



MINISTRY OF ENERGY
REPUBLIC OF SOUTH AFRICA

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Memorandum from the Parliamentary Office

509. Mr G Mackay (DA) to ask the Minister of Energy:

Whether any framework agreements were signed between Eskom and (a) her department, (b) the Department of Public Enterprises, (c) the independent power producer (IPP) office and (d) individual IPPs to procure independent power producer projects; if not, (i) why not and (ii) what are the relevant details; if so, will she provide Mr G Mackay with copies of each framework agreement? NW566E

Reply

(a) ,(b), (c), (i)

Yes, during November 2012, the Ministers of Finance, Energy and Public Enterprises entered into a Government Support Framework Agreement (GSFA) with Eskom as the buyer of electricity produced by IPPs. The GSFA contains the framework within which the Government shall make support available to Eskom in an event it cannot meet its obligation under the Power Purchase Agreement with the IPP. The Independent Power Producers Office is represented by the Department of Energy in the agreement. Such financial assistance is regarded as financial guarantee to Eskom.

In addition, the Regulatory Framework under Nersa allows the IPP cost incurred by Eskom to be a pass through to the electricity end-user with Eskom as the conduit and with no financial implications on Eskom. Any IPP procurement is added to the list from time to time in accordance with the procurement framework outlined under Section 34 of the Electricity Regulation Act.

The following project agreements have been signed with IPPs to date as part of the IPP procurement process:

A Power Purchase Agreement (PPA) that is signed between Eskom and the individual IPPs at the time of financial close. The PPA is a commercial that determines contractual obligations in terms of power delivery by the IPPs (as Seller) and payments by Eskom (as Buyer). To date, 64 IPP projects have signed Power Purchase Agreements, totaling a contractual obligation by IPPs to deliver 4 001 MW of electricity to the grid.

An Implementation Agreement (IA) is signed between the Department of Energy and the individual IPPs at financial close. The IA determines contractual obligations by the Seller in relation to socio-economic and enterprise development commitments over the life-time of the project as well as the Government support to Eskom in an event of default by Eskom.

(ii) The PPA and IA with each IPP are confidential as they contain pricing information that could be used by competitors in future IPP bidding rounds. Nonetheless, we have enclosed the GSF Agreement a prototype PPA/IA.

IMPLEMENTATION AGREEMENT

between

[INSERT PROJECT COMPANY NAME]
as the Seller

and

THE DEPARTMENT OF ENERGY
as the DoE

pursuant to the

**RENEWABLE ENERGY INDEPENDENT POWER PRODUCER
PROCUREMENT PROGRAMME**

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PREAMBLE:

THIS **RENEWABLE ENERGY IPP IMPLEMENTATION AGREEMENT** (this "**Agreement**") is made by and between:

- (1) [INSERT NAME OF SELLER (PROJECT COMPANY)], 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) THE DEPARTMENT OF ENERGY (the "**DoE**");
- (together, the "**Parties**", and "**Party**" shall mean either of them).

RECITALS:

- (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 operate, generate and sell energy from a [●] MW [wind / photovoltaic / concentrated solar power / small hydro / landfill gas / biomass / biogas] electricity generation facility located at [insert general location of the Facility].
- (B) The Seller has been authorised to enter into a Power Purchase Agreement ("**the PPA**") with Eskom Holdings SOC Limited as the Buyer ("**the Buyer**") following the Seller's selection by the DoE pursuant to the Renewable Energy Independent Power Producer ("**IPP**") procurement programme ("**IPP Programme**") conducted under Request for Proposals number DOE/003/13/14.
- (C) The DoE and the Seller have agreed that the Seller shall undertake the Project upon and subject to the terms and conditions of this Agreement and the PPA.

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**" has the meaning given to it in the PPA;

"**Affiliate**" has the meaning given to it in the PPA;

"**Agreed Form**" has the meaning given to it in the PPA;

"**Agreed Interest Rate**" has the meaning given to it in the PPA;

"**Assign**" shall have the meaning given to it in clause 15 (*Assignment*) and the term "**Assignment**" shall be construed accordingly;

"**Bi-quarterly Economic Development Performance**" has the meaning given to in it Clause 8.2 of Schedule 2 (*Economic Development Termination Points*);

"Black Enterprise" means a legal entity with fifty point one per cent (50.1%) or more of its equity owned by Black People and participation in its board of directors controlled by Black People;

"Black People" refers to Africans, Coloureds and Indians, limited to those who are Citizens;

"Business Day" has the meaning given to it in the PPA;

"Capacity" has the meaning given to it in the PPA;

"Capital Expenditure" has the meaning given to it in the PPA;

"Change in Control" means any change whatsoever in Control, whether effected directly or indirectly, excluding any change of Control in respect of a company listed on a stock exchange;

"Citizens" means people who have obtained citizenship of the Republic of South Africa by birth, descent or naturalisation in terms of the South African Citizenship Act No. 88 of 1995;

"Claims" has the meaning given to it in the PPA;

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

"Commercial Energy" has the meaning given to it in the PPA;

"Commercial Energy Payment" has the meaning given to it in the PPA;

"Commercial Operation Date" means the date determined to be the Commercial Operation Date in accordance with the PPA;

"Compensation Event" means:

- (a) any material breach by the DoE of any of its obligations under this Agreement (save for any breach that constitutes a Government Default), to the extent in each case that the breach is not caused or contributed to by the Seller or any Contractor; or
- (b) any Responsible Authority granting a right, licence, permit or authorisation to a third party that directly affects the flow of water through any Unit or the Facility (as the case may be), to the extent that such grant materially adversely affects the ability of the Seller to perform any of its obligations or exercise any of its rights under the PPA;¹

"Conduit Shareholder" means an entity that is established for the purpose only to hold Equity in the Seller, and or equity in other entities undertaking projects similar to the Project;

¹ Paragraph (b) of the definition of "Compensation Event" is applicable to small hydro Facilities only, and must be deleted in respect of all generation technologies other than small hydro.

"Consents" has the meaning given to it in the PPA;

"Construct" has the meaning given to it in the PPA;

"Contract Month" means a calendar month save that:

- (a) the first Contract Month shall be the period from and including the Signature Date up to and including the last day of the month during which the Signature Date occurs; and
- (b) the final Contract Month shall be the period from and including the first day of the month during which the Termination Date occurs up to and including the Termination Date;

"Contract Quarter" means the periods:

- (a) 1 April to 30 June;
- (b) 1 July to 30 September;
- (c) 1 October to 31 December; and
- (d) 1 January to 31 March,

during the Term. Should the Signature Date fall within any of the periods referred to above (and not commence on 1 April, 1 July, 1 October or 1 January), then the first Contract Quarter shall commence on the Signature Date and shall be the remaining portion of the Contract Quarter in which the Signature Date falls, plus the next Contract Quarter;

"Contract Year" means each twelve (12) Contract 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 after the Signature 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" has the meaning given to it in the PPA;

"Contractor" has the meaning given to it in the PPA;

"Control" means the power, directly or indirectly, to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities or any interest carrying voting rights, or to appoint or remove or cause the appointment or removal of any directors (or equivalent officials) or those of its directors (or equivalent officials) holding the majority of the voting rights on its board of directors (or equivalent body), whether by contract or otherwise, and **"Controlled"** shall be construed accordingly;

"Corrupt Act" means any offence in respect of corruption or corrupt activities contemplated in the Prevention and Combating of Corrupt Activities Act No. 12 of 2004;

"DAFF" means the Department of Agriculture, Forestry and Fisheries;

"Debt" means, at any date, all amounts due and payable by the Seller that are outstanding under the Financing Agreements at that date, excluding Shareholder Loans or interest thereon and all default interest;

"Deemed Energy Payment" has the meaning given to it in the PPA;

"Direct Agreement" means the direct agreement entered into (or to be entered into) between the Seller, the Buyer, the DoE and the Lenders (or their agent) in relation to this Agreement and the PPA, substantially in the form set out in Schedule 4 (*Direct Agreement*), as it may be amended from time to time by agreement of the parties thereto;

"Distribution Agreement" has the meaning given to it in the PPA;

"Due Date" has the meaning given to it in the PPA;

"Early Operating Energy" has the meaning given to it in the PPA;

"Early Operating Energy Payment" has the meaning given to it in the PPA;

"Economic Development Obligations" has the meaning given to it in Schedule 2 (*Economic Development Obligations*);

"Economic Development Sub-Elements" has the meaning given to it in Schedule 2 (*Economic Development Obligations*);

"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" has the meaning given to it in the PPA;

"Energy Output" has the meaning given to it in the PPA;

"Equity" means the entire issued share capital of and Shareholder Loans to the Seller;

"ERA" means the Electricity Regulation Act No. 4 of 2006, as amended or replaced from time to time;

"Expected Equity Value" means, at any date, the net present value at that date of the gross amount of any future dividends, interest and repayments of loan principal or share capital that would have been paid in respect of Equity from such date to the end of the Term, calculated in terms of clause 12.2 (*Calculations*);

"Expiry Date" has the meaning given to it in the PPA;

"Facility" has the meaning given to it in the PPA;

"Facility Completion" has the meaning given to it in the PPA;

"Facility Completion Form" has the meaning given to it in the PPA;

"Financial Model" means the financial base case for the Project as reflected in the computer model attached to this Agreement on disk as Schedule 5 (*Financial Model*), which model incorporates the forecast cash flow statements of the Seller including all expenditure, revenues, taxation and financing of the Construction, Operation and Maintenance of the Facility together with the income statements and balance sheets for the Seller over the Term, and details of all assumptions, calculations and methodology used in the compilation thereof;

"Financing Agreements" means:

- (a) the agreements relating to the Debt listed in Schedule 6 (*Project Documents*) in their form as at the Signature Date and excluding all amendments thereto not approved in advance by the DoE; and
- (b) any master agreement, confirmation, schedule or other agreement entered into or to be entered into to comply with the provisions of the agreements referred to in (a) in relation to the hedging of exposure to interest rate changes and foreign currency exchange rate fluctuations only;

"Force Majeure" has the meaning given to it in the PPA;

"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" has the meaning given to it in the PPA;

"Government Default" means any one of the following events:

- (a) an expropriation or nationalisation of a material part of the Facility and/or shares of the Seller by the Buyer or any Responsible Authority;
or

(b) a failure by the DoE to honour any valid and proper request by the Seller for payment under clause 6 (*Government Support*);

"Independent Expert" has the meaning given to it in the PPA;

"IRR" means the real post tax internal rate of return which a holder of Equity in the Seller is, at the Signature Date, forecast in the Financial Model to achieve on its investment in Equity over the Term;

"Law" has the meaning given to it in the PPA;

"Lender" means a bank, financial institution or other lender and its designated successors and assigns, who is a party to any of the Financing Agreements and provides financing to the Seller thereunder, provided that a lender who holds equity in the Seller shall not be considered to be acting as a "Lender" to the extent it provides the Seller with any financing, credit support or credit enhancement in its capacity as a shareholder in the Seller;

"Maintain" has the meaning given to it in the PPA;

"Month" has the meaning given to it in the PPA;

"Notice of Commencement of Facility" has the meaning given to it in the PPA;

"Notice of Commencement of Unit" has the meaning given to it in the PPA;

"Operate" has the meaning given to it in the PPA;

"Operating Period" has the meaning given to it in the PPA;

"Ownership Element Obligations" has the meaning given to it in Schedule 2 (*Economic Development Obligations*);

"PPA" means the Power Purchase Agreement entered into between the Buyer and the Seller on or before the Signature Date;

"PPA Compensation Event" means a "Compensation Event" as defined in the PPA;

"PPA Payment" has the meaning given to it in clause 6 (*Government Support*);

"Project" has the meaning given to it in the PPA;

"Project Data" has the meaning given to it in the PPA;

"Project Documents" means the contracts described in Schedule 6 (*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*);

"Qualifying Financial Institution" means a bank as defined in section 1 of the Banks Act, 1990, any pension fund or provident fund registered in terms of the Pension Funds Act, 1956, any unit trust scheme as defined in section 1 of the Unit Trusts Control Act, 1981, any long-term insurer as defined in section 1 of the Long-term Insurance Act, 1998, or any short-term insurer being a person registered or deemed (in terms of the Short-Term Insurance Act, 1998) to be registered as a short-term insurer in that statute, or any other entity that the DoE agrees in writing is a Qualifying Financial Institution;

"Rand", **"ZAR"** and **"Cent"** mean the lawful currency of South Africa and **"Cent"** is a one-hundredth (100th) part of one (1) Rand;

"Reasonable and Prudent Operator" has the meaning given to it in the PPA;

"Responsible Authority" has the meaning given to it in the PPA;

"Scheduled COD" has the meaning given to it in the PPA;

"Seller Default" has the meaning given to it in the PPA;

"Shareholder Loans" means at any date, in relation to any financing (other than the share capital and share premium and the financing under a Financing Agreement) made available for the Project by the Shareholders, all principal unpaid at that date (including any interest which has been capitalised);

"Shareholders" means the holders of the Equity;

"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" has the meaning given to it in the PPA;

"Success Payments" means all developers' fees, success fees, incentive fees, participation fees, premia predicated on financial close or being appointed preferred bidder in respect of the Project, and similar fees or premia paid to any person by any person, whether or not the payer or payee is a member of the consortium that formed the Seller, a developer of the Project, a Shareholder, a Contractor or a third party, as well as all monies or fees or premiums paid by way of dividend sharing, upside sharing or return sharing paid by Shareholders to any other person (regardless of who they are), or any payments of any similar nature or purpose, excluding any arranging fees, underwriting fees and participation fees payable or paid to the Lenders directly in respect of the Debt, and any success fees or arranging fees payable or paid to advisors in respect of the Project, provided such fees paid to Lenders or advisors are within the current market range of such fees;

"System" has the meaning given to it in the PPA;

"System Event" has the meaning given to it in the PPA;

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

"Term" has the meaning given to it in clause 3 (*Term*), as such period of time may be amended or extended in accordance with the terms of the PPA;

"Termination Date" means the Expiry Date or the date of the earlier termination of this Agreement in accordance with clause 11 (*Termination*);

"Termination Points" means those points to be incurred by the Seller in terms of clause 13.2 (*Termination Points*) triggered by a failure on the part of the Seller to meet its Economic Development Obligations as contained in Schedule 2 (*Economic Development Obligations*);

"Termination Thresholds" means those thresholds referred to in Annex 9 of Schedule 2 (*Economic Weights and Scaling Factors*);

"Total Project Cost" means:

- (a) for the purposes of clause 2.1 (*Development Fee*), an amount equal to the aggregate of the total Debt and Equity which is, as at the Signature Date, forecast in the Financial Model to be contributed up to the Commercial Operation Date; and
- (b) for all other purposes, the total Capital Expenditure, forecast as at the Signature Date, to be incurred up to the Commercial Operation Date by the Seller in the design, construction, development, installation and/or commissioning of the Project;

"Total Quarterly Economic Development Performance" has the meaning given to it in Clause 8.2 of Schedule 2 (*Economic Development Termination Points*);

"Transmission Agreement" has the meaning given to it in the PPA; and

"Unit" has the meaning given to it in the PPA.

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 "**DoE**" 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 DoE;
- 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 DoE;
- 1.2.10 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;
- 1.2.11 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;
- 1.2.12 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;
- 1.2.13 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; and

1.2.14 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.

1.3 **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).

1.4 **Rounding up**

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

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

2. **DEVELOPMENT FEE**

The Seller will be required to pay a development fee equal to one per cent (1%) of the Total Project Cost to the Project Development Fund for Energy currently at the National Treasury, on or before the tenth (10th) Business Day after the Signature Date.

3. **TERM**

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

3.1.1 its termination in accordance with clause 11 (*Termination*); or

3.1.2 the Expiry Date,

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

3.2 Notwithstanding anything to the contrary contained in this Agreement, this Agreement shall not terminate and shall remain in force for as long as any payments are due, but not yet paid, by the DoE to the Seller and for as long as any obligations under clause 12 (*Compensation on Termination for Government Default*) remain unperformed.

4. PROJECT SITE

4.1 DoE's inspection rights

The DoE 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 DoE'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 and/or the PPA; provided that the DoE shall ensure that its representatives shall comply with all Project Site health and safety 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.

4.2 Land use authorisations

If the Seller obtained a land use authorisation or secured a rezoning of the Project Site in order to undertake the Project, the Seller shall procure that:

- 4.2.1 when the PPA is terminated or expires in accordance with its own terms, the purpose for which the Project Site may be used or the zoning of the Project Site is restored to the purpose of use or zoning of the Project Site that existed before the relevant authorisation or rezoning was obtained, provided that if such land use authorisation or rezoning involved the registration of one or more restrictions in respect of the title deed of the Project Site, the Seller shall not apply for, or assist in any way with, or consent to or procure through any agent or instrument, the removal of such restriction without the prior written consent of the DAFF; and
- 4.2.2 if the Seller becomes aware that any other person has registered or intends to register one or more restrictions in respect of the title deed of the Project Site, it shall, as soon as reasonably practicable, notify the DAFF in writing of such fact.

4.3 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 Capacity of the Facility above the Achieved Capacity.

4.4 Commercial Operation Date

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 DoE 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.

5. TESTING AND COMMISSIONING

- 5.1 All testing and commissioning of the Facility, including the conducting of Facility Completion and maintenance tests, shall be conducted by the Seller in accordance with the provisions of the PPA.

5.2 In addition to the notice requirements set out in clause 6 (*Notices*), the Seller shall notify the DoE of the times that any and all of the tests detailed in clause 5.1 are to commence not less than three (3) Business Days prior to the start of such test. The DoE shall be entitled to nominate two (2) representatives to be present at any and all of such tests, provided that, if such representatives are not present at the scheduled time, the Seller shall be entitled to proceed with the relevant test in their absence.

6. GOVERNMENT SUPPORT

6.1 It is recorded that the Minister of Energy has determined in terms of section 34 of the ERA that:

6.1.1 new generation capacity is needed to ensure the continued uninterrupted supply of electricity;

6.1.2 such capacity and electricity shall be made available and generated from the renewable energy power generating facilities under the IPP Programme; and

6.1.3 the capacity and electricity thus produced may only be sold to and must be purchased by the Buyer.

6.2 In order to purchase the Energy Output generated by the Facility, the Buyer will have to and has agreed to enter into the PPA with the Seller simultaneously with the signature of this Agreement. The PPA contains several obligations for payment in respect of Commercial Energy, Early Operating Energy and/or Deemed Energy.

6.3 The DoE agrees that if in the case of payment of the Early Operating Energy Payment, Commercial Energy Payment, Deemed Energy Payment, Use of System Charges, any payment in respect of a PPA Compensation Event or Unforeseeable Conduct or any payment contemplated in clause 29 (*Third Party Indemnity*) of the PPA ("**PPA Payment**"):

6.3.1 the amount is due and payable by the Buyer pursuant to the PPA and has not been paid in full by the Buyer within twenty five (25) Business Days of the Due Date;

6.3.2 the PPA Payment is not consequent to termination of the PPA as a result of a Seller Default or Corrupt Act;

6.3.3 the PPA Payment amount is not in dispute;

6.3.4 the Seller has delivered a demand for payment of the PPA Payment to the Buyer in accordance with the provisions of the PPA, and despite such demand, such amount is not paid; and

6.3.5 the amount has not, despite the diligent efforts of the Seller and/or the Lenders (which, for the avoidance of doubt, shall not require the institution of legal proceedings against the Buyer), been recovered from the Buyer within three (3) Months from the due date for such payment,

then the DoE will make payment of the PPA Payment (together with any interest accrued thereon as may be due and payable in terms of and at the rate and for the period specified in the PPA or the Direct Agreement) to the Seller and/ or Lenders within forty (40) Business Days on first written demand of the Seller or the Lenders for payment.

- 6.4 The DoE will ensure that any payment or payments made pursuant to clause 12 (*Compensation on Termination for Government Default*) shall be made promptly following promulgation of the first appropriation bill occurring after delivery by the Seller and/or the Lenders to the DoE of written demand for payment in terms of clause 12.2.3, but in any event within 180 days of such demand. All payment pursuant to this clause 6 (*Government Support*) shall be made into the banking account nominated for that purpose by the Seller and/or the Lenders.

7. EMISSION CREDITS

The Seller agrees and acknowledges that the DoE shall be entitled to amend this Agreement in order to insert a clause that governs emission credits in line with Government's policies, after such policies have been established and finalised, provided that the Seller's general economic position shall not be materially adversely affected by such amendment.

8. REFINANCING

- 8.1 The Seller shall be entitled to undertake any refinancing or re-arrangement of its Debt or Equity at any time in the Term, provided that the amount and tenor of the Debt and Equity after such refinancing or re-arrangement may not increase above the amount of the Debt and Equity immediately prior to such refinancing or re-arrangements.
- 8.2 The Seller shall provide the DoE with written notice, not more than three (3) Business Days before the mechanics of such refinancing or re-arrangement are implemented, with details of:
- 8.2.1 the amount of the Debt at such date;
 - 8.2.2 the amount of accrued and unpaid interest at that date;
 - 8.2.3 the prevailing interest rate in respect of the Debt; and
 - 8.2.4 the current situation in respect of payments due by and receivable by it under any swap or derivative contracts to which it is party, which payments are pursuant to such refinancing or re-arrangement.
- 8.3 The Seller shall provide the DoE with written notice, not more than three (3) Business Days after the mechanics of such refinancing or re-arrangement are implemented, with details of the amount of the Debt at such date and the prevailing interest rate in respect of the Debt, as well as the features, in a reasonable amount of detail, of any swap or derivative contracts to which it is a party.

9. NOTICES

9.1 Notices and reports under the PPA

The Parties acknowledge that the Buyer has an interest in the content of this Agreement, and that the DoE similarly has an interest in the content of the PPA. The Seller shall, whenever any notice or report is delivered by it to the Buyer under the PPA, also deliver such notice or report to the DoE. The notices and reports which the Seller shall be obliged to deliver to the DoE include, but are not limited to:

- 9.1.1 any notices of the date on which a Unit or the Facility (as the case may be) is anticipated to be connected to the System for the first time, as contemplated in the PPA;
- 9.1.2 any notices of the date on which the Seller intends to undertake a Facility Completion test or a maintenance test, as contemplated in the PPA;
- 9.1.3 the Facility Completion Form to be delivered to the Buyer under the PPA;
- 9.1.4 any Notice of Commencement of Unit in terms of the PPA;
- 9.1.5 the Notice of Commencement of Facility in terms of the PPA;
- 9.1.6 all reports, estimates, data and other information concerning Project Data from the Seller to the System Operator and the Buyer;
- 9.1.7 any notice of failure by the Buyer to make payments due and payable to the Seller under the PPA, as contemplated in clause 9 (*Invoicing*) of the PPA; and
- 9.1.8 any notices delivered to the Buyer under the PPA in relation to System Events, PPA Compensation Events, Force Majeure and Unforeseeable Conduct.

9.2 Inspection and monitoring rights

The DoE shall have the right, upon giving a minimum of five (5) Business Days' prior written notice to the Seller:

- 9.2.1 subject to any confidentiality undertakings between the Seller and manufacturers or suppliers of Facility equipment, to examine and take copies of any Project Data, at any time during normal business hours (at the DoE's own cost); and
- 9.2.2 to monitor the Project as it is undertaken by the Seller, from time to time.

9.3 Ownership of Project Data

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

9.3.2 The DoE, 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 DoE.

10. CONSEQUENCES OF A COMPENSATION EVENT

10.1 If, as a direct result of the occurrence of a Compensation Event:

10.1.1 the Seller is unable to comply with its obligations under this Agreement; and/or

10.1.2 the Seller incurs costs or loses revenue,

then the Seller is entitled to apply for relief from its obligations under this Agreement and/or to claim compensation under this Agreement.

10.2 To obtain relief and/or claim compensation, the Seller must:

10.2.1 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 breach of an obligation under this Agreement and/or the Seller to incur costs or lose revenue, give to the DoE a notice of its claim for payment of compensation and/or relief from its obligations under this Agreement;

10.2.2 within ten (10) days of receipt by the DoE of the notice referred to in clause 10.2.1 above, give the DoE full details of the Compensation Event and the extension of time and/or any estimated change in project costs claimed and/or the loss of revenue claimed; and

10.2.3 demonstrate to the reasonable satisfaction of the DoE that:

10.2.3.1 the Compensation Event was the direct cause of the time lost and/or estimated change in project costs and/or the loss of revenue claimed; and

10.2.3.2 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.

10.3 If the Seller has complied with its obligations under clause 10.2, then:

10.3.1 in the case of an additional cost being incurred or revenue being lost by the Seller, including Capital Expenditure incurred by the Seller at any time, the DoE 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 or actual revenue lost by the Seller either:

10.3.1.1 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

- 10.3.1.2 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; and/or
- 10.3.2 the DoE shall give the Seller such relief from its obligations under this Agreement, as is reasonable for such a Compensation Event.
- 10.4 If information is provided after the dates referred to in clause 10.2, 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.
- 10.5 If the Parties cannot agree on the extent of any compensation or relief from the Seller's obligations under this Agreement, or the DoE disagrees that a Compensation Event has occurred (or as to its consequences), or that the Seller is entitled to any relief under this clause 10 (*Consequences of a Compensation Event*), the Parties shall resolve the matter in accordance with clause 17 (*Fast-Track Dispute Resolution*).

11. TERMINATION

11.1 No Termination

- 11.1.1 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.

11.2 Termination for Seller Default

- 11.2.1 Simultaneously with termination of the PPA for a Seller Default, this Agreement shall terminate.
- 11.2.2 The DoE shall be entitled to terminate this Agreement in the circumstances contemplated in clause 13.2.6.
- 11.2.3 The Seller shall reimburse the DoE with all costs incurred by the DoE in exercising any of its rights as a result of the termination of this Agreement in terms of this clause 11.2 (*Termination for Seller Default*). The DoE shall take reasonable steps to mitigate such costs.

11.3 Termination for Government Default

- 11.3.1 On the occurrence of a Government Default, or within ninety (90) days after the Seller becomes aware of same, the Seller may serve notice on the DoE of the occurrence (and specifying details) of such Government Default. If the relevant Government Default has not been remedied or rectified within thirty (30) Business Days of such notice, the Seller may serve a further notice on the DoE enforcing clause 12 (*Compensation on Termination for Government Default*) and terminating this Agreement, subject to clause 3.2.

11.3.2 If this Agreement is terminated for Government Default, clause 1 (*Definitions and Interpretation*), clause 6 (*Government Support*), clause 12 (*Compensation on Termination for Government Default*), clause 17 (*Fast Track Dispute Resolution*), clause 18 (*Dispute Resolution*) clause 21 (*Governing Law and Jurisdiction*), clause 22 (*Notices*) and clause 24 (*Miscellaneous*) shall remain of full force and effect until the DoE's obligations in terms of clause 6 (*Government Support*) and/or clause 12 (*Compensation on Termination for Government Default*) have been fully discharged.

11.4 **Termination for Corrupt Acts**

11.4.1 The Seller warrants that, in entering into this Agreement, the PPA and the Direct Agreement, it has not committed any Corrupt Act.

11.4.2 If the Seller, any Shareholder, any Contractor, any Affiliate of any one of them, or any Lender (or anyone employed by or acting on behalf of any of them) admits to or is convicted of having committed any Corrupt Act in relation to the Project or in respect of the PPA, this Agreement, the Direct Agreement or any Project Document, then the DoE shall be entitled to act in accordance with clauses 11.4.2.1 to 11.4.2.9 below:

11.4.2.1 if the Corrupt Act is committed by the Seller, any Shareholder, any director of the Seller, any director of any Shareholder, or any employee of the Seller or of any Shareholder acting under the authority of or with the knowledge of a director of the Seller or such Shareholder, as the case may be, then in any such case, the DoE may terminate this Agreement with immediate effect by giving written notice to the Seller;

11.4.2.2 if the Corrupt Act is committed by an employee of the Seller or of any Shareholder acting of his or her own accord, then in any such case, the DoE may give written notice to the Seller of termination and this Agreement will terminate, unless within thirty (30) Business Days of the Seller's receipt of such notice that employee's involvement in the Project is terminated and (if necessary) the performance of any part of the Construction, Operation and Maintenance of the Facility previously performed by him or her is performed by another person;

11.4.2.3 if the Corrupt Act is committed by a Contractor, director of a Contractor or an employee of a Contractor acting under the authority or with the knowledge of a director of that Contractor, then in any such case, the DoE may give written notice to the Seller of termination and this Agreement will terminate, unless within sixty (60) Business Days of its receipt of such notice the Seller terminates the relevant contract and procures the performance of the relevant part of the Construction, Operation and Maintenance of the Facility by another person;

11.4.2.4 if the Corrupt Act is committed by an employee of a Contractor acting of his or her own accord, then the DoE may give notice to the Seller of termination and this Agreement will terminate, unless within

thirty (30) Business Days of its receipt of such notice the Seller procures the termination of that employee's involvement in the Project and (if necessary) procures the performance of that part of the Construction, Operation and Maintenance of the Facility previously performed by that employee to be performed by another person;

- 11.4.2.5 if the Corrupt Act is committed by a Lender, a director of a Lender or any employee of a Lender acting under the authority or with the knowledge of a director of that Lender, then in any such case the DoE may give written notice to the Seller of termination and this Agreement will terminate, unless within eighty (80) Business Days of its receipt of such notice the Seller procures the termination of such Lender's involvement in the Project (in any capacity whatsoever including, without limitation, as Lender under the Financing Agreements) and provides the DoE with satisfactory proof that such Lender's entire participations in the Debt and in any undrawn financial commitments under the Financing Agreements have been assumed by any Qualifying Financial Institution (including any one or more of the remaining Lenders) or any of the Shareholders, whether by means of Equity contributions or otherwise;
- 11.4.2.6 if the Corrupt Act is committed by any employee of a Lender acting of his or her own accord, then the DoE may give written notice to the Seller of termination and this Agreement will terminate, unless within thirty (30) Business Days of the Seller's receipt of such notice, that employee's involvement in the Project is terminated;
- 11.4.2.7 if the Corrupt Act is committed by an Affiliate, director of an Affiliate or an employee of an Affiliate acting under the authority or with the knowledge of a director of that Affiliate, then the DoE may give notice to the Seller of termination and this Agreement will terminate, unless within thirty (30) Business Days of its receipt of such notice the Seller procures the termination of that Affiliate, director or employee's involvement in the Project and (if necessary) procures the performance of that part of the Construction, Operation and Maintenance of the Facility previously performed by that employee to be performed by another person;
- 11.4.2.8 if the Corrupt Act is committed by any other person not specified in clauses 11.4.2.1 to 11.4.2.6 above but involved in the Project as a subcontractor or supplier to any Contractor or to the Seller, then the DoE may give notice to the Seller of termination and this Agreement will terminate unless within sixty (60) Business Days the Seller procures the termination of such person's involvement in the Project and (if necessary) procures the performance of the relevant part of the Construction, Operation and Maintenance of the Facility by another person; and
- 11.4.2.9 any notice of termination under this clause 11.4.2 (*Termination for Corrupt Acts*) shall specify:
 - 11.4.2.9.1 the nature of the Corrupt Act;

- 11.4.2.9.2 the identity of the party or parties who has or have committed the Corrupt Act; and
- 11.4.2.9.3 the date on which this Agreement will terminate in accordance with the applicable provisions of this clause 11.4 (*Termination for Corrupt Acts*).
- 11.4.3 Without prejudice to its other rights or remedies under this clause, the DoE shall be entitled to recover from the Seller, the greater of:
 - 11.4.3.1 the amount or value of the gift, consideration or commission which is the subject of the Corrupt Act; and
 - 11.4.3.2 any Direct Losses sustained by the DoE in consequence of any breach of this clause 11.4 (*Termination for Corrupt Acts*) by the Seller.
- 11.4.4 Nothing contained in this clause 11.4 (*Termination for Corrupt Acts*) shall prevent the Seller, Shareholder, Affiliate or Contractor from paying any proper commission or bonus to its employees within the agreed terms of their employment.
- 11.4.5 The Seller shall notify the DoE of the occurrence (and details) of any Corrupt Act promptly on the Seller becoming aware of its occurrence.

12. COMPENSATION ON TERMINATION FOR GOVERNMENT DEFAULT

- 12.1 On termination of this Agreement in terms of clause 11.3 (*Termination for Government Default*), the DoE shall:
 - 12.1.1 have the option to take over the ownership of the Facility or to nominate a third party to take over the ownership of the Facility on the following terms and conditions:
 - 12.1.1.1 the purchase price of the Facility shall be the amount calculated in terms of clause 12.1.2;
 - 12.1.1.2 the Seller shall be obliged to give warranties, as may be agreed between the Seller and the DoE or its nominee, to the DoE or its nominee in respect of the ownership and condition of the Facility;
 - 12.1.1.3 the effective date of the transfer of the Facility to the DoE or its nominee will be the date on which the purchase price of the Facility is paid in full to the Seller;
 - 12.1.1.4 the Seller shall be obliged to transfer ownership of the Facility to the DoE or its nominee, and sign all documents required to effect such transfer on or before the effective date referred to in clause 12.1.1.3; and
 - 12.1.1.5 such other terms and conditions that may be agreed between the Seller and the DoE or its nominee,

provided that the DoE shall notify the Seller in writing of whether it intends to exercise such option within twenty (20) Business Days of the notice terminating this Agreement for Government Default in terms of clause 11.3 (*Termination for Government Default*); and

12.1.2 regardless of whether or not the DoE has exercised its option in terms of clause 12.1.1, pay the Seller an amount equal to the aggregate of:

12.1.2.1 an amount equal to the Debt;² and

12.1.2.2 the Expected Equity Value at the date of termination (taking no account of the event which gave rise to such termination or of such termination),

less, to the extent it is a positive amount, the aggregate, as at the Termination Date, of:

12.1.2.2.1 all credit balances on any bank accounts, held by or on behalf of the Seller on the Termination Date and the value of any right of the Seller or the Lenders to receive insurance proceeds or any proceeds pursuant to letters of credit and of any such proceeds actually received by them as a result of the relevant Government Default (save where such credit balances or proceeds are paid to the DoE and/or are to be applied in reinstatement) and sums due and payable from the Contractors and any other third parties;

12.1.2.2.2 all amounts payable by the Lenders (or the counter-parties to the interest rate or exchange rate hedging arrangements provided for in the Financing Agreements) to the Seller in connection with the early termination of such hedging arrangements as a result of prepayment of amounts outstanding under the Financing Agreements;

12.1.2.2.3 the realisable market value of any other assets and rights of the Seller or the Lenders in respect of the Project; provided that no account shall be taken of any liabilities and obligations of the Seller arising out of:

12.1.2.2.3.1 agreements or arrangements entered into by the Seller to the extent that such agreements or arrangements were not entered into in connection with the Seller's obligations in relation to the Project; and

² In the event that all or part of the Debt is denominated in a foreign currency ("**Foreign Debt**"), this Agreement will be amended in order to provide for a mechanism for determining the amount of the Foreign Debt contemplated in this clause 12.1.2.1, based on the lower of the exchange rate prescribed by National Treasury as at financial close, and the exchange rate prevailing at the Termination Date. In addition, any breakage costs due by the Seller in respect of hedging arrangements entered into in order to facilitate the servicing of principal and interest of the Foreign Debt and to protect the Seller from exchange rate fluctuations in relation to such Foreign Debt, will be specifically excluded from any termination payments to the Seller, and the definition of Financing Agreements will be amended accordingly.

12.1.2.2.3.2 agreements or arrangements entered into by the Seller to the extent that such agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms,

provided further that, if the DoE exercises the option in terms of clause 12.1.1 and takes over ownership of the Facility and the other assets and rights referred to in clause 12.1.2.2.3 in its own right, the amounts contemplated in this clause 12.1.2.2.3 shall not be deducted from the amount payable to the Seller.

12.2 Calculations

12.2.1 If any calculation is required to be made for the purposes of determining an amount payable by the DoE to the Seller pursuant to clause 12.1, the same shall be made by Independent Expert appointed by the Parties and the Lenders or, in the absence of agreement within fifteen (15) Business Days, by the President of the South African Institute of Chartered Accountants.

12.2.2 The Seller and the DoE shall ensure that the Independent Expert is appointed within fifteen (15) Business Days of delivery by the Seller of the second notice in terms of clause 11.3.1. The Independent Expert shall have fifteen (15) Business Days to calculate the amount payable by the DoE to the Seller pursuant to this clause 12 (*Compensation on Termination for Government Default*).

12.2.3 Upon determination of the amount payable by the DoE to the Seller pursuant to this clause 12 (*Compensation on Termination for Government Default*), the Seller shall be entitled to issue a written demand to the DoE for payment of such amount.

12.2.4 Each calculation to be made by the Independent Expert shall use the latest Financial Model prepared prior to the date of termination of this Agreement. The Seller will not alter the methodology employed in such Financial Model from that employed in the version of the Financial Model attached as Schedule 5 (*Financial Model*), without the prior written consent of the DoE, such consent not to be unreasonably withheld or delayed. In preparing any calculation for the purpose of this clause 12.2 (*Calculations*), the Independent Expert shall:

12.2.4.1 use the input parameters contained in such Financial Model, unless either Party objects to any such parameter as not properly reflecting the most likely outcome for the matter which is the subject of the input parameter concerned, in which case the Independent Expert, acting reasonably and after having taken appropriate specialist and technical advice and considered the representations of the Parties, if any, shall be entitled to amend the input parameter concerned to reflect the most likely outcome; and

12.2.4.2 calculate Expected Equity Value by discounting the relevant financial projections contained in such Financial Model utilising the IRR as the discount rate.

12.2.5 In making any determination pursuant to this clause 12.2 (*Calculations*), the Independent Expert shall act as an expert and not an arbitrator.

13. ECONOMIC DEVELOPMENT OBLIGATIONS

13.1 General Obligations

13.1.1 The Seller shall comply with the requirements of Schedule 2 (*Economic Development Obligations*) and the Annexes thereto.

13.1.2 Should the Seller fail to comply with its obligations as provided for in Schedule 2 (*Economic Development Obligations*), such failure may result in an amount as determined in terms of Schedule 2 (*Economic Development Obligations*) being payable to the DoE and/or in Termination Points as provided for in clause 13.2 (*Termination Points*).

13.2 Termination Points

13.2.1 Subject to clauses 13.2.3 and 13.2.4, the Seller shall be deemed to have incurred:

13.2.1.1 half of one (1/2) Termination Point at the end of any Contract Quarter if, in respect of that Contract Quarter, the Total Quarterly Economic Development Performance determined pursuant to Schedule 2 (*Economic Development Obligations*) is less than sixty five per cent (65%); and

13.2.1.2 half of one (1/2) Termination Point at the end of any Contract Quarter if, in respect of that Contract Quarter and the immediately preceding Contract Quarter, the Bi-quarterly Economic Development Performance on any of the Economic Development Sub-Elements is below the Termination Threshold set in Schedule 2 (*Economic Development Obligations*) for the specific Economic Development Sub-Element.

13.2.2 Not more than three (3) Termination Points shall be imposed upon the Seller at the end of any Contract Quarter.

13.2.3 The Seller shall, in respect of each report submitted for a Contract Quarter in which an event giving rise to a Termination Point occurs, provide the DoE with a rectification programme detailing the steps and time period it will take to rectify any event that does result in or which would entitle the award of a Termination Point. In the case where the Seller has not provided the rectification programme with the report submitted for a Contract Quarter, it shall submit such a rectification programme within ten (10) calendar days from the expiry of the period referred to in clause 7.1.2 of Schedule 2 (*Economic Development Obligations*), or such longer period as the Parties may agree. Upon the Parties reaching agreement on the proposed rectification programme, the Seller will be exempted from incurring further Termination Points in respect of that same event provided the Seller complies with the rectification programme. Such exemption shall lapse and a new Termination Point may be incurred in the event the Seller deviates from

the rectification programme, (unless the DoE agrees otherwise) or upon the expiry of the time period agreed within which the rectification programme is to be implemented.

- 13.2.4 Should the Parties not reach agreement on the proposed rectification programme, such a disagreement can be referred to dispute resolution in terms of clause 17 (*Fast Track Dispute Resolution*) for determination as to whether the proposed rectification programme will rectify the event that does result in or which will entitle the award of Termination Points and whether the time period suggested is suitable for the rectification of such event.
- 13.2.5 Any Termination Point incurred by the Seller shall lapse twelve (12) months after the date on which it was incurred.
- 13.2.6 In the event that, at any date during the Term ("**Trigger Date**"), the Seller has accumulated more than nine (9) Termination Points pursuant to this clause 13.2 (*Termination Points*) and those Termination Points have not lapsed, then the DoE shall be entitled, at any time within one (1) year following the Trigger Date, to terminate this Agreement.

14. GENERAL SELLER UNDERTAKINGS

- 14.1 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, at its sole cost and risk and in compliance with the requirements of:
- 14.1.1 applicable Laws;
 - 14.1.2 the Codes;
 - 14.1.3 the Consents;
 - 14.1.4 the terms and conditions of this Agreement;
 - 14.1.5 the terms and conditions of the Distribution Agreement or the Transmission Agreement, as applicable;
 - 14.1.6 the terms and conditions of the PPA;
 - 14.1.7 the standards of a Reasonable and Prudent Operator; and
 - 14.1.8 relevant manufacturers' guidelines and instructions.

15. ASSIGNMENT

- 15.1 The Seller may not sell, cede, delegate, assign, transfer or otherwise dispose of (collectively, "**Assign**") all or any part of its rights and/or obligations under this Agreement to a third party without the prior written approval of the DoE, provided that where the Seller has financed the Project on a limited recourse basis, the Seller may Assign its rights under this Agreement for the purpose of providing security under the relevant Financing Agreements; provided further

that the Seller notifies the DoE in writing of any such Assignment within five (5) Business Days of such Assignment.

- 15.2 The DoE shall not Assign all or any part of its rights and/or obligations under this Agreement to a third party, save with the prior written approval of the Seller (such approval not to be unreasonably withheld or delayed) or to give effect to any mandatory requirement of any Law, and provided, in both situations, that clause 6 (*Government Support*) remains of full force and effect and that all of the DoE's rights and/or obligations under the Direct Agreement are assigned together with this Agreement.

16. CHANGES IN CONTROL AND BLACK EQUITY

- 16.1 For the duration of the Term, 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) without the prior written approval of the DoE.
- 16.2 For the period commencing on the Signature Date and ending on the date which falls three (3) years after the Commercial Operation Date, the Seller shall procure that there is no:
- 16.2.1 dilution, sale, assignment, cession, transfer, exchange, renunciation or other disposal of the whole or any part of the Equity; or
- 16.2.2 dilution, sale, assignment, cession, transfer, exchange, renunciation or other disposal of the whole or any part of the issued share capital of and/or the shareholder loans in and to a Conduit Shareholder,
- without the prior written approval of the DoE.
- 16.3 The Seller shall procure that for the duration of the Term:
- 16.3.1 subject to the Lenders' rights in respect of any security held by them (or any agent acting on their behalf, or any security company, trust or other entity holding any security in respect of the Debt for the benefit of the Lenders), there is no sale, assignment, cession, transfer, exchange, renunciation or other disposal (at any time) of the whole or any part of the Equity, which results in the Seller being in breach of its undertakings with regard to Ownership Element Obligations in Schedule 2 (*Economic Development Obligations*); and
- 16.3.2 there is no dilution in the aggregate Shareholding by Black People below the Ownership Element Obligations in Schedule 2 (*Economic Development Obligations*).
- 16.4 For the purpose of this clause 16 (*Changes in Control and Black Equity*), the term "subsidiary" shall have the meaning as defined in the Companies Act No. 71 of 2008.

17. FAST TRACK DISPUTE RESOLUTION

- 17.1 Disputes expressly referred for determination pursuant to this clause 17 (*Fast Track Dispute Resolution*) shall be determined by the relevant Independent Expert.
- 17.2 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.
- 17.3 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.
- 17.4 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.
- 17.5 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.
- 17.6 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.
- 17.7 The Independent Expert shall act impartially and may take the initiative in ascertaining the facts and the Law.
- 17.8 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.
- 17.9 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 20 (*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.

- 17.10 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.
- 17.11 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:
 - 17.11.1 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
 - 17.11.2 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.
- 17.12 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 No. 42 of 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.

18. DISPUTE RESOLUTION

18.1 Referable Disputes

The provisions of this clause 18 (*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.

18.2 Internal Referral

- 18.2.1 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:
 - 18.2.1.1 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

18.2.1.2 if the Parties have been unable to resolve the dispute within fifteen (15) days of referral to the persons specified in clause 18.2.1.1, either Party may refer the dispute for a decision by the accounting officer or accounting authority of the DoE and the chief executive officer or equivalent officer of the Seller.

18.2.2 In attempting to resolve the dispute in accordance with the provisions of this clause 18.2 (*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.

18.2.3 Any dispute which has not been resolved by the representatives contemplated in clause 18.2.1.2 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.

18.3 **Performance to Continue**

No reference of any dispute to any resolution process in terms of this clause 18 (*Dispute Resolution*) shall relieve either Party from any liability for the due and punctual performance of its obligations under this Agreement.

18.4 **Litigation**

18.4.1 Save where any dispute has been expressly referred for determination in terms of clause 17 (*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.

18.4.2 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.

19. **LIABILITY**

19.1 **Direct losses**

19.1.1 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.

19.1.2 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.

19.1.3 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.

19.2 **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.

20. **CONFIDENTIALITY**

20.1 **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.

20.2 **Exclusions to Confidential Information**

For the purposes of this clause 20 (*Confidentiality*), the term "**Confidential Information**" shall not include information which:

- 20.2.1 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 20 (*Confidentiality*);
- 20.2.2 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 20 (*Confidentiality*);
- 20.2.3 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
- 20.2.4 is published by, or the publication of which is required by, a Responsible Authority or any court.

20.3 **Permitted disclosure of Confidential Information**

Notwithstanding the provisions of this clause 20 (*Confidential Information*), the Confidential Information may be disclosed:

- 20.3.1 by either Party to any Responsible Authority (where for the purposes of this clause 20.3 (*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:

- 20.3.1.1 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
- 20.3.1.2 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;
- 20.3.2 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;
- 20.3.3 by either Party as may be necessary to comply with any obligation under any applicable Law;
- 20.3.4 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
- 20.3.5 by either Party, if so agreed in writing by the Parties prior to the disclosure.

20.4 **Ownership and treatment**

- 20.4.1 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.
- 20.4.2 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.

21. **GOVERNING LAW AND JURISDICTION**

- 21.1 The validity, construction and performance of this Agreement shall be governed by the laws of South Africa.
- 21.2 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.

22. NOTICES

22.1 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 22.2 (*Addresses*) or such other address or number as contemplated in clause 22.4 (*Change in address*). No communication shall be effective until received by the addressee and a communication shall be deemed to have been received:

- 22.1.1 if delivered by hand during ordinary business hours, to its physical address in clause 22.2 (*Addresses*), when so delivered;
- 22.1.2 if delivered by pre-paid registered post, to its postal address in clause 22.2 (*Addresses*), seven (7) Business Days after posting, subject to proof of posting; and
- 22.1.3 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 22.1.1 or 22.1.2 above.

22.2 Addresses

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

22.2.1 The Seller:

Postal Address: [•]
Physical Address: [•]
Fax No.: [•]
Tel No.: [•]
Attention: [•]; and

22.2.2 The DoE:

Postal Address: Private Bag X96, Pretoria, 0001
Physical Address: 192 Visagie Street (corner Visagie Street and Paul Kruger Street), Pretoria, 0001
Fax No.: +27 12 323 5819
Tel No.: +27 12 406 7672
Attention: Mr Maduna Ngobeni.

22.3 **Domicilium citandi et executandi**

The Parties choose the physical address set out opposite their names in clause 22.2 (*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*.

22.4 **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.

23. **WARRANTIES**

23.1 **Seller warranties**

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

- 23.1.1 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;
- 23.1.2 it has the sole purpose, object and business of undertaking the Project and selling Energy Output in terms of the PPA;
- 23.1.3 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;
- 23.1.4 all the Project Documents have been duly executed on proper authority and are in full force and effect as at the Signature Date, save for those Project Documents identified in Schedule 6 (*Project Documents*) that will be executed in the Agreed Form after the Signature Date on proper authority;
- 23.1.5 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 Signature Date, or any order or other decision of any Responsible Authority or arbitrator that is binding on the Seller as at the Signature Date;
- 23.1.6 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;

- 23.1.7 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;
- 23.1.8 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;
- 23.1.9 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;
- 23.1.10 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);
- 23.1.11 all information disclosed by or on behalf of the Seller to the DoE 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 DoE which would, if disclosed, be likely to have an adverse effect on the DoE's decision (acting reasonably) to enter into this Agreement with the Seller; and
- 23.1.12 the copies of the executed Project Documents, which have been delivered to the DoE, 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.
- 23.1.13 as at the Signature Date:
 - 23.1.13.1 the Seller has an authorised and issued share capital as set out in the Seller's shareholders agreement;
 - 23.1.13.2 all shares in the issued share capital of the Seller are legally and beneficially owned as represented in the Seller's shareholders agreement;
 - 23.1.13.3 save as provided in the Financing Agreements or the Seller's shareholders agreement, no person has the right (whether actual or contingent) to call for the issue of any share or loan capital in the

Seller whether pursuant to any option or otherwise including any realisation of security;

- 23.1.13.4 save as provided in the Financing Agreements (in respect of all of the security provided by the Seller to the Lenders or their nominee) or the Seller's shareholders agreement, there are no Encumbrances over or affecting any of the Equity or the Shareholder Loans and there is no agreement or commitment to grant or create any such Encumbrance;
- 23.1.14 no person (whether the Seller, a Shareholder, Contractor or any other third person) has paid or agreed to pay any Success Payment in respect of, in connection with or pursuant to the Project, other than the Success Payments detailed in the Financial Model; and
- 23.1.15 the aggregate amount of the Success Payments paid or to be paid in respect of, in connection with or pursuant to the Project by any person (whether the Seller, a Shareholder, Contractor or any third person) are not gratuitously large when compared to the Total Project Costs.

23.2 **DoE warranties**

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

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

24. **MISCELLANEOUS**

24.1 **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.

24.2 **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.

24.3 **Waiver**

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

24.3.2 No waiver shall be effective unless it is communicated in writing to the other Party.

24.3.3 No extension of time or relaxation of any of the provisions or terms of this Agreement and/or any agreement or other undertaking made or executed pursuant to or in terms of this Agreement, shall operate as an estoppel against any Party in respect of its rights under this Agreement, nor shall it operate so as to preclude such Party thereafter from exercising its rights in accordance with this Agreement.

24.4 **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.

24.5 **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.

24.6 **Entire Agreement**

24.6.1 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.

24.6.2 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.

24.7 **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.

24.8 **Direct Agreement**

In the event that the Seller intends to finance the Project on a limited recourse or project finance basis, the DoE agrees that it shall enter into a Direct Agreement with the Seller, the Lenders and the Buyer.

24.9 **Public Relations and Publicity**

24.9.1 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 DoE 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:

- 24.9.1.1 Parliament and its members and officers in accordance with the provisions of the Public Finance Management Act No. 1 of 1999;
- 24.9.1.2 the Auditor-General under the Public Audit Act No. 25 of 2004; and
- 24.9.1.3 persons acting in the public interest in accordance with the provisions of the Promotion of Access to Information Act No. 2 of 2000.
- 24.9.2 Subject to clause 24.9.3, 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.
- 24.9.3 To the extent that the DoE is obliged to disclose or publish information pursuant to clause 24.9.1, it undertakes to the Seller, if time permits, to consult with the Seller prior to any communication contemplated by this clause 24.9.3, and if time does not so permit, such consultation shall be dispensed with by the Parties.
- 24.9.4 No facilities to photograph or film in or upon the Project Sites shall be given to or permitted by the Seller unless the DoE has given prior written approval.

24.10 **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.

24.11 **Costs**

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

24.12 **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.

[NAME OF SELLER]

By: _____

Name:

Title:

Date:

DEPARTMENT OF ENERGY

By: _____

Name:

Title:

Date:

SCHEDULE 1

DETAILS OF THE PROJECT AND FACILITY

Please see the next pages

[Parts 1 and 2 of Schedule 1 of the PPA will be inserted here once finalised]

ECONOMIC DEVELOPMENT OBLIGATIONS

[Note to Bidders: the items in square brackets are dependent on the Economic Development Proposal of the Seller and may be amended by the Seller in accordance to its Economic Development Proposal, at all times complying with the requirements as stated by the RFP.]

1. Recordal

It is recorded that:

- 1.1 the Seller having submitted a proposal in relation to Economic Development for the implementation of the Project with certain Economic Development commitments and having been appointed by the DoE, based, inter alia, on the strength of its proposal in relation to Economic Development, as the successful party to enter into this Agreement with the DoE and implement the Project and the Economic Development Obligations; and
- 1.2 the Parties wish to record the terms of the Seller commitments with regard to the Economic Development Obligations in this Schedule 2 (*Economic Development Obligations*), with the intention that they be contractually binding on the Seller.

2. Interpretation

- 2.1 In this schedule, unless the context otherwise requires, words and expressions defined in this Agreement and not redefined in this schedule shall have the same meaning when used herein.
- 2.2 The following words and phrases shall when used in this Schedule 2 (*Economic Development Obligations*) and typed in "Title Case" have the meanings assigned to them hereunder, and cognate expressions shall have corresponding meaning, namely:

"Actual Total Quantum" has the meaning attributed to it in paragraph 3.3 of this Schedule 2 (*Economic Development Obligations*);

"Adjusted Recognition of Gender" means the Adjusted Recognition for Gender calculation, determined as follows:

$$A = B/2 + C$$

where:

A is the Adjusted Recognition of Gender;

B is the percentage of Employees in the measurement category who are Black People;

C is the percentage of Employees in the measurement category who are Black Women. C is limited to a maximum of 50% of the applicable target;

"Adjusted Enterprise Development Contributions" means those Enterprise Development Contributions referred to in paragraph 3.4.14 of this Schedule 2 (*Economic Development Obligations*);

"Adjusted Socio-Economic Development Contributions" means those Socio-Economic Development Contributions referred to in paragraph 3.4.16 of this Schedule 2 (*Economic Development Obligations*);

"Amended B-BBEE Codes" means the amended B-BBEE Codes of Good Practice issued under Government Gazette No. 36928 on 10 October 2013 in terms of section 9(1) of the B-BBEE Act;

"B-BBEE" has the meaning given to it in the B-BBEE Act;

"B-BBEE Act" means the Broad Based Black Economic Empowerment Act No. 53 of 2003;

"B-BBEE Codes" means the B-BBEE Codes of Good Practice issued under Government Gazette No. 29617 on 9 February 2007 in terms of section 9(1) of the B-BBEE Act;

"B-BBEE Procurement Spend" means monetary spend on the procurement of goods and services (without double counting) from Vendors, adjusted according to B-BBEE Recognition Levels by multiplying such spend by the corresponding percentage appearing in respect of such recognition level under the column "B-BBEE Recognition Level";

"B-BBEE Recognition Levels" means those levels which are based on the overall performance of a Vendor, in respect of B-BBEE measured in terms of any applicable Sector Code, the B-BBEE Codes and/or the Amended B-BBEE Codes, demonstrated by the submission of a valid B-BBEE Verification Certificate;

"B-BBEE Verification Certificate" means a B-BBEE rating certificate to be issued by a South African National Accreditation System accredited verification agency, a chartered accountant registered with the South African Institute of Chartered Accountants or an auditor registered with the Independent Regulatory Board for Auditors in terms of any applicable Sector Code, the B-BBEE Codes or the Amended B-BBEE Codes, as applicable;

"Black Women" means women who are Black People;

"Committed Obligations" means the Economic Development Obligations, as stated in Annexes 2, 3, 4, 5, 6, 7 and 8;

"Construction Measurement Period" means the period commencing on the Signature Date and ending on the day immediately preceding the Commercial Operation Date;

"Distribution Connection Works" has the meaning given to it in the PPA but includes the portion of such works undertaken by the Seller in accordance with the conditions of any agreement concluded between the Seller and the Distributor for the carrying out by the Seller of such portion on a self-build basis;

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

"Early Operating Period" has the meaning given to it in the PPA;

"Economic Development" means the development of specific categories of people, enterprises and communities and/or economic sectors, as provided for in this Schedule 2 (*Economic Development Obligations*) and described in the Economic Development Elements;

"Economic Development Elements" means each of the Job Creation, Local Content, Ownership, Management Control, Preferential Procurement, Enterprise Development and Socio-Economic Development elements of Economic Development, including where applicable the Economic Development Sub-Elements;

"Economic Development Independent Monitor" means a person appointed as such in terms of paragraph 9.1 of this Schedule 2 (*Economic Development Obligations*);

"Economic Development Obligations" means the undertakings and/or obligations in relation to each of the Economic Development Elements in respect of the Project Activities, as detailed in this Schedule 2 (*Economic Development Obligations*);

"Economic Development Performance Credits" or **"EDPC"** means those performance credits, as referred to in paragraph 8.1 of this Schedule 2 (*Economic Development Obligations*);

"Economic Development Performance Deductions" or **"EDPD"** means those performance deductions, as referred to in paragraph 8.1 of this Schedule 2 (*Economic Development Obligations*);

"Economic Development Matrix" means the matrix to be submitted by the Seller in terms of paragraph 7.1.1.2 in the form contained in Annex 1 (*Form of Economic Development Matrix*);

"Economic Development Plan" means the plan to be submitted by the Seller in terms of paragraph 7.1.1.1 in the form contained in Annex 11 (*Form of Economic Development Plan*);

"Economic Development Sub-Elements" has the meaning attributed to it in paragraph 3.4 of this Schedule 2 (*Economic Development Obligations*);

"Economic Interest" means a claim against an enterprise representing a return on ownership of the enterprise similar in nature to a dividend right, measured using the Flow Through Principle;

"Employee" means a Person engaged on the Project Activities, whether seconded to or employed directly in relation to such Project Activities and Employment shall have a corresponding meaning;

"Employment Equity Regulations" means the regulations promulgated in terms of the Employment Equity Act No. 55 of 1998;

"Enterprise Development" means initiatives (which include monetary and non-monetary initiatives), carried out by a Measured Entity to assist and accelerate the development and sustainability of other enterprises, financial and operational independence of other enterprises;

"Enterprise Development Contributions" means the value of Enterprise Development in respect of the following:

- (a) Exempted Micro Enterprises or Qualifying Small Enterprises, which are 50% owned and Controlled by Black People or Black Women; or
- (b) any other enterprise that is 50% owned and Controlled by Black People or Black Women, with a B-BBEE Recognition Level of between Level 1 and Level 4, as determined by and in terms of the Amended B-BBEE Codes;

"EPC Contractor" means the Contractor engaged by the Seller in relation to the design, construction and commissioning of the Facility;

"Equity Instrument" means the instrument by which a participant holds a right of ownership in a Measured Entity;

"Exempted Micro Enterprise" or **"EME"** means an entity defined as such, at the time of measurement, in terms of any Sector Code, the B-BBEE Codes or the Amended B-BBEE Codes, as applicable;

"Exercisable Voting Rights" means a voting right attaching to an Equity Instrument of a participant measured using the Flow Through Principle, that is not subject to any limit other than limitations that may be subject to financing arrangements imposed by lenders providing financing for such Equity Instruments;

"Finance Charges" means all amounts, whether of interest, principal, fees, expenses, charges, costs or the like, which the Seller is required to pay to any of the Lender(s) under the Financing Agreements in consideration or as a charge for financing provided by such a Lender;

"Flow Through Principle" means the measurement of Ownership in terms of which only rights held by Persons are considered for such measurement and, in respect of rights of Ownership held in a Measured Entity through a juristic person, then the rights of Ownership held by Black People in that juristic person are considered for measurement. The measurement of ownership shall have regard to every tier of ownership in a multi-tiered chain of ownership until that chain ends with a Black Person holding ownership rights;

"Indexed" means, in relation to an amount stipulated in this Agreement, that the amount shall be adjusted on 1 April in each calendar year starting 12 months following the base date of 1 April 2013 using the following formula:

$$P_n = P_b * (I_n/I_b)$$

where:

P_n = the relevant amount in year n;

P_b = the relevant amount stipulated in this Agreement;

I_n = Consumer Price Index as published in year n in respect of the month of December of year n-1;

I_b = 100, being the Consumer Price Index (Dec 2012 = 100) as published in respect of the month of December 2012, as rebased by Statistics South Africa (or its equivalent successor entity) from time to time;

and where:

Consumer Price Index means the weighted average consumer price index (Dec 2012 = 100) as published by Statistics South Africa (or its equivalent successor entity), which is referred to as "Headline CPI – All urban areas" in Statistical Release P0141 from time to time (or equivalent successor index);

"Job Creation" means those measures that a Measured Entity can account for as being employed or implemented to achieve Employment through the Project Activities;

"Local Communities" means a community or communities in the Republic of South Africa:

- (a) in one or more residential areas or villages within 50km from the Project Site; and
- (b) in the event that there are no residential areas or villages within 50km from the Project Site, in the nearest residential areas or villages to the Project Site;

"Local Content" means the portion of the Total Project Value that is in respect of South African Products;

"Management Control" means the effective control of the management of a Measured Entity by reference to Top Management;

"Measured Entity" means an entity relied upon by the Seller to evidence any one or more of the Economic Development Obligations in terms of this Schedule 2 (*Economic Development Obligations*);

"NTC" has the meaning given to it in the PPA;

"Operating Measurement Period" means the period commencing on the Commercial Operation Date and ending on the Termination Date;

"Operations Contractor" means a Contractor engaged by the Seller for the operations of the Facility;³

"Ownership" means the effective ownership of shares in a Measured Entity, which shall be determined with reference to Shareholding;

"Paterson Decision Band B" means the decision band defined in the 'Job Evaluation, Volume I, A New Method', being a publication by TT Paterson (Business Books, 1972), generally used in the South African employment industry for the grading of occupational levels of personnel;

"People with Disabilities" for purposes of the Project means people who are considered as qualifying for protection as such in terms of the Employment Equity Act No. 55 of 1998;

"Penalty and Reward Regime" means the Economic Development Penalty and Reward Regime referred to in paragraph 8 of this Schedule 2 (*Economic Development Obligations*);

"Persons" means the natural persons engaged on the various levels in the Project;

"Person Months" means a total of 160 hours worked by an Employee;

"Preferential Procurement" means the extent to which a Measured Entity procures goods and services from suppliers with B-BBEE Recognition Levels;

"Project Activities" means activities related to the design, the construction, operation and maintenance of the Facility, including the sale of Energy Output to the Buyer and for purposes of the Job Creation Element, shall include the Employment of people to manage, within the Project, activities required to comply with the obligations related to Economic Development;

"Province" means a province as contemplated in Schedule 6 of the Constitution of the Republic of South Africa Act No. 108 of 1996;

"Qualifying Small Enterprise" or "QSE" means an entity defined as such, at the time of measurement, in terms of any Sector Code, the B-BBEE Codes or the Amended B-BBEE Codes, as applicable;

"Quarterly Achievement" means the achievements of the Seller in respect of Economic Development as more clearly stated in paragraph 8.1.3 of this Schedule 2 (*Economic Development Obligations*);

³ **Drafting Note:** The relevance of this definition and the rest of the references in this Schedule 2 (Economic Development Obligations) to Operations Contractor will depend on the structure proposed by the Bidder.

"Quarterly Obligations" means the levels of the Committed Obligations for each Contract Quarter, denoted in Annex 10 (*Quarterly Obligations*) of this Schedule 2 (*Economic Development Obligations*), in respect of the Economic Development Elements, determined in each case in terms of paragraph 5.2 (*Economic Development Elements*);

"Recognition for Local Enterprises" means expenditure allocated to enterprises; adjusted for localness; in the following manner:

- (a) Black Enterprises based in Local Communities – 135%;
- (b) Black Enterprises based in the Province where the Project is Located – 100%;
- (c) Black Enterprises based in rest of the Republic of South Africa – 80%; and
- (d) all other – 10%;

"Recognition for Localness" means expenditure allocated to persons and/or enterprises; adjusted for localness; in the following manner:

- (a) Based in Local Communities – 135%;
- (b) Based in the Province where the Project is Located – 100%;
- (c) Based in rest of the Republic of South Africa – 80%; and
- (d) all other – 10%;

"Reporting Obligations" means the reporting obligations of the Seller and the Contractors in terms of this Schedule 2 (*Economic Development Obligations*), specifically as stated in paragraph 7 of this Schedule 2 (*Economic Development Obligations*);

"Revenue" means, in relation to any reporting period, all amounts paid to or received by the Seller in terms of the PPA, excluding the Use of System Charges;

"RSA Based Employees" means those Employees based in the Republic of South Africa;

"Sector Code" means a code designated as such, and issued in terms of section 9(1) of the B-BBEE Act, developed by major stakeholders in a particular industry;

"Shareholding" means the Exercisable Voting Rights and Economic Interest in a Measured Entity;

"Skilled Black People" means Black People employed in Occupational Level C or higher as defined in Annex 2 of the Employment Equity Regulations, and includes skilled technical and academically qualified workers, junior management, supervisors, foremen, superintendents,

which shall for purposes of this Schedule 2 (*Economic Development Obligations*) be equivalent to the Paterson Decision Band B or better;

"Skilled Employees" means Employees employed in Occupational Level C or higher as defined in Annex 2 of the Employment Equity Regulations, and includes skilled technical and academically qualified workers, junior management, supervisors, foremen, superintendents, which shall for purposes of this Schedule 2 (*Economic Development Obligations*) be equivalent to the Paterson Decision Band B or better;

"Socio-Economic Development" means the initiatives carried out by a Measured Entity towards broad social and economic advancement of Black People in underdeveloped communities, which includes, without limitation, initiatives focusing on education, healthcare and programme(s), infrastructure development, enterprise creation within communities, reconstruction of underdeveloped areas, community training and skills development;

"Socio-Economic Development Contributions" shall have the meaning attributed to it in paragraph 3.4.15 of this Schedule 2;

"South African Products" means the Total Project Value, excluding:

- (a) the cost of components, parts or materials which have been or are still to be imported (whether by the Seller or the EPC Contractor or any of their contractors) and which costs are inclusive of costs abroad, plus freight and other direct importation costs, such as landing costs, dock dues, import duty, sales duty or other similar tax or duty at the South African port of entry; and
- (b) the costs of or payments made in respect of services or service providers that are not South African tax paying persons or entities;

"Top Management" means Employees of a Measured Entity who are:

- (a) members of the occupation category of "Top Management" as determined using the Employment Equity Regulations enacted in terms of the Employment Equity Act; and
- (b) appointed by or on the authority of the board of directors to undertake the day-to-day management of that Measured Entity and who:
 - (i) have individual responsibility for the overall management and for the financial management of that Measured Entity; and
 - (ii) actively involved in developing and implementing the Measured Entity's overall strategy;

"Total Amount of Procurement Spend" means the monetary spend on the procurement of goods and services for purposes of undertaking the

Project Activities (without double counting), excluding costs of imported goods and services, taxation, salaries and wages;

"Total Project Value" means during the Construction Measurement Period, the capital costs and costs of services procured for the construction of the Facility, excluding Finance Charges, land costs, mobilisation fees to the Operations Contractor and the costs payable to the Distributor, NTC and/or a Contractor for the Distribution Connection Works or the Transmission Connection Works (as the case may be);

"Total Shareholding" means the total Exercisable Voting Rights and Economic Interest in a Measured Entity;

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

"Use of System Charges" has the meaning given to it in the PPA;

"Vendors" means subcontractors to the Seller, the EPC Contractor⁴ and Operations Contractor⁵, (excluding in the case of the Seller, the EPC Contractor and/or Operations Contractor themselves), and suppliers, on any tier, who supply materials and other supplies or services to the Seller and/or the EPC Contractor and/or Operations Contractor in relation to the Project Activities;

"Women" means persons of the female gender;

"Women Owned Vendors" means suppliers and subcontractors with 50% or more of their equity owned by Women; and

"Youth" for purposes of the Project, means Persons between the ages of 18 and 35 years, when entering the Project.

- 2.3 All references in this Schedule 2 (*Economic Development Obligations*) to any Sector Code, the B-BBEE Codes and the Amended B-BBEE Codes, are to such codes as they exist at the Signature Date.

3. General Obligations

- 3.1 The Seller undertakes that, in undertaking the Project Activities, it will:

3.1.1 without derogating from any of the obligations contained in this Schedule 2 (*Economic Development Obligations*), carry out its obligations in relation to and comply with the Economic Development Obligations and attain or exceed the Quarterly Obligations;

3.1.2 comply with its Reporting Obligations;

⁴ **Drafting Note:** Where applicable.

⁵ **Drafting Note:** Where applicable.

- 3.1.3 bring to the DoE's attention any non-compliance with the Economic Development Obligations by the Seller, or a change in the Seller that may impact on the Economic Development Obligations and the measures that it plans to implement to rectify such non-compliance with the Economic Development Obligations;
- 3.1.4 generally promote and encourage contracting with QSEs, EMEs and enterprises owned by Black People in addition to those mentioned in this Schedule 2 (*Economic Development Obligations*), through other outsourcing and subcontracting of the Project operations wherever possible and within the reasonable capacity of the Seller and/or the Contractors to do so;
- 3.1.5 develop the skills of such of its Employees who are Black People, and continuously improve their responsibilities and Employment positions in the Seller and the Contractors through, inter alia, human resources training, general preference to Black People in appointing people to new Employment positions, and general career development of Black People;
- 3.1.6 keep a record of all activities undertaken in the Project in respect of Economic Development (including, without limitation, information relating to the achievement of the Economic Development Obligations by the Seller and the Contractors to the extent relied upon by the Seller) and make such a record(s) available to the DoE, its representatives and/or the auditors and allow them access to such information on request;
- 3.1.7 in the event of there being a delay in the performance of the Project, submit a report to the DoE indicating how the Economic Development Obligations during the delay period and in the following periods would be complied with; and
- 3.1.8 not do, or cause to be done anything that can result in non-compliance with the Economic Development Obligations.
- 3.2 Non-compliance with the above general obligations will result in the application of the Penalty and Reward Regime, which may result in Economic Development Performance Deductions and may also result in Termination Points and/or ultimate termination of this Agreement.
- 3.3 "**Actual Total Quantum**", for purposes of this Schedule 2 (*Economic Development Obligations*) means, in relation to the Economic Development Obligations:
 - 3.3.1 in respect of Job Creation: (100-SR-01 (RSA Based Employees who are Citizens), 100-SR-02 (Employees who are Black People), 100-SR-03 (Skilled Employees who are Black People) and 100-SR-04 (RSA Based Employees who are Citizens from Local Communities)) and Management Control (400-SR-01 (Black Top Management)), the actual number of Person Months;

- 3.3.2 in respect of Local Content (200-SR-01 (Value of Local Content Spend); Preferential Procurement (500-SR-01 (B-BBEE Procurement), 500-SR-02 (QSE and EME procurement) and 500-SR-03 (Women Owned Vendor Procurement)); Enterprise Development (600-SR-01 (Enterprise Development Contributions) and 600-SR-02 (Adjusted Enterprise Development Contributions)); Socio-Economic Development (700-SR-01 (Socio-Economic Development Contributions), 700-SR-02 (Adjusted Socio-Economic Development Contributions)), the actual amount spent in Rand terms by a Measured Entity;
- 3.3.3 in respect of Ownership (300-PC-01 (Shareholding by Black People) and 300-PC-02 (Shareholding by Local Communities) 300-CC-01 (Shareholding by Black People) and 300-OM-01 (Shareholding by Black People)), the actual Shareholding in the relevant Measured Entity,

as the case may be, relevant to the measurement parameters for the Economic Development Elements, in a specific Contract Quarter in which the Economic Development Obligations are being measured or determined.

- 3.4 "**Economic Development Sub-Elements**", for purposes of this Schedule 2 (*Economic Development Obligations*) means the following sub-elements, which collectively comprise the Economic Development Obligations:
- 3.4.1 100-SR-01 – **RSA Based Employees who are Citizens**. For purposes of this definition, reference to "RSA Based Employees who are Citizens" shall mean Employees who are ordinarily resident in the Republic of South Africa and are Citizens expressed as (i) a percentage of RSA Based Employees and (ii) a quantum of their total Person Months;
- 3.4.2 100-SR-02 – **RSA Based Employees who are Black People**. For purposes of this definition, reference to "RSA Based Employees who are Black People" shall mean Employees who are ordinarily resident in the Republic of South Africa and are Black People expressed as (i) a percentage of RSA Based Employees and (ii) a quantum of their total Person Months;
- 3.4.3 100-SR-03 – **Skilled Employees who are Black People**. For purposes of this definition, reference to "Skilled Employees who are Black People" shall mean Employees who are ordinarily resident in the Republic of South Africa and are Skilled Black People expressed as (i) a percentage of the total Skilled Employees and (ii) a quantum of their total Person Months;
- 3.4.4 100-SR-04 – **RSA Based Employees who are Citizens from Local Communities**. For purposes of this definition, reference to "RSA Based Employees who are Citizens from Local Communities" shall mean Employees who are ordinarily resident in the Republic of South Africa and are Citizens and reside in Local Communities

expressed as (i) a percentage of RSA Based Employees and (ii) a quantum of their total Person Months;

- 3.4.5 200-SR-01 - **Value of Local Content Spend.** For purposes of this definition, reference to "Value of Local Content Spend" shall mean the portion of Local Content as a percentage of the Total Project Value incurred;
- 3.4.6 300-PC-01, 300-CC-01 or 300-OM-01 – **Shareholding by Black People in the Seller, the EPC Contractor or Operations Contractor respectively.** For purposes of this definition, reference to "Shareholding by Black People" shall mean Shareholding in the enterprise by Black People as a percentage of the Total Shareholding in the Measured Entity;
- 3.4.7 300-PC-02 - **Shareholding by Local Communities in the Seller.** For purposes of this definition, reference to "Shareholding by Local Communities" shall mean Shareholding by Local Communities (only in respect of Economic Interest) as a percentage of the Total Shareholding (only in respect of Economic Interest) in the Measured Entity⁶;
- 3.4.8 400-SR-01 - **Black Top Management.** For purposes of this definition, reference to "Black Top Management" shall mean Black People Employed in Top Management as a percentage of the total Employees in Top Management using the Adjusted Recognition of Gender;
- 3.4.9 500-SR-01 - **B-BBEE Procurement.** For purposes of this definition, reference to "B-BBEE Procurement" shall mean B-BBEE Procurement Spend as a percentage of Total Amount of Procurement Spend;
- 3.4.10 500-SR-02 - **QSE and EME Procurement.** For purposes of this definition, reference to "QSE and EME Procurement" shall mean B-BBEE Procurement Spend from Qualifying Small Enterprises or Exempted Micro Enterprises as a percentage of Total Amount of Procurement Spend;
- 3.4.11 500-SR-03 - **Women Owned Vendor Procurement.** For purposes of this definition, reference to "Women Owned Vendor Procurement" shall mean monetary spend from Women Owned Vendors as a percentage of Total Amount of Procurement Spend;
- 3.4.12 600-SR-01 - **Enterprise Development Contributions.** For purposes of this definition, reference to "Enterprise Development Contributions" shall mean the contributions made towards Enterprise Development as a percentage of the Revenue;

⁶ **Drafting Note:** The wording "(only in respect of Economic Interest)" applies only where the Local Community has no Exercisable Voting Rights in the Seller and will be deleted to the extent that the Local Community has Exercisable Voting Rights in the Seller.

- 3.4.13 600-SR-02 - **Adjusted Enterprise Development Contributions.** For purposes of this definition, reference to "Adjusted Enterprise Development Contributions" shall mean the contributions made pursuant to Enterprise Development adjusted using the Recognition for Local Enterprises as a percentage of the Revenue;
- 3.4.14 700-SR-01 – **Socio-Economic Development Contributions.** For purposes of this definition, reference to "Socio-Economic Development Contributions" shall mean the contributions made pursuant to Socio-Economic Development as a percentage of the Revenue; and
- 3.4.15 700-SR-02 - **Adjusted Socio-Economic Development Contributions.** For purposes of this definition, reference to "Adjusted Socio-Economic Development Contributions" shall mean contributions made pursuant to Socio-Economic Development adjusted using the Recognition for Localness as a percentage of the Revenue.

4. **Implementation and Duration**

- 4.1 The Economic Development Obligations shall, where applicable, be implemented as indicated in Annex 10 (*Quarterly Obligations*) of this Schedule 2 (*Economic Development Obligations*).
- 4.2 The Seller shall, as part of its reporting in terms of this Agreement, procure that its chief executive officer reports to the DoE or the Economic Development Independent Monitor (if one is appointed) the progress made in performing the Economic Development Obligations in respect of the relevant measurement periods.

5. **Economic Development Elements**

- 5.1 The Economic Development requirements to be met by the Seller and its Contractors in the Construction Measurement Period and the Operating Measurement Period are contained in this Schedule 2 (*Economic Development Obligations*).
- 5.2 Quarterly Obligations will:
- 5.2.1 in the case of Job Creation, be the percentage and quantum values for each Contract Quarter as expressed in Annex 10 (*Quarterly Obligations*) of this Schedule 2 (*Economic Development Obligations*); and
- 5.2.2 in the case of Economic Development Elements other than Job Creation ("**Other ED Elements**"), be the percentage as expressed in Annex 10 (*Quarterly Obligations*) of this Schedule 2 (*Economic Development Obligations*). The quantum values indicated in Annex 10 (*Quarterly Obligations*) in respect of these Other ED Elements are only indicative of the extent of projected quantum achievement, based on the Seller's forecasts.

- 5.3 The Seller will:
- 5.3.1 be measured for compliance with the Economic Development Sub-Elements;
 - 5.3.2 have Economic Development Performance Deductions levied in terms of paragraph 8.1 of this Schedule 2 (*Economic Development Obligations*) for not meeting its Quarterly Obligations in a Contract Quarter;
 - 5.3.3 be subject to termination based on Termination Points as contemplated in clause 13.2 (*Termination Points*);
 - 5.3.4 be monitored for compliance with the Quarterly Obligations; and
 - 5.3.5 be awarded Economic Development Performance Credits in terms of paragraph 8.1 of this Schedule 2 (*Economic Development Obligations*) for exceeding its Quarterly Obligations in a Contract Quarter.
- 5.4 The Economic Development Performance Deductions and Economic Development Performance Credits will be reconciled in terms of paragraph 8.1.4 of this Schedule 2 (*Economic Development Obligations*).
- 5.5 **Economic Development in the Early Operating Period**
- 5.5.1 Sellers who deliver Early Operating Energy to the Buyer will be entitled to undertake initiatives in the Early Operating Period in respect of Enterprise Development and Socio-Economic Development Elements.
 - 5.5.2 The DoE shall recognise any contributions to Enterprise Development and Socio-Economic Development made by the Seller in the Early Operating Period as part of the contributions in the first Contract Quarter of the Operating Measurement Period.
 - 5.5.3 In order for the Department to recognise such contributions, the Seller shall:
 - 5.5.3.1 notify the Department of its intention to undertake Enterprise Development and/or Socio-Economic Development initiatives in the Early Operating Period prior to the commencement of such period;
 - 5.5.3.2 submit reports on the progress made in respect of contributions made in relation to Enterprise Development and/or Socio-Economic Development in the Early Operating Period. These reports are to be submitted in addition to the Economic Development quarterly reports due in the Construction Measurement Period, together with such Construction Measurement Period Economic Development quarterly reports; and

5.5.3.3 submit, as part of the first Contract Quarter of the Operating Measurement Period, details of any contributions made to Enterprise Development and/or Socio-Economic Development in the Early Operating Period, which shall consolidate all of the progress reports submitted in respect of the Early Operating Period.

6. **Seller's Undertakings**⁷

The Seller undertakes to attain or exceed the following levels of achievement in respect of the Economic Development Obligations:

6.1 **Job Creation**

6.1.1 The Seller undertakes to the DoE that the Employment of Employees will comply with the Committed Obligations in Annex 2 (*Job Creation Obligations*).

6.1.2 The tables detailing the Committed Obligations in relation to Job Creation are annexed hereto as Annex 2 (*Job Creation Obligations*).

6.1.3 The Quarterly Obligations, in respect of Job Creation, are contained in Annex 10 (*Quarterly Obligations*). The Seller shall procure that the Quarterly Obligations referred to in Annex 10 (*Quarterly Obligations*) with regard to Job Creation, are attained or exceeded by it in the relevant periods.

6.2 **Local Content**

6.2.1 The Seller undertakes to the DoE that it will procure that the Committed Obligations in Annex 3 (*Local Content Element Obligations*) are complied with.

6.2.2 The Quarterly Obligations, in respect of Local Content, are contained in Annex 10 (*Quarterly Obligations*). The Seller shall procure that the Quarterly Obligations referred to in Annex 10 (*Quarterly Obligations*) with regard to Local Content, are attained or exceeded by it in the relevant periods.

6.3 **Ownership**

6.3.1 The Seller undertakes to the DoE that it will procure that the Committed Obligations in Annex 4 (*Ownership Element Obligations*) are complied with.

6.3.2 The Seller undertakes to the DoE that it, and the Contractors, shall procure that the Control of the Seller, or the Control of the Contractors (as the case may be) reflects a participation by Black People and/or Black Enterprises of not less than the percentage of

⁷ Drafting Note: the obligations of the Seller contained in this section of Schedule 2 will be guided by the RFP Proposal submitted by the Seller.

Shareholding required to be held by Black People in the Seller or the Contractors pursuant to the provisions of this Schedule 2 (*Economic Development Obligations*).

6.3.3 The Quarterly Obligations, in respect of Ownership, are contained in Annex 10 (*Quarterly Obligations*). The Seller shall procure that the Quarterly Obligations referred to in Annex 10 (*Quarterly Obligations*) with regard to Ownership, are attained or exceeded by it and its Contractors in the relevant periods.

6.4 **Management Control**

6.4.1 The Seller undertakes to the DoE that it will procure that the Employment of Employees will comply with the Committed Obligations in relation to Top Management in Annex 5 (*Management Control Element Obligations*).

6.4.2 The Quarterly Obligations, in respect of Management Control, are contained in Annex 10 (*Quarterly Obligations*). The Seller shall procure that the Quarterly Obligations referred to in Annex 10 (*Quarterly Obligations*) with regard to Management Control, are attained or exceeded in the relevant periods.

6.5 **Preferential Procurement**

6.5.1 The Seller undertakes to the DoE that it will procure compliance with the Committed Obligations in relation to the Preferential Procurement element in Annex 6 (*Preferential Procurement Element Obligations*).

6.5.2 The Quarterly Obligations, in respect of Preferential Procurement, are contained in Annex 10 (*Quarterly Obligations*). The Seller shall procure that the Quarterly Obligations referred to in Annex 10 (*Quarterly Obligations*) are attained or exceeded in the relevant periods.

6.5.3 **Impact of B-BBEE Codes and Amended B-BBEE Codes on the Committed Obligations in relation to Preferential Procurement**

6.5.3.1 The Parties anticipate that the introduction of the Amended B-BBEE Codes may have an impact on the interpretation of the Committed Obligations in relation to Preferential Procurement.

6.5.3.2 The Parties therefore wish to regulate how Preferential Procurement will be recognised during the Term.

6.5.3.3 In order to demonstrate compliance with the Preferential Procurement Sub-Elements which utilise B-BBEE Recognition Levels to measure compliance, the Seller's contribution thereto will be recognised based on the valid B-BBEE Verification Certificate submitted in respect of the relevant Vendor, whether that verification certificate is issued in terms of a Sector Code, the B-BBEE Codes or the Amended B-BBEE Codes.

6.6 Enterprise Development

6.6.1 The Seller undertakes to the DoE that it will procure compliance with the Committed Obligations in relation to Enterprise Development contained in Annex 7 (*Enterprise Development Element Obligations*).

6.6.2 The Quarterly Obligations, in respect of Enterprise Development, are contained in Annex 10 (*Quarterly Obligations*). The Seller shall procure that the Quarterly Obligations referred to in Annex 10 (*Quarterly Obligations*) are attained or exceeded by it in the relevant periods.

6.7 Socio-Economic Development

6.7.1 The Seller undertakes to the DoE that it will comply with the requirements pertaining to Committed Obligations in terms of the Socio-Economic Development element contained in Annex 8 (*Socio Economic Development Element Obligations*).

6.7.2 The Quarterly Obligations, in respect of Socio-Economic Development, are contained in Annex 10 (*Quarterly Obligations*). The Seller shall procure that the Quarterly Obligations referred to in Annex 10 (*Quarterly Obligations*) with regard to Socio-Economic Development, are attained or exceeded by it in the relevant periods.

7. Reporting Obligations of the Seller and its Contractors

7.1 The Seller undertakes to submit reports in such form as may reasonably be required by the DoE, to the DoE. The Seller's obligation to the DoE shall include but not be limited to the following:

7.1.1 to, at the end of the first Contract Month (for the period between the Signature Date and the end of the first Contract Year), and thereafter at the beginning of each subsequent Contract Year:

7.1.1.1 deliver an Economic Development Plan detailing the measures that the Seller will implement in that Contract Year and subsequent Contract Years to achieve the Committed Obligations. The Economic Development Plan shall as a minimum include all of the information required in and fully comply with Annex 11 (*Form of Economic Development Plan*); and

7.1.1.2 deliver an Economic Development Matrix in relation to the Seller's commitments for the relevant Contract Year. The Economic Development Matrix shall as a minimum include all of the information required in and fully comply with Annex 1 (*Form of Economic Development Matrix*);

7.1.2 to, within fifteen (15) calendar days after the end of each Contract Quarter, deliver details of the Actual Total Quantum in relation to Economic Development Obligations.

- 7.2 For the avoidance of doubt:
- 7.2.1 the reports of the Seller must include the performance of all the Economic Development Obligations including those in respect of which the Seller relies on its Contractors to achieve; and
- 7.2.2 the Parties explicitly agree and record that nothing contained in the Economic Development Plan shall be construed to be qualifying or in any manner reducing the Economic Development Obligations, contained in the Committed Obligations. In the event of any conflict between the Economic Development Plan and any other Economic Development Obligation(s) contained in this Schedule 2 (*Economic Development Obligations*), then the provisions of this Schedule 2 (*Economic Development Obligations*) shall apply without reference to the Economic Development Plan.
- 7.3 The Seller must, in addition to the Actual Total Quantum in relation to the Economic Development Obligations referred to in paragraph 7.1.2, include as part of their report details of the Actual Total Quantum for each of the Economic Development Elements as follows:
- 7.3.1 In respect of Job Creation:
- 7.3.1.1 100-SR-01 – RSA Based Employees who are Citizens, expressed in Person Months;
- 7.3.1.2 100-SR-02 – RSA Based Employees who are Black People, expressed in Person Months;
- 7.3.1.3 100-SR-03 – Skilled Employees who are Black People, expressed in Person Months;
- 7.3.1.4 100-SR-04 – RSA Based Employees who are Citizens from Local Communities, expressed in Person Months;
- 7.3.1.5 Total RSA Based Employees, expressed in Person Months;
- 7.3.1.6 Total RSA Based Employees who are Skilled Employees, expressed in Person Months; and
- 7.3.1.7 indicate, in Person Months, the number of Employees who are People with Disabilities, Women and Youth, if any.
- 7.3.2 In respect of Local Content:
- 200-SR-01 – Value of Local Content Spend, expressed in Rand terms.
- 7.3.3 In respect of Ownership:
- 7.3.3.1 300-PC-01, 300-CC-01 or 300-OM-01 – Shareholding by Black People, expressed as a percentage of the Total Shareholding in the Measured Entity; and

- 7.3.3.2 300-PC-02 - Shareholding by Local Communities, expressed as a percentage of the Total Shareholding in the Measured Entity.
- 7.3.4 In respect of Management Control:
 - 400-SR-02 - Black Top Management, expressed in Person Months.
- 7.3.5 In respect of Preferential Procurement:
 - 7.3.5.1 500-SR-01 - B-BBEE Procurement, expressed in Rand terms;
 - 7.3.5.2 500-SR-02 - QSE and EME Procurement, expressed in Rand terms;
 - 7.3.5.3 500-SR-03- Women Owned Vendor Procurement, expressed in Rand terms; and
 - 7.3.5.4 indicating in Rand terms, goods and services procured from enterprises owned by People with Disabilities, Women and Youth, if any.
- 7.3.6 In respect of Enterprise Development:
 - 7.3.6.1 600-SR-01 - Enterprise Development Contributions, expressed in Rand terms; and
 - 7.3.6.2 600-SR-02 - Adjusted Enterprise Development Contributions, expressed in Rand terms.
- 7.3.7 In respect of Socio-Economic Development:
 - 7.3.7.1 700-SR-01 - Socio-Economic Development Contributions, expressed in Rand terms; and
 - 7.3.7.2 700-SR-02 - Adjusted Socio-Economic Development Contributions, expressed in Rand terms.
- 7.4 The DoE shall in respect of the Economic Development Plan delivered to it in terms of paragraph 7.1.1.1 above be entitled to suggest that the Seller considers alternative plans to those that the Seller proposes to implement to meet the Quarterly Obligations and achieve the Committed Obligations in respect of Socio Economic Development ("**Socio-Economic Development Plan**"), in the case where similar plans are being or will be implemented by other sellers in other projects as part of the IPP Programme. The DoE shall provide such comments within twenty (20) Business Days of receipt of the Economic Development Plans. The Seller shall consider and take into account the DoE's suggestions raised in relation to its Socio-Economic Development Plan and shall within twenty (20) Business Days submit a revised Economic Development Plan indicating how it has considered and taken into account the DoE's comments in relation to the Socio-Economic Development Plan.

8. Economic Development Performance Measurement

8.1 Economic Development Performance Credits and Deductions

8.1.1 The following formulae will be applied to determine the Economic Development Performance Credits ("**EDPC**") that the DoE may award the Seller, or Economic Development Performance Deductions ("**EDPD**") that the DoE may levy on the Seller depending on the performance of the Seller and its Contractors in exceeding, meeting, or failing to meet the Economic Development Obligations as specified in Annex 2 - Annex 8:⁸

$$\text{Performance Valuation in the Construction Measurement Period} = P * \sum_{i=1}^{12} W_i * SF_i$$

$$\text{Performance Valuation in the Operating Measurement Period} = P * \sum_{i=1}^{15} W_i * SF_i$$

where

- 8.1.1.1 $P_{\text{Construction Measurement Period}}$ = $R [^{***}]^9$
- 8.1.1.2 $P_{\text{Operating Measurement Period}}$ = $R [^{***}]^{10}$ Indexed
- 8.1.1.3 i = the specific Economic Development Sub-Element
- 8.1.1.4 W_i = Weight of Economic Development Sub-Element i extracted from Table 9.1 in Annex 9 (*Economic Development Weights and Scaling Factors*)
- 8.1.1.5 SF_i = Scaling Factor extracted from Table 9.2 in Annex 9 (*Economic Development Weights and Scaling Factors*) based on the performance in respect of each Economic Development Sub-Element in the relevant Contract Quarter ("**QEP**"), where QEP is determined as follows:

⁸ **Drafting Note:** Bidders must note that their obligations are to be expressed in percentage terms as contained in the Annexes 2 to 8 (Committed Obligations).

⁹ **Drafting Note:** amount to be extracted from the financial model of the Bidder, determined based on 5% of the costs of the design, construction and commissioning of the Facility in the average Contract Quarter and will be fixed prior to Signature Date, on a date to be notified by the DoE to the Preferred Bidders.

¹⁰ **Drafting Note:** this amount is to be based on 2% of the Bidder's forecast revenue averaged to a single quarter to be extracted from the financial model of the Bidder and will be fixed prior to the Signature Date on a date notified by the DoE to the Preferred Bidders.

8.1.1.5.1 in the case of Job Creation, it shall be as indicated in paragraph 8.1.3.1 of this Schedule 2 (*Economic Development Obligations*) for each of the Job Creation Economic Development Sub-Elements; and

8.1.1.5.2 in the case of all other Economic Development Sub-Elements, it shall be in terms of the following formula:

$$QEP_i = \frac{\text{Quarterly Achievement in the Contract Quarter}}{\text{Quarterly Obligation in the Contract Quarter}}$$

8.1.2 If the Performance Valuation results in a positive value, it is an EDPD, and if the Performance Valuation results in a negative value, it is an EDPC.

8.1.3 QEP in respect of Job Creation and Quarterly Achievement in respect of each other Economic Development Sub-Element shall be determined as follows:

8.1.3.1 in respect of Job Creation:

8.1.3.1.1 **100-SR-01: RSA Based Employees who are Citizens**

$$QEP = \left(\frac{\text{Quarterly Achievement in the Contract Quarter \% 100 - SR - 01}}{\text{Quarterly Obligation in the Contract Quarter \% 100 - SR - 01}} \right) * 0.33 + \left(\frac{\sum_{j=1}^n \text{Actual RSA Based Employees who are Citizens in Person - Months}}{\sum_{j=1}^n \text{Quarterly Obligation in the Contract Quarter of RSA Based Employees who are Citizens in Person - Months}} \right) * 0.67$$

where

$$\text{Quarterly Achievement in the Contract Quarter \% 100 - SR - 01} = \left(\frac{\sum_{j=1}^n \text{RSA Based Employees who are Citizens in Person - Months}}{\sum_{j=1}^n \text{RSA Based Employees in Person - Months}} \right)$$

j = Contract Month

n = Number of Contract Months in the Contract Quarter

8.1.3.1.2 **100-SR-02: RSA Based Employees who are Black People**

$$QEP = \left(\frac{\text{Quarterly Achievement in the Contract Quarter \% 100 - SR - 02}}{\text{Quarterly Obligation in the Contract Quarter \% 100 - SR - 02}} \right) * 0.33 + \left(\frac{\sum_{j=1}^n \text{Actual RSA Based Employees who are Black People in Person - Months}}{\sum_{j=1}^n \text{Quarterly Obligation in the Contract Quarter of RSA Based Employees who are Black People in Person - Months}} \right) * 0.67$$

where

$$\text{Quarterly Achievement in the Contract Quarter \% 100 - SR - 02} = \left(\frac{\sum_{j=1}^n \text{RSA Based Employees who are Black People in Person - Months}}{\sum_{j=1}^n \text{RSA Based Employees in Person - Months}} \right)$$

j = Contract Month

n = Number of Contract Months in the Contract Quarter

8.1.3.1.3

100-SR-03: Skilled Employees who are Black People

$$QEP = \left(\frac{\text{Quarterly Achievement in the Contract Quarter \% 100 - SR - 03}}{\text{Quarterly Obligation in the Contract Quarter \% 100 - SR - 03}} \right) * 0.33 + \left(\frac{\sum_{j=1}^n \text{Actual Skilled Employees who are Black People in Person - Months}}{\sum_{j=1}^n \text{Quarterly Obligation in the Contract Quarter of Skilled Employees who are Black People in Person - Months}} \right) * 0.67$$

where

$$\text{Quarterly Achievement in the Contract Quarter \% 100 - SR - 03} = \left(\frac{\sum_{j=1}^n \text{Skilled Employees who are Black People in Person - Months}}{\sum_{j=1}^n \text{Skilled Employees in Person - Months}} \right)$$

j = Contract Month

n = Number of Contract Months in the Contract Quarter

8.1.3.1.4

100-SR-04: RSA Based Employees who are Citizens from Local Communities

$$QEP = \left(\frac{\text{Quarterly Achievement in the Contract Quarter \% 100 - SR - 04}}{\text{Quarterly Obligation in the Contract Quarter \% 100 - SR - 04}} \right) * 0.33 + \left(\frac{\sum_{j=1}^n \text{Actual Employees who are Citizens from Local Communities in Person - Months}}{\sum_{j=1}^n \text{Quarterly Obligation in the Contract Quarter of Employees who are Citizens from Local Communities in Person - Months}} \right) * 0.67$$

where

$$\text{Quarterly Achievement in the Contract Quarter \% 100 - SR - 04} = \left(\frac{\sum_{j=1}^n \text{Employees from Local Communities who are Citizens in Person - Months}}{\sum_{j=1}^n \text{RSA Based Employees in Person - Months}} \right)$$

j = Contract Month

n = Number of Contract Months in the Contract Quarter

8.1.3.2 in respect of all the other Economic Development Sub-Elements:

8.1.3.2.1 **200-SR-01: Value of Local Content Spend**

$$\text{Quarterly Achievement} = \frac{\sum_{j=1}^n \text{Actual Local Content Spend}}{\sum_{j=1}^n \text{Portion of Total Project Value incurred}}$$

where

j = Contract Month

n= Number of Contract Months in the Contract Quarter

8.1.3.2.2 **300-PC-01: Shareholding by Black People in the Seller**

$$\text{Quarterly Achievement} = \frac{\sum_{j=1}^n \text{Shareholding by Black People in the Seller}}{n}$$

where

j = Contract Month

n= Number of Contract Months in the Contract Quarter

8.1.3.2.3 **300-PC-02: Shareholding by Local Communities in the Seller**

$$\text{Quarterly Achievement} = \frac{\sum_{j=1}^n \text{Shareholding by Local Communities in the Seller}}{n}$$

where

j = Contract Month

n= Number of Contract Months in the Contract Quarter

8.1.3.2.4 **300-CC-01: Shareholding by Black People in the EPC Contractor**

$$\text{Quarterly Achievement} = \frac{\sum_{j=1}^n \text{Shareholding by Black People in the EPC Contractor}}{n}$$

where

j = Contract Month

n= Number of Contract Months in the Contract Quarter

8.1.3.2.5 300-OM-01: Shareholding by Black People in the Operations Contractor

$$\text{Quarterly Achievement} = \frac{\sum_{j=1}^n \text{Shareholding by Black People in the Operations Contractor}}{n}$$

where

j = Contract Month

n= Number of Contract Months in the Contract Quarter

8.1.3.2.6 400-SR-01: Black Top Management

$$\text{Quarterly Achievement} = \frac{\sum_{j=1}^n \text{Black People in Top Management Adjusted for Recognition of Gender in Person – Months}}{\sum_{j=1}^n \text{Total Employees in Top Management in Person – Months}}$$

where

j = Contract Month

n= Number of Contract Months in the Contract Quarter

8.1.3.2.7 500-SR-01: B-BBEE Procurement

$$\text{Quarterly Achievement} = \frac{\sum_{j=1}^n \text{Actual BBBEE Procurement Spend}}{\sum_{j=1}^n \text{Total Procurement Spend}}$$

8.1.3.2.8 500-SR-02: QSE and EME Procurement

$$\text{Quarterly Achievement} = \frac{\sum_{j=1}^n \text{Actual QSE and EME Procurement Spend}}{\sum_{j=1}^n \text{Total Procurement Spend}}$$

where

j = Contract Month

n= Number of Contract Months in the Contract Quarter

8.1.3.2.9

500-SR-03: Women Owned Vendor Procurement

$$\text{Quarterly Achievement} = \frac{\sum_{j=1}^n \text{Actual Women Vendor Procurement Spend}}{\sum_{j=1}^n \text{Total Procurement Spend}}$$

where

j = Contract Month

n= Number of Contract Months in the Contract Quarter

8.1.3.2.10

600-SR-01: Enterprise Development Contribution

$$\text{Quarterly Achievement} = \frac{\sum_{j=1}^n \text{Enterprise Development Contributions}}{\sum_{j=1}^n \text{Revenue}}$$

where

j = Contract Month

n= Number of Contract Months in the Contract Quarter

8.1.3.2.11

600-SR-02: Adjusted Enterprise Development Contribution

$$\text{Quarterly Achievement} = \frac{\sum_{j=1}^n \text{Enterprise Development Contributions adjusted for Localness}}{\sum_{j=1}^n \text{Revenue}}$$

where

j = Contract Month

n= Number of Contract Months in the Contract Quarter

8.1.3.2.12

700-SR-01: Socio-Economic Development Contribution

$$\text{Quarterly Achievement} = \frac{\sum_{j=1}^n \text{Socio - Economic Development Contributions}}{\sum_{j=1}^n \text{Revenue}}$$

8.1.3.2.13

700-SR-02: Adjusted Socio-Economic Development Contribution

$$\text{Quarterly Achievement} = \frac{\sum_{j=1}^n \text{Socio - Economic Development Contributions adjusted for Localness}}{\sum_{j=1}^n \text{Revenue}}$$

where

j = Contract Month

n = Number of Contract Months in the Contract Quarter

8.1.4

The Economic Development Performance Deductions and Economic Development Performance Credits will be reconciled at the end of the Construction Measurement Period and during the Operating Measurement Period at the end of each Contract Year by adding the outcome of the determination of the Economic Development Performance Deductions and Economic Development Performance Credits for each Contract Quarter in the Construction Measurement Period and thereafter each Contract Quarter in the Operating Measurement Period during the Contract Year, and:

8.1.4.1

should the reconciliation of the Economic Development Performance Deductions and Economic Development Performance Credits at the end of the Construction Measurement Period or the relevant Contract Year yield a negative amount, no amounts will be due and payable to the DoE by the Seller; and

8.1.4.2

should the reconciliation of the Economic Development Performance Deductions and Economic Development Performance Credits at the end of the Construction Measurement Period or at the relevant Contract Year yield a positive amount, such amount will be due and payable to the DoE, which shall be due and payable to the DoE by the Seller within fifteen (15) Business Days of demand of such payment by the DoE to the Seller.

8.2

Economic Development Termination Points

8.2.1

In terms of clause 13.2 (*Termination Points*) of this Agreement, the Total Quarterly Economic Development Performance (“**TQP**”) of the

Seller needs to be calculated to determine the Termination Point(s) incurred in respect of a specific Contract Quarter. The TQP is determined as follows:¹¹

$$\text{Total Quarterly ED Performance} = \sum_{i=1}^{15} W_i * QEP_i$$

8.2.2 The application of the TQP formula is described in paragraph 8.2.1 of this Schedule 2 (*Economic Development Obligations*).

8.2.3 In terms of clause 13.2 (*Termination Points*) of this Agreement, a Bi-quarterly Economic Development Performance (“**BQEP**”) needs to be calculated to determine for each of the respective Economic Development Sub-Elements, the Termination Point(s) applicable to the Seller in the current and previous Contract Quarter. The BQEP is determined as follows:

$$BQEP_i = \frac{Bi - \text{quarterly Achievement in the two Contract Quarters}}{Bi - \text{quarterly Obligations in the two Contract Quarters}}$$

8.2.4 The:

8.2.4.1 Bi-quarterly Achievement in the two Contract Quarters is determined for each of the Economic Development Sub-Elements as the sum of the QEP, which is described in paragraph 8.1.1.5 of this Schedule 2 (*Economic Development Obligations*), for the two Contract Quarters; and

8.2.4.2 Bi-quarterly Obligations in the two Contract Quarters is determined for each of the Economic Development Sub-Elements as the sum of the Quarterly Obligations for the two Contract Quarters.

9. DoE Economic Development Verification

9.1 The DoE shall have the entitlement from time to time, in its sole discretion, to appoint a person or persons as Economic Development Independent Monitor(s) to carry out the functions referred to in paragraph 9.3 below. The costs of such appointment shall be borne by the DoE.

9.2 The appointment of the Economic Development Independent Monitor is in the sole discretion of the DoE, and he may be appointed at any time during the existence of the Project.

9.3 The Economic Development Independent Monitor may, subject to the terms of his appointment, *inter alia*:

¹¹ Because there are twelve Economic Development Sub-Elements which are applicable during the Construction Measurement Period, the TQP will be measured, in respect of Contract Quarters falling in the Construction Measurement Period, on the basis of a sum of twelve rather than fifteen.

- 9.3.1 review the Seller and its Contractors' records including any monitoring or audits conducted by the Seller and its Contractors, to verify compliance with the requirements of Schedule 2 (Economic Development Obligations); and
- 9.3.2 prepare reports in relation to any of the review or monitoring carried out by it in terms of its functions pursuant to the provisions of this Schedule 2 (*Economic Development Obligations*).
- 9.4 The Seller and its Contractors shall:
 - 9.4.1 monitor, audit, and record in an auditable manner, its own implementation and compliance with Schedule 2 (*Economic Development Obligations*);
 - 9.4.2 provide the Economic Development Independent Monitor with such information as the Economic Development Independent Monitor reasonably requests concerning the implementation by the Seller and its Contractors of Schedule 2 (*Economic Development Obligations*);
 - 9.4.3 invite the DoE who shall be entitled to be represented by the Economic Development Independent Monitor to all meetings at which material issues in relation to the implementation by the Seller and its Contractors of Schedule 2 (*Economic Development Obligations*) are to be discussed; and
 - 9.4.4 take account of the opinions expressed by the Economic Development Independent Monitor.

10. Access to Information

The Seller and its Contractors will allow the DoE access to all the information that is not considered commercially sensitive on which the quarterly Economic Development achievements of the Seller and the Contractors were based. The Seller and its Contractors will allow the Economic Development Independent Monitor appointed by the DoE access to all the information on which the quarterly Economic Development achievements of the Seller and the Contractors were based after receiving a duly completed confidentiality statement from the Economic Development Independent Monitor.

Form of Economic Development Matrix

Please see the next page

Job Creation Element Obligations

1. Committed Obligations

- 1.1 The Committed Obligations with regard to the Job Creation Obligations are provided in Tables 2.1(A) and 2.1(B) below.

TABLE 2.1A – Percentage of Committed Obligations with regard to Job Creation¹²

SUB-ELEMENT(S)		COMMITTED OBLIGATIONS (JOB CREATION OBLIGATIONS)
No.	Description	
100-SR-01	RSA Based Employees who are Citizens	<i>[80%]</i>
100-SR-02	RSA Based Employees who are Black People	<i>[50%]</i>
100-SR-03	Skilled Employees who are Black People	<i>[30%]</i>
100-SR-04	RSA Based Employees who are Citizens from Local Communities	<i>[20%]</i>

- 1.2 For purposes of Table 2.1A above, reference to Committed Obligations (Job Creation Obligations) shall refer to the Seller's undertaking and commitment in respect of each of the Construction Measurement Period and the Operating Measurement Period that:
- 1.2.1 *[80%]* of the Employees employed for purposes of the Project will be RSA Based Employees who are Citizens;
- 1.2.2 *[50%]* of the Employees employed for purposes of the Project will be RSA Based Employees who are Black People;
- 1.2.3 *[30%]* of the Skilled Employees employed for purposes of the Project will be Black People; and
- 1.2.4 *[20%]* of the Employees employed for purposes of the Project will be RSA Based Employees who are Citizens from Local Communities.

¹² **Drafting Note:** These obligations are to be based on the Bidder's proposal denoting the commitments made by the Bidder with regard to Job Creation. The numbers in [squared brackets] will be changed to align with the Bidder's proposal which must, at all times, comply with the minimum requirements as stated in the RFP.

TABLE 2.1B – Quantum of Committed Obligations with regard to Job Creation

100 Job Creation – Quantum		Construction Measurement Period		Operating Measurement Period	
Description					
100-SR-01	RSA Based Employees who are Citizens	[•] Person Months	[80%]	[•] Person Months	[80%]
100-SR-02	RSA Based Employees who are Black People	[•] Person Months	[50%]	[•] Person Months	[50%]
100 – SR 03	Skilled Employees who are Black People	[•] Person Months	[30%]	[•] Person Months	[30%]
100 – SR 04	Jobs Created for Local Communities	[•] Person Months	[20%]	[•] Person Months	[20%]

1.3 For purposes of Table 2.1B above, reference to Committed Obligations (Job Creation Obligations) shall refer to the Seller’s undertaking, in respect of each of the Construction Measurement Period and the Operating Measurement Period, as to the number of people that will be Employed, expressed in Person Months.

Local Content Element Obligations

1. Committed Obligations

- 1.1 The Committed Obligations with regard to the Local Content Obligations are provided in Table 2.2 below.

TABLE 2.2 – Committed Obligations with regard to Local Content¹³

SUB-ELEMENT(S)		COMMITTED OBLIGATIONS (LOCAL CONTENT OBLIGATIONS)
No.	Description	
200-SR-01	Value of Local Content Spend	<i>[18%]</i>

- 1.2 For purposes of Table 2.2 above, reference to Committed Obligations (Local Content Obligations) shall refer to the Seller's undertaking and commitment that the Seller and its Contractors shall during the Construction Measurement Period ensure that the Value of Local Content Spend is not less than *[18%]* in relation to the Project.
2. All claims made in respect of Local Content must be capable of independent verification.

¹³ **Drafting Note:** These obligations are to be based on the Bidder's proposal denoting the commitments made by the Bidder with regard to Local Content. The numbers in [squared brackets] will be changed to align with the Bidder's proposal which must, at all times, comply with the requirements as stated in the RFP.

Ownership Element Obligations

1. Committed Obligations

- 1.1 The Committed Obligations with regard to the Ownership Element Obligations are provided in Tables 2.3.1, 2.3.2 and 2.3.3 below.¹⁴

TABLE 2.3.1 – Seller

SUB-ELEMENT(S)		COMMITTED OBLIGATIONS (OWNERSHIP OBLIGATIONS)
No.	Description	
300-PC-01	Shareholding by Black People	<i>[30%]</i>
	Exercisable Voting Rights by Black People	<i>[30%]</i>
	Economic Interest by Black People	<i>[30%]</i>
300-PC-02	Shareholding by Local Communities	<i>[5%]</i>
	Exercisable Voting Rights by Local Communities	<i>[5%]¹⁵</i>
	Economic Interest by Local Communities	<i>[5%]</i>

TABLE 2.3.2 – EPC Contractor

SUB-ELEMENT(S)		COMMITTED OBLIGATIONS (OWNERSHIP OBLIGATIONS)
No.	Description	
300-CC-01	Shareholding by Black People	<i>[20%]</i>
	Exercisable Voting Rights by Black People	<i>[20%]</i>
	Economic Interest by Black People	<i>[20%]</i>

¹⁴ **Drafting Note:** These obligations are to be based on the Bidder's proposal denoting the commitments made by the Bidder with regard to Ownership. The numbers in [squared brackets] will be changed to align with the Bidder's proposal which must, at all times, comply with the requirements as stated in the RFP.

¹⁵ **Drafting Note:** This will be applicable only where the Seller is structured in such a way that the Local Community's shareholding in the Seller includes Exercisable Voting Rights.

TABLE 2.3.3 – Operations Contractor

SUB-ELEMENT(S)		COMMITTED OBLIGATIONS (OWNERSHIP OBLIGATIONS)
No.	Description	
300- OM-01	Shareholding by Black People	<i>[20%]</i>
	Exercisable Voting Rights by Black People	<i>[20%]</i>
	Economic Interest by Black People	<i>[20%]</i>

- 1.2 For purposes of the above Tables 2.3.1, 2.3.2 and 2.3.3, reference to Committed Obligations (Ownership Obligations) shall refer to the Seller’s undertaking and commitment that:
- 1.2.1 *[30%]* of the Shareholding in the Seller will be held by Black People;
 - 1.2.2 *[5%]* of the Shareholding in the Seller will be held by Local Communities;
 - 1.2.3 *[20%]* of the Shareholding in the EPC Contractor will held by Black People; and
 - 1.2.4 *[20%]* of the Shareholding in the Operations Contractor will be held by Black People.

Management Control Element Obligations

1. Committed Obligations

- 1.1 The Committed Obligations with regard to the Management Control Obligations are provided in Table 2.4 below.

TABLE 2.4 – Committed Obligations with regard to Management Control¹⁶

SUB-ELEMENT(S)		COMMITTED OBLIGATIONS (MANAGEMENT CONTROL OBLIGATIONS)
No.	Description	
400-SR-01	Black Top Management	[40%]

- 1.2 For purposes of Table 2.4 above, reference to Committed Obligations (Management Control Obligations) shall refer to the Seller's undertaking and commitment that [40%] of Top Management is comprised of Black People, determined using the Adjusted Recognition of Gender.

¹⁶ **Drafting Note:** These obligations are to be based on the Bidder's proposal denoting the commitments made by the Bidder with regard to Management Control. The numbers in [squared brackets] will be changed to align with the Bidder's proposal which must, at all times, comply with the requirements as stated in the RFP.

Preferential Procurement Element Obligations

1. Committed Obligations

- 1.1 The Committed Obligations with regard to Preferential Procurement Obligations are provided in Table 2.5 below.

TABLE 2.5 – Committed Obligations with regard to Preferential Procurement¹⁷

SUB-ELEMENT(S)		COMMITTED OBLIGATIONS (PREFERENTIAL PROCUREMENT OBLIGATIONS)
No.	Description	
500-SR-01	B-BBEE Procurement	[60.00%]
500-SR-02	QSE and EME Procurement	[10.00%]
500-SR-03	Women Owned Vendor Procurement	[5.00%]

- 1.2 For purposes of Table 2.5 above, reference to Committed Obligations (Preferential Procurement Obligations) shall refer to the Seller's undertaking and commitment that it shall comply in respect of the Project Activities (including those of the Contractors) with the preferential procurement levels, as set out below:
- 1.2.1 B-BBEE Procurement Spend shall not be less than [60%] of the Total Amount of Procurement Spend;
- 1.2.2 B-BBEE Procurement Spend from Qualifying Small Enterprises or Exempted Micro Enterprises shall not be less than [10%] of the Total Amount of Procurement Spend; and
- 1.2.3 monetary spend from Women Owned Vendors shall not be less than [5%] of the Total Amount of Procurement Spend.

¹⁷ **Drafting Note:** These obligations are to be based on the Bidder's proposal denoting the commitments made by the Bidder with regard to Preferential Procurement. The numbers in [squared brackets] will be changed to align with the Bidder's proposal which must, at all times, comply with the requirements as stated in the RFP.

Enterprise Development Element Obligations

1. Committed Obligations

- 1.1 The Committed Obligations with regard to the Enterprise Development Obligations are provided in Table 2.6 below.

TABLE 2.6 – Committed Obligations with regard to Enterprise Development¹⁸

SUB-ELEMENT(S)		COMMITTED OBLIGATIONS (ENTERPRISE DEVELOPMENT OBLIGATIONS)
No.	Description	
600-SR-01	Enterprise Development Contributions	[0.6%] of Revenue
600-SR-02	Adjusted Enterprise Development Contributions	[0.6%] of Revenue

- 1.2 For purposes of Table 2.6 above, reference to Committed Obligations (Enterprise Development Obligations) shall refer to the Seller's undertaking and commitment that:
- 1.2.1 [0.6%] of the Revenue shall be spent on Enterprise Development Contributions; and
- 1.2.2 [0.6%] of the Revenue shall be spent on Adjusted Enterprise Development Contributions.

¹⁸ **Drafting Note:** These obligations are to be based on the Bidder's proposal denoting the commitments made by the Bidder with regard to Enterprise Development. The numbers in [squared brackets] will be changed to align with the Bidder's proposal which must, at all times, comply with the requirements as stated in the RFP.

Socio Economic Development Element Obligations

1. Committed Obligations

- 1.1 The Committed Obligations with regard to the Socio-Economic Development Obligations are provided in Table 2.7 below.

TABLE 2.7 – Committed Obligations with regard to Socio-Economic Development¹⁹

SUB-ELEMENT(S)		COMMITTED OBLIGATIONS (SOCIO-ECONOMIC DEVELOPMENT OBLIGATIONS)
No.	Description	
700-SR-01	Socio-Economic Development Contributions	[1.5%] of Revenue
700-SR-02	Adjusted Socio-Economic Development Contributions	[1.5%] of Revenue

- 1.2 For purposes of Table 2.7 above, reference to Committed Obligations (Socio-Economic Development Obligations) shall refer to the Seller's undertaking and commitment that:
- 1.2.1 [1.5%] of the Revenue shall be spent on Socio-Economic Development Contributions; and
- 1.2.2 [1.5%] of the Revenue shall be spent on Adjusted Socio-Economic Development Contributions.

¹⁹ **Drafting Note:** These obligations are to be based on the Bidder's proposal denoting the commitments made by the Bidder with regard to Socio-Economic Development. The numbers in [squared brackets] will be changed to align with the Bidder's proposal which must, at all times, comply with the requirements as stated in the RFP.

Economic Development Weights and Scaling Factors

TABLE 9.1: Economic Development Weights

ED ELEMENT	DESCRIPTION	WEIGHT DURING CONSTRUCTION MEASUREMENT PERIOD (W)	WEIGHT DURING OPERATING MEASUREMENT PERIOD (W)	TERMINATION THRESHOLD
100 Job Creation		31%	38%	
100-SR-01	RSA Based Employees who are Citizens	6%	8%	70%
100-SR-02	RSA Based Employees who are Black People	7.5%	8%	70%
100-SR-03	Skilled Employees who are Black People	7.5%	9%	70%
100-SR-04	RSA Based Employees who are Citizens from Local Communities	10%	13%	70%
200-SR-01 – Value of Local Content Spend		32%	N/A	70%
300 Ownership		19%	16%	
300-PC-01	Shareholding by Black People in the Seller	7.5%	6%	70%
300-PC-02	Shareholding by Local Communities in the Seller	8.5%	7%	70%
300-CC-01	Shareholding by Black People in the EPC Contractor	3%	N/A	70%
300-OM-01	Shareholding by Black People in the Operations Contractor	N/A	3%	70%

ED ELEMENT	DESCRIPTION	WEIGHT DURING CONSTRUCTION MEASUREMENT PERIOD (W)	WEIGHT DURING OPERATING MEASUREMENT PERIOD (W)	TERMINATION THRESHOLD
400-SR-01	- Black Top Management	6%	7%	50%
500 Preferential Procurement		12%	12%	
500-SR-01	B-BBEE Procurement	6%	6%	50%
500-SR-02	QSEs and EMEs Procurement	3%	3%	50%
500-SR-03	Women Owned Vendor Procurement	3%	3%	50%
600 Enterprise Development Contributions		N/A	7%	
600-SR-01	Enterprise Development Contributions	N/A	4%	50%
600-SR-02	Adjusted Enterprise Development Contributions	N/A	3%	50%
700 Socio-Economic Development contributions		N/A	20%	
700-SR-01	Socio-Economic Development contributions	N/A	13%	50%
700-SR-02	Adjusted Socio-Economic Development contributions	N/A	7%	50%

TABLE 9.2: Economic Development Scaling Factors

LEVEL OF PERFORMANCE	SCALING FACTOR
Less than 75%	1.50
Equal or more than 75%, but less than 85%	1.00
Equal or more than 85%, but less than 90%	0.70
Equal or more than 90%, but less than 95%	0.35
Equal or more than 95%, but less than 105%	0
Equal or more than 105%, but less than 110%	(0.35)
Equal or more than 110%, but less than 115%	(0.70)
Equal or more than 115%, but less than 125%	(1.00)
Equal or more than 125%	(1.50)

Quarterly Obligations

Drafting Note: The format of the Quarterly Obligations is provided in the below table. The number of quarters to be included will be determined by the duration of the particular project.

[BIDDER TO INSERT THE FOLLOWING DETAILS:

1. BIDDER NAME;
2. PROJECT NAME; AND
3. TECHNOLOGY OF BIDDER'S PROJECT.]

ECONOMIC DEVELOPMENT ELEMENT	DESCRIPTION	CONTRACT QUARTER 1			CONTRACT QUARTER 2			CONTRACT QUARTER 3		
		Quantum	Unit	Quarterly Obligation	Quantum	Unit	Quarterly Obligation	Quantum	Unit	Quarterly Obligation
100 Job Creation										
100-SR-01	RSA Based Employees who are Citizens	[8.0]	Person Months	[50.0%]	[8.0]	Person Months	[50.0%]	[8.0]	Person Months	[50.0%]
100-SR-02	RSA Based Employees who are	[8.0]	Person	[50.0%]	[8.0]	Person	[50.0%]	[8.0]	Perso	[50.0%]

ECONOMIC DEVELOPMENT ELEMENT	DESCRIPTION	CONTRACT QUARTER 1			CONTRACT QUARTER 2			CONTRACT QUARTER 3		
		Quantum	Unit	Quarterly Obligation	Quantum	Unit	Quarterly Obligation	Quantum	Unit	Quarterly Obligation
	Black People		Months			Months			n Months	
100-SR-03	Skilled Employees who are Black People	[8.0]	Person Months	[50.0%]	[8.0]	Person Months	[50.0%]	[8.0]	Person Months	[50.0%]
100-SR-04	Jobs created for Local Communities	[8.0]	Person Months	[50.0%]	[8.0]	Person Months	[50.0%]	[8.0]	Person Months	[50.0%]
200-SR-01 – Value of Local Content Spend		[8.0]	Rand	[50.0%]	[8.0]	Rand	[50.0%]	[8.0]	Rand	[50.0%]
300 Ownership										
300-PC-01	Shareholding by Black People in the Seller	N/A	N/A	[50.0%]	N/A	N/A	[50.0%]	N/A	N/A	[50.0%]
300-PC-02	Shareholding by Local Communities in the Seller	N/A	N/A	[50.0%]	N/A	N/A	[50.0%]	N/A	N/A	[50.0%]
300-CC-01	Shareholding by Black People in the EPC Contractor	N/A	N/A	[50.0%]	N/A	N/A	[50.0%]	N/A	N/A	[50.0%]
300-OM-01	Shareholding by Black people in the Operations Contractor	N/A	N/A	[50.0%]	N/A	N/A	[50.0%]	N/A	N/A	[50.0%]
400-SR-01 - Black Top Management		[8.0]	Person Months	[50.0%]	[8.0]	Person Months	[50.0%]	[8.0]	Person Months	[50.0%]

ECONOMIC DEVELOPMENT ELEMENT	DESCRIPTION	CONTRACT QUARTER 1			CONTRACT QUARTER 2			CONTRACT QUARTER 3		
		Quantum	Unit	Quarterly Obligation	Quantum	Unit	Quarterly Obligation	Quantum	Unit	Quarterly Obligation
500 Preferential Procurement										
500-SR-01	B-BBEE Procurement	[8.0]	Rand	[50.0%]	[8.0]	Rand	[50.0%]	[8.0]	Rand	[50.0%]
500-SR-02	QSEs and EMEs Procurement	[8.0]	Rand	[50.0%]	[8.0]	Rand	[50.0%]	[8.0]	Rand	[50.0%]
500-SR-03	Women Owned Vendor Procurement	[8.0]	Rand	[50.0%]	[8.0]	Rand	[50.0%]	[8.0]	Rand	[50.0%]
600 Enterprise Development Contributions										
600-SR-01	Enterprise Development Contributions	[8.0]	Rand	[50.0%]	[8.0]	Rand	[50.0%]	[8.0]	Rand	[50.0%]
600-SR-02	Adjusted Enterprise Development Contributions	[8.0]	Rand	[50.0%]	[8.0]	Rand	[50.0%]	[8.0]	Rand	[50.0%]
700 Socio-Economic Development contributions										
700-SR-01	Socio-Economic Development contributions	[8.0]	Rand	[50.0%]	[8.0]	Rand	[50.0%]	[8.0]	Rand	[50.0%]
700-SR-02	Adjusted Socio-Economic Development contributions	[8.0]	Rand	[50.0%]	[8.0]	Rand	[50.0%]	[8.0]	Rand	[50.0%]

Form of Economic Development Plan

Please see the next pages

COMPLETION MILESTONES

Please see the next pages

[Schedule 2 Part 1 of the PPA will be inserted here once finalised]

DIRECT AGREEMENT

Please see the form of Direct Agreement on the next pages

FINANCIAL MODEL

Please see the Financial Model on the disc attached below

PROJECT DOCUMENTS

1. Financing Agreements

[To be completed nearer to the Signature Date. Seller to insert titles of:

- *any common terms agreement and facility agreement, common facility agreement or loan agreements;*
- *any agreements in relation to the hedging of exposure to interest rate changes and foreign currency exchange rate fluctuations.*

Fee Letters, Inter-creditor Agreements, Direct Agreements, Sponsor and other support agreements and security documents will not be listed in this table]

Agreement Title	Parties	Date

2. Seller's shareholders' agreement and Memorandum of Incorporation

Agreement Title	Parties	Date
Memorandum of Incorporation		

3. Contracts

Agreement Title	Parties	Date

4. Lease Agreements

Agreement Title	Parties	Date

5. **Grid Connection Agreements**

[Preferred Bidder to insert titles of the budget quote, the Distribution Agreement or Transmission Agreement, as applicable, any direct agreement concluded in respect of the connection arrangements, and, if applicable, the Self-Build Agreement.]

Agreement Title	Parties	Date

APPENDIX K2

**POWER PURCHASE AGREEMENT -
PHOTOVOLTAIC PROJECTS**

between

[INSERT PROJECT COMPANY NAME]
as Seller

and

ESKOM HOLDINGS SOC LTD
as Buyer

pursuant to the

**RENEWABLE ENERGY INDEPENDENT POWER PRODUCER
PROCUREMENT PROGRAMME**

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PREAMBLE:

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

- (1) **[INSERT PROJECT COMPANY NAME]**, 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 LTD** (Registration No. 2002/015527/30), 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 operate, generate and sell energy from a [●] MW photovoltaic electricity 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 Department of Energy ("**Department of Energy**" or "**DoE**") pursuant to the Renewable Energy Independent Power Producer 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 Construction, financing, insurance of, Operation and Maintenance of the Facility, and the sale and purchase of Energy Output from the Facility.

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;

"**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 as have been agreed by the parties thereto 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 one hundred and seventy five point two (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 four hundred and thirty eight (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 (1) 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, or 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 shall 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 auto-consumption and the electrical losses up to the Delivery Point;

"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, and the Seller has provided proof to the Buyer's reasonable satisfaction of same; 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 on-going 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 shall be the product of the Commercial Energy delivered during that Billing Period and 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 to the Seller 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;

"Consumer Price Index" means the weighted average consumer price index (Dec 2012 = 100) as published by Statistics South Africa (or its equivalent successor entity), which is referred to as "Headline CPI – All urban areas" in Statistical Release P0141 from time to time (or equivalent successor index);

"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 at the Delivery Point and expressed as AC power capacity, net of auto-consumption and the electrical losses up to 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, but excluding, for the avoidance of doubt, any such instruction given when there is a constraint in the System due to planned or unplanned maintenance, refurbishment, modification, extension or development being carried out on or to the System;

"Daily Forecast Generation Profile" has the meaning ascribed to it 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 dependent 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 Seller, 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 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 per MWh applicable to Early Operating Energy, being sixty per cent (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;

"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;

"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 notice in the form of Schedule 2 Part 3 (*Facility Completion Form*), which is 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*), 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*);

"Force Majeure" means any of the following:

- (a) any fire, explosion, tempest, flood, drought, 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 sub-clauses (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;

"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;

"In Plane Irradiance" has the meaning ascribed to it in Schedule 6 (*Deemed Energy Payment*);

"Independent Engineer" means any independent consulting engineer from the list of firms in Schedule 5 (*List of firms - 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 ten (10) 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 ten (10) 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 ten (10) 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*);

"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;

"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 per cent (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 Ltd (Registration No. 2002/015527/30) acting through its Transmission Division, or any entity to which such functions of Eskom Holdings SOC Ltd (Registration No. 2002/015527/30) 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 5 (*Form of Notice of Commencement of Facility*) and that is 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 4 (*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 COD 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, true copies of which must be delivered by the Seller to the Buyer within ten (10) Business Days of the Signature Date;

"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 (1) 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 Pyranometer" has the meaning ascribed to it in Schedule 6 (*Deemed Energy Payment*);

"Reference Temperature Sensor" 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 stated to be the 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)]¹ days of the Signature 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;

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

"South Africa" 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;

¹ Note to Bidders: the time period for Commence and Continue Construction to be finalised during the Preferred Bidder stage having regard to relevant circumstances

"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 the date which falls [●]² months after the date on which the last of the Budget Quote Conditions (as defined in the budget quote issued by the Distributor or NTC (as the case may be) in respect of the Project) has been fulfilled, or such extended date after such date of fulfilment as may be agreed in writing by the parties to the budget quote, as such date of fulfilment is agreed in writing between the Seller and the Distributor or NTC (as the case may be), and as notified separately to both the Buyer and the DoE, substantially in the form of Schedule 11 (*Form of Budget Quote Effective Date Confirmation*); 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

² To be determined at preferred bidder stage, having regard to all relevant factors.

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 in terms of applicable Law (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 in terms of an applicable Law, that:

- (a) has the effect of amending the Commercial Energy Rate or the Early Operating Energy Rate other than as provided for in this Agreement; or
- (b) results in one or more changes to the Codes that have a material financial impact on the Project; or
- (c) has an effect other than the effect detailed in sub-clause (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 reasonably have been foreseen, the impact on the Project could not reasonably have been foreseen;

provided that, in respect of all situations falling within sub-clauses (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 proposed or draft Law that was promulgated or issued for comment at any time before the Signature Date if and to the extent that such Law when enacted or made and brought into effect is materially unchanged;

"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 4 (*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;

"Unit Completion" means the mechanical and electrical completion of the Unit in accordance with the Codes, the Transmission Agreement or the Distribution Agreement (as the case may be) and the standards of a Reasonable and Prudent Operator, and where applicable the issue of the relevant Unit Completion Form in accordance with clause 4.4.1(*Early Operating Period*);

"Unit Completion Form" means the notice, in the form of Schedule 2 Part 2 (*Unit Completion Form*), which may be completed by the Independent Engineer and delivered to the Buyer to demonstrate Unit Completion, as contemplated in clause 4.4.1(*Early Operating Period*);

"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, which may not exceed the NERSA approved schedule of standard pricing as applicable to the NTC or Distributor, 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 seven (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 it 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 - means Amperes

°C	-	means Degrees Centigrade
m	-	means Metres
s	-	means Seconds
V	-	means Volts
W	-	means 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 Signature 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, and routing of power lines existing at the Signature Date on, 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 beyond the Capacity installed at the Commercial Operation Date.

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. The Seller shall, annually within the first month of a Contract Year, provide the Buyer with such information and/or documentation that

the Buyer may reasonably require in order to demonstrate the Seller's compliance with its obligations in this clause 3.5.2. If the Seller is unable to comply with its obligations in terms of this clause 3.5.2, it shall inform the Buyer in writing immediately.

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 Signature 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 the 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 or procure the Construction of 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.

4.1.4 The Seller shall provide the Buyer with such information and data, regarding any matter relating to the arrangements between the Seller and the NTC or Distributor (as the case may be), as may be reasonably required by the Buyer to enable the Buyer to comply with its obligations and exercise its rights in terms of this Agreement.

4.2 **Independent Engineer**

4.2.1 The Parties have, in Schedule 5 (*List of firms - Independent Engineer*), identified up to five (5) firms of independent consulting engineers, every one of which they approve to be appointed as the Independent Engineer for the purpose of this Agreement, and every one of which the Seller warrants:

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

4.2.1.2 as at the Signature Date, has not rendered services to the Seller, any of its shareholders (direct or indirect), Contractors or Lenders or any Affiliate of any of them in respect of the Project.

4.2.2 The Seller shall, as soon as practicably possible, but in any event within twenty (20) Business Days of the Signature Date, engage with any (or all) of such firms with a view to one (1) of them being appointed as the Independent Engineer on terms substantially similar to the terms contained in the agreement set out in Schedule 10 (*Independent Engineer Agreement*).

4.2.3 The Seller shall keep the Buyer regularly informed of the Seller's progress towards the appointment of the Independent Engineer, and shall be responsible for arranging for the signing of the agreement when it contains all the terms and conditions that have been agreed between the Seller, the Buyer and the Independent Engineer for the appointment; and the Seller and the Buyer undertake to sign such agreement at such time.

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 - Independent Engineer*) or as agreed between the Buyer and the Seller.
- 4.2.6 If, after the Signature Date, the Independent Engineer renders services to the Seller (other than in terms of the Independent Engineer Agreement), any of its shareholders (direct or indirect), Contractors or Lenders or any Affiliate of any of them in respect of the Project, the Seller shall be obliged to notify the Buyer of this occurrence promptly on becoming aware of same and, if the Buyer so elects, the Seller shall terminate the contract with the appointed Independent Engineer.
- 4.2.7 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 - 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 procure the issue of the Unit Completion Form by the Independent Engineer, at its own cost and in each case in accordance with this clause 4.4.1 (*Early Operating Period*), in respect of each Unit (if applicable) which the Seller anticipates will generate and deliver Early Operating Energy to the Delivery Point, which notice shall be in the form of Schedule 2 Part 2 (*Unit Completion Form*).
- 4.4.2 Pursuant to clause **Error! Reference source not found.** and upon the Independent Engineer determining Unit Completion and receipt of the relevant Unit Completion Form, the Seller may in respect of such Unit issue the Notice of Commencement of Unit to the Buyer 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 4 (*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.
- 4.4.3 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:
- 4.5.2.1 earlier than the day before the Scheduled COD;
- 4.5.2.2 until the Seller has demonstrated to the Independent Engineer that the Facility is compliant with the Codes;
- 4.5.2.3 until the Seller has obtained written confirmation from the Independent Engineer that the Facility complies with the Codes;
- 4.5.2.4 until NERSA, or any person nominated by NERSA for such purpose, has issued to the Seller a notification of the Facility's compliance with the Codes; and
- 4.5.2.5 until NTC and or the Distributor has provided written confirmation to the Seller certifying that the Facility may be connected to the System for the purposes of delivering Commercial Energy.
- 4.5.3 Following compliance with clause 4.5.1 and clause 4.5.2 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 5 (*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 beyond the Capacity installed at the Commercial Operation Date 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 but less than the Contracted 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*), and:

4.5.5.1.1 if the Achieved Capacity, as re-assessed, is equal to or greater than the Contracted Capacity, then clause 4.5.4 shall then apply; and

4.5.5.1.2 if the Achieved Capacity, as re-assessed, remains equal to or greater than the Minimum Acceptance Capacity but less than the Contracted Capacity, then clause 4.5.5.2 shall then apply,

provided in each case 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 (or further repairs or replacements, as the case may be) 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, and clause 4.8 (*Reduction in Contracted Capacity*) shall apply.

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 17:00 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 17:00 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 sub-clause (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 but greater than the Minimum Acceptance 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, Schedule 1 (*Details of the Project and Facility*) shall be amended accordingly, and for the purposes of this Agreement, the power output of the Facility shall be limited to the amended Contracted Capacity, and only Energy Output that is generated from the amended Contracted Capacity shall be subject to this Agreement. The Seller shall not be entitled to increase the installed Capacity of the Facility beyond the Capacity installed at the Commercial Operation Date, 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 thereof; and

4.9.1.2 collectively discuss and coordinate with any relevant Responsible Authority, 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 six (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, and to the System Operator or the Distributor (as appropriate) 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 the next payment due to the Seller.

7.2 **Daily generation forecast**

7.2.1 The Seller shall provide the Buyer, and to the System Operator or the Distributor (as appropriate) 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 the 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 Payment*).

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 Every Invoice issued by the Seller shall contain the Buyer vendor registration number allocated to the Seller upon compliance by the Seller with the Buyer's vendor registration requirements³.

9.2.3 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 forty two (42) days of receipt of such Invoice (the "**Due Date**").

9.2.4 All payments due by either Party to the other under this Agreement shall be made:

9.2.4.1 in Rand in immediately available funds to such bank account in South Africa as the recipient Party shall from time to time nominate; and

9.2.4.2 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.

³ Sellers must initiate the process of complying with the Buyer's vendor registration requirements timeously, with a view to the completion of such process at least 3 (three) months prior to the issue of the first invoice.

- 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, the matter shall be dealt with in accordance with clause 26 (*Dispute Resolution*).

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 twenty four (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 per cent (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 five (5) Business Days, deliver 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 In Plane Irradiance, temperature and other climatic data recorded at the Project Site;
 - 11.2.1.5 all estimates and other data required in terms of clause 7 read with Schedule 4 (*Forecast Information*);
 - 11.2.1.6 all data required in terms of Schedule 6 (*Deemed Energy Payment*);

- 11.2.1.7 any information required to be recorded and/or reported in terms of the Consents; and
- 11.2.1.8 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 Installation⁴**

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

⁴ Where the Seller will connect to a municipal Distributor, the Buyer will need to be satisfied, prior to the signature of the PPA, that the Facility Metering Installation and System Metering Installation are in accordance with the standards and requirements of the Buyer.

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 zero point five per cent (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 zero point five per cent (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 Independent 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:

- 14.1.1 in respect of the period prior to the Scheduled COD; or
- 14.1.2 if the time for which any System Event or combination of System Events has or have endured:
 - 14.1.2.1 in the period that the Commercial Operation Date is delayed beyond the Scheduled COD; or
 - 14.1.2.2 after the Commercial Operation Date, 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 twenty (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 (1) 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 26 (*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 26 (*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 matter shall be dealt with in accordance with clause 26 (*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 twenty (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 matter shall be dealt with in accordance with clause 26 (*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 16.2.3, 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;
 - 16.2.2 it shall provide regular (at least monthly) progress reports to the other Party, regarding the steps taken to mitigate the consequences of such event, and their effectiveness, and shall provide such information and

documentation as may reasonably be required by the other Party for the purposes of assessing the relief that is being claimed; and

- 16.2.3 it shall not be relieved from liability under this Agreement (a) 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 or (b) if it does not comply with its obligations under sub-clause 16.2.2.
- 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 (and which shall be supported by documentation reasonably required by the other Party for the purposes of assessing the relief that is being claimed) relating to its claim and 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. If the Force Majeure event occurs after the Scheduled COD but prior to the Commercial Operation Date, provided the Last COD has not yet occurred, the Last 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 twelve (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 per cent (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 twelve (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 sixty (60) Business 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 thirty (30) 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 thirty (30) 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, including, if the conduct relates to a change in the Codes, making application in accordance with NERSA's procedures to NERSA to be exempted from such change.

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 sub-clause (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 sub-clause (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 sub-clause (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 Signature Date, which failure includes that Construction works are not on-going or have been suspended or abandoned), 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.

19.1.3 The Seller undertakes to provide the Buyer with any information the Buyer may require in order to determine the Seller's compliance or not with this clause 19 (*Project Insurance*).

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 twenty (20) 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, email 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;
- 32.1.3 if delivered by email, upon receipt by the sender of a return email from the recipient in which the sender's communication is acknowledged (it being the responsibility of the sender to obtain such acknowledgement); and
- 32.1.4 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:

Postal Address: [•]
Physical Address: [•]
Email Address: [•]
Fax No.: [•]
Tel No.: [•]
Attention: [•]; and

32.2.2 The Buyer:

Postal Address: PO Box 103, Germiston 1400, South Africa
Physical Address: Eskom Holdings SOC Ltd, Simmer Centre,
Corner Power and Lake Streets, Simmerpan,
Germiston, South Africa
Email Address: callie.fabricius@eskom.co.za
Fax No.: +27 11 871 3289
Tel No.: +27 11 871 2482
Attention: General Manager, Energy Planning and Market
Development System and Market Operator,
Transmission 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 Signature Date, save for those Project Documents identified in Schedule 7 (*Project Documents*) that will be executed in the Agreed Form after the Signature Date on proper authority;
- 33.1.5 the execution and performance of any Project Documents do not and will not contravene any provision of this Agreement, the memorandum of incorporation of the Seller as at the Signature Date, or any order or other decision of any Responsible Authority or arbitrator that is binding on the Seller as at the Signature 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 copies of all the Project Documents have been or will be delivered to the Buyer in accordance with the terms of this Agreement, and 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 or this Agreement.

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 the Buyer's Representative 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 the Seller's Representative 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 Party.

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 Seller, the Lenders and the DoE.

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, 2000.

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.

35.13 **Formulation and notification of claims for relief, compensation or Deemed Energy Payments**

If the Seller claims relief, compensation or Deemed Energy Payments in terms of this Agreement, then any such claim shall be formulated and notified to the Buyer such that the claim is capable of being assessed as a single claim, separate from any other claim, unless the Buyer agrees otherwise.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their duly authorised representatives.

[NAME OF SELLER]

By: _____

Name:

Title:

Date:

ESKOM HOLDINGS SOC LTD

By: _____

Name:

Title:

Date:

DETAILS OF THE PROJECT AND FACILITY

Part 1

Facility

Description of Facility

[Seller to provide a one paragraph description of the Facility and its components.]

Scale Drawing

PLEASE SEE SCALE DRAWING AT THE END OF THIS SCHEDULE 1 PART 1

[Seller to provide a scale drawing of the Facility, in high resolution, with the following clearly labelled:

- *the Reference Pyranometer;*
- *the Reference Temperature Sensor;*
- *the Facility substation and the Distribution or Transmission substation (as the case may be);*
- *cables up to the Delivery Point;*
- *the location of the Facility Metering Installation;*
- *the location of the System Metering Installation;*
- *access roads;*
- *the legal description of the property or properties covered by the Project Site, including (in respect of each property where the Project Site covers multiple properties) farm name, farm number and registration division, magisterial district and farm subdivision name; and*
- *a clear depiction of the Project Site boundary as well as the co-ordinates of each corner point along the boundary (including the coordinate system used). The polygon formed by the Project Site boundary should close, so the last co-ordinate must be the same as the first co-ordinate.*

If all of the above information cannot be incorporated onto a single, easily legible, drawing or map, then more than one drawing or map may be used.]

Facility Details

[Seller to complete the following table by completing the Microsoft Word template provided with the RFP.]

Project Name:	
Contracted Capacity: [MW]	
Maximum Export Capacity (as defined in the Distribution Agreement or the Transmission Agreement, as the case may be): [MW]	
PV Module Type: [e.g. Polycrystalline, Monocrystalline, Thin Film]	
Number of PV Modules:	
Number of module strings (where a string constitutes a number of modules connected to a common inverter):	
Mounting Type (fixed, single axis tracking or double axis tracking):	
PV inverter (manufacturer and model):	
Maximum instantaneous AC rated capacity of inverter: [MW]	
Maximum continuous AC rated capacity of inverter: [MW]	
Number of inverters:	
Transformer ratings:	
Number of transformers:	
Planned voltage connection level:	
Planned connection point (i.e. the name of the substation or distribution line onto which the Project is intended to connect):	

P50 Forecast Energy Output:

[Seller to provide the average annual forecasted Energy Output [MWh] for the first 20 years of operation or for the duration of this Agreement (whichever is the shortest) by completing the Microsoft Excel template provided with the RFP. Forecasts shall be based upon P50 estimates.]

Contract Year	Forecast Annual Energy Output (MWh)	Contract Year	Forecast Annual Energy Output (MWh)
1		11	
2		12	
3		13	
4		14	
5		15	
6		16	
7		17	
8		18	
9		19	
10		20	

Single Line Diagram

THIS PAGE HAS BEEN LEFT BLANK INTENTIONALLY. PLEASE SEE SINGLE LINE DIAGRAM ON THE NEXT PAGE.

[Seller to provide a single line diagram of the Facility, in high resolution, with the following clearly labelled (if necessary for clearer presentation, the diagram may be broken down and presented on several pages):

- ***Ownership boundaries;***
- ***Operational boundaries;***
- ***Delivery Point;***
- ***Substation;***
- ***Layout of the Facility Metering Installation; and***
- ***Layout of the System Metering Installation.]***

Energy Rates

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

Indexation

The Commercial Energy Rate shall be adjusted on 1 April in each Calendar Year starting 12 months following the base date of 1 April 2015 using the following formula:

$$P_n = P_b * (I_n/I_b)$$

where:

P_n = Fully Indexed Commercial Energy Rate in Year n;

P_b = ZAR [insert fully Indexed Commercial Energy Rate from paragraph 1 above] /MWh;

I_n = Consumer Price Index as published in Year n in respect of the month of December of Year n-1; and

I_b = 111.00, being the Consumer Price Index (Dec 2012 = 100) as published in respect of the month of December 2014, as rebased by Statistics South Africa (or its equivalent successor entity) from time to time.

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 Scheduled COD. In particular, the project schedule Gantt chart shall show the following:

- ***anticipated timescale for completion of the distribution connection works; and***
- ***timeframes for activities such as equipment delivery lead times, securing permits and construction timescales.***

Other than for the Scheduled COD or as specifically provided for elsewhere in this Agreement, failure to achieve the milestones set forth in the project schedule Gantt chart shall not be a breach of this Agreement.]

Scheduled COD for the Facility: [●]

PLEASE SEE THE PROJECT SCHEDULE GANTT CHART ON THE NEXT PAGE

Unit Completion Form

[on the letterhead of the Independent Engineer]

[Date]

Eskom Holdings SOC Ltd
Megawatt Park
Maxwell Drive
Sunninghill
South Africa

CC copy to Fax No.: [+27 (11) 800 5503]⁵

Attention: [●]⁶

Unit Completion Form

Dear Sirs,

We refer to the Power Purchase Agreement entered into between [●] and Eskom Holdings SOC Ltd 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 Unit Completion Form as defined in and as may 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 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 the Codes.
- The Capacity of Unit [●], as measured at the Delivery Point, is [●]MW.
- The Unit [●] of the Facility has passed the relevant acceptance tests required for the Operation and Maintenance of Unit [●] and has been successfully completed in accordance with the relevant construction contract, the Codes and the Consents.
- The Facility Metering Installation has been procured, installed, tested and successfully commissioned in accordance with the PPA.

⁵ Fax number (and recipient) to be confirmed.

⁶ Buyer to insert appropriate officer on or before the execution of this Agreement.

The Unit is ready to begin generation and delivery of Early Operating Energy to the Delivery Point.

Yours faithfully,

[NAME OF INDEPENDENT ENGINEER]

Facility Completion Form

[on the letterhead of the Independent Engineer]

[Date]

Eskom Holdings SOC Ltd
Megawatt Park
Maxwell Drive
Sunninghill
South Africa

CC copy to Fax No.: [+27 (11) 800 5503]⁷

Attention: [●]⁸

Facility Completion Form

Dear Sirs,

We refer to the Power Purchase Agreement entered into between [●] and Eskom Holdings SOC Ltd 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.

We hereby represent and warrant the following:

- The Facility is compliant with the Codes.
- 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 estimated at the Delivery Point and expressed as AC power capacity, net of auto-consumption and electrical losses up to the Delivery Point, as determined pursuant to the acceptance tests described above, is [●]MW⁹.
- The Facility has a mechanism installed to limit the Capacity exported from the Facility to the lower of the Achieved Capacity and the Contracted Capacity.

⁷ Fax number (and recipient) to be confirmed.

⁸ Buyer to insert appropriate officer on or before the execution of this Agreement.

⁹ Amount to be included following completion of acceptance tests.

- The Reference Pyranometer and the Reference Temperature Sensor have been installed at the locations agreed in the PPA, have been successfully commissioned and are capable of performing their functions as set out in the PPA.

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

Yours faithfully,

[NAME OF INDEPENDENT ENGINEER]

Form of Notice of Commencement of Unit

[on the letterhead of the Seller]

[Date]

Eskom Holdings SOC Ltd
Megawatt Park
Maxwell Drive
Sunninghill
South Africa

CC copy to Fax No.: [+27 (11) 800 5503]¹⁰

Attention: [●]¹¹

Notice of Commencement of Unit [●]

Dear Sirs

We refer to the power purchase agreement dated [●], (the "PPA") between Eskom Holdings SOC Ltd (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. NERSA [or [●], being the person nominated by NERSA for such purpose] has issued to the Seller a notification of the Unit's compliance with the Codes, and such notification is attached hereto.

¹⁰ Fax number (and recipient) to be confirmed.

¹¹ Buyer to insert appropriate officer on or before the execution of this Agreement.

3. NTC and or the Distributor has provided written confirmation to the Seller certifying that the Unit may be connected to the System for purposes of delivering Early Operating Energy or Commercial Energy, and such confirmation is attached hereto.
4. The Facility Metering Installation has been procured, installed, tested and successfully commissioned in accordance with the PPA.
5. None of the events entitling the Buyer to terminate the PPA in accordance with clause 18 (*Termination*) has occurred and is continuing.
6. 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 Ltd
Megawatt Park
Maxwell Drive
Sunninghill
South Africa

CC copy to Fax No.: [+27 (11) 800 5503]¹²

Attention: [●]¹³

Notice of Commencement of Facility

Dear Sirs

We refer to the power purchase agreement dated [●] (the "**PPA**") between Eskom Holdings SOC Ltd (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 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. NERSA [or [●], being the person nominated by NERSA for such purpose] has issued to the Seller a notification of the Facility's compliance with the Codes, and such notification is attached hereto.
4. NTC and or the Distributor has provided written confirmation to the Seller certifying that the Facility may be connected to the System for purposes of delivering Commercial Energy, and such confirmation is attached hereto.
5. The Independent Engineer has confirmed that the Facility is in compliance with the Codes, and such notification is attached hereto.

¹² Fax number (and recipient) to be confirmed.

¹³ Buyer to insert appropriate officer on or before the execution of this Agreement.

6. 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]**.
7. 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.
8. 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.
9. The Facility Metering Installation has been procured, installed, tested and successfully commissioned in accordance with the PPA.
10. None of the events entitling the Buyer to terminate the PPA in accordance with clause 18 (*Termination*) have occurred and are continuing.
11. 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 twenty four (24) hours, the Buyer may on notice given no more than forty eight (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.

FORECASTING INFORMATION

1. Weekly Forecast Generation Profile

The Seller shall provide to the Buyer, and to the System Operator or Distributor (as appropriate) on a Weekly basis, before 09:00 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 to the Buyer, and to the System Operator or Distributor (as appropriate) 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	22:00		
22:00	23:00		
23:00	24:00		

SCHEDULE 5

LIST OF FIRMS - INDEPENDENT ENGINEER

[PREFERRED BIDDERS WILL BE REQUIRED TO PROVIDE DETAILS OF AT LEAST FIVE INDEPENDENT ENGINEERS, TO BE REDUCED TO FIVE OR LESS IN THE FINAL AGREEMENT]

Firm Name	Physical Address	Telephone Number	Contact person and email address
[•]	[•]	[•]	[•]
[•]	[•]	[•]	[•]
[•]	[•]	[•]	[•]
[•]	[•]	[•]	[•]
[•]	[•]	[•]	[•]

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

Facility Availability is a measure of what proportion of the Facility is typically in a functional and operable state to export Energy Output to the Delivery Point. The Facility availability shall be calculated as an average value over the Operating Period by using the following formula:

$$FA = \frac{\sum_{j=1}^k [WA]_j}{k}$$

where:

- 1.1 *FA* is the Facility Availability calculated after "k" ten (10) minute periods have elapsed in the Operating Period;
- 1.2 *j* is a counter indicating the relevant ten (10) minute period;
- 1.3 *k* is the number of complete ten (10) minute periods that have elapsed since the commencement of the Operating Period;
- 1.4 *WA* is a weighted average of the availability of the Facility (considering that Units may be of different capacities and contribute proportionately to the overall Facility Availability). *WA* shall be calculated every ten (10) minutes within the Operating Period by using the following formula:

$$WA = \frac{\sum_{i=1}^n (UA_i \times UC_i)}{AC}$$

where:

- 1.4.1 *UA_i* is the availability of the *ith* Unit, which shall be equivalent to the proportion of the total Capacity of that Unit that is in a functional and operable state to generate Energy Output. Unit Availability shall be determined within each ten (10) minute period by recording and analysing the AC power output at the inverter terminals;
- 1.4.2 *AC* is the Achieved Capacity of the Facility (MW);
- 1.4.3 *UC_i* is the nominal Capacity of the *ith* Unit (MW);
- 1.4.4 *n* is the number of Units in the Facility; and

1.4.5 i is a counter indicating the relevant Unit.

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 "In Plane Irradiance" (GK_i) (kW/m^2), which is the solar radiation available on the plane of a solar PV module;

2.1.2 module temperature ($^{\circ}C$); and

2.1.3 Energy Output of the Facility (MWh),

(the "FPC Data").

2.2 The following requirements shall apply to the measurement and recording of the FPC Data:

2.2.1 the FPC Data shall be recorded as average values taken over ten (10) minute intervals;

2.2.2 the FPC Data shall be logged by a data logger on the Project Site and date stamped;

2.2.3 the FPC Data shall be collected by the Facility SCADA system;

2.2.4 In Plane Irradiance shall be measured using a Pyranometer mounted at a location at or near the Project Site (the "Reference Pyranometer"). The Reference Pyranometer shall be confirmed by an Independent Engineer. The location of the Reference Pyranometer may not be changed without the prior written agreement of both Parties;

2.2.5 the In Plane Irradiance data shall be grouped in bins of $50W/m^2$;

2.2.6 the module temperature shall be measured using a temperature sensor mounted at an appropriate location within the Facility (the "Reference Temperature Sensor"). The Reference Temperature Sensor shall be confirmed by an Independent Engineer. The location of the Reference Temperature Sensor may not be changed without the prior written agreement of both Parties;

2.2.7 the module temperature data shall be grouped in bins of five (5) $^{\circ}C$; and

2.2.8 the Capacity of the Facility as recorded at the Delivery Point shall be divided by the Facility Availability during the same period to provide the power that the Facility could produce if it were fully (100%) available.

2.3 The FPC Data shall be stored and analysed by the Seller in order to produce a power curve that shall illustrate the relationship between the Capacity of the Facility and a GK_i for each temperature group. This suite of power curves will together form the FPC.

- 2.4 The FPC Data shall 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, Reference Pyranometer and Reference Temperature Sensor, 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 shall be confirmed by the Independent Engineer, after which it 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 Subject to paragraph 2.8 of this Schedule 6 (*Deemed Energy Payment*), if an Approved FPC is not completed within one year of Commercial Operation Date, Deemed Energy beyond that date and until an Approved FPC is completed, shall be determined by the Independent Engineer;
- 2.7 The Approved FPC shall be reviewed at the end of every five (5) Contract Years, starting after the end of the fifth (5th) Contract Year after the Commercial Operation Date, at the expense of the Seller to account for degradation of the Facility. An interim revision may be requested by either Party at any time during the Term and the costs of such revision shall be borne by the Party requesting the revision.
- 2.8 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, subject to application of the Allowed Grid Unavailability Period ("**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 (kWh) 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; and
- 3.2.3 *CER* is the Commercial Energy Rate (ZAR/kWh).

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 within the 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 (ZAR/kWh); and
- 4.3.5 *AE* is the Energy Output for each respective ten (10) minute period of Deemed Energy (kWh);
- 4.3.6 *EO* is the expected energy output for each ten (10) minute period of Deemed Energy, if the Deemed Energy Period commences:
- 4.3.6.1 within the first Contract Year following the Commercial Operation Date, the Facility's expected Energy Output based on the readings

from the Reference Pyranometer and the average performance of the Facility during the last seven (7) days of continuous operation, as calculated in terms of the following formula:

$$EO = \frac{\left(\sum_{j=1}^7 \left(\frac{E}{E_s} \right)_j \right)}{7} \times GK_i \times \frac{1(\text{hour})}{6} \times FA$$

where:

- 4.3.6.1.1 E is the daily Energy Output of the Facility (kWh), 'j' days prior to the commencement of the Deemed Energy Period;
- 4.3.6.1.2 E_s is the daily irradiation (kWh/m²) calculated from the In Plane Irradiance measured by the Reference Pyranometer 'j' days prior to the Deemed Energy Period;
- 4.3.6.1.3 j is the number of days preceding each Deemed Energy Period, from one (1) to seven (7);
- 4.3.6.1.4 FA is the Facility Availability calculated for the ten (10) minute period preceding the commencement of the Deemed Energy Period; and
- 4.3.6.1.5 GK_i (kW/ m²) is In Plane Irradiance for each ten (10) minute period; and
- 4.3.6.2 after the end of the first Contract Year following the Commercial Operation Date, the Facility's expected Energy Output 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 FA is the Facility Availability calculated for the ten (10) minute period preceding the commencement of the Deemed Energy Period; and
- 4.3.6.2.2 AP is the estimated Capacity of the Facility during each ten (10) minute period, as determined from the Approved FPC, or as confirmed by the Independent Engineer in terms of paragraph 2.6 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 Pyranometer or Reference Temperature Sensor, the relevant Deemed Energy Payment shall be calculated by the Independent Engineer, provided that if the failure of or interruption to the Reference Pyranometer or Reference Temperature Sensor 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 Pyranometer or Reference Temperature Sensor persists.

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 (*Deemed Energy Payment*) 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 (*Deemed Energy Payment*). 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.

PROJECT DOCUMENTS

[SCHEDULE 6 OF THE IA SHALL BE INSERTED ONCE FINALISED. THIS MUST INCLUDE THE BUDGET QUOTE, THE DISTRIBUTION AGREEMENT OR TRANSMISSION AGREEMENT, AS APPLICABLE, ANY DIRECT AGREEMENT CONCLUDED IN RESPECT OF THE CONNECTION ARRANGEMENTS, AND THE SELF-BUILD AGREEMENT, IF APPLICABLE.]

DIRECT AGREEMENT

THIS PAGE HAS BEEN LEFT BLANK INTENTIONALLY. PLEASE SEE THE FORM OF DIRECT AGREEMENT ON THE NEXT PAGE.

SCHEDULE 9

INTENTIONALLY NOT USED

INDEPENDENT ENGINEER AGREEMENT

**THIS PAGE HAS BEEN LEFT BLANK INTENTIONALLY. PLEASE SEE THE FORM
OF INDEPENDENT ENGINEER AGREEMENT ON THE NEXT PAGE.**

FORM OF BUDGET QUOTE EFFECTIVE DATE CONFIRMATION

[on the letterhead of the Seller]

[Date]

Eskom Holdings SOC Ltd
Megawatt Park
Maxwell Drive
Sunninghill
South Africa

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

Attention: [●]

AND TO:

The Department of Energy
192 Visagie Street (corner Visagie Street and Paul Kruger Street),
Pretoria, 0001

CC copy to Fax No.: +27 (12) 323 5819

Attention: Mr. Maduna Ngobeni

Confirmation of Budget Quote Effective Date

Dear Sirs

We refer to the power purchase agreement (the "**PPA**") that has been or is about to be entered into between Eskom Holdings SOC Ltd (the "**Buyer**") and ourselves, [●] (the "**Seller**"). Unless otherwise defined herein, capitalised terms used in this notice shall have the meanings assigned to them in the PPA.

We hereby confirm that the last of the Budget Quote Conditions (as defined in the budget quote issued by the [Distributor or NTC] in respect of the Project) has been fulfilled, and that such date of fulfilment is [●].

Yours faithfully

Confirmed by:

[NAME OF SELLER]

[INSERT NAME]

Representative of the Seller

Representative of [NTC / Distributor]