

APPENDIX E

CONFIDENTIALITY AGREEMENT FORM

**2021 All-Source Capacity and Energy
Request for Proposal**

Arizona Electric Power Cooperative, Inc.

CONFIDENTIALITY AGREEMENT

THIS CONFIDENTIALITY AGREEMENT, effective as of the date (“Effective Date”) of the signatures below (this “Agreement”), is entered into by and between Arizona Electric Power Cooperative, Inc. (“AEPSCO”), and _____ (“Bidder”). AEPSCO and Bidder are each sometimes referred to individually as a “Party” and collectively, as the “Parties.”

WHEREAS, AEPSCO is a member-owned, not-for-profit, Arizona generation and transmission cooperative corporation; and

WHEREAS, AEPSCO has issued the 2021 Request for Proposals for Capacity and Energy (the “RFP”) to meet the power supply requirements of AEPSCO’s members;

WHEREAS, in connection with the RFP, the Parties and/or their respective Affiliates may disclose to one another information that is confidential and proprietary and may enter into a transaction with each other (the “Possible Transaction”), subject to the terms and restrictions provided herein;

WHEREAS, each Party wishes to maintain the confidentiality of such information and, further, does not intend to waive any of its rights thereto;

WHEREAS, as a condition to furnishing such information, each Party requires that such information be accorded confidential treatment in accordance with and subject to the provisions of this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties agree as follows:

1. “Confidential Information” shall mean any and all technical, financial, operational, business, or other non-public information, including, without limitation, data, documents, materials, studies, projections, contract proposals, processes, drawings, plans, specifications, operating procedures, correspondence, formulae, programs, analyses, and studies, whether in written or electronic form, whether communicated in writing, verbally, or otherwise, that a Party (the “Disclosing Party”) discloses to the other Party (the “Receiving Party”) or to any of the Receiving Party’s Representatives (as defined below), including, without limitation, all notes, observations, analyses, interpretations, compilations, studies, surveys, inspections, or evaluations made by or for the Receiving Party or any of its Representatives that contain, reflect, or are based upon, in whole or in part, any of such data or information. Documents so classified by the Disclosing Party shall bear the designation “Confidential Information.” The term “Highly Sensitive Protected Material” is a subset of Confidential Information that refers to material that the Disclosing Party claims is of such a highly sensitive nature that making copies of such material or providing unrestricted access to such material to the Receiving Party or its Representatives would expose the Disclosing Party, or a person or entity to which the Disclosing Party owes a duty to protect the confidentiality of such materials, to an unreasonable risk of harm. Documents so classified by the Disclosing Party shall bear the designation “Highly Sensitive Protected Material.” For purposes of the RFP and evaluations conducted therein, Bidders in the RFP may label their bid proposals and pricing as Confidential Information; however, Bidder may also request that their

proposals and pricing be designated by AEPCO and treated as Highly Sensitive Protected Materials to the extent produced for review by parties in any subsequent Arizona Corporation Commission (“ACC”) or other proceedings seeking regulatory approval of proposals selected from the RFP. Further, to the extent not in violation with other laws and regulations, including but not limited to antitrust and unfair trade practices laws, Bidders are not required to maintain their bids and pricing as Confidential Information during the RFP process as they may choose in their sole discretion, provided they shall maintain any and all Confidential Information of AEPCO as confidential pursuant to the Confidentiality Agreement.

2. Each Party agrees to hold Confidential Information of the other Party in confidence and not to disclose any part of such Confidential Information to any Person, except in accordance with this Agreement (including, without limitation, pursuant to AEPCO’s disclosure rights set forth in Section 5 below), without the prior written approval of the Disclosing Party. Each Party further agrees to use the other Party’s Confidential Information only for the purposes of the RFP and for no other purpose. Bidder’s Confidential Information may be disclosed by AEPCO only to AEPCO’s directors, officers, employees, members, representatives, attorneys, agents, consultants, or advisors, including but not limited to Alliance for Cooperative Energy Services Power Marketing LLC (“ACES”), (collectively, “AEPCO Representatives”), and any member of any interested regulatory agency and staff, including but not limited to ACC Commissioners and Staff, including outside consultants and counsel engaged by the ACC for this RFP and any subsequent certification, who may need to know the Confidential Information for the purposes contemplated by this Agreement and who will be advised by AEPCO of this Agreement; provided, however, that AEPCO will satisfy itself that the AEPCO Representatives will act in accordance herewith. AEPCO shall be responsible for any breach of this Agreement by any of the AEPCO Representatives. AEPCO Confidential Information may be disclosed by Bidder only to Bidder’s or Bidder’s Affiliates’ directors, officers, employees, representatives, attorneys, agents, consultants, or advisors (the “Bidder Representatives”) who need to know the Confidential Information for the purposes contemplated by this Agreement and who will be advised by Bidder of this Agreement; provided, however, that Bidder will satisfy itself that the Bidder’s Representatives will act in accordance herewith. Bidder shall be responsible for any breach of this Agreement by any of the Bidder’s Representatives. The AEPCO Representatives and the Bidder’s Representatives may hereinafter sometimes be referred to as the “Representatives” of the respective Parties (by way of example only, the AEPCO Representatives may be referred to as “the Representatives of the Disclosing Party” when AEPCO is the Disclosing Party). All such AEPCO Representatives and Bidder Representatives shall be informed of the Confidential Information and the obligations under this Agreement and shall sign the Non-Disclosure Certificate acknowledging this understanding. Outside consultants, agents, and advisors of AEPCO, or any Bidder shall not share Confidential Information received from a Disclosing Party with any Affiliate of the outside consultant, agent, or advisor without the advance written approval of the Disclosing Party.

3. In addition to the protections provided for herein for Confidential Information, Confidential Information that also has been designated as Highly Sensitive Protected Material shall be subject to the following protections. First, the Highly Sensitive Protected Material will be accorded by the Receiving Party the highest level of protection that is reasonably possible in order to preserve the confidentiality of this material. Second, only one copy of Highly Sensitive Protected Material will be provided to the Receiving Party, and the Receiving Party shall not be permitted to make any

additional copies of such Highly Sensitive Protected Material, or any part of the Highly Sensitive Protected Material, without the prior written consent of the Disclosing Party. Third, the Receiving Party agrees that Highly Sensitive Protected Material shall be made available only for review by approved Representatives of the Receiving Party, which Representatives must be approved by the Disclosing Party, applying its sole and absolute discretion, before Highly Sensitive Protected Material may be provided to the proposed Representative.

4. The confidentiality obligations of this Agreement shall not apply to information disclosed in connection with this Agreement that: (i) is or becomes publicly known other than through a breach of the provisions of this Agreement or other confidentiality or other legal or fiduciary obligation by the Receiving Party or any of its Representatives; (ii) is already known to the Receiving Party at the time of disclosure, provided the source of such information was not known by the Receiving Party to be bound by a confidentiality agreement with or other legal or fiduciary obligation of confidentiality owed to the Disclosing Party or any of its Affiliates; (iii) is lawfully received by the Receiving Party from a source other than the Disclosing Party or its Representatives without, to the Receiving Party's knowledge, breach of any confidentiality agreement with or other legal or fiduciary obligation of confidentiality owed to the Disclosing Party or any of its Affiliates by such source; (iv) is independently developed by the Receiving Party without use, directly or indirectly, of Confidential Information received from the Disclosing Party or any of its Representatives; or (v) is authorized in writing by the Disclosing Party to be released from the confidentiality obligations of this Agreement.

Notwithstanding the provisions of Section 2 above, the Receiving Party and its Representatives may disclose any of the Confidential Information in the event, but only to the extent, that, based upon reasonable advice of counsel, it is required to do so by the disclosure requirements of any law, rule, or regulation or any order, decree, subpoena or ruling or other similar process of any court, securities exchange, governmental agency, or governmental or regulatory authority.

5. All Confidential Information may be subject to review by one or more of the regulatory authorities having jurisdiction over AEPCO or the Possible Transaction or by the staff(s) thereof, and may be subject to formal or informal discovery by each such authority or staff or other parties. In addition, all Confidential Information may be subject to review by a district or appellate court in a proceeding involving AEPCO. Bidder agrees that, notwithstanding anything herein to the contrary, AEPCO may, without notice to Bidder, use and disclose Confidential Information in testimony, evidence, applications, pleadings, in response to any applicable disclosure requirements of any applicable law, rule, or regulation, or any formal or informal discovery in any proceeding, or otherwise in any proceeding or non-public communication or discussion seeking or relating to approval or review by any such regulatory authority of the Possible Transaction or any other regulatory proceeding or proceeding before a district or appellate court to which the Possible Transaction or such Confidential Information may be relevant, and in any such case, AEPCO will make reasonable efforts to obtain confidential treatment for Confidential Information disclosed to it or its Representatives. In addition, if the Receiving Party becomes legally compelled (by oral questions, interrogatories, request for information or documents, subpoena, civil investigative demand, or similar process) to disclose any Confidential Information of the Disclosing Party, the Receiving Party will provide the Disclosing Party with prompt written notice thereof, if permitted by law, so the Disclosing Party may seek a protective order or other appropriate remedy and/or waive compliance with the provisions of this Agreement. In the event such protective order or other remedy is not obtained reasonably in advance of the time the Receiving Party is required to disclose such Confidential Information, the Receiving Party will disclose, except to the extent the Disclosing Party shall have waived compliance

with the provisions of this Agreement, only that Confidential Information of the Disclosing Party the disclosure of which is compelled and will make reasonable efforts to obtain confidential treatment for such Confidential Information so disclosed (and may disclose such information in accordance with this Section 5 without liability hereunder).

6. While this Agreement remains in effect, the Receiving Party, upon the Disclosing Party's written request, shall return to the Disclosing Party as promptly as practicable, but in no event later than thirty (30) days from the date such request is received, all Confidential Information provided to the Receiving Party and in its possession or the possession of its Representatives. In lieu of returning the information as provided herein, the Receiving Party may destroy all Confidential Information provided by, and shall certify in writing such destruction to, the Disclosing Party. Notwithstanding the return or destruction of the Confidential Information, the Receiving Party shall continue to be bound by its obligations hereunder for the duration of the term of confidentiality hereof. Counsel for the Receiving Party may retain copies of Confidential Information (in whole or in part) required to evidence compliance with regulatory or legal obligations; provided, however, that any such Confidential Information so retained shall be subject to the terms of this Agreement.

Notwithstanding the paragraph above, (i) the Receiving Party and its Representatives shall not be obligated to return or destroy any Confidential Information that the Receiving Party is retaining pursuant to a document retention hold established in connection with any actual or anticipated civil or criminal investigation or litigation, in which event the Confidential Information shall be retained by the Receiving Party or its Representatives until such time as the document retention hold is no longer in effect, at which time the Confidential Information shall be returned to the Disclosing Party or destroyed as aforesaid; (ii) to the extent that the Receiving Party's or any of its Representative's computer back-up procedures create copies of the Confidential Information, the Receiving Party or such Representative may retain such copies in its archival or back-up computer storage for the period the Receiving Party or such Representative normally archives backed-up computer records; (iii) each of the Receiving Party and its Representatives may retain those materials containing the Disclosing Party's Confidential Information that are distributed to or created by its board of directors or senior management in connection with the Possible Transaction; and (iv) the Receiving Party and its Affiliates shall not be required to return or destroy any filing or other document or material provided to, or document or material created or held by, any governmental authorities in connection with the Possible Transaction.

Any Confidential Information not returned or destroyed pursuant to this Section 6 shall be retained subject to the terms this Agreement.

7. The Disclosing Party shall be entitled to seek equitable relief, including injunction and specific performance, in the event of a breach or threatened breach of this Agreement upon proof of such breach. Further, the Receiving Party waives any requirement that the Disclosing Party post a bond in connection with obtaining any such equitable relief. In the event of a breach of this Agreement, such remedies shall be in addition to any other remedies available at law or equity. In no event shall any Party be entitled to consequential, exemplary, indirect, special, or punitive damages for breach or threatened breach of this Agreement, except to the extent that the other Party, pursuant to the provisions of Section 15 hereof, is obligated to indemnify such Party against third party claims.

8. Neither Party acquires any property or other interest, including, without limitation, any right under any patent, trademark, or copyright, in Confidential Information merely as a result of its disclosure or exchange under this Agreement. For the avoidance of any doubt, the Parties do not intend to disclose any patent, trademark or copyrighted materials as part of the Confidential Information hereunder.

9. Neither Party nor any of its Representatives has made or makes any representation or warranty, whether express, implied, statutory, or otherwise, as to the accuracy or completeness of Confidential Information or any condition or aspect thereof. Except as otherwise agreed in writing, each Party agrees that neither the Disclosing Party nor any of its Representatives shall have any liability to the Receiving Party or any of its Representatives resulting from the use of the Confidential Information or any errors therein or omissions therefrom.

10. This Agreement does not constitute a joint venture or partnership between the Parties. Nothing herein shall require either Party to disclose Confidential Information or to negotiate or to enter into any agreement as a result of the exchanges and discussions contemplated by this Agreement. Bidder acknowledges and agrees that AEPCO has no obligation to negotiate exclusively with Bidder or any other Person regarding the Possible Transaction except as may be otherwise expressly provided in a subsequent written agreement. Each of the Parties acknowledges that it is sophisticated and has been advised, and will continue to be advised, by experienced counsel and, to the extent it deems appropriate, other advisors in connection with the Possible Transaction. No contract or agreement regarding the Possible Transaction or any transaction involving the Parties will be deemed to exist between the Parties unless and until a final definitive agreement setting forth the definitive terms of the Possible Transaction has been fully executed and delivered. Unless and until such a final definitive agreement regarding the Possible Transaction has been executed and delivered, neither Party will be under any legal obligation of any kind whatsoever with respect to the Possible Transaction by virtue of this Agreement, except for the matters specifically agreed to herein or as otherwise expressly provided in a subsequent written agreement with respect to the Possible Transaction. Each Party reserves the right, in its sole discretion, to terminate discussions and negotiations regarding the Possible Transaction at any time, for any or no reason.

11. This Agreement shall be effective on the Effective Date for a period of two (2) years thereafter and shall terminate upon the expiration of such period. Termination shall not affect the obligations of either Party under this Agreement with respect to Confidential Information already disclosed to such Party or any of its Representatives under this Agreement.

12. For purposes of this Agreement, the following terms shall have the meanings set forth below:

- (a) "Affiliate" shall mean any Person controlling, controlled by or under common control with another Person, with control meaning the ability to direct the management or policies of a Person, whether through the ownership of voting rights of fifty (50) percent or more, by contract, or otherwise.
- (b) "Person" shall mean any individual, corporation, partnership, limited liability company, joint venture, association, trust, estate, government or agency or subdivision thereof or any other entity.

13. No failure or delay by the Disclosing Party in exercising any right, power, or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise of any right, power, or privilege. No waiver by any Party of any provision of this Agreement shall be effective unless in writing and designated as a waiver, and such waiver shall not imply a subsequent or prior waiver of that or any other provision.

14. The Disclosing Party represents and warrants to the Receiving Party that it may disclose or make available all Confidential Information disclosed to the Receiving Party hereunder without violating or being in breach of any contractual, fiduciary, or other obligation of non-disclosure existing at the time of such disclosure. The Disclosing Party shall indemnify, defend and hold harmless the Receiving Party and its Representatives from and against, and shall pay to the Receiving Party and its Representatives the amount of, any and all reasonable out-of-pocket expenditures in respect of any and all losses, damages, liabilities, obligations, penalties, fines, charges, costs, expenses and disbursements (including interest payable as a part thereof, reasonable legal and accountants' fees and expenses relating thereto, and other out-of-pocket expenses incurred in investigating, preparing or settling any action, cause of action, arbitration, claim, demand, suit or proceeding of any nature, in law or in equity, by or before any governmental authority or arbitrator) incurred by or assessed against the Receiving Party or its Representatives in respect of, resulting from, arising out of or caused by any third-party claims relating to any violation or breach of the representation and warranty made by the Disclosing Party in the preceding sentence.

15. This Agreement shall be governed by and construed in accordance with the laws of the State of Arizona, without regard to the conflict of law principles thereof that would otherwise direct the application of the laws of a different jurisdiction.

16. Any and all notices and other communications that are required or permissible pursuant to this Agreement shall be in writing, and shall be deemed given: (i) upon personal delivery to an officer of the recipient as set forth below; (ii) upon the sender's receipt of electronic confirmation of transmission, if sent by facsimile; or (iii) upon receipt, if sent by mail or courier. The Parties designate the following addresses for the provision of such notices:

To AEPCO:
Arizona Electric Power Cooperative, Inc.
Attn: General Counsel
1000 S. Highway 80
Benson, AZ 85602

To _____ (Bidder):
[To be completed]

17. The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provision of this Agreement, which shall remain in full force and effect. Any unenforceable provision shall be deemed modified to the limited extent required to permit its enforcement in a manner most closely representing the intention of the Parties as expressed herein.

18. The Parties hereby expressly acknowledge and agree that (i) they are or may be involved in the same or similar businesses, (ii) nothing herein or otherwise will restrict either Party from competing with the other Party or its Affiliates, and (iii) there is no fiduciary relationship or other implied obligation of the Parties with respect to the subject matter hereof or based on any course of dealing, the Parties' respective obligations being solely those expressly set forth herein.

19. This Agreement constitutes the entire Agreement between the Parties on the subject of confidentiality of information disclosed during the RFP. There are no terms, conditions, representations, warranties, or agreements between the Parties concerning the subject matter of this Agreement that have not been specifically stated herein. This Agreement may not be modified except by written agreement designated as a modification executed by authorized officers of the Parties.

20. This Agreement may be executed in any number of counterparts, and by different parties in separate counterparts, each of which shall be deemed an original but all of which together shall constitute one instrument.

IN WITNESS WHEREOF, each of the Parties has caused this Agreement to be executed by its duly authorized representative as of the date first above written.

Arizona Electric Power Cooperative, Inc.

Bidder

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

Date: _____

Date: _____

NONDISCLOSURE CERTIFICATE
OF REPRESENTATIVES

I certify my understanding that the Confidential Information is provided to me pursuant to the terms and restrictions of the Confidentiality Agreement in the AEPCO RFP, and that I have been given a copy of it and have read the Confidentiality Agreement and agree to be bound by it. I understand that the contents of the Confidential Information, and any notes, memoranda, or any other form of information regarding or derived from the Confidential Information, shall not be disclosed to anyone other than in accordance with the Confidentiality Agreement and shall be used only for the purpose of the proceeding in the AEPCO RFP.

Date: _____ By: _____

Print name: _____

Company: _____

Representing: _____