

Dated [●], 20[●]

**POWER PURCHASE AGREEMENT -
WIND PROJECTS**

between

THE SELLER
as defined herein

and

ESKOM HOLDINGS SOC LIMITED
as Buyer

pursuant to the

**RENEWABLE ENERGY INDEPENDENT POWER PRODUCER
PROCUREMENT PROGRAMME**

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PREAMBLE:

THIS **RENEWABLE ENERGY POWER PURCHASE AGREEMENT** dated [●] (this "**Agreement**") is entered into by and between:

- (1) [details of the Independent Power Producer to be included once determined], a limited liability company (Registration No. [●]) incorporated under the laws of South Africa and having its principal place of business at [●] in the Republic of South Africa (the "**Seller**"); and
- (2) **ESKOM HOLDINGS SOC LIMITED**, acting through its Single Buyer Office (the "**Buyer**");

(together, the "**Parties**", and "**Party**" shall mean either of them).

INTRODUCTION

- (A) The Seller has been, or expects shortly to be granted, and currently holds, or expects shortly to hold, an electricity generation licence permitting it to construct, own, operate and maintain, and to generate and sell energy from, a [●] MW wind power generation facility located at *[insert general location of the Facility]*.
- (B) The Buyer has been authorised to enter into this Agreement following the Seller's selection by the DoE pursuant to the Renewable Energy Independent Power Producer ("**IPP**") programme ("**IPP Programme**").
- (C) The Seller wishes to sell the Energy Output from the Facility to the Buyer, and the Buyer wishes to purchase the Energy Output of the Facility from the Seller, on the terms and conditions of this Agreement.
- (D) The Parties wish to record their agreement in respect of the terms and conditions governing the design, engineering, Construction, financing, insurance of, commissioning, Operation and Maintenance of the Facility, and the sale and purchase of Energy.

THE PARTIES AGREE as follows:

1. Definitions and Interpretation

1.1 Definitions

In this Agreement the following capitalised words and expressions shall have the following meanings (and cognate expressions shall have corresponding meanings):

"**Achieved Capacity**" means the Capacity of the Facility, as specified in the Facility Completion Form, and which may not be greater than the Contracted Capacity;

"**Affiliate**" means, in respect of a person, any person which Controls (directly or indirectly) that person and any other person Controlled (directly or indirectly) by such first-mentioned person, including, where a person is a company, the ultimate holding company of such person,

any holding company of such person and any subsidiary (direct or indirect) of such holding company;

"Agreed Form" means, in relation to any document not executed simultaneously with this Agreement, the terms and conditions of that document have been agreed by the Parties and initialled by each of them for identification purposes on or before the Signature Date;

"Agreed Interest Rate" means the prime rate of interest (expressed as a percentage rate per annum) at which First National Bank, a division of First Rand Bank Limited (or should First National Bank or First Rand Bank Limited cease to exist, any other major commercial bank in South Africa) lends on overdraft, as published by that bank from time to time, provided that, in respect of any day for which no such rate is published, the applicable rate shall be that prevailing in respect of the last day for which such rate was published;

"Allowed Grid Unavailability Period" means:

- (a) where the Facility is connected to the Transmission System, a period of 175.2 hours in every Contract Year, and reduced for the first and last Contract Year to reflect the proportion which the number of days in that first or last Contract Year bears to three hundred and sixty five point two five (365.25) days; or
- (b) where the Facility is connected to the Distribution System, a period of 438 hours in every Contract Year, and reduced for the first and last Contract Year to reflect the proportion which the number of days in that first or last Contract Year bears to three hundred and sixty five point two five (365.25) days;

"Assign" shall have the meaning given to it in clause 23.1 (*Prohibition on Assignment*) and the term **"Assignment"** shall be construed accordingly;

"Billing Period" means each period of one Month which falls within the Term, provided that:

- (a) the first Billing Period shall commence on the day on which the Seller becomes entitled to a Deemed Energy Payment contemplated in clause 14.4.1, on the first day of the Early Operating Period, or otherwise on the Commercial Operation Date (as appropriate), and shall end on the last day of the Month in which the first Billing Period commenced; and
- (b) the final Billing Period shall commence on the first day of the Month in which the Termination Date occurs and end on the Termination Date;

"Business Day" means a day, other than a Saturday or a Sunday or an official public holiday in South Africa;

"Capacity" means, in respect of a Unit or the Facility, at any time and from time to time, the capability (expressed in MW) of such Unit, or the Facility, as the case may be, to generate and provide Energy to the Delivery Point. For the avoidance of doubt, Capacity shall be net of electrical losses between the generator terminals and the Delivery Point and autoconsumption for auxiliaries;

"Capital Expenditure" means any expenditure treated as capital expenditure under GAAP;

"Change in Control" has the meaning given to it in the Implementation Agreement;

"Claims" means any and all suits, sanctions, legal proceedings, claims, assessments, judgments, damages, penalties, fines, liabilities, demands and/or losses by, on behalf of or in favour of any third party;

"Codes" means, as applicable, any code in respect of electricity distribution or transmission as published by NERSA from time to time;

"Commence and Continue Construction" means that:

- (a) the Seller has authorised a Contractor to commence works under the terms of a binding written contract that is directly related to the construction of the Facility and such Contractor has begun significant ground works, such as excavations for laying foundations or cables or other substantial action that would involve significant cost for and effort from such Contractor to undertake; or
- (b) the Seller has procured plant items that involve material expenditure in relation to the construction of the Facility, and has provided proof to the Buyer's reasonable satisfaction that such procurement has taken place and expenditure has been incurred,

provided that to Commence and Continue Construction does not include:

- (A) preparing unpaved access roads to and around the Project Site;
- (B) exploration of the Project Site, including borehole investigations to determine foundation conditions and other preconstruction monitoring or testing to establish background information related to the ground conditions of the Project Site;
- (C) clearing land or erecting fences on and surrounding the Project Site; and
- (D) dismantling pre-existing buildings or machinery on the Project Site in order to Construct the Facility,

and that Construction works are ongoing and have not been suspended or abandoned; and the phrase "**Commenced and Continued Construction**" shall have a corresponding meaning;

"**Commercial Energy**" means the Energy Output delivered by the Seller to the Buyer during the Operating Period;

"**Commercial Energy Payment**" means, in relation to each Billing Period, an amount (excluding VAT) that shall be due and payable by the Buyer to the Seller for the Commercial Energy delivered in that Billing Period, which payment shall be calculated with reference to the Commercial Energy Rate;

"**Commercial Energy Rate**" means the rate per MWh applicable to Commercial Energy, as specified in Schedule 1 Part 3 (*Energy Rates*);

"**Commercial Operation Date**" means the date specified in the Notice of Commencement of Facility as being the Commercial Operation Date of the Facility in terms of clause 4.5 (*Commercial Operation Date*);

"**Compensation Event**" means any material breach by the Buyer of any of its obligations under this Agreement (save for any breach that constitutes a Government Default), including any failure to make any payments due and payable on the due date for payment, to the extent in each case that the breach is not caused or contributed to by the Seller or any Contractor or by Force Majeure, a System Event or Unforeseeable Conduct;

"**Connection Works**" means the Facility Connection Works and the Transmission Connection Works or the Distribution Connection Works, as applicable;

"**Consents**" means all consents, permits, clearances, authorisations, approvals, rulings, exemptions, registrations, filings, decisions, licences, required to be issued by or made with any Responsible Authority in connection with the performance of any of the Construction, Operation and Maintenance of the Facility by the Seller;

"**Construct**" means to investigate, survey, design, engineer, procure, construct, install, test, commission and do any and all other related things in accordance with the standards of a Reasonable and Prudent Operator, and the term "**Construction**" shall have a corresponding meaning;

"**Contract Year**" means each twelve (12) Month period, commencing at 00:00 hours on 1 April and ending at 24:00 hours on 31 March of the following year, provided that:

- (a) the first Contract Year shall commence at 00:00 hours on the first day of the Early Operating Period, or otherwise at 00:00 hours on the Commercial Operation Date, and shall end at 24:00 hours on 31 March of the following year; and

(b) the final Contract Year shall end at 24:00 hours on the Termination Date;

"Contracted Capacity" means the anticipated Capacity of the Facility, measured at the Delivery Point and expressed as AC power capacity, net of autoconsumption and electrical losses between the generator terminals and the Delivery Point, as stated in Schedule 1 (*Details of Project and Facility*);

"Contractor" means any contractor directly engaged by the Seller to undertake the whole or any part of the Construction, Operation and/or Maintenance of the Facility;

"Control" has the meaning given to it in the Implementation Agreement;

"Corrupt Act" has the meaning given to it in the Implementation Agreement;

"Curtailement" means any instruction from the System Operator to limit or reduce the Energy Output of the Facility;

"Daily Forecast Generation Profile" has the meaning ascribed to in clause 7.2 (*Daily generation forecast*);

"Deemed Energy" means that Energy Output that would otherwise be available to the Buyer, but for a System Event or a Compensation Event, as determined in accordance with Schedule 6 (*Deemed Energy Payment*);

"Deemed Energy Payment" means an amount (excluding VAT) that shall be due and payable by the Buyer to the Seller for the Deemed Energy during a specified period pursuant to the provisions of clause 14 (*Consequences of a System Event*), which payment shall be calculated in accordance with Schedule 6 (*Deemed Energy Payment*) with reference to the Commercial Energy Rate, and dependant on the period in respect of which such payment is due and payable;

"DEA" means Department of Environmental Affairs of the Government of the Republic of South Africa;

"Delivery Point" means the physical point, situated on the high voltage side of the generator transformer of the Facility, where the Facility connects to the System (whether or not such point is situated on or off the Project Site), and where the Energy Output is to be delivered by the Seller to the Buyer as described in Schedule 1 (*Details of Project and Facility*);

"Direct Agreement" means the direct agreement entered into (or to be entered into) between the Buyer, the DoE and the Lenders (or their agent) in relation to this Agreement and the Implementation Agreement, substantially in the form set out in Schedule 8 (*Direct*

Agreement), as it may be amended from time to time by agreement of the parties thereto;

"Direct Loss" means, in respect of either Party, any losses, liabilities, expenses, damages, costs and claims (including Claims) arising directly as a result of the other Party's failure to perform its obligations under this Agreement, and for the avoidance of doubt, includes, in respect of the Seller, any loss of payment which would have been due to it but for the Buyer's breach of this Agreement;

"Distribution Agreement" means the agreement entered into between the Seller (as Customer) and a Distributor which sets out the terms and conditions on which the Facility will be connected to and use the Distribution System;

"Distribution Connection Works" means the Eskom Connection Works or the Municipality Connection Works, as appropriate, and as defined in the Distribution Agreement;

"Distribution System" means a distribution network of any Distributor which operates at a nominal voltage of 132 kV or less, as described in the Codes, as that system may be refurbished, modified, extended or developed from time to time during the Term (but, for the avoidance of doubt, not including any private network used by the Facility or customers of any Distributor);

"Distributor" has the meaning given to it in the Codes;

"Due Date" has the meaning given to it in clause 9.2 (*General principles as regards invoicing*);

"Early Operating Energy" means the Energy Output delivered by the Seller to the Buyer, measured during the Early Operating Period;

"Early Operating Energy Payment" means, in relation to each Billing Period during the Early Operating Period, the amount (excluding VAT) that shall be due and payable by the Buyer to the Seller for Early Operating Energy delivered during that Billing Period, which shall be the product of the Early Operating Energy delivered during that Billing Period and the Early Operating Energy Rate;

"Early Operating Energy Rate" means the rate applicable to the supply of Early Operating Energy, being sixty percent (60%) of the Commercial Energy Rate, as specified in Schedule 1 Part 3 (*Energy Rates*);

"Early Operating Period" means the period commencing at 00:00 on the Unit Commencement Date of the first Unit to start generating Energy, and ending on the later of the Scheduled COD and the Commercial Operation Date;

"Economic Development Obligations" has the meaning ascribed to it in Schedule 2 of the Implementation Agreement;

"Effective Date" means the Signature Date;

"Encumbrance" means:

- (a) any mortgage, pledge, lien, assignment or cession conferring security, hypothecation, security interest, preferential right or trust arrangement or other encumbrance securing any obligation of any person;
- (b) any arrangement under which money or claims owed to, or for the benefit of, a bank or other person, may be applied against or set off against any other monies or claims owed by the relevant bank or other person, or made subject to a combination of accounts so as to effect discharge or settlement of any sum owed or payable to that bank or other person; or
- (c) any other type of preferential agreement or arrangement (including any title transfer and retention arrangement), the effect of which is the creation of a security interest;

"Energy" means electrical energy generated by a Unit or the Facility, as the case may be, and measured in MWh;

"Energy Output" means the Energy (expressed in MWh) delivered to the Delivery Point;

"Equity" has the meaning given to it in the Implementation Agreement;

"Expiry Date" means the date falling twenty (20) years after the Scheduled COD, as may be extended or amended in accordance with the terms of this Agreement;

"Facility" means the generation facility located at the Project Site and comprising all plant, machinery and equipment, all associated buildings, structures, roads on the Project Site that are not national, provincial or municipal roads, and other appurtenances, as further described in Schedule 1 (*Details of Project and Facility*), together with all required interfaces to be Constructed for the safe, efficient and timely Operation of that facility, including all Facility Connection Works and, for the avoidance of doubt, excluding the Transmission Connection Works or Distribution Connection Works, as the case may be;

"Facility Completion" means the mechanical and electrical completion of the Facility, and the issue of the relevant Facility Completion Form;

"Facility Completion Form" means the forms attached to this Agreement as Schedule 2 (*Completion Milestones and Forms of Notices*), which are to be completed by the Independent Engineer and delivered to the Buyer in respect of the mechanical and electrical completion of the Facility, in accordance with clause 4.3 (*Facility Completion and Commissioning*) and Schedule 2 Part 2 (*Facility*

Completion Form), confirming that the Facility has been duly completed;

"Facility Connection Works" has the meaning given to it in the Transmission Agreement or the Distribution Agreement, as applicable;

"Facility Metering Installation" means metering equipment (including an electronic main meter) conforming with the requirements of and standards set out in the Codes, installed by the Seller in accordance with clause 12.2 (*Facility Metering Installation*);

"Financing Agreements" has the meaning ascribed thereto in the Implementation Agreement;

"Force Majeure" means any of the following:

- (a) any fire, explosion, tempest, flood, ionising radiation, riot and civil commotion;
- (b) any failure by the Buyer or any Responsible Authority, utility or other like body to carry out works or provide services or authorise the Seller to carry out works (relating to their authorisation which affect the works) or provide utility supplies, following due and proper attendance by the Seller in making arrangement for such works or utility supplies and complying with the requirements of the relevant Responsible Authority or the owner of the utility or other like body in respect of such arrangement;
- (c) any accidental loss or damage to the Construction works and/or the Facility;
- (d) any off-site failure or shortage of fuel or transport;
- (e) any blockade or embargo;
- (f) any delay in obtaining any Consent, provided that the affected Party has complied with all of its obligations in respect of the obtaining of such Consent;
- (g) any official or unofficial strike, lockout, go slow or other such labour disputes generally affecting the construction and energy industry or a significant sector of it;
- (h) war, civil war, armed conflicts or terrorism;
- (i) nuclear contamination;
- (j) chemical or biological contamination of the Facility and/or the Project Site from any of the events referred to above; or
- (k) a Compensation Event as contemplated and defined in the Implementation Agreement,

which directly causes either Party to be unable to comply with all or a material part of its obligations under this Agreement, (the "**Affected Party**"), save to the extent that any of the events listed in subclauses (a) to (j) inclusive:

- (A) is within the reasonable control of the Affected Party ;
- (B) could reasonably have been avoided or overcome by the Affected Party acting in accordance with the standards of a Reasonable and Prudent Operator; or
- (C) is (directly or indirectly) as a result of the negligence, wilful conduct or default of the Affected Party , including breach by such Affected Party of any of its obligations under any Project Document,

and further provided that wind speeds within the maximum design parameters for the Operation of the Facility shall not be Force Majeure;

"Forecast Generation Profiles" has the meaning given to it in clause 7 (*Generation Forecasts*);

"GAAP" means generally accepted accounting practice in the Republic of South Africa as approved from time to time by the South African Accounting Practices Board;

"Government" means the Government of the Republic of South Africa as contemplated in The Constitution of the Republic of South Africa, 1996, acting through its Department of Public Enterprises or Department of Energy;

"Government Default" has the meaning given to it in the Implementation Agreement;

"Implementation Agreement" means the agreement entitled the Implementation Agreement" entered into, on or about the Signature Date, between the Seller and the Department of Energy of the Government of the Republic of South Africa, in the form set out in Schedule 9 (*Implementation Agreement*);

"Independent Engineer" means any independent consulting engineer from the list of firms in Schedule 5 (*List of firms that can be appointed as the Independent Engineer*) that is appointed in accordance with the provisions of clause 4.2, to act jointly on behalf of the Seller and the Buyer;

"Independent Expert" means -

- (a) a chartered accountant of not less than 10 (ten) years professional experience, nominated at the request of any Party by the President for the time being of the South African Institute of Chartered Accountants: Northern Region, if the matter relates primarily to a financial or financial management matter; or

- (b) an attorney or advocate of not less than 10 (ten) years professional experience agreed to between the Parties, and failing agreement nominated (at the request of either Party) by the Chairman for the time being of the Law Society of the Northern Provinces, if the matter relates primarily to a legal matter; or
- (c) an electrical or power engineer of not less than 10 (ten) years professional experience agreed to between the Parties and failing agreement nominated (at the request of either Party) by the President for the time being of the Engineering Council of South Africa, if the matter relates primarily to an engineering matter;

"**Indexed**" or "**Indexation**" shall have the meaning ascribed to it in Schedule 1 Part 3 (*Energy Rates*);

"**Intellectual Property**" means all intellectual property whatsoever used from time to time in connection with the Construction, Operation and Maintenance of the Facility, whether capable of registration, registered or not;

"**Invoice**" means a tax invoice meeting the requirements of the VAT Act, and denominated in Rand;

"**Last COD**" means the date which falls eighteen (18) months after the Scheduled COD;

"**Law**" means:

- (a) any constitution, statute, ordinance, treaty, decree, proclamation or subordinated legislation or other legislative measure, including all national and provincial statutes and legislation and all municipal by-laws, as well as the common law and customary law and any judgment, decision, order or rule of any court or tribunal with relevant jurisdiction, in each case having the force of law in South Africa; and
- (b) any present or future directive, requirement, instruction, request, order, regulation, condition of or limitation in any necessary approval, permission, permit, approval, consent, licence, authorisation, registration, grant, acknowledgement, exemption or agreement to be obtained from any Responsible Authority, or direction or rule of a Responsible Authority which is legally binding or, if not legally binding, would customarily be complied with by a Reasonable and Prudent Operator, including the Codes;

"**Lender**" has the meaning given to it in the Implementation Agreement;

"**Licensed Intellectual Property**" means all Intellectual Property to be used under licence from any third party;

"Maintain" means to maintain in good working order and condition and, as necessary, to inspect, refurbish, repair, replace, modify, reinstate, overhaul and test so that the plant, machinery, equipment or facility concerned may be Operated at all material times as required by clause 20 (*General Seller undertakings*), and the term **"Maintenance"** shall be construed accordingly;

"Metering Certifier" means a reputable, experienced and qualified company agreed by the Parties to perform electricity meter certification functions under clause 12 (*Metering*) of this Agreement (or if the Parties fail to agree upon such a company within ten (10) days of a request by one Party to the other in respect of the same, then such independent expert as shall be selected by the chairman of the Engineering Council of South Africa shall be the Metering Certifier), and who, for the purposes of this Agreement, shall be deemed to be an Independent Expert;

"Minimum Acceptance Capacity" means a Capacity of the Facility which is equal to fifty percent (50%) of the Contracted Capacity of the Facility;

"Month" means a period of one (1) calendar month according to the Gregorian calendar, each such period beginning at 00:00 hours on the first day of such calendar month and ending at 24:00 hours on the last day of such calendar month;

"National Transmission Company" or **"NTC"** means Eskom Holdings SOC Limited acting through its Transmission Division, or any entity to which such functions of Eskom Holdings SOC Limited are transferred pursuant to a restructuring of the South African electricity market (including the creation of an independent system operator), or otherwise as mandated by the Government or any other Responsible Authority;

"NERSA" means the National Energy Regulator of South Africa as established by section 3 of the National Energy Regulator Act, 40 of 2004;

"Notice of Commencement of Facility" means the notice in the form of Schedule 2 Part 4 (*Form of Notice of Commencement of Facility*) and that delivered by the Seller to the Buyer in terms of clause 4.5 (*Commercial Operation Date*);

"Notice of Commencement of Unit" means the notice in the form of Schedule 2 Part 3 (*Form of Notice of Commencement of Unit*) and that is delivered by the Seller to the Buyer in terms of clause 4.4.1 (*Early Operating Period*);

"Operate" means to despatch a Unit or Units or the Facility, and otherwise operate as required by clause 20 (*General Seller undertakings*), and the term **"Operation"** shall be construed accordingly;

“Operating Expenditure” means any expenditure treated as operating expenditure under GAAP;

“Operating Period” means the period from the later of the Commercial Operation Date and the Scheduled Commercial Operation Date to the Termination Date;

“Outage” means a Scheduled Outage or an Unscheduled Outage;

“Project” means the ownership or lease of the Project Site and the ownership, Construction, Operation and Maintenance of the Facility;

“Project Data” has the meaning ascribed to it in clause 11.2.1;

“Project Documents” means the contracts described in Schedule 7 (*Project Documents*) relating to the Project, each executed by the parties thereto simultaneously with this Agreement or otherwise in the Agreed Form;

“Project Site” means the site upon which the Facility is to be Constructed and Operated as more fully described and defined in Schedule 1 (*Details of Project and Facility*);

“Rand”, “ZAR” and “Cent” mean the lawful currency of South Africa and **“Cent”** is a one-hundredth (100th) part of one Rand;

“Reactive Energy Output” means reactive energy (expressed in kilovar-hours) as measured at the Delivery Point, being the product of voltage and current and the *sine* of the phase angle between them integrated over any time period;

“Reasonable and Prudent Operator” means a person seeking in good faith to perform its contractual obligations and, in so doing and in the general conduct of its undertaking, exercising that degree of skill, diligence, prudence, responsibility and foresight which would reasonably and ordinarily be expected from a skilled and appropriately experienced developer, contractor, owner or operator internationally, who is complying with all applicable Laws, engaged in the same or a similar type of undertaking, in the same or similar circumstances and conditions, and any references herein to the **“standards of a Reasonable and Prudent Operator”** shall be construed accordingly;

“Reference Mast” has the meaning ascribed to it in Schedule 6 (*Deemed Energy Payment*);

“Responsible Authority” means any ministry or department, any minister, any organ of state, any official in the public administration or any other governmental or regulatory department, commission, institution, entity, service utility, board, agency, instrumentality or authority (in each case, whether national, provincial or municipal) or any court, each having jurisdiction over the matter in question, but excluding for all purposes the Buyer;

"Scheduled COD" means the date which corresponds to the stated Scheduled COD in Schedule 2 Part 1 (*Completion Milestones*), as that date may be extended or amended in accordance with the terms of this Agreement;

"Scheduled Outage" means any period in which the Facility is scheduled for planned Maintenance in accordance with Schedule 3 (*Scheduled and Unscheduled Outages*);

"Seller Default" means any of the following events or circumstances (in each case, other than where solely due to Force Majeure, a Compensation Event, a System Event, Government Default or Unforeseeable Conduct):

- (a) an order being made for the winding-up, liquidation, business rescue or dissolution of the Seller (in any of these cases, where applicable, whether provisional or final and whether voluntary or compulsory);
- (b) the Seller has not Commenced and Continued Construction of the Facility within one hundred and eighty (180) days of the Effective Date;
- (c) the Seller fails to achieve the Commercial Operation Date on or before the Last COD;
- (d) NERSA lawfully withdraws, revokes or cancels the Seller's generation licence due to the Seller's act or omission;
- (e) the Seller abandons the Construction or Operation and Maintenance of the Facility;
- (f) the Implementation Agreement is terminated, in accordance with its terms, due to failure by the Seller to comply with the Economic Development Obligations as detailed in the Implementation Agreement;
- (g) the Seller fails to comply with any provision of clause 23 (*Assignment*) and clause 25 (*Changes in Control*); and
- (h) any other breach of any material provision of this Agreement has occurred more than once and:
 - (i) the Buyer has given an initial warning notice to the Seller describing that breach in reasonable detail and stating that if that breach persists or recurs then the Buyer may take further steps to terminate this Agreement; and
 - (ii) the Buyer has issued a second and final warning notice following the persistence or recurrence of that breach in the period of forty five (45) days after the initial warning notice, stating that if that breach persists or recurs

within the period of forty five (45) days after the final warning notice then the Buyer may exercise its rights in terms of clause 18.3.2 on ten (10) days' notice to the Seller;

"**Shareholder Loans**" has the meaning given to it in the Implementation Agreement;

"**Shareholders**" has the meaning given to it in the Implementation Agreement;

"**Signature Date**" means the date this Agreement has been duly executed by each of the Parties;

"**South Africa**" or "**RSA**" means the Republic of South Africa;

"**Special Loss**" means, in relation to either Party, any loss or damage suffered or incurred by it which does not constitute a Direct Loss, including indirect losses, consequential or special losses and wasted or increased overheads;

"**System**" means, as applicable, the Transmission System or the Distribution System;

"**System Event**" means:

- (a) any delay in the connection of the Facility to the System, beyond [●], being the date agreed in writing between the Seller and the Distributor or NTC (as the case may be) as the estimated connection date for same; or
- (b) any constraint, unavailability, interruption, Curtailment, breakdown, inoperability or failure of or disconnection from, the whole or any part of the System,

that is not caused by any natural force or event or an act or omission of the Seller or a Contractor or, for the avoidance of doubt, termination of the Distribution Agreement or Transmission Agreement by the Distributor or the NTC (as the case may be) due to breach of either such agreement by the Seller;

"**System Metering Installation**" means back-up metering equipment (including an electronic check meter) conforming with the requirements of, and standards set out in, the Codes, installed by the NTC or the Distributor (as the case may be) on the instructions of the Buyer in accordance with clause 12.3 (*System Metering Installation*);

"**System Operator**" has the meaning given to it in the Codes;

"**Term**" has the meaning given to it in clause 2 (*Term*), as such period of time may be amended, reduced or extended in accordance with the terms of this Agreement;

"Termination Date" means the Expiry Date or the date of the earlier termination of this Agreement in accordance with clause 18 (*Termination*);

"Transmission Agreement" means the agreement entered into between the Seller (as Customer) and the NTC which sets out the terms and conditions on which the Facility will be connected to and use the Transmission System;

"Transmission Connection Works" has the meaning given to it in the Transmission Agreement;

"Transmission System" means the national transmission system of the NTC, consisting of all lines and substation equipment which operate at a nominal voltage of above 132 kV, as that system may be refurbished, modified, extended or developed from time to time during the Term (but, for the avoidance of doubt, not including any private network used by the Facility or customers of the NTC);

"Unforeseeable Conduct" shall occur if, after the Signature Date, the Buyer, the NTC or the Distributor (as the case may be) or any Responsible Authority takes any action (including the introduction, application, or change of any Law, regulation, by-law or order having the force of Law) or fails to carry out its obligations as prescribed by Law, that:

- (a) has an impact on the Commercial Energy Rate or the Early Operating Energy Rate; or
- (b) results in one or more changes to the Codes that have a material financial impact on the Project; or
- (c) if it has an effect other than the effect detailed in subclause (a) or (b):
 - (i) the principal effect of which is directly borne by:
 - (1) the Project and not other similar projects;
 - (2) the Seller and not other persons; or
 - (3) parties undertaking projects similar to the Project and not other persons; and
 - (ii) in respect of which the Seller is not entitled to any other relief pursuant to any other provisions of this Agreement; and
 - (iii) which was not foreseen by the Seller on or before the Signature Date or if it was foreseen, the impact on the Project was not foreseen; and
 - (iv) which could not reasonably have been foreseen by any person in the position of the Seller on or before the

Signature Date or if it could have reasonably have been foreseen, the impact on the Project could not reasonably have been foreseen;

provided that, in respect of all situations falling within subclauses (a), (b) or (c):

- (aa) Unforeseeable Conduct shall be deemed not to have occurred under circumstances where any action or omission of the Buyer, the NTC or the Distributor, or the Responsible Authority is in direct response to any act or omission of the Seller which is illegal (other than an act or omission rendered illegal by virtue of such conduct of the Responsible Authority) or in violation of agreements to which the Seller is a party;
- (bb) an increase in taxes of general application which does not discriminate against the Seller or against the Seller and other parties undertaking projects similar to the Project shall be deemed not to be Unforeseeable Conduct;
- (cc) Unforeseeable Conduct shall be deemed not to have occurred if such conduct by the Buyer, the NTC or the Distributor, or any Responsible Authority is required as a result of an event of Force Majeure and is reasonably proportionate thereto; and
- (dd) Unforeseeable Conduct shall not include any Law that was enacted or made but not yet in force as at the Signature Date, or any bill that was promulgated for comment at any time before the Signature Date if and to the extent that such bill is materially unchanged when enacted and brought in effect;

"Unit" means a separate electricity generating unit or section (comprising multiple units) forming part of the Facility, which is or are capable of generating and delivering Energy to the Buyer at the Delivery Point, and **"Units"** means all or any combination of them;

"Unit Commencement Date" means, in respect of each Unit (if applicable), the date specified in the Notice of Commencement of Unit set out in Schedule 2 Part 3 (*Form of Notice of Commencement of Unit*) as being the date on which that Unit will begin generation and delivery of Early Operating Energy to the Delivery Point;

"Unscheduled Outage" means an outage that is not a result of a Scheduled Outage;

"Use of System Charges" means the TUOS Charge as defined in the Transmission Agreement, or the Distribution Use-of-System Charges as defined in the Distribution Agreement, as the case may be;

"VAT" means value-added tax levied in terms of the VAT Act;

"**VAT Act**" means the Value-Added Tax Act, 1991, as amended or replaced from time to time;

"**Week**" means a period of 7 days, beginning at 00:00 on a Monday and ending at 24:00 on the next succeeding Sunday; and

"**Weekly Forecast Generation Profile**" has the meaning ascribed to in clause 7.1 (*Weekly generation forecast*).

1.2 Interpretation

In this Agreement, unless otherwise specified:

- 1.2.1 the index and headings of clauses of this Agreement are for ease of reference only and shall be ignored in the interpretation and application of this Agreement;
- 1.2.2 words importing the singular shall include the plural and vice versa and words importing one gender shall include the other genders;
- 1.2.3 references to any Recital, clause, paragraph, Schedule or Annex are to those contained in this Agreement, and references to a part of a Schedule are to the part of the Schedule in which the reference is relevant, and all Schedules and Annexes to this Agreement are an integral part of this Agreement. If there is any conflict between the provisions of the main body of this Agreement and the provisions of any of the Schedules or Annexes, the provisions of the main body shall prevail;
- 1.2.4 unless otherwise specified, all references to any time shall be to the time of day in Johannesburg, South Africa;
- 1.2.5 "**person**" includes a corporation, company, firm, government, state or agency of a state or any association or partnership (whether or not having separate legal personality) of any of the foregoing that is recognised by Law as the subject of rights and duties, and references to a "**person**" (or to a word incorporating a person) shall be construed so as to include that person's successors in title and assigns or transferees;
- 1.2.6 in computation of periods of time from a specified day to a later specified day, "**from**" means from and including and "**until**" or "**to**" means to and including;
- 1.2.7 "**include**", "**including**" and "**in particular**" shall not be construed as being by way of limitation, illustration or emphasis only and shall not be construed as, nor shall they take effect as, limiting the generality of any preceding words. The words "**other**" and "**otherwise**" shall not be construed so as to be limited or defined by any preceding words, where a wider construction is reasonably possible;

- 1.2.8 references to a "**Party**", the "**Seller**" or the "**Buyer**" shall include its successors and permitted assignees, provided that, in the case of the Seller, the relevant transfer or assignment has received the prior written approval of the Buyer;
- 1.2.9 references to this "**Agreement**" or any other document shall be construed as references to this Agreement or that other document as amended, varied, novated, supplemented, or replaced from time to time, provided that, in the case of any other document, such amendment, variation, novation, supplement or replacement has received the prior written approval of the Buyer;
- 1.2.10 references to any amount shall mean that amount exclusive of VAT, unless the amount expressly includes VAT;
- 1.2.11 references to legislation include any statute, by-law, regulation, rule, subordinate legislation or delegated legislation or order, and a reference to any legislation is to such legislation as amended, modified or consolidated from time to time, and to any legislation replacing it or made under it;
- 1.2.12 the terms "**hereof**", "**herein**", "**hereunder**" and similar words refer to this entire Agreement and not to any particular clause, paragraph, Part, Schedule or any other subdivision of this Agreement;
- 1.2.13 the rule of construction that, in the event of ambiguity, an agreement shall be interpreted against the Party responsible for the drafting thereof, shall not apply in the interpretation of this Agreement;
- 1.2.14 the expiration or termination of this Agreement shall not affect such of the provisions of this Agreement as expressly provide that they will operate after any such expiration or termination or which of necessity must continue to have effect after such expiration or termination, notwithstanding that these provisions do not expressly state this;
- 1.2.15 if any provision in clause 1.1 (*Definitions*) is a substantive provision conferring rights or imposing obligations on either Party then, notwithstanding that such provision is contained in such clause, effect shall be given thereto as if such provision were a substantive provision in the body of this Agreement; and
- 1.2.16 if the Facility is to be connected to the Distribution System, then all references to the terms "Transmission System", "Transmission Agreement", "National Transmission Company", "NTC" and "Transmission Connection Works" in this Agreement may be ignored. If the Facility is to be connected to the Transmission System, then all references to the terms "Distribution System", "Distribution Agreement", "Distributor" and "Distribution Connection Works" in this Agreement may be ignored.

1.3 Abbreviations

In this Agreement the following abbreviations shall have the following meanings:

A	Amperes
°C	Degrees Centigrade
m	Metres
s	Seconds
V	Volts
W	Watts

1.4 Units of measurement

Unless a provision of this Agreement expressly requires otherwise, all technical data and information contained in this Agreement or in any document relating to or arising out of this Agreement shall be interpreted and expressed in a manner consistent with the International System of Units (*Systeme International d'Unites*) (8th edition, 2006).

1.5 Rounding up

Unless a provision of this Agreement expressly requires otherwise, in making calculations in accordance with this Agreement:

- 1.5.1 the calculation of any sums of money owing by either Party under this Agreement shall be performed to the nearest Cent; and
- 1.5.2 any other calculation shall be performed to an accuracy of three (3) decimal places, with a fourth digit, after the decimal point, having a value of five (5) or above being rounded up.

2. TERM

This Agreement shall be effective from the Effective Date until the earlier of:

- 2.1 its termination in accordance with clause 18 (*Termination*); or
- 2.2 the Expiry Date,

(such period being the "**Term**" of this Agreement).

3. PROJECT SITE AND CONSTRUCTION

3.1 Project Site

The Seller shall obtain and maintain the peaceful use and possession of the Project Site and such associated rights as may be necessary for the purposes of undertaking and implementing the Project for the duration of the Term. The Seller shall acquire such other land and/or rights in respect of land as it requires in order to perform its obligations under this Agreement and all such land and rights shall be deemed to form part of the Project Site and shall be at the sole risk of the Seller, subject to applicable Laws. Details of the Project Site, including a scale map that identifies the location of the Project Site, are included in Schedule 1 (*Details of the Project and Facility*) and a diagram setting out the transmission lines and substation, interconnection facility, and significant ancillary facilities including the facilities at the Delivery Point, is included in Schedule 1 Part 2 (*Single Line Diagram*).

3.2 Risk and liability

Subject to applicable Laws, the Seller shall be fully responsible to the Buyer for the suitability of the Project Site, for the conduct of the Project and for the condition of the Project Site, including but not limited to its climatic, hydrological, hydro-geological, ecological, environmental, geotechnical, geological, paleontological and archaeological conditions (including the discovery of any heritage resources as defined in the National Heritage Resources Act, 1999), the adequacy of the road and rail links to the Project Site and the availability of adequate supplies of utilities.

3.3 Buyer's inspection rights

The Buyer shall have the right from time to time, on not less than forty-eight (48) hours' written notice, to designate not more than four (4) of the Buyer's representatives who shall be entitled to have access to the Project Site at reasonable times for the purposes of viewing the Facility and verifying the Seller's compliance with its obligations under this Agreement; provided that the Buyer shall ensure that its representatives shall comply with all Project Site health and safety rules, precautions and standards, and any other reasonable requirements of the Seller and its Contractors, and shall not interfere with the Construction or Operation of the Facility.

3.4 No improvements

The Seller shall not be entitled to Construct or procure the Construction of any addition to or any expansion of the Facility that is intended to or may or will result in increasing the installed Capacity of the Facility above the Achieved Capacity.

3.5 No use of electricity from the System

3.5.1 The Parties record and agree that this Agreement does not permit the supply of electrical energy to the Seller by the Buyer or from the System. The Parties record and agree that the connection of a Unit or the Facility, as the case may be, to the System for purposes of drawing electrical energy from the System for any purpose shall be pursuant to a separate agreement entered into between the Seller and the System Operator.

3.5.2 Regardless of such separate agreement between the Seller and the System Operator, the Seller shall not supply Energy Output to the Buyer whilst importing energy from the System unless such imported energy is used for safety systems, lighting or other loads not directly related to Energy generation, and the Buyer shall not be obliged to accept or purchase any Energy Output supplied by the Seller in breach of this provision.

3.6 General Construction obligations

3.6.1 The Seller shall Commence and Continue Construction of the Facility within one hundred and eighty (180) days of the Effective Date. Should the Seller fail to Commence and Continue Construction of the Facility within such period, the Buyer shall be entitled to terminate this Agreement in accordance with clause 18.3 (*Termination for Seller Default*) for a Seller Default, provided that should a dispute arise regarding whether the Seller has Commenced and Continued Construction, such dispute shall be referred to the Independent Engineer, whose determination shall be final and binding on the Parties.

3.6.2 The Seller shall procure the Construction of the Facility in accordance with:

3.6.2.1 all applicable Laws, including the Consents; and

3.6.2.2 the standards of a Reasonable and Prudent Operator.

3.6.3 The Seller shall provide or procure all plant, equipment, machinery consumables, parts, materials and services whatsoever required for the Construction of the Facility in accordance with the standards set out in this clause 3.6 (*General Construction obligations*).

3.7 Commercial Operation Date

3.7.1 The Seller shall use its reasonable endeavours to achieve the Commercial Operation Date by the Scheduled COD.

3.7.2 If the Seller becomes aware that, for any reason, the Commercial Operation Date will not be achieved by the Scheduled COD, the Seller shall, without any unreasonable delay, notify the Buyer in writing of that fact and measures that it will take to mitigate such

delay and of the impact of such measures on its ability to achieve the Scheduled COD, upon implementing such measures.

4. TESTING AND COMMISSIONING

4.1 Connection to the System

4.1.1 The Seller warrants that it has entered into a Distribution Agreement or the Transmission Agreement with the Distributor or the NTC, as applicable, in the Agreed Form, on or before the Signature Date.

4.1.2 The Seller shall give the Buyer at least sixty (60) days' advance written notice of the date on which it anticipates it shall require, in terms of the Transmission Agreement or the Distribution Agreement, as the case may be, a Unit or Units (if the Facility is being commissioned in phases) and, in any event, the Facility to be connected to the System.

4.1.3 The Parties record that it is intended, in the Distribution Agreement or the Transmission Agreement, that:

4.1.3.1 the Distributor or the NTC, as applicable, shall Construct the Distribution Connection Works or the Transmission Connection Works (as the case may be); and

4.1.3.2 the Seller shall Construct the Facility Connection Works to connect the Unit or Units (if the Facility is being commissioned in phases) and, in any event, the Facility with or to the System.

4.2 Independent Engineer

4.2.1 The Seller has, in Schedule 5 (*List of firms who can be appointed as Independent Engineer*), provided the Buyer with a list of five (5) independent consulting engineers, every one of which:

4.2.1.1 has at least 7 (seven) years professional experience as an engineer in the renewable energy industry; and

4.2.1.2 the Seller approves to be appointed as the Independent Engineer for the purpose of this Agreement.

4.2.2 The Buyer shall, within twenty (20) Business Days of the Effective Date, select one (1) such nominee to be appointed as the Independent Engineer on terms substantially similar to the terms contained in the agreement set out in Schedule 10 (*Independent Engineer Agreement*), and shall notify the Seller of the selection of the Independent Engineer in writing as soon as such selection has been made.

4.2.3 Both Parties shall attend to the appointment of the Independent Engineer on terms substantially similar to the terms contained in

the agreement set out in Schedule 10 (*Independent Engineer Agreement*).

- 4.2.4 The Independent Engineer shall be appointed at the sole cost and expense of the Seller, but shall act on behalf of, and owe a duty of care to, both the Buyer and the Seller equally.
- 4.2.5 Neither Party shall, without the prior written consent of the other Party (such consent not to be unreasonably withheld) at any point during the Term:
- 4.2.5.1 terminate or seek to amend materially the contract with the Independent Engineer; or
- 4.2.5.2 appoint any other person to be the Independent Engineer. Any person appointed to replace the existing Independent Engineer, as Independent Engineer, shall be one of the other firms listed in Schedule 5 (*List of firms who can be appointed as the Independent Engineer*) or as agreed between the Buyer and the Seller.
- 4.2.6 If the contract with the Independent Engineer is terminated at any point during the Term, a new Independent Engineer shall be appointed in accordance with this clause 4.2 (*Independent Engineer*) from one of the firms listed in Schedule 5 (*List of firms who can be appointed as the Independent Engineer*) or as agreed between the Buyer and the Seller, both acting reasonably, on terms substantially similar to the terms contained in the agreement set out in Schedule 10 (*Independent Engineer Agreement*).

4.3 Facility completion and commissioning

- 4.3.1 The Seller shall use all reasonable endeavours to commission the Facility and to procure the issue of the Facility Completion Form by the Independent Engineer, at its own cost and in each case in accordance with this clause 4.3 (*Facility completion and commissioning*), Schedule 2 (*Completion Milestones and Forms of Notices*), the Codes, the Transmission Agreement or the Distribution Agreement (as the case may be) and the standards of a Reasonable and Prudent Operator, so as to cause the Commercial Operation Date to fall on or before the Scheduled COD.
- 4.3.2 The Seller may, but shall not be obliged to, procure the issue of the Facility Completion Form where the resulting Achieved Capacity would be expected to be less than the Contracted Capacity. However, the Seller shall be obliged to procure the issue of the Facility Completion Form in respect of the Facility (regardless of Capacity) in order, *inter alia*, to achieve the Commercial Operation Date in accordance with clause 4.5 (*Commercial Operation Date*).

- 4.3.3 The Seller shall provide the Buyer on a Weekly basis with relevant information regarding the commissioning and testing undertaken pursuant to clause 4.3.1.

4.4 Early Operating Period

- 4.4.1 The Seller may issue the Notice of Commencement of Unit to the Buyer in respect of each Unit (if applicable) at least ten (10) Business Days before the Seller anticipates that the relevant Unit or Units will begin generation and delivery of Early Operating Energy to the Delivery Point, which notice shall be in the form of Schedule 2 Part 3 (*Form of Notice of Commencement of Unit*). The Seller shall not be entitled to issue the first Notice of Commencement of Unit more than one hundred and eighty (180) days before the Scheduled COD.
- 4.4.2 Until 00:00 on the Unit Commencement Date in respect of a Unit, the Buyer shall not be obliged to purchase Early Operating Energy generated by that Unit or to pay the Early Operating Energy Rate in respect of any Early Operating Energy generated by that Unit.

4.5 Commercial Operation Date

- 4.5.1 The Seller shall give the Buyer no less than sixty (60) Days' prior written notice of its intention to issue the Notice of Commencement of Facility.
- 4.5.2 The Seller may not issue the Notice of Commencement of Facility before the Scheduled COD.
- 4.5.3 Following compliance with clause 4.5.1 and upon the Independent Engineer ascertaining the Facility Completion and receipt of the relevant Facility Completion Form pursuant to clause 4.3 (*Facility Completion and Commissioning*), the Seller shall issue the Notice of Commencement of Facility to the Buyer within two (2) Business Days of the delivery of the relevant Facility Completion Form, which notice shall be in the form of Schedule 2 Part 4 (*Form of Notice of Commencement of Facility*).
- 4.5.4 If the Facility has achieved Facility Completion in terms of clause 4.3 (*Facility Completion and Commissioning*) and the Achieved Capacity is equal to or greater than the Contracted Capacity, then:
- 4.5.4.1 for the purposes of this Agreement, the power output of the Facility shall be limited to the Contracted Capacity, and only Energy Output that is generated from the Contracted Capacity shall be subject to this Agreement;
- 4.5.4.2 the Seller shall deliver to the Buyer a Notice of Commencement of Facility, following which the Commercial Operation Date will be the first day starting at 00:00 hours

following the day upon which the Buyer receives from the Seller such Notice of Commencement of Facility; and

4.5.4.3 the Seller shall not be entitled to increase the installed Capacity of the Facility above the Contracted Capacity at any time in the future.

4.5.5 If the Facility has achieved Facility Completion in terms of clause 4.3 (*Facility Completion and Commissioning*) and the Achieved Capacity is equal to or greater than the Minimum Acceptance Capacity, the Seller shall:

4.5.5.1 if necessary, at its own expense and in the shortest possible time, on giving notice to the Buyer, effect such repairs or replacements to the Facility, or any part thereof, as necessary for the Facility to achieve its Contracted Capacity, following which the Facility Completion shall be re-assessed in accordance with clause 4.3 (*Facility Completion and Commissioning*), provided that such repairs or replacements must be completed and the Facility Completion Form must have been completed and submitted by the Seller to the Buyer by the Last COD; or

4.5.5.2 elect, without effecting any repairs or replacements to the Facility, to deliver to the Buyer a Notice of Commencement of Facility, following which the Commercial Operation Date will be the first day starting at 00:00 hours following the day upon which the Buyer receives from the Seller such Notice of Commencement of Facility and clause 4.8 (*Reduction in Contracted Capacity*) shall apply.

4.5.6 If the Facility has achieved Facility Completion in terms of clause 4.3 (*Facility Completion and Commissioning*) and the Achieved Capacity is less than the Minimum Acceptance Capacity, then the Seller shall, at its own expense and in the shortest possible time, effect such repairs or replacements to the Facility, or any part thereof, necessary for the Facility to achieve an Achieved Capacity greater than or equal to the Minimum Acceptance Capacity, provided that such repairs or replacements must have been completed, the Facility Completion must have been re-assessed and the duly completed Facility Completion Form must have demonstrated an Achieved Capacity equal to or greater than the Minimum Acceptance Capacity by the Last COD.

4.6 **Delays in achieving the Commercial Operation Date**

For every day that the achievement of the Commercial Operation Date is delayed beyond the Scheduled COD (unless such delay is caused by a System Event or a Compensation Event), the Operating Period shall be reduced by an additional day and the Expiry Date shall be brought forward by one (1) day.

4.7 **Last COD**

4.7.1 The Seller shall be entitled to declare the Commercial Operation Date for the Facility at any time up to 17h00 on the Last COD in respect of that Achieved Capacity for which the Independent Engineer has completed the Facility Completion Form by no later than 17h00 on the Last COD and, if the Seller does so and the Achieved Capacity is greater than the Minimum Acceptance Capacity, the Buyer shall not be entitled to call a Seller Default in terms of subclause (c) of the definition of "Seller Default".

4.7.2 If the Commercial Operation Date is not achieved by the Last COD, then the Buyer shall be entitled to terminate this Agreement in accordance with clause 18.3 (*Termination for Seller Default*) for a Seller Default.

4.8 **Reduction in Contracted Capacity**

If the Achieved Capacity on the Commercial Operation Date is less than the Contracted Capacity, then, on and from the Commercial Operation Date, the Contracted Capacity shall be reduced to the Achieved Capacity of the Facility as at the Commercial Operation Date, and Schedule 1 (*Details of the Project and Facility*) shall be amended to reflect the Achieved Capacity as the new Contracted Capacity. The Seller shall not be entitled to increase the installed Capacity of the Facility above the new Contracted Capacity, as amended, at any time in the future.

4.9 **Coordination with Distributors and the NTC**

4.9.1 To the extent that the Facility is connected with or shall be connected with such part of the System as is owned, operated or administered by a Distributor or the NTC (as the case may be), in addition to complying with the other requirements of this clause 4 (*Testing and Commissioning*), the Parties shall:

4.9.1.1 provide the Distributor or the NTC (as the case may be) with such information as may be necessary under Law or the Codes, or usual in terms of the practices of a Reasonable and Prudent Operator in respect of; and

4.9.1.2 collectively discuss and coordinate with the Distributor or the NTC (as the case may be),

the actions contemplated in this clause 4 (*Testing and Commissioning*) and shall additionally comply with such reasonable requests and instructions that are in accordance with the Codes and the practices of a Reasonable and Prudent Operator, as may be received from the Distributor or the NTC (as the case may be) from time to time.

5. SALE OF ENERGY

5.1 Sale of Energy

Subject to and in accordance with the terms and conditions set out in this Agreement, during the Early Operating Period and the Operating Period:

- 5.1.1 the Seller shall sell all the Early Operating Energy and Commercial Energy generated by a Unit or the Facility (as the case may be) to the Buyer at the Delivery Point, on a self-despatch basis, and subject only to the Codes and the standards of a Reasonable and Prudent Operator;
- 5.1.2 the Buyer shall pay the Early Operating Energy Payment for the Early Operating Energy, or the Commercial Energy Payment for the Commercial Energy, delivered by the Seller to the Delivery Point;
- 5.1.3 the Buyer shall ensure that the System Operator or the Distributor (as the case may be) operates the System, subject to the relevant Codes and the Transmission Agreement or Distribution Agreement (as the case may be), in such a way that the Facility can self-despatch. The operation of the System by the System Operator or the Distributor (as the case may be) in a manner not required or permitted by the relevant Codes and/or the Transmission Agreement or Distribution Agreement (as the case may be) shall be dealt with as a Curtailment in terms of Clause 14 (*Consequences of a System Event*) to the extent that the Facility is prevented or hindered from being self-despatched, unless this is caused by any natural force or event or an act or omission of the Seller or a Contractor; and
- 5.1.4 subject to clause 14 (*Consequences of a System Event*) and clause 15 (*Consequences of a Compensation Event*), the Buyer shall pay the Deemed Energy Payment that is payable in respect of the Deemed Energy in accordance with Schedule 6 (*Deemed Energy Payment*).

5.2 Title and Risk

Title in, and risk of loss of, all Energy sold to the Buyer in accordance with clause 5.1 (*Sale of Energy*), shall pass to the Buyer at the Delivery Point.

6. MAINTENANCE INSPECTIONS

- 6.1 If the Buyer, on reasonable grounds and based on the number of Unscheduled Outages and Scheduled Outages in any rolling 6 Month period and the Energy Output of the Facility, at any time is of the opinion that the Facility is not being Maintained to the standard of a Reasonable and Prudent Operator, it may require that the Independent Engineer conduct an inspection (and, based on the outcome of the

inspection, such tests of the Facility's condition as may be necessary) to ascertain whether the Facility is being Maintained to the standard of a Reasonable and Prudent Operator.

- 6.2 If the inspection and, if applicable, tests detailed in clause 6.1 show that the Facility is being Maintained to the standard of a Reasonable and Prudent Operator, the Buyer shall bear all costs of conducting such inspection and tests, including the Seller's reasonable costs and losses. If the inspection and, if applicable, tests show that the Facility is not being Maintained to the standard of a Reasonable and Prudent Operator, the Buyer may require the Seller to undertake such works as may be performed by a Reasonable and Prudent Operator to ensure that the Facility is Maintained to such standard, and the Seller shall bear all costs of conducting such inspection and tests and performing such works, including the Buyer's reasonable costs.
- 6.3 Any dispute arising from or relating to the performance of the inspection or tests by the Independent Engineer or the results thereof shall be referred to and determined by an Independent Expert in accordance with the provisions of clause 27 (*Fast-Track Dispute Resolution*).

7. GENERATION FORECASTS

7.1 Weekly generation forecast

- 7.1.1 The Seller shall provide the Buyer in writing for each Week in the Early Operating Period and the Operating Period, by no later than 09:00 hours on the preceding Wednesday, the Seller's estimate made in good faith of the forecast level of Energy expected to be generated by the Facility for each day in the Week, which shall generally be in the form of Schedule 4 (*Forecast Information*) ("**Weekly Forecast Generation Profile**").
- 7.1.2 If the Seller fails to provide any Weekly Forecast Generation Profile, then the Buyer shall be entitled to do or procure that another person provides it with that forecast, and it shall be entitled to recover the costs it incurs in respect of such forecast from the Seller. The Buyer shall provide the Seller with details of such costs and such evidence as is available in respect of such costs. The Buyer shall be entitled to set the amount of such costs off against next payment due to the Seller.

7.2 Daily generation forecast

- 7.2.1 The Seller shall provide the Buyer in writing for each day in the Early Operating Period and the Operating Period, by no later than 10:00 hours on the preceding day, the Seller's estimate made in good faith of the forecast level of Energy expected to be generated each hour (the first such hour starting at 00:00 and ending at 00:60 minutes) in the day (starting at 00:00 hours and ending at 24:00 hours), which shall generally be in the form of Schedule 4 (*Forecast Information*) ("**Daily Forecast Generation Profile**").

7.2.2 If the Seller fails to provide the Daily Forecast Generation Profile for any day, then the Buyer shall be entitled to do or procure that another person provides it with that forecast, and it shall be entitled to recover the costs it incurs in respect of such forecast from the Seller. The Buyer shall provide the Seller with details of such costs and such evidence as is available in respect of such costs. The Buyer shall be entitled to set the amount of such costs off against next payment due to the Seller.

7.3 Other relevant data

By 20:00 hours on the day preceding the day in respect of which the Seller has issued a Daily Forecast Generation Profile, the Seller shall submit to the Buyer, in written form, details of any special factors which, in the good faith and reasonable opinion of the Seller, will have a material effect on the ability of a Unit or Units or the Facility to produce Energy or provide the Energy Output on the following day.

8. TARIFF AND OTHER CHARGES

8.1 Early Operating Energy Payments

The Buyer shall pay to the Seller the Early Operating Energy Payment for all Early Operating Energy sold by the Seller and purchased by the Buyer during each Billing Period during the Early Operating Period at the Early Operating Energy Rate.

8.2 Commercial Energy Payments

The Buyer shall pay to the Seller the Commercial Energy Payment for all Commercial Energy sold by the Seller and purchased by the Buyer during each Billing Period at the Commercial Energy Rate.

8.3 Deemed Energy Payments

The Buyer shall pay to the Seller the Deemed Energy Payment for all Deemed Energy accruing in each Billing Period calculated in terms of clause 14 (*Consequences of a System Event*), clause 15 (*Consequences of a Compensation Event*) and Schedule 6 (*Deemed Energy Payments*).

8.4 Use of System Charges

The Buyer shall reimburse to the Seller the Use of System Charges, if any, which the Seller is obliged to pay and has paid in terms of the Distribution Agreement or the Transmission Agreement, as the case may be in each Billing Period. If any Use of System Charges are repaid to the Seller as a result of a dispute in terms of either the Distribution Agreement or the Transmission Agreement, then the Seller shall be obliged to repay the Buyer to the extent such amounts have already been reimbursed to the Seller in terms of this clause 8.4 (*Use of System Charges*), and the Buyer shall be entitled to deduct such amounts in the next Invoice issued to the Seller.

8.5 Failure to make Payments

- 8.5.1 If any payment that is due and payable is not paid by the Due Date, interest shall accrue on the full amount due and payable, at the Agreed Interest Rate, from the Due Date to, but excluding, the date of payment.
- 8.5.2 If the Buyer fails to pay any amount or amounts that are due and payable by the Buyer under this Agreement, within five (5) Business Days of the Due Date for payment, the Seller may serve notice on the Buyer of such failure and specifying details thereof. If such failure has not been remedied or rectified within twenty (20) Business Days of such notice, the Seller may call a Compensation Event and rely on and enforce the Implementation Agreement, all in terms of clause 15 (*Consequences of a Compensation Event*).

9. INVOICING

9.1 Early Operating Period and Operating Period invoices

- 9.1.1 The Seller shall, within two (2) Business Days of the end of a Billing Period, submit to the Buyer for that Billing Period an Invoice specifying:
- 9.1.1.1 the Early Operating Energy Payment and/or Commercial Energy Payment (as the case may be) due to the Seller for such Billing Period setting out the calculations upon which such Early Operating Energy Payment or Commercial Energy Payment is based;
 - 9.1.1.2 the Deemed Energy Payments (if any) due to the Seller for such Billing Period, including:
 - 9.1.1.2.1 the periods for which the Deemed Energy Payments are payable;
 - 9.1.1.2.2 the calculations upon which such Deemed Energy Payments are based
 - 9.1.1.2.3 the circumstances which entitle the Seller to such Deemed Energy Payments; and
 - 9.1.1.2.4 written confirmation of the Independent Engineer where required in terms of Schedule 6 (*Deemed Energy Payment*);
 - 9.1.1.3 the Use of System Charges (if any) due to the Seller in terms of clause 8.4 (*Use of System Charges*) for such Billing Period; and
 - 9.1.1.4 any amounts owed by the Seller to the Buyer (or vice versa).
- 9.1.2 Subject to clause 12.7 (*Readings and inaccuracy*), the Seller shall prepare the Invoice for the Billing Period based on the billing data

obtained by it from the Facility Metering Installation for that Billing Period.

9.2 General principles as regards invoicing

The following provisions shall apply in respect of all Invoices prepared and issued pursuant to this Agreement.

- 9.2.1 Save as provided in the VAT Act, every payment due and payable by either Party to the other pursuant to this Agreement shall be subject to VAT.
- 9.2.2 Subject to clause 8.5.1, the Party who received the invoice shall pay to the other Party (who issued the invoice) the amount of each Invoice within thirty (30) Business Days of receipt of such Invoice (the "**Due Date**").
- 9.2.3 All payments due by either Party to the other under this Agreement shall be made:
 - 9.2.3.1 in Rand in immediately available funds to such bank account in South Africa as the recipient Party shall from time to time nominate; and
 - 9.2.3.2 subject to clause 22 (*Set-Off*), without deduction or withholding, whether by way of set-off or otherwise, other than as required by any Law or as expressly provided in this Agreement.

9.3 Billing disputes

The following provisions shall apply in respect of all Invoices prepared and issued pursuant to this Agreement:

- 9.3.1 A Party shall notify the other Party in writing if it disputes (in good faith) an Invoice (including the data or records on which the dispute is based) before the Due Date for payment thereof, which notice shall specify the amount in dispute, and provide appropriate details of the basis of the dispute. The disputing Party shall pay the undisputed portion of the Invoice on the Due Date.
- 9.3.2 The Parties will use their reasonable endeavours to resolve the dispute as soon as practicable, and in any event within thirty (30) days of the notice of the dispute served pursuant to clause 9.3 (*Billing disputes*). Without limiting the generality of the foregoing, where the dispute is in respect of the billing data obtained by the Seller from the Facility Metering Installation, the Buyer shall be entitled to request a test of the Facility Metering Installation in accordance with clause 12.6 (*Testing and inspection*).
- 9.3.3 If it is agreed or determined (including as a result of a test of the Facility Metering Installation pursuant to clause 12.6 (*Testing and inspection*)) that all or part of a disputed amount which was paid

should not have been paid, then the amount of such overpayment shall be refunded within five (5) Business Days of such agreement or determination, together with interest at the Agreed Interest Rate from the date of such overpayment to, but excluding, the date of repayment.

- 9.3.4 If the Parties fail to resolve a dispute regarding an Invoice within thirty (30) days of the date upon which the notice in this clause 9.3 (*Billing disputes*) was served, either Party shall be entitled to refer the dispute to an Expert for determination in accordance with clause 27 (*Fast-Track Dispute Resolution*), provided that the Expert shall take into account the data and records of the most recent test of the Facility Metering Installation, held in accordance with clause 12.6 (*Testing and inspection*).

10. OUTAGES

10.1 Scheduled Outages

- 10.1.1 The Seller shall comply with the requirements of Schedule 3 (*Scheduled and Unscheduled Outages*) in relation to Scheduled Outages.
- 10.1.2 Subject to clause 10.1.1, the Seller shall be entitled to remove the Facility from service during the period of the Scheduled Outage to carry out its planned Maintenance.
- 10.1.3 The Seller shall be responsible for all costs incurred by it in connection with or arising from any Maintenance carried out by it or on its behalf on the Facility during any Scheduled Outage.

10.2 Unscheduled Outages

- 10.2.1 In case of an Unscheduled Outage due to failure of any part of the equipment forming part of the Facility, the Seller shall inform the Buyer within four (4) hours from the commencement of the Unscheduled Outage of the time period that the Facility is expected to be unavailable, if that time period extends or is expected to extend for the period from 00:00 to 24:00 of any given Day. Unscheduled Outages that are expected to extend for less than the 24 hour period from 00:00 to 24:00 of any given Day do not need to be reported to the Buyer in terms of this section.
- 10.2.2 The Seller shall be responsible for all costs incurred by it in connection with or arising from any Maintenance carried out by it or on its behalf on the Facility during any Unscheduled Outage.

11. REPORTS, RECORDS, PLANS AND MONITORING

11.1 Reports

Subject to the terms and conditions of this Agreement, the Seller shall as soon as reasonably possible, and in any event within two (2) hours,

notify the Buyer if the Facility or such number of Units comprising at least ten percent (10%) of the Contracted Capacity, as the case may be, is incapable of generating Energy for any of the following reasons (and provided that its unavailability has not already been notified as part of a Scheduled Outage or pursuant to clause 7 (*Generation Forecasts*)):

- 11.1.1 for reasons of any Outages; or
- 11.1.2 where to do so would not be in accordance with the standards of a Reasonable and Prudent Operator; or
- 11.1.3 in circumstances relating to safety (of either personnel or of the Facility or apparatus); or
- 11.1.4 in circumstances where to do so would be unlawful; or
- 11.1.5 for reasons of Force Majeure, a System Event, Government Default or a Compensation Event,

and shall, within 5 Business Days, delivery to the Buyer a written report detailing the reasons (in reasonable detail) for such incapacity.

11.2 Data and records

- 11.2.1 The Seller shall maintain complete and accurate data and records required to facilitate the proper administration of this Agreement and the Project. Such data and records ("**Project Data**") shall include an accurate and up-to-date log of Operations, updated daily, in a format reasonably acceptable to the Buyer. The Project Data should include, but not be limited to, the following information, with records of:
 - 11.2.1.1 for each ten (10) minute period in each day, the Energy Output and the Reactive Energy Output;
 - 11.2.1.2 changes in Operating status during the day;
 - 11.2.1.3 the number of Outages in the day, the duration of each Outage and the reason for each Outage;
 - 11.2.1.4 all wind and other climatic data recorded at the Project Site;
 - 11.2.1.5 all data required in terms of Schedule 6 (*Deemed Energy Payment*);
 - 11.2.1.6 any information required to be recorded and/or reported in terms of the Consents; and
 - 11.2.1.7 any unusual conditions found during Maintenance inspections.

11.3 Recordkeeping

All Project Data shall be maintained for the duration of the Term and for any additional length of time as may be required by any applicable Laws or otherwise by any Responsible Authority.

11.4 Ownership, inspection, copy and use rights

11.4.1 The Buyer shall have the right, upon giving a minimum of two (2) Business Days' prior written notice to the Seller, to examine and take copies of any Project Data at any time during normal business hours (at the Buyer's own cost).

11.4.2 Subject to any confidentiality undertakings between the Seller and manufacturers or suppliers of Facility equipment, the Buyer shall be entitled to put the Project Data in the public domain and to use the Project Data as the Buyer deems appropriate.

11.4.3 The Buyer and the Seller shall have joint ownership of the Project Data, but the Seller shall not, by virtue of its ownership rights, have any rights to prevent the disclosure and use of the Project Data by the Buyer.

12. METERING

12.1 Metering agents

The Buyer may, by written notification to the Seller and subject to the Seller's approval (not to be unreasonably withheld or delayed), appoint a third party (including, to the extent Buyer deems necessary, a Distributor) to act as a metering agent and to perform and fulfil the Buyer's rights and obligations pursuant to this clause 12 (*Metering*), provided that should the Buyer appoint such a metering agent, the Buyer shall nonetheless remain liable to the Seller under this Agreement for any breach or failure to perform by the metering agent.

12.2 Facility Metering Installation

12.2.1 The Seller shall, acting as a Reasonable and Prudent Operator, procure, install, test, commission, Operate and Maintain the Facility Metering Installation at the Delivery Point, at its sole cost.

12.2.2 The Facility Metering Installation shall be used for invoicing purposes as provided herein.

12.3 System Metering Installation

12.3.1 The Buyer shall cause the NTC or the Distributor (as applicable) to procure, install, test, commission, Operate and Maintain a System Metering Installation adjacent to the Facility Metering Installation at the Delivery Point, in accordance with the Transmission Agreement or the Distribution Agreement, as applicable.

12.3.2 The purpose of the System Metering Installation shall be to provide data for comparison purposes as against the data to be provided by the Facility Metering Installation.

12.4 Capabilities of Meters

12.4.1 The Facility Metering Installation and the System Metering Installation shall be capable of measuring and recording the following parameters for various time and frequency blocks in accordance with applicable Laws and the Codes:

12.4.1.1 Energy Output and Reactive Energy Output;

12.4.1.2 instantaneous voltage, current and power factor;

12.4.1.3 frequency;

12.4.1.4 maximum demand in MVA/MW for each demand period and for the total period since the last reset;

12.4.1.5 MWh/MVARh since last reading;

12.4.1.6 real time and time of day metering; and

12.4.1.7 number of resets.

12.4.2 The Facility Metering Installation and the System Metering Installation shall also have the capability to download and transmit such real time data to a Supervisory Control and Data Acquisition ("**SCADA**") system, in a form and format suitable for SCADA.

12.4.3 The Buyer shall be entitled to, and the Facility Metering Installation shall enable the Buyer to, access the Facility Metering Installation and its data remotely at any time and without any notice.

12.5 Sealing

12.5.1 The Facility Metering Installation and the System Metering Installation shall each be sealed in the presence of duly authorised representatives of both Parties immediately after the commissioning of the relevant meter.

12.5.2 Seals shall only be broken for the purposes of inspection, testing, maintenance or adjustment of the relevant meter, and shall be immediately re-sealed after that purpose is completed, all in the presence of duly authorised representatives of both Parties.

12.6 Testing and inspection

12.6.1 Subject to clauses 12.6.2 and 12.6.5, the Buyer may request a test of the Facility Metering Installation and the Seller may request a test of the System Metering Installation, by notice in writing to the other Party.

- 12.6.2 The Facility Metering Installation and the System Metering Installation shall be tested by a Meter Certifier as often as the Party responsible for such meter deems necessary, but in any event within thirty (30) days of receipt of written request for such test pursuant to clause 12.6.1.
- 12.6.3 Save on reasonable grounds, including a suspected inaccuracy determined pursuant to clause 12.6.4, the Buyer shall not be entitled to call for more than one (1) test of the Facility Metering Installation in any period of twelve (12) Months, and the Seller shall not be entitled to call for more than one (1) test of the System Metering Installation in any period of twelve (12) Months.
- 12.6.4 Without limiting clause 12.6.1, if readings taken from the Facility Metering Installation and the System Metering Installation are significantly different from one another and/or demonstrate a level of inaccuracy falling outside the particular standard and specification used for the relevant meter, or are beyond a tolerance level of $\pm 0.5\%$, whichever is the lesser, then the Facility Metering Installation and the System Metering Installation shall both be tested.
- 12.6.5 The Parties shall provide each other with not less than seven (7) days' prior written notice of any test to be held pursuant to this clause 12.6 (*Testing and inspection*), which shall be held between 09:00 and 17:00 hours on any Business Day. Both Parties shall have the right to be represented at the conduct of any such test by representatives of each Party.
- 12.6.6 The Parties shall promptly provide each other with copies of test reports, including all supporting metering data and records, if so requested in writing by the other Party. The Parties shall answer any questions as regards the test report promptly and in full.
- 12.6.7 The Facility Metering Installation and the System Metering Installation shall be treated as working satisfactorily so long as the errors are within the limits prescribed for meters of the particular standard and specification used, or are within a tolerance level of $\pm 0.5\%$, whichever is the lesser. If, as a result of a test conducted pursuant to this clause 12.6 (*Testing and inspection*), the measure of error is found to be outside this maximum tolerance, then the Facility Metering Installation and/or the System Metering Installation, as the case may be, shall be recalibrated as soon as practicable and in any event within two (2) days of the relevant meter owner being notified of such event, at the expense of the Party responsible for the non-compliant meter, and the provisions of clause 12.7 (*Readings and inaccuracy*) shall apply in respect of any data retrieved from such non-compliant meter and used for billing purposes prior to the relevant meter test.
- 12.6.8 If any related monitoring equipment or associated circuits are found not to comply with the requirements of the relevant standards as set out in applicable Law and the Codes, they shall

be repaired or replaced at the expense of the Party which owns them as soon as practicably possible.

12.7 Readings and inaccuracy

12.7.1 The Seller shall be responsible for retrieving and analysing data from the Facility Metering Installation for billing purposes on the last Business Day of each Month during each Billing Period, as the case may be, at a time mutually agreed between the Parties.

12.7.2 Should the Facility Metering Installation fail to register or, upon testing pursuant to clause 12.6 (*Testing and inspection*), be found to have a level of inaccuracy falling outside the maximum tolerance level specified in clause 12.6.7, then the Facility Metering Installation shall be recalibrated in accordance with clause 12.6.7 and the Energy Output from the Unit or the Facility, as the case may be, shall, for the period referred to in clause 12.7.4, be measured on the basis of the readings registered by the System Metering Installation.

12.7.3 Should both the System Metering Installation and the Facility Metering Installation fail to register or, upon testing, be found to have a level of inaccuracy falling outside the maximum tolerance level specified in clause 12.6.7, then each of the System Metering Installation and the Facility Metering Installation shall be recalibrated in accordance with clause 12.6.7, and the Energy Output from the Unit or the Facility, as the case may be, shall, for the period referred to in clause 12.7.4, be calculated on the basis of such correction procedure as the Parties may agree (using such data as permitted by the relevant Code, including estimated data prepared in accordance with the relevant Code), and in the absence of agreement shall be referred to an Expert for determination in accordance with clause 27 (*Fast-Track Dispute Resolution*).

12.7.4 The period referred to in clauses 12.7.2 and 12.7.3 shall be:

12.7.4.1 the actual period during which inaccurate measurements were made, if such period can be determined from the logged readings; or

12.7.4.2 if not determinable from the logged readings, the period immediately preceding the test of the Facility Metering Installation equal to one-half of the time from the date of the last previous test of the Facility Metering Installation; or

12.7.4.3 in the case of clause 12.7.3, from the date of the last previous test of the System Metering Installation or Facility Metering Installation, whichever was most recently tested (with the remaining period being calculated on the basis of the measurements as actually recorded by the System Metering Installation, or the Facility Metering Installation, as the case may be).

12.8 Miscellaneous

- 12.8.1 Each Party shall not, and shall ensure that its contractors (including the Contractors, in the case of the Seller) do not, interfere in any manner whatsoever with the proper functioning of the other Party's metering equipment, save in the course of an inspection, testing, Maintenance or agreed adjustment in the presence of duly authorised representatives of both Parties.
- 12.8.2 The Facility Metering Installation and the System Metering Installation shall not be relocated without the prior written agreement of both Parties.
- 12.8.3 The Seller shall be entitled to access the System Metering Installation remotely to download data for the purposes of performing its obligations and exercising its rights under this Agreement, without prior notice to the Buyer.

13. UTILITIES AND CONSUMABLES

13.1 Responsibility for the supply of utilities

At all times during the Term, the Seller shall be responsible for securing all supplies of electricity, water, sanitation, telecommunications, waste disposal services and all other utilities required for the Construction, Maintenance and Operation of the Project.

13.2 Responsibility for the supply of consumables

The Seller shall be solely responsible for obtaining, stockpiling (if applicable) and transporting all supplies of consumables necessary to comply with its obligations under this Agreement.

14. CONSEQUENCES OF A SYSTEM EVENT

- 14.1 The Seller shall not be entitled to bring any claims under this clause 14 (*Consequences of a System Event*) for Deemed Energy Payments if the time for which any System Event or combination of System Events has or have endured:
- 14.1.1 in the period that the Commercial Operation Date is delayed beyond the Scheduled COD; or
- 14.1.2 in any Contract Year,
- is less than the Allowed Grid Unavailability Period for such period or Contract Year, unless such System Event or combination of System Events occurred as a result of Curtailment. The Allowed Grid Unavailability Period shall not be applicable to any System Event or combination of System Events that are caused by Curtailment.
- 14.2 If and to the extent that:

- 14.2.1 before the Commercial Operation Date, a System Event that is contemplated in paragraph (a) of the definition of System Event occurs that causes a delay in the achievement of the Commercial Operation Date beyond the Scheduled COD; and/ or
- 14.2.2 after the Commercial Operation Date, a System Event materially adversely affects the ability of the Seller to perform any of its obligations or exercise any of its rights under this Agreement,

then the Seller shall be entitled to apply for relief from any rights of the Buyer arising under clause 18.3 (*Termination for Seller Default*) and to payment of the Deemed Energy Payment in terms of clause 14.4.
- 14.3 Subject to clause 14.1, to obtain relief and/or payment of the Deemed Energy Payment, the Seller must:
 - 14.3.1 as soon as practicable, and in any event within one (1) day after it became aware that the System Event has occurred and
 - 14.3.1.1 has caused or is likely to cause delay and/or materially adversely affect the ability of the Seller to perform its obligations or exercise its rights; or
 - 14.3.1.2 entitles the Seller to claim a Deemed Energy Payment,

give to the Buyer a notice of its claim for relief from its obligations under this Agreement and for the Deemed Energy Payment, including full details of the nature of the System Event, the date of occurrence and its likely duration (if known);
 - 14.3.2 within four (4) days of the Seller giving the notice referred to in clause 14.3.1, give full details of the System Event and of the Deemed Energy Payment and/or relief claimed; and
 - 14.3.3 provide the Buyer with all reasonable assistance in respect of the Buyer's discussions with and actions against the System Operator or the NTC or Distributor (as the case may be) in respect of the relevant System Event;
 - 14.3.4 demonstrate to the reasonable satisfaction of the Buyer that:
 - 14.3.4.1 the Seller could not have avoided such occurrence or consequences by steps which it might reasonably be expected to have taken, without incurring material expenditure;
 - 14.3.4.2 the System Event directly caused the delay beyond the Scheduled COD in the circumstances contemplated in clause 14.2.1, or there is a need for relief from other obligations under this Agreement;

- 14.3.4.3 the Facility would otherwise have been available and able to generate and deliver Energy Output but for the System Event;
 - 14.3.4.4 the Deemed Energy Payment and/or relief from the obligations under this Agreement claimed could not reasonably be expected to be mitigated or recovered by the affected Party acting in accordance with the standards of a Reasonable and Prudent Operator, without incurring material expenditure; and
 - 14.3.4.5 the Seller is using reasonable endeavours to perform its obligations under this Agreement.
- 14.4 If the Seller has complied with its obligations under clause 14.3 above, then:
- 14.4.1 if the System Event occurs in the circumstances contemplated in clause 14.2.1, then:
 - 14.4.1.1 the Scheduled COD shall remain unchanged, the Expiry Date shall continue to occur 20 years after Scheduled COD, and the Operating Period shall continue to commence on the later of the unchanged Scheduled COD and the Commercial Operation Date, but the Last COD shall be postponed by one day for every day by which the Commercial Operation Date is delayed by the System Event in terms of clause 14.2.1;
 - 14.4.1.2 subject to clause 14.1, the Seller shall be entitled to receive the Deemed Energy Payment for the period by which the Commercial Operation Date has been delayed by the System Event, as agreed between the Parties or decided pursuant to clause 27 (*Fast-Track Dispute Resolution*), subject to any adjustments that may be effected in terms of paragraph 5 (*Adjustment of Deemed Energy Payments*) of Schedule 6 (*Deemed Energy Payment*); and/or
 - 14.4.1.3 the Buyer shall not be entitled to exercise its rights to terminate this Agreement under clause 18.3 (*Termination for Seller Default*) for the failure of the Seller to achieve the Commercial Operation Date by the original Last COD as a result of such System Event; or
 - 14.4.2 if the System Event occurs after the Commercial Operation Date, then:
 - 14.4.2.1 subject to clause 14.1, the Seller shall be entitled to receive the Deemed Energy Payment for the period that the System Event continues, as agreed between the Parties or decided pursuant to clause 27 (*Fast-Track Dispute Resolution*), subject to any adjustments that may be effected in terms of paragraph 5 (*Adjustment of Deemed Energy Payments*) of Schedule 6 (*Deemed Energy Payment*); and/or

- 14.4.2.2 the Buyer shall not be entitled to exercise its rights to terminate this Agreement under clause 18.3 (*Termination for Seller Default*) for the failure of the Seller to comply with any provision of this Agreement as a result of such System Event.
- 14.5 If information required by clause 14.3 above is provided after the dates referred to in that clause, then the Seller shall not be entitled to any relief or the Deemed Energy Payment during the period for which the information is delayed.
- 14.6 The Seller shall notify the Buyer if, at any time, it receives or becomes aware of any further information relating to the System Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.
- 14.7 If the Parties cannot agree on the extent of the relief required, or the Buyer disagrees that a System Event has occurred or that the Seller is entitled to any extension of the Last COD and/or to any Deemed Energy Payment, and/or relief from other obligations under this Agreement, the Parties shall resolve the matter in accordance with clause 27 (*Fast-Track Dispute Resolution*).

15. CONSEQUENCES OF A COMPENSATION EVENT

- 15.1 If, as a direct result of the occurrence of a Compensation Event:
- 15.1.1 the Seller is unable to achieve the Commercial Operation Date by the Scheduled COD;
- 15.1.2 the Seller is unable to comply with its obligations under this Agreement; and/or
- 15.1.3 the Seller incurs costs or loses revenue,
- then the Seller is entitled to apply for relief from its obligations under this Agreement, from any rights of the Buyer arising under clause 18.3 (*Termination for Seller Default*), to claim compensation under this Agreement and/or, if the Compensation Event is the failure of the Buyer to make due payment as detailed in clause 8 (*Tariff and Other Charges*), enforce the Implementation Agreement.
- 15.2 To obtain relief and/or claim compensation, the Seller must:
- 15.2.1 as soon as practicable, and in any event within five (5) days after it became aware that the Compensation Event has caused or is likely to cause delay, breach of an obligation under this Agreement, the Seller to incur costs or lose revenue and/or enforce the Implementation Agreement, give to the Buyer a notice of its claim for postponement of the Last COD, payment of compensation, relief from its obligations under this Agreement and/or bring a claim under the Implementation Agreement;

- 15.2.2 within ten (10) days of receipt by the Buyer of the notice referred to in clause 15.2.1 above, give the Buyer full details of the Compensation Event and the extension of time and/or any estimated change in project costs claimed, the loss of revenue claimed and/or the amount which may be claimed under the Implementation Agreement; and
- 15.2.3 demonstrate to the reasonable satisfaction of the Buyer that:
 - 15.2.3.1 the Compensation Event was the direct cause of the estimated change in project costs, the loss of revenue claimed and/or any delay in the achievement of the Commercial Operation Date by the Scheduled COD; and
 - 15.2.3.2 the estimated change in project costs, the loss of revenue claimed, time lost, and/or relief from the obligations under the Agreement claimed, could not reasonably be expected to be mitigated or recovered by the Seller acting in accordance with the standards of a Reasonable and Prudent Operator.
- 15.3 If the Seller has complied with its obligations under clause 15.2, then:
 - 15.3.1 the Scheduled COD shall remain unchanged, the Expiry Date shall continue to occur 20 years after Scheduled COD and the Operating Period shall continue to commence on the later of the unchanged Scheduled COD and the Commercial Operation Date, but the Last COD shall be postponed by such time as shall be reasonable for such a Compensation Event, taking into account the likely effect of the delay;
 - 15.3.2 in the case of an additional cost being incurred by the Seller:
 - 15.3.2.1 on or before the Commercial Operation Date; or
 - 15.3.2.2 as a result of Capital Expenditure being incurred by the Seller at any time,

the Buyer shall have the option to compensate the Seller for the actual estimated change in project costs as adjusted to reflect the actual costs reasonably incurred either:
 - 15.3.2.2.1 in one lump-sum payment, payable within ninety (90) Business Days of its receipt of a written demand by the Seller supported by all relevant information; or
 - 15.3.2.2.2 in equal monthly instalments for the remainder of the Term, commencing within ninety (90) Business Days of its receipt of a written demand by the Seller supported by all relevant information, provided that interest shall accrue on the full amount due and payable, at the Agreed Interest Rate, from the Due Date to, but excluding, the date of final payment;

- 15.3.3 in the case of a payment of compensation for the estimated change in project costs that does not result in Capital Expenditure being incurred by the Seller but which reflects a change in the costs being incurred by the Seller after the Commercial Operation Date and/or the revenue lost by the Seller, the Buyer shall compensate the Seller in accordance with clause 15.6 by an adjustment to the Commercial Energy Payment;
- 15.3.4 the Buyer shall give the Seller such relief from its obligations under this Agreement, as is reasonable for such a Compensation Event; and/or
- 15.3.5 the Seller shall be entitled to enforce the Implementation Agreement, if the Compensation Event arises out of the failure of the Buyer to make a due payment as detailed in clause 8.3.
- 15.4 If information is provided after the dates referred to in clause 15.2, then the Seller shall not be entitled to any extension of time, compensation, or relief from its obligations under this Agreement in respect of the period for which the information is delayed.
- 15.5 If the Parties cannot agree on the extent of any compensation, delay incurred, or relief from the Seller's obligations under this Agreement, or the Buyer disagrees that a Compensation Event has occurred (or as to its consequences), or that the Seller is entitled to any relief under this clause 15 (*Consequences of a Compensation Event*), the Parties shall resolve the matter in accordance with clause 27 (*Fast-Track Dispute Resolution*).
- 15.6 Any payment of compensation for loss of revenue referred to in clause 15.3 shall be calculated in accordance with Schedule 6 (*Deemed Energy Payment*), and shall be in addition to any other applicable compensation payable under clause 15.3.

16. FORCE MAJEURE

- 16.1 Subject to clause 16.2.2, the Party claiming relief shall be relieved from liability under this Agreement to the extent that, by reason of the Force Majeure event, it is not able to perform all or a material part of its obligations under this Agreement.
- 16.2 Where a Party is (or claims to be) affected by an event of Force Majeure:
- 16.2.1 it shall take all reasonable steps to mitigate the consequences of such an event upon the performance of its obligations under this Agreement and to resume performance of its obligations affected by the event of Force Majeure as soon as practicable, and shall use all reasonable endeavours to remedy its failure to perform; and
- 16.2.2 it shall not be relieved from liability under this Agreement to the extent that it is not able to perform, or has not in fact performed, its

obligations under this Agreement due to its failure to comply with its obligations under sub-clause 16.2.1.

- 16.3 The Party claiming relief shall serve written notice on the other Party within five (5) Business Days of it becoming aware of the relevant event of Force Majeure. Such initial notice shall give sufficient details to identify the particular event claimed to be an event of Force Majeure.
- 16.4 A subsequent written notice shall be served by the Party claiming relief on the other Party within a further fifteen (15) Business Days which shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the event of Force Majeure on the ability of the Party to perform, the action being taken in accordance with clause 16.2.1, the date of the occurrence of the event of Force Majeure and an estimate of the period of time required to overcome it (and/or its effects).
- 16.5 If the Force Majeure event occurs prior to the Scheduled COD, the Scheduled COD shall be postponed by such time as shall be reasonable for such a Force Majeure event, taking into account the likely effect of the delay.
- 16.6 The Party claiming relief shall notify the other as soon as the consequences of the event of Force Majeure have ceased and when performance of its affected obligations can be resumed.
- 16.7 If, following the issue of any notice referred to in clause 16.4, the Party claiming relief receives or becomes aware of any further information relating to the event of Force Majeure (and/or any failure to perform), it shall submit such further information to the other Party as soon as reasonably possible.
- 16.8 The Seller's sole right to relief in relation to the occurrence of an event of Force Majeure shall be as provided in this clause 16 (*Force Majeure*).
- 16.9 The Seller shall not be entitled to enforce this clause 16.9 pursuant to any Force Majeure event in respect of which it is entitled to bring a claim under any insurance policy or would have been so entitled had it been in compliance with clause 19.1 (*Insurances and Information*). If, during any 12 month period commencing on 1 April, the cumulative duration of Force Majeure events or their consequences, each of which event lasts twenty four (24) hours or longer, exceeds sixty (60) or more days, the Seller shall be entitled to an extension of the Term and/or other relief from the Buyer as shall place the Seller in the same overall economic position as it would have been in but for such Force Majeure event, provided that any compensation shall not take a monetary form and the total extension of the Term shall not exceed ten (10) years.

17. UNFORESEEABLE CONDUCT

- 17.1 Should any Unforeseeable Conduct occur which adversely affects the general economic position of the Seller, the Seller shall be entitled to

such compensation and/or relief from the Buyer as shall place the Seller in the same overall economic position as the Seller would have been in but for such Unforeseeable Conduct.

- 17.2 Should any Unforeseeable Conduct occur which beneficially affects the general economic position of the Seller, the Seller shall pay the value of such benefit to the Buyer so that the Seller remains in the same overall economic position it would have been in had the materially beneficial Unforeseeable Conduct not occurred.
- 17.3 Neither Party shall be entitled to any relief or compensation under this clause 17 (*Unforeseeable Conduct*) unless the economic consequences of the Unforeseeable Conduct exceed zero point five percent (0.5%) of the sum of all Early Operating Energy Payments (if any), Deemed Energy Payments (if any) and Commercial Energy Payments made to the Seller during the preceding 12 month period.
- 17.4 The Party claiming the occurrence of the Unforeseeable Conduct ("**Claiming Party**") shall give written notice to the other Party ("**Receiving Party**") containing reasonable particulars of such conduct and its likely economic consequences to the Seller, whether adverse or beneficial.
- 17.5 Subject to clause 17.6, the Receiving Party shall have 60 (sixty) days from the date of receipt of such notice to effect a remedy for the Unforeseeable Conduct which restores the general economic position of the Seller to that which it would have been in if such Unforeseeable Conduct had not occurred. If the Receiving Party does not effect such a remedy within such period, the Parties shall consult within 10 (ten) Business Days after the expiration of such period with a view to reaching a mutually satisfactory resolution of the situation. If a mutually satisfactory resolution has not been reached within such 10 (ten) Business Day consultation period, the matter shall be dealt with in accordance with clause 26 (*Dispute Resolution*).
- 17.6 If the Seller is the Claiming Party, and the remedy contemplated by the Buyer under clause 17.5 is monetary compensation, the Buyer shall have the option to compensate the Seller as a result of the Unforeseeable Conduct either:
- 17.6.1 in one lump-sum payment, payable within sixty (60) Business Days of its receipt of the notice contemplated in clause 17.5 from the Seller; or
- 17.6.2 in equal monthly instalments for the remainder of the Term, commencing within sixty (60) Business Days of its receipt of the notice contemplated in clause 17.5 from the Seller, provided that interest shall accrue on the full amount due and payable, at the Agreed Interest Rate, from the Due Date to, but excluding, the date of final payment.

17.7 In so far as the Seller is the Claiming Party, it shall use all reasonable endeavours to minimise and mitigate the effects of any Unforeseeable Conduct.

18. TERMINATION

18.1 No Termination

Neither Party shall have any right nor shall it exercise or purport to exercise, any right to terminate this Agreement except as expressly set out in this Agreement.

18.2 Termination for Government Default

Simultaneously with termination of the Implementation Agreement for a Government Default, this Agreement shall terminate.

18.3 Termination for Seller Default

18.3.1 The Seller shall notify the Buyer of the occurrence, and details, of any Seller Default promptly on the Seller becoming aware of its occurrence.

18.3.2 On the occurrence of a Seller Default, or within a reasonable time after the Buyer becomes aware of the same, the Buyer may:

18.3.2.1 where the Seller Default is the default detailed in subclause (c) of the definition of "**Seller Default**" (namely failure to achieve the Commercial Operation Date on or before the Last COD); or the default detailed in subclause (f) of that definition (namely the termination of the Implementation Agreement due to failure by the Seller to comply with the Economic Development Obligations as detailed in the Implementation Agreement), serve a notice on the Seller terminating this Agreement (save for clauses 20 (*General Seller Undertakings*) to 35 (*Miscellaneous*)) with immediate effect;

18.3.2.2 where the Seller Default is the default detailed in subclause (b) of the definition of "**Seller Default**" (namely failure to Commence and Continue Construction of the Facility within one hundred and eighty (180) days of the Effective Date), if the same is continuing, serve notice of default on the Seller requiring the Seller to remedy the Seller Default referred to in such notice of default (if the same is continuing) within ninety (90) days of such notice of default being delivered. If the Seller Default is not remedied within such period, the Buyer may serve a further notice on the Seller terminating this Agreement (save for clauses 20 (*General Seller Undertakings*) to 35 (*Miscellaneous*)) with immediate effect; or

18.3.2.3 for any other Seller Default, while the same is subsisting, serve notice of default on the Seller requiring the Seller to remedy the Seller Default referred to in such notice of default (if the same is continuing) within one hundred and eighty (180) days of such notice of default being delivered. If the Seller Default is not remedied within such period, the Buyer may serve a further notice on the Seller terminating this Agreement (save for clauses 20 (*General Seller Undertakings*) to 35 (*Miscellaneous*)) with immediate effect.

18.3.3 Buyer's Costs

18.3.3.1 The Seller shall reimburse the Buyer with all costs incurred by the Buyer in exercising any of its rights in terms of this clause 18.3 (*Termination for Seller Default*). The Buyer shall take reasonable steps to mitigate such costs.

18.3.3.2 The rights of the Buyer (to terminate or otherwise) under this clause 18.3 (*Termination for Seller Default*) are in addition (and without prejudice) to any other right which the Buyer may have in law to claim the amount of any Direct Loss or damages suffered by the Buyer on account of the acts or omissions of the Seller (or to take any action other than termination of this Agreement).

18.4 Termination for Corrupt Acts

Simultaneously with termination of the Implementation Agreement for a Corrupt Act, this Agreement shall terminate.

19. PROJECT INSURANCE

19.1 Insurances and information

19.1.1 The Seller shall, in accordance with this clause 19 (*Project Insurance*), obtain and maintain in effect, at its own cost and expense, such insurance coverage as is required by:

19.1.1.1 any Laws; and

19.1.1.2 the standards of a Reasonable and Prudent Operator.

19.1.2 The Seller shall take reasonable steps to ensure that its Contractors obtain and maintain in effect at all times such insurance cover as is appropriate for a reasonable and prudent contractor.

19.2 Application of insurance proceeds

Unless the Buyer (acting reasonably) otherwise agrees in writing, the Seller shall apply all proceeds of any insurance claim made due to loss or damage to the Project or any part of the Facility (other than claims under any loss of revenue policies) towards reinstatement,

reconstruction, replacement, repair or renewal of such loss or damage in the first instance.

20. GENERAL SELLER UNDERTAKINGS

- 20.1 As between the Parties and save as otherwise expressly provided for in this Agreement, at all times during the Term, the Seller shall exercise its rights and perform all of its obligations as provided for in this Agreement, including the Construction, Operation and Maintenance of the Facility, at its sole cost and risk and in compliance with the requirements of:
- 20.1.1 applicable Laws;
 - 20.1.2 the Codes;
 - 20.1.3 the Consents;
 - 20.1.4 the terms and conditions of this Agreement;
 - 20.1.5 the standards of a Reasonable and Prudent Operator; and
 - 20.1.6 relevant manufacturers' guidelines and instructions.
- 20.2 The Seller shall at all times ensure that sufficient suitable and appropriately qualified and experienced personnel will be employed (whether by the Seller or its Contractors) to undertake the Construction, Operation and Maintenance of the Facility and that such personnel shall be located in the Republic of South Africa. Without limiting the generality of the foregoing, the Seller shall ensure that all key personnel positions are always filled as soon as reasonably possible.
- 20.3 The Buyer may require the Seller to remove any employee or other personnel of the Seller or any Contractor from the Project Site and the Seller shall do so (provided such removal is permitted under applicable Law) if in the reasonable opinion of the Buyer such employee or personnel engages in any conduct which might reasonably result in a breach of any provision of this Agreement or threaten public health, safety or security, and the Seller shall as soon as reasonably possible replace such employee or personnel with suitable appropriately qualified and experienced replacements (provided such replacement is permitted under applicable Law).

21. INTELLECTUAL PROPERTY OF THE BUYER

- 21.1 All intellectual property rights whatsoever, whether capable of registration or not, regarding the Buyer's name, trademarks, logos, image and all other intellectual property matters relating to the Buyer, including its name, trademarks, logos and/or image shall remain the sole property of the Buyer.
- 21.2 Subject to existing rights and obligations and clause 21.3, the Buyer shall, on prior written application by the Seller, grant a non-exclusive

revocable right and licence to the Seller to use the Buyer's trademarks and logos for a period not to exceed the remainder of the Term.

- 21.3 In order to establish and maintain standards of quality and propriety acceptable to the Buyer, in the event that the Seller desires to use the Buyer's trademarks or logos in any way, the Seller shall first submit the concept or a sample of the proposed use to the Buyer for approval, which shall be in its sole and absolute discretion. The Buyer shall use reasonable endeavours to advise the Seller of its approval or disapproval of the concept or sample within twenty (20) Business Days of its receipt of the concept or sample. If the Buyer approves the concept or sample, the Seller shall not depart therefrom in any respect without the Buyer's further prior written approval.
- 21.4 If at any time the Buyer revokes its approval for the specified use of any trademark or logo, the Seller shall forthwith discontinue all use of such trademark or logo and shall remove from public sale or distribution any previously approved product in respect of which the Buyer has revoked its approval. The costs incurred by the Seller as a result of such revocation shall be borne by the Seller if the grounds for the revocation include any ground described in clause 21.5.
- 21.5 The Buyer may revoke its approval immediately upon ten (10) Business Days written notice to the Seller if the Seller, any Contractor or any of its or its Contractors' officers, directors or employees commits any crime or otherwise engages in conduct which violates any Law, or engages in any conduct that offends against public morals and decency and, in the Buyer's reasonable opinion, materially prejudices the reputation and public goodwill of the Buyer.
- 21.6 The Seller acknowledges that the name or names of the Buyer (the "**Protected Names**") are associated with and peculiar to the Buyer and are the intellectual property of the Buyer. Consequently, the Seller agrees that the sole and exclusive ownership of the Protected Names shall vest in the Buyer.
- 21.7 In circumstances where the Seller utilises any of the Protected Names, either on its own or in combination or association with any other name, it does so only in terms of this Agreement and with the prior approval of the Buyer. On termination or expiry of this Agreement, the Seller shall not be entitled to operate or conduct any business using any of the Protected Names either on its own or in combination or association with any other name.
- 21.8 Within twenty (20) Business Days after the end of the Term and where the Seller has operated a company utilising any of the Protected Names with the permission of the Buyer, the Seller shall either:
- 21.8.1 de-register the company bearing any of the Protected Names; or
- 21.8.2 change the name to a name not substantially similar to any of the Protected Names.

21.9 The naming of the Seller's business operation shall be undertaken in consultation with the Buyer and subject to the Buyer's approval. In circumstances where the name chosen by the Seller and approved by the Buyer is not part of the Buyer's intellectual property, then the rights of the Buyer contemplated in clause 21.8 shall not be applicable and the intellectual property shall be the sole property of the Seller.

22. SET-OFF

Whenever any sum of money is agreed or determined to be due and payable by the Seller to the Buyer, such sum may at the Buyer's discretion be deducted from or applied to reduce the amount then due, or which at any time afterwards may become due from the Buyer to the Seller; provided that the Buyer gives five (5) Business Days' notice to the Seller of its intention to apply such deduction.

23. ASSIGNMENT

23.1 Prohibition on Assignment

Save as provided in clause 23.2 (*Restrictions on Assignment*), neither Party may sell, cede, delegate, assign, transfer or otherwise dispose of (collectively, "**Assign**") all or any part of its rights and/or obligations hereunder to a third party without the prior written approval of the other Party.

23.2 Restrictions on Assignment

Notwithstanding clause 23.1 (*Prohibition on Assignment*):

23.2.1 where the Seller's rights and obligations under the Implementation Agreement have been assigned in accordance with the terms of the Implementation Agreement, the Seller may Assign its rights and obligations under this Agreement to the same assignee as in the assignment under the Implementation Agreement;

23.2.2 the Buyer may Assign all (and not less than all) of its rights and obligations under this Agreement to a creditworthy Affiliate of the Buyer, provided that, prior to such Assignment, it obtains:

23.2.2.1 the prior written approval of the Seller, which approval shall not be unreasonably withheld, conditioned or delayed; and

23.2.2.2 an amendment to the Implementation Agreement, executed by the Government, pursuant to which the Government agrees to extend the terms of the Implementation Agreement to cover the obligations and liabilities of the Buyer's assignee under this Agreement and the Direct Agreement, together with the obligations and liabilities of the Buyer under this Agreement and the Direct Agreement which are due but not yet discharged at date of such Assignment, and provides the same to the Seller,

provided further that the Buyer shall assign all (and not less than all) of its rights and obligations under the Direct Agreement to its assignee simultaneously with its Assignment of this Agreement; and

23.2.3 the Buyer shall Assign all or some of its rights and obligations under this Agreement to a third party as part of and pursuant to:

23.2.3.1 the dissolution, restructuring, amalgamation or reorganisation of the Buyer or its businesses, or the occurrence of an analogous event; or

23.2.3.2 the transfer of all or a material part of the Buyer's business, property, assets and/or undertaking to one or more third parties and/or successor entities;

provided that, in each case:

23.2.3.2.1 such dissolution, restructuring, amalgamation, reorganisation, analogous event or transfer is at the instruction of the Government and/or NERSA and/or any other Responsible Authority, or is required to give effect to any mandatory requirement of Law;

23.2.3.2.2 the Buyer obtains and provides to the Seller an amendment to the Implementation Agreement, executed by the Government, pursuant to which the Government agrees to extend the terms of the Implementation Agreement to cover the obligations and liabilities of the Buyer's assignee under this Agreement and the Direct Agreement, together with the obligations and liabilities of the Buyer under this Agreement and the Direct Agreement which are due but not yet discharged at date of such Assignment; and

23.2.3.2.3 the Buyer assigns its corresponding rights and obligations under the Direct Agreement to its assignee simultaneously with its Assignment of this Agreement.

24. CONTRACTORS

The Seller shall not be relieved of any obligation, responsibility or liability under this Agreement by virtue of the appointment of any Contractor to carry out any part of the Construction, Operation and/or Maintenance of the Facility, and the Seller shall be responsible under this Agreement for the payment, performance, acts, defaults, omissions, breaches and negligence of all Contractors.

25. CHANGES IN CONTROL

From the Signature Date, the Seller shall procure that there is no Change in Control in the Seller (or in any company of which the Seller is a subsidiary),

unless such Change in Control has been approved in terms of the Implementation Agreement.

26. DISPUTE RESOLUTION

26.1 Referable Disputes

The provisions of this clause 26 (*Dispute Resolution*) shall, save where expressly provided otherwise, apply to any dispute arising in relation to or in connection with any aspect of this Agreement between the Parties.

26.2 Internal Referral

26.2.1 If a dispute arises in relation to any aspect of this Agreement, the Parties shall attempt in good faith to come to an agreement in relation to the disputed matter, in accordance with the following informal process:

26.2.1.1 all disputes shall first be referred to a meeting of the liaison officers or other designated executives from each Party who are actively involved in the Project, and have sufficient authority to be able (if necessary with consultation back to their respective organisations) to resolve it; and

26.2.1.2 if the Parties have been unable to resolve the dispute within fifteen (15) days of referral to the persons specified in clause 26.2.1.1, either Party may refer the dispute for a decision by the accounting officer or accounting authority of the Buyer and the chief executive officer or equivalent officer of the Seller.

26.2.2 In attempting to resolve the dispute in accordance with the provisions of this clause 26.2 (*Internal Referral*), the Parties shall (and shall procure that their employees and representatives shall) use reasonable endeavours to resolve such dispute without delay by negotiations or any other informal procedure which the relevant representatives may adopt. Those attempts shall be conducted in good faith in an effort to resolve the dispute without necessity for formal proceedings.

26.2.3 Any dispute which has not been resolved by the representatives contemplated in clause 26.2.1.2 within fifteen (15) days of the dispute being referred to them (or any longer period agreed between the Parties) shall be treated as a dispute in respect of which informal resolution has failed.

26.3 Performance to Continue

No reference of any dispute to any resolution process in terms of this clause 26 (*Dispute Resolution*) shall relieve either Party from any liability for the due and punctual performance of its obligations under this Agreement.

26.4 Litigation

- 26.4.1 Save where any dispute has been expressly referred for determination in terms of clause 27 (*Fast Track Dispute Resolution*), if informal resolution of any dispute has failed, then the dispute may be referred to litigation in the High Courts by either Party.
- 26.4.2 Neither Party is limited in any proceedings before the High Court to the information, evidence or arguments used in the informal attempts to resolve the dispute.

27. FAST TRACK DISPUTE RESOLUTION

- 27.1 Disputes expressly referred for determination pursuant to this clause 27 (*Fast Track Dispute Resolution*) shall be determined by the relevant Independent Expert.
- 27.2 Within five (5) Business Days after a dispute has been referred by either Party to the appropriate Independent Expert, the Independent Expert shall require the Parties to submit in writing their respective arguments. The Independent Expert shall, in his absolute discretion, consider whether a hearing is necessary in order to resolve the dispute.
- 27.3 It shall be entirely within the power and competence of the Independent Expert to decide upon any matters related to the proper preparation of the dispute for hearing and in that regard the Independent Expert shall direct the Parties accordingly.
- 27.4 The Independent Expert shall set the date for the hearing, choose the venue (which must be a venue in South Africa) for the hearing and determine all matters regarding any aspect of the hearing. Moreover, the Independent Expert can decide whether at the hearing the Parties are to give oral evidence or confine themselves to presenting their cases in writing or by some other appropriate procedure. In this regard, the Independent Expert must be guided by considerations of fairness, the cost-effective resolution of the dispute, and the need to resolve the dispute quickly.
- 27.5 The Independent Expert shall provide both Parties with his written decision on the dispute, within 20 (twenty) Business Days of the referral (or such other period as the Parties may agree after the referral). The Independent Expert shall give his reasons for the award, if so requested by either Party.
- 27.6 The Independent Expert's costs of any referral shall be borne as the Independent Expert shall specify or, if not specified, equally by the Parties. Each Party shall bear its own costs arising out of the referral, including its legal costs and the costs and expenses of any witnesses.
- 27.7 The Independent Expert shall act impartially and may take the initiative in ascertaining the facts and the Law.

- 27.8 Should the need arise for either Party to seek interim or temporary relief before the adjudication is finalised, that Party may apply to the Independent Expert to grant such interlocutory order or give the required temporary relief and the Independent Expert shall have the same power to do so as if the matter were one heard by a Judge in the High Court of South Africa, save that if by Law such power or order cannot be exercised or given by an Independent Expert then, and then only, should the Parties refer such matter to such High Court.
- 27.9 The proceedings shall be confidential and all information, data or documentation disclosed or delivered by either Party to the Independent Expert in consequence of or in connection with his appointment as Independent Expert shall be treated as confidential. Neither the Parties nor the Independent Expert shall, save as permitted by clause 30 (*Confidentiality*) of this Agreement, disclose to any person any such information, data or documentation unless the Parties otherwise agree in writing, and all such information, data or documentation shall remain the property of the Party disclosing or delivering the same and all copies shall be returned to such Party on completion of the Independent Expert's work.
- 27.10 The Independent Expert is not liable for anything done or omitted in the discharge or purported discharge of his functions as Independent Expert, unless the act or omission is grossly negligent or in bad faith. Any employee or agent of the Independent Expert is similarly protected from liability.
- 27.11 Should any Party fail to co-operate with the Independent Expert with the result that in the view of the Independent Expert such default or omission prejudices the adjudication process, then the Independent Expert can either:
- 27.11.1 give that Party written notice that unless it remedies the default or omission within a given time, it will forfeit the right to continue to participate in the adjudication; or
- 27.11.2 warn the Party in writing that its default or omission may make it liable to a punitive order of costs irrespective of whether it succeeds in the adjudication or not and such punitive award of costs may include an order of attorney and client costs or attorney and own client costs as those expressions are understood in the Uniform Rules of Court.
- 27.12 The Independent Expert shall be deemed not to be an arbitrator but shall render his decision as an expert and the provisions of the Arbitration Act, 1965 and any other law relating to arbitration shall not apply to the Independent Expert or his determination or the procedure by which he reaches his determination. The Independent Expert's decision shall be final and binding on the Parties.

28. LIABILITY

28.1 Direct losses

28.1.1 The Parties' liability to each other in respect of any claim that arises pursuant to this Agreement, whether under delict or contract, shall be as detailed in this Agreement, and no Party shall have any additional liability to the other Party in respect of such claim.

28.1.2 Notwithstanding anything contained to the contrary in this Agreement, neither Party shall be liable to the other Party for any Special Loss suffered by such other Party as a result of any act or omission by the first Party.

28.1.3 Save as expressly provided elsewhere in this Agreement, neither Party shall be liable to the other Party for any losses, liabilities, expenses, damages, costs and claims (including Claims) suffered or claimed which arise out of, under or in connection with any alleged breach of any statutory duty or delictual act or omission or otherwise.

28.2 Mitigation

The Parties shall comply with their common law duties to mitigate any losses, liabilities, expenses, damages, costs and claims (including Claims) they may have pursuant to this Agreement.

29. THIRD PARTY INDEMNITY

Each Party (the "**Indemnifying Party**") shall indemnify and hold harmless the other Party, its Affiliates, and their respective officers, employees, consultants, agents and representatives (the "**Indemnified Parties**") against any and all Claims which may be asserted against or suffered by any of the Indemnified Parties, which relate to any death, injury or loss or damage to property suffered by the relevant third party, to the extent resulting from any negligent act or omission of the Indemnifying Party and its respective officers, employees, consultants, agents and representatives, provided that the death, injury, loss or damage suffered by the relevant third party is not attributable to any act or omission of any one or more of the Indemnified Parties or to the failure of one or more of the Indemnified Parties to take reasonable steps to mitigate or avoid the death, injury, loss or damage in question.

30. CONFIDENTIALITY

30.1 Confidential Information

Each Party shall treat any and all information and data disclosed to it by the other Party in connection with this Agreement in any form whatsoever, and this Agreement itself (the "**Confidential Information**") as confidential and proprietary, shall preserve the secrecy of the Confidential Information and shall not use the Confidential Information

for any purpose other than solely in connection with the Project. Project Data shall not constitute Confidential Information.

30.2 Exclusions to Confidential Information

For the purposes of this clause 30 (*Confidentiality*), the term "**Confidential Information**" shall not include information which:

- 30.2.1 at the time of disclosure or at any time thereafter is in, or becomes part of, the public domain other than through a breach of this clause 30 (*Confidentiality*);
- 30.2.2 the Party receiving the information can prove was already known to it, or was independently acquired or developed by it without being in breach of its obligations under this clause 30 (*Confidentiality*);
- 30.2.3 became available to the Party receiving the information from another source in a non-confidential manner otherwise than in breach of an obligation of confidentiality; or
- 30.2.4 is published by, or the publication of which is required by, a Responsible Authority or any court.

30.3 Permitted disclosure of Confidential Information

Notwithstanding the provisions of clause 30.1 (*Confidential Information*), the Confidential Information may be disclosed:

- 30.3.1 by either Party to any Responsible Authority (where for the purposes of this clause 30.3 (*Permitted disclosure of Confidential Information*) such definition shall be limited to South Africa) or to any of the shareholders (direct or indirect), agents, consultants, contractors, advisers, financiers, potential financiers, investors, potential purchasers of the interests of a shareholder (direct or indirect), insurers or lenders of such Party or its Affiliates, in any such case for the purpose of enabling the disclosing Party to comply with its obligations under this Agreement, provided that:
 - 30.3.1.1 such Party notifies the recipient at or about the time of such disclosure that the information is confidential and should not be disclosed by the recipient to third parties; and
 - 30.3.1.2 such Party shall be responsible for ensuring that the recipient keeps the Confidential Information confidential and shall accordingly be responsible for any failure of the recipient to do so;
- 30.3.2 by either Party as may be required by the regulations of any recognised securities exchange upon which the share capital of the Party (or any shareholder (direct or indirect) in the Party) is or is proposed to be from time to time listed or dealt in, and the Party making the disclosure shall, if reasonably practicable prior to

making the disclosure, and in any event as soon as reasonably practicable thereafter, supply the other Party with a copy of such disclosure or statement and details of the persons to whom the Confidential Information is to be, or has been, disclosed;

- 30.3.3 by either Party as may be necessary to comply with any obligation under any applicable Law;
- 30.3.4 by the Buyer to the Distributor or NTC, as applicable, as may be necessary to enable the Distributor or NTC to operate the System and carry out its obligations in relation thereto as a Reasonable and Prudent Operator (including in relation to the application by any person for connection to the System), provided that:
 - 30.3.4.1 only Confidential Information which is necessary for such purpose is disclosed by the Buyer to the Distributor or NTC, as applicable; and
 - 30.3.4.2 the Buyer notifies the recipient at or about the time of such disclosure that the information is confidential and should not be disclosed by the recipient to third parties;
- 30.3.5 by either Party if required by any court, any arbitrator or administrative tribunal or an expert in the course of proceedings before it to which the disclosing Party is a party; or
- 30.3.6 by either Party, if so agreed in writing by the Parties prior to the disclosure.

30.4 Ownership and treatment

- 30.4.1 Save for all Project Data, all information supplied by or on behalf of a Party shall remain the property of such Party, and this Agreement shall not operate to transfer ownership interest therein.
- 30.4.2 The Parties shall, in so far as is reasonably practicable, ensure that any copies of the Confidential Information, whether in hard copy or computerised form, shall clearly identify the Confidential Information as confidential.

31. GOVERNING LAW AND JURISDICTION

- 31.1 The validity, construction and performance of this Agreement shall be governed by the laws of South Africa.
- 31.2 Subject to the provisions of clause 27 (*Fast Track Dispute Resolution*), each Party agrees that the High Court of South Africa shall have exclusive jurisdiction to hear and decide any application, action, suit, proceeding or dispute in connection with this Agreement, and irrevocably submits to the jurisdiction of the High Court of South Africa.

32. NOTICES

32.1 Methods of delivery

Unless otherwise provided in this Agreement, all notices, requests, statements and other communications required or permitted between the Parties by this Agreement shall be in writing and either hand-delivered or sent by pre-paid registered post or facsimile to the address or number within South Africa of the Party concerned set out in clause 32.2 (*Addresses*) or such other address or number as contemplated in clause 32.4 (*Change in address*). No communication shall be effective until received by the addressee and a communication shall be deemed to have been received:

- 32.1.1 if delivered by hand during ordinary business hours, to its physical address in clause 32.2 (*Addresses*), when so delivered;
- 32.1.2 if delivered by pre-paid registered post, to its postal address in clause 32.2 (*Addresses*), seven (7) Business Days after posting, subject to proof of posting; and
- 32.1.3 if delivered by facsimile, upon sending, subject to confirmation of uninterrupted transmission on a transmission report and provided that a hard copy is promptly dispatched to the recipient in the manner provided in clauses 32.1.1 or 32.1.2 above.

32.2 Addresses

The Parties choose the postal and physical addresses and contact details set out below:

32.2.1 The Seller:

[To be inserted].

32.2.2 The Buyer:

Postal Address: PO Box 1091, Johannesburg 2000, South Africa

Physical Address: Eskom Holdings SOC Limited, Megawatt Park, Maxwell Drive, Sunninghill, South Africa

Fax No.: +27 11800 5503

Tel No.: +27 11800 5639

Attention: General Manager, Legal Department, Corporate Services Division

32.3 Domicilium citandi et executandi

The Parties choose the physical address set out opposite their names in clause 32.2 (*Addresses*) as their *domicilium citandi et executandi* for all purposes of and in connection with this Agreement. Notwithstanding anything to the contrary herein, a written legal notice or process actually received by a Party shall be an adequate written notice or process, notwithstanding that it was not sent to or delivered at its chosen *domicilium citandi et executandi*.

32.4 Change in address

Either Party may change its nominated physical or postal address to another physical or postal address, as the case may be, in South Africa (and not in any other country) or its contact details by giving at least fifteen (15) days' prior written notice to the other Party.

33. WARRANTIES

33.1 Seller warranties

The Seller represents and warrants to the Buyer as on the Signature Date and on each day thereafter during the Term, that:

- 33.1.1 it is a limited liability company, duly incorporated and validly existing under the Laws and has taken all necessary actions to authorise its execution of and to fulfil its obligations under this Agreement and the Project Documents;
- 33.1.2 it has the sole purpose, object and business of undertaking the Project and selling Energy in terms of this Agreement;
- 33.1.3 its obligations under this Agreement and its rights and obligations under the Project Documents to which it is a party are legal, valid and binding and enforceable against it, in accordance with the terms of this Agreement and such Project Documents to which it is a party;
- 33.1.4 all the Project Documents have been duly executed on proper authority and are in full force and effect as at the Effective Date, save for those Project Documents identified in Schedule 7 (*Project Documents*) that will be executed in the Agreed Form after the Effective Date on proper authority;
- 33.1.5 the execution and performance of any Project Documents do not and will not contravene any provision of the memorandum or articles of association or memorandum of incorporation of the Seller as at the Effective Date, or any order or other decision of any Responsible Authority or arbitrator that is binding on the Seller as at the Effective Date;
- 33.1.6 all Consents required for the conduct of the Project are in full force and effect as at the Signature Date, save for any Consents which

are not required under the Laws to be obtained by the Signature Date, provided that the Seller warrants that it knows of no reason (having made all reasonable enquiries in this regard) why any such Consent will not be granted on reasonable terms by the time it is required to obtain such Consent;

- 33.1.7 no litigation, arbitration, investigation or administrative proceeding is in progress as at the Signature Date or, to the best of the knowledge of the Seller as at the Signature Date (having made all reasonable enquiries), threatened against it or any of the Contractors, which is likely to have a material adverse effect on the ability of the Seller to conduct the Project;
- 33.1.8 the Seller is not subject to any obligation or non-compliance which is likely to have a material adverse effect on its ability to conduct the Project;
- 33.1.9 no proceedings or any other steps have been taken or, to the best of the knowledge of the Seller (having made all reasonable enquiries), threatened for the winding-up or liquidation (whether voluntary or involuntary, provisional or final), judicial management (whether provisional or final), business rescue or deregistration of the Seller or for the appointment of a liquidator, judicial manager or similar officer over it or over any of its assets;
- 33.1.10 it has not carried out any trading or business activities since its incorporation or incurred any liabilities other than in connection with the operations of the Project (including the entering into of this Agreement and the other Project Documents);
- 33.1.11 all information disclosed by or on behalf of the Seller to the Buyer at any time up to the Signature Date and, in particular, during the bid process preceding the award of this Agreement to the Seller, is true, complete and accurate in all material respects and the Seller is not aware of any material facts or circumstances not disclosed to the Buyer which would, if disclosed, be likely to have an adverse effect on the Buyer's decision (acting reasonably) to enter into this Agreement with the Seller; and
- 33.1.12 the copies of the executed Project Documents, which have been delivered to the Buyer, are true and complete copies of such Project Documents and there are no other documents replacing or relating to any such Project Documents, which would materially affect the performance of these Project Documents.

33.2 Buyer warranties

The Buyer represents and warrants to the Seller as on the Signature Date and on each day thereafter during the Term, as follows:

- 33.2.1 it is duly incorporated under the laws of South Africa and has the right, power and authority to enter into this Agreement and to perform its obligations hereunder; and

- 33.2.2 the execution and performance of this Agreement by it has been duly authorised by all necessary corporate action, and its obligations hereunder constitute valid, binding and enforceable obligations.

34. REPRESENTATIVES

34.1 Buyer's Representative

- 34.1.1 The Buyer shall appoint from the Signature Date until the Expiry Date an individual (the "**Buyer's Representative**") whose identity shall be notified to the Seller to act as the Buyer's duly authorised representative for all purposes connected with this Agreement. The Buyer shall notify the Seller in writing forthwith upon the replacement at any time of the Buyer's Representative and such replacement shall not be effective until notice has been given.
- 34.1.2 The Buyer's Representative may delegate any of his functions from time to time to a person or persons the identity of whom shall be notified to the Seller and references in this Agreement to the Buyer's Representative shall be construed to include such persons.
- 34.1.3 Any notice, instruction or information required to be given by or made to the Buyer shall only be valid if given by or delivered to the Buyer's Representative.

34.2 Seller's Representative

- 34.2.1 The Seller shall appoint from the Signature Date until the Expiry Date, an individual (the "**Seller's Representative**") whose identity shall be notified to the Buyer to act as the Seller's duly authorized representative for all purposes connected with this Agreement. The Seller shall notify the Buyer in writing forthwith upon the replacement at any time of the Seller's Representative and such replacement shall not be effective until such notice has been given.
- 34.2.2 Any notice, instruction or information required to be given by or made to the Seller shall only be valid if given by or delivered to the Seller's Representative.

35. MISCELLANEOUS

35.1 No partnership or agency

This Agreement shall not constitute or imply any partnership, joint venture, agency, fiduciary relationship or other relationship between the Parties other than the contractual relationship expressly provided for in this Agreement. Neither Party shall have, nor represent that it has, any authority to make any commitments on the other Party's behalf.

35.2 No amendment or variation

This Agreement may not be released, discharged, supplemented, interpreted, amended, varied or modified in any manner except by an instrument in writing signed by a duly authorised officer or representative of each of the Parties to this Agreement.

35.3 Waiver

35.3.1 The failure of any Party to exercise any contractual right or remedy shall not constitute a waiver thereof.

35.3.2 No waiver shall be effective unless it is communicated in writing to the other Parties.

35.3.3 No waiver of any right or remedy arising from a breach of contract shall constitute a waiver of any right or remedy arising from any other breach of this Agreement.

35.4 Third Parties

The Parties intend that terms and conditions of this Agreement shall be solely for the benefit of the Parties and their respective successors, and shall not confer any rights upon any third Parties.

35.5 Counterparts

This Agreement may be executed in any number of counterparts or duplicates, each of which shall be an original, and such counterparts or duplicates shall together constitute one and the same agreement.

35.6 Entire Agreement

35.6.1 This Agreement contains the whole agreement between the Parties in respect of the subject matter hereof and supersedes any prior written or oral agreement between them.

35.6.2 Each Party acknowledges and agrees that it is not entering into this Agreement in reliance on, and shall have no right of action against the other Party in respect of, any assurance, promise, undertaking, representation or warranty made by the other Party at any time prior to the Signature Date, unless it is expressly set out in this Agreement.

35.7 Further assurances

Each Party agrees to execute, acknowledge and deliver such further instruments, and do all further similar acts as may be necessary or appropriate to carry out the purposes and intent of this Agreement.

35.8 Direct Agreement

In the event that the Seller intends to finance the Project on a limited recourse or project finance basis, the Buyer agrees that it shall enter

into a Direct Agreement with the Lenders and the DoE. The Buyer shall provide the Seller with a certified copy of the fully executed Direct Agreement as soon as possible after execution thereof.

35.9 Public Relations and Publicity

35.9.1 The Seller acknowledges that certain information pertaining to the Project and the Project Data is required to be disclosed in accordance with the statutory reporting obligation of the Buyer to publish information about the performance of the Seller and/or any other information as it may be required to publish from time to time in response to enquiries from:

35.9.1.1 Parliament and its members and officers in accordance with the provisions of the Public Finance Management Act, 1999;

35.9.1.2 the Auditor-General under the Public Audit Act, 2004; and

35.9.1.3 persons acting in the public interest in accordance with the provisions of the Promotion of Access to Information Act, 2002.

35.9.2 Subject to clause 35.9.3, neither Party shall communicate with representatives of the press, television, radio or other communications media on any matter concerning this Agreement without the prior approval of the other Party, such consent not to be unreasonably withheld.

35.9.3 To the extent that the Buyer is obliged to disclose or publish information pursuant to clause 35.9.1, it undertakes to the Seller, if time permits, to consult with the Seller prior to any communication contemplated by this clause 35.9.3, and if time does not so permit, such consultation shall be dispensed with by the Parties.

35.9.4 No facilities to photograph or film in or upon the Project Sites shall be given to or permitted by the Seller unless the Buyer has given prior written approval.

35.10 Language

This Agreement is made only in the English language. Each document referred to in this Agreement or to be delivered under it shall be in the English language.

35.11 Costs

Each Party shall bear its own costs in relation to the negotiation and preparation of this Agreement.

35.12 Severability

If any provision of this Agreement is held by a court or other Responsible Authority to be unlawful, void or unenforceable, it shall be deemed to be deleted from this Agreement and shall be of no force and

effect and this Agreement shall remain in full force and effect as if such provision had not originally been contained in this Agreement. In the event of any such deletion the Parties shall negotiate in good faith in order to agree the terms of a mutually acceptable and satisfactory alternative provision in place of the provision so deleted.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their duly authorised representatives as of the date first written above.

[NAME OF SELLER]

By: _____

Name:

Title:

Date:

ESKOM HOLDINGS SOC LIMITED

By: _____

Name:

Title:

Date:

DETAILS OF THE PROJECT AND FACILITY

Part 1

Facility

[Seller to provide a one paragraph description of the Facility and its components and a scale map of the Facility showing the layout of the Project, including location of the Facility, the Reference Mast, substation and cables up to the Delivery Point and the location of the Facility Metering Installation and the System Metering Installation.]

Project Name:

Contracted Capacity:

Wind Turbine Generator ("**WTG**") Type and nameplate capacity:

WTG Model Number:

Hub Height:

WTG Rotor Diameter:

Number of WTGs:

Layout of WTGs:

Co-ordinates of WTGs:

Voltage connection level:

P50 Energy Yield Forecast:

[Seller to provide average monthly forecasted Energy Output [MWh] for the first 20 years of operation or for the duration of this Agreement (whichever is the shortest). Forecasts shall be based upon P50 estimates. The Energy Output forecasts must be confirmed by an independent energy yield expert with at least five (5) years of relevant experience.]

Single Line Diagram

[Seller to provide single line diagram of the facility with a clear demarcation of the following:

Ownership and operational boundaries;

Delivery Point;

Point of Connection (as defined in the Transmission Agreement or the Distribution Agreement, as the case may be); and

Substation.]

Energy Rates

1. The Commercial Energy Rate shall be ZAR [●]/MWh, as Indexed annually.
2. The Early Operating Energy Rate shall be ZAR [●]/MWh, as Indexed annually, which is equal to 60% of the Commercial Energy Rate.

Indexation

[The Indexation applicable to the Commercial Energy Rate shall be extracted from of clause 2.4.1.2 of Part B of the RFP]

SCHEDULE 2

COMPLETION MILESTONES AND FORMS OF NOTICES

Part 1

Completion Milestones

[The Seller must include in this schedule, for information purposes only, a level 1 Project Schedule Gantt chart at monthly resolution to show the key activities, events, dependencies and milestones from early Project development through to Commercial Operation Date, dependencies and critical path. Other than for the Scheduled COD or as specifically provided for elsewhere in this Agreement, failure to achieve the milestones in such chart shall not be a breach of this Agreement.]

Estimated scheduled Unit Commencement Date for each Unit (for information purposes only):

Scheduled COD for the Facility:

Facility Completion Form

[on the letterhead of the Independent Engineer]

[Date]

Eskom Holdings SOC Limited
Megawatt Park
Maxwell Drive
Sunninghill
South Africa

CC copy to Fax No.: [+27 (11) 800 5503]¹

Attention: [●]²

Facility Completion Form

Dear Sirs,

We refer to the Power Purchase Agreement entered into between [●] and Eskom Holdings SOC Limited on [insert date] (the "PPA").

All capitalised terms in this notice ("**Notice**") shall, unless separately defined herein, bear the meaning ascribed to them in the PPA.

This Notice is the Facility Completion Notice as defined in and required to be issued in terms of the PPA.

Based on the information provided to us by the Seller, we hereby represent and warrant as at the date hereof the following:

- The Facility has passed the relevant acceptance tests and has been successfully commissioned in accordance with the relevant construction contract, the Codes and the Consents.
- The Achieved Capacity of the Facility, being the net capacity of the Facility determined pursuant to the acceptance tests described above, is [●]MW³.
- The Reference Mast has been installed at the location agreed in the PPA, has been successfully commissioned and is capable of performing its functions as set out in the PPA.

The Facility is ready to commence commercial operation and to deliver Energy Output to the Buyer.

¹ Fax number (and recipient) to be confirmed.

² Buyer to insert appropriate officer on or before the execution of this Agreement.

³ Amount to be included following completion of acceptance tests.

Yours faithfully,

[NAME OF INDEPENDENT ENGINEER]

Form of Notice of Commencement of Unit

[on the letterhead of the Seller]

[Date]

Eskom Holdings SOC Limited
Megawatt Park
Maxwell Drive
Sunninghill
South Africa

CC copy to Fax No.: *[+27 (11) 800 5503]*⁴

Attention: *[●]*⁵

Notice of Commencement of Unit [●]

Dear Sirs

We refer to the power purchase agreement dated *[●]*, (the "PPA") between Eskom Holdings SOC Limited (the "Buyer") and ourselves, *[●]* (the "Seller").

This notice ("**Notice**") is the Notice of Commencement of Unit referred to in clause 4.4 (*Early Operating Period*) of the PPA. Unless otherwise defined herein, capitalised terms used in this Notice shall have the meanings assigned to them in the PPA.

We hereby give notice that Unit *[●]* of the Facility has been successfully connected to the System as required in terms of the Transmission Agreement or the Distribution Agreement (as the case may be), and that the Unit Commencement Date for Unit *[●]* will be **[insert date]**.

The Capacity of Unit *[●]*, as measured at the Delivery Point, is *[●]*MW.

We hereby represent and warrant that:

1. We have obtained all of the Consents required for the Operation and Maintenance of Unit *[●]*, all of which remain in full force and effect, and we know of no reason why any such Consent may be withdrawn or terminated.
2. The Facility Metering Installation has been procured, installed, tested and successfully commissioned in accordance with the PPA.

⁴ Fax number (and recipient) to be confirmed.

⁵ Buyer to insert appropriate officer on or before the execution of this Agreement.

3. None of the events entitling the Buyer to terminate the PPA in accordance with clause 18 (*Termination*) has occurred and is continuing.
4. All of the Project insurances required pursuant to clause 19 (*Project Insurance*) of the PPA are in place and in full force and effect.

Yours faithfully,

[NAME OF SELLER]

Representative of the Seller

Form of Notice of Commencement of Facility

[on the letterhead of the Seller]

[Date]

Eskom Holdings SOC Limited
Megawatt Park
Maxwell Drive
Sunninghill
South Africa

CC copy to Fax No.: [+27 (11) 800 5503]⁶

Attention: [●]⁷

Notice of Commencement of Facility

Dear Sirs

We refer to the power purchase agreement dated [●] (the "PPA") between Eskom Holdings SOC Limited (the "Buyer") and ourselves, [●] (the "Seller").

This notice ("**Notice**") is the Notice of Commencement of Facility referred to in clause 4.5 (*Commercial Operation Date*) of the PPA. Unless otherwise defined herein, capitalised terms used in this Notice shall have the meanings assigned to them in the PPA.

We hereby represent and warrant as at the date hereof the following:

1. The Facility has achieved Facility Completion and the Facility Completion Form has been issued in respect of it.
2. The Achieved Capacity of the Facility is [●] MW.
3. The Facility is ready to commence commercial operation and to deliver Energy Output to the Buyer, and the Commercial Operation Date shall be **[insert date]**.
4. We have obtained all of the Consents required for the Operation and Maintenance of the Facility, all of which remain in full force and effect, and we know of no reason why any such Consent may be withdrawn or terminated.

⁶ Fax number (and recipient) to be confirmed.

⁷ Buyer to insert appropriate officer on or before the execution of this Agreement.

5. All agreements required for the Construction, Operation and Maintenance of the Facility and the performance by the Seller of its obligations under the PPA, including the Transmission Agreement or the Distribution Agreement (as the case may be), have been entered into, are in full force and effect and remain valid and binding.
6. The Facility Metering Installation has been procured, installed, tested and successfully commissioned in accordance with the PPA.
7. None of the events entitling the Buyer to terminate the PPA in accordance with clause 18 (*Termination*) have occurred and are continuing.
8. All of the Project insurances required pursuant to clause 19 (*Project Insurance*) of the PPA are in place and in full force and effect.

Yours faithfully,

[NAME OF SELLER]

Representative of the Seller

SCHEDULED AND UNSCHEDULED OUTAGES

The following conditions shall apply to ensure a good co-ordination between Seller and Buyer in respect of the Operation of the Facility during scheduled and Unscheduled Outages.

1. Three (3) year ahead Planned Maintenance Schedule

- 1.1 Not later than six (6) Months prior to the commencement of each Contract Year, (save for the first year of Operation of the Facility, for which the corresponding period shall be forty (40) Business Days prior to the Commercial Operation Date), the Seller shall provide indicative capacity plans, including maintenance schedules, for the three (3) year period.
- 1.2 The Buyer shall determine the Operating reserve and the Weekly unplanned allowance requirements resulting in the capacity in respect of which Maintenance can be undertaken for the three (3) year ahead period.
- 1.3 Not later than sixty (60) Business Days prior to the commencement of each Contract Year, the Buyer shall publish the provisional Maintenance schedule indicating which Maintenance has to be rescheduled to meet the requirements for System stability ("**Maintenance Schedule**"). The Buyer and the Seller, both acting reasonably shall consult and agree regarding alterations to the indicative capacity plans or Maintenance Schedules.

2. Annual Planned Maintenance Schedule

- 2.1 Not later than six (6) Months prior to the commencement of each Contract Year (save for the first year of Operation of the Facility, for which the corresponding period shall be forty (40) Business Days prior to the Commercial Operation Date), the Seller shall submit its Scheduled Outages for that year following consultation with the Buyer regarding the Buyer's anticipated major Maintenance Outages in that calendar year.
- 2.2 The Buyer may on not less than forty (40) Business Days' prior written notice to the Seller, request the Seller to reschedule a Scheduled Outage to an alternative Month and the Seller shall use all reasonable endeavours to accommodate such rescheduling if it is consistent with the standards of a Reasonable and Prudent Operator.
- 2.3 The Seller may on no less than twenty (20) Business Days' prior written notice to the Buyer reschedule a Scheduled Outage to an alternative Month; provided that such rescheduling is consented to in writing by the Buyer, which consent may not be unreasonably withheld.

3. **Monthly and Weekly planned maintenance schedule**

- 3.1 Following consultation with the Buyer regarding the Buyer's anticipated major maintenance outages in the Contract Month, not later than five (5) Business Days prior to the commencement of each calendar month (the "**Contract Month**"), the Seller shall submit its Scheduled Outages for that Contract Month.
- 3.2 The Buyer may on no less than five (5) Business Days' prior written notice to the Seller, request the Seller to reschedule a Scheduled Outage to an agreed time period and the Seller shall use all reasonable endeavours to accommodate such rescheduling if it is consistent with the standards of a Reasonable and Prudent Operator.
- 3.3 The Seller may on no less than five (5) Business Days' prior written notice to the Buyer reschedule a Scheduled Outage to an agreed time period provided that such rescheduling is consented to in writing by the Buyer, which consent may not be unreasonably withheld.
- 3.4 The Seller shall publish the final Maintenance Schedule for the Facility by the Thursday preceding the first Week of that schedule.
- 3.5 The Seller may not conduct scheduled maintenance other than in accordance with the Maintenance Schedule, unless it has received the approval of the System Operator.

4. **Reactions to unplanned outages and curtailment**

In case of a System Event that lasts more than 24 hours, the Buyer may on notice given no more than 48 hours after the commencement of the System Event, request the Seller to reschedule a Scheduled Outage to be commenced during the time period of System Event and the Seller shall use all reasonable endeavours to accommodate such rescheduling if it is consistent with the standards of a Reasonable and Prudent Operator.

SCHEDULE 4

FORECASTING INFORMATION

1. Weekly Forecast Generation Profile

The Seller shall provide to the System Operator or Distributor (as appropriate) on a Weekly basis, before the 09h00 on the preceding Wednesday, the Week ahead generation forecast, calculated at the Delivery Point.

Day	MWh	Available MW
1 st		
2 nd		
3 rd		
4 th		
5 th		
6 th		
7 th		

2. Daily Forecast Generation Profile

The Seller shall provide on a daily basis, fourteen (14) hours before the commencement of each day, the day ahead generation forecast, calculated at the Delivery Point.

Time	Hours	MWh	Available MW
00:00	01:00		
01:00	02:00		
02:00	03:00		
03:00	04:00		
04:00	05:00		
05:00	06:00		
06:00	07:00		
07:00	08:00		
08:00	09:00		
09:00	10:00		
10:00	11:00		
11:00	12:00		
12:00	13:00		
13:00	14:00		
14:00	15:00		
15:00	16:00		
16:00	17:00		
17:00	18:00		
18:00	19:00		
19:00	20:00		
20:00	21:00		
21:00	23:00		
23:00	23:00		
23:00	24:00		

SCHEDULE 5

**LIST OF FIRMS THAT CAN BE APPOINTED AS THE INDEPENDENT
ENGINEER**

[List of firms to be inserted]

DEEMED ENERGY PAYMENT

The Deemed Energy Payment for the purposes of this Agreement shall be determined in terms of this Schedule 6 (*Deemed Energy Payment*), and shall be invoiced in terms of clause 9 (*Invoicing*).

1. Facility Availability

- 1.1 Facility Availability is a measure of the Facility's capability to export Energy Output to the Delivery Point, and must be calculated and updated on a cumulative basis, during the Operating Period, by using the following formula:

$$FA = \frac{\sum_{i=1}^n (T_a)_i}{T \times n}$$

- 1.1.1 Where:

- 1.1.1.1 FA is the Facility Availability calculated after an amount of time equal to "T" has elapsed in the Operating Period;
- 1.1.1.2 T is the total time that has elapsed since the Commercial Operation Date (hours);
- 1.1.1.3 T_a is the total time since the Commercial Operation Date for which the relevant WTG is in a functional and operable state to export Energy Output to the Delivery Point (hours);
- 1.1.1.4 i is a counter indicating the relevant WTG; and
- 1.1.1.5 n is the number of WTGs in the Facility.

2. Facility Power Curve ("FPC")

- 2.1 From the Commercial Operation Date and for the first Contract Year thereafter, the Seller shall measure and record the following information for the purpose of determining the FPC:
- 2.1.1 wind speed (m/s);
- 2.1.2 wind direction (degrees); and
- 2.1.3 Energy Output of the Facility,
(the "**FPC Data**").
- 2.2 The following requirement shall apply to the measurement and recording of the FPC Data:
- 2.2.1 all FPC Data (except Energy Output, which shall be measured using the Facility Metering Installation) shall be measured and recorded

using a self-supporting wind speed and direction measurement station mounted upon a mast, turbine or other appropriate location and used to monitor the wind conditions experienced by the Project Site ("**Reference Mast**"). The Reference Mast shall be located at or near to the Facility and must be confirmed by the Independent Engineer. The location of the Reference Mast may not be changed without the prior written agreement of both Parties.

- 2.2.2 the FPC Data shall be recorded as average values taken over ten (10) minute intervals;
- 2.2.3 the FPC Data shall be logged by a data logger on the Project Site and date stamped;
- 2.2.4 the FPC Data shall be collected by the Facility SCADA system;
- 2.2.5 If the Energy Output of the Facility cannot be measured directly at the Delivery Point, then it may be calculated by summing the electricity produced by each Unit in the Facility (as measured at the turbine meter at the base of each Unit) and multiplying by zero point nine seven five (0.975) to account for internal losses;
- 2.2.6 the wind speed data shall be binned into wind speed intervals of 0.5m/s; and
- 2.2.7 the wind direction data shall be binned into direction intervals of 15 degrees.
- 2.3 The FPC Data shall be stored and analysed by the Seller in order to produce, for each recorded wind speed direction, an FPC, which shall indicate the relationship between the Capacity of the Facility and the wind speed.
- 2.4 The FPC Data must be reported to the Buyer by the end of the first Contract Year following the Commercial Operation Date. The FPC Data shall be delivered in the following formats:
 - 2.4.1 a hard copy of curves showing binned values only;
 - 2.4.2 a hard copy scatter plot showing the individual average ten (10) minute values; and
 - 2.4.3 all raw data obtained from the SCADA, the Reference Mast and the Facility Metering Installation, averaged, in electronic format, to enable the Buyer to compare the raw data to the binned data.
- 2.5 Within one (1) Month after the end of the first Contract Year following the Commercial Operation Date, the FPC as at that time shall be confirmed by the Independent Engineer and thereafter shall become the "**Approved FPC**", unless the Buyer and Seller agree, at any time, to amend the FPC, in which case such amended FPC shall be the Approved FPC.

- 2.6 In case of dispute involving the Approved FPC between the Seller and the Buyer, the Independent Engineer shall, based on the FPC, determine the content of the Approved FPC.
- 2.7 The Approved FPC shall remain in place for the duration of the PPA unless an update is requested by the Buyer or Seller, in which case, costs of the update will be incurred by the Party requesting the revision.
- 2.8 If there has been insufficient data recorded during the first Contract Year following the Commercial Operation Date to develop a full and complete suite of Approved FPCs then the development of the FPC shall be extended by a further six (6) months.
- 2.9 If an Approved FPC is not completed within eighteen (18) months of the Commercial Operation Date, Deemed Energy beyond that date shall be determined by the Independent Engineer until an Approved FPC is completed.
- 2.10 If the insufficiency of data available to complete an Approved FPC is due to the breach, wilful misconduct or negligence of the Seller, then no Deemed Energy Payments shall be payable by the Buyer until such breach, wilful misconduct or negligence is remedied and an Approved FPC is completed.

3. Deemed Energy Payment before the Commercial Operation Date

- 3.1 Where the Compensation Event or System Event entitling the Seller to the Deemed Energy Payment commences before the Commercial Operation Date and causes a delay of the Commercial Operation Date beyond the Scheduled COD, the Deemed Energy Payment for the period by which the Commercial Operation Date is delayed beyond the Scheduled COD ("**the Delay Period**") shall be determined as follows:

$$DEP = EO \times CER$$

- 3.2 Where:

3.2.1 DEP is the Deemed Energy Payment for the Delay Period (ZAR);

3.2.2 *EO* is the P50 average Energy Output forecast (being Energy Output that the Facility is judged to have a 50% probability of exceeding and a 50% probability of underachieving (MWh) which, for the avoidance of doubt, is net of all expected losses and expected downtime due to planned and unplanned maintenance), as confirmed in writing by the Independent Engineer ("**the P50 Forecast**") for the Delay Period (MWh); and

3.2.3 CER is the Commercial Energy Rate (ZAR/MWh).

- 3.3 Where the Delay Period has not been agreed between the Parties, it shall be determined by the Independent Engineer.

4. Deemed Energy Payment after the Commercial Operation Date

4.1 The Seller shall measure and record the time period for which a System Event (excluding Curtailment) persists. If the Allowed Grid Unavailability Period is exceeded in any Contract Year, then Deemed Energy Payments shall become payable and shall be calculated for the duration of additional System Events in such Contract Year and invoiced in accordance with the principles set out in clause 9 (*Invoicing*). Where any System Event commencing in one Contract Year carries over into the following Contract Year (the "**Second Contract Year**"), the period of time for which such System Event endures in the Second Contract Year shall be included in the calculation of the Allowed Grid Unavailability Period for all System Events commencing in and enduring in the Second Contract Year. Periods of Curtailment shall not be included in the Allowed Grid Unavailability Period.

4.2 Where the Compensation Event or System Event entitling the Seller to the Deemed Energy Payment commences after the Commercial Operation Date, the Deemed Energy Payment for the period during which a Compensation Event or a System Event entitles the Seller to the Deemed Energy Payment (a "**Deemed Energy Period**") shall be calculated as follows:

$$DEP = \left(\left[\sum_{i=0}^x EO_i \right] - \left[\sum_{i=0}^x AE_i \right] \right) \times CER$$

4.3 Where:

4.3.1 *DEP* is the Deemed Energy Payment for that Deemed Energy Period (ZAR);

4.3.2 *x* is the total number of ten (10) minute periods of Deemed Energy in that Deemed Energy Period;

4.3.3 *i* is each individual ten (10) minute period of Deemed Energy;

4.3.4 *CER* is the Commercial Energy Rate;

4.3.5 *AE* is the Energy Output during each respective ten (10) minute period of Deemed Energy (MWh);

4.3.6 *EO* is the expected Energy Output during each ten (10) minute period of Deemed Energy (MWh), if the Deemed Energy Period commences:

4.3.6.1 within the first Contract Year following the Commercial Operation Date or the extended period in which the Approved FPC has not yet been determined, *EO* will be calculated as if the Facility has achieved the P50 Forecast for the appropriate month;

4.3.6.2 after the end of the first Contract Year and following the completion of the Approved FPC, *EO* will be based on the

Approved FPC and shall be calculated using the following formula:

$$EO = \left(FA \times AP \times \frac{1(\text{hour})}{6} \right)$$

where:

- 4.3.6.2.1 *EO* is the expected Energy Output (MWh);
- 4.3.6.2.2 *FA* is the Facility Availability calculated for the ten (10) minute period preceding the commencement of the Deemed Energy Period (%); and
- 4.3.6.2.3 *AP* is the estimated Capacity of the Facility during each ten (10) minute period, as determined from the Approved FPC and the FPC Data (MW), or as confirmed by the Independent Engineer in terms of paragraph 2.9 of this Schedule 6 (*Deemed Energy Payment*).
- 4.4 If the Deemed Energy Period commences during the first five (5) minutes of a ten (10) minute period, such ten (10) minute period shall be taken into account in the calculation of the Deemed Energy Payment. If the Deemed Energy Period commences during the last five (5) minutes of a ten (10) minute period, such ten (10) minute period shall not be taken into account in the calculation of the Deemed Energy Payment.
- 4.5 In the event of a failure or interruption to the Reference Mast, Deemed Energy shall be referred to the judgment of the Independent Engineer, provided that if the failure of or interruption to the Reference Mast is due to the breach, wilful misconduct or negligence of the Seller, no Deemed Energy Payment shall be payable by the Buyer for as long as such failure of or interruption to the Reference Mast persists.
- 4.6 In the case that the Approved FPC has been delayed for six (6) months, the Deemed Energy Payment shall be calculated using the methodology presented in paragraph 3 (*Deemed Energy Payment before the Commercial Operation Date*) of this Schedule 6 until the Approved FPC is agreed.

5. Adjustment of Deemed Energy Payments

- 5.1 Where the Approved FPC has been determined, the Buyer or Seller may dispute the Deemed Energy Payment calculated in terms of paragraph 4.3.6.1 and paragraph 3 (*Deemed Energy Payment before the Commercial Operation Date*) of this Schedule 6 retrospectively if the Deemed Energy Payment calculated based on the Approved FPC proves to be different from the Deemed Energy Payment calculated in terms of paragraph 4.3.6.1 and paragraph 3 (*Deemed Energy Payment before the Commercial Operation Date*) of this Schedule 6. Overpayments made by the Buyer may be set off against payment due by the Buyer, and underpayments may be included in the Invoice for the Billing Period after such underpayment was determined.

- 5.2 The amount of the overpayment or underpayment determined in terms of paragraph 5.1 of this Schedule 6 (*Deemed Energy Payment*) shall bear interest at the Agreed Interest Rate from the date of such overpayment or underpayment to, but excluding, the date of repayment or set-off, as the case may be.

SCHEDULE 7

PROJECT DOCUMENTS

1. Financing Agreements:
 - 1.1 **[insert Financing Agreements];**
2. the Seller's shareholders agreement;
3. Contracts:
 - 3.1 **[insert contracts];**

PROJECT DOCUMENTS TO BE SIGNED AFTER SIGNATURE DATE

[Insert list of documents]

SCHEDULE 8

DIRECT AGREEMENT

[Form of Direct Agreement to be included]

SCHEDULE 9

IMPLEMENTATION AGREEMENT

[Form of Implementation Agreement to be included]

SCHEDULE 10

INDEPENDENT ENGINEER AGREEMENT

[Form of Agreement to be inserted]