ADDITIONALLY, ANY SALE OR OTHER TRANSFER OF THESE SECURITIES IS SUBJECT TO CERTAIN RESTRICTIONS THAT ARE SET FORTH IN THIS AGREEMENT OF LIMITED PARTNERSHIP.

**AMENDED AND RESTATED  
AGREEMENT OF LIMITED PARTNERSHIP  
OF  
THE LEGACY CMS GROUP, LTD.**

This Amended and Restated Agreement of Limited Partnership (this "Agreement") of The Legacy CMS Group, Ltd. (the "Partnership") is entered into effective as of the 1<sup>st</sup> day of July, 2006 (the "Effective Date"), by and among Legacy CMS Management, LLC, a Texas limited liability company (the "General Partner"), and the Limited Partners (as hereinafter defined).

**WITNESSETH:**

WHEREAS, pursuant to a Certificate of Limited Partnership filed with the Texas Secretary of State on April 14, 2003, the Partnership was formed as The Legacy CMS Group, Ltd.;

WHEREAS, the General Partner and John Devine Elder III ("Elder"), as the initial Partners of the Partnership, are subject to that certain Agreement of Limited Partnership of the Legacy CMS Group, Ltd dated effective April 14, 2003 (the "Original Agreement");

WHEREAS, pursuant to the terms of this Agreement, Lane Everett Sloan ("Sloan"), Ryk Jeffery Holden ("Holden"), Elisa Hattie Kaplan ("Kaplan") and Courtney Anne Granite ("Granite") are being admitted as Limited Partners in the Partnership (the "New Limited Partners") effective as of the Effective Date; and

WHEREAS, incident to becoming a Limited Partner, Sloan has committed to contribute \$50,000.00 and Holden, Kaplan and Granite have performed past services valued at \$40,000.00, \$20,000.00 and \$20,000.00, respectively;

WHEREAS, each of the New Limited Partners is knowledgeable of the Partnership's business, have had an opportunity to discuss their investment in the Partnership with management of the Partnership, and understands that an investment in the Partnership entails substantial risk, and they might lose their entire investment in the Partnership; and

WHEREAS, the General Partner and Limited Partners desire to amend and restate the Original Agreement in its entirety as hereinafter set forth;

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

**ARTICLE I  
FORMATION AND ORGANIZATION**

1.1 Formation; Name of Partnership. The General Partner and the existing Limited Partner have entered into and formed Legacy CMS Group, Ltd., a Texas limited partnership (the "Partnership"), for the purposes hereinafter set forth. The General Partner of the Partnership is Legacy CMS Management, LLC, a Texas limited liability company, and the Limited Partners are the Persons identified under the heading "Limited Partners" on Exhibit 1 hereto. The Partnership shall conduct its business

under the names "Legacy CMS Group, Ltd.," "Legacy Energy Solutions" and/or "Legacy Energy Management Solutions", and such names shall be used at all times in connection with the Partnership's business and affairs; provided, however, that the Partnership shall conduct its business under such name or variations thereof as the General Partner deems necessary or appropriate to meet the requirements of law in any jurisdiction in which the Partnership may elect to do business.

1.2 Amendment and Restatement of Original Agreement. This Agreement amends and restates in its entirety the Original Agreement.

1.3 Definitions. In addition to the terms defined elsewhere in this Agreement, the following terms as used herein, unless the context specifically requires otherwise, shall have the following respective meanings:

"Accounting Year" or "year" shall mean an accounting year ending on December 31 of each calendar year.

"Act" means the Texas Revised Limited Partnership Act as adopted and from time to time amended by the State of Texas.

"Additional Limited Partner" shall mean a Person who acquires a Partnership Interest directly from the Partnership and who is admitted to the Partnership as a Limited Partner.

"Adjusted Capital Account Deficit" shall mean, with respect to any Partner, the deficit balance, if any, in such Partner's Capital Account as of the end of the relevant year, after giving effect to the following adjustments: (i) credit to such Capital Account any amounts which the Partner is obligated to contribute to the Partnership, (ii) credit to such Capital Account the Partner's share of Partner Minimum Gain and the Partner's share of Minimum Gain; and (iii) debit to such Capital Account the items described in Treasury Regulations § 1.704-1(b)(2)(ii)(d)(4), (5) and (6). The foregoing definition of Adjusted Capital Account Deficit is intended to comply with the provisions of Treasury Regulations § 1.704-1(b)(2)(ii)(d) and shall be interpreted consistently therewith.

"Affiliate" shall mean, when used with respect to a specified Person, any other Person directly or indirectly controlling or controlled by or under direct or indirect common control with the specified Person, provided that the Partnership shall not be deemed to be an Affiliate of any Partner. For purposes of this definition "control," when used with respect to any specified Person, means the power to direct the management and policies of the Person, directly or indirectly, whether through the ownership of voting securities or other equity interests, by contract, by family relationship or otherwise; and the terms "controlling" and "controlled" have the meanings correlative to the foregoing.

"Agreed Price" shall mean, with respect to the purchase of the Partnership Interest of any Partner pursuant to Article 6 upon the occurrence of any Operative Event, an amount equal to the Fair Market Value of the Partnership Interest of the Subject Partner or such other amount as may be set forth in a written agreement, executed after the effective date hereof, between the Subject Partner and the Partnership.

"Agreement" shall mean this instrument, as amended, modified or restated from time to time pursuant to Section 10.7 hereof. All references to Sections are herein made, unless noted otherwise, to Sections of this Agreement.



"Bankruptcy" shall have the meaning assigned to it in Section 7.1(b).

"Bankruptcy Proceedings" shall have the meaning assigned to it in Section 7.1(b)(i).

"Capital Account" shall have the meaning assigned to it in Section 4.2.

"Capital Contributions" of a Partner shall mean the amount of cash and the net fair market value (as set forth in this Agreement, or if not set forth in this Agreement, as determined by the General Partner) of property or services contributed by that Partner to the Partnership pursuant to Article 3.

"Cause" shall mean that the General Partner has determined, in its reasonable judgment, that any one or more of the following has occurred:

(i) the breach of any provision of this Agreement by a Partner which has not been cured within five (5) days after the General Partner provides notice of the breach to the Partner; or

(ii) embezzlement, fraud, theft, dishonesty (materially injurious to the Partnership), commission of a crime involving fraud or deception, current substance abuse or misappropriation of funds; or

(iii) misfeasance, insubordination, malfeasance, neglect of duties, incompetence or gross negligence of a Partner in the performance or non-performance of his duties resulting in harm, monetary or otherwise, to the Partnership or the General Partner or any of their respective direct and indirect subsidiaries and affiliates, or their respective businesses or reputations which has not been cured within five (5) days after the General Partner provides notice of such matter to such Partner; or

(iv) the failure of a Partner to devote a Partner's full time (or partial time if mutually agreed to between the General Partner and such Partner) and best efforts to the Partnership's business which has not been cured within five (5) days after notice by the General Partner to Employee; or

(v) the willful failure of a Partner to comply with the lawful directives and assignments of the management of the Partnership, provided that such directives and assignments are consistent with such Partner's education and business experience, or any policies or procedures of the Partnership that may be adopted or amended from time to time by the General Partner.

"Certificate" shall mean the certificate or certificates required by law to be filed in connection with the formation of the Partnership.

"Code" shall refer to the Internal Revenue Code of 1986, as amended.

"Common Unit" means a Unit designated as a "Common Unit".

"Covered Person" shall have the meaning assigned to it in Section 8.2.

"Culpable Acts" shall mean, with respect to any Person, fraud, bad faith, gross negligence, willful misconduct or misappropriation of funds by such Person.

"Descendants" shall mean, with respect to a particular individual, such individual's children, grandchildren, great-grandchildren, and more remote progeny, and such individual's "descendants" include only those that have been born to a lawful marriage or legally adopted prior to attaining the age of fourteen (14) years.

"Fair Market Value" shall mean, with respect to determining the Agreed Price, shall be the fair market value of the subject Partnership Interest (which shall take into account any applicable discounts for minority interest and lack of marketability). Unless otherwise agreed to by the Subject Partner and the purchasers hereunder, the Fair Market Value of the subject Partnership Interest shall be determined by an appraiser (the "Appraiser") agreed upon by the Subject Partner and the General Partner. If such parties fail to agree upon the appointment of an appraiser within ten (10) days after a request by one of such parties for such appointment has been received by the other party or parties, the parties shall each, at their own expense, appoint an appraiser and the two appraisers so appointed shall in turn select a third appraiser within ten (10) days of their appointment and the third appraiser as so selected shall be the Appraiser. The Appraiser as so appointed shall determine the Fair Market Value of the subject Partnership Interest, after making appropriate adjustments and discounts for lack of liquidity and transferability, minority interest and other factors deemed appropriate by the Appraiser. The costs and expenses of the Appraiser shall be divided evenly between the Subject Partner, on one hand, and the Partnership, on the other hand. The determination of the fair market value of such Partnership Interest by the Appraiser shall be final and binding on all parties. The Appraiser shall deliver a written report of his or her appraisal to the Partnership, the Nonsubject Partners (if applicable), and the Subject Partner.

"Family" shall mean, with respect to a particular individual, such individual's spouse, siblings, parents and Descendants.

"GAAP" shall mean U.S. generally accepted accounting principles as in effect from time to time.

"General Partner" shall mean Legacy CMS Management, LLC, a Texas limited liability company, or any other Person that, at the time of reference, serves as the general partner of the Partnership in accordance with the provisions of this Agreement.

"Limited Partner" shall mean those persons whose names are set forth in Exhibit 1 hereto, other than the General Partner, or any other Person (including each additional Limited Partner and each substituted Limited Partner) that, at the time of reference, is admitted to the Partnership as a limited partner in accordance with the provisions of this Agreement.

"Liquidating Event" shall mean a sale of all or substantially all of the assets of the Partnership, or a merger, combination or consolidation of the Partnership with another entity, whereby, as a result of such merger, combination or consolidation, the Partners own less than 50% of the capital interests of the surviving entity.

"Liquidator" shall have the meaning assigned to it in Section 7.2.

"Major Decision(s)" shall have the meaning assigned to it in Section 2.2.

"Minimum Gain" shall mean the aggregate gain, if any, that would be realized by the Partnership for purposes of computing income or loss with respect to each Partnership asset if each Partnership asset was disposed of by the Partnership in a taxable transaction in full

satisfaction of all nonrecourse liabilities of the Partnership secured by such asset. Minimum Gain with respect to each Partnership asset shall be further determined in accordance with the rules of Treasury Regulations § 1.704-2(d) and any subsequent rule or regulation governing the determination of minimum gain. A Partner's share of Minimum Gain at the end of any Partnership year shall equal the aggregate Nonrecourse Deductions allocated to such Partner (or his predecessors in interest) up to that time, less such Partner's (and predecessors') aggregate share of decreases in Minimum Gain determined in accordance with Treasury Regulations § 1.704-2(g).

"Net Cash Flow" shall mean, with respect to any period, all cash revenues and receipts received by the Partnership (excluding Capital Contributions); less (i) cash expended (other than to the extent expended from reserves established in accordance with clause (ii) of this definition) for debts and expenses and interest and principal payments on any indebtedness of the Partnership and (ii) reserves that the General Partner determines in its discretion to be advisable pursuant to Section 2.1. For purposes of determining Net Cash Flow, depreciation and amortization shall not be considered an expense of the Partnership. Net Cash Flow shall be determined consistent with the financial statements of the Partnership.

"Net Income" shall mean, for a taxable year of the Partnership, the excess of (i) the income and gain of the Partnership for such year determined in accordance with the accounting principles described in Section 4.1(a), over (ii) the deductions and losses of the Partnership for such year determined in accordance with the accounting principles described in Section 4.1(a).

"Net Loss" shall mean, for a taxable year of the Partnership, the excess of (i) the deductions and losses of the Partnership for such year determined in accordance with the accounting principles described in Section 4.1(a), over (ii) the income and gain of the Partnership for such year determined in accordance with the accounting principles described in Section 4.1(a).

"Nonrecourse Deductions" shall mean the excess, if any, of the net increase in the amount of Minimum Gain during a Partnership year over the aggregate amount of any distributions during such year of proceeds of a nonrecourse liability that are allocable to an increase in Minimum Gain. The Nonrecourse Deductions of a year shall consist first of depreciation with respect to each item of Partnership property to the extent of the increase in Minimum Gain attributable to nonrecourse liabilities of the Partnership secured by such Partnership property, with the remainder of any Nonrecourse Deductions made up of a pro rata portion of the Partnership's other items of loss. Nonrecourse Deductions shall be further determined in accordance with the rules of Treasury Regulations §§ 1.704-2(b)(1) and 1.704-2(c) and any subsequent rule or regulation governing the determination of Nonrecourse Deductions.

"Nonsubject Partner" shall have the meaning assigned to it in Section 6.3.

"Operative Event", with respect to any Partner, shall mean any of the following events:

- (i) with respect to each Service Partner, the death of such Partner,

(ii) with respect to each Service Partner, the termination of the marital relationship of such Partner by death or divorce if such Partner does not succeed to his or her spouse's community interest in the Partner's Partnership Interest or purchase such interest pursuant to the terms hereof, or the entering into of any property settlement arrangement or agreement in connection therewith, pursuant to which such Partner's interest in his or her Partnership Interest is to be diluted, lessened, encumbered or impaired;

(iii) the Bankruptcy of such Partner;

(iv) with respect to each Service Partner, such Partner is no longer employed or otherwise engaged to provide services to the General Partner or the Partnership, for any reason or no reason (including, without limitation, death, disability, with Cause, without Cause, or voluntary resignation by such Partner); and

(v) the material breach by such Partner of any provisions of this Agreement, and the General Partner has provided written notice of such breach to such Partner and such Partner has failed to cure such breach within 15 days of receipt of such notice.

"Partner Minimum Gain" shall mean the aggregate of the partner nonrecourse debt minimum gain amounts of the Partnership computed in accordance with Treasury Regulations § 1.704-2(i)(3).

"Partner Nonrecourse Deductions" shall be determined in accordance with the principles of Treasury Regulations § 1.704-2(i)(1). The amount of Partner Nonrecourse Deductions for a year is determined in accordance with Treasury Regulations § 1.704-2(i)(2) and generally equals the net increase, if any, in the amount of Partner Minimum Gain during that year, determined pursuant to Treasury Regulations § 1.704-2(i)(3).

"Partners" shall refer collectively to the General Partner and the Limited Partners.

"Partnership" shall have the meaning assigned to it in Section 1.1.

"Partnership Interest" shall mean the interest of each Partner in the Partnership (which shall include, without limitation, its rights as General Partner or Limited Partner, as the case may be, and its interest in revenues, income, gains, losses, deductions, Net Cash Flow and distributions.

"Partnership Office" shall have the meaning assigned to it in Section 1.5.

"Partnership Year" shall mean the Accounting year of the Partnership.

"Percentage Interest" shall mean, with respect to any Partner, a fraction, the numerator of which is the number of Common Units (on an as-converted basis) then owned by such Partner, and the denominator of which is the total number of Common Units (on an as-converted basis) then owned by all of the Partners (or, with respect to any vote or approval of, or other reference to, less than all of the Partners, the total number of Common Units (on an as-converted basis) then owned by such Partners). For purposes of this Agreement, references to "on an as-converted basis" shall mean the number of Common Units that would be outstanding if all outstanding Units that are under any circumstance convertible into Common Units were so converted into Common Units immediately prior to the moment in question.

"Person" shall mean an individual, corporation, association, limited liability company, limited liability partnership, partnership, estate, trust, unincorporated organization or other entity or a government or any agency or political subdivision thereof.

"Purchase Price" shall have the meaning assigned thereto in Section 6.3(a).

"Registered Agent" shall have the meaning assigned to it in Section 1.6.

"Registered Office" shall have the meaning assigned to it in Section 1.6.

"Regulatory Allocations" shall have the meaning assigned to it in Section 4.1(d).

"Related Party" shall mean, as to any Partner, (i) any Affiliate of such Partner, (ii) any employee, manager, officer, director, shareholder or partner of such Partner or of any Affiliate of such Partner, (iii) any Partner of the family of any Person that is a Related Party of such Partner, and (iv) all agents (whether or not disclosed) acting on behalf of or by the direction of any of the foregoing.

"Required Interest" shall mean the written approval of the General Partner and the written approval of the Limited Partners holding at least a majority of the Percentage Interests of all Limited Partners.

"Rules" shall have the meaning assigned to it in Section 10.5(a).

"Securities Act" shall have the meaning assigned to it in Section 6.5.

"Service Partner" shall mean any Partner that is an employee of the Partnership or otherwise provides services to the Partnership.

"Special Purchase Entity" shall mean a Partner that is not a natural person and (i) was formed for the purpose of owning a Partnership Interest or (ii) whose primary asset is a Partnership Interest.

"Subject Partner" shall have the meaning assigned to it in Section 6.3.

"Substituted Limited Partner" shall mean a Person who acquires a Partnership Interest from an existing Partner and who is admitted to the Partnership as a Limited Partner.

"Tax Matters Partner" shall have the meaning assigned to it in Section 5.3.

"Transfer" shall have the meaning assigned to it in Section 6.1.

"Treasury Regulations" shall mean the Income Tax Regulations promulgated under the Code, as such regulations may be amended from time to time (including corresponding provisions of succeeding regulations).

"Unit" means a unit of ownership in the Partnership of any class or series outstanding from time to time, including, without limitation, Common Units and any preferred units hereafter issued and outstanding.

"Unit Designation" means an addendum or exhibit to this Agreement executed by the General Partner to establish any series or class(es) of Units, which addendum or exhibit shall set

forth the designations, preferences, limitations and relative rights, including voting rights, of the Units of each such series or class

"Winding Up" shall mean the period following a termination of the Partnership.

"Withdrawing General Partner" shall have the meaning assigned to it in Section 7.1(d).

1.4 Term. The Original Agreement became effective and the Partnership commenced as of April 14, 2003, the date of filing of the Certificate, and shall continue perpetually, unless sooner terminated in accordance with any provision of this Agreement.

1.5 Principal Office. The principal office of the Partnership (the "Partnership Office") shall be Four Houston Center, 1221 Lamar Street, Suite 510, Houston, Texas 77010, or such other location or locations in the State of Texas as the General Partner may determine. The books and records of the Partnership shall be kept at the Partnership Office, or such other location or locations in the State of Texas as the General Partner may determine.

1.6 Registered Office and Registered Agent. The "Registered Office" of the Partnership in Texas shall be Four Houston Center, 1221 Lamar Street, Suite 510, Houston, Texas 77010, and the name of the "Registered Agent" at such address is John D. Elder III. The Registered Office and/or Registered Agent may be changed by the General Partner from time to time in accordance with provisions of the Act.

1.7 Filing of Certificate. The General Partner has executed and filed the Certificate. The General Partner shall execute, file and/or record any other certificate or certificates and take all other steps permitted, necessary or appropriate to qualify the Partnership to conduct business in any jurisdiction or political subdivision in which the Partnership proposes to do business and to be treated as a limited partnership doing business in such jurisdiction.

1.8 Purposes of the Partnership. The objects and purposes of the Partnership are to (i) to provide cost management solutions to businesses, non-profit companies and federal, state and local governmental entities, and to do any and all such other acts as may be necessary, incidental or convenient in connection with the foregoing (the "Core Business"), and (ii) engage in the transaction of any or all lawful business for which limited partnerships may be formed under the Act.

## ARTICLE 2 MANAGEMENT

2.1 Powers of the General Partner. Subject to the limitations imposed in this Agreement, the General Partner shall manage and control all activities of the Partnership. In furtherance of the foregoing, subject to the limitations imposed in this Agreement, the General Partner shall, at the reasonable expense of and on behalf of the Partnership, have the full, exclusive and complete discretion to manage and control, and shall make all decisions affecting the business and affairs of the Partnership. Except in the event that the General Partner assigns its Partnership Interest in accordance with Article 6 or otherwise consented to by Elder, the General Partner may not be removed by the Limited Partners. The General Partner shall also have full power and authority to implement, or cause to be implemented, all Major Decisions. Without limiting the generality of the foregoing, the General Partner, subject to the limitations imposed in this Agreement, shall have the following power and authority, exercisable in the sole discretion of the General Partner:

(a) to enter into, execute, amend, and perform any and all agreements, contracts, documents, certifications, and instruments binding the Partnership as may be necessary or convenient in

connection with the ownership, management, maintenance, and operation of Partnership property;

(b) to execute, in furtherance of any or all of the purposes of the Partnership, any lease, bill of sale, contract, or other instrument purporting to convey or encumber the real or personal property of the Partnership;

(c) to acquire any assets (including real estate), and to sell, transfer, exchange, or otherwise dispose of any assets (including real estate) of the Partnership;

(d) to vote corporate stock, general or limited partnership interests, or other securities that are assets of the Partnership; and to consent to the reorganization, consolidation, merger, termination, dissolution, or liquidation of a corporation or other business enterprise that is an asset of the Partnership;

(e) to have the Partnership's direct expenses billed directly to and paid by the Partnership;

(f) to pay all taxes, charges, and assessments against the Partnership and its property;

(g) to open, maintain, and close bank accounts, to designate and change signatories on such accounts, and to draw checks and other orders for the payment of monies;

(h) to deposit Partnership funds that, from time to time, are not required for the operation of the business of the Partnership in interest bearing bank, trust department, brokerage or money market fund accounts or to purchase commercial paper, treasury bills, or other instruments or any other similar investments as the General Partner may deem necessary, appropriate or advisable;

(i) to engage consultants, accountants, attorneys, investment advisors, and any and all other agents and assistants, both professional and non-professional, as the General Partner may deem necessary, appropriate or advisable in furtherance of the purposes of the Partnership, and to compensate such Persons for services rendered out of Partnership funds;

(j) to collect all sums due the Partnership;

(k) to prepare and file all Partnership tax returns and to make all elections for the Partnership thereunder;

(l) to establish reserves for working capital and for taxes, insurance, debt service, repairs, replacements or renewals, or other costs and expenses incident to the ownership of Partnership property and for other such purposes as the General Partner deems appropriate under the circumstances from time to time;

(m) to establish and issue series and classes of Units and to fix and determine the designations, preferences, limitations and relative rights, including voting rights, of the Units of each such series or class.

(n) to admit Additional Limited Partners and Substituted Limited Partners as contemplated by Article 6 of this Agreement;

(o) to settle claims, to prosecute, defend, and settle lawsuits, and to handle all

matters with governmental agencies;

(p) except as otherwise provided herein, to determine the timing and amount of any distributions to the Partners (whether of cash or property);

(q) to prepare and modify any budgets for the Partnership;

(r) to borrow, mortgage, pledge, or in any other manner encumber all or any part of the assets of the Partnership;

(s) to act as the "tax matters partner" pursuant to Section 6231(a)(7) of the Code;

(t) to purchase such insurance as the General Partner, in its sole discretion, determines;

(u) to hold, manage, invest and reinvest all or any part of the assets of the Partnership;

(v) to the extent funds of the Partnership are available, to make or cause to be made all disbursements to pay all debts and obligations of the Partnership;

(w) to determine and approve the compensation of all employees, consultants and similar personnel of the Partnership (and its Affiliates) who perform services for the Partnership;

(x) to enter into service and other agreements with Affiliates of the Partnership (including the Partners and Affiliates of the Partners); and

(y) to take any and all other action that the General Partner may deem necessary, appropriate, or desirable in furtherance of the purposes of the Partnership.

The foregoing powers shall be exercised by the General Partner on the Partnership's behalf and in its name, as its act and deed. All actions taken by the General Partner in implementing any Major Decisions of the Partners, and all other actions taken by the General Partner in the course of the Partnership's business, shall be binding on the Partnership. Persons dealing with the Partnership shall be entitled to rely conclusively upon the power and authority of the General Partner as set forth herein.

**2.2 Major Decisions.** Notwithstanding any other provision of this Agreement or the Act to the contrary, without the approval of a Required Interest to the specific act in question, the General Partner shall have no right, power or authority to do any of the following acts or decisions (each a "Major Decision", and collectively, "Major Decisions"):

(a) to merge or consolidate the Partnership with any Person or sell all or substantially all of the assets of the Partnership except as provided in Section 9.1; and

(b) to terminate the Partnership.

**2.3 Reimbursement of General Partner.** The General Partner shall diligently and faithfully devote the time to the management of the Partnership necessary to serve the Partnership purposes and shall perform all of the duties of a General Partner which are provided for in this Agreement and the Act. The General Partner shall be entitled to reimbursement of all reasonable expenses incurred in the





formation and administration of the Partnership.

2.4 Limited Partner Status. The Limited Partners shall not perform any act on behalf of the Partnership; incur any expense, obligation or indebtedness of any nature on behalf of the Partnership; or in any manner participate in the management of the Partnership or receive or be credited with any amounts, except as specifically contemplated hereunder. A Limited Partner shall not be personally liable for any amounts other than the amounts contributed by such Limited Partner to the capital of the Partnership, and shall not be liable for any of the debts or losses of the Partnership or of the General Partner, except only to the extent that a liability of the Partnership is founded on or results from an unauthorized act or activity of such Limited Partner.

2.5 Outside Activities. The Partners acknowledge that the General Partner, and the Affiliates of the General Partner, are engaged in activities other than the activities of the Partnership and that the General Partner and its Affiliates shall not be expected or required to devote its full time to the management of the Partnership. Participation in the Partnership shall not in any way act as a restraint on the other present or future business activities or investments of any Partner (or any Affiliate of a Partner), so long as such activities are not competitive with the business of the Partnership. As a result of this Agreement, no Partner (or any Affiliate of a Partner) shall, under any circumstances, be obligated or bound to offer or present to the Partnership or any of the other Partners any business opportunity presented or offered to them as a prerequisite to the acquisition of or investment in such business opportunity by such Partner (or any Affiliate of such Partner) for his or her account or the account of others, so long as such opportunities are not Partnership Opportunities (as hereinafter defined). As such, each Partner shall be required to present to the Partnership any Partnership Opportunities before engaging in such opportunities; provided, however, the General Partner may, in its discretion, waive such obligation to present to the Partnership any Partnership Opportunities (in a Unit Designation or otherwise in writing) with respect to any Limited Partner in connection with the admittance of such Partner to the Partnership and the issuance of Units to such Partner. "Partnership Opportunities" shall mean such business opportunities that (i) are competitive with the Partnership, (ii) relate to the business activities conducted by the Partnership at that time, (iii) relate to business activities contemplated by the Partnership that are a reasonable extension of the business activities then engaged in by the Partnership or (iv) are within the realm of business activities which the Partnership could engage in a manner which is consistent with its present or reasonably then-contemplated business activities.

2.6 Power of Attorney. By the execution of this Agreement, the Limited Partners constitute and appoint the General Partner as their true and lawful attorney-in-fact and agent with full power and authority to act in their name, place and stead in the execution, acknowledgment, delivering, filing and recording of the Certificate and all other certificates and documents that the General Partner deems necessary or reasonably appropriate for the following specific purposes:

- (a) to register, qualify or continue the Partnership as a partnership in Texas and to qualify the Partnership to do business in the states in which the Partnership is required to qualify;
- (b) to reflect a change in the identity of any Partner or the addition of any Partner pursuant to the provisions of Article 6 or to reflect an amendment of this Agreement made pursuant to the provisions of Section 10.7 or any amendment of the Certificate as required by any such change or amendment;
- (c) to amend Exhibit I hereto to reflect (i) any additional Capital Contributions made by the Partners in accordance with the terms of this Agreement, (ii) the issuance of any Units in accordance with the terms of this Agreement and (iii) the admission or substitution of any Limited Partner in accordance with the terms of this Agreement;

- (d) to adopt any Unit Designation; and
- (e) to reflect the termination of the Partnership after same has been terminated in accordance herewith.

The power of attorney granted herein shall be deemed to be coupled with an interest and shall to the extent permitted by law survive the termination and liquidation of the Limited Partner, and shall be binding on any assignee or vendee of a Partnership Interest hereunder, or any portion thereof, including any of the distributive rights relating thereto. The power of attorney granted hereunder shall be exercisable only by the General Partner.

2.7 Drag-along. (a) In the event that Elder decides to sell all or a portion of his interests in the Partnership to a third party (an "Approved Sale"), at the written request of Elder, all of the Limited Partners holding Common Units (and the General Partner if requested by Elder) shall be required to sell (and agree to sell) all (or their respective portion) of their Common Units to such third party on the same terms and conditions as negotiated and agreed to by Elder, provided that each of the Partners, incident to such Approved Sale, receives the same consideration per Common Unit. However, it is expressly agreed and contemplated that such third party may pay one or more Partners additional consideration for agreements restricting competition or for providing future services and that such amounts paid shall not be treated as consideration for the sale of the Common Units.

(b) Generally, the Partnership shall pay all transaction costs associated with any Approved Sale to the extent such costs are incurred for the benefit of all holders of Partners. To the extent such costs are not incurred by the Partnership prior to the distribution of proceeds from any Approved Sale or by the acquiring company, such costs shall be borne by each holder of Common Units according to his, her or its pro rata share (based upon the amount of consideration received by such Partner in the Approved Sale) of the costs of any Approved Sale. Each holder of Common Units shall be obligated to join on a pro rata basis (based upon the amount of consideration received by such holder for such Common Units in the Approved Sale) in any indemnification or other obligations that the holders of a majority of the the Common Units and any other Units the holders of which are entitled to vote on such matter (voting as a single class on an as-converted basis) then outstanding agree to provide in connection with such Approved Sale (other than any such obligations that relate specifically to a Partner, such as indemnification with respect to representations and warranties given by a Partner regarding such holder's title to and ownership of his, her or its Units); provided that such indemnification shall not exceed such holder's net proceeds from such Approved Sale.

### ARTICLE 3 CAPITAL OF THE PARTNERSHIP

3.1 Initial Capital Contributions of the Partners. Subject to the terms of this Agreement, each Partner hereby commits to contribute, or has contributed, to the Partnership the cash, property or services set forth opposite its name in the column entitled "Initial Capital Contributions" in Exhibit 1. Each of the contributions has been made or shall be made concurrently with each Partner's execution and delivery hereof in cash or property. If any portion of a Partner's initial Capital Contribution is other than cash, the Partners agree that the aggregate fair market value of the cash and other property contributed by such Partner equals the value set forth opposite such Partner's name in the column entitled "Initial Capital Contributions" in Exhibit 1. The Partners agree that the Capital Accounts of the General Partner and Elder have been "booked up" to the fair market value thereof as reflected on Exhibit 1 and that such amounts set forth on Exhibit 1 shall be controlling and reflected in the books of the Partnership as the Capital Account of the Partners commencing as of the Effective Date.

3.2 Return of Capital; Partner's Loans. No Partner is entitled to the return of his or her contribution or any subsequent contributions to the Partnership or to be paid interest in respect of either of his or her Capital Account or any contribution made by him or her to the Partnership. No unrepaid capital contribution shall be deemed or considered to be a liability of the Partnership or of any Partner. No Partner shall be required to contribute or loan any cash or property to the Partnership to enable the Partnership to return any Partner's contribution to the Partnership. Notwithstanding the prior sentence, nothing herein shall prevent a Partner from loaning money to the Partnership under terms and conditions determined by the General Partner and such Partner.

3.3 Schedule of Partners; Contributions; Unit Ownership; Uncertificated Interests. The name and address of, and the number of Units of each class and series held by, each Partner are set forth in Exhibit 1 attached hereto. Exhibit 1 hereto shall be amended by the General Partner from time to time to reflect (i) any additional Capital Contributions made by the Partners, (ii) the issuance of additional Units, and (iii) the admission of Additional or Substituted Limited Partners. The Partnership Interests owned by Partners hereunder shall not be represented by certificates.

3.4 No Further Obligation; Additional Capital Contributions. Except as expressly provided for in or contemplated by this Article 3, neither the General Partner nor the Limited Partners shall have any obligation to provide funds to the Partnership under this Agreement, whether by contributions to capital, loans, return of monies received or otherwise. Any Partner may, but shall not be obligated to, make such additional Capital Contributions as such Partner and the General Partner may determine.

3.5 Designation and Issuance of Additional Units. The Partnership, by action of the General Partner, may establish, offer and issue such series and classes of Units as the General Partner may determine to be appropriate in its discretion. The General Partner shall fix and determine the designations, preferences, limitations and relative rights, including voting rights, of the Units of each such series or class (which may be superior to those of the Common Units and any other class or series of Units), and modify, waive or amend any provision of this Agreement with respect to such Units, by execution of a Unit Designation and attaching such Unit Designation as an addendum or exhibit to this Agreement, whereupon such Unit Designation shall become a part hereof and incorporated herein and this Agreement shall be deemed to have been amended to the extent inconsistent with such Unit Designation. No Partner shall have any preemptive rights or other rights to acquire any Units sold by the Partnership. Each Limited Partner acquiring additional Units hereby agrees to make additional Capital Contributions to the Partnership in the amount agreed upon at the time of such offer and sale.

#### ARTICLE 4 ALLOCATIONS, NET CASH FLOW AND DISTRIBUTIONS

##### 4.1 Allocations.

(a) In General. The recognition and classification of the items of income, gain, loss and deduction of the Partnership (whether recognized prior to or during Winding Up) shall be the same for purposes of this Section 4.1 as their recognition and classification for federal income tax purposes determined (i) without regard to any Section 754 Election which may have been made, (ii) without regard to any provision of the Code which provides that an item of income or gain is not includable in gross income or that an expenditure is not deductible or chargeable to a capital account, and (iii) without regard to any items allocated pursuant to Section 4.1(e).

(b) Net Income. Subject to the terms of any Unit Designation(s) covering any outstanding Units from time to time, Net Income shall be allocated in the following priority:

(i) First, to each Partner in proportion to, and to the extent of, the amount by which (A) the amount of the cumulative Net Loss allocated to each Partner pursuant to Section 4.1(d)(i), if applicable, and next pursuant to Section 4.1(c), exceeds (B) the cumulative Net Income theretofore allocated to each Partner pursuant to this Section 4.1(b)(i); and

(ii) Second, to the Partners in accordance with their respective Percentage Interests.

(c) Net Loss. Subject to the terms of any Unit Designation(s) covering any outstanding Units from time to time, Net Loss shall be allocated to the Partners in accordance with their respective positive Capital Account balances.

(d) Restrictions on Allocations. Notwithstanding anything in this Section 4.1 to the contrary:

(i) The Net Loss allocated to a Partner pursuant to Section 4.1(c) shall not exceed the maximum amount of Net Loss that can be so allocated without causing such Partner to have an Adjusted Capital Account Deficit at the end of the year. All Net Loss in excess of the limitation set forth in this Section 4.1(d)(i) shall be allocated to the General Partner.

(ii) In the event a Partner receives any adjustments, allocations or distributions described in Treasury Regulations § 1.704-1 (b) (2) (ii) (d) (4), (5) or (6), items of Net Income shall be specially allocated to such Partner in an amount and manner sufficient to eliminate, to the extent required by the Treasury Regulations, the Adjusted Capital Account Deficit of such Partner as quickly as possible.

(iii) In the event a Partner has an Adjusted Capital Account Deficit at the end of any Accounting year, such Partner shall be specially allocated items of Net Income in the amount and manner sufficient to eliminate, to the extent required by Treasury Regulations, the Adjusted Capital Account Deficit of such Partner as quickly as possible.

(iv) Notwithstanding any other provision of this Agreement, but subject to the exceptions set forth in Treasury Regulations § 1.704-2(f)(2), (3), (4) or (5), if there is a net decrease in Minimum Gain during an Accounting year, the Partners must be allocated items of Net Income for such year (and, if necessary, subsequent years) in the proportion to, and to the extent of, an amount equal to such Partner's share of the net decrease in Minimum Gain (as such share is determined in accordance with Treasury Regulations § 1.704-2(g)(2)). The Minimum Gain charge back shall consist first of Net Income from the disposition of Partnership assets subject to nonrecourse liabilities of the Partnership with the remainder of the Minimum Gain charge back, if any, made up of a pro rata portion of the Partnership's other items of income or gain for such year and shall be determined in accordance with Treasury Regulations §§ 1.704-2(f)(6), 1.704-2(g)(2) and 1.704-2(j)(2)(i), or any successor provisions. If such Net Income from the disposition of Partnership assets exceeds the amount of Minimum Gain charge back, a proportionate share of each item of such Net Income shall constitute a part of the Minimum Gain charge back.

(v) Notwithstanding any other provision of this Agreement, but subject to the exceptions referenced in Treasury Regulations § 1.704-2(i)(4), if there is a net

decrease in Partner Minimum Gain during any year, items of income and gain for such year (and, if necessary subsequent years) shall first be allocated to each Partner with a share of that Partner Minimum Gain in proportion to, and to the extent of, an amount equal to such Partner's share of the net decrease in Partner Minimum Gain (as such share is determined in accordance with Treasury Regulations § 1.704-2(i)(4)). The items to be so allocated shall be determined in accordance with Treasury Regulations § 1.704-2(i)(4), or any successor provision.

(vi) Nonrecourse Deductions for any taxable year shall be allocated among the Partners in the same manner as are the other Profits and Losses of the Partnership for such year. Partner Nonrecourse Deductions for any taxable year should be allocated among the Partners in accordance with Treasury Regulations § 1.704-2(i)(1).

(vii) The allocations set forth in this Section 4.1(d) ("Regulatory Allocations") are intended to comply with certain requirements of Treasury Regulations §§ 1.704-1 and 1.704-2. Notwithstanding any other provision of this Section 4.1 (other than the Regulatory Allocations), the Regulatory Allocations shall be taken into account in allocating other Net Income and Net Loss among the Partners so that, to the extent possible, the net amount of such allocations of other Net Income and Net Loss and the Regulatory Allocations to the Partners shall be equal to the net amount that would have been allocated among the Partners if the Regulatory Allocations had not occurred.

(e) Section 704(c). Items of income, gain, loss, and deduction with respect to an asset contributed to the Partnership by a Partner that has a fair market value (as set forth in this Agreement, or if not set forth in this Agreement, as determined by the General Partner) at the time of such contribution which is different from its adjusted tax basis shall, for tax purposes only, be allocated among the Partners in the manner provided under Section 704(c) of the Code and Treasury Regulations thereunder so as to take into account any variation between the basis of the property to the Partnership and its fair market value at the time of contribution. Such allocations shall be made in accordance with the traditional method set forth in Treasury Regulations § 1.704-3(b).

4.2 Computation of Capital Account. The balance of the "Capital Account" of a Partner as of the Effective Date is as set forth on Exhibit I and, in addition to the adjustments contemplated in Section 4.6, as of any subsequent date is increased by (i) the amount of cash contributed by that Partner to the Partnership on or prior to that date (other than the satisfaction by Sloan of his capital commitment that is already reflected on Exhibit I); (ii) the fair market value (as set forth in this Agreement, or if not set forth in this Agreement, as determined by the General Partner) of any property (reduced by any liabilities which are assumed by the Partnership or to which such property is subject) which is contributed by that Partner to the Partnership on or prior to that date; and (iii) any item of Partnership income or gain which is allocated to such Partner pursuant to Section 4.1 on or prior to that date; and is decreased by (a) any Partnership deduction or loss which is allocated to such Partner pursuant to Section 4.1 on or prior to that date; (b) the amount of cash distributed by the Partnership to such Partner on or prior to that date; and (c) the fair market value (as set forth in this Agreement, or if not set forth in this Agreement, as determined by the General Partner) of any property (reduced by any liabilities which are assumed by the distributee Partner or to which the property is subject) which is distributed by the Partnership to the Partner on or prior to that date. For Capital Account purposes, depreciation, cost recovery deductions and gain or loss on a sale or other disposition shall take into account the book basis, and not the tax basis, of the assets of the Partnership. Allocations pursuant to Section 4.1(e) shall not be taken into account for Capital Account purposes.

4.3 Distributions. Except as otherwise provided in Section 7.4 herein, and subject to the terms of any Unit Designation(s) covering any outstanding Units from time to time, the General Partner shall distribute Net Cash Flow at such times as it may determine in its sole discretion. Subject to the terms of any Unit Designation(s) covering any outstanding Units from time to time, distributions of Net Cash Flow shall be made to the Partners in proportion to their respective Percentage Interests. However, subject to the terms of any Unit Designation(s) covering any outstanding Units from time to time, distributions of Net Cash Flow which is derived in whole or in part from a Liquidating Event, shall be made in accordance with positive Capital Account balances in accordance with Section 7.4. Notwithstanding anything in this Section 4.3 to the contrary, to the extent that there is Net Income allocated to the Partners holding any class or series of Units, other than Net Income allocated in accordance with 4.1(b)(i) above, the General Partner shall be required to make distributions of Net Cash Flow to the holders of such class or series of Units in an amount sufficient to pay the federal income tax liability incurred by the Partners with respect to the Net Income so allocated to them for the prior tax year (other than Net Income allocated under Section 4.1(b)(i)), assuming that all such Partners are taxed at a 35% marginal rate. Subject to the terms of any Unit Designation(s) covering any outstanding Units from time to time, such distributions shall be made in proportion to their respective Percentage Interests, unless such Net Income results from a Liquidating Event, in which event, subject to the terms of any Unit Designation(s) covering any outstanding Units from time to time, such distributions shall be made in proportion to the positive Capital Account balances of the Partners.

4.4 Allocations Subsequent to Assignment. To the extent permitted by the Code, Net Income or Net Loss and other items attributable to a Partnership Interest acquired by reason of an assignment from a Partner shall be allocated or adjusted between the assignor or the assignee based upon either (i) the length of time in any Accounting year of the Partnership during which the assigned Partnership Interest was owned by each of them, determined with reference to the effective date of the assignment or (ii) an interim closing of the Partnership's books at assignor's sole expense. Such manner of allocation or adjustment shall be determined by the assignor, with the consent of the General Partner, which consent shall not be unreasonably withheld.

4.5 Varying Interests. In the event that the Partners are admitted to the Partnership on different dates during any Accounting year or if the Partnership Interest owned by the Partners vary on different dates during any Accounting year, Net Income or Net Loss for such Accounting year shall be allocated among the Partners in proportion to each Partner's respective ownership of the Partnership Interest from time to time during such Accounting year in accordance with Code Section 706, using any convention permitted under such Code Section and selected by the General Partner. For purposes of determining Net Income or Net Loss allocable to any period, all Partnership items of income, gain, loss, deduction and credit shall be determined on a daily, monthly or other basis, as determined by the General Partner using any permissible method under Code Section 706 and the Treasury Regulations promulgated thereunder.

4.6 Revaluations of Partnership Assets.

(a) Consistent with the provisions of Treasury Regulations Section 1.704-1(b)(2)(iv)(f), and as provided in this Section 4.6, the fair market value of all of the Partnership's assets (net of liabilities of the Partnership) shall be adjusted upward or downward (resulting in corresponding adjustments to the Capital Accounts) to reflect any unrealized gain or unrealized loss attributable to such Partnership property, as of the times of the adjustments provided in Section 4.6(b), as if such unrealized gain or unrealized loss had been recognized on an actual sale of each such property and allocated pursuant to Section 4.1.

(b) Such adjustments shall be made as of the following times: (i) immediately prior to the acquisition of an additional interest in the Partnership by any new or existing Partner in exchange for more than a de minimis Capital Contribution; (ii) immediately prior to the distribution by the Partnership to a Partner of more than a de minimis amount of property as consideration for an interest in the Partnership; or (iii) immediately prior to the liquidation of the Partnership within the meaning of Treasury Regulations Section 1.704-1(b)(2)(ii)(g); provided, however, that adjustments pursuant to clauses (i) and (ii) above shall be made only if the General Partner determines that such adjustments are necessary or appropriate to reflect the relative economic interests of the Partners in the Partnership. Nothing herein shall require the General Partner to make adjustments pursuant to clauses (i) and (ii) above in the event of the exercise of an option to acquire a Partnership Interest with an exercise price based upon the fair market value of the subject Partnership Interest at the time of grant will not require.

(c) In accordance with Treasury Regulations Section 1.704-1(b)(2)(iv)(c), the fair market value of Partnership assets distributed in kind shall be adjusted upward or downward to reflect any unrealized gain or unrealized loss attributable to such Partnership property, as of the time any such asset is distributed.

(d) In determining unrealized gain or unrealized loss for purposes of this Section 4.6, the aggregate cash amount and fair market value of all of the Partnership's assets and liabilities (including cash or cash equivalents) shall be determined by the General Partner using such reasonable method of valuation as it may adopt, or in the case of a liquidating distribution pursuant to Article 7 by the Liquidator using such reasonable methods of valuation as it may adopt. The General Partner or the Liquidator, as the case may be, shall allocate such aggregate value among the assets of the Partnership (in such manner as they determine in their sole and absolute discretion) to arrive at a fair market value for individual properties.

(e) Notwithstanding the foregoing provisions of this Section 4.6, the fair market value of all of the assets of the Partnership (net of liabilities of the Partnership) shall be calculated in good faith by the General Partner. In determining the fair market value of the assets of the Partnership, the General Partner may, but is not required to, seek and rely on the advice and opinions of professional appraisers and accountants as the General Partner, in its discretion, deems advisable or appropriate.

## ARTICLE 5

### ACCOUNTING AND TAX MATTERS

5.1 Accounting Records, Accounting Year. The books and records of the Partnership shall be kept on such basis of accounting as the General Partner may determine from time to time. Such books and records shall be maintained by reference to an accounting year which shall be the calendar year. The General Partner shall keep or cause to be kept full and proper accounts of all transactions of the Partnership in accordance with the accounting principles described in this Section 5.1.

5.2 Inspection. The books and records of the Partnership shall be maintained at the Partnership Office. The General Partner shall have the right to reasonably restrict access to the books and records of the Partnership (both with respect to the type of information available and the manner of access).



5.3 Tax Matters. Subject to the control and direction of the General Partner, the General Partner shall be the "Tax Matters Partner" of the Partnership within the meaning of Section 6231(a)(7) of the Code and any regulations issued thereunder, unless the Code or the regulations issued thereunder require another person to be the tax matters partner. The Tax Matters Partner shall prepare and file (or cause to be prepared and filed) all income tax returns of the Partnership, and shall furnish copies thereof to the Partners. After the receipt of a final partnership administrative adjustment for a taxable year, the Tax Matters Partner will not file a "petition for readjustment of the partnership items," within the meaning of Section 6226 of the Code, in any court other than the United States Tax Court, without the consent of the General Partner. Further, the Tax Matters Partner will not agree, pursuant to Section 6229(b)(1)(B) of the Code, to extend the period for assessing any tax imposed by subtitle A of the Code with respect to any Person which is attributable to any Partnership item (or affected items) of the Partnership without the consent of the General Partner. The reasonable expenses, if any, which the Tax Matters Partner incurs in fulfilling its responsibilities under this Section 5.3 shall be expenses of the Partnership.

5.4 Income Tax Elections. The General Partner shall have the right to make any applicable elections under the Code on behalf of the Partnership, including any election under Treasury Regulations § 1.754-1(b) to adjust the basis of Partnership property in the manner provided in Treasury Regulations § 734(b) and 743(b) of the Code (a "Section 754 Election").

#### ARTICLE 6

#### TRANSFERS OF PARTNERSHIP INTERESTS; COVENANTS OF PARTNERS

6.1 Transfers of Partnership Interests. No Partner may sell, assign, transfer, mortgage, pledge, collaterally assign, convey, donate, contribute, grant an equity interest in or otherwise dispose of or alienate (hereinafter collectively called "Transfer") all or any part of its Partnership interest unless such Transfer is effected as follows:

- (a) the Transfer is approved in writing by the General Partner;
- (b) the Transfer is made pursuant to Section 6.2;
- (c) the Transfer is made pursuant to Section 6.3;
- (d) the Transfer is made pursuant to Section 6.4; or
- (e) with respect to any Units other than Common Units, such Transfer is made pursuant to the provisions of the Unit Designation covering such Units.

Additionally, each Limited Partner that is a Special Purpose Entity agrees that prior to the termination and dissolution of the Partnership that such Limited Partner (i) will prevent each owner of such Limited Partner from transferring any interest in such Limited Partner (including an equity interest) and will prevent each owner of such Limited Partner from granting any option or other right to acquire, including upon exercise or conversion, any interest in such Limited Partner (including an equity interest), and (ii) will not issue any interest in (including equity securities of) or grant any option or other right to acquire, including upon exercise or conversion, any interest in (including equity securities of) such Limited Partner, without first obtaining the approval of the General Partner.

Any attempted Transfer in violation of the provisions of this Article 6 shall be void *ab initio*.

6.2 Right of First Refusal.

(a) If, at any time after the date that is five (5) years after any holder of Common Units first becomes a Partner or such other time period as may be provided in any Unit Designation, such holder (herein referred to as "Seller") receives from a single, third party Qualifying Purchaser (as defined below) a bona fide written offer to purchase all (but not less than all) of the Seller's Common Units (herein referred to as the "Proposal") for consideration consisting exclusively of cash, a promissory note from the purchaser, or a combination thereof, which Proposal the Seller desires to accept in good faith, the Seller shall give Elder, the Partnership and the other Partners (herein referred to as the "Offeree Partners") written notice of the Seller's good faith intention to sell such Common Units (the "Offered Units") pursuant to the Proposal, which notice shall state the name and address of the proposed purchaser, a certification that the proposed purchaser is a Qualifying Purchaser, the price and all of the terms and conditions of the Proposal received by the Seller, and shall state that the notice is being given pursuant to this Section. A copy of the written offer, and any proposed sales agreement and/or other documents, from or with the proposed purchaser shall be provided with the notice. Notification of the Proposal to Elder, the Partnership and the other Partners in the manner set out above shall constitute an offer (the "Offer") by the Seller to sell the Offered Units to Elder, the Partnership and the Offeree Partners at the price and upon the terms set forth in the Proposal. As used herein, the term "Qualifying Purchaser" shall mean Person who is not engaged in, and does not propose to engage in, directly or indirectly, any activity that is proscribed under Section 6.11 of this Agreement (or any successor provision thereto).

(b) Commencing with the date of delivery of said notice, Elder shall have the first option for a period of thirty (30) days to agree in writing to purchase all or any portion of the Offered Units upon the terms set forth in the Proposal, subject to the remaining provisions of this Section. Elder shall have the right to assign his rights under this Section to any other Person.

(c) If Elder does not accept the Offer within the applicable time period described above, or accepts the Offer for less than all of the Offered Units, he shall notify the Partnership of its option to accept the Offer. Commencing with the date of delivery of said notice, the Partnership shall have the option for a period of thirty (30) days to agree in writing to purchase all or any portion of the Offered Units as to which Elder has not exercised his option upon the terms set forth in the Proposal, subject to the remaining provisions of this Section. The Partnership shall have the right to assign its rights under this Section to any other Person.

(d) If neither Elder nor the Partnership accepts the Offer within the applicable time periods described above, or if they accept the Offer for less than all of the Offered Units, the Partnership shall notify the Offeree Partners of their option to accept the Offer. Commencing with the date of delivery of said notice, the Offeree Partners shall have the option for a period of thirty (30) days to agree in writing to purchase all or any portion of the Offered Units as to which Elder and the Partnership have not exercised their respective options upon the terms set forth in the Proposal, subject to the remaining provisions of this Section. The Offeree Partners shall have the right to exercise said option in such proportions as they agree upon among themselves or, in the absence of any such agreement, in proportion to the respective Percentage Interests, measured as of the date of the Partnership's notice to the Offeree Partners, of those Offeree Partners exercising such option to purchase.

(e) If Elder, the Partnership and/or any of the Offeree Partners elect to purchase all or any portion of the Offered Units, a closing of all such purchases and sales shall be held on or before that date which is the later of: (i) the date that is sixty (60) days after the date of the Partnership's notice to the Offeree Partners pursuant to paragraph (d) above, or (ii) the date set out for closing under the terms of the Proposal. At the closing, the Offering Partner will transfer the Offered Units to be sold to Elder, the Partnership and/or the Remaining Partners, as the case may be, free and clear of any encumbrances (other

than any encumbrances to be taken subject to or assumed under the terms of the Proposal).

(f) Notwithstanding anything in this Section 6 to the contrary, if, at the end of the option periods described above, the Offer has not been exercised by Elder, the Partnership and/or the Remaining Partners to purchase all of the Offered Units, then the right to exercise such options shall expire and Offering Partner shall be free for a period of forty (40) days after the expiration of the Offeree Partners' option period pursuant to paragraph (d) above to sell all, but not less than all, of the Offered Units to the prospective purchaser (but not more than one purchaser) named in the Proposal at the price and upon the terms and conditions set forth in the Proposal, subject to the remaining terms hereof. If such Offered Units are not so sold within the aforesaid forty (40) day period, Seller shall not be permitted to sell such Offered Units without again complying with this Section. Seller and any Person who purchases Offered Units under this Section (other than an existing Partner who purchased pursuant to his right of first refusal rights as set out above) shall comply with the applicable requirements set forth in the Partnership Agreement relating to Transfers of Units (including, without limitation, the provisions of Sections 6.6 and 6.8 thereof) and shall, as a condition to such purchaser's purchase of the Offered Units, provide the Partnership such information and certifications as the Partnership may request to confirm that such purchaser is a Qualifying Purchaser.

### 6.3 Option on Occurrence of Operative Event.

(a) Upon the occurrence of an Operative Event with respect to any Partner (other than Elder whose Partnership Interest shall not be subject to this provision), Elder shall have the option to acquire, upon the terms set out in this Section 6.3, all or any part of the Partnership Interest then held by such Partner; provided that as set forth in Section 6.4, upon termination of the marital relationship of a Partner, such Partner shall have the first option to purchase all or any part of a Partnership Interest obtained by the former spouse. Upon the occurrence of any such Operative Event, the Partner subject to such Operative Event (and/or its representative(s), former spouse or the trustee in bankruptcy, if applicable) (such Partner, its representative(s), former spouse and/or the trustee in bankruptcy being herein referred to as the "Subject Partner"), shall submit a written offer to sell such Partnership Interest to Elder by United States Certified Mail, Return Receipt Requested, which notice shall refer to the provisions of this Section 6.3. Elder shall have an exclusive option for a period of ninety (90) days after its receipt of such notice to elect to purchase all or any part of said Partnership Interest. The aggregate purchase price for the Partnership Interest elected for purchase shall be an amount equal to the Agreed Price of such Partnership Interest as of the date of such Operative Event less the expenses of appraisal, if any, and any disposition costs, which shall be borne by the Subject Partner (the "Purchase Price"). The Purchase Price shall be paid over a period of four (4) years in five (5) equal annual installments, with the first such installment being on the closing date of such purchase and sale and the remaining four (4) installments being paid on the following four consecutive anniversary dates of such closing date, and there shall be no penalty for prepayment; unpaid principal balances shall bear interest at a variable rate per annum equal to the prime rate of interest published from time to time in the Wall Street Journal, Southwest Edition, or its successors, in effect from time to time, plus 1%, limited to the maximum lawful rate. If Elder elects to exercise its option to purchase all or any part of the Subject Partner's Partnership Interest, a closing shall occur at the offices of the Partnership on or before thirty (30) days after the later of (i) the date of exercise of such option or (ii) the final determination of the Fair Market Value, or at such other time and place as the parties may agree. The above notwithstanding, in the event that the Operative Event result from the termination of the Subject Partner's employment or engagement with the Partnership for Cause at any time, or such Subject Partner resigns his employment or engagement with the Partnership on or before December 31, 2009, or the Operative Event arises from the Subject Partner's material breach of this Agreement, the Purchase Price shall be paid in ten (10) equal annual installments over a period of nine (9) years after the closing of the sale rather than four (4) years (with the first installment due upon the closing of such purchase and the remaining payments on each subsequent

anniversary thereafter). At such closing, the Subject Partner and/or the trustee in bankruptcy (if applicable) shall deliver such instruments of transfer as Elder may reasonably require so as to transfer the Subject Partner's Partnership Interest to Elder in exchange for Elder's agreement to pay the Purchase Price herein provided. Elder shall grant the Subject Partner a security interest in the Subject Partner's Partnership Interest purchased by Elder, to be evidenced by a security agreement in a form reasonably acceptable to Elder and the Subject Partner. The payment to be made to the Subject Partner or its representative pursuant to this Section 6.3 shall be in complete liquidation and satisfaction of all the rights and interest of the Subject Partner (and of all Persons claiming by, through, or under the Subject Partner) in and in respect of the Partnership, including, without limitation, such Partnership Interest, any rights in specific Partnership property, and any rights against the Partnership and (insofar as the affairs of the Partnership are concerned) against the Partners. Elder shall have the right to assign his rights hereunder to any other Person.

(b) In the event that Elder does not elect to exercise the option upon the occurrence of an Operative Event pursuant to this Section 6.3 within such ninety (90) day time period or elects to exercise such option, but does not elect to purchase all of the Subject Partner's Partnership Interest, then the Partnership shall have the option to acquire, upon the terms set out in this Section 6.3, all or any part of the Partnership Interest of the Subject Partner not elected for purchase by Elder. Upon the expiration of such ninety (90) day time period as provided in Section 6.3(a) or upon the earlier receipt of written notice from Elder that he has either elected not to exercise his option pursuant to Section 6.3(a) or elected to purchase less than all of the Subject Partner's Partnership Interest, the Subject Partner shall submit a written offer to sell the Partnership Interest not elected for purchase by Elder to the Partnership by United States Certified Mail, Return Receipt Requested, which notice shall refer to the provisions of this Section 6.3. The Partnership shall have an exclusive option for a period of sixty (60) days after receipt of such notice to elect to purchase all or any part of the Partnership Interest not elected for purchase by Elder. The aggregate purchase price for the Partnership Interest being purchased by the Partnership shall be an amount equal to the Purchase Price of the Partnership Interest being purchased by the Partnership. The Purchase Price shall be paid in five (5) equal annual installments over a period of four (4) years (or ten (10) equal annual installments over a term of nine (9) years in the event such purchase is in connection with the Subject Partner resigning on or before December 31, 2009 or being terminated for Cause at any time), with the first such installment being on the closing date of such purchase and sale and the remaining four (4) installments being paid on the following four consecutive anniversary dates of such closing date, and there shall be no penalty for prepayment; unpaid principal balances shall bear interest at a variable rate per annum equal to the prime rate of interest published from time to time in the Wall Street Journal, Southwest Edition, or its successors, in effect from time to time, plus 1%, limited to the maximum lawful rate. If the Partnership elects to exercise its option to purchase the Subject Partner's Partnership Interest, a closing shall occur at the offices of the Partnership on or before thirty (30) days after the later of (i) the date of exercise of such option, or (ii) the final determination of Fair Market Value, or (iii) at such other time and place as the parties may agree. At such closing, the Subject Partner and/or the trustee in bankruptcy (if applicable) shall deliver such instruments of transfer as Partnership may reasonably require so as to transfer the Subject Partner's Partnership Interest to the Partnership in exchange for the Partnership's agreement to pay the Purchase Price herein provided. The payment to be made to the Subject Partner or its representative pursuant to this Section 6.3 shall be in complete liquidation and satisfaction of all the rights and interest of the Subject Partner (and of all Persons claiming by, through, or under the Subject Partner) in and in respect of the Partnership, including, without limitation, such Partnership Interest, any rights in specific Partnership property, and any rights against the Partnership and (insofar as the affairs of the Partnership are concerned) against the Partners. The Partnership shall have the right, as determined by the General Partner, to assign its rights hereunder to any other Person.

(c) In the event that Elder and the Partnership do not elect to exercise the option upon the occurrence of an Operative Event pursuant to this Section 6.3 within the applicable time periods or elect to exercise such option, but do not elect to purchase all of the Subject Partner's Partnership Interest, then the remaining Partners (the "Nonsubject Partners") shall have the option to acquire, upon the terms set out in this Section 6.3, all or any part of the Partnership Interest of the Subject Partner not elected for purchase by Elder and the Partnership. The purchasing Nonsubject Partners shall have the right to exercise said option in such proportions as they agree upon among themselves or, in the absence of any such agreement, in proportion to their respective Percentage Interest as reflected by the Partnership books on the date the Partnership's option expires. Upon the expiration of such sixty (60) day time period as provided in Section 6.3(b) or upon the earlier receipt of written notice from the Partnership that it has either elected not to exercise its option pursuant to Section 6.3(b) or that it and Elder elected to purchase less than all of the Subject Partner's Partnership Interest, the Subject Partner shall submit a written offer to sell the Partnership Interest not elected for purchase by the Partnership and Elder to the Nonsubject Partners by United States Certified Mail, Return Receipt Requested, which notice shall refer to the provisions of this Section 6.3. The Nonsubject Partners shall have an exclusive option for a period of sixty (60) days after receipt of such notice to elect to purchase all or any part of the Partnership Interest not elected for purchase by Elder and the Partnership. The aggregate purchase price for the Partnership Interest being purchased by the Nonsubject Partners shall be an amount equal to the Purchase Price, with each Nonsubject Partner paying an amount equal to his proportionate share of the Purchase Price (based upon the respective portion of the Partnership Interest being purchased by such Nonsubject Partner). The Purchase Price shall be paid over a period of four (4) years (or ten (10) annual installments in the event such purchase is in connection with the Subject Partner resigning on or before December 31, 2009 or being terminated for Cause at any time) in equal annual installments, with the first such installment being on the closing date of such purchase and sale and the remaining four (4) installments being paid on the following four consecutive anniversary dates of such closing date, and there shall be no penalty for prepayment; unpaid principal balances shall bear interest at a variable rate per annum equal to the prime rate of interest published from time to time in the Wall Street Journal, Southwest Edition, or its successors, in effect from time to time, plus 1%, limited to the maximum lawful rate. If the Nonsubject Partners elect to exercise their option to purchase the Subject Partner's Partnership Interest, a closing shall occur at the offices of the Partnership on or before thirty (30) days after the later of (i) the date of exercise of such option or (ii) the determination of the Fair Market Value of the subject Partnership Interest, or at such other time and place as the parties may agree. At such closing, the Subject Partner and/or the trustee in bankruptcy (if applicable) shall deliver such instruments of transfer as the Nonsubject Partners may reasonably require so as to transfer the Subject Partner's Partnership Interest to the Nonsubject Partners in exchange for the Nonsubject Partners' agreement to pay the purchase price herein provided. The Nonsubject Partners who elect to exercise their option to purchase the Subject Partner's Partnership Interest shall grant the Subject Partner a security interest in the Subject Partner's Partnership Interest purchased by such Subject Partner, to be evidenced by a security agreement in a form reasonably acceptable to the General Partner, such Nonsubject Partners and the Subject Partner. The payment to be made to the Subject Partner or its representative pursuant to this Section 6.3 shall be in complete liquidation and satisfaction of all the rights and interest of the Subject Partner (and of all Persons claiming by, through, or under the Subject Partner) in and in respect of the Partnership, including, without limitation, such Partnership Interest, any rights in specific Partnership property, and any rights against the Partnership and (insofar as the affairs of the Partnership are concerned) against the Partners.

(d) Prior to or upon the occurrence of any Operative Event which shall cause, or threaten to cause, the involuntary disposition of any Partner's Partnership Interest (or any portion thereof or interest therein), the Partner subject thereto (or his or her representative) shall send written notice thereof to the Partnership, by certified or registered mail, return receipt requested, disclosing in full the nature and details of such actual or threatened involuntary disposition, and the provisions of Section 6.3 shall apply; provided, that the option of the Partnership pursuant to Section 6.3 shall extend for sixty (60)

days from the later of such involuntary disposition or the sending of such notice.

(e) In the event of an Operative Event and less than all of the Subject Partner's Partnership Interest is purchased pursuant to this Section 6.3, the Partnership Interest shall remain subject to the transfer restrictions contained in Section 6.1.

(f) Notwithstanding any provision in this Section 6.3 to the contrary, if the Subject Partner fails to timely submit a written offer to Elder, the Partnership or the Nonsubject Partners, as the case may be, under this Section 6.3, and Elder, the Partnership or the Nonsubject Partners become aware of events that obligate the Subject Partner to make such an offer, Elder, the Partnership or the Nonsubject Partners, as the case may be, may send the Subject Partner notice of such failure to comply herewith and the Subject Partner shall be deemed to have made the offer to sell such Partnership Interest in accordance with this Section 6.3.

**6.4 Option Upon Termination of Marital Relationship.** If the marital relationship of a Partner is terminated by death or divorce and such Partner does not succeed to his or her spouse's community interest in the Partner's Partnership Interest (or any part thereof), such Partner shall have the first option to purchase all or any part of his or her spouse's interest in such Partnership Interest, and, upon such Partner's election to exercise such option, his or her spouse or the executor or administrator of such spouse's estate shall be obligated to sell the Partnership Interest elected for purchase to such Partner. The price at which such interest shall be purchased shall be an amount equal to the Purchase Price as would be determined as provided in Section 6.3 hereof, as if an Operative Event had occurred (and for purposes of determining the "Agreed Price," such Partner's spouse shall be deemed the "Subject Partner" and such Partner shall be deemed the "Nonsubject Partner"). The Purchase Price shall be paid over a period of five (5) years in equal annual installments, with the first such installment being on the date that is one (1) year after the closing date of such purchase and sale, and there shall be no penalty for prepayment; unpaid principal balances shall bear interest at a variable rate per annum equal to the prime rate of interest published from time to time in the Wall Street Journal, Southwest Edition, or its successors, in effect from time to time, plus 1%, limited to the maximum lawful rate. Such option must be exercised within ninety (90) days after such death or divorce. Should such Partner fail to exercise such option within such ninety (90) day period, such failure shall constitute an Operative Event hereunder, and the provisions of Section 6.3 shall apply; provided, however, the failure of Elder to purchase such Partnership Interest from his spouse shall not constitute an Operative Event hereunder.

**6.5 Certain Representations and Covenants of Partners.** Each Partner that is acquiring a Partnership Interest in connection with the execution and delivery of this Agreement, by execution of this Agreement, and each assignee or transferee of a Partner by acceptance of the rights and interests of his assignor or transferor in the Partnership, represents, warrants to, covenants and agrees with the Partnership and the Partners as follows:

(a) Such Person or his representative has extensive knowledge and experience in investing in ventures similar to that of the Partnership and is capable of evaluating the merits and risks of an investment in the Partnership. Such Person is able to bear the economic risk of an investment in the Partnership, including the risk of holding indefinitely any Partnership Interest acquired by such Person.

(b) Such Person has relied on his or its own representatives (including appropriate professional advisors) for legal, tax and investment advice in evaluating an investment in the Partnership and has not relied on another Partner for such advice. Such Person or his representative has been afforded full access to the Partnership's records and affairs for purposes of investigating an investment in the Partnership, and all information requested by such Person or his representative concerning the Partnership has been supplied.

(c) Such Person recognizes that the Partnership is engaged in an enterprise of high and inherent risks and that no governmental agency has made any finding, investigation or determination relating to the fairness of this Agreement or the suitability for any purpose of an investment in the Partnership.

(d) Such Person is acquiring its Partnership Interest for his own account, for investment, and not with a view to resale or assignment or subdivision thereof. Notwithstanding any other provision of this Agreement to the apparent contrary, such Person shall not sell or assign any Partnership Interest in the absence of an effective registration statement under the Securities Act of 1933, as amended (the "Securities Act"), which is not contemplated, or an opinion of counsel satisfactory to the General Partner that any such proposed sale or assignment does not violate the Securities Act or the registration provisions of any securities law, state or federal, applicable thereto.

Each Partner or such Person agrees to indemnify and hold harmless the Partnership and the other Partners, their respective agents and representatives, and the controlling Persons of each of the foregoing, from and against any and all loss, claims, damage or liability directly or indirectly related to, arising from or incurred in connection with any breach of the foregoing representations and warranties (including any misrepresentation or omission related thereto, whether existing on the date hereof or subsequent hereto) by such Person. In the event of any rescission of the sale of a Partnership Interest to a Partner, the Capital Contributions or any other funds of such Partner held by the Partnership or its agents may be retained and applied in satisfaction of such indemnification obligation.

6.6 Additional Covenants Concerning Transfers. In the event of any Transfer of a Partnership Interest in accordance with the provisions of this Article 6, each Partner agrees to cooperate fully with the Partner making such Transfer in order to facilitate such Transfer. Such cooperation includes, without limitation, the execution of all appropriate instruments or documents as the General Partner may reasonably require to evidence such Transfer or such Partner's consent thereto. Except as otherwise required by the General Partner, the Partner making such transfer shall deliver to the General Partner a legal opinion, in form and substance reasonably satisfactory to the General Partner, of counsel reasonably acceptable to the General Partner, to the effect that registration under the Securities Act or the securities laws of any state is not required for such Transfer, or such other evidence that may be satisfactory to the General Partner to the effect that any such Transfer will not be in violation of the Securities Act or other applicable federal or state securities laws, or any rule or regulation promulgated thereunder, and such other opinions as the General Partner may reasonably require.

6.7 Effect of Change in Partners. Subject to all of the provisions of this Agreement, admission of any new Partner or the withdrawal, death, incapacity, dissolution, liquidation, bankruptcy or substitution of any Partner shall not interrupt the continuity of or cause the termination of the Partnership.

6.8 Admission as Additional Limited Partner. The General Partner may admit one or more Additional Limited Partners to the Partnership upon such terms as the General Partner may determine, and no Limited Partner shall have any preemptive rights or other rights to acquire any Units sold by the Partnership as contemplated in this Section 6.8. Without limiting the generality of the foregoing, in order to raise additional capital for the Partnership or to attract qualified personnel or to reward personnel (collectively, "Key Personnel"), the General Partner is authorized to admit Additional Limited Partners and to sell (or with respect to Key Personnel, in exchange for services), additional Units or grant options to acquire additional Units, under such terms and conditions as may be determined by the General Partner consistent with the General Partner's fiduciary duty to the Partnership. Incident to admitting additional Limited Partners and notwithstanding anything in this Agreement to the contrary, the terms of this Agreement may be amended by the General Partner without the consent of the Limited Partners in order to provide for the rights, preferences and duties of such additional Units and such Additional Limited

Partners.

6.9 Admission as Substituted Limited Partner. Any Partnership Interest acquired pursuant to any provision of this Article 6 shall constitute a limited partnership interest following the Transfer, provided that the Person acquiring such limited partnership interest shall not become a Substituted Limited Partner except upon the written approval of the General Partner. The General Partner shall also have the discretion as to whether or not to admit, as a Substituted Limited Partner, any successor-in-interest of an insolvent Limited Partner. Prior to being admitted to the Partnership as a Substituted Limited Partner, a transferee or successor-in-interest of a Limited Partner shall not have any consent or approval rights otherwise enjoyed by the Limited Partners under this Agreement (including, without limitation, under Section 2.2). Any Person admitted to the Partnership as a Substituted Limited Partner shall, prior to such admission, execute and deliver copies of this Agreement as then constituted. Upon admission, such Person shall be subject to all provisions of this Agreement in the place of its transferor as if originally a party hereto. Any Partnership Interest transferred pursuant to any provision of this Article 6 shall thereafter remain subject to all the provisions of this Article 6 and this Agreement.

6.10 Voluntary Withdrawal. Except in the case of a Transfer of all or any part of its Partnership Interest as permitted by the foregoing provisions of this Article 6, the General Partner covenants and agrees that it will not voluntarily withdraw from the Partnership as a Partner without the prior written consent of each of the other Partners.

6.11 Covenant of Confidentiality; Non-Disparagement; Noncompetition.

(a) Prior to a Partner's withdrawal as a Partner from the Partnership, and thereafter for a period of three (3) years, such Partner shall not knowingly divulge, furnish, or make available to any third person, whether a natural person or an entity, or use for his own account or for the benefit of any third party, without the prior written consent of the General Partner (which consent may be given or withheld in its sole and absolute discretion), any trade secrets or other confidential or proprietary information concerning the Partnership or any Partner of the Partnership, or any business of the foregoing (whether such Partner has such information in his memory or embodied in writing or other physical form) (collectively, the "Confidential Information"), including, without limitation, (i) information concerning the operations, systems, services, personnel and financial affairs of the Partnership, (ii) computer software, forms, contracts, agreements, literature or other documents designed, developed or written by, for, with or on behalf of the Partnership, (iii) the strategy and the methodology and processes used by the Partnership or (iv) any and all notes, analysis, compilations, studies, summaries, and other material prepared by or for the Partnership or containing or based, in whole or in part, on any other Confidential Information. Any covenant made pursuant to this Section 6.11(a) shall be subject to the terms and conditions of any separate agreement between the Partner and the Partnership relating to employment and the provisions of services to the Partnership. Notwithstanding the foregoing, nothing herein shall prevent a Partner who becomes legally compelled to disclose such confidential information by a legal authority having competent jurisdiction over such Partner (by special deposition, interrogatory, request for documents, subpoena, civil investigative demand or similar process; each such process, a "demand") from responding to such demand without the General Partner's prior written consent; *provided, however*, that such individual Partner shall have given the Partnership written notice of any such demand promptly after the receipt thereof. Each Partner agrees to deliver to the Partnership any time requested including without limitation, upon withdrawal as a Partner all Confidential Information in whatever form the Confidential Information exists as well as deliver any other information relating to the Confidential Information in the Partner's possession or control.

The Partners acknowledge and agree that the engaging in the activities prohibited in Section 6.11(c)



below while such Partner is a Partner of the Partnership or during the one (1) year period following the transfer of all of such Partner's Partnership Interests in accordance with Article 6 (the "Restriction Period") is prima facie evidence that the Partner is using Confidential Information in violation of this Section 6.11(a) and the burden of proof in any proceeding to restrict such activity shall be on such Partner to provide evidence that such activity did not result in the unauthorized use of the Confidential Information.

(b) Prior to the withdrawal of a Partner from the Partnership, and thereafter for a period of two (2) years, such Partner shall not disparage or defame the Partnership or the General Partner, or any of their respective current or former officers, directors, shareholders, partners or members, in communications with investors, clients, potential clients, competitors, the media, or other Persons with whom any of the above do business or may do business.

(c) Prior to the withdrawal of a Partner from the Partnership, and for a 12-month period from the date of such withdrawal thereafter, unless otherwise consented to or waived in writing by the General Partner or as set forth in a Unit Designation, such Partner shall not directly or indirectly, on behalf of such Partner or any other Person:

(i) compete with, invest in, own, manage, operate, finance or control, or participate in the ownership, management, operation, financing, or control of, or be in any manner connected with any Person that is engaged or plans to engage in any activities that are in competition with the Core Business, or any related business that the Partnership is then engaged or has plans to engage, in any state in which the Partnership then conducts business, or then has affirmative plans to conduct business. The foregoing provision shall not apply to investments in shares of stock of a corporation traded on a national securities exchange or on the national over-the-counter market which shall constitute less than one percent (1%) of the outstanding shares of such stock of such corporation;

(ii) induce or attempt to induce to leave his or her employment or engagement with the Partnership, or employ or otherwise engage, any of the Partners, employees, consultants, agents or independent contractors of the Partnership (for this purpose the terms "employees," "consultants," "agents," and "independent contractors" shall include any persons having such status with regard to the Partnership at any time during the six (6) months preceding any solicitation (direct or indirect) in question); and

(iii) solicit or attempt to solicit, or endeavor to entice any customers or prospective customers, suppliers, licensees or other business relations of the Partnership, either directly or indirectly, to divert their business to any Person away from, or to cease doing business with, the Partnership or in any way interfere or attempt to interfere with the relationship between any such customer or prospective customer, supplier, licensee or business relation and the Partnership (for this purpose the terms "customer," "supplier," "licensee" and "other business relation" shall include any Persons having such status with regard to the Partnership at any time during the twelve (12) months preceding any solicitation (direct or indirect) in question and "prospective customer" means any Person that, as of such time, the Partnership has identified as a potential customer).

Each Partner agrees that this covenant in Section 6.11(c) is reasonable with respect to its duration, geographical area, and scope. Further, the provisions set forth in Sections 10.2 and 10.3 are not oppressive to any Partner nor injurious to the public

Any covenant made pursuant to this Section 6.11(c) shall be subject to the terms and

conditions of any separate agreement between the Partner and the Partnership relating to employment and the provisions of services to the Partnership that may be entered into concurrent with or after the execution of this Agreement.

(d) Each Partner acknowledges that the material breach or attempted or threatened breach by it of any provisions of this Section 6.11 would cause irreparable injury to the Partnership not compensable in money damages and that the Partnership shall be entitled, in addition to all other applicable remedies, to obtain a temporary and a permanent injunction and a decree for specific performance of this Section 6.11 without being required to prove damages or furnish any bond or other security. The provisions of this Section 6.11 shall survive the termination of this Agreement.

(e) Notwithstanding anything in this Agreement to the contrary, each Partner (and each employee, representative, or other agent of such Partner) may disclose to any and all persons, without limitation of any kind, the tax treatment and tax structure of (i) the Partnership and (ii) any of its transactions, and all materials of any kind (including opinions or other tax analyses) that are provided to such Partner relating to such tax treatment and tax structure.

(f) If a Partner fails to comply with any of the provisions of Section 6.11, the Partnership and the other Partners shall be entitled to cease any further payments under Article 6 (with respect to the payment of any Purchase Price from the sale of the Partnership Interests) or otherwise under this Agreement notwithstanding any finding that the provision which was violated was prohibited by law, invalid or unenforceable; provided, however, no party shall exercise its right to cease payments hereunder unless and until litigation has commenced with respect to such Partners obligations under this Section 6.11.

(g) Notwithstanding any provision in this Agreement to the contrary, the Partners agree that the General Partner shall have the right to reasonably restrict the Partners access to the books and records of the Partnership.

## ARTICLE 7

### TERMINATION, WINDING UP AND TERMINATION

#### 7.1 Causes.

(a) In General. Each Partner expressly waives any right which it might otherwise have to terminate the Partnership except as set forth in this Section 7.1. The Partnership shall be terminated only upon the occurrence of any of the following events:

(i) the withdrawal, Bankruptcy as defined in Section 7.1(b), termination or liquidation of the General Partner;

(ii) the agreement of a Required Interest to terminate the Partnership;

(iii) the occurrence of any other circumstance which, by law, would require the Partnership to be terminated.

Nothing contained in this Section 7.1 is intended to grant to any Partner the right to terminate the Partnership at will (by withdrawal or otherwise), or to exonerate any Partner from liability to the Partnership and the remaining Partners if it terminates the Partnership at will. Any termination at will of the Partnership shall be in contravention of this Agreement for purposes of the Act.

(b) Bankruptcy. The "Bankruptcy" of a Partner shall be deemed to have occurred for purposes of this Section 7.1 upon the occurrence of any of the following:

(i) commencement by such Partner of any proceeding seeking relief under any bankruptcy or insolvency law, including but not limited to a reorganization, arrangement, readjustment of debt, receivership, trusteeship or liquidation (hereinafter referred to as "Bankruptcy Proceedings");

(ii) acquiescence by such Partner to any Bankruptcy Proceeding commenced or brought against such Partner by any other party or parties, it being deemed that such Partner has acquiesced to any such Bankruptcy Proceeding that is not dismissed within sixty (60) days after the commencement thereof or if such Partner, by action, inaction or answer, approves of, consents to, admits the material allegations of any petition filed in connection therewith or defaults in answering any such petition;

(iii) final adjudication of such Partner to be bankrupt or insolvent;

(iv) expiration of sixty (60) days without termination, dismissal or discharge of the appointment of a trustee, receiver or liquidator, with or without such Partner's consent, for all or any substantial part of the property of such Partner, whether or not including such Partner's Partnership Interest; or

(v) execution by such Partner of an assignment for the benefit of creditors.

(c) Limited Partner. The Bankruptcy, death or dissolution and liquidation of a Limited Partner shall not result in the termination of the Partnership, but the rights of such Limited Partner to share in revenues and expenses and to receive distributions of Net Cash Flow shall, upon the happening of such an event, devolve upon such Limited Partner's legal representative or successors-in-interest, as the case may be, subject to this Agreement, and the Partnership shall continue as a limited partnership. The Limited Partner's legal representative or successors-in-interest shall be liable for all of the obligations of the Limited Partner. In no event shall the legal representative or successors-in-interest become a Substituted Limited Partner except in accordance with Article 6.

(d) Reconstitution. If the Partnership terminates pursuant to Section 7.1(a)(i) as a result of the withdrawal, Bankruptcy, termination, dissolution or liquidation of any General Partner (the "Withdrawing General Partner"), and if there is a General Partner in addition to the Withdrawing General Partner, the Partnership shall be reconstituted, the business of the Partnership shall be continued in the reconstituted Partnership and the interest of the Withdrawing General Partner shall be converted to a limited partner interest. If there is no General Partner in addition to the Withdrawing General Partner, the Partnership shall be reconstituted and the interest of the Withdrawing General Partner shall be converted to a limited partner interest if the Limited Partners holding the Required Interest, within thirty (30) days after the date of such event of termination, elect to continue the Partnership and appoint, effective as of the date of the event of termination, an additional general partner who shall succeed as General Partner hereunder. If the Partnership is reconstituted, the Unit ownership of the Withdrawing General Partner shall not be affected by the conversion of the Withdrawing General Partner's interest to a limited partner interest, and all of the allocations in Sections 4.1 and 4.3 shall continue to apply to the Withdrawing General Partner.

## 7.2 Liquidator.

(a) In General. If the Partnership is terminated, the General Partner (or in the event that the General Partner has withdrawn, or has liquidated or terminated or become Bankrupt, or has wrongfully terminated the Partnership, a Limited Partner or a liquidator selected by the Limited Partners) shall commence to wind up the affairs of the Partnership and to liquidate and sell its assets. The party actually conducting such liquidation in accordance with the foregoing sentence, whether the General Partner, a Limited Partner or a liquidator, is herein referred to as the "Liquidator." The Liquidator (if other than the General Partner or a Limited Partner) shall have sufficient business expertise and competence to conduct the Winding Up and termination of the Partnership and, in the course thereof, to cause the Partnership to perform any contracts which the Partnership has or thereafter enters into. The Liquidator shall have full right and unlimited discretion to determine the time, manner and terms of any sale or sales of Partnership property pursuant to such liquidation, having due regard for the activity and condition of the relevant market and general financial and economic conditions. The Liquidator (other than the General Partner) appointed as provided herein shall be entitled to receive such reasonable compensation for its services as shall be agreed upon by the Liquidator and a Required Interest.

(b) Successor Liquidator. The Liquidator may resign at any time by giving fifteen (15) days' prior written notice and, if the Liquidator is not the General Partner, may be removed at any time, with or without cause, by written notice of removal signed by the Limited Partners holding a majority of the Percentage Interests held by the Limited Partners. Upon the death, dissolution, removal or resignation of the Liquidator, a successor and substitute Liquidator (who shall have and succeed to all the rights, powers and duties of the original Liquidator) will, within thirty (30) days thereafter, be appointed by the Limited Partners evidenced by written appointment and acceptance. The right to appoint a successor substitute Liquidator in the manner provided herein shall be recurring and continuing for so long as the functions and services of the Liquidator are authorized to continue under the provisions hereof, and every reference herein to the Liquidator will be deemed to refer also to any such successor or substitute Liquidator appointed in the manner herein provided.

(c) Powers. The Liquidator shall have and may exercise, without further authorization or consent of any of the parties hereto or their legal representatives or successors-in-interest, all of the powers conferred upon the General Partner under the terms of this Agreement to the extent necessary or desirable in the good faith judgment of the Liquidator to perform its duties and functions. The Liquidator (if not the General Partner or a Limited Partner) shall not be liable as a general partner to the Limited Partners and shall, while acting in such capacity on behalf of the Partnership, be entitled to the indemnification rights.

7.3 Court Appointment of Liquidator. If, within ninety (90) days following the date of termination a Liquidator or successor Liquidator has not been appointed in the manner provided herein, any interested party shall have the right to make application to the then senior United States Federal District Judge (in his individual and not judicial capacity) for that Federal District of Texas in which the Partnership Office is situated for appointment of the Liquidator or successor Liquidator, and the Judge, acting as an individual and not in his judicial capacity, shall be fully authorized and empowered to appoint and designate the Liquidator or successor Liquidator who shall have all the powers, duties, rights and authority of the Liquidator herein provided.

## 7.4 Liquidation.

(a) Procedures. In the course of the Winding Up and terminating the business and affairs of the Partnership, its assets (other than cash) shall be sold, its liabilities and obligations to creditors (including any loan made by Partners) and all expenses incurred in its liquidation shall be paid,

and all resulting revenues and expenses shall be credited or charged to the Capital Accounts of the Partners in accordance with Article 4. All Partnership property shall be sold upon liquidation of the Partnership and no Partnership property shall be distributed in kind to the Partners except by agreement of the Partners. If the interest of the Partnership in the assets is to be distributed in kind, the Liquidator shall determine the fair market value of such Partnership property and the Capital Accounts of the Partners shall be adjusted for the gain or loss that would have been recognized if the Partnership property to be distributed had been sold by the Partnership for such fair market value.

(b) Distribution. The net proceeds from such sales (after deducting all selling costs and expenses in connection therewith), together with (at the expiration of the period referred to in Section 7.5) the balance in the reserve account referred to in Section 7.5 and any Partnership property that is to be distributed in kind shall be distributed among the remaining Partners in the following order and priorities:

(i) Partnership assets shall be distributed to the General Partner for any compensation, fees or unreimbursed costs and expenses owed by the Partnership to the General Partner;

(ii) Partnership assets shall be distributed to the Partners in an amount sufficient to discharge completely the principal and accrued interest owing to such Partners pursuant to any loans made to the Partnership by such Partners; and

(iii) Subject to the terms of any Unit Designation(s) covering any Units then outstanding, Partnership assets shall be distributed among the Partners in accordance with and to the extent of their positive Capital Account balances, as determined after taking into account all Capital Account adjustments for the taxable year of the Partnership during which the liquidation of the Partnership occurs, and thereafter any remaining assets shall be distributed among the Partners in accordance with Percentage Interests.

(c) Negative Capital Accounts. No Partner shall be required to restore any deficit balance existing on its Capital Account upon the liquidation and termination of the Partnership.

(d) Miscellaneous. The Liquidator shall be instructed to use all reasonable efforts to effect complete liquidation of the Partnership within one (1) year after the date the Partnership is dissolved. Each holder of a Partnership Interest shall look solely to the assets of the Partnership for all distributions and shall have no recourse therefor (upon termination or otherwise) against the Partnership, the General Partner or the Liquidator. Upon the completion of the liquidation of the Partnership and the distribution of all Partnership funds, the Partnership shall terminate and the General Partner (or a Limited Partner or the Liquidator, as the case may be) shall have the authority to execute and record all documents required to effectuate the termination of the Partnership.

7.5 Creation of Reserves. After making payment or provision for payment of all debts and liabilities of the Partnership and all expenses of liquidation, the Liquidator may set up, for a period not to exceed one (1) year after the date of termination, such cash reserves as the Liquidator may deem reasonably necessary for any contingent or unforeseen liabilities or obligations of the Partnership; provided, however, that any unused portion of the reserves shall be distributed to the Partners within four (4) years of the date on which such reserves were created.

7.6 Final Audit. Within a reasonable time following the completion of the liquidation, the Liquidator shall supply to each of the Partners a statement, certified by the Partnership's independent certified public accountants if the Limited Partner's holding a Required Interest shall so request, which shall set forth the assets and the liabilities of the Partnership as of the date of complete liquidation, each

Partner's pro rata portion of distributions pursuant to Section 7.4, and the amount retained as reserves by the Liquidator pursuant to Section 7.5.

## ARTICLE 8 STANDARD OF CARE; EXCULPATION; INDEMNIFICATION

8.1 **Standard of Care.** In the performance of its duties under this Agreement, and with respect to any action taken on behalf of or with respect to the Partnership, the General Partner shall use reasonable efforts to conduct the business of the Partnership in a manner it believes is in the best interest of the Partnership.

8.2 **Exculpation.** None of the General Partner, any Related Party of the General Partner or any Liquidator (each a "Covered Person") shall be liable to the Partnership or any Partner under any theory of law, including tort, contract or otherwise (INCLUDING A COVERED PERSON'S OWN NEGLIGENCE) for any loss, damage or claim incurred by reason of any act or omission by such Covered Person in good faith on behalf of the Partnership and in a manner reasonably believed to be within the scope of authority conferred on such Covered Person by this Agreement, including any such loss, damage or claim attributable to errors in judgment, negligence or other fault of such Covered Person, except that a Covered Person shall be liable for any such loss, damage or claim incurred by reason of Culpable Acts of such Covered Person. A Covered Person shall be fully protected in relying in good faith upon the records of the Partnership and upon such information, opinions, reports or statements presented to the Partnership by any Person as to matters the Covered Person reasonably believes are within such other Person's professional or expert competence and who has been selected with reasonable care by or on behalf of the Partnership, including information, opinions, reports or statements as to the value and amount of the assets, liabilities, profits, losses or any other facts pertinent to the existence and amount of assets from which distributions to Partners might properly be paid.

8.3 **Indemnification.** To the fullest extent permitted by applicable law, each Covered Person shall be entitled to indemnification from the Partnership for any loss, damage or claim incurred by such Covered Person by reason of any act or omission performed or omitted by such Covered Person in good faith on behalf of the Partnership and in a manner reasonably believed to be within the scope of authority conferred on such Covered Person by this Agreement, except that no Covered Person shall be entitled to be indemnified in respect of any loss, damage or claim incurred by reason of Culpable Acts of such Covered Person; provided, however, that any indemnity under this Article 8 shall be provided out of and to the extent of Partnership assets only, and no Covered Person shall have any personal liability on account thereof. THE FOREGOING INDEMNITY IS INTENDED TO INDEMNIFY EACH COVERED PERSON FOR HIS OWN ACTS OF NEGLIGENCE AND SHALL APPLY IRRESPECTIVE OF ANY CLAIM OF CONCURRENT OR CONTRIBUTORY NEGLIGENCE ON THE PART OF SUCH COVERED PERSON.

8.4 **Expenses.** To the fullest extent permitted by applicable law, expenses (including legal fees) incurred by a Covered Person in defending any claim, demand, action, suit or proceeding for which indemnity is sought under this Agreement shall, from time to time, be advanced by the Partnership prior to the final disposition of such claim, demand, action, suit or proceeding upon receipt by the Partnership of an undertaking by or on behalf of the Covered Person to repay such amount if it shall be determined that the Covered Person is not entitled to be indemnified as authorized under this Article 8.

## ARTICLE 9

### MERGER AND CONVERSION

9.1 Merger and Conversion. (a) Pursuant to the Act, and with the prior written consent of the General Partner and the Required Interest as contemplated in Section 2.1, the Partnership may adopt a plan of merger or plan of conversion and may merge with, or convert into, one or more domestic or foreign limited partnerships, corporations, general partnerships, limited liability companies, associations or other legal entity organized pursuant to the laws of the state of Texas or any other state to the extent of such laws or the constituent documents of such entity would permit such entity to enter into a merger with the Partnership. Notwithstanding the foregoing, the approval of the Limited Partners shall not be required to approve such merger or conversion, so long as all of the holders of Units of any class or series receive, subject to Section 9.1(b) below, the same form and amount of consideration per Unit (or if any holders of any such class or series of Units are given an option as to the form and amount of consideration to be received, all such holders are given the same option). Further, no approval of the Limited Partners shall be required for a transaction to convert the Partnership to a limited liability company or a corporation (whether by virtue of merger, conversion or other transaction), whether such converted entity is taxed as a partnership, "C" corporation or "S" corporation, which is consummated primarily for the purpose of changing the form of entity used to conduct the business of the Partnership, so long as the Limited Partners have the same or substantially the same relative rights, obligations and interests in the new entity as they enjoyed as Partners of the Partnership immediately prior thereto (other than rights, obligations and interest with respect to the taxation of such entity or with respect to voting rights as contemplated in Section 9.1(b) below). In the event any transaction pursuant to this Section 9.1 results in the termination of the Partnership, each Partner will receive, incident to such merger or other transaction, shares of stock or other equity interests in the successor entity in proportion to each Partner's then current respective Capital Account balance, as adjusted by treating the Partnership as having liquidated and gains and losses allocated in accordance with this Agreement.

(b) The Partners acknowledge and agree that the General Partner controls the Partnership and generally has the right and authority to take all actions except for the Major Decisions, without the approval of the Partners. Accordingly, the voting rights of the Limited Partners are limited. The Partners agree that upon any conversion of the Partnership, the converted entity shall be controlled by the General Partner (or the owners of the General Partner). Accordingly, each Partner (other than the General Partner and Elder and any non-employee investors designated by the General Partner) may receive non-voting stock and each Partner shall execute a Stockholders Agreement, in a form approved by the General Partner, containing voting agreements (which will include the grant of a proxy to the General Partner or Elder for the right to vote the subject shares of such Partner), transfer restrictions, drag-along rights, lock-up provisions and other provisions reasonably required by the General Partner consistent with this Agreement or otherwise customary; provided, however, the Partners contemplate that upon an initial public offering of the stock of such converted entity, such Stockholders Agreement would provide that such provisions of the Stockholders Agreement which are not customary for a publicly-traded company (with ownership and capitalization similar to the converted entity) would expire or would no longer be applicable upon such initial public offering.

**ARTICLE 10**  
**MISCELLANEOUS**

10.1 **Certificate Requirements.** The General Partner shall (i) sign, swear to and file, from time to time in said office, all such writings to further amend the Certificate as are required by the Act for the carrying out of the terms and provisions of this Agreement; and (ii) upon winding up of the Partnership, shall sign and file in said office the writing required by the Act to cancel the Certificate as theretofore amended.

10.2 **Notices and Approvals.** All notices, requests, statements, offers, acceptances or other matters required or permitted to be given or furnished hereunder to any Partner shall be deemed sufficiently given or furnished if in writing and personally delivered to such Partner, or deposited in the United States mail, in a sealed envelope, certified mail with return receipt requested, with postage prepaid, or delivered via overnight courier, or delivered by facsimile transmission, at the addresses of the Partners set forth in Exhibit 1, or at such other address as such Partner shall have previously designated by the giving of fifteen (15) days' written notice to the Partner giving such notice, request, statement, offer, acceptance or other writing. For purposes of this Agreement, the date of the giving of notice shall be the date of the facsimile transmission if the original of such transmission is personally delivered, delivered by certified mail or delivered by overnight courier within two (2) business days following the date of the facsimile transmission, and, if facsimile transmission is not used, the date of the giving of notice shall be the date of delivery, if personally delivered or delivered by overnight courier, or three (3) business days after the date deposited in the mail if delivered by certified mail.

10.3 **Force Majeure.** If, as a result of force majeure (including and without limitation any and all events and circumstances not within or subject to a party's reasonable control), the General Partner is unable to carry out, wholly or in part, its duties and obligations under this Agreement, then the duties and obligations of the General Partner, so far as it is affected by the force majeure, shall be suspended during the continuance of the force majeure. The General Partner shall use all reasonable diligence to remove the force majeure as quickly as reasonably possible. The requirement that any force majeure shall be remedied with all reasonable diligence shall not require the settlement of strikes, lockouts or other labor difficulty suffered, but resolution of all such difficulties shall be entirely within the discretion of the party concerned.

10.4 **Applicable Law.** **THIS AGREEMENT IS ENTERED INTO AND SHALL BE CONSTRUED AND ENFORCED IN ACCORDANCE WITH THE APPLICABLE LAWS OF THE STATE OF TEXAS WITHOUT REGARD TO CONFLICT OF LAWS RULES.** This Agreement shall be subject to all valid applicable laws and official orders, rules and regulations, and, in the event this Agreement or any portion thereof is, or the operations contemplated hereby are, found to be inconsistent with or contrary to any such laws or official orders, rules and regulations, the latter shall be deemed to control, and this Agreement shall be regarded as modified accordingly, and, as so modified, shall continue in full force and effect; provided, however, that nothing herein contained shall be construed as a waiver of any right to question or contest any such law, order, rule or regulation in any forum having jurisdiction in the premises.

10.5 **WAIVER OF JURY TRIAL: Venue.**

(a) **EACH OF THE PARTIES TO THIS AGREEMENT WAIVES ANY RIGHT TO TRIAL BY JURY OF ANY DISPUTE OF ANY NATURE WHATSOEVER THAT MAY ARISE BETWEEN THEM, INCLUDING, BUT NOT LIMITED TO, THOSE DISPUTES RELATING TO OR INVOLVING, IN ANY WAY THE CONSTRUCTION, PERFORMANCE OR BREACH OF THIS AGREEMENT OR ANY OTHER AGREEMENT BETWEEN THE PARTIES, THE**



**PROVISIONS OF ANY FEDERAL, STATE OR LOCAL LAW, REGULATION OR ORDINANCE NOTWITHSTANDING.** By execution of this Agreement, each of the parties hereto acknowledges and agrees that such party has had an opportunity to consult with legal counsel and that such party knowingly and voluntarily waives any right to a trial by jury of any dispute pertaining to or relating in any way to the transactions contemplated by this Agreement, the provisions of any federal, state or local law, regulation or ordinance notwithstanding.

(b) Without limiting the enforceability or scope of this Section 10.5, the parties to this Agreement agree that if a controversy or claim between them arises out of or relates to this Agreement and results in litigation, the courts of Harris County, Texas, or the courts of the United States of America located in Harris County, Texas, shall have jurisdiction to hear and decide such matter, and such parties hereby submit to the jurisdiction of such courts.

10.6 Successors and Assigns. This Agreement shall be binding upon the Partners, their heirs, executors, administrators, legal representatives, successors and assigns, any or all of whom shall execute and deliver all necessary documents required to carry out the terms of this Agreement.

10.7 Amendments. This Agreement may be amended, modified and restated from time to time by agreement of a Required Interest, as well as the General Partner may, without the approval of a Required Interest, make such amendments in this Agreement as may be necessary to admit an Additional or Substituted Limited Partner in accordance with the provisions of Article 6, to adopt any Unit Designation as provided herein or as otherwise provided herein. Further, additional requirements for the approval of any amendment or modification of this Agreement may be set forth in any Unit Designation. Any amendment, modification or restatement of this Agreement shall be in writing and shall be signed by the General Partner and such Limited Partners, if any, as may be required under the foregoing provisions.

10.8 Entire Agreement. This Agreement, together with the agreements referred to herein and any confidentiality and/or noncompetition agreements that such Partners may have entered into with the Partnership in connection with their employment, embody the entire agreement and understanding among the Partners relating to the subject matter hereof and shall supersede all their prior agreements and understandings relating to such subject matter.

10.9 Waiver of Partition. Notwithstanding any statute or principle of law to the contrary, each Partner hereby agrees that, during the term of the Partnership, it shall have no right (and hereby waives any right that it might otherwise have had) to cause any Partnership property to be partitioned and/or distributed in kind (except as permitted by Section 7.4).

10.10 Gender and Number. Whenever required by the context, as used in this Agreement, the singular number shall include the plural and the neuter shall include the masculine or feminine gender, and vice versa.

10.11 Captions. The Article and Section headings appearing in this Agreement are for convenience of reference only and are not intended, to any extent or for any purpose, to limit or define the text of any Article or Section.

10.12 Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be an original, but all of which shall constitute but one and the same document.

10.13 Spouses' Community Interest Subject to Agreement. The respective spouses of the individual Partners join in the execution of this Agreement to evidence that the respective community interests of each, if any, in and to any of the Partners' Partnership Interests is subject to the terms and

provisions of this Agreement in all respects as if such spouses were a Partner hereunder with respect to such community interest. Any option to purchase a Partner's Partnership Interest pursuant to this Agreement shall include any interest therein owned by the spouse of such Partner.

10.14 Construction. This Agreement has been freely and fairly negotiated among the parties. If an ambiguity or question of intent or interpretation arises, this Agreement will be construed as if drafted jointly by the parties and no presumption or burden of proof will arise favoring or disfavoring any party because of the authorship of any provision of this Agreement.

10.15 Representation by Counsel and Tax Advice. Each party acknowledges that Cox Smith Matthews Incorporated has represented John D. Elder III in connection with the negotiation and execution of this Agreement and has not represented any other party hereto, including without limitation, the Partnership or the General Partner. Each party further acknowledges that it has been encouraged to seek legal counsel and tax advice to represent such party's interest in the negotiation and execution of this Agreement and analyze the tax consequences to such party, and each party has either had such representation or voluntarily declined to have such representation.

\*\*\*\*\*

**AMENDED AND RESTATED  
AGREEMENT OF LIMITED PARTNERSHIP**

**OF**

**THE LEGACY CMS GROUP, LTD.**  
(a Texas Limited Partnership)

**[COUNTERPART SIGNATURE PAGE]**

IN WITNESS WHEREOF, the General Partner and the Limited Partners have executed this Agreement effective as of the date first set forth above.

**GENERAL PARTNER:**

Legacy CMS Management, LLC

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

John D. Elder III, Manager

A-18 - Secretary of State Registration

Please see the enclosed.

**\*201002700689\***

DATE 01/26/2010	DOCUMENT ID 201002700689	DESCRIPTION REGISTRATION OF FOREIGN LIMITED PARTNERSHIP (LPI)	FILING 125.00	EXPED 00	PENALTY 00	CERT 00	COPY 00
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**Receipt**

This is not a bill. Please do not remit payment.

CORPORATION SERVICE COMPANY  
ATTN: LISA VAIDO  
887 SOUTH HIGH STREET  
COLUMBUS, OH 43206

**STATE OF OHIO  
CERTIFICATE**

**Ohio Secretary of State, Jennifer Brunner**

**1909628**

It is hereby certified that the Secretary of State of Ohio has custody of the business records for

**ACCLAIM ENERGY, LTD.**

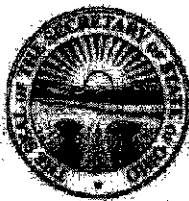
and, that said business records show the filing and recording of:

Document(s):

**REGISTRATION OF FOREIGN LIMITED PARTNERSHIP**

Document No(s):

**201002700689**



United States of America  
State of Ohio  
Office of the Secretary of State

Witness my hand and the seal of the  
Secretary of State at Columbus, Ohio  
this 21st day of January, A.D. 2010.

A handwritten signature in dark ink, appearing to read "Jennifer Brunner", is written over a horizontal line.

Ohio Secretary of State



Form 531B Prescribed by the  
Ohio Secretary of State

Central Ohio: (614) 468-3310  
Toll Free: (877) SCS-FILE (737-3463)

www.sos.state.oh.us  
Busserv@sos.state.oh.us

Expedite this form (extra cost)  
Mail form to one of the following:

☒ Expedite PO Box 1389  
Columbus, OH 43260

☐ Non Expedite PO Box 670  
Columbus, OH 43260

## CERTIFICATE OF FOREIGN LIMITED PARTNERSHIP

Filing Fee: \$125  
(104-LPF)

Name of limited partnership in its jurisdiction of formation: <u>ACCLAIM ENERGY, LTD.</u>														
Name under which the foreign limited partnership desires to transact business in Ohio (if different from its jurisdiction of formation):  Name must include one of the following words or abbreviations: "Limited Partnership," "L.P.," "Limited," or "Ltd."														
Jurisdiction of Formation:	<u>TEXAS</u>													
Date of Formation:	<u>4/14/2003</u>													
Address of the office required to be maintained in the jurisdiction of formation by the laws of that jurisdiction or, if not so required, of the principal office of the foreign limited partnership:  <u>1221 LAMAR STREET SUITE 510</u> Mailing Address: <table border="0"><tr><td><u>HOUSTON</u></td><td><u>TX</u></td><td><u>77010</u></td></tr><tr><td>City</td><td>State</td><td>Zip Code</td></tr></table>			<u>HOUSTON</u>	<u>TX</u>	<u>77010</u>	City	State	Zip Code						
<u>HOUSTON</u>	<u>TX</u>	<u>77010</u>												
City	State	Zip Code												
Name and Address of each General Partner <table border="0"><thead><tr><th>Name</th><th>Business or Residential Address</th></tr></thead><tbody><tr><td><u>ACCLAIM ENERGY MANAGEMENT, LLC</u></td><td><u>1221 LAMAR STREET SUITE 510 HOUSTON, TX 77010</u></td></tr><tr><td>_____</td><td>_____</td></tr><tr><td>_____</td><td>_____</td></tr><tr><td>_____</td><td>_____</td></tr><tr><td>_____</td><td>_____</td></tr></tbody></table>			Name	Business or Residential Address	<u>ACCLAIM ENERGY MANAGEMENT, LLC</u>	<u>1221 LAMAR STREET SUITE 510 HOUSTON, TX 77010</u>	_____	_____	_____	_____	_____	_____	_____	_____
Name	Business or Residential Address													
<u>ACCLAIM ENERGY MANAGEMENT, LLC</u>	<u>1221 LAMAR STREET SUITE 510 HOUSTON, TX 77010</u>													
_____	_____													
_____	_____													
_____	_____													
_____	_____													

CLIENT SERVICE CENTER

JAN 21 PM 4:33

RECEIVED  
SECRETARY OF STATE

## ORIGINAL APPOINTMENT OF AGENT

The undersigned authorized representative(s) of

**ACCLAM ENERGY, LTD.**

Name of Foreign Limited Partnership

hereby appoints the following to be **Statutory Agent** upon whom any process, notice or demand required or permitted by statute to be served upon the foreign limited partnership may be served. The name and address of the agent is

**CSC- Lawyers Incorporating Service (Corporation Service Company)**

Agent Name

**50 West Broad Street, Suite 1800**

Mailing Address

**Columbus**

City

**Ohio**  
State

**43215**

Zip Code

- ☐ If the agent is an individual using a P.O. Box, check this box to confirm that the agent is an Ohio resident.

The entity above irrevocably consents to service of process on the agent listed above as long as the authority of the agent continues, and to service of process upon the OHIO SECRETARY OF STATE if

- A. an agent is not appointed or
- B. an agent is appointed but the authority of that agent has been revoked, or
- C. the agent cannot be found or served after the exercise of reasonable diligence

Provide the address of the office where a list of the names and business or residence addresses of the partners of the limited partnership and their capital contributions is to be maintained until the registration of the foreign limited partnership is canceled or withdrawn

**1221 LAMAR STREET SUITE 510**

Mailing Address

**HOUSTON**

City

**TX**

State

**77010**

Zip Code

By signing and submitting this form to the Ohio Secretary of State, the undersigned hereby certifies that he or she has the requisite authority to execute this document.

**REQUIRED**

Must be  
authenticated  
(signed) by at  
least one  
general partner.

Signature

Date

JOHN D ELDER III, MEMBER OF OF, ACCLAIM ENERGY MANAGEMENT, LLC

Print Name

Signature

Date

Print Name

Signature

Date

Print Name

Signature

Date

Print Name



**\*201002700688\***

DATE:	DOCUMENT ID	DESCRIPTION	FILING	EXPED	PENALTY	CERT	COPY
01/28/2010	201002700688	REG. OF FOR. PROFIT LIM. LIAB. CO. (LFF)	125.00	.00	.00	.00	.00

**Receipt**

This is not a bill. Please do not remit payment.

CORPORATION SERVICE COMPANY  
ATTN: LISA VAIDO  
887 SOUTH HIGH STREET  
COLUMBUS, OH 43208

**STATE OF OHIO  
CERTIFICATE**

**Ohio Secretary of State, Jennifer Brunner**

1909627

It is hereby certified that the Secretary of State of Ohio has custody of the business records for

**ACCLAIM ENERGY MANAGEMENT, LLC**

and, that said business records show the filing and recording of:

Document(s):

**REG. OF FOR. PROFIT LIM. LIAB. CO.**

Document No(s):

**201002700688**



United States of America  
State of Ohio  
Office of the Secretary of State

Witness my hand and the seal of the  
Secretary of State at Columbus, Ohio  
this 21st day of January, A.D. 2010.

*Jennifer Brunner*

Ohio Secretary of State



Prescribed by:  
The Ohio Secretary of State  
Central Ohio: (614) 466-3910  
Toll Free: 1-877-SOS-FILE (1-877-767-3453)

www.sos.state.oh.us  
e-mail: busseerv@sos.state.oh.us

Expedite this Form: (Select One)	
<input type="radio"/> Expedite	PO Box 1390 Columbus, OH 43216
** Requires an additional fee of \$405 **	
<input type="radio"/> Non Expedite	PO Box 670 Columbus, OH 43216

**REGISTRATION OF A FOREIGN  
LIMITED LIABILITY COMPANY**  
Filing Fee \$125.00

THE UNDERSIGNED DESIRING TO FILE A:

**(CHECK ONLY ONE (1) BOX)**

<input checked="" type="checkbox"/> (1) Registration of a Foreign For-Profit Limited Liability Company (109-LFA) ORC 1705	<input type="checkbox"/> (2) Registration of a Foreign Non-profit Limited Liability Company (109-LFA) ORC 1705
State of Organization <u>TEXAS</u>	State of Organization _____
Date of Formation <u>4/14/2003</u>	Date of Formation _____

Name of limited liability company in its state of organization. <u>ACCLAIM ENERGY MANAGEMENT, LLC</u>				
Name under which the foreign limited liability company desires to transact business in Ohio (if different from its home-state name) is:  _____ <small>Name must include one of the following words or abbreviations: "limited liability company," "limited," "LLC," "LLP," "Ltd.," or "Ltd."</small>				
<input type="checkbox"/> Check here if additional provisions are attached				
The address to which interested persons may direct requests for copies of the limited liability company's operating agreement, bylaws, or other charter documents of the company is:  <u>ELISA H. KAPLAN</u> Name <u>1221 LAMAR STREET SUITE 510</u> Street Address / P.O. Box Address <table><tr><td><u>HOUSTON</u> City</td><td><u>TX</u> State</td><td><u>77019</u> Zip code</td></tr></table>		<u>HOUSTON</u> City	<u>TX</u> State	<u>77019</u> Zip code
<u>HOUSTON</u> City	<u>TX</u> State	<u>77019</u> Zip code		

The limited liability company hereby appoints the following as its agent upon whom process against the limited liability company may be served in the state of Ohio. The name and complete address of the agent is:

CSC-Lawyers Incorporating Service (Corporation Service Company)

Name

50 West Broad Street, Suite 1500

Mailing Address

Columbus

City

Ohio

State

43215

Zip Code

- ☐ If the agent is an individual and using a P.O. Box, check this box to certify the agent is a resident of the state of Ohio.

The limited liability company irrevocably consents to service of process on the agent listed above as long as the authority of the agent continues, and to service of process upon the OHIO SECRETARY OF STATE if:

- a. an agent is not appointed, or
- b. an agent is appointed but the authority of that agent has been revoked, or
- c. the agent cannot be found or served after the exercise of reasonable diligence.

**REQUIRED**

Articles and original appointment of agent must be (signed) by a member, manager or other representative.

Signature

JOHN D. ELDER II, MEMBER

Print Name

Date

Signature

Date

Print Name

Signature

Date

Print Name

## B-1 - Jurisdiction of Operations

Acclaim Energy, Ltd. and its affiliates are currently licensed or registered to provide retail natural gas or retail electric aggregation, brokerage and consulting services in the following jurisdictions:

State	Natural Gas	Electricity
Texas	Not required	Yes
California	Not required	Not required
Connecticut	Not required	Yes
District of Columbia	Yes	Yes
Delaware	Not required	Yes
Illinois	Not required	Yes
Massachusetts	Yes	Yes
Maryland	Yes	Yes
Maine	Yes	Yes
New Jersey	Not required	Yes
New Mexico	Not required	N/A - Regulated
New York	Not required	Not required
Oregon	Not required	Not required
Pennsylvania	Not required	Yes

## B-2 - Experience and Plans

Acclaim Energy, Ltd. (the "Company") is a full-service energy consulting and brokerage firm acting exclusively on behalf of its clients. The Company has been in existence since 2003, however, its consultants and risk managers possess numerous years of experience in the energy industry as illustrated by the following:

Name	Summary of Experience
Ryk Holden	Over 28 years of energy industry experience as an energy trader and risk manager with Shell, Enron and the Company.
Richard Zdunkewicz	Over 20 years of energy industry experience as a transaction originator and structurer with Pennzoil, Enron, Semptra Energy and the Company.
Ron Fort	Over 30 years of energy industry experience as a trader and structurer with Amerex and the Company.
Trish Collins	Over 15 years of energy industry experience as a transaction originator and structurer with Enron, Suez Energy and the Company.
Bhavin Patel	Over 10 years of energy industry experience as an Operations Manager with Enron, Reliant Energy and the Company.
Dennis Vegas	Over 20 years of energy industry experience as a Marketing Executive with Enron and the Company.
John D. Elder III	Over 6 years of energy industry experience as an Executive Officer with the Company.

The Company acquires and manages client relationships on both a direct basis and through its channel partners. Our channel partners are typically large, national consulting firms which do not possess the deep energy expertise which the Company possesses. Our targeted clients are typically large, multi-facility national accounts, such as big box and in-line retailers and mid-sized to large manufacturers. The Company currently has the staff, systems and resources to adequately manage our current client base and our anticipated growth. The Company will add future staff to accommodate the growth in its client base as necessary to provide the highest quality of services to its clients. The Company does not intend to act as a physical supplier of energy in the future.

### B-3 - Summary of Experience

The following table illustrates the Company's experience in providing the services for which it is seeking to be certified. The Company provides its services in numerous markets and jurisdictions across North America.

#### Natural Gas

Business Segment	# of Accounts
Commercial	2,000
Industrial	30
Governmental	20
Other	15
Total	2,065

#### Electricity

Business Segment	# of Accounts
Commercial	4,500
Industrial	400
Governmental	2,150
Other	375
Total	7,425

#### **B-4 - Disclosure of Liabilities and Investigations**

There are no existing, pending or past rulings, judgments, contingent liabilities, revocations or authority, regulatory investigations or any other matters that could adversely impact Acclaim Energy Ltd.'s financial or operational status or the ability to provide the services the company is seeking to be certified to provide.

## C-1 - Annual Reports

Not applicable. Acclaim Energy, Ltd. is a privately-held company and does not produce annual reports, only financial statements. Historic financial statements are included in C-3.



C-2 - SEC Filings

Not applicable. Acclaim Energy, Ltd. and its affiliates are private companies.

**C-3 - Financial Statements**

Please see the enclosed.

1:35 PM

01/11/11

Accrual Basis

**Acclaim Energy, LTD.**  
**Profit & Loss Prev Year Comparison**  
**January through December 2010**

	Jan - Dec 10	Jan - Dec 09	\$ Change	% Change
<b>Ordinary Income/Expense</b>				
<b>Income</b>				
Energy Rate Optimization	3,949,577.69	3,169,483.28	780,094.41	24.8%
Energy Management Services Fees				
Reliability Systems	-14,500.00	60,000.00	-74,500.00	-124.2%
Critical Load Registration	4,900.00	32,300.00	-27,400.00	-84.8%
Demand Response Fees	11,787.36	125,998.16	-114,210.80	-96.6%
Powerviews	8,840.00	14,930.00	-6,290.00	-42.1%
Reporting	350.00	77,000.00	-76,650.00	-99.6%
Energy Management Services Fees - Other	105,000.00	304,150.00	-199,150.00	-65.5%
<b>Total Energy Management Services Fees</b>	<b>116,177.36</b>	<b>614,378.16</b>	<b>-498,200.80</b>	<b>-81.1%</b>
Risk Management Services	15,750.00	-8,750.00	22,500.00	333.3%
Retro Energy Audit	0.00	18,895.31	-18,895.31	-100.0%
Consulting	840.00	60,397.50	-59,557.50	-98.6%
HEI Consulting	15,084.92	55,426.78	-36,331.86	-65.6%
<b>Total Income</b>	<b>4,101,439.97</b>	<b>3,911,631.03</b>	<b>189,808.94</b>	<b>4.9%</b>
<b>Cost of Goods Sold</b>				
<b>Bonus</b>				
Administrative Bonus	7,934.85	8,500.00	-565.15	-6.7%
Energy Team Bonus	0.00	0.00	0.00	0.0%
Operations Bonus	0.00	95,850.00	-95,850.00	-100.0%
<b>Total Bonus</b>	<b>7,934.85</b>	<b>104,450.00</b>	<b>-96,515.15</b>	<b>-92.4%</b>
<b>Rate Op</b>				
Direct expenses	11,068.98	20,291.40	-9,222.42	-45.5%
Commissions & Bonuses				
Attainment Bonus	38,600.00	0.00	38,600.00	100.0%
Sales Commissions				
Sales - Demand Response/ELIS	112,000.00	0.00	112,000.00	100.0%
Sales - Mike Goodwin Deals	1,178.26	0.00	1,178.26	100.0%
Sales - Energy Rate Optimization	257,845.97	197,906.43	39,739.54	20.1%
<b>Total Sales Commissions</b>	<b>350,824.23</b>	<b>197,906.43</b>	<b>152,917.80</b>	<b>77.3%</b>
<b>Total Commissions &amp; Bonuses</b>	<b>388,824.23</b>	<b>197,906.43</b>	<b>190,917.80</b>	<b>96.5%</b>
Referral Commissions				
Referral - ELIS	140,000.00	0.00	140,000.00	100.0%
Referral - Reliability Services	6,000.00	0.00	6,000.00	100.0%
Referral - CL Registration	435.00	0.00	435.00	100.0%
Referral - Energy Rate Optimiza	336,459.43	478,085.91	-141,626.48	-29.6%
<b>Total Referral Commissions</b>	<b>482,894.43</b>	<b>478,085.91</b>	<b>4,808.52</b>	<b>1.0%</b>
Rate Op Direct Legal Expense	0.00	19,190.00	-19,190.00	-100.0%
<b>Total Rate Op</b>	<b>882,787.64</b>	<b>715,473.74</b>	<b>167,313.90</b>	<b>23.4%</b>
<b>Management Services Fees</b>				
Referral Fees	0.00	4,345.00	-4,345.00	-100.0%
Direct Costs	16,802.69	67,770.78	-50,968.07	-75.2%
Legal Fees	0.00	1,788.50	-1,788.50	-100.0%
Miscellaneous Direct Costs	166.40	0.00	166.40	100.0%
<b>Total Management Services Fees</b>	<b>16,969.09</b>	<b>73,864.26</b>	<b>-56,895.17</b>	<b>-77.0%</b>
HEI Consulting Cost of Services	0.00	1,044.33	-1,044.33	-100.0%
<b>Total COGS</b>	<b>907,891.58</b>	<b>894,852.33</b>	<b>12,839.25</b>	<b>1.4%</b>
<b>Gross Profit</b>	<b>3,193,748.39</b>	<b>3,016,778.70</b>	<b>176,969.69</b>	<b>5.9%</b>
<b>Expense</b>				
Reconciliation Discrepancies	502.30	0.00	502.30	100.0%
<b>Variable Costs</b>				
Corporate Expenses				
Consulting Fees				
Other Consulting Fees	64,782.88	2,012.86	62,770.02	3,118.5%
<b>Total Consulting Fees</b>	<b>64,782.88</b>	<b>2,012.86</b>	<b>62,770.02</b>	<b>3,118.5%</b>
Office Expense				
Food and Beverage	0.00	2,964.88	-2,964.88	-100.0%
Kitchen Supplies	2,138.23	1,502.55	635.68	42.3%
Office Supplies	12,885.94	10,813.49	2,072.45	19.2%
Visitor Parking	800.00	0.00	800.00	100.0%
Administrative Expenses	0.00	189.85	-189.85	-100.0%
<b>Total Office Expense</b>	<b>15,824.17</b>	<b>15,480.77</b>	<b>343.40</b>	<b>2.2%</b>
<b>Total Corporate Expenses</b>	<b>80,607.05</b>	<b>17,493.63</b>	<b>63,113.42</b>	<b>360.8%</b>
<b>General &amp; Administrative</b>				
Courier	4,088.68	1,150.34	2,938.34	255.4%
Postage	855.80	1,101.12	-245.32	-22.3%
Misc. Expenses	0.00	1,218.56	-1,218.56	-100.0%
Gifts	3,468.26	1,310.56	2,157.70	160.6%
Contributions	3,100.00	0.00	3,100.00	100.0%
Dues and Subscriptions	295.98	3,834.70	-3,538.72	-92.3%
Moving Expense	0.00	211.13	-211.13	-100.0%
Miscellaneous	0.00	1,690.92	-1,690.92	-100.0%
Travel & Ent				
Automobile Expense				
Gas & Oil	3,352.38	1,583.37	1,769.01	111.7%
Repairs & Maintenance	1,680.32	3,804.85	-1,924.53	-53.4%
<b>Total Automobile Expense</b>	<b>5,032.70</b>	<b>5,188.22</b>	<b>-155.52</b>	<b>-3.0%</b>
Meals	0.00	58.10	-58.10	-100.0%
Reimbursed Miles	0.00	17.60	-17.60	-100.0%
Toll Road	1,124.55	75.00	1,049.55	1,399.4%
Entertainment	0.00	0.00	0.00	0.0%
Parking	786.57	107.98	678.59	628.4%
Rental Car	0.00	130.78	-130.78	-100.0%
Hotel/Lodging	0.00	489.62	-489.62	-100.0%
Airfare	8.40	1,127.60	-1,119.20	-99.3%
<b>Total Travel &amp; Ent</b>	<b>6,952.22</b>	<b>7,186.88</b>	<b>-234.66</b>	<b>-3.3%</b>
<b>Total General &amp; Administrative</b>	<b>18,780.94</b>	<b>17,704.21</b>	<b>1,076.73</b>	<b>6.0%</b>

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Accrual Basis

**Acclaim Energy, LTD.**  
**Profit & Loss Prev Year Comparison**  
**January through December 2010**

	Jan - Dec 10	Jan - Dec 09	\$ Change	% Change
<b>Marketing Costs</b>				
AWBD Event	0.20	0.00	0.20	100.0%
Market Research	28,817.42	0.00	28,817.42	100.0%
Advertising	198.00	3,309.54	-3,113.54	-94.1%
Consulting Services	0.00	57,308.07	-57,308.07	-100.0%
Donations	10,100.00	500.00	9,600.00	1,920.0%
Events	11,006.40	15,620.13	-4,613.73	-29.5%
Food and Beverage	0.00	102,384.52	-102,384.52	-100.0%
JE Business Development	36,748.43	25,350.06	11,397.47	45.0%
Marketing Materials	13,253.42	10,012.51	3,240.91	32.4%
Memberships	1,813.06	89.00	1,744.06	2,527.6%
Travel Expenses	0.00	2,226.24	-2,226.24	-100.0%
<b>Total Marketing Costs</b>	<b>101,934.93</b>	<b>216,780.97</b>	<b>-114,846.04</b>	<b>-53.0%</b>
<b>Operations Costs</b>				
Food and Beverage	0.00	36.76	-36.76	-100.0%
<b>Total Operations Costs</b>	<b>0.00</b>	<b>36.76</b>	<b>-36.76</b>	<b>-100.0%</b>
<b>Sales Costs</b>				
Events	7,772.62	6,728.91	1,043.71	15.5%
Food and Beverage	0.00	2,139.53	-2,139.53	-100.0%
Marketing Materials	338.64	0.00	338.64	100.0%
Memberships	4,964.85	1,520.91	3,443.94	226.4%
Printing	0.00	1,217.03	-1,217.03	-100.0%
Prospecting	73,646.36	30,825.06	42,821.30	138.9%
<b>Total Sales Costs</b>	<b>88,723.47</b>	<b>42,431.44</b>	<b>46,292.03</b>	<b>104.4%</b>
<b>Total Variable Costs</b>	<b>288,026.39</b>	<b>294,447.01</b>	<b>-6,420.62</b>	<b>-2.2%</b>
<b>Fixed Costs</b>				
<b>Operations Costs</b>				
Service Delivery	22,449.88	0.00	22,449.88	100.0%
<b>Total Operations Costs</b>	<b>22,449.88</b>	<b>0.00</b>	<b>22,449.88</b>	<b>100.0%</b>
<b>Depreciation</b>	<b>34,497.95</b>	<b>0.00</b>	<b>34,497.95</b>	<b>100.0%</b>
<b>Corporate Operating Costs</b>				
Employee Development				
Team Activities and Awards	2,378.00	1,863.88	514.12	27.6%
Training	565.49	0.00	565.49	100.0%
<b>Total Employee Development</b>	<b>2,943.49</b>	<b>1,863.88</b>	<b>1,079.61</b>	<b>57.9%</b>
<b>Technical Infrastructure</b>				
Computer Expense				
Maintenance & Support	128,121.62	137,710.10	-9,588.28	-7.0%
Subscribed Monthly Services	17,838.33	5,533.50	12,305.83	222.4%
Computer Software	28,320.83	19,040.98	9,279.85	48.7%
Computer - Misc.	6,296.60	4,628.45	1,668.15	36.0%
<b>Total Computer Expense</b>	<b>180,578.58</b>	<b>166,913.03</b>	<b>13,665.55</b>	<b>8.2%</b>
<b>Internet Expense</b>				
Internet Hosting	3,052.61	2,573.28	479.33	18.6%
Internet Expense - Other	0.00	20.00	-20.00	-100.0%
<b>Total Internet Expense</b>	<b>3,052.61</b>	<b>2,593.28</b>	<b>459.33</b>	<b>17.7%</b>
<b>Telephone</b>				
Telephone Equipment	1,011.63	3,414.84	-2,403.01	-70.4%
Cellular Telephone	0.00	1,318.24	-1,318.24	-100.0%
Local/Long Dis/Telephone	35,999.13	31,434.24	4,564.88	14.5%
Communication - Misc	28.00	0.00	28.00	100.0%
<b>Total Telephone</b>	<b>37,039.76</b>	<b>35,167.12</b>	<b>872.64</b>	<b>2.4%</b>
<b>Technical Infrastructure - Other</b>	<b>293.15</b>	<b>0.00</b>	<b>293.15</b>	<b>100.0%</b>
<b>Total Technical Infrastructure</b>	<b>220,964.10</b>	<b>205,673.43</b>	<b>15,290.67</b>	<b>7.4%</b>
<b>Professional Consulting Fees</b>				
Human Resource Recruiting Fees	1,015.44	0.00	1,015.44	100.0%
Human Resource Consulting Fees	11,079.80	16,000.00	-4,920.20	-30.8%
<b>Total Professional Consulting Fees</b>	<b>12,095.24</b>	<b>16,000.00</b>	<b>-3,904.76</b>	<b>-24.4%</b>
<b>Salary &amp; Benefits</b>				
<b>Payroll Expenses</b>				
Life Insurance	2,809.04	100.00	2,509.04	2,509.0%
Payroll Expenses	224,448.50	360,864.86	-136,236.46	-37.8%
Salary Vacation	0.00	2,307.84	-2,307.84	-100.0%
Health Insurance	16,113.07	4,485.03	11,618.04	258.5%
Garage Parking	4,380.00	6,807.50	-2,547.50	-36.9%
Metro Passes	0.00	0.00	0.00	0.0%
Long Term Disability Insurance	-81.28	675.42	-756.70	-112.0%
Employer's Payroll Taxes	41,318.37	19,993.08	21,325.29	108.7%
Special Recognition	0.00	1,495.10	-1,495.10	-100.0%
Payroll Expenses - Other	21,250.00	37.50	21,212.50	56,566.7%
<b>Total Payroll Expenses</b>	<b>310,017.70</b>	<b>396,696.43</b>	<b>-86,678.73</b>	<b>-21.9%</b>
<b>Contract Labor</b>	<b>34,896.06</b>	<b>22,040.61</b>	<b>12,855.45</b>	<b>57.4%</b>
401 (k) Plan Expenses	2,431.58	2,826.48	-394.90	-14.0%
Personnel Hiring	37.87	176.00	-138.13	-78.5%
Staff Training	0.00	286.42	-286.42	-100.0%
<b>Total Salary &amp; Benefits</b>	<b>347,183.21</b>	<b>422,025.94</b>	<b>-74,842.73</b>	<b>-17.7%</b>
<b>Professional Fees</b>				
Accounting/Tax Fees	21,624.93	4,500.00	17,324.93	385.0%
Legal Fees	78,132.20	43,503.55	34,628.65	79.6%
<b>Total Professional Fees</b>	<b>99,957.13</b>	<b>48,003.55</b>	<b>51,953.58</b>	<b>108.2%</b>
<b>Total Corporate Operating Costs</b>	<b>683,143.17</b>	<b>883,666.80</b>	<b>-10,423.63</b>	<b>-1.5%</b>
<b>Marketing Salary &amp; Benefits</b>				
Life Insurance	725.00	150.00	575.00	383.3%
Payroll Expenses	56,268.72	98,334.54	-42,067.82	-42.8%
Health Insurance	5,928.00	14,157.36	-8,229.36	-58.1%
Garage Parking	2,040.00	2,040.00	0.00	0.0%
Metro Passes	0.00	170.00	-170.00	-100.0%
Long Term Disability Insurance	980.80	1,068.92	-88.12	-8.2%
Employers Payroll Taxes	5,012.98	5,923.08	-910.10	-15.4%
<b>Total Marketing Salary &amp; Benefits</b>	<b>70,953.50</b>	<b>121,643.90</b>	<b>-50,690.40</b>	<b>-41.8%</b>

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Accrual Basis

**Acclaim Energy, LTD.**  
**Profit & Loss Prev Year Comparison**  
**January through December 2010**

	Jan - Dec 10	Jan - Dec 09	\$ Change	% Change
<b>Operations Salary &amp; Benefits</b>				
Life Insurance	75.00	0.00	75.00	100.0%
Payroll Expenses	419,104.41	344,214.38	73,890.03	21.5%
Health Insurance	29,988.20	18,215.00	2,773.20	15.2%
Garage Parking	2,169.00	1,484.00	705.00	47.5%
Metro Passes	357.00	1,350.00	-1,003.00	-73.8%
Long Term Disability Insurance	1,380.96	884.84	496.12	56.1%
Employers Payroll Taxes	29,488.91	29,860.35	-371.44	-1.2%
<b>Total Operations Salary &amp; Benefits</b>	<b>472,583.48</b>	<b>396,018.55</b>	<b>76,564.93</b>	<b>19.3%</b>
<b>Sales Salary &amp; Benefits</b>				
Life Insurance	2,200.00	400.00	1,800.00	450.0%
Payroll Expenses	699,770.12	771,367.04	-71,596.92	-9.3%
Health Insurance	37,374.48	32,547.00	4,827.48	14.8%
Garage Parking	8,160.00	8,105.00	55.00	0.7%
Long Term Disability Insurance	2,722.12	2,475.37	246.75	10.0%
Employers Payroll Taxes	60,050.95	62,086.48	-2,035.53	-3.3%
Sales Salary & Benefits - Other	15,673.64	0.00	15,673.64	100.0%
<b>Total Sales Salary &amp; Benefits</b>	<b>825,951.31</b>	<b>875,963.89</b>	<b>-51,012.58</b>	<b>-5.8%</b>
<b>Overhead Costs</b>				
Bank Service Charges	6,608.31	8,150.85	-1,542.54	-18.9%
Insurance				
Surety Bond	1,390.00	400.00	990.00	247.5%
Workers Compensation	7,010.59	10,136.03	-3,125.44	-30.8%
Commercial Package	1,838.17	1,993.28	-155.11	-7.8%
Key Man Life Insurance	5,023.20	3,159.00	1,864.20	59.0%
<b>Total Insurance</b>	<b>15,261.96</b>	<b>15,688.31</b>	<b>-426.35</b>	<b>-2.7%</b>
Licenses and Permits				
Filing Fees	16,645.79	432.00	16,213.79	3,753.2%
Licenses and Permits - Other	800.00	2,198.98	-1,398.98	-63.6%
<b>Total Licenses and Permits</b>	<b>17,445.79</b>	<b>2,630.98</b>	<b>14,814.81</b>	<b>563.1%</b>
Rent				
Security Services	64.95	0.00	64.95	100.0%
Automobile Lease Payment	7,645.32	7,645.32	0.00	0.0%
Office Equipment	29.82	3,040.07	-3,010.25	-99.0%
Office Rent	192,856.28	192,482.77	373.51	0.2%
Property Tax	496.11	571.47	-75.36	-13.2%
Rent - Other	339.78	0.00	339.78	100.0%
<b>Total Rent</b>	<b>201,432.26</b>	<b>203,739.83</b>	<b>-2,307.57</b>	<b>-1.1%</b>
Repairs				
Equipment Repairs	0.00	1,804.52	-1,804.52	-100.0%
<b>Total Repairs</b>	<b>0.00</b>	<b>1,804.52</b>	<b>-1,804.52</b>	<b>-100.0%</b>
<b>Total Overhead Costs</b>	<b>240,748.32</b>	<b>232,014.09</b>	<b>8,734.23</b>	<b>3.8%</b>
<b>Total Fixed Costs</b>	<b>2,350,327.61</b>	<b>2,320,407.23</b>	<b>29,920.38</b>	<b>1.3%</b>
<b>Total Expense</b>	<b>2,638,856.30</b>	<b>2,614,854.24</b>	<b>24,002.06</b>	<b>0.9%</b>
<b>Net Ordinary Income</b>	<b>554,882.09</b>	<b>401,924.46</b>	<b>152,957.63</b>	<b>38.1%</b>
<b>Other Income/Expense</b>				
Other Income				
Interest Income	496.71	324.83	171.88	52.9%
<b>Total Other Income</b>	<b>496.71</b>	<b>324.83</b>	<b>171.88</b>	<b>52.9%</b>
Other Expense				
Credit Card Expense	29,286.78	0.00	29,286.78	100.0%
Franchise Taxes	16,760.91	4,645.72	12,115.19	260.6%
Discount for Prepayment of Fees	34,785.48	81,015.60	-46,230.12	-57.1%
Interest Expense				
Other Interest	2,863.42	5,084.65	-2,221.23	-43.3%
Interest Expense - Other	116,169.42	108,101.02	8,068.40	7.5%
<b>Total Interest Expense</b>	<b>119,032.84</b>	<b>113,185.67</b>	<b>5,847.17</b>	<b>5.2%</b>
<b>Total Other Expense</b>	<b>199,876.02</b>	<b>198,846.99</b>	<b>1,029.03</b>	<b>0.5%</b>
<b>Net Other Income</b>	<b>-199,379.31</b>	<b>-198,522.16</b>	<b>-857.15</b>	<b>-0.4%</b>
<b>Net Income</b>	<b>355,512.78</b>	<b>203,402.30</b>	<b>152,110.48</b>	<b>74.8%</b>

#### C-4 - Financial Arrangements

The Company is not engaged in the business of providing competitive retail natural gas or electricity physical supply services. This section is not applicable.

There are no financial arrangements needed or in place required for Acclaim Energy, Ltd and its affiliates to conduct competitive retail natural gas services. All of our activities are consultative in nature and no title is taken to any physical natural gas commodities and no financial positions are taken by us in the course of our business activities.

**C-5 - Forecasted Financial Statements**

Please see the enclosed.

Spread in thousands

**BALANCE SHEET**

**ASSETS**

Cash and Marketable Securities  
A/R - Third Party - net of reserve  
TOTAL CURRENT ASSETS

Other Assets  
TOTAL ASSETS

**LIABILITIES & EQUITY**

Current Maturities of Senior Debt  
Accounts Payable  
Accrued Expenses  
Other short term liabilities

TOTAL CURRENT LIABILITIES  
Senior Debt and Revolver (less current mat)  
Subordinated Debt

TOTAL LONG-TERM DEBT  
TOTAL LIABILITIES

Shareholder's Equity

TOTAL LIABILITIES & EQUITY

**INCOME STATEMENT**

Net Sales  
Cost of Sales  
Gross Profit

SG&A  
EBITDA  
EBITDA Margin (%)

Depreciation  
EBIT (Operating Earnings)

Interest Expense  
Other Income/(Expense)

INCOME BEFORE TAXES

	2011	2012	2013	2014	2015
Cash and Marketable Securities	858,442	1,122,535	1,470,259	1,909,318	2,495,052
A/R - Third Party - net of reserve	2,043,450	2,145,622	2,252,903	2,365,549	2,389,204
TOTAL CURRENT ASSETS	3,403,654	3,795,007	4,276,355	4,855,718	5,470,916
Other Assets	3,514,649	3,514,649	3,514,649	3,514,649	3,514,649
TOTAL ASSETS	6,953,208	7,348,818	7,833,400	8,414,848	9,019,653
Current Maturities of Senior Debt	283,671	283,671	283,671	283,671	283,671
Accounts Payable	306,821	322,162	338,270	355,184	358,735
Accrued Expenses	497,323	522,189	548,299	575,714	581,471
Other short term liabilities	195,853	205,646	215,928	226,725	228,992
TOTAL CURRENT LIABILITIES	1,283,668	1,333,668	1,386,168	1,441,293	1,452,869
Senior Debt and Revolver (less current mat)	1,702,024	1,418,353	1,134,683	851,012	567,341
Subordinated Debt	0	0	0	0	0
TOTAL LONG-TERM DEBT	1,702,024	1,418,353	1,134,683	851,012	567,341
TOTAL LIABILITIES	2,985,692	2,752,022	2,520,851	2,292,305	2,020,210
Shareholder's Equity	3,967,516	4,596,797	5,312,549	6,122,543	6,999,443
TOTAL LIABILITIES & EQUITY	6,953,208	7,348,818	7,833,400	8,414,848	9,019,653
Net Sales	4,657,472	4,890,346	5,134,863	5,391,606	5,445,522
Cost of Sales	1,022,774	1,073,912	1,127,608	1,183,989	1,195,828
Gross Profit	3,634,698	3,816,433	4,007,255	4,207,618	4,249,694
SG&A	2,538,452	2,602,290	2,666,164	2,729,921	2,686,973
EBITDA	1,096,246	1,214,144	1,341,091	1,477,697	1,562,721
EBITDA Margin (%)	23.54%	24.83%	26.12%	27.41%	28.70%
Depreciation	3,924	5,969	8,270	10,858	10,974
EBIT (Operating Earnings)	1,092,322	1,208,175	1,332,821	1,466,839	1,551,747
Interest Expense	-138,289	-138,289	-124,815	-108,504	-89,356
Other Income/(Expense)	-96,915	-101,761	-106,849	-112,191	-113,313
INCOME BEFORE TAXES	857,118	968,125	1,101,157	1,246,144	1,349,077



## C-6 - Credit Rating

Not applicable. Acclaim Energy, Ltd. and its affiliates are private companies with no public debt.

C-7 - Credit Report

Please see the enclosed.

**Live Report : ACCLAIM ENERGY, LTD.****D-U-N-S® Number:** 15-155-3588**Endorsement:** jdluhy@acclaimenergy.com

D&B Address	1221 Lamar St Ste 510
Address	Houston, TX - 77010
Location Type	Single Location
Phone	713 524-0250
Fax	
Web	

Trade Names	
Trade Names	ACCLAIM ENERGY ADVISORS

**Company Summary****Predictive Indicators - Supplier Evaluation Risk**

**Supplier Evaluation Risk Rating: 8** High risk of supplier experiencing severe financial stress over the next 12 months.

**Predictive Indicators - Credit Capacity for Headquarters****D&B Rating: 1R3**

**Number of employees:** 1R indicates 10 or more employees

**Composite credit appraisal:** 3 is fair

This assessment is based on D&B's D&B Rating.

**History & Operations****This is a single location**

Manager	JOHN D ELDER III, PARTNER
Year Started	2003
Employees	19
SIC	8748
Line of business	Business consulting services
NAICS	541690
History Status	CLEAR

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**C-8 - Bankruptcy Information**

Not applicable. Acclaim Energy, Ltd. and its affiliates have never filed for bankruptcy protection.

**C-9 – Merger Information**

Not applicable.

## D-1 - Operations

The Company is a full-service energy consulting and brokerage operation. The various operational groups and their respective functions are described below.

**Client Development and Consulting** – acquires clients and provides client-specific advisory; supported by the Mid-Office Operations, the Risk Management and Structuring Operations and Client Services Operations, this group is responsible for developing and maintaining relationships with the Company's clientele.

**Mid-Office Operations** – supports the Client Development and Consulting Group; acquires client-specific energy load data and manages the "Request for Proposal" process for the Company's clientele.

**Risk Management and Structuring Operations** – supports the Client Development and Consulting Group and the Company's clientele by providing energy market intelligence, including market prices and recommendations for procurement and price risk management strategies.

**Client Services Operations** – supports the Client Development and Consulting Group and the Company's clientele related to contract management, utility bill verification, energy supplier transition issues and specific client reporting. This group also supports and maintains the Company's web portal and utility reporting technologies.

**Financial Operations** – provides accounting, accounts payable and accounts receivable support to the Company; this is not a client-facing function.

**Marketing** – provides marketing support and competitive intelligence to the Client Development and Consulting Group.

## D-2 - Operations Expertise

Please refer to Exhibit B-2 above and Exhibit D-3 below for evidence of our staff's Operational Expertise.

### D-3 - Key Technical Personnel

Name	Title	Email Address	Telephone #
Ryk Holden	Director, Risk Management	<a href="mailto:rholden@acclaimenergy.com">rholden@acclaimenergy.com</a>	713-524-0250
Ron Fort	Director, Structuring	<a href="mailto:rfort@acclaimenergy.com">rfort@acclaimenergy.com</a>	713-524-0250
Richard Zdunkewicz	Director, Business Development and Pricing; Principal Consultant	<a href="mailto:rzdunkewicz@acclaimenergy.com">rzdunkewicz@acclaimenergy.com</a>	713-524-0250
Trish Collins	Director, Principal Consultant	<a href="mailto:tcollins@acclaimenergy.com">tcollins@acclaimenergy.com</a>	713-524-0250
Bhavin Patel	Manager, Client Services Operations	<a href="mailto:bpatel@acclaimenergy.com">bpatel@acclaimenergy.com</a>	713-524-0250

Name	Background
Ryk Holden	Mr. Holden is a 1981 graduate of the University of Illinois, with a degree in Engineering. His applicable technical expertise is in the price risk management and the structuring of both wholesale and retail natural gas and electricity supply agreements and financial hedging instruments. Work experience: Shell North America, 1981 – 1989; Enron Capital & Trade, 1989 – 1992; MG Trading, 1992 – 1998; Holden Energy, 1998 – 2005; Acclaim Energy Advisors, 2004 - current
Ron Fort	Mr. Fort is a 1967 graduate of Oxford College, Emory University in Atlanta, Georgia, with a degree in Business Administration. Mr. Fort's applicable technical expertise is in the structuring of retail energy supply contracts and the active management of price risk ("hedging"). Work experience: Phoenix Trading Company (energy commodities futures trading), 1984 - 1999; PolarShield, Inc. 1999 – 2002; Amerex Retail Energy Services, 2004 – 2009; Acclaim Energy Advisors, 2009 – current.
Richard Zdunkewicz	Mr. Zdunkewicz is a 1980 graduate of Texas A & M University, with a degree in Economics. His applicable technical expertise is in the structuring of retail energy supply contracts in most major deregulated markets. Work experience: Enron Energy Services, 1997 – 2001; Sempra Energy Solutions, 2001- 2004; Direct Energy Business, 2004-2006; Acclaim Energy Advisors, 2006 – current.
Trish Collins	Ms. Collins is a 1989 graduate of the University of Arkansas, with a degree in Chemical Engineering. Her applicable technical expertise is in the structuring of retail energy supply contracts in all deregulated markets across North America. Work experience: Enron Energy Services, 2000 – 2001; Nation's Energy Holdings, LLC, 2001 – 2002; Suez Energy Resources North America, 2002 – 2004; LPB Energy Management, 2004 – 2005; Acclaim Energy Advisors, 2007 – current
Bhavin Patel	Mr. Patel is a 2001 graduate of Texas A & M University, with a degree in Economics and a minor in Business Administration. Mr. Patel's applicable technical expertise is in contract management systems and technologies. Mr. Patel is an active member of the National Contract Management Association. Work experience: Reliant Energy, 2002 – 2005; Science Applications International Corporation, 2005 – 2006; Enterprise Products Operations, L.P., 2006 – 2007; Acclaim Energy Advisors, 2007 - current