



**CITY OF CAPE TOWN  
ISIXEKO SASEKAPA  
STAD KAAPSTAD**

**SHORT TERM POWER PURCHASE AGREEMENT (STPPA)**

EXISTING INDEPENDENT POWER PRODUCERS PROGRAMME

## **SHORT TERM POWER PURCHASE AGREEMENT**

between

**[INSERT NAME OF SELLER]**

as Seller

and

**THE CITY OF CAPE TOWN**

as Buyer<sup>[1]</sup><sub>SEP</sub>

pursuant to the<sup>[1]</sup><sub>SEP</sub>

**EXISTING INDEPENDENT POWER PRODUCERS PROGRAMME**

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#### **\*SCHEDULES**

Schedule 1:	Details of the Facility
Schedule 2:	Notice of Contracted Capacity of the Facility
Schedule 3:	Outages and Deratings
Schedule 4:	Inspection and Testing
Schedule 5:	Calculation of Payments
Schedule 6:	Performance Requirements



## PREAMBLE:

This SHORT TERM POWER PURCHASE AGREEMENT is entered into by and between:

- (1) [details of the Seller to be included once determined]<sup>1</sup>, a limited liability company (Registration No. \_\_\_\_\_) incorporated under the laws of South Africa and having its principal place of business at \_\_\_\_\_ in the Republic of South Africa [INSERT NAME OF COMPANY] (the "**Seller**"); and
- (2) THE CITY OF CAPE TOWN, being a Metropolitan Municipality established by the City of Cape Town Establishment Notice No. 479 of 22 September 2000 issued in terms of sections 12 and 14 of the Local Government: Municipal Structures Act No.117 of 1998 (as amended) with its principal place of business situated at 12 Hertzog Boulevard, Cape Town, Western Cape, South Africa (the "**Buyer**"),

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

## INTRODUCTION

- (A) The Buyer issued a request for tender inviting proposals from certain qualifying bidders for the short term provision of Energy to the Buyer on a Dispatchable basis, as the primary generation, and where available, on a Self-Dispatchable basis, as the secondary generation, in accordance with the terms of this Agreement.
- (B) The Seller, in response to the Tender, wishes to sell a portion of, or the residual, available Energy Output and Net Dependable Capacity of its Facility to the Buyer,

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<sup>1</sup> The Seller may be an Independent Power Producer (ie. a private entity that owns and or operates facilities (where facilities have been set up as a special purpose vehicle) to generate electricity with the intention of selling such electricity to a utility, government, and/or other off-takers OR a privately owned plant (ie. facilities that are owned by a business entity, have not been set up as a special purpose vehicle, with the intention of generating electricity for the entity's own operating consumption).

and the Buyer wishes to purchase such Energy Output and Net Dependable Capacity of the Facility from the Seller, on the terms and conditions of this Agreement.

- (C) The Seller has been granted and currently holds, or is exempted from holding, an electricity generation licence permitting it to own, operate, generate and sell [Insert] MW of Energy from a Dispatchable]<sup>2</sup> electricity generation Facility and [Insert] MW of Energy from a Self-Dispatchable<sup>3</sup> electricity generation Facility] located at [insert general location of the Facility(ies)] as described in Schedule 1 (Details of the Facility).
- (D) The Parties wish to record their agreement in respect of the terms and conditions governing the sale and purchase of Energy Output and Net Dependable Capacity.

## **NOW THEREFORE THE PARTIES AGREE AS FOLLOWS:**

### **1. DEFINITIONS AND INTERPRETATION**

#### **1.1. Definitions**

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

**"Affected Party"** means a party to this Agreement which is rendered unable to perform its contractual obligations under this Agreement due to the occurrence of a Force Majeure Event;

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<sup>2</sup> To be completed prior to signature.

<sup>3</sup> To be completed prior to signature where bidders have additional Self-Dispatchable energy available.

**"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;

**"Agreement"** means this short-term power purchase agreement entered into between the Parties and includes all schedules and annexures which may be attached hereto;

**"Agreed Interest Rate"** means the prime rate of interest (expressed as a percentage rate per annum) at which Nedbank, a division of Nedbank Group Limited, registration number 1966/010630/06 (or should Nedbank cease to exist, any other major commercial bank in South Africa) lends on overdraft, as published by that bank from time to time, provided that, in respect of any day for which no such rate is published, the applicable rate shall be that prevailing in respect of the last day for which such rate was published;

**"Allowed Grid Unavailability Period"** means:

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

**"Ambient Site Conditions"** means the range of environmental conditions at a site in which a Facility is located, in respect of which the Facility is designed to Operate, as detailed in the table in Schedule 1 (*Details of the Facility*) with the title "Ambient Site Conditions";

**"Anti-Bribery and Corruption Laws"** means the Prevention and Combating of Corrupt Activities Act, 12 of 2004, or any other anti-bribery and corruption laws, or any other national or international regulatory enactment of similar import, that may have a bearing on the activities of the Seller;

**"Automatic Generation Control"** or **"AGC"** has the meaning given to it in the Codes;

**"Availability"** means, at any time and from time to time on an hourly or intra-hour basis, the capability of a Facility to make available Energy Output at the Delivery Point, whether or not it is actually generating Energy Output at the Delivery Point and **"Available"** shall be construed accordingly;

**"Availability Notice"** means any notice from the Seller to the Buyer, updating any Declaration issued in terms of clause 7 (Declarations and Dispatch) of this Agreement, which declares any change in respect of the current Declared Capacity for any reason whatsoever;

**"Availability Period"** means a period of a minimum of 4 (four) hours (namely, 240 consecutive minutes) per weekday during the Term;

**"Auxiliary Consumption"** means such part of the Energy as is consumed by a Facility itself in the process of generating Energy, including consumption in respect of the provision of related services and operating auxiliary equipment. For the avoidance of doubt, Auxiliary Consumption does not include Energy Input but, in

the case of any interconnecting facilities between a Facility and the Delivery Point, does include electrical losses up to the Delivery Point;

**“Back Energisation”** means the initial connection of a Facility to the System for energising the main step-up transformer and back-feeding power to a Facility;

**“Base Date”** means 1 January 2024;

**“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 Commercial Operation Date, and shall end on the last day of the Month in which the first Billing Period commenced; and
- (b) the final Billing Period shall commence on the first day of the Month in which the Termination Date occurs and end on the Termination Date;

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

**“Buyer Default”** means a failure by the Buyer to honour any valid and proper request by the Seller for payment;

**“Capacity”** means, in respect of the Facility, at any time and from time to time, the capability (expressed in MW) of the Facility to generate and provide Energy to the Delivery Point(s). For the avoidance of doubt, Capacity shall be net of Auxiliary Consumption, Energy Input and the electrical losses up to the Delivery Point;

**“Capital Expenditure”** means any expenditure treated as capital expenditure under IFRS;

**"Change in Law"** means:

- (a) the adoption, enactment, promulgation, coming into effect, repeal, amendment, reinterpretation, change in application or other modification after the Signature Date of any Applicable Law;
- (b) any Consent being terminated, withdrawn, amended, modified or replaced after the Signature Date, other than:
  - (i) in accordance with the terms upon which it was originally granted;
  - (ii) as a result of any failure by the Seller or Buyer (as the case may be) to comply with any condition set out therein;
  - (iii) as a result of the negligence or conduct of the Seller, or Buyer, any Affiliate of the Seller or Buyer or any of their respective contractors; or
  - (iv) as a result of a Buyer Event of Default or a Seller Event of Default;

but shall exclude:

- (a) the enactment of any bill, but only if such bill is enacted without any material changes being made to the contents of such bill from the form published in the Government Gazette of the Republic of South Africa as at the Signature Date; or
- (b) the adoption, enactment, promulgation, coming into effect, repeal, amendment, reinterpretation, change in application or other modification after the Signature Date of any Applicable Law relating to any taxes, charges, imposts, duties, levies, deductions or withholdings that are assessed or payable in relation to a person's income such as any income taxes,

corporation taxes, taxes on capital gains or any one-off windfall taxes on profits;

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

**"Codes"** means, as applicable, any code in respect of electricity generation, dispatch, scheduling, communications, distribution or transmission as published by NERSA (and or the relevant regulator) from time to time;

**"Commercial Energy"** means the Energy Output delivered to the Delivery Point by the Seller to the Buyer in accordance with the terms of this Agreement from the Facility during the Term;

**"Commercial Energy Payment"** means, in relation to each Billing Period, an amount in Rand (excluding VAT) that is due and payable by the Buyer to the Seller for the Commercial Energy delivered in that Billing Period, in respect of either or both the Dispatchable Facility and the Self-Dispatchable Facility, as set out and calculated in terms of Schedule 5 (*Calculation of Payments*);

**"Commercial Operation Date"** or **"COD"** means the date specified in the Notice of Contracted Capacity as being the Commercial Operation Date on which the Seller shall sell the Commercial Energy and Contracted Capacity of such Facility to the Buyer in terms of clause 4 (Testing and Commercial Operation Date);

**"Conditions Precedent"** means the conditions set out in Clause 3 of this Agreement, fulfilment of which is a prerequisite for this Agreement to become effective;

**"Connection Agreements"** means the Transmission Agreement and or the Distribution Agreement, as applicable;

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

**"Constructed"** means where the construction of a Facility is, in the opinion of the Independent Engineer and the Buyer complete and the Facility is able to produce Commercial Energy;

**"Consumer Price Index"** means the weighted average consumer price index (April/June 2023 = 100) as published by Statistics South Africa (or its equivalent successor entity), which is referred to as **"Headline CPI-All urban areas"** in Statistical Release P0141 from time to time (or equivalent successor index);

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

(c) the first Contract Year shall commence at 00:00 hours on the Commercial Operation Date, and shall end at 24:00 hours on 30 June of the following year; and

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

**"Contracted Capacity"** means:

(a) prior to the Commercial Operation Date, the anticipated residual Capacity of the Facility/ies (including for the avoidance of doubt the Dispatchable



Facility and, where relevant, the Self-Dispatchable Facility), to be sold to the Buyer in terms of this Agreement and as set out in respect of the relevant Facility in Schedule 1 (Details of the Facility), being a portion of the Total Capacity of the Facility to produce Energy; and

- (b) with effect from the Commercial Operation Date, the actual residual Capacity of the Facility/ies (including for the avoidance of doubt the Dispatchable Facility and, where relevant, the Self-Dispatchable Facility), to be sold to the Buyer in terms of this Agreement, as set out in respect of the relevant Facility, in the Notice of Contracted Capacity of Facility, being a portion of the Total Capacity of the Facility to produce Energy;

**“Contractor”** means any contractor directly engaged by the Seller to the whole or any part of the Operation and/or Maintenance of the Facility and **“Contractors”** shall have a corresponding meaning;

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

**“Corrupt Practice”** or **“Corrupt Act”** means the offering, giving, receiving or soliciting, directly or indirectly, anything of value to influence improperly the actions of another person. For the sake of clarity, the definition of corrupt practice should be understood as including the following: (a) any payment or anything else of value to any official of any government or public international organisation

(including any officer or employee of any government department, agency or instrumentality) to influence or reward his or its decision, or to gain any other advantages for either Party in connection with this Agreement; (b) any payment or anything else of value to any representative of a private enterprise (whether for profit or otherwise) to improperly, dishonestly and outside the ordinary course of ethical business practice, influence or reward his or its decision, or to gain any other advantage; and/or (c) any act or omission that constitutes a contravention of any Anti-Bribery and Corruption Laws;

**"Declaration"** has the meaning given to it in clause 7.2;

**"Declared Capacity"** means, in respect of the relevant Availability Period, the figure (expressed in MW) at the prevailing Ambient Site Conditions stated by the Seller in the most recent Declaration or unelapsed Availability Notice, to be the Capacity of a Facility to supply Commercial Energy at the Delivery Point;

**"Delivery Point"** means: the physical point or points of connection, situated on the higher voltage side of the generator transformer (or transformers, as the case may be) of the Facility where the Facility physically connects to the System (whether or not such point is situated on or off the Site), and where the Energy Output is to be delivered by the Seller to the Buyer and the Net Dependable Capacity is to be made Available by the Seller to the Buyer, as such points are described in Schedule 1 (Details of the *Facility*);

**"Derating"** means a Planned Derating or an Unplanned Derating;

**"Direct Loss"** means, in respect of either Party, any losses, liabilities, expenses, damages, costs and claims (including Claims) arising directly as a result of the other Party's failure to perform its obligations under this Agreement, and for the

avoidance of doubt, includes, in respect of the Seller, any loss of payment which would have been due to it but for the Buyer's breach of this Agreement;

**"Dispatch"** means the exercise of the right of the Buyer, subject to the Codes and the standards of a Reasonable and Prudent Operator, to issue a Dispatch Instruction to the Seller in order to schedule, coordinate and manage the flow of Energy Output of a Dispatchable Facility including to commence, increase, redirect the Energy Output, decrease, shut-down or cease delivery of the Energy Output of a Dispatchable Facility and **"Dispatchable"** shall have a corresponding meaning;

**"Dispatch Compliance"** means a Dispatchable Facility's compliance with:

- (a) Dispatch Instruction within a tolerance of plus or minus 2,5% (two point five percent) of the MW value, MWh value and or MVar value (as the case may be) specified in the Dispatch Instruction; and
- (b) where applicable, the requirements in clause 7.6.2 below;

**"Dispatchable Facility"** means a Facility that the Buyer purchases Commercial Energy from, which it has a contractual right to influence the Dispatch of, which is capable of being Dispatched and is operated on such basis, and which can be used or called upon on demand and Dispatched at the request of the Buyer over the full duration of the Dispatchable Period while meeting all the technical performance requirements stipulated in Schedule 6 (*Performance Requirements*) for normal operation;

**"Dispatch Instruction"** means an instruction from the Buyer to the Seller to deliver Energy Output to the Delivery Point, given in accordance with clause 7.5 (Dispatch Instruction);

**“Dispatchable Period”** means the period commencing at 06:00 hours on any Weekday and ending at 22:00 hours of the same day;

**“Dispatch Schedule”** means a schedule that the Buyer undertakes to provide to the Seller in accordance with clause 7.4 (Dispatch Schedule), specifying the Energy Output that the Buyer anticipates may be required from the Dispatchable Facility for each hour (a minimum of 4 (four) hours and a maximum of 16 hours of the following day), for the avoidance of doubt the Dispatch Schedule is not binding on the Buyer;

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

**“Distribution Connection Works”** means the relevant municipal connection works or the NTC connection works, as appropriate and as defined in the Distribution Agreement;

**“Distribution System”** means the distribution network owned and operated by the Distributor which operates at a nominal voltage of one hundred and 132 (one hundred and thirty two) 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 not including any private network used by the Facility or customers of the Distributor);

**“Distributor”** means either the City of Cape Town or the relevant Municipality, which has been licensed to act as a distributor pursuant to the Distribution Licence or the NTC (as the case may be);

**“Due Date”** has the meaning given to it in clause 9.3 (*General principles as regards invoicing*);

**“Effective Date”** means the date that the Conditions Precedent are fulfilled or waived, as the case may be as set out in clause 3.2.1.8 below;

**“Energy”** means electrical energy produced by the Facility and is measured in kWh;

**“Energy Input”** means the electrical energy (expressed in MWh) drawn by a Facility from the System or otherwise;

**“Energy Output”** means the Energy (expressed in MWh) of a Facility metered as delivered to the Delivery Point by the Seller for sale to the Buyer in terms of this Agreement, which, for the avoidance of doubt, excludes:

- (a) Energy Output to be sold to any third party in terms of any Third Party PPA; and/or
- (b) Auxiliary Consumption, Energy Input and any electrical losses up to the Delivery Point;

**“Environmental Laws”** means any Laws designed to:

- (a) protect ecosystems and dependant animal and plant species;
- (b) regulate the harm caused to the environment and or public health by pollution or degradation; and /or
- (c) regulate the generation, handling, storage, use, release, emission or spillage of any substance which, alone or in combination with any other, is capable of causing harm to the environment, including, without limitation, any waste;

**“Existing Dispatchable Facility”** means a Dispatchable Facility which is at the Effective Date Constructed, Operational and can generate the Contracted Capacity and sell Commercial Energy to the Buyer;

**“Existing Self-Dispatchable Facility”** means a Self-Dispatchable Facility which is at the Effective Date Constructed, Operational and can sell Commercial Energy to the Buyer;

**“Expiry Date”** means the date falling 3 (three) years after the Commercial Operation Date;

**“Facility”** means the Existing Dispatchable Facility located at the Site and, where relevant or available, may include an Existing Self-Dispatchable Facility, and comprising all plant, machinery and equipment, all associated buildings, structures specifically required for the type of technology utilised in such power generation plant, including any roads on the Site that are not national, provincial or municipal roads, and other appurtenances, as further described in Schedule 1 (*Details of the Facility*), together with all required interfaces Constructed for the safe, efficient and timely Operation of that facility, including all Facility Connection Works and, for the avoidance of doubt, excluding the Transmission Connection Works or Distribution Connection Works, as the case may be;

**“Facility Connection Works”** has the meaning given to it in the Distribution Agreement or the Transmission Agreement as applicable;

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

**“Force Majeure”** means any act, event, or circumstance, or any combination of acts, events or circumstances which:

- (a) is beyond the reasonable control of the Affected Party;
- (b) is without fault or negligence on the part of the Affected Party and is not the direct or indirect result of a breach by the Affected Party of any of its obligations under any Connection Agreement, Existing PPA, Fuel Supply Agreement, Independent Engineer Agreement or any other agreement relevant to the Seller's performance in terms of this Agreement;
- (c) could not have been (including by reasonable anticipation) avoided or overcome by the Affected Party, acting in accordance with the standards of a Reasonable and Prudent Operator; and
- (d) prevents, hinders or delays the Affected Party in its performance of all (or part) of its obligations under this Agreement.

Without limiting the generality of the foregoing, a Force Majeure Event may include any of the following acts, events or circumstances, but only to the extent that it satisfies the requirements set out in sub-clauses (a) through (d) above:

- (i) any action or failure to act by a Responsible Authority, including without limitation, any Consent or Authorisation (a) ceasing to remain in full force and effect other than in accordance with the terms and conditions upon which it was issued or by reason of the failure of the holder thereof to comply with any of its terms or conditions or (b) not being issued or renewed upon application having been properly made;
- (ii) lightning, fire, earthquake, tsunami, drought, unusual flood, violent storm, cyclone, typhoon, tornado or other natural calamity or act of God;

- (iii) pandemic, epidemic or plague (including for the avoidance of doubt any effects of the outbreak of COVID-19 (or any mutations or further strains thereof)); and any instruction, regulation, directive legislation or the like issued by a Responsible Authority in response to such acts, events or circumstances;
- (iv) strikes, lock-outs and other industrial action at the Site other than by employees of the Affected Party or of any Affiliate of the Affected Party or of any contractor or supplier of the Affected Party or of any Affiliate of the contractor or supplier;
- (v) accidents or explosions;
- (vi) acts of war whether declared or not, invasion, armed conflict, act of foreign enemy or blockade in each case occurring within or involving the Republic of South Africa;
- (vii) acts of rebellion, riot, civil commotion, act or campaign of terrorism, or sabotage of a political nature, in each case occurring within the Republic of South Africa, except in respect of these acts forming part of or directly caused by strikes, lock outs and other industrial action by the employees of the Affected Party or of any Affiliate of the Affected Party or of any contractor or supplier of the Affected Party or of any Affiliate of the contractor or supplier;
- (viii) boycott, sanction or embargo;
- (ix) any restriction imposed by a Responsible Authority in respect of the supply of water to the Facility and or any limitation imposed by a Responsible Authority in respect of any water use right pursuant solely to any natural event, disaster



or Act of God, (which includes but is not limited to cyclone, drought, fire, lightning, earthquake, explosion, tsunami, tempest, unusual flood, violent storm, typhoon, tornado, ionising radiation, pandemic, epidemic or plague);

(x) any failure or delay by a Responsible Authority to issue any permits, licenses or approvals which a Party is required to provide under this Agreement and for which such Party has duly and timeously applied for, and has diligently pursued in accordance with the standards of a Reasonable and Prudent Operator;

(xi) a Force Majeure Event in respect of the Distribution Agreement or the Transmission Agreement (as the case may be);

Notwithstanding any other provision of this Agreement, the following shall not constitute Force Majeure:

(A) failure of any Party to make any payment of money in accordance with its obligations under this Agreement, provided always that the obligation of the Affected Party to make such a payment of money is not excused in terms of this Agreement by reason of an event of Force Majeure;

(B) late delivery of fuel, equipment, machinery, plant, spare parts or materials caused by negligent conduct or wilful misconduct on the part of the Affected Party or any of its suppliers or contractors;

(C) late performance by any Party, caused by such Party or such Party's equipment suppliers, suppliers, contractors, or subcontractors, except where such cause is itself a Force Majeure Event;

- (D) mechanical or electrical breakdown or failure of equipment, machinery or plant owned or operated by any Party due to the manner in which such equipment, machinery or plant has been operated or maintained;
- (E) delays resulting from reasonably foreseeable unfavourable weather or reasonably foreseeable unsuitable ground conditions or other similar reasonably foreseeable adverse conditions;
- (F) any failure by the Affected Party to obtain and/or maintain or cause to be obtained and/or maintained any Consent, save in the event that such failure is as a result of any failure or delay by a Responsible Authority contemplated above;
- (G) strikes, lockouts and other industrial action by the employees of the Affected Party, any of its Affiliates or any contractor of the Affected Party or of any Affiliate, unless such action is part of any wider industrial action involving a significant section of the construction industry or the electricity supply sector;
- (H) wear and tear or random flaws in materials and equipment or breakdown in or degradation of equipment or machinery of the Affected Party;
- (I) an event, circumstance or situation that arises as a direct or indirect result of any appeal or review being lodged against any amendment to any of the Authorisations issued in terms of any Environmental Laws;
- (J) unavailability of personnel employed by or contracted to the Seller, its Contractors; and or

(K) an event, circumstance or situation that arises as a direct or indirect result of any Responsible Authority imposing additional conditions on the Affected Party in terms of any Consents issued in terms of any environmental Laws;

**"Fuel"** means a gaseous, liquid or solid material consumed in the power plant to produce Energy which may include, but is not limited to, hydrogen, natural gas, methane rich gas, propane, butane, naphtha, diesel, bio-diesel, ethanol, methanol, biogas, landfill gas, syngas and blast furnace gas;

**"Fuel Supply Agreement"** means the fuel supply agreement or agreements to be entered into, from time to time, between the Seller and the Fuel Supplier or Suppliers for the supply of Fuel to the Seller;

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

**"IFRS"** means International Financial Reporting Standards as developed by the International Accounting Standards Board;

**"Independent Engineer"** means a reputable and experienced independent consulting engineer (as an individual representing a company) appointed by the Seller with the consent of the Buyer (not to be unreasonably delayed or withheld) and in accordance with the provisions of clause 5.2 below relating to the independent engineer, to act jointly on behalf of the Seller and the Buyer provided that, if such an individual is not appointed within ten (10) days of a request by one Party to the other in respect of the same, then the dispute shall be resolved in terms of clause 23 (Fast Track Dispute Resolution);

**"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: Western Cape 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 Legal Practice Council: Western Cape, if the matter relates primarily to a legal matter; or
- (c) an electrical or power engineer of not less than ten (10) years professional experience agreed to between the Parties and failing agreement nominated (at the request of either Party) by the President for the time being of the Engineering Council of South Africa, if the matter relates primarily to an engineering matter;

**"Indexed"** or **"Indexation"** shall have the meaning ascribed to it in Appendix B (Indexation) of Schedule 5 (*Calculation of Payments*);

**"Information Exchange Code"** means the South African Grid Code – Information Exchange Code Rev 10.0 – August 2019, including amendments thereto as published by NERSA from time to time;

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

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

**“Last COD”** means the date which falls [six (6) months]<sup>4</sup> after the Effective Date, provided that the Last COD shall be no later than twelve (12) months following the Signature Date;

**“Law”** means:

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

**“Maintain”** means to maintain in good working order and condition and, as necessary, to inspect, refurbish, repair, secure, replace, modify, reinstate, overhaul and test so that the plant, machinery, equipment or facility concerned may be

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<sup>4</sup> Time allowances for the Deadline Date and the Last COD to be finalised prior to signature, provided that the Last COD cannot be later than 12 months following the Signature Date.

Operated at all material times as required by the clause 17 (*General Seller Undertakings*), and the term “**Maintenance**” shall be construed accordingly;

“**Metering Certifier**” means a reputable and experienced individual (representing a company) appointed by the Seller with the consent of the Buyer (not to be unreasonably delayed or withheld) to perform the electricity meter certification, testing, calibration, sealing and commissioning functions under clause 12 (Metering) of this Agreement and which, for the purposes of this Agreement and subject to the Codes, shall use only an individual qualified as a Level 4 (or greater) meter worker according to SANS474/NRS057 (as those standards may be updated, amended or replaced), provided that, if such an individual is not appointed within ten (10) days of a request by one Party to the other in respect of the same, then the dispute shall be resolved in terms of clause 23 (Fast Track Dispute Resolution);

“**Metering Installation**” means the metering equipment including all meters, fittings, equipment and wiring used to measure and record the delivery of the Commercial Energy at the Delivery Point(s) in accordance with clause 12 (Metering) and as detailed in Schedule 1 (Details of the Facility) comprising an electronic main meter and if applicable an electronic check meter, including all associated infrastructure, which is:

- (a) installed by the Seller;
- (b) tested in accordance with clause 12 (Metering) read with Schedule 4 (Inspection and Testing);
- (c) Operated and Maintained by the Seller; and

(d) conforming with the requirements of and standards set out in this Agreement and in the Codes;

**"Minimum Acceptance Capacity"** means the Capacity relevant to the Dispatchable Facility which is equal to ninety percent (90%) of the Contracted Capacity of the Dispatchable Facility;

**"Minimum Stable Load"** means the minimum output level (expressed in MW) which can be continuously dispatched and automatically loaded by the Facility during normal system conditions, which level is as stipulated in Schedule 6 (Performance Requirements);

**"Month"** means a period of one (1) calendar month according to the 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;

**"Municipality"** means any metropolitan, district or local municipality as defined in terms of the Local Government: Municipal Structures Act No.117 of 1998 (as amended);

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

**"NERSA"** means the National Energy Regulator of South Africa as established by section 3 of the National Energy Regulator Act, 4 of 2004;

**“Net Dependable Capacity”** or **“NDC”** means, from the COD, the Capacity of the Dispatchable Facility at Reference Site Conditions, measured at the Delivery Point, which:

- (a) shall be determined by the initial and periodic tests done in accordance with Schedule 4 (Inspection and Testing), with the test results corrected to the Reference Site Conditions;
- (b) if there is more than one Delivery Point, shall be the sum of the Net Dependable Capacity from each such Delivery Point, measured at each Delivery Point for each Facility so that there is accounting for all Auxiliary Consumption;
- (c) must be continuously dependable, as demonstrated by the tests for Net Dependable Capacity undertaken in accordance with the provisions of Schedule 4 (Inspection and Testing); and
- (d) shall never be less than the Minimum Acceptance Capacity and shall never exceed the Contracted Capacity;

**“Net Dependable Capacity Payment”** means, in relation to each Billing Period the amount in Rand (excluding VAT) that shall be due and payable by the Buyer to the Seller for Net Dependable Capacity made Available during that Billing Period, which shall be calculated in terms of Schedule 5 (Calculation of Payments);

**“Net Dependable Capacity Test”** has the meaning given to it in Schedule 4 (Inspection and Testing) of this Agreement;

**“Notice of Contracted Capacity of Facility”** means the notice in the form of Schedule 2 (*Form of Notice of Contracted Capacity of Facility*) that is delivered



by the Seller to the Buyer in terms of clause 5.5 (*Commercial Operation Date*) in respect of the Contracted Capacity for the Dispatchable Facility and the Self-Dispatchable Facility;

**“NTC Fault”** means (i) any constraint, unavailability, interruption, breakdown, inoperability or failure of or disconnection of a Facility from the whole or any part of the System which is caused by the NTC (including for the avoidance of doubt any breach by the Seller of any Transmission Agreement or Distribution Agreement with the NTC) and/or (ii) the unavailability of Energy Input supplied by the NTC;

**“Operate”** means to manage and operate the Facility and otherwise operate as required by this Agreement and in accordance with the standards of a Reasonable and Prudent Operator and the term **“Operation/al”** shall be construed accordingly;

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

**“Payment/s”** means any one or a combination of the Net Dependable Capacity Payments and the Commercial Energy Payment of Schedule 5 (*Calculation of Payments*);

**“Personal Information”** has the meaning set out in the POPI Act;

**“Planned Derating”** means any event or occurrence, other than an Outage, that requires the Capacity of a Facility to be reduced below the Net Dependable Capacity, and is scheduled well in advance and, in any event, not less than ninety (90) days prior to the next Contract Year and has a predetermined start date and duration;

**“POPI Act”** means the Protection of Personal Information Act No. 4 of 2013, as amended;

**“Processing”** or **“Process”** has the meaning set out in the POPI Act;

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

**“Reasonable and Prudent Operator”** 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 Site Conditions”** means the environmental conditions at the Site upon which a Dispatchable Facility is situated, at which the Contracted Capacity and Net Dependable Capacity (as the case may be) are stated, as detailed in the table in Schedule 1 (Details of the Facility) Part 1 (Facility/Facilities) with the title **“Reference Site Conditions”**;

**“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, and or any other state-owned entity;

**“Sanctioned Entity”** means:

- (a) a person which is listed in a Sanctions List or is subject to Sanctions; or
- (b) a person which is ordinarily resident, organised or operating in a country or territory which is listed on a Sanctions List or is subject to Sanctions;

**“Sanctioned Transaction”** means any transaction that is prohibited by, or would cause any breach of, Sanctions;

**“Sanctions”** means trade, economic or financial sanctions, embargoes or restrictions imposed or applied pursuant to applicable Laws and regulations which are administered or enforced from time to time by any Sanctions Authority;

**“Sanctions Authority”** means:

- (a) the United Nations;
- (b) the European Union;
- (c) the government of the United States of America;
- (d) the government of the United Kingdom;
- (e) the government of the Republic of France;
- (f) and any of their applicable and authorised governmental authorities, including, without limitation, the Office of Foreign Assets Control for the US Department of Treasury (also known as “OFAC”), the US Department of Commerce, the US State Department or the US Department of the Treasury,

Her Majesty's Treasury (also known as "HMT"), the Bank of England and the French Ministry of Finance;

**"Sanctions List"** means:

- (a) the Specially Designated Nationals and Blocked Persons List maintained by OFAC;
- (b) the Consolidated List of Financial Sanctions Targets and the Investments Ban List maintained by HMT, and any similar list maintained, or a public announcement of a Sanctions designation made by any Sanctions Authority, in each case as amended, supplemented or substituted from time to time;

**"Scheduled Outage"** means the removal of a portion of a Facility or a Facility from service in order to perform work on specific components, that is scheduled in accordance with Schedule 3 (Outages and Deratings) that must have a predetermined start date and duration);

**"Self-Dispatchable Facility"** means a Facility that the Buyer purchases Commercial Energy from which the Buyer has no contractual right to influence the Dispatch of under normal operating conditions and which may, for the avoidance of doubt, form part of the Facility to create a Dispatchable Facility required in terms of this Agreement or be of a technology that has the ability to respond to dispatch instructions but is not contractually obliged to do so in terms of this Agreement and **"Self-Dispatchable"** shall bear a corresponding meaning;

**"Seller Default"** means any of the following events or circumstances (in each case, other than where solely due to Force Majeure, Buyer Default, Change in Law or a System Unavailability Event):

- (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 fails to achieve the [Minimum Contracted Capacity] on or before the Last COD;
- (c) NERSA lawfully withdraws, revokes or cancels the Seller's generation licence due to the Seller's act or omission;
- (d) any Consent is suspended or revoked, and not discharged due to a material breach by the Seller;
- (e) the Seller fails to maintain compliance with the requirements of any Consents or the Codes;
- (f) the Seller fails to comply with clause 20 (Assignment);
- (g) the Seller fails to deliver a Notice of Contracted Capacity of Facility;
- (h) any other breach of any material provision of this Agreement has occurred more than once and:
  - (i) the Buyer has given an initial warning notice to the Seller describing that breach in reasonable detail and stating that if that breach persists or recurs then the Buyer may take further steps to terminate this Agreement; and
  - (ii) the Buyer has issued a second and final warning notice following the persistence or recurrence of that breach for a period of thirty (30) days after the initial warning notice, stating that if that breach persists or recurs within the period of thirty (30) days after the final warning notice

then the Buyer may exercise its rights in terms of clause 16.1 on ten (10) days' notice to the Seller;

- (i) 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 the clause below relating to Seller default;
  - (iii) any Consent is suspended or revoked, and not discharged, due to a material breach by the Seller;
  - (iv) the Seller fails to maintain compliance with the requirements of the Codes;
  - (v) the Seller fails to settle (whether by way of set-off or payment) any amount in excess of R200 000/MW (two hundred thousand Rand per MW) Indexed of the Contracted Capacity that is due and payable by it to the Buyer pursuant to this Agreement and not disputed in good faith and the same remains unpaid, for a period of 60 (sixty) Business Days after written demand by the Buyer; or

(vi) any of the warranties in clause 30.1 (Seller warranties) fails, at any time during the existence of this Agreement, to be true and correct in all material respects and the Seller fails to remedy, cure or correct that untruth and incorrectness within a period of 120 (one hundred and twenty) days of such warranty failing to be true and correct in all material respects;

(vii) any of the warranties in clause 30.1 (Seller warranties) fails, at any time during the existence of this Agreement, to be true and correct in all material respects and the Seller fails to remedy, cure or correct that untruth and incorrectness within a period of one hundred and twenty (120) days of such warranty failing to be true and correct in all material respects;

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

**"Site"** means the site upon which the Facility is Operated as more fully described and defined in Schedule 1 (*Details of the Facility*);

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

**"South African Standards"** means the South African National Standards ("SANS") and or any other body or institute that presides over and or prescribes technical standards to be used in South Africa from time to time;

**"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;

**"Suppliers"** means any and all suppliers of any Fuel and equipment or goods and services which may be required by the Seller in relation to the Operation and Maintenance of the Facility;

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

**"System Unavailability Event"** means any constraint, unavailability, interruption, breakdown, inoperability or failure of or disconnection of a Facility from, the whole or any part of the System, which event is not caused by:

- (a) an act or omission of the Seller or a Contractor or Supplier;
- (b) any unavailability of Energy Input supplied by an entity other than the Distributor; or
- (c) for the avoidance of doubt, the termination of the Distribution Agreement or Transmission Agreement by the Distributor or the NTC (as the case may be) due to breach of such agreement by the Seller;

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

**"Termination Date"** means the Expiry Date or the date of the earlier termination of this Agreement in accordance with clause 16 (*Termination*);

**"Third Party PPA"** means a power purchase agreement entered into between the Seller and a third party for the sale of Energy from the Facility/ies to such third party on the terms and conditions stated therein;

**"Total Capacity"** means the total capacity (expressed in MW) of the Facility to generate and provide Energy in terms of this Agreement and any Third Party PPA;



**“Transmission Agreement”** means the agreement entered into between the Seller (as Customer) and the NTC which sets out the terms and conditions on which the Facility will be connected to and use the Transmission System, provided that the Buyer has approved the terms and conditions thereof in writing;

**“Transmission Connection Works”** has the meaning given to it in the Transmission Agreement;

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

**“Unplanned Derating”** means a derating that is not a Planned Derating;

**“Unscheduled Outage”** means any outage of the Facility that is not a Scheduled Outage;

**“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;

**“Water”** has the meaning given to it in the Water Use Right;

**“Water Use Right”** means either a water use agreement or a water use licence in terms of National Water Act, 36 of 1998 or a combination of a water use agreement with a third party for the provision of Water to the Seller, and such water use licence;

**"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. the index and headings of clauses of this Agreement are for ease of reference only and shall be ignored in the interpretation and application of this Agreement;
- 1.2.2. words importing the singular shall include the plural and vice versa and words importing one gender shall include the other genders;
- 1.2.3. references to any Recital, clause, paragraph, Schedule or Annex are to those contained in this Agreement, and references to a part of a Schedule are to the part of the Schedule in which the reference is relevant, and all Schedules and Annexes to this Agreement are an integral part of this Agreement. If there is any conflict between of the main body of this Agreement and the provisions of any of the Schedules or Annexes, the provisions of the main body shall prevail;
- 1.2.4. unless otherwise specified, all references to any time shall be to the time of day in Johannesburg, South Africa;
- 1.2.5. **"person"** includes a corporation, company, firm, government, state or agency of a state or any association or partnership (whether or not having separate legal personality) of any of the foregoing that is by Law as the subject of rights and duties, and references to a **"person"** (or to a word incorporating a person) shall be construed so as to include that person's successors in title and assigns or transferees;

- 1.2.6. in computation of periods of time from a specified day to a later specified day, "**from**" means from and including and "**until**" or "**to**" means to and including;
- 1.2.7. "**include**", "**including**" and "**in particular**" shall not be construed as being by way of limitation, illustration or emphasis only and shall not be construed as, nor shall they take effect as, limiting the generality of any preceding words. The words "**other**" and "**otherwise**" shall not be construed so as to be limited or defined by any preceding words, where a wider construction is reasonably possible;
- 1.2.8. references to a "**Party**", the "**Seller**" or the "**Buyer**" shall include its successors and permitted assignees, provided that, in the case of the Seller, the relevant transfer or assignment has received the prior written approval of the Buyer;
- 1.2.9. references to this "**Agreement**" or any other document shall be construed as references to this Agreement or that other document as amended, varied, novated, supplemented, or replaced from time to time, provided that, in the case of any other document, such amendment, variation, novation, supplement or replacement has received the prior written approval of the Buyer;
- 1.2.10. references to any amount shall mean that amount exclusive of VAT, unless the amount expressly includes VAT;
- 1.2.11. references to legislation include any statute, by-law, regulation, rule, subordinate legislation or delegated legislation or order, and a reference to any legislation is to such legislation as amended, modified or consolidated from time to time, and to any legislation replacing it or made under it;

- 1.2.12. the terms "**hereof**", "**herein**", "**hereunder**" and similar words refer to this entire Agreement and not to any particular clause, paragraph, Part, Schedule or any other subdivision of this Agreement;
- 1.2.13. the rule of construction that, in the event of ambiguity, an agreement shall be interpreted against the Party responsible for the drafting thereof, shall not apply in the interpretation of this Agreement;
- 1.2.14. the expiration or termination of this Agreement shall not affect such of the provisions of this Agreement as expressly provide that they will operate after any such expiration or termination or which of necessity must continue to have effect after such expiration or termination, notwithstanding that these provisions do not expressly state this; and
- 1.2.15. if any provision in clause 1.1 (*Definitions*) is a substantive provision conferring rights or imposing obligations on either Party then, notwithstanding that such provision is contained in such clause, effect shall be given thereto as if such provision were a substantive provision in the body of this Agreement.
- 1.2.16. if the Facility is, or is to be, connected to the Distribution System, then all references to the terms "Transmission System", "Transmission Agreement", "National Transmission Company", "NTC" and "Transmission Connection Works" in this Agreement may be ignored. If the Facility is, or is to be, connected to the Transmission System, then all references to the terms "Distribution System", "Distribution Agreement", "Distributor" and "Distribution Connection Works" in this Agreement may be ignored.

1.3. **Abbreviations**

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

**°C** - means Degrees Centigrade;

**COD** - Commercial Operation Date

**A** - means Amperes;

**h** - means Hours

**kWh** – means kilowatt-hours

**m** - means Metres;

**MWh** – means Megawatt-hours

**MVar** - Megavolt ampere reactive

**MVarh** - Megavolt ampere reactive hour

**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. **Status of agreement**

In the event of a conflict between the provisions of this Agreement and any other agreement related to the sale of Energy in terms of this Agreement, this Agreement will prevail.

### 2. **TERM**

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

- 2.1. its termination in accordance with clause 16 (*Termination*); or
- 2.2. the Expiry Date,

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

### 3. **CONDITIONS PRECEDENT**

#### 3.1. **Effectiveness of rights and obligations**

The whole of this Agreement (save for clauses 1 (definitions and interpretation), this clause 3 (Conditions Precedent), clause 4 (Risk and liability) and clauses 18 (Intellectual Property of the Buyer) to 21 (Contractors) (inclusive) and clauses 22

(Dispute Resolution) to 29 (Notices) (inclusive) and clauses 31 (Representatives) to 32 (Miscellaneous), which come into effect on the Signature Date) ("**Surviving Conditions**") is subject to the Conditions Precedent listed in clause 3.2 having been fulfilled or duly waived in accordance with clause 3.4 by not later than [3 (three) months]<sup>5</sup> following the Signature Date or such extended date as notified by the Buyer ("**Deadline Date**").

### 3.2. **Conditions Precedent**

3.2.1. The Conditions Precedent provided below do not necessarily constitute an exhaustive list of conditions which must be fulfilled in order for this Agreement to be of full force and effect, and any conditions not stated below which render the Agreement inoperable will also be deemed to be Conditions Precedent (and the Buyer maintains the right to specify by written notice pursuant to the bid process any such conditions to be deemed as Conditions Precedent at any time prior to the Deadline Date):

3.2.1.1. provided the Buyer with copies of the following duly executed and in a form satisfactory to the Buyer:

3.2.1.1.1. Connection Agreements;

3.2.1.1.2. Water Use Licence, if applicable;

3.2.1.1.3. NERSA Generation Licence<sup>6</sup>;

3.2.1.1.4. Fuel Supply Agreement, if applicable;

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<sup>5</sup> Time allowances for the Deadline Date and the Last COD to be finalised prior to signature, provided that the Last COD cannot be later than 12 months following the Signature Date.

<sup>6</sup> Where relevant only.

- 3.2.1.2. the Seller shall have obtained all or any of Consents required by any Responsible Authority (including the Buyer, as applicable), statute, regulation or by-Law for the implementation of this Agreement, the installation, commissioning and operation of the Facility as well as the production and delivery of the Energy Output and Net Dependable Capacity, including such authorisations for compliance with all Environmental Laws;
- 3.2.1.3. the Seller shall obtain (at his cost) an irrevocable, on demand bank guarantee (the "**Performance Security**") for proper performance, in the form, amount and currencies stated in the Tender and shall ensure that the Performance Security is valid and enforceable until the Expiry Date;
- 3.2.1.4. the Buyer shall have complied, where relevant, with section 33 of the Local Government: Municipal Finance Management Act 56 of 2003;
- 3.2.1.5. the Buyer shall, where relevant to the Facility, have received a favourable determination in terms of section 34 of the Electricity Regulation Act 4 of 2006;
- 3.2.1.6. all Schedules to this Agreement have been completed in full and signed by the Parties and have been included into this Agreement; and
- 3.2.1.7. any other Conditions Precedent duly notified by the Buyer and published in terms of the STPPA tender process prior to the Deadline Date (and in respect of which the Deadline Date may be extended by the Buyer on notice if required to reasonably meet the timeline);
- 3.2.1.8. the Effective Date shall be the date on which the last Party provides to the other Party a certificate signed by its duly authorised officer stating that the



Conditions Precedent for which it is responsible as set out in Clauses 3.2 above, have been met.

**3.3. Responsibilities concerning Conditions Precedent**

3.3.1. The Parties shall each use all reasonable efforts to cause the Conditions Precedent listed in Clause 3.2 (*Conditions Precedent*) for which it is responsible to be satisfied by the Deadline Date (as may be extended from time to time by the Buyer). The Parties shall provide each other with such reasonable cooperation as may be necessary to assist the other in satisfying the Conditions Precedent listed above.

3.3.2. Each Party shall be responsible at its own expense for satisfying and procuring the satisfaction of those Conditions Precedent for which it is responsible.

**3.4. Waiver and extension**

3.4.1. The Buyer may waive the requirement for the Seller to satisfy and procure the satisfaction of any of the Conditions Precedent listed in Clause 3.2 (*Conditions Precedent*) in writing. On receipt by the Seller of such waiver in writing, the relevant Condition(s) Precedent will be deemed to have been satisfied for the purposes of Clause 3.1 (*Effectiveness of rights and obligations*).

3.4.2. The Parties may, by agreement in writing, extend the date by which the Conditions Precedent listed in Clause 3.2 (*Conditions Precedent*) are to be fulfilled, provided such agreement is made prior to the Deadline Date. In addition, the Buyer may extend the Deadline Date in terms of the bid process on notice.

**3.5. Reports**

The Seller shall notify the Buyer at least once a Month on the progress made in satisfying the Conditions Precedent listed in Clause 3.2 (*Conditions Precedent*).

**3.6. Failure to fulfil**

If any Condition Precedent is not fulfilled or waived on or before the Deadline Date (or such extended date), then the whole of this Agreement, (other than the Surviving Provisions) shall have no force or effect, the Parties shall be entitled to be restored as nearly as possible to the positions in which they would have been had this Agreement not been entered into and no Party shall have any claim against the others in terms of this Agreement except for such claims, if any, as may arise from a breach of this clause 3 or the Surviving Provisions.

**4. RISK AND LIABILITY**

4.1. Subject to Applicable Laws, the Seller shall be fully responsible to the Buyer for the suitability of the Site and for the Operation and Maintenance of the Facility on the Site.

4.2. The Seller agrees and undertakes that, as between it and the Buyer:

4.2.1. it shall be solely responsible for, shall bear full responsibility for and shall discharge all environmental obligations in relation to the Facility and the Site pursuant to and in accordance with the applicable Consents and Laws; and

4.2.2. if applicable, it shall be solely responsible for, shall bear full responsibility for, shall discharge all obligations and shall bear all consequences (including the possibility that any of the following could lead, directly or indirectly, to a Seller Default) that:

- 4.2.2.1. arises as a direct or indirect result of any appeal or review being lodged against any amendment to any of the Consents issued in terms of any Environmental Laws; or
- 4.2.2.2. arises as a direct or indirect result of any Responsible Authority imposing additional conditions on the Seller in terms of any Consents issued in terms of any Environmental Laws, pursuant to a review by the Responsible Authority of the Seller's provisional or final air emissions licence or waste management licence; or
- 4.2.2.3. arise as a direct or indirect result of the Responsible Authority declaring the area in which the Site is situated as an air pollution priority area and imposing additional requirements on the Seller in terms of its air emissions licence to align with the air quality management plan for that area; and
- 4.2.3. it shall be solely responsible for, shall bear full responsibility for and shall discharge all obligations pursuant to any obligations or requirements to decommission the Facility at the end of its life, pursuant to and in accordance with the applicable Consents and Environmental Laws. The Seller shall comply with all of its obligations in clause 17 (*General Seller Undertakings*); and
- 4.2.4. if the Seller fails to comply with any of its obligations under this clause 4 (*Risk and liability*), it alone shall be liable for and bear the full responsibility of and consequences for such failure, and the Buyer shall not bear any liability, responsibility or consequence for or of such failure;
- 4.2.5. if any consequence arises pursuant to any circumstance, event or situation detailed in clause 4.2.2, it alone shall be liable for and bear the full responsibility of and consequences for such circumstance, event or situation, and the Buyer

shall not bear any liability, responsibility or consequence for or of such circumstance, event or situation, including any consequential Seller Default; and

- 4.2.6. that the Buyer has no obligations of any nature to monitor compliance with or to enforce the terms and conditions of any of the Consents; and
- 4.2.7. it indemnifies and shall hold harmless, upon demand, the Buyer against any claims, costs (including Claims for indirect losses), damages, losses, expenses and any other consequences of or arising out of the Seller's failure to comply with clause 4.2.2 and arising out of any circumstance, event or situation detailed in this clause 4 (*Risk and liability*); and
- 4.2.8. it indemnifies and shall hold harmless, upon demand, the Buyer against any claims, costs (including Claims for indirect losses), damages, losses, expenses and any other consequences of or arising out of any consequence arises pursuant to any circumstance, event or situation detailed in clause 4.2.2.
- 4.2.9. The provisions of this clause 4 (*Risk and liability*) shall remain in full force and effect after the Termination Date.

## **5. TESTING AND COMMERCIAL OPERATION DATE**

### **5.1. Connection to the System**

- 5.1.1. The Seller warrants that it has entered into the requisite Connection Agreements with the Distributor or the NTC, as applicable, for each Facility forming part of this Agreement, on or before the Effective Date.
- 5.1.2. The Seller shall provide the Buyer with such information and data, regarding any matter relating to the arrangements between the Seller and the NTC or

Distributor (as the case may be), as may be reasonably required by the Buyer to enable the Buyer to comply with its obligations and exercise its rights in terms of this Agreement.

5.1.3. To the extent the Facility is connected with or shall be connected with such part of the System as is owned, operated or administered by the Distributor or the NTC (as the case may be), in addition to complying with the other requirements of this clause 4 (*Testing and Commercial Operation Date*), the Seller shall:

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

5.1.3.2. procure all substantiating documents from the Distributor or the NTC as required by the Buyer pursuant to the Buyer's obligations under this Agreement; and

5.1.3.3. collectively discuss and coordinate with any relevant Responsible Authority, the Distributor or the NTC (as the case may be), regarding the actions contemplated in this clause 4 (*Testing and Commercial Operation Date*) and shall additionally comply with such reasonable requests and instructions that are in accordance with the Codes and the practices of a Reasonable and Prudent Operator, as may be received from the Distributor or the NTC (as the case may be) from time to time.

## 5.2. **Independent Engineer**

5.2.1. It is recorded that an Independent Engineer has been appointed by the Seller, at its sole cost and risk and on terms and conditions approved by the Buyer.

5.2.2. The Independent Engineer so appointed shall act on behalf of, and owe a duty of care to, both the Buyer and the Seller equally and shall be required to have an independent opinion in relation to its obligations in terms of this Agreement.

5.3. **Independent Engineer Inspection and Testing**

5.3.1. The procedure for the inspection and testing of the Facility for the purposes of Schedule 4 (*Inspection and Testing*) shall be finalised in consultation with the Independent Engineer and the Buyer and the Seller shall provide the Independent Engineer with all information and documents required to perform its obligations in terms of this Agreement.

5.3.2. The Seller shall also provide, to the Buyer, all the information provided to the Independent Engineer in terms of clause 5.3.1 above.

5.4. **Facility Contracted Capacity**

5.4.1. The Seller may not procure the issue of the Notice of Contracted Capacity Form until:

5.4.1.1. the Independent Engineer has confirmed that the Metering Installation has been procured, installed, tested and successfully commissioned in accordance with the NERSA's minimum testing standards, the Codes as well as all metering requirements as set out in this Agreement, any Existing PPA Agreement and the Connection Agreements, and such confirmation from the NTC or Distributor, as the case may be, is provided by the Seller to the Independent Engineer;

5.4.1.2. the Seller has, in terms of clause 5.3 (*Independent Engineer Inspection and Testing*) and the requirements of Schedule 4 (*Inspection and Testing*),

demonstrated to the Independent Engineer that the Facility is compliant with the Codes and has provided written confirmation from NERSA and the Independent Engineer, to the Buyer, that the Facility is compliant with the Codes and the Buyer has issued to the Seller, written notice (such notice not to be unreasonably withheld or delayed) of its receipt and acceptance of such notice;

5.4.1.3. the Seller has provided written confirmation from the NTC and or the Distributor (as the case may be) to the Buyer certifying that the Facility is connected to the System; and

5.4.1.4. the NDC Test (as defined in Schedule 4 (*Inspection and Testing*)) for the Dispatchable Facility has been successfully completed in accordance with the provisions of Schedule 4 (*Inspection and Testing*), to the satisfaction of the Independent Engineer; and

5.4.1.5. in the case of a Self-Dispatchable Facility, until the Seller has ensured that all the required tests contained in the Codes and the tests and standards of a Reasonable and Prudent Operator are performed to demonstrate that key features of the design operate satisfactorily.

5.4.2. The Notice of Contracted Capacity Form issued by the Independent Engineer shall, as between the Seller and the Buyer:

5.4.2.1. in the case of a Dispatchable Facility:

5.4.2.1.1. be sufficient evidence that the NDC Test (each as defined in Schedule 4 (*Inspection and Testing*)) for the Facility has been successfully completed in accordance with the provisions of Schedule 4 (*Inspection and Testing*), and

- 5.4.2.1.2. be sufficient evidence that the Net Dependable Capacity is above the Minimum Acceptance Capacity; and
- 5.4.2.1.3. and insofar as it states the Net Dependable Capacity at a value below the Minimum Acceptance Capacity and or the Contracted Capacity (respectively), be *prima facie* evidence of such values, which values, if disputed by either the Seller or the Buyer, shall be referred to and determined in accordance with the provisions of clause 22 (Dispute Resolution); and
- 5.4.2.2. in the case of a Self-Dispatchable Facility, be sufficient evidence that the Seller has ensured that all the required tests contained in the Codes and the tests and standards of a Reasonable and Prudent Operator are performed to demonstrate that key features of the design operate satisfactorily.

**5.5. Commercial Operation Date (COD)**

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 the Notice of Contracted Capacity Form in respect of the Facility.

**5.6. Delays in achieving the Commercial Operation Date**

- 5.6.1. The Seller shall be entitled to declare the Commercial Operation Date for the Facility at any time up to 17:00 on the Last COD in respect of that Net Dependable Capacity for which the Independent Engineer has completed the Notice of Contracted Capacity of Facility by no later than 17:00 on the Last COD and, if the Seller does so and the Net Dependable Capacity is greater than the Minimum Acceptance Capacity, the Buyer shall not be entitled to call



a Seller Default in terms of sub-clause (b) or (g) of the definition of "Seller Default".

- 5.6.2. If the Commercial Operation Date is not achieved by the Last COD, then the Buyer shall be entitled to terminate this Agreement in accordance with clause 16.1 (*Termination for Seller Default*) for a Seller Default.

**5.7. Reduction in Contracted Capacity**

- 5.7.1. If the Net Dependable Capacity on the Commercial Operation Date is less than the original Contracted Capacity projected on the Signature Date to be achieved in respect of the Facility, but greater than the Minimum Acceptance Capacity, then, on and with effect from the Commercial Operation Date the Contracted Capacity for the Dispatchable Facility shall be reduced to the Net Dependable Capacity as at the Commercial Operation Date, and Schedule 1 (Details of the Facility) shall be amended to reflect the Net Dependable Capacity as the new Contracted Capacity for the Dispatchable Facility.

**6. SALE OF ENERGY OUTPUT AND CAPACITY**

**6.1. Sale of Energy**

Subject to and in accordance with the terms and conditions set out in this Agreement:

- 6.1.1. the sale of Energy from the Seller to the Buyer in terms of this Agreement shall be limited to the Contracted Capacity of the Facility and only Energy Output that:

- 6.1.1.1. is generated from the Contracted Capacity;

- 6.1.1.1.1. unless operating under Automatic Generation Control, is generated in such a manner that Dispatch Compliance is achieved; and
- 6.1.1.1.2. does not exceed the value of Energy Output specified in the Dispatch Instruction, unless operating under Automatic Generation Control or unless the Energy Output is or must be exceeded because the Facility is in transient operation pursuant to clause 7.6.2 below, may be sold to the Buyer, and for the avoidance of doubt, any payments made by the Buyer for Energy Output will be made with reference to the metered values at the Delivery Point;
- 6.1.1.2. during the Term:
  - 6.1.1.2.1. the Seller shall make Available to the Buyer at the Delivery Point, the Net Dependable Capacity;
  - 6.1.1.2.2. the Buyer shall pay the Net Dependable Capacity Payment for the Net Dependable Capacity made Available by the Seller at the Delivery Point;
  - 6.1.1.2.3. to the extent that a Dispatch Instruction has been issued, the Seller shall sell the Commercial Energy generated by the Facility to the Buyer at the Delivery Point;
  - 6.1.1.2.4. to the extent that a Dispatch Instruction has been issued, the Buyer shall pay the Commercial Energy Payment for the Commercial Energy specified in the Dispatch Instruction and delivered by the Seller to the Delivery Point (and for the avoidance of doubt, any Commercial Energy Payments made by the Buyer for Energy Output will be made with reference to the metered values at the Delivery Point); and

6.1.1.2.5. the Seller shall sell to the Buyer at the Delivery Point the Commercial Energy generated by the Self-Dispatchable Facility as specified in the Notice of Contracted Capacity and the Buyer shall pay the Commercial Energy Payment for the Commercial Energy delivered by the Seller to the Delivery Point (and for the avoidance of doubt, any Commercial Energy Payments made by the Buyer for Energy Output will be made with reference to the metered values at the Delivery Point).

6.2. **Title and Risk**

Title in, and risk of loss of, all Energy sold to the Buyer in accordance with clause 6.1 (*Sale of Energy*), shall pass to the Buyer at the Delivery Point.

6.3. **Intangible and/or Tradeable Benefits of Renewable Energy (where relevant)**

6.3.1. All renewable energy intangible and/or tradeable benefits relating to the operation of the Facility (where so relevant) shall vest in the Buyer.

6.3.2. The Seller shall take all reasonable and necessary steps to procure that all renewable energy intangible and/or tradeable benefits (where so relevant) that arise or may arise in respect of the operation of the Facility over the Term of this Agreement accrue to, and are recorded for the benefit of, the Buyer in a registry of the Buyer's choice.

6.3.3. The Buyer will be responsible for all costs associated with the accrual and recordal as aforesaid.

6.3.4. The Buyer shall reimburse to the Seller, upon receipt of an invoice from the Seller, all of the Seller's reasonable, necessary, and demonstrated costs incurred in complying with its obligations under this clause 6.3.

## 7. DECLARATIONS AND DISPATCH

### 7.1. Ability to generate Energy Output

Subject to the Codes, the Seller shall issue a Declaration, in accordance with the provisions of clause 7.2, stating the Declared Capacity in respect of the Dispatchable Facility at a Capacity between the Minimum Stable Load for the Dispatchable Facility and the Net Dependable Capacity, and where Capacity is not Available, the Seller shall still issue a Declaration advising the Buyer of the level of Declared Capacity and where it is zero (0), the Seller must, on request from the Buyer, inform the Buyer of that and provide detailed reasons for the non-Availability of Capacity, which shall be limited to the following:

- 7.1.1. for reason of any Outage;
- 7.1.2. where to do so would not be in accordance with the standards of a Reasonable and Prudent Operator;
- 7.1.3. to the extent of any illegality, in circumstances where to do so would be unlawful;
- 7.1.4. for reasons of Force Majeure or a Change in Law; or
- 7.1.5. in any other circumstances, with the Buyer's approval (which approval shall not be unreasonably withheld).

### 7.2. Declarations

- 7.2.1. Not later than 10:00 hours on each day during the period from the Commercial Operation Date to the Termination Date, the Seller shall, in accordance with the Information Exchange Code and subject to Schedule 6 (Performance Requirements), provide notice ("**Declaration**") to the Seller for each Availability

Period of the following six (6) consecutive days in respect of the Dispatchable Facility.

7.2.2. If the Seller fails to give a Declaration on or before the time specified in clause 7.2.1, the Declared Capacity in clause 7.2.1 for each Availability Period of the relevant day shall be deemed to be the same as the most recent (as at that point in time) Declaration.

7.2.3. For the avoidance of doubt, the Seller shall be entitled to deliver a Declaration even if it knows or suspects that the Buyer may be unable to Dispatch the Dispatchable Facility for any reason.

### 7.3. **Availability Notice**

7.3.1. The Seller may, in accordance with the Information Exchange Code and subject to Schedule 6 (Performance Requirements), by issuing an Availability Notice to the Buyer:

7.3.1.1. revise downwards and continue to revise downwards the Declared Capacity for any Availability Period at any time up to and until the start of the applicable Availability Period; or

7.3.1.2. revise upwards and continue to revise upwards the Declared Capacity for any Availability Period at any time up to and until the start of the applicable Availability Period, provided that the Seller shall immediately issue an Availability Notice revising the Declared Capacity for any Availability Period, if the Seller believes there are factors which, in the opinion of the Seller, may have a material effect on the ability of the Facility to deliver Energy Output in the relevant Availability Period.

7.3.2. For the avoidance of doubt, while there shall be no limit on the number of Availability Notices the Seller is permitted to issue, the Seller shall be penalised for short notice Availability Notices issued in terms of clause 7.3.3.1, in accordance with Schedule 5 (Calculation of Payments) Appendix A.4 (Weighting Factor).

7.3.3. Each Availability Notice shall specify for the Dispatchable Facility:

7.3.3.1. a duration for the reduction in the Declared Capacity below the Net Dependable Capacity of the Dispatchable Facility; and or

7.3.3.2. a deadline by which the Declared Capacity shall be restored to the Net Dependable Capacity of the Dispatchable Facility; or

7.3.3.3. that the Net Dependable Capacity of the Dispatchable Facility shall be determined at a new level upon the resumption of Operation following the relevant Outage or Derating.

#### 7.4. **Dispatch Schedule**

Before 14:00 hours on each day, the Buyer shall in accordance with the Information Exchange Code provide the Seller with a schedule (the "**Dispatch Schedule**") for the Dispatchable Facility in respect of each Availability Period in each of the following month, week and day. The Dispatch Schedule shall indicate the Energy Output that the Buyer anticipates may be required in each Availability Period of each of the following month, week and day.

#### 7.5. **Dispatch Instruction**

7.5.1. The Buyer may, in accordance with the Information Exchange Code, at its discretion:

- 7.5.1.1. issue a Dispatch Instruction that specifies its requirements in 10 minute intervals or intervals of up to an hour of the period covered by the Dispatch Instruction; and
- 7.5.1.2. alter a Dispatch Instruction on an intra-hour basis.
- 7.5.2. A Dispatch Instruction issued by the Buyer on any day must be time stamped and may differ from the Dispatch Instruction that was anticipated, in the Dispatch Schedule, to be issued by the Buyer in respect of the same Availability Period. The Buyer shall use reasonable endeavours, in accordance with the Information Exchange Code, to notify the Seller of such changes to the Dispatch Schedule in advance of issuing the relevant Dispatch Instruction.
- 7.5.3. Subject to Schedule 6 (Performance Requirements) and for the avoidance of doubt, the Buyer may not knowingly issue a Dispatch Instruction to the Seller which requires the Dispatchable Facility:
  - 7.5.3.1. to deliver Energy Output at a level which exceeds the Declared Capacity;
  - 7.5.3.2. to Operate in a manner contrary to safety and technical guidelines for the Facility, including the specifications contained in Schedule 6 (Performance Requirements);
  - 7.5.3.3. to Operate in a manner contrary to the standards of a Reasonable and Prudent Operator;
  - 7.5.3.4. to Operate in contravention of the Codes; or
  - 7.5.3.5. to Operate in a manner inconsistent with the status of the System at the time at which the Dispatch Instruction is to be implemented,

and, if the Buyer does issue a Dispatch Instruction in contravention of any of the above, such Dispatch Instruction shall be a “**Non-Compliant Dispatch Instruction**”.

7.5.4. As soon as reasonably practicable after it becomes aware of any Non-Compliant Dispatch Instruction, the Seller shall notify the Buyer of any limitations to the Dispatch Instruction necessary to ensure that the performance of the Dispatchable Facility remains in compliance with this Agreement and the Codes.

7.6. **Seller's Obligation to Comply with Dispatch Instruction**

7.6.1. Provided the Dispatch Instruction complies with the provisions of clause 7.5 (Dispatch Instruction) and is not a Non-Compliant Dispatch Instruction, the Seller shall ensure that Dispatch Compliance is achieved by the Dispatchable Facility.

7.6.2. A Dispatchable Facility shall achieve Dispatch Compliance for any Availability Period in which it increases or decreases its Energy Output above or below that required in the Dispatch Instruction for that Availability Period if such increase or decrease is required in order to generate the Energy Output specified in a Dispatch Instruction for the subsequent Availability Period, provided that the increase or decrease in Energy Output:

7.6.2.1. is undertaken at the ramp rate specified in the Dispatch Instruction (which shall not be greater than the applicable maximum dispatch ramp rate referred to in Table [1.3] of Schedule 6 (Performance Requirements)); or

7.6.2.2. if a ramp rate is not specified in the Dispatch Instruction, is undertaken at the applicable maximum dispatch ramp rate referred to in Table [1.3] of Schedule 6 (Performance Requirements); and in each case, shall commence at the latest possible point during the Availability Period as is



necessary to increase or decrease, at the applicable maximum dispatch ramp rate referred to in Table [1.3] of Schedule 6 (Performance Requirements), the Energy Output of the Dispatchable Facility to generate the Energy Output specified in a Dispatch Instruction for the subsequent Availability Period at the commencement of that subsequent Availability Period.

7.6.3. For example, if:

7.6.3.1. the Dispatch Instruction is to deliver 150 MWh of Energy Output for the time period 16h00 to 17h00 and to deliver 300 MWh of Energy Output for the hour 17h00 to 18h00; and

7.6.3.2. a ramp rate is not specified in the Dispatch Instruction; and

7.6.3.3. the maximum dispatch ramp rate is 15MW / minute, then Dispatch Compliance shall be achieved for the hour 16h00 to 17h00 if the increase in Energy Output is undertaken at 16h50; or

7.6.4. the Dispatch Instruction is to deliver 75 MWh of Energy Output for the time period 16h00 to 16h30 and to deliver 150 MWh of Energy Output for the half-hour 16h30 to 17h00; and

7.6.4.1. a ramp rate is not specified in the Dispatch Instruction; and

7.6.4.2. the maximum dispatch ramp rate is 15MW / minute, then Dispatch Compliance shall be achieved for the half-hour 16h00 to 16h30 if the increase in Energy Output is undertaken at 16h25.

- 7.6.5. If the Seller generates Energy Output in excess of 110% of a Dispatch Instruction for a period of longer than two (2) consecutive hours, the Buyer shall be entitled forthwith to disconnect the Facility from the System.

## **8. TARIFF AND OTHER CHARGES**

### **8.1. Net Dependable Capacity Payments**

The Buyer shall pay to the Seller the Net Dependable Capacity Payment for all Net Dependable Capacity sold by the Seller and purchased by the Buyer during each Billing Period.

### **8.2. Commercial Energy Payments**

The Buyer shall pay to the Seller the Commercial Energy Payment for all Commercial Energy sold by the Seller and purchased by the Buyer during each Billing Period, which for the avoidance of doubt, may be Commercial Energy generated by the Dispatchable Facility and or the Self-Dispatchable Facility.

### **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 twenty (20) Business Days of such notice, the Seller may proceed in accordance with the provisions of clause 16.2 (Termination for Buyer Default).

## **9. INVOICING**

### **9.1. 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 separately specifying:

9.1.1.1. the Commercial Energy Payment;

9.1.1.2. the Net Dependable Capacity Payment due to the Seller for such Billing Period, setting out the calculations upon which such Payments are based; and

9.1.1.3. any amounts owed by the Seller to the Buyer (or vice versa).

9.1.2. Subject to clause 12.5 (Readings and inaccuracy), the Seller shall prepare the Invoice for the Billing Period based on the billing data obtained by it from the Main Metering Installation for that Billing Period, the Availability of the Facility for that Billing Period and the Dispatch Instructions received by the Seller for that Billing Period.

### **9.2. Vendor Registration Requirements**

The Seller shall register and be fully compliant with the Buyer's vendor registration requirements (as well as any other requirements in Law as required by the Buyer) at least three (3) Months prior to the issue of the first Invoice.

### **9.3. General principles as regards invoicing**

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

- 9.3.1. 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;
- 9.3.2. every Invoice issued by the Seller shall contain the Buyer's vendor registration number allocated to the Seller upon compliance by the Seller with the Buyer's vendor registration requirements;
- 9.3.3. subject to clause 8.3.1, the Party who received the Invoice shall pay to the other Party (who issued the Invoice) the amount of each Invoice within forty two (42) days of receipt of such Invoice (the "**Due Date**"); and
- 9.3.4. all payments due by either Party to the other under this Agreement shall be made:
  - 9.3.4.1. in Rand in immediately available funds to such bank account in South Africa as the recipient Party shall from time to time nominate; and
  - 9.3.4.2. subject to clause 19 (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.

#### 9.4. **Billing disputes**

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

- 9.4.1. A Party shall notify the other Party in writing if it disputes (in good faith) an Invoice (including the data or records on which the dispute is based) before the Due Date for payment thereof, which notice shall specify the amount in dispute, and provide appropriate details of the basis of the dispute. The disputing Party shall pay the undisputed portion of the Invoice on the Due Date.

- 9.4.2. 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 9.4 (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 Main Metering Installation, the Buyer shall be entitled to request a test of the Main Metering Installation in accordance with clause 12.4 (Testing and inspection).
- 9.4.3. If it is agreed or determined (including as a result of a test of the Main Metering Installation pursuant to clause 12.4 (Testing and inspection)) that all or part of a disputed amount which was paid should not have been paid, then the amount of such overpayment shall be refunded within five (5) Business Days of such agreement or determination, together with interest at the Agreed Interest Rate from the date of such overpayment to, but excluding, the date of repayment.
- 9.4.4. 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 9.4 (Billing disputes) was served, either Party shall be entitled to refer the dispute for determination in accordance with clause 23 (Fast Track Dispute Resolution).

## **10. OUTAGES AND DERATINGS**

### **10.1. Scheduled Outages or Planned Deratings**

- 10.1.1. The Seller shall comply with the requirements of Schedule 3 (Outages and Deratings) in relation to Outages or Planned Deratings.
- 10.1.2. Subject to clause 10.1.1, the Seller shall be entitled to remove the Facility from service during the period of the Scheduled Outage to carry out its planned Maintenance.

10.1.3. The Seller shall be responsible for all costs incurred by it in connection with or arising from any Maintenance carried out by it or on its behalf on the Facility during any Scheduled Outage or Planned Derating.

## 10.2. **Unscheduled Outages or Unplanned Deratings**

10.2.1. In case of an Unscheduled Outage or Unplanned Derating due to a failure of any part of any equipment forming part of the Facility, the Seller shall inform the Buyer promptly of the Unscheduled Outage or Unplanned Derating of the time period that the Facility is expected not to be Available or is expected to be operating at reduced Capacity.

10.2.2. The Seller shall be responsible for all costs incurred by it in connection with or arising from any Maintenance carried out by it or on its behalf on the Facility during any Unscheduled Outage or Unplanned Derating.

## 11. **REPORTS, RECORDS, PLANS AND MONITORING**

### 11.1. **Reports**

11.1.1. The Seller shall as soon as reasonably possible, and in any event within two (2) hours, notify the Buyer if the Facility is incapable of generating the necessary Energy required to meet its obligations in terms of this Agreement for any of the following reasons (and provided that its unavailability has not already been notified as part of a Scheduled Outage):

11.1.2. for reasons of any Outages;

11.1.3. where to do so would not be in accordance with the standards of a Reasonable and Prudent Operator;

- 11.1.4. in circumstances relating to safety (of either personnel or of the Facility or apparatus);
- 11.1.5. in circumstances where to do so would be unlawful; or
- 11.1.6. for reasons of Force Majeure or System Unavailability Event and shall, within five (5) Business Days, deliver to the Buyer a written report detailing the reasons (in reasonable detail) for such incapacity.

## 11.2. **Data and records**

- 11.2.1. The Seller shall maintain complete and accurate data and records required to facilitate the proper administration of this Agreement. Such data and records ("**Facility Data**") shall include an accurate and up-to-date log of Operations, updated daily, in a format reasonably acceptable to the Buyer. The Facility Data should include, but not be limited to, the following information, with records of:
  - 11.2.1.1. for each ten (10) minute period in each day, the Energy Output;
  - 11.2.1.2. changes in Operating status during the day;
  - 11.2.1.3. the number of Outages or Deratings in the day and the duration of each Outage or Derating;
  - 11.2.1.4. any unusual conditions found during Maintenance inspections;
  - 11.2.1.5. data used for corrections referred to in Schedule 4 (Inspection and Testing) and Schedule 5 (Calculation of Payments);
  - 11.2.1.6. [the Fuel levels as recorded on a daily basis;] and

- 11.2.1.7. information relating to the performance of the Facility and data obtained from the meters.

### 11.3. **Recordkeeping**

All Facility 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 Data at any time during normal business hours (at the Buyer's own cost).
- 11.4.2. In order for the Buyer to monitor the performance of the Facility and or evaluate the relief claimed by the Seller in terms of this Agreement, the Buyer may request written evidence in addition to that set out in any provision of this Agreement, acting reasonably, from the Seller.
- 11.4.3. The receipt of information by the Buyer in accordance with this Agreement in no way detracts from the Seller's responsibilities under this Agreement, and the Buyer incurs no obligation nor is any notice or consent tacitly provided by the Buyer nor is the Buyer estopped from exercising any right it may have under this Agreement as a result of receipt of this information.

## 12. **METERING**

### 12.1. **Existing Metering Installation**



- 12.1.1. If the Facility is, at the Signature Date, connected to the System, the Seller may use the Existing Metering Installation(s) for the purposes of this Agreement, provided that:
- 12.1.1.1. the Seller shall, at the Signature Date, provide the Buyer with all information pertaining to the commissioning and maintenance reports for the Existing Metering Installation and with written confirmation that it has obtained all relevant Consents to use the Existing Metering Installation for the purposes of this Agreement, as may also be required under any Third Party PPA;
- 12.1.1.2. the Seller shall, by no later than 5 (five) days following the Signature Date, provide the Buyer and or the Metering Certifier with full access to all Metering Installations and ancillary equipment installed for the purposes of inspection and testing required to determine whether the Existing Metering Installation meets the requirements for a Metering Installation in terms of clause 12.4 below;
- 12.1.1.3. the specifications of the Existing Metering Installation shall, at a minimum, be equal to those required in terms of clause 12.3 of this Agreement, failing which the Seller shall, at its own cost and by no later than 3 (three) Months, procure the necessary improvements, upgrades and/or a new metering installation in accordance with the terms of clause 12.2 below.
- 12.1.2. The Seller shall, during the Term of this Agreement, provide the Buyer and or the Independent Engineer with full access to all Metering Installations and ancillary equipment installed for the purposes of any inspection required in accordance with this Agreement, including without limitation:

- 12.1.2.1. where applicable, the Seller shall provide sufficient meter configuration and remote interrogation information to facilitate the Buyer being able to remotely interrogate the meters and retrieve the metering data;
- 12.1.2.2. if the Facility has a valid metering Code exemption which may negatively impact remote access to the meters, the Seller shall provide such details thereof to the Buyer on the Signature Date, in which event the Seller shall co-operate with the Buyer, or put alternate measures in place to the satisfaction of the Buyer, to enable the Buyer to obtain the required remote access to the Metering Installation; and
- 12.1.2.3. if the remote interrogation is not, in the opinion of the Independent Engineer, functional, the Seller shall, within two Business Days of the end of a Billing Period, retrieve the metering data from the Metering Installation and furnish same to the Buyer for this purpose.

## 12.2. **New Metering Installation**

The Seller shall, acting in accordance with the standards of a Reasonable and Prudent Operator and subject to the provisions of this clause 12, in respect of the Facility, procure, install, Operate and Maintain a Metering Installation at the Delivery Point of each Facility, at its sole cost and in such a manner and location so as to ensure that the Metering Installation measures the Energy Output and can be used effectively for invoicing purposes as provided in clause 9 of this Agreement.

## 12.3. **Capabilities of Meters**

- 12.3.1. Each Metering Installation shall be capable of measuring and recording the following parameters for various time and frequency blocks in accordance with

applicable Laws, the Codes and any other standards, policies and or regulations made available by the Distributor, the NTC and or NERSA from time to time:

12.3.1.1. active and reactive energy in terms of four (4) quadrant metering; and

12.3.1.2. on a ten (10) minute profile data.

12.3.2. The Seller shall ensure that the meters within the Metering Installation utilise separate CT cores and separate PT circuits to the meters within any check metering installation, where such is present and or required.

12.3.3. The Buyer shall be entitled to, and each Metering Installation shall enable the Buyer to, access each Metering Installation and their data remotely at any time, without any notice and in priority to the Seller and or any other party.

#### 12.4. **Testing and inspection**

12.4.1. Subject to clauses 12.4.2 and 12.4.5, the Buyer may request a test of the Metering Installation, by notice in writing to the Seller.

12.4.2. The Metering Installation shall be tested by the Metering Certifier as often as the Party responsible for such Metering Installation deems necessary, but in any event within thirty (30) days of receipt of written request for such test pursuant to clause 12.4.1.

12.4.3. Save on reasonable grounds, including a suspected inaccuracy determined pursuant to clause 12.4.4, the Buyer shall not be entitled to call for more than one (1) test of each Main Metering Installation and each Check Metering Installation in any period of twelve (12) Months. The Buyer shall be entitled to call for additional tests if it has concerns, on reasonable grounds, including a

suspected inaccuracy determined pursuant to clause 12.4.4, that an inaccuracy exists.

- 12.4.4. Without limiting clause 12.4.1, if readings taken from the Metering Installations are significantly different from one another (where an electronic check meter is applicable) and or demonstrate a level of inaccuracy falling outside the particular standard and specification used for the relevant Metering Installation, or are beyond a tolerance level of zero point five percent ( $\pm 0.5\%$ ) on active energy (kWh) readings accumulated over the Billing Period, whichever is the lesser, then each Metering Installation shall be tested.
- 12.4.5. 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 12.4 (Testing and inspection), which shall be held between 09:00 and 17:00 hours on any Business Day. Both Parties shall have the right to be represented at the conduct of any such test by representatives of each Party.
- 12.4.6. The Parties shall promptly provide each other with copies of test reports, including all supporting metering data and records, if so requested in writing by the other Party. The Parties shall answer any questions as regards the test report promptly and in full.
- 12.4.7. The 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 zero point five percent ( $\pm 0.5\%$ ), whichever is the lesser. If, as a result of a test conducted pursuant to this clause 12.4 (Testing and inspection), the measure of error is found to be outside this maximum tolerance, then the cause for the error in respect of the Metering Installation, as the case may be, shall be investigated and, if

necessary, the relevant equipment shall be replaced as soon as practicable and in any event within two (2) days of the relevant Metering Installation owner being notified of such event, at the expense of the Party responsible for the noncompliant Metering Installation, and the provisions of clause 12.5 (Readings and inaccuracy) shall apply in respect of any data retrieved from such non-compliant Metering Installation and used for billing purposes prior to the relevant Metering Installation test.

#### **12.5. Readings and inaccuracy**

- 12.5.1. The Seller shall be responsible for retrieving and analysing data from the 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.
- 12.5.2. Should the Metering Installation fail to register or, upon testing pursuant to clause 12.4 (Testing and inspection), be found to have a level of inaccuracy falling outside the maximum tolerance level specified in clause 12.4.7, then the Metering Installation shall be retested and, if necessary, the relevant equipment shall be replaced in accordance with clause 12.4.7 and the Energy Output from the Facility shall, for the period referred to in clause 12.5.4, be measured on the basis of the readings registered by the electronic check meter, where applicable.
- 12.5.3. Should the 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 12.4.7, then it shall be retested and, if necessary, the relevant equipment shall be replaced in accordance with clause 12.4.7, and the Energy Output from the Facility shall, for the period referred to in clause 12.5.4, be calculated

on the basis of such correction procedure as the Parties may agree (using such data as permitted by the relevant Codes, including estimated data prepared in accordance with the relevant Codes), and in the absence of agreement shall be referred to an Independent Expert for determination in accordance with clause 23 (Fast Track Dispute Resolution).

12.5.4. The period referred to in clauses 12.5.2 and 12.5.3 shall be:

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

12.5.4.2. if not determinable from the logged readings, the period immediately preceding the test of the Metering Installation equal to one-half ( $\frac{1}{2}$ ) of the time from the date of the last previous test of the Metering Installation; or

12.5.4.3. in the case of clause 12.5.3 from the date of the last previous test of the Metering Installation (with the remaining period being calculated on the basis of the measurements as actually recorded by the Metering Installation).

12.5.5. The Metering Installation shall be synchronised to South African Standard Time ("**SAST**") and maintain time offsets not exceeding 2 minutes from SAST.

## 12.6. **Miscellaneous**

12.6.1. 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 Installation, save in the course of an inspection, testing Maintenance or agreed adjustment in the presence of duly authorised representatives of both Parties.

12.6.2. The Metering Installation shall not be relocated without the prior written agreement of both Parties.

12.6.3. The Buyer shall be entitled to, and the Seller shall ensure that the capabilities are present, to access each 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 NTC and or the Distributor (as the case may be).

12.7. **Compliance with the Buyer's metering telecommunications protocols**

12.7.1. The Seller shall ensure that each Metering Installation provides for the capability to interface with the Buyer's communication protocols by liaising with the Buyer prior to procurement.

12.7.2. The Seller shall, at its sole cost and risk, ensure that the telecommunication systems and associated infrastructure required to fulfil its metering obligations in terms of this Agreement are:

12.7.2.1. installed, Operated and Maintained in compliance; and

12.7.2.2. able to interface,

with the Buyer's metering communication protocols and or standards as those protocols and or standards may be changed and or updated from time to time.

13. **UTILITIES AND CONSUMABLES**

At all times during the Term, the Seller shall be solely responsible for securing all supplies of consumables, electricity, water, fuel, sanitation, telecommunications,

waste disposal services and all other utilities required for the Maintenance and Operation of the Facility.

#### **14. SYSTEM UNAVAILABILITY EVENT**

##### **14.1. Consequences of a System Unavailability Event**

- 14.1.1. For the avoidance of doubt, the Seller shall not be entitled to bring any claims under this clause 14.1.1 if the time for which any System Unavailability Event or combination of System Unavailability Events has or have endured is less than the Allowed Grid Unavailability Period for such Contract Year in respect of the Facility. The Net Dependable Capacity Payments shall continue to be payable during the Allowed Grid Unavailability Period, provided that the Seller complies with the provisions of this clause 14.1 (Consequences of a System Unavailability Event).
- 14.1.2. Subject to clause 14.1.1, if and to the extent that a System Unavailability 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 16.1 (Termination for Seller Default).
- 14.1.3. In order to obtain relief in terms of clause 14.1.2 and or payment of the Net Dependable Capacity Payment during the occurrence of the System Unavailability Event, the Seller must as soon as practicable, and in any event within one (1) day after it became aware or ought to have reasonably become aware that the System Unavailability Event has occurred and 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:



- 14.1.3.1. give to the Buyer a notice of its claim for relief from its obligations under this Agreement, including full details of the nature of the System Unavailability Event, the date of occurrence and its likely duration (if known);
- 14.1.3.2. within four (4) days of the Seller giving the notice referred to in clause 14.1.3.1, give full details of the System Unavailability Event and relief claimed;
- 14.1.3.3. provide the Buyer with all reasonable assistance in respect of the Buyer's discussions with and actions against the NTC in respect of the relevant System Unavailability Event;
- 14.1.3.4. demonstrate to the reasonable satisfaction of the Buyer that:
  - 14.1.3.4.1. the Seller could not have avoided such occurrence or consequences by steps which it might reasonably be expected to have taken, without incurring material expenditure;
  - 14.1.3.4.2. there is a need for relief from other obligations under this Agreement as a direct result of a System Unavailability Event;
  - 14.1.3.4.3. a Dispatchable Facility, as the case may be, would otherwise, but for the System Unavailability Event, have been able to make Available the Net Dependable Capacity or the Net Dependable Capacity and to generate and deliver Energy Output;
  - 14.1.3.4.4. any relief from the obligations under this Agreement claimed could not reasonably be expected to be mitigated or recovered by the affected Party acting in accordance with the standards of a Reasonable and Prudent Operator, without incurring material expenditure; and

- 14.1.3.4.5. the Seller is using reasonable endeavours to perform its obligations under this Agreement.
- 14.1.4. If the Seller has complied with its obligations under clause 14.1.3 above, then:
- 14.1.4.1. if the System Unavailability Event is not due to an event of Force Majeure and/or an NTC Fault, then the Seller shall be entitled to receive the Net Dependable Capacity Payments in terms of clause 4.3 (Net Dependable Capacity Payments) of Schedule 5 (Calculation of Payments), in respect of the Dispatchable Facility for the period that the System Unavailability Event continues, as agreed between the Parties or decided pursuant to clause 22 (Dispute Resolution), subject to any adjustments that may be effected in terms of Schedule 5 (Calculation of Payments); and
- 14.1.4.2. the Buyer shall not be entitled to exercise its rights to terminate this Agreement under clause 16.1 (Termination for Seller Default) for the failure of the Seller to comply with any provision of this Agreement as a result of such System Unavailability Event (excluding a System Unavailability Event which arises pursuant to clause 14.2.1). Notwithstanding what is stated in this clause 14.1.4, if the System Unavailability Event persists for [3 (three)] months or longer, the Buyer shall be entitled to declare a Force Majeure Event in terms of clause 15.
- 14.1.5. If information required by clause 14.1.3 above is provided after the dates referred to in that clause, then the Seller shall not be entitled to any relief, additional costs or the Net Dependable Capacity Payment during the period for which the information is delayed.

- 14.1.6. The Seller shall notify the Buyer if, at any time, it receives or becomes aware of any further information relating to the System Unavailability Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.
- 14.1.7. If the Parties cannot agree on the extent of the relief required, or the Buyer disagrees that a System Unavailability Event has occurred and or to relief from other obligations under this Agreement, the Parties shall resolve the matter in accordance with clause 22 (Dispute Resolution).
- 14.2. **Consequences of a System Unavailability Event caused by a Force Majeure Event**
- 14.2.1. Notwithstanding the provisions of clause 14.1 (Consequences of System Unavailability Event), if a System Unavailability Event is caused by a Force Majeure event under the Transmission Agreement or Distribution Agreement (as the case may be), then:
- 14.2.1.1. the Seller shall not be entitled to receive and the Buyer shall not be required to pay the Net Dependable Capacity Payments in terms of clause 14.1 (Consequences of System Unavailability Event); and
- 14.2.1.2. the Seller shall be entitled to relief from any rights of the Buyer under clause 16.1 (Termination for Seller Default).
- 14.2.2. For the avoidance of doubt, the Buyer shall be entitled to relief under this clause 14.2 (Consequences of System Unavailability Event arising from Force Majeure) for the following Force Majeure events arising under the Transmission Agreement or the Distribution Agreement (as the case may be) which give rise to a System Unavailability Event:

- 14.2.2.1. Catastrophic earthquake, tsunami, cyclone, typhoon or tornado;
- 14.2.2.2. Epidemic or plague;
- 14.2.2.3. Acts of war whether declared or not, invasion, armed conflict, act of foreign enemy or blockade in each case occurring with or involving the Republic of South Africa;
- 14.2.2.4. Acts of rebellion, act or campaign of terrorism, or sabotage of a political nature, in each case occurring within the Republic of South Africa;
- 14.2.2.5. Boycott, sanction or embargo;

hereinafter referred to as the “**Buyer’s Force Majeure Relief**”.

14.2.3. In order to obtain such relief, the Buyer must:

- 14.2.3.1. as soon as practicable, and in any event within one (1) day after it became aware or ought to have reasonably become aware that the Buyer's Force Majeure Relief has occurred; and
- 14.2.3.2. has caused or is likely to cause delay and or materially adversely affect the ability of the Buyer and/or the Seller to perform its obligations or exercise its rights;

give to the Seller a notice of its claim for relief from its obligations under this Agreement, including full details of the nature of Buyers Force Majeure Relief, the date of occurrence and its likely duration (if known);

- 14.2.3.3. within four (4) days of the Buyer giving the notice referred to in clause 14.2.3, give full details of the System Unavailability Event arising from Buyers Force Majeure Relief; and

- 14.2.3.4. demonstrate to the reasonable satisfaction of the Seller that:
  - 14.2.3.4.1. the Buyer could not have avoided the occurrence or consequences of the Buyer Force Majeure Relief by steps which it might reasonably be expected to have taken, without incurring material expenditure;
  - 14.2.3.4.2. there is a need for relief from other obligations under this Agreement it incurs as a direct result of a System Unavailability Event arising from the Buyer Force Majeure Relief;
  - 14.2.3.4.3. any relief from the obligations under this Agreement claimed could not reasonably be expected to be mitigated or recovered by the affected Party acting in accordance with the standards of a Reasonable and Prudent Operator, without incurring material expenditure; and
  - 14.2.3.4.4. the Buyer is using reasonable endeavours to perform its obligations under this Agreement.
- 14.2.4. Upon receipt of the information set out in clause 14.2.3 from the Buyer, the Seller shall as soon as is reasonably possible:
  - 14.2.4.1. provide the Buyer with all reasonable assistance in respect of the Buyer's discussions with and actions against the NTC or the Distributor (as the case may be) in respect of the relevant System Unavailability Event arising from the Buyer Force Majeure Relief; and
  - 14.2.4.2. provide proof that the Seller is using reasonable endeavours to perform its obligations under this Agreement.
- 14.2.5. The Buyer shall notify the Seller if, at any time, it receives or becomes aware of any further information relating to the System Unavailability Event arising from

the Buyer Force Majeure Relief, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.

- 14.2.6. If the Parties cannot agree on the extent of the relief required, or the Seller disagrees that the System Unavailability is as a result of a Buyer Force Majeure Relief under the Transmission Agreement or the Distribution Agreement, then the Parties shall resolve the matter in accordance with clause 22 (Dispute Resolution).

## 15. **FORCE MAJEURE**

- 15.1. If a Party (the "Affected Party") is unable to perform all or part of its obligations under this Agreement by reason of Force Majeure, the Affected Party shall serve written notice on the other Party within five (5) Business Days of it becoming aware of the Force Majeure Event, and shall give sufficient details to identify the particular event claimed to be the Force Majeure Event.
- 15.2. The Affected Party shall, within a further fifteen (15) Business Days, serve a subsequent notice (such notice being a "Force Majeure Notice") setting out:
- 15.2.1. full particulars of the Force Majeure Event;
  - 15.2.2. the impact of the Force Majeure Event on the Affected Party's obligations under this Agreement;
  - 15.2.3. the Affected Party's reasonable estimate of the length of time by which its performance has been and will be affected by such Force Majeure Event; and the steps which it is taking or intends to take or will take to remove and mitigate the adverse consequences of the Force Majeure Event on its performance

hereunder, and which notice 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 as is available.

- 15.3. The Affected Party shall have the burden of proving both the existence of any Force Majeure Event and the effect (both as to nature and extent) which any such Force Majeure Event has on its performance.
- 15.4. If the Parties are, on the basis of the Force Majeure Notice and any supporting documentation, unable to agree as to the existence or as to the effect of a Force Majeure Event by the date falling sixty (60) Days after the receipt by the non-Affected Party of the Force Majeure Notice, either Party shall be entitled to refer the matter to dispute resolution in accordance with clause 22 (Dispute Resolution).
- 15.5. If information is provided after the dates referred to in this clause 15 (Force Majeure), then the Seller shall not be entitled to any extension of time or relief from its obligations under this Agreement in respect of the period for which the information is delayed.
- 15.6. If it is agreed or determined that a Force Majeure Event has occurred, the Affected Party shall, provided that it has complied with the requirements of this clause 15 (Force Majeure), not be liable for any failure to perform an obligation under this Agreement as a consequence of such Force Majeure Event to the extent only that:
  - 15.6.1. such performance is prevented, hindered or delayed by Force Majeure; and
  - 15.6.2. such failure could not have been mitigated by the Affected Party (acting as a Reasonable and Prudent Operator).

- 15.7. Subject to the provisions of this clause 15, if the Force Majeure Event subsists for more than 90 (ninety) consecutive Days, either Party shall have the right to terminate this Agreement after having given the other Party 14 (fourteen) days' written notice.
- 15.8. The Seller shall not be entitled to enforce this clause 15.8 pursuant to any Force Majeure Event in respect of which it is entitled to bring a claim under any insurance policy.
- 15.9. The Affected Party shall use all reasonable efforts to mitigate, rectify and overcome the effects of such Force Majeure Event and to minimise the effect on the Facility and shall give the other Party:
- 15.9.1. regular reports on the progress of the mitigation measures; and
- 15.9.2. notice promptly on the cessation of the Force Majeure Event.
- 15.10. If the Force Majeure Event affects the Seller's performance or part (but not all) of its obligations under this Agreement, then the Buyer shall have the right to require the Seller to undertake a Net Dependable Capacity Test in accordance with Schedule 4 (Inspection and Testing) to establish the Net Dependable Capacity of the Facility during such Force Majeure Event.
- 15.11. Subject to the Seller complying with its obligations under the provisions of this clause 15 (Force Majeure), the Seller shall be entitled to receive and the Buyer shall make any Payments to the Seller that are due to the Seller to the extent that the Seller, notwithstanding the existence of the Force Majeure Event:
- 15.11.1. makes Available any Capacity; and
- 15.11.2. sells to the Buyer the Commercial Energy.



## 16. TERMINATION

### 16.1. Termination for Seller Default

- 16.1.1. The Seller shall notify the Buyer of the occurrence, and details, of any Seller Default promptly on the Seller becoming aware of its occurrence.
- 16.1.2. For the avoidance of doubt, none of the terms of any third party agreement (including without limitation the Third Party PPA) or in respect of any Water Use Right may be used by the Seller as a defence (in the event of the counterparty to the relevant agreement being unable to perform its obligations or, in the case of the Water Use Rights, the Water supply being inadequate or no longer existing) to prevent the Buyer from exercising its rights in terms of this clause 16.1 (Termination for Seller Default).
- 16.1.3. On the occurrence of a Seller Default, or within a reasonable time after the Buyer becomes aware of the same, the Buyer may:
  - 16.1.3.1. where the Seller Default is the default detailed in subclauses (a) (namely, 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); sub-clause (b) of the definition of "**Seller Default**" (namely the Seller fails to achieve the Minimum Contracted Capacity on or before the Last COD); sub-clause (g)(namely the Seller fails to deliver a Notice of Contracted Capacity of Facility); sub-clause (f) (namely, the Seller fails to comply with any provision of clause 20 (Assignment) of the definition of "Seller Default", serve a notice on the Seller terminating this Agreement (save for clause 4 (Risk and liability) and clauses 18 (Intellectual Property of the Buyer) to 21 (Contractors) and

clauses 22 (Dispute Resolution) to 29 (Notices) and clauses 31 (Representatives) to 32 (Miscellaneous) with immediate effect);

16.1.3.2. or 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 thirty (30) 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 clause 4 (Risk and liability) and 18 (Intellectual Property of the Buyer) to 21 (Contractors) and clauses 22 (Dispute Resolution) to 29 (Notices) and clauses 31 (Representatives) to 32 (Miscellaneous) with immediate effect.

#### 16.1.4. Buyer's Costs

16.1.4.1. The Seller shall reimburse the Buyer with all costs incurred by the Buyer in exercising any of its rights in terms of clause 16.1 (*Termination for Seller Default*). The Buyer shall take reasonable steps to mitigate such costs.

16.1.4.2. The rights of the Buyer (to terminate or otherwise) under this clause 16.1 (*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).

#### 16.2. Termination for Buyer Default

Should the Buyer be in default as provided for under clause 8.3 (*Failure to make Payments*), the Seller serves notice of default on the Buyer requiring the Buyer to

remedy the Buyer Default referred to in such notice of default (if the same is continuing) within sixty (60) days of such notice of default being delivered. If the Buyer Default is not remedied within such period, the Seller may serve a further notice on the Buyer terminating this Agreement.

### **16.3. Termination for Corrupt Acts**

16.3.1. The Seller warrants that, in entering into this Agreement and any agreement referred to herein, it has not committed any Corrupt Activity.

16.3.2. If the Seller, any Shareholder, any Contractor, any Supplier or any Lender or 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 Activity in relation to this Agreement or in respect of any ancillary agreement to this Agreement, then the Buyer shall be entitled to act in accordance with clauses 16.3.2.1 to 16.3.2.8 below:

16.3.2.1. if the Corrupt Activity 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;

16.3.2.2. if the Corrupt Activity 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 Operation and Maintenance of

the Facility is terminated and (if necessary) the performance of any part of the Operation and Maintenance of the Facility previously performed by him or her is performed by another person;

16.3.2.3. if the Corrupt Activity is committed by a Contractor or a Supplier, director of a Contractor or Supplier or an employee of a Contractor or a Supplier acting under the authority or with the knowledge of a director of that Contractor or Supplier, 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 or Maintenance of the Facility by another person;

16.3.2.4. if the Corrupt Activity is committed by an employee of a Contractor or a Supplier 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 Operation and Maintenance of the Facility and (if necessary) procures the performance of that part of the Operation and Maintenance of the Facility previously performed by that employee to be performed by another person;

16.3.2.5. if the Corrupt Activity 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 Facility (in any capacity

whatsoever including, without limitation, as Lender under any relevant 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;

- 16.3.2.6. if the Corrupt Activity 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 Facility is terminated;
- 16.3.2.7. if the Corrupt Activity 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 Operation and Maintenance of the Facility and (if necessary) procures the performance of that part of the Operation and Maintenance of the Facility previously performed by that employee to be performed by another person;
- 16.3.2.8. if the Corrupt Activity is committed by any other person not specified in clauses 16.3.2.1 to 16.3.2.7 above but involved in the Facility 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 Operation and Maintenance of the Facility and (if necessary) procures the performance of the relevant part of the Operation and Maintenance of the Facility by another person; and

16.3.3. any notice of termination under this clause 16.3 (Termination for Corrupt Activity) shall specify:

16.3.3.1. the nature of the Corrupt Activity;

16.3.3.2. the identity of the party or parties who has or have committed the Corrupt Activity; and

16.3.3.3. the date on which this Agreement will terminate in accordance with the applicable provisions of this clause 16.3 (Termination for Corrupt Activity).

16.3.4. Without prejudice to its other rights or remedies under this clause, the Buyer shall be entitled to recover from the Seller, the greater of:

16.3.4.1. the amount or value of the gift, consideration or commission which is the subject of the Corrupt Activity; and

16.3.4.2. any direct losses sustained by the Buyer in consequence of any breach of this clause 16.3 (Termination for Corrupt Activity) by the Seller.

16.3.5. Nothing contained in this clause 16.3 (Termination for Corrupt Activity) 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.

16.3.6. The Seller shall notify the Buyer of the occurrence (and details) of any Corrupt Activity promptly on the Seller becoming aware of its occurrence.

## **17. GENERAL SELLER UNDERTAKINGS**

17.1. 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 Operation and Maintenance of the Facility, at its sole cost and risk and in compliance with the requirements of:

17.1.1. applicable Laws;

17.1.2. the Codes;

17.1.3. the Consents;

17.1.4. the terms and conditions of this Agreement;

17.1.5. the terms and conditions of the relevant Connection Agreements;

17.1.6. the standards of a Reasonable and Prudent Operator; and

17.1.7. relevant manufacturers' guidelines and instructions.

17.2. If there is a conflict between the documents listed in clause 17.1, the order of priority between the documents shall be the order of priority in which the sub-clauses to clause 17.1 are listed.

## **18. INTELLECTUAL PROPERTY OF THE BUYER**

18.1. All intellectual property rights whatsoever, whether capable of registration or not, regarding the Buyer's name, trademarks, logos, image and all other intellectual property matters relating to the Buyer, including its name, trademarks, logos and/or image shall remain the sole property of the Buyer.

- 18.2. Subject to existing rights and obligations and clause 18.3, the Buyer may, on prior written application by the Seller, grant a non-exclusive revocable right and licence to the Seller to use the Buyer's trademarks and logos for a period not to exceed the remainder of the Term.
- 18.3. 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.
- 18.4. If at any time the Buyer revokes its approval for the specified use of any trademark or logo, the Seller shall forthwith discontinue all use of such trademark or logo and shall remove from public sale or distribution any previously approved product in respect of which the Buyer has revoked its approval. The costs incurred by the Seller as a result of such revocation shall be borne by the Seller if the grounds for the revocation include any ground described in clause 18.5.
- 18.5. The Buyer may revoke its approval immediately upon ten (10) Business Days written notice to the Seller if the Seller, any Contractor or any of its or its Contractors' officers, directors or employees commits any crime or otherwise engages in conduct which violates any Law, or engages in any conduct that offends against public morals and decency and, in the Buyer's reasonable opinion, materially prejudices the reputation and public goodwill of the Buyer.



- 18.6. The Seller acknowledges that the name or names of the Buyer (the "Protected Names") are associated with and peculiar to the Buyer and are the intellectual property of the Buyer. Consequently, the Seller agrees that the sole and exclusive ownership of the Protected Names shall vest in the Buyer.
- 18.7. In circumstances where the Seller utilises any of the Protected Names, either on its own or in combination or association with any other name, it does so only in terms of this Agreement and with the prior approval of the Buyer. On termination or expiry of this Agreement, the Seller shall not be entitled to operate or conduct any business using any of the Protected Names either on its own or in combination or association with any other name.
- 18.8. Within twenty (20) Business Days after the end of the Term and where the Seller has operated a company utilising any of the Protected Names with the permission of the Buyer, the Seller shall either:
- 18.8.1. de-register the company bearing any of the Protected Names; or
- 18.8.2. change the name to a name not substantially similar to any of the Protected Names.
- 18.9. The naming of the Seller's business operation shall be undertaken in consultation with the Buyer and subject to the Buyer's approval. In circumstances where the name chosen by the Seller and approved by the Buyer is not part of the Buyer's intellectual property, then the rights of the Buyer contemplated in clause 18.8 shall not be applicable and the intellectual property shall be the sole property of the Seller.

## 19. **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.

## 20. **ASSIGNMENT**

20.1. The Seller may not sell, cede, delegate, assign, transfer or otherwise dispose of (collectively, "Assign" and the term "Assignment" shall be construed accordingly) all or any part of its rights and/or obligations under this Agreement to a third party without the prior written approval of the Buyer.

20.2. The Buyer shall not Assign all or any part of its rights and/or obligations under this Agreement to a third party, save with the prior written approval of the Seller (such approval not to be unreasonably withheld or delayed) or to give effect to any mandatory requirement of any Law.

## 21. **CONTRACTORS**

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

## 22. **DISPUTE RESOLUTION**

### 22.1. **Referable Disputes**

The provisions of this clause 22 (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.

**22.2. Internal Referral**

22.2.1. 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:

22.2.1.1. 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 Facility, and have sufficient authority to be able (if necessary with consultation back to their respective organisations) to resolve it; and

22.2.1.2. if the Parties have been unable to resolve the dispute within fifteen (15) days of referral to the persons specified in clause 22.2.1.1, 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.

22.2.2. In attempting to resolve the dispute in accordance with the provisions of this clause 22.2, 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.

22.2.3. Any dispute which has not been resolved by the representatives contemplated in clause 22.2.1.2 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.

**22.3. Performance to Continue**

No reference of any dispute to any resolution process in terms of this clause 22 shall relieve either Party from any liability for the due and punctual performance of its obligations under this Agreement.

**22.4. Litigation**

22.4.1. Save where any dispute has been expressly referred for determination in terms of clause 23 (*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.

22.4.2. 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.

22.4.3. All documents, evidence and reports to be provided by the Seller to the Buyer under this Agreement pursuant to a dispute or the raising of a Claim by the Seller shall, at the request of the Buyer, be provided in duplicate in hard copy (either through hand-delivery or by pre-paid registered post).

**23. FAST TRACK DISPUTE RESOLUTION**

23.1. Disputes expressly referred for determination pursuant to this clause 23 shall be determined by the relevant Independent Expert.

23.2. 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.

- 23.3. 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.
- 23.4. The Independent Expert shall set the date for the hearing, choose the venue (which must be a venue in Cape Town, 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.
- 23.5. 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.
- 23.6. Subject to obtaining the prior written consent of the Parties, the Independent Expert may appoint a separate third party expert to assist the Independent Expert in making his decision as contemplated in clause 23.5.
- 23.7. 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.

- 23.8. The Independent Expert shall act impartially and may take the initiative in ascertaining the facts and the Law.
- 23.9. 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.
- 23.10. 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 27 (*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.
- 23.11. 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.

24. 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:

24.1.1. 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

24.1.2. 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.

24.2. 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.

## 25. **LIABILITY**

### 25.1. **Direct losses**

25.1.1. 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. No Party shall have a claim against the other Party for damages pursuant to this Agreement, unless this Agreement expressly grants such a claim to that Party and, if this Agreement grants a Party a right to

terminate this Agreement, that Party shall not be entitled to claim damages or compensation in lieu of terminating this Agreement.

25.1.2. 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 (save in respect of any losses, liabilities, expenses, damages, costs and claims (including Claims) raised by the Buyer in respect of the obligations and indemnities provided under clause 4 (Risk and liability), clause 26 (Third Party Indemnity) and clause 30.1 (Seller warranties) and the reimbursement of the Buyer's costs in terms of clause 16.1.4 (Buyer's Costs).

25.1.3. Save for the obligations and indemnities provided under clause 4 (Risk and liability), clause 26 (Third Party Indemnity) and clause 30.1 (Seller warranties) and the reimbursement of the Buyer's costs in terms of clause 16.1.4 (Buyer's Costs) and as expressly provided elsewhere in this Agreement, neither Party shall be liable to the other Party for any losses, liabilities, expenses, damages, costs and claims (including Claims) suffered or claimed which arise out of, under or in connection with any alleged breach of any statutory duty or delictual act or omission or otherwise.

## 25.2. **Mitigation**

25.2.1. The Parties shall comply with their common law duties to mitigate any losses, liabilities, expenses, damages, costs and claims (including Claims) they may have pursuant to this Agreement or any other agreement in terms of which a failure by any party thereto would give rise, whether directly or indirectly, to a claim against the Buyer under this Agreement.



25.2.2. The Seller's obligation to minimise and mitigate the effects of a Force Majeure Event and or a Change in Law will include diligently pursuing, consistent with the standards of a Reasonable and Prudent Operator, any relief or recourse available to it under any Applicable Law or agreement, save that this shall not include commencing or pursuing litigation or any equivalent process that is contrary to the Seller's commercial interests, acting reasonably.

## 26. **THIRD PARTY INDEMNITY**

Each Party (the "**Indemnifying Party**") indemnifies and holds 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.

## 27. **CONFIDENTIALITY**

### 27.1. **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 Facility. Facility Data shall not constitute Confidential Information.

**27.2. Exclusions to Confidential Information**

For the purposes of this clause 27 (*Confidentiality*), the term “**Confidential Information**” shall not include information which:

- 27.2.1. constitutes Facility Data;
- 27.2.2. 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 27;
  - 27.2.2.1. 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 27;
- 27.2.3. 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 27 (*Confidentiality*);
- 27.2.4. 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
- 27.2.5. is published by, or the publication of which is required by, a Responsible Authority or any court.

**27.3. Permitted disclosure of Confidential Information**

Notwithstanding the provisions of clause 27.1 (*Confidential Information*), the Confidential Information may be disclosed:

- 27.3.1. by either Party to any Responsible Authority (where for the purposes of this clause 27.3 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 shareholders (direct or indirect), insurers or lenders of such Party or its affiliates, in any such case for the purpose of enabling the disclosing Party to comply with its obligations under this Agreement, provided that:
- 27.3.1.1. 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
- 27.3.1.2. 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;
- 27.3.2. 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;
- 27.3.3. by either Party as may be necessary to comply with any obligation under any applicable Law;

- 27.3.4. by the Distributor or the NTC, as applicable, as may be necessary to enable the Distributor or the NTC to operate the System and carry out its obligations in relation thereto as a Reasonable and Prudent Operator (including in relation to the application by any person for connection to the System), provided that:
- 27.3.4.1. only Confidential Information which is necessary for such purpose is disclosed by the Distributor or the NTC, as applicable; and
- 27.3.4.2. the Buyer notifies the recipient at or about the time of such disclosure that the information is confidential and should not be disclosed by the recipient to third parties;
- 27.3.5. by either Party if required by any court, any arbitrator or administrative tribunal or an expert in the course of proceedings before it to which the disclosing Party is a party;
- 27.3.6. by the Buyer as may be necessary to disclose the information to the National Treasury of the Government, the Department of Public Enterprises of the Government and the Department of Mineral Resources and Energy of the Government; or
- 27.3.7. by either Party, if so agreed in writing by the Parties prior to the disclosure.

**27.4. Ownership and treatment**

- 27.4.1. Save for all Facility 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.

27.4.2. 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.

## 28. **GOVERNING LAW AND JURISDICTION**

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

28.2. Subject to the provisions of clause 23 (*Fast Track Dispute Resolution*), each Party agrees that the High Court of South Africa, Western Cape Division 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, Western Cape Division.

## 29. **NOTICES**

### 29.1. **Methods of delivery**

Unless otherwise provided in this Agreement, all notices, requests, statements and other communications required or permitted between the Parties by this Agreement shall be in writing and either hand-delivered or sent by pre-paid registered post or email to the address within South Africa of the Party concerned set out in clause 29.2 (*Addresses*) or such other address or number as contemplated in clause 29.4 (*Change in address*). No communication shall be effective until received by the addressee and a communication shall be deemed to have been received:

29.1.1. if delivered by hand during ordinary business hours, to its physical address in clause 29.2 (*Addresses*), when so delivered;

- 29.1.2. if delivered by pre-paid registered post, to its postal address in clause 29.2 (Addresses), seven (7) Business Days after posting, subject to proof of posting; and
- 29.1.3. 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).

29.2. **Addresses**

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

29.2.1. The Seller:

Postal Address: [●]

Physical Address: [●]

Email Address: [●]

Tel No.: [●]

Attention: [●]; and

29.2.2. The Buyer:

Postal Address: [●]

Physical Address: 12 Hertzog Boulevard

Email Address: [●]

Tel No.: [●]

Attention: [●]

**29.3. Domicilium citandi et executandi**

The Parties choose the physical address set out opposite their names in clause 29.2 (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*.

**29.4. 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.

**30. WARRANTIES**

**30.1. Seller warranties**

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

- 30.1.1. it is a limited liability company, duly incorporated and validly existing under the Laws and has taken all necessary actions to authorise its execution of and to fulfil its obligations under this Agreement;
- 30.1.2. its obligations under this Agreement are legal, valid and binding and enforceable against it, in accordance with the terms of this Agreement;

- 30.1.3. as at the Effective Date, the Connection Agreements and the counterparties thereto are as detailed and identified in the relevant Connection Agreement provided to the Buyer in terms of this Agreement;
- 30.1.4. all Consents (whether provisional or final) required for the conduct of the Facility are in full force and effect as at the Effective Date;
- 30.1.5. 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, which is likely to have a material adverse effect on the ability of the Seller to Operate the Facility;
- 30.1.6. 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, business rescue practitioner or similar officer over it or over any of its assets;
- 30.1.7. all information disclosed by or on behalf of the Seller to the Buyer at any time up to the Effective 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;



- 30.1.8. the Suppliers have, at all times during the Term, all Supplier Consents required to enable them to fulfil their obligations in terms of any relevant supply agreements, and have complied in all material or relevant respects, with such Supplier Consents and the Laws applicable to the Suppliers;
- 30.1.9. where applicable, it has entered into a Fuel Supply Agreement that secures a supply of Fuel for the Facility for a period of at least 3 (three) consecutive years or longer, which supply commences in sufficient time to enable the Seller to fulfil all its obligations pursuant to this Agreement;
- 30.1.10. as at the Effective Date, it has appointed the Independent Engineer;
- 30.1.11. as at the Effective Date, it has an adequate supply of Water and the Water Use Right shall grant it access to an adequate supply of Water to enable it to Operate and Maintain the Facility and to make it Available and to generate Energy Output; and that to the best of its knowledge and belief, after all due and proper enquiry, there is no actual or potential reason why it will not have, nor is there any actual or potential threat to, such a supply of Water at any time in the future. This warranty is given at the Effective Date and is not repeated; and
- 30.1.12. in respect of intellectual property:
- 30.1.12.1. it has not and will not infringe any intellectual property rights belonging to a third party; and
- 30.1.12.2. it indemnifies the Buyer and shall keep the Buyer fully and effectively indemnified against all claims, demands, costs (including indirect costs), damages, expenses and liabilities of whatsoever nature which may arise from a claim of breach of intellectual property.

## 30.2. **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:

- 30.2.1. it is duly established under the laws of South Africa and has the right, power and authority to enter into this Agreement and to perform its obligations hereunder; and
- 30.2.2. the execution and performance of this Agreement by it has been duly authorised by all necessary internal processes, and its obligations hereunder constitute valid, binding and enforceable obligations.

## 31. **REPRESENTATIVES**

### 31.1. **Buyer's Representative**

- 31.1.1. The Buyer shall appoint from the Effective Date until the Expiry Date an individual (the "**Buyer's Representative**") whose identity shall be notified to the Seller to act as the Buyer's duly authorised representative for all purposes connected with this Agreement. The Buyer shall notify the Seller in writing forthwith upon the replacement at any time of the Buyer's Representative and such replacement shall not be effective until notice has been given.
- 31.1.2. 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.
- 31.1.3. Any notice, instruction or information required to be given by or made to the Buyer shall only be valid if given by or delivered to the Buyer's Representative.

## 31.2. **Seller's Representative**

31.2.1. The Seller shall appoint from the Effective 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 authorised 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.

31.2.2. Any notice, instruction or information required to be given by or made to the Seller shall only be valid if given by or delivered to the Seller's Representative.

## 32. **MISCELLANEOUS**

### 32.1. **Joint and several liability**

If the Seller constitutes (under applicable Laws) a joint venture, consortium or other unincorporated grouping of two or more persons:

32.1.1. these persons shall be deemed to be jointly and severally liable to the Buyer for the performance of this Agreement;

32.1.2. these persons shall notify the Buyer of their leader who shall have authority to bind the Seller and each of these persons;

32.1.3. each of these person shall carry individually the minimum levels of insurance stated in this Agreement; and

32.1.4. the Seller shall not alter its composition or legal status without the prior consent of the Buyer.

32.2. **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.

32.3. **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.

32.4. **Waiver**

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

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

32.4.3. 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.

32.5. **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.

32.6. **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.

32.7. **Entire Agreement**

32.7.1. 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.

32.7.2. 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.

32.8. **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.

32.9. **Public Relations and Publicity**

32.9.1. The Seller acknowledges that certain information pertaining to the Facility and the Facility Data may be 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:

- 32.9.1.1. Parliament and its members and officers in accordance with the provisions of the Public Finance Management Act, 1999 or the Local Government: Municipal Finance Management Act, 2003;
  - 32.9.1.2. the Auditor-General under the Public Audit Act, 2004; and
  - 32.9.1.3. persons acting in the public interest in accordance with the provisions of the Promotion of Access to Information Act, 2000.
- 32.9.2. Subject to clause **Error! Reference source not found.** 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.

#### 32.10. **Language**

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

#### 32.11. **Costs**

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

#### 32.12. **Severability**

If any provision of this Agreement is held by a court or other Responsible Authority to be unlawful, void or unenforceable, it shall be deemed to be deleted from this Agreement and shall be of no force and effect and this Agreement shall remain in full force and effect as if such provision had not 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.

32.13. **Claims for relief and or compensation**

If the Seller claims relief and or compensation 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.

32.14. **City of Cape Town General Conditions of Contract and Special Conditions of Contract**

The Parties expressly stipulate and agree that:

- 32.14.1. the EIPPP procurement process resulting in the conclusion by the Parties of this Agreement is governed by the City of Cape Town General Conditions of Contract and Special Conditions of Contract set out in Volume 3 of TENDER NO: [ ]/2022/23 ("CCT Contract Conditions"); and
- 32.14.2. notwithstanding any of the provisions of the CCT Contract Conditions, with effect from the Signature Date, the provisions of this Agreement shall take precedence and shall be the only terms and conditions governing the sale of Energy from the Seller to the Buyer.
- 32.14.3. THE NEXT PAGE IS THE SIGNATURE PAGE

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

By:

Name:

Title:

Date:

By:

Name:

Title:

Date: