

**Caroline County
Board of Supervisors Agenda
Executive Summary**

Meeting Date: April 20, 2021

Title: New Business – Non-Disclosure Agreement with
Rappahannock Electric Cooperative

(Check Mark)

<input type="checkbox"/> Consent	<input type="checkbox"/> Closed Meeting
<input checked="" type="checkbox"/> Action	<input type="checkbox"/> Public Hearing
<input type="checkbox"/> No Action (Information Only)	<input type="checkbox"/> Ordinance
<input type="checkbox"/> Resolution	<input type="checkbox"/> PowerPoint Presentation

Summary: Attached is a proposed confidentiality agreement (also referred to as a non-disclosure agreement or NDA) with Rappahannock Electric Cooperative. The NDA, which has been reviewed and approved by County Attorney Ben Emerson, is required by REC to enable discussions with the County regarding REC's role in potential broadband expansion projects in Caroline. In turn, the NDA requires REC to keep the County's confidential information confidential as well, to the extent that such a provision is applicable.

Of particular note is that the agreement requires all individuals receiving "confidential information" to be "bound by confidentiality obligations no less protective of the confidential information than the terms contained herein." This language requires each person on the committee and any county employees likely to receive confidential information to sign a written agreement having the same terms as the NDA. Failure of the County to meet this obligation will be an immediate breach of the NDA.

Action(s) Requested of Board: Authorize the County Administrator to sign the attached Confidentiality Agreement on behalf of the County

Confidentiality Agreement

This Confidentiality Agreement (the "**Agreement**"), dated as of _____, 2021 ("**Effective Date**"), is between RAPPAHANNOCK ELECTRIC COOPERATIVE, a Virginia nonstock utility cooperative with its principal office at 247 Industrial Court, Fredericksburg, Virginia 22408 ("**REC**"), and CAROLINE COUNTY, a political subdivision of the Commonwealth of Virginia (the "**County**"), with its office at 212 N. Main Street, P.O. Box 447, Bowling Green, Virginia 22427. REC and the County are collectively referred to herein as the "**Parties**" and individually as a "**Party**."

1. For the purposes of this Agreement, the "**Disclosing Party**" shall mean the Party who discloses to the Recipient (defined below), either directly or indirectly, Confidential Information (as defined below) of such Party or any embodiment thereof, or on whose behalf such possession is so delivered; and the "**Recipient**" shall mean the Party who receives any Confidential Information of the Disclosing Party, or who receives benefit from the receipt by any entity affiliated with it, of any Confidential Information of the Disclosing Party.

2. In connection with the exploration of a potential business relationship between the Parties (the "**Purpose**"), each Party may disclose or deliver to the other Party, or Recipient may otherwise receive access to, Confidential Information (as defined below). Recipient shall use the Confidential Information solely for the Purpose and, subject to Section 5, shall not disclose or permit access to Confidential Information other than to its affiliates and its or their employees, officers, directors, shareholders, attorneys, accountants, County committee members, and advisors (collectively, "**Representatives**") who: (a) need to know such Confidential Information for the Purpose; (b) know of the existence and terms of this Agreement; and (c) are bound by confidentiality obligations no less protective of the Confidential Information than the terms contained herein. Recipient shall safeguard the Confidential Information from unauthorized use, access or disclosure using at least the degree of care it uses to protect its most sensitive information and no less than a reasonable degree of care. Recipient shall promptly notify Disclosing Party of any unauthorized use or disclosure of Confidential Information and fully cooperate with Disclosing Party to prevent further use or disclosure. Recipient will be responsible for any breach of this Agreement caused by its Representatives. REC understands and agrees that the County is subject to the Virginia Freedom of Information Act (the "Act") which requires disclosure of Records (as defined under the Act) in Recipient's possession unless an exception applies under the Act. To the extent reasonably possible under the Act, the County will treat all Records that are expressly identified by REC as Confidential Information as exempt under the Act as it is currently enacted, but such records will be disclosed if (a) the County receives legal advice that disclosure under the Act is required by law or (b) a Court requires disclosure of such information under the Act.

3. "**Confidential Information**" means all non-public, proprietary or confidential information of Disclosing Party, in oral, visual, written, electronic or other tangible or intangible form, that is clearly marked or designated as "confidential," and all notes, analyses, summaries and other materials prepared by Recipient or any of its Representatives that are clearly marked "confidential" and contain, are based on or otherwise reflect, to any degree, any of the foregoing ("**Notes**"); provided, however, that Confidential Information does not include any information that: (a) is or becomes generally available to the public other than as a result of Recipient's or its Representatives' act or omission; (b) is obtained by Recipient or its Representatives on a non-confidential basis from a third party that was not legally or contractually restricted from disclosing such information; (c) was in Recipient's or its Representatives' possession, as established by documentary evidence, prior to Disclosing Party's disclosure hereunder; or (d) was or is independently developed by Recipient or its Representatives, as established by documentary evidence, without using any Confidential Information.

4. Each Party represents and warrants that:

(a) the performance of its obligations herein does not and will not violate any other contract or obligation to which the Recipient is a party or is legally bound;

(b) it has implemented and will continue to maintain sufficient information security protocols to secure and protect the confidentiality of all Confidential Information in the Recipient's or its Representatives' possession or control; and

(c) to the extent applicable and the Purpose requires Recipient to collect, access, use, store, process, dispose of or disclose credit, debit or other payment cardholder information:

(i) Recipient shall at all times during the term of this Agreement remain in compliance with the Payment Card Industry Data Security Standard requirements as the same may be modified from time to time, at Recipient's sole cost and expense.

5. If Recipient or any of its Representatives is required by applicable law or a valid legal order to disclose any Confidential Information, Recipient shall if permissible, prior to such disclosure to the extent reasonably possible, notify Disclosing Party of such requirements so that Disclosing Party may seek a protective order or other remedy, and Recipient shall reasonably assist Disclosing Party therewith. If Recipient remains legally compelled to make such disclosure, it shall: (a) only disclose that portion of the Confidential Information that, in the opinion of its legal counsel, Recipient is required to disclose.

6. Subject to all applicable laws, rules and regulations pertaining to the retention of documents by political subdivisions, upon the expiration of this Agreement or otherwise at Disclosing Party's request, Recipient shall either return to Disclosing Party or destroy all Confidential Information in its and its Representatives' possession other than Notes, and destroy all Notes, and certify in writing to Disclosing Party the destruction of such Confidential Information.

7. No Party has any obligation under this Agreement to (a) disclose any Confidential Information or (b) negotiate for, enter into or otherwise pursue the Purpose. Disclosing Party provides all Confidential Information without any representation or warranty, expressed or implied, as to the accuracy or completeness thereof, and Disclosing Party will have no liability to Recipient or any other person relating to Recipient's use of any of the Confidential Information or any errors therein or omissions therefrom.

8. Disclosing Party retains its entire right, title and interest in and to all Confidential Information, and no disclosure of Confidential Information hereunder will be construed as a license, assignment or other transfer of any such right, title and interest to Recipient or any other person.

9. The rights and obligations of the parties under this Agreement expire two years after (i) the Effective Date, or (ii) the termination or expiration of any written agreement entered into by the parties in connection with the Purpose (the “**Definitive Agreement**”), if any; provided that with respect to Confidential Information that constitutes a trade secret under the laws of any jurisdiction, such rights and obligations will survive such expiration until, if ever, such Confidential Information loses its trade secret protection other than due to an act or omission of Recipient or its Representatives.

10. Recipient acknowledges and agrees that any breach of this Agreement will cause injury to Disclosing Party for which money damages would be an inadequate remedy and that, in addition to remedies at law, Disclosing Party is entitled to seek equitable relief as a remedy for any such breach.

11. This Agreement and all matters relating hereto are governed by, and construed in accordance with, the laws of the Commonwealth of Virginia, without regard to the conflict of laws provisions of any jurisdiction to the contrary. Any legal suit, action or proceeding relating to this Agreement must be instituted in the federal or state courts located in Caroline County, Virginia. Each Party irrevocably submits to the exclusive jurisdiction of such courts in any such suit, action or proceeding.

12. All notices must be in writing and addressed to the relevant party at its address set forth in the preamble (or to such other address such party specifies in accordance with this Section 12). All notices must be personally delivered or sent prepaid by nationally recognized courier or certified or registered mail, return receipt requested, and are effective upon actual receipt.

13. This Agreement constitutes the entire agreement of the parties with respect to its subject matter, and supersedes all prior and contemporaneous understandings, agreements, representations and warranties, whether written or oral, with respect to such subject matter. This Agreement may only be amended, modified, waived or supplemented by an agreement in writing signed by both parties, and no failure or delay in enforcing any right will be deemed a waiver.

14. In the event of a conflict between the terms and conditions of this Agreement and any Definitive Agreement, the terms and conditions of this Agreement shall control with regard to the use and protection of Confidential Information unless the Definitive Agreement provides more stringent protection.

[Signature Page Follows]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the Effective Date.

CAROLINE COUNTY, VIRGINIA

RAPPAHANNOCK ELECTRIC
COOPERATIVE

By _____

By _____

Name:

Name:

Title:

Title:

Approved as to form:

County Attorney