Mid-South 2022 MISO Energy and Capacity Resources RFP

Mutual Confidentiality Agreement

CONFIDENTIALITY AGREEMENT

 THIS CONFIDENTIALITY AGREEMENT (“Agreement”) entered into and made effective as of the \_\_\_\_\_\_ day of August 2022\_\_\_, by and between Mid-South Electric Cooperative Association (“MidSouth”), and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Bidder”) (each individually referred to as “Party” and collectively as “Parties”).

WITNESSETH:

 WHEREAS, the Parties hereto intend to enter into confidential discussions and may enter into negotiations with regard to the evaluation of potential power supply alternatives and possible undertaking of a business relationship with regards to the MidSouth Request for Proposal Request for Proposal (RFP) (the “Proposed Transaction”);

WHEREAS, it will be necessary for the Parties or their Affiliates (as defined in Section 1 below) to disclose certain confidential information to each other for the sole purpose of enabling the Parties to evaluate their interest in entering into the Proposed Transaction; and

WHEREAS, the Parties have also entered into this Agreement to ensure that confidential information disclosed in connection with the evaluation of the Proposed Transaction, will be protected from unauthorized disclosure consistent with this Agreement.

 NOW, THEREFORE, in consideration of the mutual promises and covenants made herein, and with the intent to be legally bound hereby, the Parties agree as follows:

 1. Nondisclosure of Confidential Information. The term “Confidential Information” as used in this Agreement shall mean any and all information including written materials which are marked “confidential” and provided by either Party or their Affiliates to the other Party, or information disclosed verbally or ascertained through due diligence, investigation, or discussions between employees or agents of the Parties or their Affiliates, if the recipient is told prior to or promptly after an innocent disclosure (and such statement is promptly confirmed in writing) that the information is “Confidential.” Such Confidential Information shall include, but not be limited to, all marketing, technical, engineering, operational, economic, or financial knowledge, information or data of any nature whatsoever relating to the future, present, or past business, operations, plans or assets of any Party, including any Affiliates of a Party, which is disclosed (either directly or through their agents) or their Affiliates in connection with the Proposed Transaction; provided, however, that the Parties shall not share any cost and sales information relevant to competition between the Parties or future plans relating to competition between the Parties. Each Party or their Affiliates, in connection with Confidential Information provided by it will be referred to herein as the “Disclosing Party” and in connection with Confidential Information received by it will be referred to herein as the “Receiving Party”. For the avoidance of doubt, Alliance for Cooperative Energy Services Power Marketing LLC is an agent of MidSouth.

 The Receiving Party agrees, except as required by law, that it will keep the Confidential Information confidential and will not use the Confidential Information for any purpose other than in connection with the Proposed Transaction and evaluating the Proposed Transaction. The Confidential Information may be disclosed to the Receiving Party’s Affiliates, but only if such Affiliates need to know the Confidential Information in connection with the Proposed Transaction. As used in this Agreement, the term “Affiliate” shall mean any corporation, partnership, or other entity that directly or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such Party.

 Each Party agrees that (i) such Affiliates will be informed by the respective Party of the confidential nature of the Confidential Information and the requirement that it not be used other than in connection with the Proposed Transaction, (ii) such Affiliates will be provided a copy of this Agreement and will be required to agree to and be bound by the terms of this Agreement as a condition of receiving the Confidential Information, and (iii) in any event, each respective Party will be responsible for any disclosure of Confidential Information, or any other breach of this Agreement, by any of its Affiliates.

The Receiving Party shall not disclose the Confidential Information to any person other than as permitted hereby and shall safeguard the Confidential Information, including the content, substance or any effect thereof which would disclose such content or substance of such Confidential Information, from unauthorized disclosure using the same degree of care as such Receiving Party takes to preserve its own confidential information, provided in any event no less than a reasonable degree of care. For purposes hereof, “person” will be interpreted broadly to include, without limitation, public and private media including, without limitation, the internet, and any corporation, company, group, governmental department or agency, trust, association, limited liability company, partnership, other entity or individual.

The Receiving Party shall notify the Disclosing Party immediately upon discovery of any loss, unauthorized disclosure or use of the Confidential Information or any other breach of this Agreement by the Receiving Party, or its Affiliates. In any such event, the Receiving Party shall assist the Disclosing Party in every reasonable way to regain possession of the Confidential Information and prevent any further unauthorized disclosure or use.

 2. Notice Preceding Required Disclosure. If the Receiving Party or its Affiliates are required by oral questions, interrogatories, requests for information or documents, subpoena, civil investigation, demand or similar process or by law or regulation: (a) to disclose any Confidential Information of the other; or (b) to disclose the possibility of any potential Proposed Transaction or the discussions pertaining thereto, it is agreed that the Receiving Party will provide prompt notice to the Disclosing Party of such potential disclosure, if legally permissible, so that an appropriate protective order may be sought and/or a waiver of compliance with the provisions of this Agreement may be granted.

 3. Confidential Information Exclusions. Confidential Information does not include any information which (i) is or becomes publicly available other than as a result of a disclosure by the Receiving Party or any of its Affiliates in breach of this Agreement, (ii) is already in the Receiving Party's or any of its Affiliates’ possession prior to disclosure by the Disclosing Party, (iii) is or becomes available to the Receiving Party or any of its Affiliates from a source other than the Disclosing Party, or (iv) is independently developed by the Receiving Party or on its behalf without violating any of the Receiving Party’s obligations hereunder.

 4. Return of Information. Upon written request from the Disclosing Party, the Receiving Party shall return or destroy any and all Confidential Information, including all originals, copies, translations, notes, or any other form of said material.

 5. Survival of Obligations. The obligations and commitments established by this Agreement shall remain in full force and effect for a period of two (2) years from the date of this Agreement provided however, that the Parties' confidentiality obligations under this Agreement will survive with respect to any Confidential Information that constitutes a trade secret under applicable law, and will remain in effect until trade secret protection is lost under applicable law.

 6. Nature of Information. Each Party hereby accept the representations of the other Party that the other Party’s Confidential Information is of a special, unique, unusual, extraordinary, and/or intellectual character. Each Party acknowledges that the other Party’s interests in such Confidential Information may be irreparably injured by disclosure of such Confidential Information. Each Party acknowledge and agree that money damages may not be a sufficient remedy for any breach of this Agreement by it, and that in addition to all other remedies, the other Party shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and each further agrees to waive any requirement for the securing or posting of any bond in connection with such remedy.

 7. Governing Law. The validity and interpretation of this Agreement and the legal relations of the Parties to it shall be governed by the laws of the State of Texas. In the event that a court of competent jurisdiction determines that any portion of this Agreement is unreasonable because of its term or scope, or for any other reason, the Parties agree that such court may reform such provision so that it is reasonable under the circumstances and that such provision, as reformed, shall be enforceable. The Parties further agree that service of any process, summons, notice or document by U.S. certified or registered mail to each Party’s respective executive offices will be effective service of process for any action, suit, or proceeding brought in any such court.

 8. No Other Agreement. It is expressly understood that this Agreement is not and shall not be construed as any obligation or form of a letter of intent or agreement to enter into the potential Proposed Transaction. No Party may rely on this Agreement or the negotiations or exchange of Confidential Information or other documentation between the Parties as a commitment to enter into binding definitive agreements concerning any potential Proposed Transaction. The Receiving Party’s obligation to maintain the Confidential Information confidential as provided in the Agreement shall survive any decision by the Disclosing Party not to proceed with any transaction with the Receiving Party relating to the Proposed Transaction, or a decision by the Disclosing Party to proceed with another transaction with a party other than the Receiving Party.

 9. No Representations or Warranties. With respect to any information, including but not limited to Confidential Information, which any Party furnishes or otherwise discloses to the other Party for the purpose of evaluating any Proposed Transaction, it is understood and agreed that the Party disclosing such information does not make any representations or warranties as to the accuracy, completeness, or fitness for a particular purpose thereof. It is further understood and agreed that no Party nor their Affiliates shall have any liability or responsibility to the other Party or to any person or entity resulting from the use of any information so furnished or otherwise provided.

 10. Modification and Waiver. The provisions of this Agreement may be modified or waived only by a separate writing signed by all the Parties expressly so modifying or waiving the same. No failure or delay by any of the Parties in exercising any right, power, or privilege hereunder shall operate as a waiver thereof, nor shall any partial exercise thereof preclude any other or further exercise thereof, or of any other right, power, or privilege.

 11. Severability. If any provision of this Agreement is declared void or otherwise unenforceable and cannot be reformed as provided in Section 7 hereof, such provision shall be deemed to have been severed from this Agreement, which shall otherwise remain in full force and effect.

 IN WITNESS WHEREOF, the Parties have entered into this Agreement on the day and year first above written.

**MIDSOUTH ELECTRIC** {**BIDDER NAME}**

**COOPERATIVE ASSOCIATION**

By: By:

Name: Name:

Title: Title: