



**POWER PURCHASE AGREEMENT
WASTE TO ENERGY**

between

Mahlamba Ndlopfu & Waste 2 Energy Global SA Consortium

CC WS
P.H
[Pty Ltd]

as Seller

and

City of Ekurhuleni (CoE)
as Buyer

pursuant to the

EKURHULENI INDEPENDENT POWER PRODUCER PROCUREMENT PROGRAMME

CONTRACTED CAPACITY: [•] 33 MW

FACILITY UNIT: [•] WELTERREDEN, RIETFontein, SIMMER & JACK

FACILITY UNIT LOCATION: [•] CHLOORKOP

 WS

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PREAMBLE:

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

Mahlamba ndlopfu & Waste 2 Energy Global SA Consortium CC
(1) ~~Pty Ltd~~ a limited liability company (Registration No. *2009/093224/23*) incorporated under the laws of South Africa and having its principal place of business at *40 ELECTRON, ISANDO, ISANDO, KENYON PAUL 1600* in the Republic of South Africa (the "Seller") herein represented by *LYBON BALDI* in his/her capacity as *MEMBER* him/her being duly authorized thereto; and

(2) **City of Ekurhuleni Metropolitan Municipality (CoE)**, an organ of state with local sphere of government as defined in section 2 of the Local Government: Municipal Systems Act, Act 32 of 2000 (the "**Buyer and/or Distributor**"),

(jointly referred to as, the "**Parties**", and "**Party**" shall have a corresponding meaning).

INTRODUCTION

- (A) The Buyer is proceeding on the basis that Seller will obtain a generation license from NERSA, if required, in terms of the provisions of the Electricity Regulation Act.
- (B) The Buyer has been authorized in accordance with the provisions of section 33 of the MFMA to enter into this Agreement following the Seller's appointment by the Buyer pursuant to the City of Ekurhuleni independent Power Producer programme.
- (C) The Seller wishes to sell the Energy Output from the Facility Unit to the Buyer, and the Buyer wishes to purchase 100% of the metered energy generated up to the Contracted Capacity 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 Unit, and the sale and purchase of Energy Output from the Facility Unit.

THE PARTIES AGREE as follows:

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this agreement, unless the context indicates a contrary intention, the following words and expressions bear the meanings assigned to them and cognate expressions bear corresponding meanings –

"Companies Act" means the companies act, no 71 of 2008.

"Confidential Information" means any information or data relating to the City of Ekurhuleni and/or any of its related companies (even if not marked as being confidential, restricted, secret, proprietary or any similar designation), in whatever format and whether recorded or not (and if recorded, whether recorded in writing, on

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any electronic medium or otherwise), which –

- a) by its nature or content is identifiable as confidential and/or proprietary to the City of Ekurhuleni and/or any related company; or
- b) is intended or by its nature or content could reasonably be expected to be confidential and/or proprietary to the employer and/or any related company,

and includes –

- (i) information relating to the City of Ekurhuleni and/or any related company's, existing and future strategic objectives and existing and future business plans and corporate opportunities;
- (ii) trade secrets;
- (iii) technical information, techniques, know-how, operating methods and procedures;
- (iv) details of costs, sources of materials and customer lists (whether actual or potential) and other information relating to the existing and prospective customers and suppliers of the City of Ekurhuleni and/or any related company;
- (v) pricing, price lists and purchasing policies;
- (vi) computer data, programmes and source CODES;
- (vii) information contained in or constituting the hardware or software of the City of Ekurhuleni and/or any related company, including third party products and associated material;
- (viii) information relating to the City of Ekurhuleni and/or any related company's network telecommunications services and facilities;
- (ix) any and all methodologies, formulae and related information in developed software and processes and other business of the City of Ekurhuleni and/or any related company;
- (x) products, drawings, designs, plans, functional and technical requirements and specifications;



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- (xi) intellectual property that is proprietary to the City of Ekurhuleni and/or any related company or that is proprietary to a third party and in respect of which the City of Ekurhuleni and/or any related company has rights of use or possession;
 - (xii) marketing information of whatsoever nature or kind;
 - (xiii) financial information of whatsoever nature or kind;
 - (xiv) information relating to any contracts to which the City of Ekurhuleni and/or any related company is a party; and
 - (xv) any information which is not readily available to a competitor of the City of Ekurhuleni and/or any of its related companies in the normal and ordinary course of business;
- (a) **"Effective Date"** means [insert];
- (b) **"Employee"** means [insert], with identity number [insert];
- (c) **"Intellectual Property"** means the following in any location or jurisdiction worldwide –
- (i) all inventions (whether patentable or unpatentable) and whether or not reduced to practise), all improvements thereto, and all patents, patent applications, and patent disclosures, together with all revisions, extensions and re-examinations thereof;
 - (ii) all trademarks, service marks, trade dress, logos, trade names and corporate names, (including all domain names, internet and intranet names, addresses, icons and other designations useful to identify or locate the City of Ekurhuleni or a related company on a computer network such as the world wide web), together with all translations, adaptations, derivations and combinations thereof and including all goodwill associated therewith, and all applications, registrations, and renewals in connection therewith;
 - (iii) all works capable of copyright, all copyright, and all applications, registrations and renewals in connection therewith;
 - (iv) all trade secrets and business information (including ideas, research and development, know-how, formulas, compositions, manufacturing and

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production processes and techniques, technical data, designs, drawings, specifications, customer and supply lists, pricing and cost information, and business and marketing plans and proposals);

- (v) all computer software (including data and related documentation);
 - (vi) all patterns and/or designs and design applications and registrations;
 - (vii) all other proprietary rights;
 - (viii) all business or trade names used by or in connection with, or normally associated with the City of Ekurhuleni or a related company; and
 - (ix) all copies and tangible embodiments thereof, in each instance in whatever form or medium.
- (d) **"Personal Information"** shall bear the meaning of the terms "personal information" as well as "special personal information" as set out in POPI.
- (e) **"POPI"** means the protection of personal information act, no 4 of 2013.
- (f) **"Process"** means to process as that concept is defined in POPI, including but not limited to the collection, retention, use, storage or distribution of personal information, and "processing" shall have a corresponding meaning;
- (g) **"Related Company"** means any company or other entity that is related to the City of Ekurhuleni, as such concept is defined in the companies act, including, without limitation, [insert name(s) of related companies].

"Achieved Capacity" means the Capacity of the Facility Unit, as specified in the Facility Unit 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 initialed 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 the Buyer's bank 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;

"Agreed Tariff" means the Commercial Energy Tariff as defined;

"Agreement" means this power purchasing agreement contained in this document, including all annexures and schedules thereto;

"Allowed Grid Unavailability Period" means, where the Facility is connected to the Distribution System, a period of fifty six (56) hours in every Contract Year for each Point of Connection, 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 24.1 (*Prohibition on Assignment*) and the term **"Assignment"** shall be construed accordingly;

"Billing Interval" means a 30-minute period over which energy is recorded and demand is integrated by the Facility Metering Installation or the System Metering Installation

"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 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;

"Buyer" means the City of Ekurhuleni in its capacity as the purchaser of the energy generated by the seller,

"Buyer Default" means any failure by the Buyer to carry out works or provide services or authorize the Seller to carry out works (relating to their authorization 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 Buyer in respect of such arrangement, which has the consequence of a Compensation Event;

"Capacity" means, in respect of a Facility Unit, at any time and from time to time, the capability (expressed in MW) of such Facility Unit, 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" means any change whatsoever in control whether affected directly or indirectly;

"Change in Law" means a change in law promulgated after the inception of this Agreement which amends or cancels any existing government approval or determination and which amendment or cancellation has a material adverse effect on the Seller or the Buyer;

"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 favor 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;

"CoE" means the City of Ekurhuleni;

"Commercial Energy" means the Energy Output delivered by the Seller to the Buyer during the Operating Period, limited to the Contracted Capacity at any given time;

"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 Tariff" means the tariff applicable to Commercial Energy, as specified in Schedule 1 Part 1 (Energy Tariffs);

"Commercial Operation Date" means the date specified in the Notice of Commencement of Facility Unit as being the Commercial Operation Date of the Facility Unit in terms of clause 4 (Commercial Operation Date/ COD);

"Competent Authority" means the Department of Environmental Affairs as the regulator for environmental matters;

"Compensation Event" means any material breach by the Buyer of any of its obligations under this Agreement 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 Agreement" means the agreement entered into between the Seller (as Customer) and the Buyer (as Distributor), which sets out the terms and conditions on which the Facility Unit will be connected to the Distribution System;

"Connection Works" means the Facility Unit Connection Works;

"Consents" means all consents, permits, clearances, authorizations, approvals, rulings, exemptions, registrations, filings, decisions, licenses, 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 Unit 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;

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"**Contract Year**" means each twelve (12) Month period, commencing at 00:00 hours on 1 July and ending at 24:00 hours on 30 June of the following year, provided that:

- (a) the first Contract Year shall commence at 00:00 hours on the first day of the Commercial Operation Date, and shall end at 24:00 hours on 30 June 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 Unit 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 Part 2 (*Details of Facility Unit*);

"**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 Unit;

"**Control**" has the meaning given to it in this Agreement;

"**Controlled Capacity**" means the Capacity output of a Facility Unit where it is limited by a control system such that the total combined Capacity of all Facility Units does not exceed the Contracted Capacity, and may be less than the Achieved Capacity of the Facility Unit.

"**Corrupt Act**" means any offence in respect of corruption or corrupt activities contemplated in the Prevention and Combating of Corrupt Activities Act, 12 of 2004 and other applicable legislation;

"**Curtailement**" means any instruction from the Buyer (as System Operator) to limit or reduce the Energy Output of the Facility Unit, and payment thereof shall be considered in terms of the Deemed Energy Payment mechanism once the Allowed Grid Unavailability Period is exceeded.

"**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 5 (*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 5 (*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;

"**Delivery Point**" means the physical point where the Facility unit 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 Part 2 (*Details of Facility Unit*);

"**Direct Loss**" means, in respect of either Party, any losses, liabilities, expenses, damages, costs and 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 System" means a distribution network of the Buyer (as the System 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 Unit or customers of any Distributor);

"Distributor" has the meaning given to it in the Codes and in the context of this agreement refers to the City of Ekurhuleni;

"Due Date" means 30 days from date of receipt of the invoice;

"EIA Record of Decision" means a record of decision of the Department of Environmental Affairs (DEA) or of any provincial environmental authority to whom the DEA has delegated the power to issue a record of decision) in favour of the Seller or Buyer as the case may be, issued in accordance with section 24 of the National Environmental Management Act, 107 of 1998, as read with of the Environmental Impact Assessment Regulations 2010 and other regulations, notices or schedules issued under the National Environmental Management Act, 107 of 1998, and which sets out certain environmental based conditions in accordance with which the Seller is to implement and perform the Project;

"Ekurhuleni Power Producer" means a power producer appointed by the City of Ekurhuleni to produce power in accordance with its Independent Power Producing Programme;

"Energy" means electrical energy generated by a Facility Unit and measured in MWh;

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

"Expiry Date" means 20 years after the COD date of each Facility Unit;

"Facility" means the complete facility inclusive of all facility units at a project site;

"Facility Power Curve" means a curve used to determine the predicted output of a power plant given various variables such as irradiation, temperature, humidity, altitude, etc.

"Facility Unit" means a module within a facility;

"Facility Unit Data" has the meaning ascribed to it in clause 11.2.1;

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

"Facility Unit Completion Forms" means the notice in the form of Schedule 2 Part 1 and 2 (*Facility Unit Completion Forms*), which is to be completed by the Seller and delivered to the Buyer in respect of the mechanical and electrical completion of the Facility Unit, in accordance with clause 4.3 (*Facility Unit Completion and Commissioning*), confirming that the Facility Unit has been duly completed;

"Facility Unit Connection Works" has the meaning given to it in the Connection Agreement listed in Schedule 6;

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"Facility Unit 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 Unit Metering Installation*);

"Force Majeure" means any of the following:

- (a) any fire, explosion, tempest, flood, drought, ionising radiation, riot and civil commotion;
- (b) any accidental loss or damage to the Construction works and/or the Facility Unit beyond the control of the parties;
- (c) any blockade or embargo;
- (d) 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;
- (e) any official or unofficial strike, lockout, go slow or other such labor disputes generally affecting the construction and energy industry or a significant sector of it;
- (f) war, civil war, armed conflicts or terrorism;
- (g) nuclear contamination;
- (h) chemical or biological contamination of the Facility Unit and/or the Project Site from any of the events referred to above; or

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 (h) 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, willful 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;

"Generation Tariff" means the Megaflex Tariff as approved by NERSA to Eskom for local authorities (with an annual increase as approved by NERSA), or in the event of Eskom changing the Megaflex tariff, the new tariff structure which Eskom will charge the Buyer for bulk energy purchases, less discount as set out in Schedule 1 Part 1;

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"Government" means the Government of the Republic of South Africa as contemplated in The Constitution of the Republic of South Africa, 1996;

"Local Community" means that body of persons comprising of-

- a) the resident's of the municipality; or
- b) the rate payers of the municipality;

and includes more specifically the poor or other disadvantaged sections of that body of persons.

"Independent Engineer" means any independent consulting engineer that is appointed in accordance with the provisions of clause 4.2;

"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 South African Legal Practice Council and their successors-in-title, if the matter relates primarily to a legal matter; or
- (c) an electrical, power or such other suitable 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;

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

"Last COD" means the date which falls three (3) years after the Signature Date;

"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, license, authorization, 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;

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"Load Shedding" means load reduction obtained by disconnecting load at selected points on the transmission or distribution system, and is a form of Curtailment.

"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" 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;

"Megaflex Tariff" means the Megaflex Tariff charged by Eskom to Local Authorities, as approved by NERSA on an annual basis

"Metering Certifier" means a reputable, experienced and qualified company appointed and paid for by the Buyer, 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 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;

"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;

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

"Municipal Finance Management Act" means the Local Government Municipal Finance Management Act 56 of 2003

"National Energy Regulator Act" means the National Energy Regulator Act 40 of 2004;

"NEMA" means the National Environmental Management Act 107 of 1998

"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 2 (Form of Notice of Commencement of Facility) and that is delivered by the Seller to the Buyer in terms of clause 4.4 (Commercial Operation Date);

"Notice of Commencement of Facility Unit" means the notice in the form of Schedule 2 Part 1 (Form of Notice of Commencement of Unit) and that is delivered by the Seller to the Buyer in terms of clause 4.4 (Commercial Operation Date);

"Operate" means to dispatch a Facility Unit and otherwise operate as required by clause 20 (*General Seller Undertakings*), and the term **"Operation"** shall be

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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;

"Party" means a party to this Agreement and "Parties" shall have a corresponding meaning

"Point of Connection" or **"POC"** means the electrical node in the distribution system where the Seller's plant is connected to the Buyer's network;

"PPA" means this energy power purchase agreement;

"Project" means the ownership or lease of the Facility Unit and the ownership, Construction, Operation and Maintenance of the Facility Unit and may consist of multiple Project Sites;

"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, 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 Units are to be Constructed and Operated as more fully described and defined in Schedule 1 Part 2 (*Details of Facility Unit*);

"Property" means the property on which the Facility Unit is constructed/erected as listed in Schedule 1 Part 2 (*Details of the Facility Unit*);

"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 Temperature Sensor" has the meaning ascribed to it in Schedule 5 (*Deemed Energy Payment*);

"Response Time" means a period of five (5) days within which a Party must

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respond, commencing on the next day and ending five (5) business days thereafter.

"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 for each Facility Unit in Schedule 1 Part 2 (*Details of Facility Unit*), or where only one date is provided, means the date by which the last Unit in a multiple Unit Facility must reach COD, 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 Unit 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 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) calendar days of the Signature Date;
- (c) the Seller fails to achieve the Commercial Operation Date on or before the Last COD;
- (d) the Seller abandons the Construction or Operation and Maintenance of the Facility Unit;
- (e) the Seller fails to comply with any provision of clause 24 (*Assignment*) and clause 26 (*Changes in Control*);
- (f) the Seller fails to achieve COD by the last stipulated COD date; and
- (g) 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;



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"**Signature Date**" means the date of the last Party signing this Agreement;

"**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;

"**System**" means the Distribution System;

"**System Event**" means:

- (a) any constraint, unavailability, interruption, Curtailment, breakdown, inoperability or failure of or disconnection from, the whole or any part of the System;
- (b) any delay in the connection of the facility to the system, beyond months, being the date agreed to in writing between the Seller and the Buyer and/or Distributor (as the case may be) as the estimated connection date for same; or
- (c) failure to provide connectivity by the Commercial Operation Date or any such date as provided for earlier than the Commercial Operation Date in the Connection Agreement, which failure has the effect of adversely affecting the ability of the Seller to perform any of its obligations or exercise any of its rights under this Agreement

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 this Agreement by the Distributor 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 Distributor 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 Amount**" means the amount payable by the Buyer to the Seller in the event of termination as a consequence of such Buyer Default, which is:

- (a) the reasonable termination costs incurred by the Seller as a direct consequence of the termination 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*);

"**Unforeseeable Conduct**" shall occur if, after the Signature Date, the Buyer 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), provided that the Buyer undertakes not to introduce or change any regulation or by-law that would have the outcomes listed hereunder:

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- (a) has the effect of amending the Commercial 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 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 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, 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 1 and 2 (*Unit Commencement Forms*) as being the dates on which that Unit will begin generation and delivery of Commercial Energy to the Delivery Point;

"Unit Completion" means the mechanical and electrical completion of the Unit in accordance with the Codes, the Connection Agreement and the standards of a Reasonable and Prudent Operator, and where applicable the issue of the relevant Unit Completion Form in accordance with clause 4.3 (*Facility Unit completion and commissioning*);

"Unit Completion Form" means the notice, in the form of Schedule 2 Part 1 and 2 (*Unit Completion Forms*), which shall be completed by the Seller and delivered to the Buyer to demonstrate Facility Unit Completion;

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

"Use of System Charges" means 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 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;

"Waste" in this Agreement means municipal solid waste collected from premises and transported to a landfill site, or any other form of waste that can be transformed into electrical Energy; and

"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.

1.2 Interpretation

In this Agreement, unless otherwise specified:

1.2.1 clause headings and the heading of the agreement are for convenience only and are not to be used in its interpretation;

1.2.2 an expression which denotes –

1.2.2.1 any gender includes the other genders;

1.2.2.2 a natural person includes a juristic person and *vice versa*;

1.2.2.3 the singular includes the plural and *vice versa*;

1.2.2.4 a party includes a reference to that party's successors in title and assigns allowed at law; and

1.2.2.5 a reference to a consecutive series of two or more clauses is deemed to be inclusive of both the first and last mentioned clauses.

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- 1.2.3 any reference in this agreement to –
- 1.2.3.1 **"Business Hours"** shall be construed as being the hours between 08h30 and 17h00 on any business day. any reference to time shall be based upon South African standard time.
 - 1.2.3.2 **"Days"** shall be construed as calendar days unless qualified by the word **"business"**, in which instance a **"business day"** will be any day other than a Saturday, Sunday or public holiday as gazetted by the government of the republic of South Africa from time to time.
 - 1.2.3.3 **"Laws"** means all constitutions; statutes; regulations; by-laws; CODEs; ordinances; decrees; rules; judicial, arbitral, administrative, ministerial, departmental or regulatory judgements, orders, decisions, rulings, or awards; policies; voluntary restraints; guidelines; directives; compliance notices; abatement notices; agreements with, requirements of, or instructions by any governmental body; and the common law, and "law" shall have a similar meaning; and
 - 1.2.3.4 **"Person"** means any person, company, close corporation, trust, partnership or other entity whether or not having separate legal personality.
- 1.2.4 the words **"include"** and **"including"** mean **"include without limitation"** and **"including without limitation"**. The use of the words **"include"** and **"including"** followed by a specific example or examples shall not be construed as limiting the meaning of the general wording preceding it.
- 1.2.5 any substantive provision, conferring rights or imposing obligations on a party and appearing in any of the definitions in this clause **Error! Reference source not found.** or elsewhere in this agreement, shall be given effect to as if it were a substantive provision in the body of the agreement.
- 1.2.6 words and expressions defined in any clause shall, unless the application of any such word or expression is specifically limited to that clause, bear the meaning assigned to such word or expression throughout this agreement.
- 1.2.7 unless otherwise provided, defined terms appearing in this agreement in title case shall be given their meaning as defined, while the same terms appearing in lower case shall be interpreted in accordance with their plain English meaning.
- 1.2.8 a reference to any statutory enactment shall be construed as a reference to that enactment as at the effective date and as amended or substituted from time to time.
- 1.2.9 unless specifically otherwise provided, any number of days prescribed shall be determined by excluding the first and including the last day or, where the last day falls on a day that is not a business day, the next succeeding business day.
- 1.2.10 if the due date for performance of any obligation in terms of this agreement is a day which is not a business day then (unless otherwise stipulated) the due date for performance of the relevant obligation shall be the immediately preceding business day.
- 1.2.11 where figures are referred to in numerals and in words, and there is any conflict between the two, the words shall prevail, unless the context indicates a contrary

intention.

- 1.2.12 the rule of construction that this agreement shall be interpreted against the party responsible for the drafting of this agreement, shall not apply.
- 1.2.13 any reference in this agreement to "this agreement" or any other agreement or document shall be construed as a reference to this agreement or, as the case may be, such other agreement or document, as amended, varied, novated or supplemented from time to time.
- 1.2.14 in this agreement the words "**clause**" or "**clauses**" and "**annexure**" or "**annexures**" refer to clauses of and annexures to this agreement.

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.

1.6 **Suspensive Conditions**

The following suspensive conditions will apply to this Agreement:

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- 1.6.1 The Buyer must provide authorization to enter into this Agreement for a 20-year period in accordance with the applicable provisions of the Municipal Finance Management Act, 56 of 2003 within a period of One month after conclusion of this agreement;
- 1.6.2 The Minister of Energy must issue the ministerial determination, if applicable, in terms of which the CoE can be the Buyer;
- 1.6.3 The Seller must obtain a generation license, where required in terms of the relevant legislation;
- 1.6.4 The Seller must secure the land on which the plant has to be erected and provide proof of security of tenure of same, unless the land already belongs to the Buyer, in which case the Buyer must provide the rights to the use of the land to the Seller;
- 1.6.5 The Seller must acquire all the necessary property rights in terms of zoning and permits, unless the property already belongs to the Buyer and has the necessary rights in place;
- 1.6.6 The Seller must obtain all required environmental authorizations and other permits;
- 1.6.7 The Connection Agreement must be signed within a period of 3 years
- 1.6.8 The Buyer must comply with the requirements of Section 33 of the Local Government: Municipal Finance Management Act 56 of 2003.

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

- 3.1.1 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 Facility Unit.
- 3.1.2 The Seller shall acquire such other land and/or rights in respect of land and shall provide proof of same 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.
- 3.1.3 All electricity infrastructure affixed to the property of the project site shall be deemed the asset of the Seller in accordance with the provisions of section 24 of the Electricity Regulation Act. The said electricity infrastructure shall not be subject to attachment by a creditor nor constitute security in the form of a landlords hypothec.

- 3.1.4 Details of the Project Site, including a scale map that identifies the location of the Project Site, diagram setting out the transmission lines and substation, interconnection facility, significant ancillary facilities and the Delivery Point, are included in Schedule 1 Part 2 (*Details of the Facility Unit*).

3.2 Risk and liability

- 3.2.1 Subject to applicable Laws, the Buyer is responsible for all pre-existing obligations in respect of the Project Sites on the Signature Date. Thereafter the Seller shall be fully responsible to the Buyer for the conduct of the Project, for the condition of the Project Sites and for the availability of adequate supplies of utilities.

- 3.2.2 Where the Seller establishes the Project on landfill sites belonging to the Buyer, the Buyer shall be responsible for the operation and maintenance of the landfill sites applicable to this agreement at the Buyer's cost for the full duration of the Agreement.

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 Unit 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 Unit.

3.4 No extension beyond allowed Contracted Capacity

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 allowed Contracted Capacity of the Facility.

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 Distributor or from the System. The Parties record and agree that the connection of a Facility Unit 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 Buyer, 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.

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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 procure the Construction of the Facility Unit in accordance with:

3.6.1.1 all applicable Laws, including the Consents; and

3.6.1.2 the standards of a Reasonable and Prudent Operator.

3.6.2 The Seller shall provide or procure all plant, equipment, machinery consumables, parts, materials and services whatsoever required for the Construction of the Facility Unit 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 Connection Agreement with the Buyer, 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 Connection Agreement the Facility Unit to be connected to the System.

4.1.3 The Parties record that it is intended, in the Connection Agreement, that:

4.1.3.1 the Distributor shall Construct or procure the Construction of the Connection Works on the grids side of metering point. The Distributor will own and operate the network; and

4.1.3.2 the Seller shall Construct the Facility Unit Connection Works to connect the Facility Unit with or to the System and will be responsible for constructing connection works to the metering point.

4.2 Independent Engineer

The Seller shall use an Independent Engineer to conduct Grid Code compliance studies.

 
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4.3 Facility Unit completion and commissioning

- 4.3.1 The Seller shall use all reasonable endeavors to commission the Facility Unit and to procure the issue of the Facility Unit Completion Form, at its own cost and in each case in accordance with this clause 4.3 (*Facility Unit completion and commissioning*), Schedule 2 Part 1 and 2 (*Facility Unit Completion Forms*), the Codes, the Connection Agreement 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 shall provide the Buyer on a Monthly basis with relevant information regarding the commissioning and testing undertaken pursuant to clause 4.3.1.

4.4 Commercial Operation Date

- 4.4.1 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 Unit in the form of Schedule 2 Part 1 and 2 (*Facility Unit Completion Forms*).
- 4.4.2 The Seller may not issue the notice of Commencement of Facility Unit Forms:
- 4.4.2.1 until the Seller has demonstrated that the Facility Unit is compliant with the Codes;
 - 4.4.2.2 until the Seller has obtained written confirmation from the Independent Engineer that the Facility Unit complies with the Codes;
 - 4.4.2.3 until NERSA, or any person nominated by NERSA for such purpose, has been notified of the Facility Unit's intended connection to the Distributor's grid.
 - 4.4.2.4 until the Distributor has provided written confirmation, which confirmation will not be unreasonably withheld, to the Seller certifying that the Facility Unit may be connected to the System for the purposes of delivering Commercial Energy.
- 4.4.3 Following compliance with clause 4.4.1 and clause 4.4.2 and upon 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 1 Part 5 (*Form of Notice of Commencement of Facility*).
- 4.4.4 If the Facility Unit has achieved Facility Unit Completion in terms of clause 4.3 (*Facility Unit Completion and Commissioning*) and the Achieved Capacity is equal to or greater than the Contracted Capacity, then:
- 4.4.4.1 for the purposes of this Agreement, the power output of the Facility Unit shall be limited to the Contracted Capacity, and only Energy Output that is generated from the Contracted Capacity shall be subject to this Agreement;

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4.4.4.2 the Seller shall deliver to the Buyer a Notice of Commencement of Facility Unit, 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 Unit; and

4.4.4.3 the Seller shall not be entitled to increase the Contracted Capacity after the Commercial Operation Date at any time in the future. The Seller shall always have the right to install additional equipment to compensate for degrading machine output over time, provided that the Contracted Capacity is not exceeded.

4.5 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. Notwithstanding the aforementioned, the Expiry Date shall remain unaltered.

4.6 Last COD

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.

4.7 Reduction in Contracted Capacity

If the Achieved Capacity on the Last COD is less than the Contracted Capacity as a result of failure to perform on the part of the Seller, then, on and from the Last COD, the Contracted Capacity shall be reduced to the Achieved Capacity of the Facility as at the Last COD. 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 subjected to this Agreement. In this case, the Seller shall not be entitled to increase the amended Contracted Capacity of the Facility at any time in the future.

4.8 Coordination with the Buyer as Distributor

4.8.1 In addition to complying with the other requirements of this clause 4 (*Testing and Commissioning*), the Seller shall:

4.8.1.1 provide the Buyer (as Distributor) 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

4.8.1.2 discuss and coordinate with any relevant Responsible Authority or the Distributor, 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 Buyer

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 Operating Period:

- 5.1.1 the Seller shall sell all the Commercial Energy generated by a Facility Unit to the Buyer (in its capacity as system operator) at the Delivery Point, on a self-dispatch basis, and subject only to the Codes and the standards of a Reasonable and Prudent Operator;
- 5.1.2 the Buyer (in its capacity as system operator) shall pay for the Commercial Energy delivered by the Seller to the Delivery Point;
- 5.1.3 the Buyer (in its capacity as system operator) shall ensure that the System is subject to the relevant Codes and the Connection Agreement, in such a way that the Facility Unit can self-dispatch. The operation of the System in a manner not required or permitted by the relevant Codes and/or the Connection Agreement shall be dealt with as a Curtailment in terms of clause 14 (*Consequences of a System Event*) to the extent that the Facility Unit is prevented or hindered from being self-dispatched, 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 (in its capacity as system operator) shall pay the Deemed Energy Payment that is payable in respect of the Deemed Energy in accordance with Schedule 5 (*Deemed Energy Payment*).
- 5.1.5 The Seller shall be responsible for the costs of all infrastructure to connect the generation plant to the distribution network up to the metering point of the buyer.

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.

5.3 Carbon Credits

Any carbon credits that are earned from this project are to accrue to the Seller as the power producer;

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 Unit, at any time is of the opinion that the Facility Unit is not being Maintained to the standard of a Reasonable and Prudent Operator, it may require that the Buyer, at his cost, conduct an inspection (and, based on the

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outcome of the inspection, such tests of the Facility Unit's condition as may be necessary) to ascertain whether the Facility is being Maintained to the standard of a Reasonable and Prudent Operator. The Buyer shall provide the Seller with 1 week's notice of the intended inspection.

- 6.2 If the inspection and, if applicable, tests detailed in clause 6.1 show that the Facility Unit 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 Unit 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 Unit 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 or the results thereof shall be referred to and determined in accordance with the provisions of clause 29 *Fast-Track Dispute Resolution*).

7. GENERATION FORECASTS

7.1 Monthly generation forecast

- 7.1.1 The Seller shall provide the Buyer in writing for each Month in 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 Unit for each day in the Month, which shall generally be in the form of Schedule 4 (*Forecast Information*) ("**Monthly Forecast Generation Profile**").
- 7.1.2 If the Seller fails to provide any Monthly 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.

8. TARIFF AND OTHER CHARGES

8.1 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 Tariff.

8.2 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 5 (*Deemed Energy Payment*).

8.3 Failure to make Payments

8.3.1 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.

8.3.2 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 ten (10) Business Days of such notice, the Seller may call a Compensation Event and rely on and enforce this Agreement, all in terms of clause 15 (Consequences of a Compensation Event).

9. INVOICING

9.1 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 Commercial Energy Payment due to the Seller for such Billing Period setting out the calculations upon which such 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; and

9.1.1.2.3 the circumstances which entitle the Seller to such Deemed Energy Payments;

9.1.1.3 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 Unit 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 requirements.

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- 9.2.3 The Party who received the Invoice shall pay to the other Party (who issued the Invoice) the amount of each Invoice within thirty (30) 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 23 (*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. In the event that a dispute was incorrectly raised, interest will be paid at the Agreed Interest Rate.
- 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 Unit Metering Installation, the Buyer shall be entitled at its own cost to request a test of the Facility Unit 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 Unit 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, or offset against the next month's invoice.
- 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 28 (*Dispute Resolution*). The adjudicating independent expert shall use the latest data and records and test certificates for the metering

10. OUTAGES

10.1 Scheduled Outages

- 10.1.1 The Seller shall comply with the requirements of Schedule 3 (*Scheduled and*

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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 Unit 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 Unit 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 Unit, the Seller shall inform the Buyer within four (4) hours from the commencement of the Unscheduled Outage of the time period that the Facility Unit 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 Unit 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 notify the Buyer if the Facility Unit comprising at least ten per cent (10%) of the Contracted Capacity 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 Unit 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 or a Compensation Event;

and shall in the Monthly Report deliver to the Buyer details of the reasons for such incapacity.

11.2 **Data and records**

- 11.2.1 The Seller shall maintain complete and accurate data and records required

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to facilitate the proper administration of this Agreement and the Facility Unit. Such data and records ("**Facility Unit Data**") shall include an accurate and up-to-date log of Operations, updated daily, in a format reasonably acceptable to the Buyer. The Facility Unit Data should include, but not be limited to, the following information, with records of:

- 11.2.1.1 for each thirty (30) 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 estimates and other data required in terms of clause 7 read with Schedule 4 (*Forecasting Information*);
- 11.2.1.5 all data required in terms of Schedule 5 (*Deemed Energy Payment*);
- 11.2.1.6 any information required to be recorded and/or reported in terms of the Consents; and
- 11.2.1.7 any unusual conditions found during Maintenance inspections.

11.3 Recordkeeping

All Facility Unit 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 Facility Unit 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 Unit equipment, the Buyer shall be entitled to put the Facility Unit Data in the public domain and to use the Facility Unit Data as the Buyer deems appropriate.
- 11.4.3 The Buyer and the Seller shall have joint ownership of the Facility Unit Data for the duration of this contract, and on termination of this agreement such ownership rights will be transferred to the Buyer. The Seller shall not, by virtue of its ownership rights, have any rights to prevent the disclosure and use of the Facility Unit 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

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approval (not to be unreasonably withheld or delayed), appoint a third party to act as a metering agent and to perform and fulfill the Buyer's rights and obligations pursuant to this clause 12, 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 Unit Metering Installation

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

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

12.3 System Metering Installation

12.3.1 The Buyer shall procure, install, test, commission, Operate and Maintain a System Metering Installation adjacent to the Facility Unit Metering Installation at the Delivery Point, in accordance with the Connection Agreement.

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 Unit Metering Installation.

12.4 Capabilities of Meters

12.4.1 The Facility Unit 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 Active 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 Unit 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 Unit Metering Installation shall

enable the Buyer to, access the Facility Unit Metering Installation and its data remotely at any time and without any notice.

12.5 Sealing

12.5.1 The Facility Unit Metering Installation and the System Metering Installation shall each be sealed in accordance to their respective sealing policies in the presence of duly authorised representatives of both Parties immediately after the commissioning of the relevant meter.

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

12.6 Testing and inspection

12.6.1 Subject to clauses 12.6.2 and 12.6.5, the Buyer may request a test of the Facility Unit 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 Unit Metering Installation and the System Metering Installation shall be tested by a Metering 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, either Party shall be entitled to call for a test of the Facility Unit Metering Installation.

12.6.4 Without limiting clause 12.6.1, if readings taken from the Facility Unit 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 Unit 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, which shall be held between 08:00 and 16:00 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 and calibration 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 Unit 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,

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the measure of error is found to be outside this maximum tolerance, then the Facility Unit 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 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 Unit 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 Unit Metering Installation fail to register or, upon testing pursuant to clause 12.6, be found to have a level of inaccuracy falling outside the maximum tolerance level specified in clause 12.6.7, then the Facility Unit Metering Installation shall be recalibrated in accordance with clause 12.6.7 and the Energy Output from the Facility Unit 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 Unit 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 Unit Metering Installation shall be recalibrated in accordance with clause 12.6.7, and the Energy Output from the Facility Unit 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 for determination in accordance with clause 29 (*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 Unit Metering Installation equal to one-half of the time from the date of the last previous test of the Facility Unit 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 Unit 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 Unit Metering Installation.

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 Unit 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 & 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 Facility Unit.

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 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.
- 14.2 If and to the extent that:

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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) business 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 demonstrate to the reasonable satisfaction of the Buyer that:

14.3.3.1 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;

14.3.3.2 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;

14.3.3.3 the Facility Unit would otherwise have been available and able to generate and deliver Energy Output but for the System Event;

14.3.3.4 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

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- 14.3.3.5 the Seller is using reasonable endeavors 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 28 (*Dispute Resolution*), subject to any adjustments that may be effected in terms of paragraph 5 (*Adjustment of Deemed Energy Payments*) of Schedule 5 (*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 28 (*Dispute Resolution*), subject to any adjustments that may be effected in terms of paragraph 5 (*Adjustment of Deemed Energy Payments*) of Schedule 5 (*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 28 (*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 this 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 this 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 this 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 this 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

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to occur twenty (20) years after Commercial Operation Date of the affected Facility Unit 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 the Buyer shall give the Seller such relief from its obligations under this Agreement, as is reasonable for such a Compensation Event; and/or
- 15.3.3 the Seller shall be entitled to enforce this 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 28 (*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 5 (*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.

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- 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 July, 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 any allowance in terms of the MFMA.

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.

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- 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 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 ten (10) 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 28 (*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, (where practicable and possible) 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 by effluxion of time

18.2.1 This contract shall terminate on the Expiry Date unless its term is extended for a further period by written agreement between the Parties.

18.2.2 On Termination in accordance with this clause 18.2, the Seller shall decommission the Facility in accordance with the provisions of clause 18.6 below, save for this Agreement being extended in accordance with clause 18.2.1 above.

18.2.3 On termination in accordance with this clause 18.2, the Facility shall be Decommissioned in accordance with clause 18.6 below.

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 as contemplated in clause 4.5); serve a notice on the Seller terminating this Agreement (save for clauses 20 (*General Seller Undertakings*) to 37 (*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 37 (*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 37 (*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 Buyer Default

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

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

18.4.2.1 serve notice of the default on the Buyer requiring the Buyer to remedy the Buyer Default within ninety (90) days of such notice of default being delivered;

18.4.2.2 serve a notice on the Buyer terminating this Agreement in the event the default is not remedied as provided for in clause 18.5.2.1 above;

18.4.3 The Termination Amount will be paid subject to the operational budget available to the Buyer annually.

18.4.4 Following Termination as a result of a Buyer's Default, the Seller shall have the right to enter into new agreements with other off-takers. Any use of infrastructure of the Buyer in such a case shall result in separate wheeling agreements being entered into between the Seller with the Buyer as defined in this Agreement.

18.5 Termination for Corrupt Acts

18.5.1 The Seller warrants that, in entering into this Agreement it has not committed any Corrupt Act.

18.5.2 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 this Agreement or any Project Document, then the Buyer shall be entitled to act in accordance with clauses 18.5.2.1 to 18.5.2.9 below:

18.5.2.1 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 Buyer may terminate this Agreement with immediate effect by giving written notice to the Seller;

18.5.2.2 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 Buyer 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

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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;

- 18.5.2.3 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 Buyer 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;
- 18.5.2.4 if the Corrupt Act is committed by an employee of a Contractor acting of his or her own accord, then the Buyer 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;
- 18.5.2.5 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 Buyer 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 Buyer 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;
- 18.5.2.6 if the Corrupt Act is committed by any employee of a Lender acting of his or her own accord, then the Buyer 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;
- 18.5.2.7 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 Buyer 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;
- 18.5.2.8 if the Corrupt Act is committed by any other person not specified in

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clauses 18.5.2.1 to 18.5.2.6 above but involved in the Project as a subcontractor or supplier to any Contractor or to the Seller, then the Buyer 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

- 18.5.2.9 any notice of termination under this clause 18.5.2 (Termination for Corrupt Acts) shall specify:
- 18.5.2.9.1 the nature of the Corrupt Act;
 - 18.5.2.9.2 the identity of the party or parties who has or have committed the Corrupt Act; and
 - 18.5.2.9.3 the date on which this Agreement will terminate in accordance with the applicable provisions of this clause 18.5 (Termination for Corrupt Acts).
- 18.5.3 Without prejudice to its other rights or remedies under this clause, the Buyer shall be entitled to recover from the Seller, the greater of:
- 18.5.3.1 the amount or value of the gift, consideration or commission which is the subject of the Corrupt Act; and
 - 18.5.3.2 any Direct Losses sustained by the Buyer in consequence of any breach of this clause 18.5 (Termination for Corrupt Acts) by the Seller.
- 18.5.4 Nothing contained in this clause 18.5 (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.
- 18.5.5 The Seller shall notify the Buyer of the occurrence (and details) of any Corrupt Act promptly on the Seller becoming aware of its occurrence.
- 18.5.6 Simultaneously with termination for a Corrupt Act, this Agreement shall terminate.

18.6 Decommissioning of Facility on Termination

On termination of this agreement the Seller shall be liable to discharge any and all obligations and requirements to decommission the Facility, pursuant to and in accordance with all applicable Environmental Laws. This includes but is not limited to removing all infrastructure constructed on the property in accordance with the demolition rules and regulations of the Buyer and rehabilitate the land.

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:

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- 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 specifically requested information the Buyer may reasonably 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 Facility Unit or any part of the Facility Unit (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 Unit, 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 Unit.
- 20.3 The Buyer in its capacity as Distributor 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

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is permitted under applicable Law).

- 20.4 The Seller undertakes to grant the Buyer exclusivity of purchase all the Energy generated from the Facility.
- 20.5 The Seller undertakes to keep a stockpile of Waste equivalent to the generation of electricity for two (2) weeks to guard against a shortage of Waste as a result of industrial action experienced by the Buyer.

21. GENERAL BUYER UNDERTAKINGS

- 21.1 Where the Seller has been granted the right to use Waste collected by the Buyer, the Buyer undertakes to provide Waste to the Seller for the duration of this Agreement.

22. INTELLECTUAL PROPERTY OF THE PARTIES

- 22.1 All intellectual property rights whatsoever, whether capable of registration or not, regarding either Party's name, trademarks, logos, image and all other intellectual property matters relating to either Party's, including its name, trademarks, logos and/or image shall remain the sole property of the respective Party's until termination of this Agreement.
- 22.2 Subject to existing rights and obligations and clause 22.3, either Party shall, on prior written application by the requesting Party, grant a non-exclusive revocable right and licence to the requesting Party to use the granting Party's trademarks and logos for a period not to exceed the remainder of the Term.
- 22.3 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.
- 22.4 If at any time a Party revokes its approval for the specified use of any trademark or logo, the other Party 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 revoking Party has revoked its approval. The costs incurred by the other Party as a result of such revocation shall be borne by the that Party if the grounds for the revocation include any ground described in clause 22.5.
- 22.5 The revoking Party may revoke its approval immediately upon ten (10) Business Days written notice to the other Party if the other Party, 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 revoking Party's reasonable opinion, materially prejudices its reputation and public goodwill.
- 22.6 The Parties acknowledges that the name or names of either Party (the "**Protected Names**") are associated with and peculiar to the respective Parties and are the

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intellectual property of the respective Parties. Consequently, the Parties agrees that the sole and exclusive ownership of their respective Protected Names shall vest in themselves respectively.

- 22.7 In circumstances where a Party 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 other Party. On termination or expiry of this Agreement, neither Party shall 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.
- 22.8 Within twenty (20) Business Days after the end of the Term and where a Party has operated a company utilising any of the Protected Names with the permission of the other Party, the Party utilizing the Protected Names 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.
- 22.9 The renaming of a Party's business operation shall be undertaken in consultation with the other Party and subject to the other Party's approval. In circumstances where the name chosen by the former Party and approved by the other Party is not part of the other Party's intellectual property, then the rights of the other Party contemplated in clause 22.8 shall not be applicable and the intellectual property shall be the sole property of the former Party.

23. 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. Set-off shall be effected on issuing of the next invoice.

24. ASSIGNMENT


24.1 Prohibition on Assignment

- 24.1.1 Save as provided in clause 24.2 (*Restrictions on Assignment*), neither Party may sell, cede, encumber, 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.

24.2 Restrictions on Assignment

Notwithstanding clause 24.1 (*Prohibition on Assignment*):

- 24.2.1 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:
- 24.2.1.1 the prior written approval of the Seller, which approval shall not be

 
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unreasonably withheld, conditioned or delayed; and

24.2.1.2 pursuant to which the Municipality agrees to cover the obligations and liabilities of the Buyer's assignee under this Agreement, together with the obligations and liabilities of the Buyer under this Agreement which are due but not yet discharged at date of such Assignment, and provides the same to the Seller.

24.2.2 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:

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

24.2.2.2 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:

24.2.2.2.1 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;

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

24.3 Buyer's Step-in Rights

The Buyer shall not exercise any step-in rights under this Agreement.

25. 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 Unit, and the Seller shall be responsible under this Agreement for the payment, performance, acts, defaults, omissions, breaches and negligence of all Contractors.

26. 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 this Agreement.

27. SOCIO ECONOMIC DEVELOPMENT

Where employment opportunities exist, the Seller shall give preference the Local

Community.

28. DISPUTE RESOLUTION

28.1 Referable Disputes

The provisions of this clause 28 (*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.

28.2 Internal Referral

28.2.1 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:

28.2.1.1 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

28.2.1.2 if the Parties have been unable to resolve the dispute within fifteen (15) days of referral to the persons specified in clause 28.2.1.1, 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.

28.2.2 In attempting to resolve the dispute in accordance with the provisions of this clause 28.2 (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.

28.2.3 Any dispute which has not been resolved by the representatives contemplated in clause 28.2.1.2 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.

28.3 Performance to Continue

No reference of any dispute to any resolution process in terms of this clause 28 (*Dispute Resolution*) shall relieve either Party from any liability for the due and punctual performance of its obligations under this Agreement.

28.4 Litigation

28.4.1 Save where any dispute has been expressly referred for determination in terms of clause 29 (*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.

28.4.2 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.

29. FAST TRACK DISPUTE RESOLUTION

- 29.1 Disputes expressly referred for determination pursuant to this clause 29 (*Fast Track Dispute Resolution*) shall be determined by the relevant Independent Expert.
- 29.2 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.
- 29.3 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.
- 29.4 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.
- 29.5 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.
- 29.6 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.
- 29.7 The Independent Expert shall act impartially and may take the initiative in ascertaining the facts and the Law.
- 29.8 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.
- 29.9 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 32 (*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.

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- 29.10 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.
- 29.11 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:
- 29.11.1 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
- 29.11.2 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.
- 29.12 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.

30. LIABILITY

30.1 Direct losses

- 30.1.1 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.
- 30.1.2 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.
- 30.1.3 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 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.

30.2 Mitigation

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

31. 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.

32. CONFIDENTIALITY

32.1 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. Facility Unit Data shall not constitute Confidential Information.

32.2 Exclusions to Confidential Information

For the purposes of this clause 32 (*Confidentiality*), the term "**Confidential Information**" shall not include information which:

- 32.2.1 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 32 (*Confidentiality*);
- 32.2.2 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 32 (*Confidentiality*);
- 32.2.3 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
- 32.2.4 is published by, or the publication of which is required by, a Responsible Authority or any court.

32.3 Permitted disclosure of Confidential Information

Notwithstanding the provisions of clause 32.1 (*Confidential Information*), the Confidential Information may be disclosed:

- 32.3.1 by either Party to any Responsible Authority (where for the purposes of this clause 32.3 (*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

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such case for the purpose of enabling the disclosing Party to comply with its obligations under this Agreement, provided that:

- 32.3.1.1 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
- 32.3.1.2 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;
- 32.3.2 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;
- 32.3.3 by either Party as may be necessary to comply with any obligation under any applicable Law;
- 32.3.4 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
- 32.3.5 by either Party, if so agreed in writing by the Parties prior to the disclosure.

32.4 Ownership and treatment

- 32.4.1 Save for all Facility Unit 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.
- 32.4.2 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.

33. GOVERNING LAW AND JURISDICTION

- 33.1 The validity, construction and performance of this Agreement shall be governed by the laws of South Africa.
- 33.2 No Change in Law shall have retrospective application on the provisions of this Agreement, to the extent that the said Change in Law does not render the agreement illegal.
- 33.3 Subject to the provisions of clause 29 (*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.

34. NOTICES

34.1 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 34.2 (Addresses) or such other address or number as contemplated in clause 34.4 (Change in address). No communication shall be effective until received by the addressee and a communication shall be deemed to have been received:

- 34.1.1 if delivered by hand during ordinary business hours, to its physical address in clause 34.2 (Addresses), when so delivered;
- 34.1.2 if delivered by pre-paid registered post, to its postal address in clause 34.2 (Addresses), seven (7) Business Days after posting, subject to proof of posting;
- 34.1.3 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
- 34.1.4 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 34.1.1 or 34.1.2 above.

34.2 Addresses

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

- 34.2.1 The Seller: *Mahlamba ndlopivu & Waste 2 Energy Consortium*
 - Postal Address: [•] *40 ELECTRON AVENUE
I SANDO, KEMPTON PARK*
 - Physical Address: [•] *40 ELECTRON AVENUE 1600
I SANDO, KEMPTON PARK 1600*
 - Email Address: [•] *l.baloyi@mnbe.co.za*
 - Fax No.: [•] *lybonb@webmail.co.za*
 - Tel No.: [•] *086 415 4370*
 - Attention: [•]; and
- 34.2.2 The Buyer: *CITY OF EKURHULENI*
 - Postal Address: [•] *P.O Box 21, BOKSBURG, 1460*
 - Email Address: [•] *hendrick.raedani@ekurhuleni.gov.za*

Fax No.: [•]
Tel No.: [•] 011 999 3132
Attention: [•] HENDRICK - RABDANI

34.3 Domicilium citandi et executandi

The Parties choose the physical address set out opposite their names in clause 34.2 (*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*.

34.4 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.

35. WARRANTIES

35.1 Seller warranties

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

- 35.1.1 it is a limited liability company, duly incorporated and validly existing under the Laws and has taken all necessary actions to authorize its execution of and to fulfill its obligations under this Agreement and the Project Documents;
- 35.1.2 it has the purpose, object and business of undertaking the Project and selling Energy in terms of this Agreement;
- 35.1.3 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;
- 35.1.4 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;
- 35.1.5 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;
- 35.1.6 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

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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;

- 35.1.7 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;
- 35.1.8 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;
- 35.1.9 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;
- 35.1.10 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
- 35.1.11 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.

35.2 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:

- 35.2.1 it is an organ of state and has the right, power and authority to enter into this Agreement and to perform its obligations hereunder; and
- 35.2.2 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.

36. REPRESENTATIVES

36.1 Buyer's Representative

- 36.1.1 The Buyer shall appoint from the Signature Date until the Expiry Date an individual (the "**Buyer's Representative**") whose identity shall be notified to

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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.

36.1.2 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.

36.1.3 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.

36.2 **Seller's Representative**

36.2.1 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.

36.2.2 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.

37. MISCELLANEOUS

37.1 **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.

37.2 **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. Neither Party shall unreasonably preclude the amendment or renegotiation of this Agreement.

37.3 **Waiver**

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

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

37.3.3 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.

37.4 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.

37.5 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.

37.6 Entire Agreement

37.6.1 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.

37.6.2 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.

37.7 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.

37.8 Public Relations and Publicity

37.8.1 The Seller acknowledges that certain information pertaining to the Project and the Facility Unit 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:

37.8.1.1 Parliament and its members and officers in accordance with the provisions of the Municipal Finance Management Act, 2003;

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

37.8.1.3 persons acting in the public interest in accordance with the provisions of the Promotion of Access to Information Act, 2000.

37.8.2 Subject to clause 37.8.3, 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.

37.8.3 To the extent that the Buyer is obliged to disclose or publish information pursuant to clause 37.8.1, it undertakes to the Seller, if time permits, to

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consult with the Seller prior to any communication contemplated by this clause 37.8.3, and if time does not so permit, such consultation shall be dispensed with by the Parties.

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

37.9 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.

37.10 Costs

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

37.11 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.

37.12 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.

ENERGY TARIFFS

1. The Commercial Energy Rate shall be determined as the Sum of the applicable tariff components of the Megaflex tariff for Local Authorities (Municipalities) excluding VAT as published by Eskom annually and charged to the Buyer, less the discounted structure as offered by the Seller, multiplied by the measurable Energy and demand quantities, and divided by the sum of the measured generated Energy.
2. The applicable Megaflex tariff components are as follows, as amended when the tariff structure is amended by Eskom and approved by NERSA:

Megaflex tariff component	Applicable	Tariff component measurement
Service charge	Not charged by Eskom	N/A
Administrative / fixed charge	Yes	R/delivery point/day
Network access charge / Network capacity charge	Yes	R/kVA
Network demand charge / Utilized demand charge	Yes, as determined during the peak period only	R/kVA
Network transmission charge	Not applicable as no transmission networks are involved	N/A
Peak energy charge	Yes	c/kWh
Standard energy charge	Yes	c/kWh
Off-peak energy charge	Yes	c/kWh
Reactive energy charge	Yes, only during high demand period which is from 1 June to 31 August annually	c/kvarh
Urban low voltage subsidy charge	Not applicable as the Facility will be connected at the low or medium voltage level to the Buyer's networks	N/A
Ancillary service charge	Not applicable as the Buyer is not procuring ancillary services	N/A
Electrification and rural network subsidy charge	Not applicable	N/A

3. The discounted rate shall be as per the Letter of Appointment attached to Schedule 1 Part 1:

Contract Year	Discount (%)	Contract Year	Discount (%)
1	[•]	11	[•]
2	[•]	12	[•]
3	[•]	13	[•]
4	[•]	14	[•]
5	[•]	15	[•]

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Contract Year	Discount (%)	Contract Year	Discount (%)
6	[•]	16	[•]
7	[•]	17	[•]
8	[•]	18	[•]
9	[•]	19	[•]
10	[•]	20	[•]

4. Annual tariff increases shall be equivalent to the tariff increase NERSA approves to Eskom for Local Authority tariffs and shall apply annually from 1 July to 30 June of the following year.
5. In the event that Eskom discontinues or changes the Megaflex tariff for Local Authorities, the Commercial Energy Tariff shall be the new tariff structure which Eskom will charge the Buyer for bulk energy purchases, less the agreed discount, with additional changes applied as may be applicable (e.g. Eskom changes the time-of-use hours) and provided that the new tariff is not lower than the prevailing Megaflex rates.
6. The Buyer and the Seller shall ensure that energy units are consistently applied.
7. Separate tariffs shall apply for Energy and demand purchased by the Seller from the Buyer for operating plants during periods when generation is not possible. Such a tariff is subject to conclusion of a separate supply agreement between the Seller and the Buyer (as network service provider) and the Buyer (as network service provider) shall apply the appropriate tariff from its NERSA approved set of tariffs.

DETAILS OF THE FACILITY UNIT

1. Description of Facility Unit

[•] [Seller to provide a short description of the Facility Unit, location and components.]

2. Facility Unit data

[Seller to complete the following table for each Facility Unit]

Project Name:	[•]
Contracted Capacity: [MW]	33 MW
Maximum Export Capacity (as defined in the Connection Agreement): [MW]	[•]
Waste to Energy Type:	[•]
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):	[•]

3. Forecast Energy Output:

[Seller to provide the average annual forecasted Energy Output [MWh] for each Facility Unit for the first 20 years of operation or for the duration of this Agreement]

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	[•]

4. Scale drawing

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

- the Facility substation and the Distribution substation;

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- *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.*

5. Facility Unit Single Line Diagram

[●] [Seller to provide a single line diagram of each Facility Unit, 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 and Operational boundaries;*
- *Delivery Point;*
- *Substation;*
- *Layout of the Facility and System Unit Metering Installation.]*

6. Facility Unit Completion Milestones and Scheduled Completion Date

[●] [The Seller must include in this schedule, for information purposes only, for each Facility Unit a level 1 project schedule Gantt chart at monthly resolution to show key activities, events, dependencies and milestones from early Project development through to Scheduled COD. The Gantt chart shall show anticipated timescale for unit completion of the 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 each Facility Unit: [●]

[on the letterhead of the Seller]

[Date [●] CC copy: [●]

Attention: [●]

Notice of Commencement of Facility Unit [●]

Dear Sirs

We refer to the power purchase agreement dated [●], (the "PPA") between City of Ekurhuleni (the "Buyer") and ourselves, [●] (the "Seller"). This notice ("Notice") is the Notice of Commencement of Facility Unit referred to in the PPA. Unless otherwise defined herein, capitalized terms used in this Notice shall have the meanings assigned to them in the PPA. We hereby give notice that the Facility Unit has been successfully connected to the System as required in terms of the Connection Agreement and the Commercial Operation Date shall be [insert date]. The Commercial Capacity of the Facility 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 the Facility 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. All agreements required for the Construction, Operation and Maintenance of the Facility Unit and the performance by the Seller of its obligations under the PPA, including the Connection Agreement, have been entered into, are in full force and effect and remain valid and binding.
3. The Facility Unit Metering Installation has been procured, installed, tested and successfully commissioned in accordance with the PPA.
4. None of the events entitling the Buyer to terminate the PPA in accordance with clause 18 (*Termination*) have occurred and are continuing.
5. until NERSA, or any person nominated by NERSA for such purpose, has been notified of the Facility Unit's intended connection to the Distributor's grid.
6. the Buyer has provided written confirmation to the Seller certifying that the Facility Unit may be connected to the System for purposes of delivering Commercial Energy, and such confirmation is attached hereto.
7. An Independent Engineer has confirmed that the Facility Unit is in compliance with the Codes, and such notification is attached hereto.
8. All of the Project insurances required pursuant to clause 19 (*Project Insurance*) of the PPA are in place and in full force and effect.

Yours faithfully,
[NAME OF SELLER]

Representative of the Seller

[on the letterhead of the Independent Engineer]

[Date [•] CC copy: [•]

Attention: [•]

Notice of Completion of Facility Unit [•]

Dear Sirs,

We refer to the Power Purchase Agreement entered into between [•] and City of Ekurhuleni on [insert date] (the "PPA"). All capitalized terms in this notice ("Notice") shall, unless separately defined herein, bear the meaning ascribed to them in the PPA. This Notice is the Facility 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 Facility Unit has been successfully connected to the System as required in terms of the Connection Agreement and the Codes.
- The Achieved Capacity of the Facility Unit, being the net Capacity of the Facility Unit 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 [•] MW.
- The Facility Unit has passed the relevant acceptance tests and has been successfully commissioned in accordance with the relevant construction contract, the Codes and the Consents.
- The Facility Unit has a mechanism installed to limit the Capacity exported from the Facility Unit to the Contracted Capacity.
- The Facility Unit Metering Installation has been procured, installed, tested and successfully commissioned in accordance with the PPA.

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

Yours faithfully,

[NAME OF INDEPENDENT ENGINEER]

COMPLETION MILESTONES AND FORMS OF NOTICES
Completion Milestones

[The Distributor 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: [●]

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 Unit 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 Unit, 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 Unit, 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

PPA (Waste to Energy)

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 Unit 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

- 4.1 In case of a System Event that is expected to last more than two (2) weeks, the Buyer may, on notice of no more than forty eight (48) hours during the System Event, request the Seller to undertake those activities possible that were planned for the next Scheduled Outage, taking into account the Seller's requirements to mobilize overhaul resources and have spares and equipment available, to be commenced during the time period of System Event but allowing a reasonable period to mobilize following notification.
- 4.2 The Seller shall use reasonable endeavors to accommodate such rescheduling if it is consistent with the standards of a Reasonable and Prudent Operator and the Seller, acting reasonably, considers it feasible to mobilize necessary resource, spares and equipment to undertake an effective Scheduled Outage.
- 4.3 The Buyer should compensate the Seller for any additional costs incurred to mobilize resources and spares rapidly during the System Event Outage, and for any power revenue losses resulting from extensions to the duration of the outage which result from difficulties in mobilizing the outage at short notice, or as a result of a future further Scheduled Outage still being required because the resources needed for all the planned maintenance may not have been possible to mobilize at short notice during the System Event.

MONTHLY FACILITY UNIT FORECASTING INFORMATION

Monthly Facility Unit Forecast Generation Profile

The Seller shall provide to the Buyer, and to the System Operator or Distributor (as appropriate) on a Monthly basis, before 09:00 on the preceding Wednesday, the Month ahead generation forecast, calculated at the Delivery Point.

Day	MWh	Available MW
1		
2		
3		
4		
5		
6		
Etc		

DAY SPECIFIC INFORMATION (IF APPLICABLE)

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		

DEEMED ENERGY PAYMENT: BASIC PRINCIPLES

1. The Deemed Energy Payment for the purposes of this Agreement shall be determined in terms of this Schedule 5 (*Deemed Energy Payment*), and shall be invoiced in terms of clause 9 (*Invoicing*).
2. The Facility Unit capacities for Deemed Energy determination is recorded as follows:

Facility Unit number	Achieved Capacity (MW)	Controlled Capacity (MW) <i>(not to exceed Achieved Capacity for each Facility Unit)</i>
[•]	[•]	[•]
[•]	[•]	[•]
[•]	[•]	[•]
[•]	[•]	[•]
[•]	[•]	[•]
[•]	[•]	[•]
Total check		[•] <i>This total may never exceed the Contracted Capacity</i>

3. A Facility Unit must be available for it to be considered for Deemed Energy payments.
4. Deemed Energy shall be determined as follows:
 - 4.1. Scenario 1: Where the Facility Units combined have a controlled output, as metered at the Delivery Point (or multiple Points as the case may be), that is limited to the Contracted Capacity, the Deemed Energy shall be determined as follows in respect of each Billing Interval that has commenced or have endured:
 - 4.1.1. for a System Event: by multiplying the Contracted Capacity with 30 minutes, provided the cumulative outage duration for a POC within a Contract Year has exceeded the Allowed Grid Unavailability Period and subtracting the summated Energy Output of all metered Energy; or
 - 4.1.2. for an event other than a System Event: by multiplying the Contracted Capacity with 30 minutes and subtracting the summated Energy Output of all metered Energy.
 - 4.2. Scenario 2: Where the Facility Units combined have an output, as metered at the Delivery Point (or multiple Points as the case may be), that is less than the Contracted Capacity prior to an event that results in Deemed Energy Payment, the Deemed Energy shall be determined as follows in respect of each Billing Interval that has commenced or have endured:
 - 4.2.1. for a System Event: by multiplying the Capacities of the available units as measured during the last 30-minute billing interval prior to the Deemed Energy Payment event with 30 minutes, provided the cumulative outage duration for a POC within a Contract Year has exceeded the Allowed Grid Unavailability

Period and subtracting the summated Energy Output of all metered Energy;
or

- 4.2.2. for an event other than a System Event: by multiplying the Capacities of the available units as measured during the last 30-minute billing interval prior to the Deemed Energy Payment event with 30 minutes and subtracting the summated Energy Output of all metered Energy.
- 4.3. Scenario 3: Where the Seller elects to make use of a Facility Power Curve, the Deemed Energy shall be determined using the calculation methodology as outlined in Part 2 of this Schedule 5 (*Deemed Energy Payment*).

DEEMED ENERGY: SCENARIO 3 CALCULATION METHODOLOGY

1. Facility Availability

- 1.1. Facility Availability is a forecast of the Facility's capability to export Energy Output to the Delivery Point, and must be calculated for each thirty (30) minute period during the continuation of the period during which a Compensation Event or a System Event entitles the Seller to the Deemed Energy Payment (a "Deemed Energy Period"), by using the following formula:

$$FA = \frac{\sum_{i=1}^n (UA_i \times U_{c_i})}{AC}$$

- 1.2. Where:

- 1.2.1. *FA* is the Facility Availability for the Deemed Energy Period;
- 1.2.2. *AC* is the Achieved Capacity of the Facility (MW);
- 1.2.3. *U_c* is the nominal Capacity of each Unit (MW);
- 1.2.4. *n* is the number of Units in the Facility;
- 1.2.5. *i* is each individual Unit; and
- 1.2.6. *UA* is the availability of each respective Unit and is calculated according to the following formula:

$$UA = \frac{T_a}{30}$$

- 1.2.7. Where *T_a* is the time during each thirty (30) minute period for which the relevant Unit is in a functional and operable state to export Energy Output to the Delivery Point (minutes).

2. Facility Power Curve ("FPC")

- 2.1. From the Commercial Operation Date and for the entire period of the first Contract Year thereafter, the Seller shall measure and record the following information for the purpose of determining the FPC:
- 2.2. Volume and type of Waste used in Energy production;
- 2.3. Temperature of generator air intake;
- 2.4. Volume of water used;
- 2.5. Any other parameter having influence on the Energy Output produced or efficiency of the generator; and
- 2.6. Energy Output of the Facility,
- (the "FPC Data").

- 2.7. The following requirements shall apply to the measurement and recording of the FPC Data:
- 2.7.1. the gas flow data must:
 - 2.7.1.1. be measured using suitably calibrated instrumentation; and
 - 2.7.1.2. be grouped in bins to the nearest five percent (5%), and should cover the operational range of the Facility;
 - 2.7.2. the FPC Data shall be recorded as average values taken over thirty (30) minute intervals;
 - 2.7.3. the FPC Data shall be logged by a data logger on the Project Site and date stamped; and
 - 2.7.4. the FPC Data shall be collected by the Facility's SCADA system.
 - 2.7.5. The FPC Data shall be stored and analysed by the Seller in order to produce, for each recorded bin, a FPC, which shall indicate the relationship between the Energy Output of the Facility and the parameters recorded.
 - 2.7.6. The FPC Data must be reported to the Buyer by not later than the end of the first Contract Year following the Commercial Operation Date. The FPC Data shall be delivered in the following formats:
 - 2.7.6.1. a hard copy of curves showing binned values only;
 - 2.7.6.2. a hard copy scatter plot showing the individual average thirty (30) minute values; and
 - 2.7.6.3. all raw data obtained from the SCADA, averaged, in electronic format, to enable the Buyer to compare the raw data to the binned data.
 - 2.8. Within one (1) Month after the end of the first Contract Year following the Commercial Operation Date, the FPC as at that time shall be confirmed by the Seller and thereafter shall become the "Approved FPC", unless the Buyer and Seller agree, at any time, to amend the FPC, in which case such amended FPC shall be the Approved FPC.
 - 2.9. Subject to paragraph 2.8 of this Schedule 5 Part 2 (Deemed Energy Payment), if an Approved FPC is not completed within the first Contract Year after the Commercial Operation Date, Deemed Energy beyond that date and until an Approved FPC is completed, shall be determined by the Buyer.
 - 2.10. The Approved FPC will be renewed at the end of every five (5) Contract Years, commencing at the end of the fifth (5th) Contract Year after the Commercial Operation Date, at the expense of the Seller in order to account for Facility degradation. An interim update may be requested by the Buyer or Seller at any point during the Term, in which case, costs of the update will be incurred by the Party requesting the revision.
 - 2.11. 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.
 - 2.12. The Seller may propose an alternative method for generating the FPC as a result of a Compensation Event or a System Event. Such proposed FPC must be verified and agreed by the Buyer.
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 applicable 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:

$$DEP = AE_{for} \times CER \times 1000$$

- 3.2. Where:

- 3.2.1. *DEP* is the Deemed Energy Payment for the Delay Period (ZAR);
- 3.2.2. *AE_{for}* is the forecasted Energy Output for the Facility in question for the Delay Period (MWh) at all times limited to a maximum of the Facility Contracted Capacity; 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 persists. If the Allowed Grid Unavailability Period in respect of any POC is exceeded in any Contract Year, then Deemed Energy Payments shall become payable and shall be calculated for the duration of additional System Events affecting that Facility in such Contract Year and invoiced in accordance with the principles set out in clause 9.2 (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 endures in the Second Contract Year.
- 4.2. Deemed Energy shall be calculated by subtracting actual Energy Output produced from the energy the Facility Unit would have otherwise produced had a System Event or Compensation Event not taken place.
- 4.3. 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 Deemed Energy Period shall be calculated as follows:

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

- 4.4. Where:

- 4.4.1. *DEP* is the Deemed Energy Payment for that Deemed Energy Period (ZAR);
- 4.4.2. *x* is all thirty (30) minute periods in that Deemed Energy Period;
- 4.4.3. *i* is each individual thirty (30) minute period of Deemed Energy;
- 4.4.4. *CER* is the Commercial Energy Rate (ZAR/kWh);
- 4.4.5. *AE* is the Energy Output during each respective thirty (30) minute period of Deemed Energy (kWh); and

- 4.4.6. *DE* is the Deemed Energy during each respective thirty (30) minute period, if the Deemed Energy Period commences:
- 4.5. within the first Contract Year following the Commercial Operation Date or the extended period in which the Approved FPC has not been determined, Deemed Energy shall be calculated pro rata as if the Facility had achieved the P50 forecast Energy Output and provided in Schedule 1 Part 2 (*Details of the Facility*);
- 4.6. after the end of the first Contract Year following the Commercial Operation date and after completion of the Approved FPC, the Deemed Energy for each thirty (30) minute period shall be calculated using the FPC Data and the Approved FPC according to the following formula:

$$DE = \frac{1(hour) \times AP}{2} \times FA$$

- 4.7. Where:
- 4.7.1. *DE* is the Deemed Energy for each thirty (30) minute period during that Deemed Energy Period;
- 4.7.2. *AP* is the average power output calculated based on the FPC Data and, when available, the Approved FPC, during each thirty (30) minute period during that Deemed Energy Period (kW), or as confirmed in terms of paragraph 2.6 of this Schedule 5 Part 2 (*Deemed Energy Payment*); and
- 4.7.3. *FA* is the Facility Availability determined during each thirty (30) minute period.
- 4.8. The Buyer shall not be liable for Deemed Energy Payments based on Capacity in excess of the Facility Contracted Capacity. The Deemed Energy during any thirty (30) minute period shall be capped at the Facility Contracted Capacity in terms of the following formula:

$$\frac{DE + AE}{1/2(hour)} \leq AC$$

- 4.9. Where:
- 4.9.1. *DE* is the Deemed Energy during each respective thirty (30) minute period, as determined in terms of paragraph 4.4.6.2 of this Schedule 5 Part 2 (*Deemed Energy Payment*);
- 4.9.2. *AE* is the Energy Output during each respective thirty (30) minute period of Deemed Energy (kWh); and
- 4.9.3. *AC* is the Facility Contracted Capacity of the Facility (kW).
- 4.10. The Deemed Energy Period may commence at any point within a thirty (30) minute billing interval, and any Energy Output registered by the meter during this interval will be deducted from Deemed Energy for the Deemed Energy Payment.
- 4.11. In the event of a failure or interruption to the equipment used to measure the FPC Data, the relevant Deemed Energy Payment shall be calculated by an Independent Expert, provided that if the failure of or interruption to the equipment used to measure the FPC Data 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 equipment used to measure the FPC Data 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 or paragraph 2 of this Schedule 5 Part 2 (*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 or paragraph 2 of this Schedule 5 Part 2 (*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 4 of this Schedule 5 Part 2 (*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.
- 5.3. Any errors discovered to the formulae in Schedule 5 (*Deemed Energy Payment*) shall be corrected and any historic payments adjusted in terms of clause 9.3 (*Billing Disputes*).

PROJECT DOCUMENTS

[SCHEDULE 6 SHALL INCLUDE THE CONNECTION AGREEMENT, LAND TENURE AGREEMENT, FUNDING AGREEMENT, FUEL AGREEMENT (WHERE APPLICABLE) AND ANY OTHER AGREEMENT OR PROJECT DOCUMENT NOT PROVIDED FOR ATTACHMENT ELSEWHERE. LAND TENURE AND FUEL AGREEMENTS ARE PROJECT SPECIFIC AND THE BUYER OR DISTRIBUTOR IS NOT PROVIDING STANDARD AGREEMENTS FOR THESE]

SOCIO ECONOMIC DEVELOPMENT

The Seller shall state the following to enable the buyer to report on opportunities created:

SOCIO ECONOMIC DEVELOPMENT REPORTING FIGURES	
Project Name:	[•]
Contracted Capacity: [MW]	[•]
Estimated private sector investment injection to the local economy (refer to definition for Local Community)	[•]
Estimated number of job opportunities created during construction	[•]
Estimated number of job opportunities created during operation of the plant	[•]