

POWER PURCHASE AGREEMENT

between

THEZI LANGA PROPRIETARY LIMITED

(as Seller)

and

BUFFALO CITY METROPOLITAN MUNICIPALITY (BCMM)

(as Buyer)

CONTRACTED CAPACITY: 50 MW (AC)

FACILITY: Thezi-Langa Solar Photovoltaic Power Generating Plant

LOCATION: East London Industrial Zone Renewable Energy Park,
Berlin Area, Buffalo City Metropolitan Municipality,
Eastern Cape Province, Republic of South Africa

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

- (1) **THEZI-LANGA PROPRIETARY LIMITED**, a limited liability company incorporated under the laws of the Republic of South Africa (Registration No. 2010/022564/07) and having its registered office at 5A Castle Cycle, 58 Drake Road, Bonnie Doon, East London in the Eastern Cape Province of the Republic of South Africa (the "**Seller**"); and
- (2) **BUFFALO CITY METROPOLITAN MUNICIPALITY**, a metropolitan municipality established in terms of the Local Government: Municipal Structures Act 117 of 1998 as amended (the "**Buyer**")

(each hereinafter referred to as a "**Party**" and together as the "**Parties**")

RECITALS

- (A) The Seller has proposed to the Purchaser that the Seller will design, engineer, construct, insure, Commission (as hereinafter defined), operate and maintain an approximately 50MW (AC) Solar Photovoltaic powered electric generation facility (the "Facility") to be located at the Site (as hereinafter defined) at Berlin and with a Contract Capacity (as hereinafter defined) 50MW (AC) on build, own and operate basis;
- (B) The Buyer has accepted the Seller's proposal to design, engineer, construct, insure, Commission, operate and maintain the Facility as well as for the sale of associated electric energy from the Facility;
- (C) The Seller will, subject to the approval of NERSA, acquire a licence as required in terms of chapter 3 of the Electricity Regulation Act, 2006 for the generation and sale of the Net Energy Output to the Buyer in terms of this Agreement;
- (D) The Seller wishes to sell the Net Energy Output from the Facility to the Buyer, and the Buyer wishes to purchase the Net Energy Output of the Facility from the Seller, on a take or pay basis, on the terms set out in this Agreement;
- (E) The Seller has been issued with an Environmental Impact Assessment Record of Decision from the Department of Environmental Affairs and obtained Grid Connection approval from the Buyer;
- (F) Subject to the fulfilment of the Conditions as well as those of any licence to be granted by NERSA, the Seller shall construct, commission, operate and maintain the Facility in order to supply the Net Energy Output to the Buyer;
- (G) The Parties wish to record their agreement in respect of the terms and conditions governing the Construction, financing, insurance, Operation and Maintenance of the Facility, and the sale and purchase of Energy Output from the Facility.

THE PARTIES AGREE as follows:

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Agreement, unless inconsistent with or otherwise indicated by the context:

“Achieved Capacity” means the Capacity of the Facility, as specified in the Facility Completion Form;

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

"AFSA Rules" means the commercial rules of AFSA prevailing from time to time;

"AFSA" means the Arbitration Foundation of Southern Africa;

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

"Agreed Interest Rate" means the prime rate of interest (expressed as a percentage rate per annum) which the Seller’s bank lends on overdraft, as published by that bank from time to time, provided that in respect of any date 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) compounded monthly in arrears and on a 365 day calendar year irrespective of whether such year was a leap year. A certificate issued by a manager of the said bank, whose status need not be proved, it shall be *prima facie* proof of its prime rate prevailing from time to time;

"Agreement" means this Power Purchase Agreement, including all schedules hereto, as amended or supplemented from time to time;

“Assign” shall have the meaning given to it in Clause 24 (Assignment) and the term **“Assignment”** shall be construed accordingly;

“BCMM” means the Buffalo City Metropolitan Municipality;

"Billing Period" means each period of one (1) month which falls within the Term, provided that:

- (a) the first Billing Period shall commence on the day on which the Seller becomes entitled to a Deemed Energy Payment contemplated in Clause 15.4.1, or on the first day of the Early Operating Period, or otherwise on the Commercial Operation Date (as appropriate) and shall end on the last day of the Month in which the first Billing Period commenced; and
- (b) the final Billing Period shall commence on the first day of the Month in which the Termination Date occurs and shall end on the Termination Date;

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

"Buyer Approvals" means all or any approvals, in terms of any Law, which the Buyer must obtain to enable the Buyer to purchase the Commercial Energy generated by the Seller and enter into the [Supplementary Agreement];

“Buyer Event of Default” means an event described in Clause 21.4;

"Capacity" means, in respect of a Unit or the Facility, at any time and from time to time, the capability (expressed in MW) of such Unit, or the Facility, as the case may be, to generate and supply Energy to the Delivery Point. For the avoidance of doubt, Capacity shall be net of auto-consumption and the electrical losses up to the Delivery Point;

"Change in Law" means:

- (a) the adoption, enactment, promulgation, coming into effect, repeal, amendment, reinterpretation, change in application or other modification after the Effective Date of any Law;
- (b) any Seller Approval or Buyer Approval being Terminated, withdrawn, amended, modified or replaced after the Effective 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 gross negligence or wilful misconduct of the Seller, or Buyer, any Affiliate of the Seller or Buyer or any of their respective contractors; or
- (c) any licence, permit or similar approval, for which the Seller or Buyer makes a proper application at the appropriate time to the Competent Authority, and which application the Seller or Buyer diligently pursues, not being granted, by either:
 - (i) the scheduled COD in relation to those licences, permits or approvals required to commence commercial operations or,
 - (ii) in relation to any other licences, permits or approvals, by the end of the period proposed by the Seller and approved by the Buyer (or vice versa) (which approval shall not be unreasonably withheld);
- (d) other than if the refusal by such Competent Authority to grant such approval;
 - (i) is made in accordance with any applicable Law regulating the granting of such approval; or
 - (ii) is the result of any gross negligence or misconduct of the Seller or Buyer, any Affiliate of the Seller or Buyer or any of their respective contractors,

but shall exclude:

- (i) 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 Gazette (as defined in the Interpretation Act of 1957) as at the Effective Date;
- (ii) the adoption, enactment, promulgation, coming into effect, repeal, amendment, reinterpretation, change in application or other modification after the Effective Date of any 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;

- (iii) the adoption, enactment, promulgation, coming into effect, repeal, amendment, reinterpretation, change in application or other modification after the Effective Date of any Law relating to the Environment or to the protection and/or preservation of the Environment;
- (iv) the adoption, enactment, promulgation, coming into effect, repeal, amendment, reinterpretation, change in application or other modification after the Effective Date of any Law relating to the power conservation programme, the conservation of electricity or Energy or to Energy efficiency;
- (v) the adoption, enactment, promulgation, coming into effect, repeal, amendment, reinterpretation, change in application or other modification after the Effective Date of any Law which results in or relates to Market Change;

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

"Code" means, as applicable, any code in respect of electricity distribution or transmission as published by NERSA from time to time and **"Codes"** shall be construed accordingly;

"Collective Metering Installation" means collectively the Metering Installation and the Check Metering Installation;

"Commercial Energy" means the Net Energy Output (expressed in kWh) measured at the PUC and delivered by the Seller to the Delivery Point and purchased or to be purchased by the Buyer during the Operating Period;

"Commercial Energy Payment" means, in relation to each Billing Period, an amount in South African Rand (excluding VAT) that shall be due and payable by the Buyer to the Seller for the Commercial Energy delivered in that Billing Period, which shall be the product of the Commercial Energy delivered during that Billing Period and the Commercial Energy Price;

"Commercial Energy Price" means the price payable by the Buyer for each kWh of Commercial Energy purchased and supplied to the Delivery Point at any time during the Operating Period;

"Commercial Operation Date" or **"COD"** means the first day, as identified in the Notice of Commencement of Facility and determined precisely by the Parties via a funnelling mechanism consisting of a series of stepped notification periods, upon which the Seller for the commercial purposes of this Agreement measures Energy at the PUC and delivers Commercial Energy to the Delivery Point;

"Compensation Event" means any material breach by the Buyer of any of its obligations under this Agreement, including any failure to make any payments due and payable to the Seller on the due date for payment, to the extent in each case that the breach is not

caused or contributed to by the Seller or any Contractor or by Force Majeure, a System Event or Unforeseeable Conduct.

"Competent Authority" means the Government, any sphere thereof, any ministry, any executive, legislative, administrative or quasi-governmental regulator, department, body, instrumentality, agency authority of South Africa having jurisdiction over this Agreement, either Party, or any asset or transaction contemplated by this Agreement, but excluding the Buyer acting in its Capacity as such under this Agreement;

"Conditions" means the conditions precedent contained in Clause 3 below;

"Connection Agreement" means the agreement entered into (or to be entered into) between the Seller (as Customer) and the Buyer and/or Eskom (as Distributor), which sets out the terms and conditions on which the Facility will be connected to the Distribution System;] **[Drafting Note: Connection requirements to be discussed]**

"Connection Works" means the construction of the physical connection by which the Facility in terms of the Connection Agreement will be connected (whether directly or indirectly) to the System and all associated works and activities;

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

"Construct" means to investigate, survey, design, engineer, procure, construct, expand, refurbish, upgrade, improve, install, test, commission and do any and all other related things in accordance with the standards of a Reasonable and Prudent Operator, and the term **"Construction"** shall be construed accordingly;

"Construction Period" means the period which commences on the Effective Date and ends on the day preceding the Commercial Operation Date;

"Construction Programme" means the programme for the construction of the Facility as set out in Schedule Part (*Construction Programme*) which specifies certain milestones for the construction of the Facility and the scheduled dates for such milestones;

"Consumer Price Index" means the weighted average price change for the immediately preceding twelve (12) month period of consumer goods and services purchased by households in South Africa and as published by Statistics South Africa (or its equivalent successor entity) from time to time;

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

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

"Contracted Capacity" means the anticipated Capacity of the Facility Unit at the Delivery Point and expressed as AC power capacity, net of auto-consumption and the electrical losses up to the Delivery Point, as stated in Schedule 1 Part 1 (*Description of Facility*);

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

“Control” means the power, directly or indirectly, to direct or cause the direction of the management and policies of a corporate entity, 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”** or **“Controlling”** shall be construed accordingly;

“Curtailement” means any instruction from the Buyer (as System Operator) to limit or reduce the Energy Output of the Facility, but excluding, for the avoidance of doubt, any such instruction given when there is a constraint in the System due to planned or unplanned maintenance, refurbishment, modification, extension or development being carried out on or to the System.

“Deemed Energy” means that Energy Output that would otherwise be available to the Buyer, but for a System Event or Compensation Event, as determined in accordance with Schedule 7 (*Deemed Energy Payment*);

“Deemed Energy Payment” means an amount (excluding VAT) that shall be due and payable by the Buyer to the Seller for the Deemed Energy during a specified period pursuant to the provisions of Clause 15 (*Consequences of a System Event*), which payment shall be calculated in accordance with Schedule 7 (*Deemed Energy Payment*) with reference to the Commercial Energy Price, and dependent on the period in respect of which such payment is due and payable;

“Delivery Point” means the physical point, situated on the high voltage side of the generator transformer of the Facility, where the Facility connects to the System (whether or not such point is situated on or off the Project Site), and where the Energy Output is to be delivered by the Seller to the Buyer as described in Schedule 1 Part 2 (*Site and Connection Layout Diagram*) [**Drafting Note: please advise if a diagram of the delivery point is relevant**];

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

“Direct Loss” means, in respect of either Party, any losses, liabilities, expenses, damages, costs and Claims 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;

“Dispute” means any dispute between the Parties whether resulting from a claim in contract, in delict or based on any other legal doctrine which may arise out of, or in connection with, (whether, in each case, wholly or partially, directly or indirectly) this Agreement or the interpretation, application, implementation, validity, breach or

termination of this Agreement or any related instrument, agreement or document, or any other provision hereof or thereof.

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

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

"Distributor" has the meaning given to it in the Codes and in the context of this Agreement refers to the Buffalo City Metropolitan Municipality;

"Due Date" means fifteen (15) Business Days from delivery of an invoice by either Party to the other in respect of any amount owing by the recipient Party to the other in Terms of this Agreement (or, in the instance of the Buyer, the later of that period and its then prevailing payment policies);

"Early Operating Energy" means the Energy Output measured at the PUC and delivered by the Seller to the Delivery Point during the Early Operating Period;

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

"Early Operating Energy Price" means the price payable by the Buyer for each kWh of Early Operating Energy delivered by the Seller to the Delivery Point during the Early Operating Period;

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

"Emission Credits" means any tradable instrument, certificate, allowance, entitlement, permit, economic or financial cost or benefit, tax or tax credit now or in the future which is associated with (in whole or in part) any emissions at the Facility (excluding any and all costs and expenses associated with applicable consents or regulations) including greenhouse gasses (including CO₂, NO_x or SO₂-or any other liquid, solid or gas) and including the cost or benefit of any authorisations and allocations and international treaties or domestic Laws to produce or to offset any emissions in any period and including any rights or interest recognised under articles 6, 12 or 17 of the Kyoto Protocol or any successor international agreement;

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

"Energy Output" means the Energy (expressed in MWh/kWh) delivered by the Seller to the Delivery Point;

"Environment" means all or any of the following media, namely air (including air within buildings or other natural or man-made structures above or below ground), water (including subterranean and groundwater, and water in drains and sewers), land (including any seabed or riverbed, surface and sub-surface land), flora, fauna and/or human beings, and "Environmental" shall be constrained accordingly;

"Environment Credits" means, all financial benefits of an environmental nature that are created or otherwise arise from the establishment of the Facility and/or the generation of renewable Energy therefrom. Forms of such benefits shall include, without limitations, any and all Environmental air quality credits, Green Credits, renewable Energy credits, carbon credits, emission reduction credits, certificates, tags, or off-sets, allowances, or similar products or rights, howsoever entitled -

- (a) resulting from the avoidance of the emission of any gas, chemical or other substance, including but not limited to mercury, nitrogen oxide, sulphur dioxide, carbon dioxide, carbon monoxide, particular matter or similar pollutants or contaminants of air, water or soil, gas chemical or other substances,
- (b) attributable to the generation, purchase, sale, or use of renewable Energy generated or to be generated or otherwise attributable to the establishment and operation of the Facility during the Term of this Agreement, and
- (c) Environment Credits shall include those currently existing or arising during the Term of this Agreement and Law or internationally under any Law relevant to the avoidance of any emission described in any governmental, regulatory or voluntary programme, including but not limited to the United Nations Framework Convention on Climate Change and related Kyoto Protocol or other programs, Law or regulations involving or administered by any other Competent Authority;

"Environmental Failure" means:

- (a) any non-compliance by either Party (or any of its Affiliates and contractors and it's and their respective directors, officers, employees and agents) with any Laws which regulate activities that may impact on the Environment and which are applicable to the Party's performance of its obligations under this Agreement; or
- (b) any pollution or degradation of the Environment that is directly attributable to either Party (or any of its Affiliates and contractors and it's and their respective directors, officers, employees and agents) which arises from or in connection with the performance or non-performance by that Party of its obligations under this Agreement; including any such pollution or degradation arising from the presence, handling, use, transport, storage, release or disposal of any potentially hazardous substances (or potentially hazardous substances) in respect of which any investigation, impact assessment, remediation or other responsive measure is required to be undertaken under any applicable Law;

"Eskom" means Eskom Holdings SOC Limited;

"Event of Insolvency" means, in relation to either Party:

- (a) it passes a resolution or files any application or action for relief under any insolvency Law;

- (b) proceedings are started for an order (whether provisional or final, voluntary or involuntary) to be made for its winding-up, liquidation or business rescue or for the appointment of a business rescue practitioner, liquidator or similar officer in relation to it or a material part of its assets required for the performance of the Project; and/or
- (c) it convenes a meeting with its creditors for the purpose of any arrangement, compromise or composition in respect of its debts for the benefit of its creditors;

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

"Facility" means the generation Facility located at the Project Site and comprising all plant, machinery and equipment, all associated buildings, structures, roads on the Project Site that are not national, provincial or municipal roads and other appurtenances, as further described in Schedule 1 Part 1 (*Description of Facility*), together with all required interfaces to be Constructed for the safe, efficient and timely Operation of that Facility including all interconnection facilities and equipment up to the Point of Metering or as agreed in the Connection Agreement;

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

"Facility Completion Form" means the notice in the form set forth in Schedule 2 Part 3 (*Facility Completion Form*), which is to be completed by the Independent Engineer and delivered to the Buyer in respect of the mechanical and electrical completion of the Facility, in accordance with Clause 5.3 (*Facility Completion and Commission*), confirming that the Facility has been duly completed;

"Facility Metering Installation" means metering equipment (including an electronic main meter and back up meter) located at the PUC conforming with the requirements of and standard set out in the Code and otherwise specified by the Seller and installed, operated and Maintained by Eskom or the Distributor (as the case may be) in accordance with the procedures set out in the System Agreements;

"Forecast Generation Profile" has the meaning ascribed to it in Clause 5 (*Generation Forecasts*).

"Force Majeure" means:

- (a) any event or circumstance or combination of events or circumstances beyond the reasonable control of the Party affected by such event, circumstance or combination of events or circumstances (the **"Affected Party"**);
- (b) which could not have been prevented or avoided or overcome by the Party acting as a Reasonable and Prudent Operator;
- (c) which materially and adversely affects the performance by that Party of its obligations or the enjoyment by that Party of its rights under or pursuant to this Agreement; and

- (d) is not the direct result of a breach by the Affected Party of any other Project Document to which it is a party.

Without limitation to the generality of the foregoing, "Force Majeure" shall include the following events and circumstances to the extent that they satisfy the above requirements:

- (i) acts of God (including lightning, fire, earthquake, volcanic eruption, landslide, flood, storm, hurricane, cyclone, tornado, typhoon, tidal wave or other natural disasters;
- (ii) explosion, ionising radiation, radioactive contamination or chemical contamination;
- (iii) epidemic or plague;
- (iv) any act of war (whether declared or undeclared), invasion, armed conflict, revolution, riot, insurrection, civil commotion, act of terrorism, or sabotage;
- (vi) air crash, shipwreck or train crash;
- (vii) any blockade, embargo, import restrictions, rationing or allocation, or closure of harbours, docks or other facilities for the use of, or services to, shipping or navigation;
- (viii) any delay in obtaining any Consent, provided the Affected Party has complied with all of its obligations in respect of the obtaining of such Consent;
- (ix) any official or unofficial strike, lockout, go slow or other such labour disputes generally affecting the construction and energy industry or a significant sector of it;
- (x) any event or circumstance of a nature analogous to any of the foregoing;
- (xi) (in the case of the Seller alone) any act, event or circumstance of a nature analogous to any of the foregoing affecting a contractor in a manner which, had the Seller been performing the functions of the contractor itself rather than through the affected contractor, the Seller would have been entitled to relief under this provision;
- (xii) (in the case of the Seller alone and only to the extent applicable) any act, event or circumstance of a nature analogous to any of the foregoing affecting the Facility in such a manner that the Seller would have been entitled to relief under this provision;
- (xiii) any action or inaction of the Distributor or Eskom (as the case may be) which results in or amounts to breach by the Distributor or Eskom (as the case may be) of any contractual or associated arrangements between the Buyer and the Distributor or Eskom as regards Energy to be supplied under this Agreement;

(each such event or circumstance or combination thereof, a "**Force Majeure Event**").

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

"Government Default" means an expropriation or nationalisation of a material part of the Facility and/or shares of the Buyer by an Competent Authority;

"Green Credits" means collectively the certified emission reduction credits and Environment Credits, save for the exclusion of any carbon credit or heat certificate available under the Kyoto Protocol as amended or substituted from time to time (commonly known collectively as CER or VER reduction credits);

"Implementation Agreement" means the agreement entitled the Implementation Agreement entered into, on or about the Signature Date, between the Seller and the Buyer.

"Independent Engineer" means any independent consulting engineer from the list of firms in Schedule 8 (*List of Firms – Independent Engineer*) that is appointed in accordance with the provisions of Clause 5.2, to act jointly on behalf of the Seller and the Buyer;

"Independent Expert" means:

- (a) a chartered accountant of not less than ten (10) years professional experience, nominated at the request of any Party by the President for the time being of the South African Institute of Chartered Accountants, if the matter relates primarily to a financial or financial management matter;
- (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 Chair of for the time being of the South African Legal Practice Council or their successors-in-title, if the matter relates primarily to a legal matter;
- (c) an electrical, power or such other suitable engineer of not less than ten (10) years professional experience agreed to between the Parties and failing agreement nominated (at the request of either Party) by the President for the time being of the Engineering Council of South Africa, if the matter relates primarily to an engineering matter; or
- (d) an expert in the area under dispute appointed pursuant to the provisions of Clause 25.4 below;

Intellectual Property means all intellectual property rights conferred by Law, at Law or in equity and subsisting anywhere in the world, including:

- (a) copyright; inventions (including patents, innovation patents and utility models); confidential information, trade secrets, technical data and know-how, whether or not confidential and in whatever form held, including formulae, design specifications, drawings, data, manuals and instructions; designs; trademarks and service marks; and circuit layout designs, topography rights and rights in databases, whether or not any of these is registered, registrable or patentable;
- (b) any similar rights resulting from intellectual activity in the industrial, commercial, scientific, literary or artistic fields which subsist now or in the future;

- (c) any applications and the right to apply for registration of any of the above; and
- (d) any rights or action against any third party in connection with the intellectual property rights included in paragraphs (a) to (c) above, whether arising before, on or after the Signature Date;

"Kyoto Protocol" means the Protocol to the United Nations Framework Convention on Climate Change ("**UNFCC**") adopted at the Third Conference of the Parties to the UNFCC in Kyoto, Japan on 11 December 1997, as amended from time to time;

"Last COD" means the date which falls twenty one (21) days after the Scheduled COD;

"Law" means-

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

"Laws" shall be construed accordingly;

"Lender" or **"Lenders"** means, either in the singular or collectively, as applicable, a bank, financial institution or other lender and its designated successors and assigns who provides financing to the Seller for the Project, provided that a lender who holds equity in the Seller shall not be considered to be acting as a "Lender" to the extent it provides the Seller with any financing, credit support or credit enhancement in its capacity as a shareholder in the Seller;

"Maintain" means to maintain in good working order and condition and, as necessary, to inspect, refurbish, repair, replace, modify, reinstate, overhaul and test so that the Facility or any of its plant, machinery, equipment concerned may be operated at all material times as required in Terms of this Agreement and the Term **"Maintenance"** shall be construed accordingly;

"Market Change" means a significant change which materially impacts upon the obligations of the Parties in the structure of the electricity market in the RSA which makes giving effect to the arrangements contemplated by this Agreement impracticable, provided that any such change is beyond the Control of both Parties and occurs after the date of this Agreement (it being clarified that any significant change which materially impacts upon the obligations of the Parties in the structure of the electricity market in the RSA on account of any Change in Law or intervention, requirement or approval of NERSA or the Government shall be deemed to fall outside the Control of the Parties for the purposes of this definition;

"Metering Certifier" means a reputable, experienced and qualified company agreed by the Parties to perform electricity meter certification functions under Clause 11 (*Metering*) of this Agreement (or if the Parties fail to agree upon such a company within ten (10) days of a request by one Party to the other in respect the same, then such independent expert as selected by the Chair of the Engineering Council of South Africa shall be the metering Certifier), and who, for the purposes of this Agreement, shall be deemed to be an Independent Expert.

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

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

"Net Energy Output" means the total Energy output generated by the Facility and measured and recorded at the PUC in accordance with Clause 11 (*Metering*);

"Notice of Commencement of Facility" means the twenty one (21) day notice which the Seller is required to give the Buyer of the COD, and which notice must substantially be the in the form of the draft notice set out in Schedule 2 Part 5 (*Form of Notice of Commencement of Facility*);

"Notice of Commencement of Unit" means the twenty one (21) day notice which the Seller is required to give the Buyer of the COD, and which notice must substantially be the in the form of the draft notice set out in Schedule 2 Part 4 (*Form of Notice of Commencement of Unit*);

"Operating Period" means the period from the Commercial Operating Date to the earlier of the Expiry Date or the Termination Date;

"Outage" means a Scheduled or an Unscheduled Outage;

"PUC" means Point of Utility Connection where the Facility will physically connect to the System as identified or provided for in Schedule 1 Part 2 (*Site and Connection Layout Diagram*) and the Connection Agreement and where the amount of Energy is measured and read in accordance with the provisions of Clause 11 (*Metering*);

"Project" means the acquisition of ownership or conclusion of a lease in respect of the Project Site and the design, engineering, procurement, ownership, construction, operation and Maintenance of the Facility;

"Project Agreements" means the contracts described in Schedule 10 (Project Agreements) relating to the Project, each executed by the parties thereto simultaneously with this Agreement or otherwise in the Agreed Form, true copies of which must be delivered by the Seller to the Buyer within ten (10) Business Days of the Signature Date [•] **[Drafting Note: A list of the Project Agreements will be included once identified.]**

"Project Site" means the site upon which the Facility is to be Constructed and Operated as more fully described and defined in Schedule 1 Part 2 (*Site and Connection Layout Diagram*);

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

“**Reasonable Efforts**” means, for any action required to be made, attempted or taken by a Party under this Agreement, the efforts that a prudent person would undertake to protect its own interests, including commercial interests, taking into account the conditions affecting such action, including the amount of notice to act, the recognition of the need to act, the duration and type of the action, the competitive Environment in which such action occurs, and the Projected benefit, cost and risk to the Party required to take such action provided that a party shall not be required to expend funds in excess of amounts that it determines in its sole discretion to be appropriate;

“**Replacement Arrangements**” has the meaning given to it in Clause 20 (*Market Change*) below;

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

“**Scheduled Outage**” means any period in which the Facility is scheduled for planned Maintenance in accordance with Schedule 4 (*Scheduled and Unscheduled Outages*);

“**Seller Approval**” means any permission, permits, approval, consent, licence, authorisation, registration, grant, acknowledgement, exemption or agreement to be obtained from any Competent Authority by the Seller (or by the owner, if applicable) and any Law to enable the Seller (or the owner, if applicable) to undertake its obligations in respect of the Project, including the licenses granted or to be granted to the Seller (or to the owner, if applicable) under the Electricity Regulation Act, 2006 to operate the Facility and to trade in the supply of Energy from such Facility;

“**Seller Event of Default**” means an event described in Clause 21.3;

“**Seller Information**” means all information provided on or prior to the Effective Date, by the Seller and/ or any third party on behalf of or at the request of or in accordance with an instruction from the Seller, to the Buyer, which information is relevant to the Project and or the ability of the Seller to undertake the Project;

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

“**South Africa**” means the Republic of South Africa;

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

“Supplementary Agreement” means the agreement concluded or to be concluded between the Buyer and the BCMM regulating the use by the Buyer of the transmission System and the administration of the payment mechanism in so far as they relate to the BCMM;

“System” means, as applicable, the network for conveyance of Energy to which the Facility will be connected, whether the national transmission System of the Eskom (which operates at a nominal voltage of above 132 KV) or a distribution network of any Distributor (which operates at a nominal voltage of 132 KV or less), 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 and customers of Eskom or any Distributor);

“System Agreements” means the Connection Agreement, the Transmission Agreement and the Distribution Agreement or any one of them as the context may require;

“System Event” means;

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

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

“System Metering Installation” means back-up metering equipment (including an electronic main check meter) conforming with the requirements of and standards set out in the Code and otherwise specified by Eskom and/or the Distributor, as the case may be;

“System Operator” has the meaning given to it in the Codes;

“Technical Dispute” means a Dispute that relates to a technical, engineering, operational or accounting matter and is of a type susceptible to resolution by an Expert in the relevant field, provided that any matter that this Agreement provides is to be determined by an expert shall be deemed to be a Dispute of this kind.

“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 this Agreement;

"Termination Date" means the Expiry Date, or the date of the earlier termination of this Agreement, as the case may be;

"Termination Notice" means a written notice served by one Party on the other Party, stating its decision to immediately terminate this Agreement and the grounds for termination, by reference to its right to terminate as set out in this Agreement;

["Transmission Agreement" means the agreement entered into between the Seller (as customer) and ESKOM/BCMM which sets out the terms and conditions on which the Facility will be connected to and use the System;]

"Unforeseeable Conduct" shall occur if, after the Signature Date, the Buyer or any Competent Authority takes any action in terms of applicable Law (including the introduction, application, or change in any Law, regulation, by-law or order having the force of Law) or fails to carry out its obligations in terms of an applicable Law, that:

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

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

- (aa) Unforeseeable Conduct shall be deemed not to have occurred under circumstances where any action or omission of the Buyer or the Competent Authority is in direct response to any act or omission of the Seller which is illegal (other than an act or omission rendered illegal by virtue of such conduct of the Competent Authority) or in violation of agreements to which the Seller is a party;
- (bb) an increase in taxes of general application which does not discriminate against the Seller or against the Seller and other parties undertaking

projects similar to the Project shall be deemed not to be Unforeseeable Conduct;

- (cc) Unforeseeable Conduct shall be deemed not to have occurred if such conduct by the Buyer or any Competent Authority is required as a result of an event of Force Majeure and is reasonably proportionate thereto; and
- (dd) Unforeseeable Conduct shall not include any Law that was enacted or made but not yet in force as at the Signature Date, or any proposed or draft Law that was promulgated or issued for comment at any time before the Signature Date if and to the extent that such Law when enacted or made and brought into effect is materially unchanged;

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

“Unit Commencement Date” means, in respect of each Unit (if applicable), the date specified in the Notice of Commencement of Unit set out in Schedule 2 Part 4 (*Form of Notice of Commencement of Unit*) as being the date on which that Unit will begin generation and delivery of Early Operating Energy to the Delivery Point;

“Unit Completion” means the mechanical and electrical completion of the Unit in accordance with the Codes, the Transmission Agreement of the Distribution Agreement (as the case may be) and the standards of a Reasonable and Prudent Operator, and where applicable the issue of the relevant Unit Completion Form in accordance in accordance with Clause 5.4 (*Early Operating Period*);

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

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

“VAT” means the 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; and

“Week” means a period of seven (7) days, beginning at 00:00 hours on a Monday and ending at 24:00 hours on the next succeeding Sunday.

1.2 Interpretation

In this Agreement, unless inconsistent with or otherwise indicated by the context –

- 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, or Schedule 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 to this Agreement are an integral part of this Agreement. If there is any conflict between the provisions of the main body of this Agreement and the provisions of any of the Schedules, the provisions of the main body shall prevail;
- 1.2.4 unless otherwise specified, all references to time are to South Africa Standard Time;
- 1.2.5 “**person**” includes a corporation, company, firm, joint venture, trust, government, government entity, state or agency of the state or any association or partnership (whether or not having separate legal personality) of any of the foregoing that is recognised by Law as the subject of rights and duties, and references to a “**person**” (or to a word incorporating a person) shall be construed so as to include that person’s successors in title and assigns or transferees;
- 1.2.6 the words “**include**”, “**including**” and “**in particular**” indicate examples or emphasis only and shall not be construed as limiting the generality of any preceding words;
- 1.2.7 the words “**or other**” or “**otherwise**” shall not be construed as limiting the generality of 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;
- 1.2.10 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;
- 1.2.11 the rule of interpretation that, in the event of ambiguity, an agreement or any part thereof shall be interpreted against the Party responsible for the drafting thereof, shall not apply in the interpretation of this Agreement;
- 1.2.12 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 to it as if it were a substantive provision in the body of this Agreement;

- 1.2.13 when any number of days is prescribed in this Agreement same shall be reckoned exclusively of the first and inclusively of the last day unless the last day falls on a Saturday, Sunday or public holiday in which case the last day shall be the next succeeding day which is not a Saturday, Sunday or public holiday;
- 1.2.14 references to any amount shall mean that amount exclusive of VAT, unless the amount expressly includes VAT;
- 1.2.15 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;
- 1.2.16 where figures are referred to in numerals and in words, if there is any conflict between the two, the words shall prevail;
- 1.2.17 expressions defined in this Agreement shall bear the same meanings in Schedules to this Agreement which do not themselves contain their own definitions;
- 1.2.18 where any term is defined within the context of any particular Clause in this Agreement, the term so defined, unless it appears from the Clause in question that the term so defined has limited application to the relevant Clause, shall bear the same meaning ascribed to it for all purposes in terms of this Agreement, notwithstanding that such term has not been defined in the definitions Clause;
- 1.2.19 any reference to days (other than a reference to Business Days), months or years shall be a reference to calendar days, months or years, as the case may be;
- 1.2.20 the expiration or termination of this Agreement, shall not affect such of the provisions of this Agreement as expressly provide that they shall operate after any such expiration or termination, or which of necessity must continue to have effect after such expiration or termination, notwithstanding that the provisions themselves do not expressly state this;
- 1.2.21 "**writing**" or "**written**" includes any hand-written, typewritten or facsimile communications but excludes any communication by way of a data message, unless use of a data message has been expressly authorised herein. The term "**data message**" has the meaning assigned to it in the Electronic Communications and Transactions Act, 25 of 2002.

1.3 Units of Measurement

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

1.4 Rounding up

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

1.4.1 the calculation of any sums of money owing by either Party under this Agreement shall be performed to the nearest Cent; and

1.4.2 any other calculation shall be performed to an accuracy of three (3) decimal places, with a fourth digit, after the decimal point, having a value of five (5) or above being rounded up.

2. TERM

2.1 Term

This Agreement shall consist of an Early Operating Period and an Operating Period. As used herein, "Term" shall mean the Early Operating Period and the Operating Period, unless the Seller or the Buyer terminates the Agreement prior to the end of the Early Operating Period pursuant to the terms of this Agreement.

2.2 Early Operating Period

The Early Operating Period will begin on the Signature Date and will terminate on the earlier of (i) the Commercial Operation Date, or (ii) the date the Agreement is terminated pursuant to the provisions of Clause 21 (*Termination*).

2.3 Operating Period

If applicable, the Operating Period will commence on the Commercial Operation Date and will terminate at 24:00 hours on the last date of the Month in accordance with its terms and shall continue in full force and effect for a period of twenty (20) years from the Commercial Operations Date as such date may be extended pursuant to Clause 2.5.

2.4 Extension of term due to Force Majeure

The Term shall automatically be extended by the aggregate periods allowed for the performance by the Parties of obligation(s) referred to in Clause 17 (*Force Majeure*)

2.5 Renewal Term

The Term shall be extended for an additional period on terms mutually agreeable to the Seller and the Buyer. Not less than one hundred and eighty (180) days before the end of the Term, the Seller shall provide notice in writing to the Buyer of the Seller's desire to extend the Term for an additional, specified period. The Buyer shall respond to the Seller's notice within thirty (30) days of receipt indicating whether the Buyer agrees to extend the Term for an additional, specified period. If the Buyer notifies the Seller that the Buyer does not agree to extend the Term, the Term shall expire in accordance with Clause 2.3.

3. CONDITIONS PRECEDENT

3.1 Effectiveness of rights and obligations

Save for Clause 1 (*Definitions and Interpretation*), Clause 2 (*Term*), this Clause 3 and Clauses 23 (*Intellectual Property*), 25 (*Dispute Resolution*), 26 (*Limitation of Liability*), 27 (*Third Part Indemnity*), 28 (*Confidentiality*), 29 (*Governing Law and Jurisdiction*), 30 (*Notices*), 31 (*Warranties*), and 33 (*Miscellaneous*) which shall come into force and effect on and from the Signature Date, none of the other provisions of this Agreement or rights and obligations of the Parties contained in such other provisions of this Agreement shall be effective until the Conditions Precedent listed in Clause 3.2 (*Conditions Precedent*) have either been fulfilled or duly waived in accordance with Clause 3.4 (*Waiver and Extension*).

3.2 Conditions Precedent

The Conditions Precedent referred to in Clause 3.1 (*Effectiveness of rights and obligations*) are:

- 3.2.1 the Seller shall have obtained all or any of the authorisations required by any regulatory authority, 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 Commercial Energy to the PUC and the Delivery Point, including such authorisations for compliance with all Environmental legislation, regulations and/or policies;
- 3.2.2 the Seller shall have secured the issuance and grant of all Seller Approvals;
- 3.2.3 the Seller shall have secured such funding (whether as equity or debt funding or both) as it requires for the commencement, implementation and operation of the Project, including the sale and supply of the Net Energy Output, and all or any Conditions Precedent in respect of such transaction documents are met;
- 3.2.4 NERSA and the BCMM shall have consented in writing to the transactions contemplated in this Agreement;
- 3.2.5 the Seller shall have concluded upon terms and conditions acceptable to the Parties thereto and, if so required, NERSA, the following agreements:
 - (a) the System Agreements;
 - (b) the Project Agreements;
 - (c) an agreement in terms of which the Seller is granted the sole and exclusive use of the Project Site for the Term; andsuch agreements are unconditional as to their terms, save to the extent that they are conditional upon this Agreement becoming operative;
- 3.2.6 the Seller shall have provided to the Buyer a certificate signed by a duly authorised officer of the Seller stating that the Conditions Precedent set out in Clauses 3 to 3.2.5 above have been met;
- 3.2.7 the Buyer shall have secured the issuance and grant of all Buyer Approvals and the Buyer shall have provided to the Seller a certificate signed by a duly authorised officer of the Buyer stating that this condition has been met;

- 3.2.8 the Buyer shall have concluded a Supplementary Agreement and same becomes unconditional in accordance with its terms;
- 3.2.9 the Buyer shall have obtained authority in accordance with the applicable provisions of the Municipal Finance Management Act 56 of 2003 and the board of the Seller shall have passed a resolution authorising the Seller to enter into this Agreement, and certified copies of such authority or resolution shall have been provided to the other Party; and
- 3.2.10 all Schedules have been completed in full and signed by the Parties and have been included into this Agreement.

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 within twelve (12) Months after the Signature Date. The Buyer shall provide the Seller with such reasonable cooperation as may be necessary to assist the Seller 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 expiry of the period stipulated in Clause 3.3.1.

3.5 Reports

Each Party shall notify the other in writing at least once a Month on the progress made in satisfying the Conditions Precedent listed in Clause 3.2 (*Conditions Precedent*) for which it is responsible.

3.6 Failure to fulfil

If the Conditions Precedent have not been satisfied or waived by the end of the period referred to in Clause 3.3.1, either Party may immediately terminate this Agreement by serving a Termination Notice on the other Party, in which case either Party shall be discharged from any further obligations under this Agreement save for those liabilities which have accrued and any right or obligation expressed to arise upon or survive such termination.

4. PROJECT SITE AND CONSTRUCTION

4.1 Project Site

- 4.1.1 The Facility shall be located at the area generally described as the East London Industrial Development Zone Renewable Energy Park, Berlin Area, Buffalo City Metropolitan Municipality in the Eastern Cape Province of South Africa and shall be identified as the **Thezi-Langa Solar Photovoltaic Power Generation Plant**.
- 4.1.2 Details of the Project Site, including a scale map that identifies the location of the Project Site, location of the Facility at the Project Site, diagram setting out the transmission lines and substation, interconnection facility and important ancillary facilities and the Delivery Point, are included in Schedule 1 (*Details of the Project and Facility*).
- 4.1.3 All electricity infrastructure affixed to the Project Site shall be deemed the asset of the Seller in accordance with the provisions of section 24 of the Electricity Regulation Act 4 of 2006. The said electricity infrastructure shall not be subject to attachment by a creditor nor constitute security in the form of a landowner's hypothec.

4.2 General Construction obligations

- 4.2.1 The Seller shall procure the construction of the Facility in accordance with:
- (a) the Construction Programme;
 - (b) applicable laws, including the Consents;
 - (c) any conditions stipulated in the Seller Approvals which relate to the construction of the Facility; and
 - (d) the standards of a Reasonable and Prudent Operator.
- 4.2.2 The Seller shall provide or procure all plant, equipment, machinery consumables, parts, materials and services whatsoever required for the Construction of the Facility in accordance with the standards set out in this Clause 4.2 (*General Construction obligations*).

4.3 Use of Contractors and Subcontractors

- 4.3.1 Without limiting the Seller's liability or obligations under this Agreement, the Seller may engage Contractors and Subcontractors to perform any of its obligations under this Agreement. Any Contractors and Subcontractors engaged by the Seller to perform any portion of the Seller's obligations under this Agreement shall have all licences and registrations required to perform the services to be performed by such Subcontractor, must maintain insurance as required pursuant to Clause 22 (*Project Insurance*) and shall perform any work in accordance with applicable industry standards.
- 4.3.2 In exercising its right under this Clause 4.3 to engage Contractors and Subcontractors, the Seller shall, in accordance with its economic development obligations as stated in the award letter set forth in Schedule 12 (*Economic Development Objectives*) undertake prior consultations with the Buffalo City Development Agency

4.4 Buyer Inspection Visits

- 4.4.1 The Buyer shall have the right, on a recurring basis and upon not less than forty-eight (48) hours' prior written notice to the Seller to designate not more than two (2) of the Buyer's officers, employees, and representatives to visit the construction site at reasonable times for the purposes of viewing the Facility and verifying the Seller's compliance with the Construction Programme.
- 4.4.2 The Seller shall comply with all reasonable requests of the Buyer for, and assist in arranging, any such observation visits.
- 4.4.3 All persons visiting the Facility or the Site on behalf of the Buyer shall comply with the Seller's and its Contractors' generally applicable safety regulations, standards and procedures made available to such persons, shall comply with the reasonable instructions and directions of the Seller and its Contractors, and shall not interfere with or disrupt the activities of the Seller or its Contractors on the Site, including the Construction and Operation of the Facility.

4.5 Progress Reports

No later than 30 (thirty) days after the expiry of each calendar quarter in the Construction Period, the Seller shall deliver to the Buyer a written report setting out the construction activities undertaken in the preceding period as well as the overall progress in the construction of the Facility with reference to all the milestones.

4.6 Commercial Operation Date

- 4.6.1 Subject to any extension which may be granted in terms of this Agreement, the Seller shall use all commercially reasonable efforts to achieve the Commercial Operation Date by the Scheduled COD.
- 4.6.2 If the Seller becomes aware that, for any reason, the Commercial Operation date will not be achieved by the Scheduled COD, the Seller shall, without any unreasonable delay, notify the Buyer in writing of that fact and the measures that it ((acting as a Reasonable and Prudent Operator) will take to mitigate such delay and of the impact of such measures on its ability to achieve the Scheduled COD, upon implementing such measures.

5. TESTING AND COMMISSIONING

5.1 Connection to the System

- 5.1.1 The Seller warrants that it has obtained one Connection Authorisation with the Buyer and intends to enter into a further Connection Agreement with Eskom, in the Agreed Form, on or before the Signature Date.
- 5.1.2 The Seller shall give the Buyer at least sixty (60) days' advance written notice of the date on which it anticipates it shall require, in terms of the Connection Agreements, the Facility to be connected to the System.
- 5.1.3 The Parties acknowledge that it is intended, in the Connection Agreements, that:
 - (a) the Distributor shall Construct or procure the Construction of the Connection Works on the grids side of metering point. The Distributor will own and operate the network; and

- (b) the Seller shall Construct the Facility Connection Works to connect the Facility with or to the System and will be responsible for constructing connection works to the metering point.

5.2 Independent Engineer

- 5.2.1 The Parties have, in Schedule 8 (*List of Firms – Independent Engineer*), identified up to five (5) firms of independent consulting engineer, every one of which they approve to be appointed as the Independent Engineer for the purposes of this Agreement, and every one of which the Seller warrants:
 - (a) has at least seven (10) years professional experience as an engineer in the renewable energy industry; and
 - (b) as at the Signature Date, has not rendered services to the Seller, any of its shareholders (direct or indirect), Contractors or Lenders or any Affiliate of any of them in respect of the Project.
- 5.2.2 The Seller shall, as soon as practically possible, but in any event within twenty (20) Business Days of the Signature Date, engage with any (or all) of such firms with a view to one (1) of them being appointed as the Independent Engineer on terms substantially similar to the terms contained in the agreement set out in Schedule 9 (*Independent Engineer Agreement*).
- 5.2.3 The Seller shall keep the Buyer regularly informed of the Seller's progress towards the appointment of the Independent Engineer, and shall be responsible for arranging for the signing of the agreement when it contains all the terms and conditions that have been agreed between the Seller, the Buyer and the Independent Engineer for the appointment; and the Seller and the Buyer undertake to sign such agreement at such time.
- 5.2.4 The Independent Engineer shall be appointed at the sole cost and expense of the Seller, but shall act on behalf of, and owe a duty of care to, both the Buyer and Seller equally.
- 5.2.5 Neither Party shall without the prior written consent of the other Party (such consent not to be unreasonably withheld) at any point during the Term:
 - (a) terminate or seek to amend materially the contract with the Independent Engineer; or
 - (b) appoint any other person to be the Independent Engineer. Any person appointed to replace the existing Independent Engineer, as Independent Engineer, shall be one of the other firms listed in Schedule 8 (*List of Firms – Independent Engineer*) or as agreed between the Buyer and the Seller.
- 5.2.6 If, after the Signature Date, the Independent Engineer renders services to the Seller (other than in terms of the Independent Engineer Agreement), any of its shareholders (direct or indirect), Contractors or Lenders or any Affiliate of any of them in respect of the Project, the Seller shall be obliged to notify the Buyer of this occurrence promptly on becoming aware of same and, if the Buyer so elects, the Seller shall terminate the contract with the appointed Engineer.

- 5.2.7 If the contract with the Independent Engineer is terminated at any point during the Term, a new Independent Engineer shall be appointed in accordance with this Clause 5.2 (*Independent Engineer*) from one of the firms listed in Schedule 8 (*List of Firms – Independent Engineer*) or as agreed between the Buyer and the Seller, both acting reasonably, on terms substantially similar to the terms contained in the agreement set out in Schedule 9 (*Independent Engineer Agreement*).

5.3 Facility completion and commissioning

- 5.3.1 The Seller shall use all reasonable efforts to commission the Facility and to procure the issuance of the Facility Completion Form by the Independent Engineer, at its own cost and in each case in accordance with this Clause 5.3 (*Facility Completion and Commissioning*), Schedule 2 Part 1 and 2 (*Completion Milestones and Forms of Notices*), the Codes, the Transmission Agreement or the Distribution Agreement (as the case may be) and the standards of a Reasonable and Prudent Operator, so as to cause the Commercial Operation Date to fall on or before the Scheduled COD.
- 5.3.2 The Seller may, but shall not be obliged to, procure the issue of the Facility Completion Form where the resulting Achieved Capacity would be expected to be less than the Contracted Capacity. However, the Seller shall be obliged to procure the issue of the Facility Completion Form in respect of the Facility (regardless of Capacity) in order, inter alia, to achieve the Commercial Operation Date in accordance with Clause 5.5 (*Commercial Operation Date*).
- 5.3.3 The Seller shall provide the Buyer on a Monthly basis with relevant information regarding the testing and commissioning undertaken pursuant to Clause 5.3.1.

5.4 Early Operating Period

- 5.4.1 The Seller may procure the issue of the Unit Completion Form by the Independent Engineer, at its own cost and in each case in accordance with this Clause 5.4 (*Early Operating Period*), in respect of each Unit (if applicable) which the Seller anticipates will generate and deliver Early Operating Energy to the Delivery Point, which notice shall be in the form of Schedule 2 Part 2 (*Unit Completion Form*).
- 5.4.2 Pursuant to Clause 5.4.1 and upon the Independent Engineer determining Unit Completion and receipt of the relevant Unit Completion Form, the Seller may in respect of such Unit issue the Notice of Commencement of Unit to the Buyer at least ten (10) Business Days before the Seller anticipates that the relevant Unit or Units will begin generation and delivery of early Operating Energy to the Delivery Point, which notice shall be in the form of Schedule 2 Part 4 (*Form of Notice of Commencement of Unit*).
- 5.4.3 Until 00:00 hours on the Unit Commencement Date in respect of a Unit, the Buyer shall not be obliged to purchase Early Operating Energy generated by that Unit or to pay the Early Operating Energy Price in respect of any Early Operating Energy generated by that Unit.

5.5 Commercial Operation Date

- 5.5.1 The Seller shall give the Buyer no less than sixty (60) days' prior written notice of its intention to issue the Notice of Commencement of Facility in the form of Schedule 2 Part 5 (*Form of Notice of Commencement of Facility*).
- 5.5.2 The Seller may not issue the Notice of Commencement of facility:
- (a) earlier than the day before the Scheduled COD;
 - (b) until the Seller has demonstrated to the Independent Engineer that the Facility is compliant with the Codes;
 - (c) until Seller has obtained written confirmation from the Independent Engineer that the Facility complies with the Codes;
 - (d) until NERSA, or any person nominated by NERSA for such purpose, has issued to the Seller a notification of the Facility's compliance with the Codes; and
 - (e) until the Distributor has provided written confirmation to the Seller certifying that the Facility may be connected to the System for the purposes of delivering Commercial Energy.
- 5.5.3 Following compliance with Clause 5.5.1 and Clause 5.5.2 and upon the Independent Engineer ascertaining the Facility Completion and receipt of the relevant Facility Completion Form pursuant to Clause 5.3 (*Facility Completion and Commissioning*), the Seller shall issue the Notice of Commencement of Facility to the Buyer within two (2) Business Days of the delivery of the relevant Facility Completion Form, which notice shall be in the form of Schedule 2 Part 5 (*Notice of Commencement of Facility*).
- 5.5.4 If the Facility has achieved Facility Completion in terms of Clause 5.3 (*Facility Completion and Commissioning*) and the Achieved Capacity is equal to or greater than the Contracted Capacity, then:
- (a) for the purposes of this Agreement, the power output of the Facility shall be limited to the Contracted Capacity, and only Energy Output that is generated from the Contracted capacity shall be subject to this Agreement;
 - (b) the Seller shall deliver to the Buyer a Notice of Commencement of Facility, following which the Commercial Operation Date will be the first day starting at 00:00 hours following the day upon which the Buyer receives from the Seller such Notice of Commencement of Facility; and
 - (c) the Seller shall not be entitled to increase the installed Capacity of the Facility beyond the Contracted Capacity installed at the Commercial Operation date at any time in the future.

5.6 Delays in achieving the Commercial Operation Date

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

5.7 Last COD

- 5.7.1 The Seller shall be entitled to declare the Commercial Operation Date for the Facility at any time up to 17:00 hours on the Last COD in respect of that Achieved Capacity for which the Independent Engineer has completed the Facility Completion Form by no later than 17:00 hours on the Last COD and, if the Seller does so and the Achieved Capacity is greater than the Minimum Acceptance Capacity, the Buyer shall not be entitled to call a Seller default in terms of Clause 21.3 (*Seller Events of Default*).
- 5.7.2 If the Commercial Operation Date is not achieved by the Last COD, then the Buyer shall be entitled to terminate this Agreement in accordance with Clause 21.3 (*Seller Events of Default*).

5.8 Reduction in Contracted Capacity

If the Achieved Capacity on the Commercial Operation Date is less than the Contracted Capacity but greater than the Minimum Acceptance Capacity, then, on and from the Commercial Operation Date, the Contracted Capacity shall be reduced to the Achieved Capacity of the Facility as at the Commercial Operation Date, Schedule 1 (*Details of the Project and Facility*) shall be amended accordingly, and for the purposes of this Agreement, the power output of the Facility shall be limited to the amended Contracted Capacity, and only Energy Output that is generated from the amended Contracted Capacity shall be subject to this Agreement. The Seller shall not be entitled to increase the installed Capacity of the Facility beyond the Capacity installed at the Commercial Operation Date, at any time in the future.

5.9 Coordination with Distributors and the NTC

- 5.9.1 In addition to complying with the other requirements of this Clause 5 (*Testing and Commissioning*), the Seller shall:
- (a) provide the Buyer (as Distributor) with such information as may be necessary under Law or the Codes, or usual in terms of the practices of a Reasonable and Prudent Operator in respect thereof; and
 - (b) discuss and coordinate with any relevant Competent Authority or the Distributor, the actions contemplated in this Clause 5 (*Testing and Commissioning*) and shall additionally comply with such reasonable requests and instructions that are in accordance with the Codes and the practices of a Reasonable and Prudent Operator, as may be received from the Buyer from time to time.
- 5.9.2 To the extent that the Facility is connected with or shall be connected with such part of the System as is owned, operated or administered by Eskom, in addition to complying with the other requirements of this Clause 5 (*Testing and Commissioning*), the Parties shall:
- (a) provide Eskom with such information as may be necessary under Law or the Codes, or usual in terms of the practices of a Reasonable and Prudent Operator in respect thereof; and

- (b) collectively discuss and coordinate with any relevant Competent Authority or Eskom (as the case may be), the actions contemplated in this Clause 5 (*Testing and Commissioning*) and shall additionally comply with such reasonable requests and instructions that are in accordance with the Codes and the practices of a Reasonable and Prudent Operator, as may be received from Eskom from time to time.

6. SALE OF ENERGY OUTPUT

6.1 Sale of Energy Output

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

- 6.1.1 the Seller shall sell all the Early Operating Energy and Commercial Energy generated by a Unit or the Facility (as the case may be) to the Buyer at the Delivery Point, on a self-despatch basis, and subject only to the Codes and the standards of a Reasonable and Prudent Operator;
- 6.1.2 the Buyer shall pay the Early Operating Energy Payment for the Early Operating Energy and the Commercial Energy Payment for the Commercial Energy, delivered by the Seller to the Delivery Point;
- 6.1.3 the Buyer (in its capacity as system operator) or Eskom (as the case may be) shall ensure that the System is subject to the relevant Codes and the applicable Connection Agreement, in such a way that the Facility can self-despatch. The operation of the System by the System Operator or the Eskom (as the case may be) in a manner not required or permitted by the relevant Codes and/or the relevant Connection Agreement shall be dealt with as a Curtailment in terms of Clause 15 (*Consequences of a System Event*) to the extent that the Facility is prevented or hindered from being self-despatched, unless this is caused by any natural force or event or an act or omission of the Seller or a Contractor; and
- 6.1.4 Subject to Clause 15 (*Consequences of a System Event*) and Clause 16 (*Consequences of a Compensation Event*), the Buyer (in its capacity as system operator) shall pay the Deemed Energy Payment that is payable in respect of the Deemed Energy in accordance with Schedule 7 (*Deemed Energy Payment*).
- 6.1.5 The Seller shall be responsible for the costs of all infrastructure to connect the generation plant to the distribution network up to the metering point of the Buyer.

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 Output*) shall pass to the Buyer at the Delivery Point.

7. GENERATION FORECASTS

7.1 Monthly generation forecast

- 7.1.1 The Seller shall provide the Buyer in writing for each week in the Early Operating Period and the Operating Period (save during Scheduled Outages), by no later than 09:00 hours on the 25th of the preceding Month, the Seller's estimate made

in good faith of the forecast level of Net Energy Output expected to be generated by the Facility for each day in the Month, which shall generally be in the form of Schedule 5 (*Forecast Information*) ("**Monthly Forecast Generation Profile**").

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

7.2 Weekly generation forecast

- 7.2.1 The Seller shall provide the Buyer in writing for each Week in the Early Operating Period and the Operating Period (save during Scheduled Outages), by no later than 09:00 hours on the preceding Friday, the Seller's estimate made in good faith of the forecast level of Net Energy Output expected to be generated by the Facility for each day in the Week, which shall generally be in the form of Schedule 5 (*Forecast Information*) ("**Weekly Forecast Generation Profile**").

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

8. TARIFF AND OTHER CHARGES

8.1 Early Operating Energy Payments

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

- 8.1.2 The Early Operating Energy Price shall be R1,02 (excluding VAT) for each kWh measured at the PUC and delivered to the Delivery Point.

8.2 Commercial Energy Payments

- 8.2.1 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 after the Commercial Operation Date at the Commercial Energy Tariff.

- 8.2.2 The Commercial Energy Price during the first year of the Operating Period shall be R1,02 (excluding VAT) for each kWh measured at the PUC and delivered to the Delivery Point.

8.2.3 The price paid by the Buyer for the Commercial Energy shall escalate annually on the anniversary of the Commercial Operation Date. Such escalation shall be calculated in accordance with the Consumer Price Index as set forth in Schedule 1 Part 3 (*Energy Rates and Indexation*) or, in the event that the Consumer Price Index becomes unavailable or is discontinued or is re-based, re-weighted or re-classified, in accordance with such other index or rate as the Parties shall agree.

8.3 Deemed Energy Payments

The Buyer shall pay to the Seller the Deemed Energy Payment for all Deemed Energy accruing in each Billing Period calculated in terms of Clause 15 (*Consequences of a System Event*), Clause 16 (*Consequences of a Compensation Event*) and Schedule 7 (*Deemed Energy Payment*).

8.4 Use of System Charges

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

8.5 Failure to make Payments

8.5.1 If any payment that is due and payable is not paid by the Due Date, interest shall accrue on the full amount due and payable, at the Agreed Interest Rate calculated from the Due Date to, but excluding, the date of payment.

8.5.2 If the Buyer fails to pay any amount or amounts that are due and payable by the Buyer under this Agreement, within five (5) Business Days of the Due Date for payment, the Seller may serve notice on the Buyer of such failure and specifying details thereof. If such failure has not been remedied or rectified within ten (10) Business Days of such notice, the Seller may call a Compensation Event and rely on and enforce this Agreement, all in terms of Clause 16 (*Consequences of a Compensation Event*).

9 INVOICING

9.1 Early Operating Period and Operating Period Invoices

9.1.1 The Seller shall, within two (2) Business Days of the end of a Billing Period, submit to the Buyer for that Billing Period an Invoice specifying.

(a) The Early Operating and/or Commercial Energy Payment (as the case may be) due to the Seller for such Billing Period setting out the calculations upon which such Early Operating Energy or Commercial Energy Payment is based;

- (b) the Deemed Energy Payments (if any) due to the Seller for such Billing Period, including:
 - (i) the periods for which the Deemed Energy Payments are payable;
 - (ii) the calculations upon which such Deemed Energy Payments are based;
 - (iii) the circumstances which entitle the Seller to such Deemed Energy Payments; and
 - (iv) written confirmation of the Independent Engineer where required in terms of Schedule 7 (*Deemed Energy Payment*)
- (c) any amounts owed by the Seller to the Buyer (or vice versa).

9.1.2 Subject to Clause 11.7 (*Readings and inaccuracy*), the Seller shall prepare the invoice for the Billing Period based on the billing data obtained by it from the Facility Metering Installation for that Billing Period.

9.2 Supplementary invoices

9.2.1 During the Term the Seller may submit to the Buyer, after the COD, within ten (10) days of the end of a Billing Period, a tax invoice/s for any sums payable by the Buyer to the Seller for all or any amounts due in terms of this Agreement other than in respect of those amounts payable by the Seller in terms of Clause 9.1 above.

9.3 General provisions regarding 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 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 8.5.1, the Party who received the Invoice shall pay to the other Party (who issued the Invoice) the amount of each Invoice within thirty (30) days of receipt of such Invoice (the "**Due Date**").
- 9.3.4 All payments due by either Party to the other under this Agreement shall be made:
 - (a) in South African Rand in immediately available funds to such bank account in South Africa as the recipient Party shall from time to time nominate; and

- (b) 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 sufficient details of the basis of the dispute to enable the receiving Party to identify the nature of the dispute.
- 9.4.2 The Parties shall 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 Facility Metering Installation, the Buyer shall be entitled at its own cost to request a test of the Facility Metering Installation in accordance with Clause 11.6 (*Testing and inspection*).
- 9.4.3 If it is agreed or determined (including as a result of a test of the facility Metering Installation pursuant to Clause 11.6 (*Testing and inspection*)) that all or part of a disputed amount which was paid should not have been paid, then the amount of such overpayment shall be refunded within five (5) Business Days of such agreement or determination, together with interest at the Agreed Interest Rate from the date of such overpayment to, but excluding, the date of repayment.
- 9.4.4 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, the matter shall be dealt with in accordance with Clause 25 (*Dispute Resolution*). The adjudicating Independent expert shall use the latest data and records and test certificates for the metering.

10. EMISSION CREDITS

- 10.1 The Parties acknowledge that the Facility has the potential to produce substantial Carbon and other Emissions Credits and related emissions reduction credits or benefits (economic or otherwise) in relation to the generation of energy after the Commercial Operations Date for the first Unit in time that is commissioned. The Parties agree that the Seller shall own and be entitled to claim any and all such fungible (tradable) Emissions Credits or benefits to the extent that such credits or benefits may be available in relation to the Facility or Units comprised in it during the Term of this Agreement and shall have the right to market them for the exclusive benefit of the Seller.
- 10.2 The Parties agree that the Buyer shall have no rights or obligations in respect of any Emission Credits relating to this Agreement or the benefits and title to any Emissions Credits received by the Seller.

- 10.2 Subject to Clause 10.2 above, the Buyer shall use reasonable endeavours to issue or execute any documents (at the Seller's cost) which may be necessary in order for the Seller to exercise its rights and obligations in connection with Emission Credits obtained by the Facility.

11. METERING

11.1 Metering agents

The Buyer may, by written notification to the Seller and subject to the Seller's approval (not to be unreasonably withheld or delayed), appoint a third party to act as a metering agent and to perform and fulfil the Buyer's rights and obligations pursuant to this Clause 11 (*Metering*), provided that should the Buyer appoint such a metering agent, the Buyer shall nonetheless remain liable to the Seller under this Agreement for any breach or failure to perform by the metering agent.

11.2 Facility Metering Installation

- 11.2.1 The Seller shall, acting as a Reasonable and Prudent Operator, procure, install, test, commission, Operate and Maintain the Facility Metering Installation at the Delivery Point, at its sole cost.
- 11.2.2 The Facility Metering Installation shall be used for invoicing purposes as provided herein.

11.3 System Metering Installation

- 11.3.1 The Buyer shall procure, install, test, commission, Operate and Maintain a System Metering Installation adjacent to the Facility Metering Installation at the Delivery Point at its sole cost, in accordance with the Connection Agreements.
- 11.3.2 The purpose of the System Metering Installation shall be to provide data for comparison purposes as against the data to be provided by the Facility Metering Installation.

11.4 Capabilities of Meters

- 11.4.1 The Facility Metering Installation and the System Metering Installation shall be capable of measuring and recording the following parameters for various time and frequency blocks in accordance with applicable Laws and the Codes:
- (a) active Energy Output and Reactive Energy Output;
 - (b) instantaneous voltage, current and power factor;
 - (c) frequency;
 - (d) maximum demand in MVA/MW for each demand period and for the total period since the last reset;
 - (e) MWh/MVARh since last reading;
 - (f) real time and time of day metering; and

(g) number of resets.

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

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

11.5 Sealing

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

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

11.6 Testing and Inspection

11.6.1 Subject to Clauses 11.6.2 and 11.6.5, the Buyer may request a test of the Facility Unit Metering Installation and the Seller may request a test of the System Metering Installation, by notice in writing to the other Party.

11.6.2 The Facility Metering Installation and the System Metering Installation shall be tested by a Metering Certifier as often as the Party responsible for such meter deems necessary, but in any event within thirty (30) days of receipt of written request for such test pursuant to Clause 11.6.1.

11.6.3 Save on reasonable grounds, including a suspected inaccuracy determined pursuant to Clause 11.6.4, the Buyer shall not be entitled to call for more than one (1) test of the Facility Metering Installation in any period of twelve (12) Months, and the Seller shall not be entitled to call for more than one (1) test of the System Metering Installation in any period of twelve (12) Months.

11.6.4 Without limiting Clause 11.6.1, if readings taken from the Facility Metering Installation and the System Metering Installation are significantly different from one another and/or demonstrate a level of inaccuracy falling outside the particular standard and specification used for the relevant meter, or are beyond a tolerance level of \pm zero point five per cent (0.5%), whichever is the lesser, then the Facility Metering Installation and the System Metering Installation shall both be tested.

11.6.5 The Parties shall provide each other with not less than seven (7) days' prior written notice of any test to be held pursuant to this Clause 11.6 (*Testing and*

Inspection), which shall be held between 09:00 and 16:00 hours on any Business Day. Both Parties shall have the right to be represented at the conduct of any such test by representatives of each Party.

- 11.6.6 The Parties shall promptly provide each other with copies of test and calibration reports, including all supporting metering data and records, if so requested in writing by the other Party. The Parties shall answer any questions as regards the test report promptly and in full.
- 11.6.7 The Facility Metering Installation and the System Metering Installation shall be treated as working satisfactorily so long as the errors are within the limits prescribed for meters of the particular standard and specification used, or are within a tolerance level of \pm zero point five per cent (0.5%), whichever is the lesser. If, as a result of a test conducted pursuant to this Clause 11.6 (*Testing and Inspection*), the measure of error is found to be outside this maximum tolerance, then the Facility Metering Installation and/or the System Metering Installation, as the case may be, shall be recalibrated as soon as practicable and in any event within two (2) days of the relevant meter owner being notified of such event, at the expense of the Party responsible for the non-compliant meter, and the provisions of Clause 11.7 shall apply in respect of any data retrieved from such non-compliant meter and used for billing purposes prior to the relevant meter test.
- 11.6.8 If any related monitoring equipment or associated circuits are found not to comply with the requirements of the relevant standards as set out in applicable Law and the Codes, they shall be repaired or replaced at the expense of the Party which owns them as soon as practicably possible.

11.7 Readings and Inaccuracy

- 11.7.1 The meters shall be read by the Parties jointly for the purposes of billing on the last business day of each Billing Period at 24:00 or such other time on that day as may be agreed between them in writing, and the reading suitably recorded in writing.
- 11.7.2 Should the Facility Metering Installation fail to register or, upon testing pursuant to Clause 11.6 (*Testing and inspection*), be found to have a level of inaccuracy falling outside the maximum tolerance level specified in Clause 11.6.7, then the Facility Metering Installation shall be recalibrated in accordance with Clause 11.6.7 and the Energy Output from the Facility shall, for the period referred to in Clause 11.7.4, be measured on the basis of the readings registered by the System Metering Installation.
- 11.7.3 Should both the System Metering Installation and the Facility Metering Installation fail to register or, upon testing, found to have a level of inaccuracy falling outside the maximum tolerance level specified in Clause 11.6.7, then each of the System Metering Installation and the Facility Metering Installation shall be recalibrated in accordance with Clause 11.6.7 and the Energy Output from the Facility shall for the period referred to in Clause 11.7.4, be calculated on the basis of such correction procedure as the Parties may agree (using such data as permitted by the relevant Code, including estimated data prepared in

accordance with the relevant Code, and in the absence of agreement shall be referred for determination in accordance with Clause 25.3 (*Referral to an Expert*).

- 11.7.4 The period referred to in Clauses 11.7.2 and 11.7.3 shall be:
- (a) the actual period during which inaccurate measurements were made, if such period can be determined from the logged readings;
 - (b) if not determinable from the logged readings, the period immediately preceding the test of the Facility Metering Installation equal to one half of the time from the date of the last previous test of the Facility Metering Installation; or
 - (c) in the case of Clause 11.7.3, from the date of the last previous test of the System Metering Installation or Facility Metering Installation, whichever was most recently tested (with the remaining period being calculated on the basis of the measurements as actually recorded by the System Metering Installation, or the Facility Metering Installation.

11.8 Miscellaneous

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

12. INTERRUPTION OF SERVICE AND OUTAGES

12.1 Interruptions

- 12.1.1 The Buyer acknowledges and understands that solar power is an intermittent resource and that the Output of the Facility, which is dependent on the sun and other factors, will constantly vary and that no particular amount of Output is guaranteed in amount or time of delivery.
- 12.1.2 Notwithstanding anything to the contrary herein, the Seller shall have the right to interrupt, reduce or discontinue the delivery of Output for purposes of inspecting, maintaining, repairing, replacing, constructing, installing, removing, or altering the equipment used for the production or delivery of Output, or at the direction of a Competent Authority or electric utilities. Other than unexpected interruptions or emergencies, the Seller shall give the Buyer notice as set out in Clause 12.4.1 and Schedule 4 (*Scheduled and Unscheduled Outages*) and an estimate of the expected duration of the interruption. Both the Seller and the

Buyer shall use commercially reasonable efforts to minimize any such interruption or disruption in delivery.

12.2 Repair and Maintenance

The Seller shall use commercially reasonable efforts to maintain the Facility in good working order, ordinary wear and tear excepted, and shall operate the Facility in accordance with all applicable Laws, regulations and the Code and in accordance with the standards of a Reasonable and Prudent Operator.

12.3 Scheduled Outages

12.3.1 The Seller shall comply with the requirements of Schedule 4 (*Scheduled and Unscheduled Outages*) in relation to Scheduled Outages.

12.3.2 Subject to Clause 12.3.1, the Seller shall be entitled to remove the Facility from service during the period of the Scheduled Outage to carry out its planned Maintenance.

12.3.3 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.

12.4 Unscheduled Outages

12.4.1 In case of an Unscheduled Outage due to failure of any part of the equipment forming part of the Facility, the Seller shall inform the Buyer within 4 (four) hours from the commencement of the Unscheduled Outage of the time period that the Facility is expected to be unavailable, if that time period extends or is expected to extend for the period from 00:00 to 24:00 of any given day. Unscheduled Outages that are expected to extend for less than the 24 (twenty four) hour period from 00:00 to 24:00 of any given day do not need to be reported to the Buyer in Terms of this Clause.

12.4.2 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.

13. REPORTS, RECORDS, PLANS AND MONITORING

13.1 Reports

Subject to the terms and conditions of this Agreement, the Seller shall as soon as reasonably possible notify the Buyer if the Facility or such number of Units comprising at least ten per cent (10%) of the Contracted Capacity, as the case may be, is incapable of generating Energy for any of the following reasons (and provided that its unavailability has not already been notified as part of a Scheduled Outage or pursuant to Clause 7 (*Generation Forecasts*)):

13.1.1 for reasons of any Outages;

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

- 13.1.3 in circumstances relating to safety (of either personnel or of the Facility or apparatus); or
- 13.1.4 in circumstances where to do so would be unlawful; or
- 13.1.5 for reasons of Force Majeure, a System Event, Government Default or a Compensation Event;

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

13.2 Data and Records

The Seller shall Maintain complete and accurate data and records required to facilitate the proper administration of this Agreement and the Project at the Project Site. Such data and records shall include an accurate and up-to-date log of Operations (“**Project Data**”), updated daily, in a format reasonably acceptable to the Buyer. The Project Data should include, but not limited to, the following information, with records of:

- 13.2.1 for each ten (10) minute period in each day, the Energy Output and the Reactive Energy Output;
- 13.2.2 changes in Operating status during the day;
- 13.2.3 the number of Outages in the day, the duration of each Outage and the reason for each Outage;
- 13.2.4 all In Plane Irradiance, temperature and other climatic data recorded at the Project Site;
- 13.2.6 all estimates and other data required in terms of Clause 7 (*Generation Forecasts*) read with Schedule 5 (*Forecast Information*);
- 13.2.7 all data required in terms of Schedule 7 (*Deemed Energy Payment*);
- 13.2.8 any information required to be recorded and/or reported in terms of the Consents; and
- 13.2.9 any unusual conditions found during Maintenance inspections.

13.3 Record keeping

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

13.4 Ownership, inspection, copy and use rights

- 13.4.1 The Buyer shall have the right, upon giving a minimum of five (5) Business Days’ prior written notice to the Seller, to examine and take copies of any Project Data which it may reasonably require for the purposes of fulfilling its obligations in Terms of this Agreement at any time during normal business hours (at the Buyer’s own cost). The Buyer shall in such notice state the reasons for the

requirement of the inspection and/or copying to be undertaken in Terms of this Clause 13.4.1.

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

13.4.3 The Buyer and the Seller shall have joint ownership of the Project data for the duration of this Agreement, and upon termination of this Agreement such ownership rights will be transferred to the Buyer. The Seller shall not, by virtue of its ownership rights, have any rights to prevent the disclosure and use of the Project Data by the Buyer.

14. UTILITIES AND CONSUMABLES

14.1 Responsibility for the supply of utilities

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

14.2 Responsibility for the supply of consumables

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

15. CONSEQUENCES OF A SYSTEM EVENT

15.1 The Seller shall not be entitled to bring any claims under this Clause 15 (*Consequences of a System Event*) for Deemed Energy Payments:

15.1.1 in respect of the period prior to the Scheduled COD; or

15.1.2 if the time for which any System Event or combination of System Events has or have endured:

(a) in the period that the Commercial Operation Date is delayed beyond the Scheduled COD; or

(b) after the Commercial Operation Date, in any Contract Year,

is less than the Allowed Grid Unavailability Period for such period or Contract Year, unless such System Event or combination of System Events occurred as a result of Curtailment. The Allowed Grid Unavailability Period shall not be applicable to any System Event or combination of System Events that are caused by Curtailment.

15.2 If and to the extent that:

15.2.1 before the Commercial Operation Date, a System Event that is contemplated in paragraph (a) of the definition of System Event occurs that causes a delay in the achievement of the Commercial Operation Date beyond the Scheduled COD; and/or

15.2.2 after the Commercial Operation Date, a System Event materially adversely affects the ability of the Seller to perform any of its obligations or exercise any of its rights under this Agreement,

then the Seller shall be entitled to apply for relief from any rights of the Buyer arising under Clause 21.3 (*Seller Events of Default*) and to payment of the Deemed Energy Payment in terms of Clause 15.4.

15.3 Subject to Clause 15.1, to obtain relief and/or payment of the Deemed Energy Payment, the Seller must:

15.3.1 as soon as practicable, and in any event within one (1) day after it became aware that the System Event has occurred and:

(a) has caused or is likely to cause delay and/or materially adversely affect the ability of the Seller to perform its obligations or exercise its rights; or

(b) entitles the Seller to claim a Deemed Energy Payment,

give to the Buyer a notice of its claim for relief from its obligations under this Agreement and for the Deemed Energy Payment, including full details of the nature of the System Event, the date of occurrence and its likely duration (if known);

15.3.2 within four (4) business days of the Seller giving the notice referred to in Clause 15.3.1, give full details of the System Event and of the Deemed Energy Payment and/or relief claimed; and

15.3.3 demonstrate to the reasonable satisfaction of the Buyer that:

(a) 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;

(b) the System Event directly caused the delay beyond the Scheduled COD in the circumstances contemplated in Clause 15.2.1, or there is a need for relief from other obligations under this Agreement;

(c) the Facility would otherwise have been available and able to generate and deliver Energy Output but for the System Event;

(d) the Deemed Energy Payment and/or relief from the obligations under this Agreement claimed could not reasonably be expected to be mitigated or recovered by the affected Party acting in accordance with the standards of a Reasonable and Prudent Operator, without incurring material expenditure; and

(e) the Seller is using reasonable efforts to perform its obligations under this Agreement.

15.4 If the Seller has complied with its obligations under Clause 15.3 above, then:

15.4.1 If the System Event occurs in the circumstances contemplated in Clause 15.2.1, then:

- (a) the Scheduled COD shall remain unchanged, the Expiry Date shall continue to occur twenty (20) years after Scheduled COD, and the Operating Period shall continue to commence on the later of the unchanged Scheduled COD and the Commercial Operation Date, but the Last COD shall be postponed by one (1) day for every day by which the Commercial Operation Date is delayed by the System Event in terms of Clause 15.2.1;
- (b) subject to Clause 15.1, the Seller shall be entitled to receive the Deemed Energy Payment for the period by which the Commercial Operation Date has been delayed by the System Event, as agreed between the Parties or decided pursuant to Clause 25 (*Dispute Resolution*), subject to any adjustments that may be effected in terms of paragraph 5 (*Adjustment of Deemed Energy Payments*) of Schedule 7 (*Deemed Energy Payment*); and/or
- (c) the Buyer shall not be entitled to exercise its rights to terminate this Agreement under Clause 21.3 (*Seller Events of Default*) for the failure of the Seller to achieve the Commercial Operation Date by the original Last COD as a result of such System Event; or

15.4.2 if the System Event occurs after the Commercial Operation Date, then:

- (a) subject to Clause 15.1, the Seller shall be entitled to receive the Deemed Energy Payment for the period that the System Event continues, as agreed between the Parties or decided pursuant to Clause 25 (*Dispute Resolution*), subject to any adjustments that may be effected in terms of paragraph 5 (*Adjustment of Deemed Energy Payments*) of Schedule 7 (*Deemed Energy Payment*); and/or
- (b) the Buyer shall not be entitled to exercise its rights to terminate this Agreement under Clause 21.3 (*Seller Events of Default*) for the failure of the Seller to comply with any provision of this Agreement as a result of such System Event.

15.5 If information required by Clause 15.3 above is provided after the dates referred to in that Clause, then the Seller shall not be entitled to any relief or the Deemed Energy Payment during the period for which the information is delayed.

15.6 the Seller shall notify the Buyer if, at any time, it receives or becomes aware of any further information relating to the System Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.

15.7 If the Parties cannot agree on the extent of the relief required, or the Buyer disagrees that a System Event has occurred or that the Seller is entitled to any extension of the Last COD and/or to any Deemed Energy Payment, and/or relief from other obligations under this Agreement, the matter shall be dealt with in accordance with Clause 25 (*Dispute Resolution*).

16. CONSEQUENCES OF A COMPENSATION EVENT

- 16.1 If, as a direct result of the occurrence of a Compensation Event:
- 16.1.1 the Seller is unable to achieve the Commercial Operation Date by the Scheduled COD;
 - 16.1.2 the Seller is unable to comply with its obligations under this Agreement; and/or
 - 16.1.3 the Seller incurs costs or loses revenue,
- then the Seller is entitled to apply for relief from its obligations under this Agreement, from any rights of the Buyer arising under Clause 21.3 (*Seller Events of Default*), to claim compensation under this Agreement and/or, if the Compensation Event is the failure of the Buyer to make due payment as detailed in Clause 8 (*Tariff and Other Charges*), enforce this Agreement.
- 16.2 To obtain relief and/or claim compensation, the Seller must:
- 16.2.1 as soon as practicable, and in any event within five (5) days after it became aware that the Compensation Event has caused or is likely to cause delay, breach of an obligation under this Agreement, the Seller to incur costs or lose revenue and/or enforce this Agreement [the Implementation Agreement], give to the Buyer a notice of its claim for postponement of the Last COD, payment of compensation, relief from its obligations under this Agreement and/or bring a claim under this Agreement [the Implementation Agreement];
 - 16.2.2 within ten (10) days of receipt by the Buyer of the notice referred to in Clause 16.2.1 above, give the Buyer full details of the Compensation Event and the extension of time and/or any estimated change in project costs claimed, the loss of revenue claimed and/or the amount which may be claimed under this Agreement [the Implementation Agreement]; and
 - 16.2.3 demonstrate to the reasonable satisfaction of the Buyer that:
 - (a) the Compensation Event was the direct cause of the estimated change in project costs, the loss of revenue claimed and/or any delay in the achievement of the Commercial Operation Date by the Scheduled COD; and
 - (b) the estimated change in project costs, the loss of revenue claimed, time lost, and/or relief from the obligations under the Agreement claimed, could not reasonably be expected to be mitigated or recovered by the Seller acting in accordance with the standards of a Reasonable and Prudent Operator.
- 16.3 If the Seller has complied with its obligations under Clause 16.2, then:
- 16.3.1 the Scheduled COD shall remain unchanged, the Expiry Date shall continue to occur twenty (20) years after Scheduled COD and the Operating Period shall continue to commence on the later of the unchanged Scheduled COD and the Commercial Operation Date, but the Last COD shall be postponed by such time as shall be reasonable for such a Compensation Event, taking into account the likely effect of the delay;
 - 16.3.2 in the case of an additional cost being incurred by the Seller:

- (a) on or before the Commercial Operation Date; or
 - (b) as a result of Capital Expenditure being incurred by the Seller at any time, the Buyer shall have the option to compensate the Seller for the actual estimated change in project costs as adjusted to reflect the actual costs reasonably incurred either:
 - (i) in one lump-sum payment, payable within ninety (90) Business Days of its receipt of a written demand by the Seller supported by all relevant information; or
 - (ii) in equal monthly instalments for the remainder of the Term, commencing within ninety (90) Business Days of its receipt of a written demand by the Seller supported by all relevant information, provided that interest shall accrue on the full amount due and payable, at the Agreed Interest Rate, from the Due Date to, but excluding, the date of final payment;
- 16.3.3 in the case of a payment of compensation for the estimated change in project costs that does not result in Capital Expenditure being incurred by the Seller but which reflects a change in the costs being incurred by the Seller after the Commercial Operation Date and/or the revenue lost by the Seller, the Buyer shall compensate the Seller in accordance with Clause 16.6 by an adjustment to the Commercial Energy Payment;
- 16.3.4 the Buyer shall give the Seller such relief from its obligations under this Agreement, as is reasonable for such a Compensation Event; and/or
- 16.3.5 the Seller shall be entitled to enforce this Agreement, if the Compensation Event arises out of the failure of the Buyer to make a due payment as detailed in Clause 8.5.
- 16.4 If information is provided after the dates referred to in Clause 16.2, then the Seller shall not be entitled to any extension of time, compensation, or relief from its obligations under this Agreement in respect of the period for which the information is delayed.
- 16.5 If the Parties cannot agree on the extent of any compensation, delay incurred, or relief from the Seller's obligations under this Agreement, or the Buyer disagrees that a Compensation Event has occurred (or as to its consequences), or that the Seller is entitled to any relief under this Clause 16 (*Consequences of a Compensation Event*), the matter shall be dealt with in accordance with Clause 25 (*Dispute Resolution*).
- 16.6 Any payment of compensation for loss of revenue referred to in Clause 16.3 shall be calculated in accordance with Schedule 5 (*Deemed Energy Payment*), and shall be in addition to any other applicable compensation payable under Clause 16.3.

17. FORCE MAJEURE

17.1 Notification and obligation to remedy

- 17.1.1 In the event of the occurrence of a Force Majeure that prevents a Party from performing all or a material part of its obligations under this Agreement, such Party (the "**Affected Party**") shall:

- (a) as soon as reasonably practicable but in any event within five (5) Business Days of it becoming aware of the relevant event of Force Majeure, serve written notice on the other Party. Such initial notice shall give sufficient details to identify the particular event claimed to be an event of Force Majeure;
- (b) take all reasonable steps to mitigate the consequences of such an event upon the performance of its obligations affected by the event of Force Majeure as soon as practicable, and shall use all reasonable endeavours to remedy its failure to perform;
- (c) shall provide regular (at least monthly) progress reports to the other Party, regarding the steps taken to mitigate the consequences of such event, and their effectiveness, and shall provide such information and documentation as may reasonably be required by the other Party for the purposes of assessing the relief that is being claimed;
- (d) serve a subsequent written notice on the other Party within a further fifteen (15) Business Days which shall contain such relevant information (and which shall be supported by documentation reasonably required by the other Party for the purposes of assessing the relief that is being claimed) relating to its claim and the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the event of Force Majeure on the ability of the Party to perform, the action being taken in accordance with Clause 17.1.1(b), the date of the occurrence of the event of Force Majeure and an estimate of the period of time required to overcome it (and/or its effects);
- (e) notify the other Party as soon as the consequences of the event of Force Majeure have ceased and when performance of its affected obligations can be resumed; and
- (f) if, following the issue of any notice referred to in Clause 17.1.1(d), the Affected Party receives or becomes aware of any further information relating to the event of Force Majeure (and/or failure to perform), submit such further information to the other Party as soon as reasonably possible.

17.2 Implications of Force Majeure

- 17.2.1 The Affected Party shall, provided it has complied with its obligations under Clause 17.1.1, be relieved from liability under this Agreement to the extent that, by reason of the Force Majeure event, it is not able to perform all or a material part of its obligations under this Agreement.
- 17.2.3 If the Force Majeure event occurs prior to the Scheduled COD, the Scheduled COD shall be postponed by such time as shall be reasonable for such a Force Majeure, taking into account the likely effect of the delay. If the Force Majeure event occurs after the Scheduled COD but prior to the Commercial Operation Date, provided the last COD has not yet occurred, the Last COD shall be

postponed by such time as shall be reasonable for such a Force Majeure event, taking into account the likely effect of the delay.

- 17.2.4 The Seller's sole relief in relation to the occurrence of an event of Force Majeure shall be as provided in this Clause 17 (*Force Majeure*).
- 17.2.5 If, during any twelve (12) month period commencing on 1 April, the cumulative duration of Force Majeure events or their consequences, each of which event lasts twenty four (24) hours or longer, exceed sixty (60) or more days, the Seller shall be entitled to an extension of the Term and/or other relief from the Buyer as shall place the Seller in the same overall economic position as it would have been but for such Force Majeure event, provided that any compensation shall not take a monetary form and the total extension of the Term shall not exceed ten (10) years.

18. UNFORESEEABLE CONDUCT

- 18.1 Should any Unforeseeable Conduct occur which adversely affects the general economic position of the Seller, the Seller shall be entitled to such compensation and/or relief from the Buyer as shall place the Seller in the same overall economic position as the Seller would have been in but for such Unforeseeable Conduct.
- 18.2 Should any Unforeseeable Conduct occur which beneficially affects the general economic position of the Seller, the Seller shall pay the value of such benefit to the Buyer so that the Seller remains in the same overall economic position it would have been in had the materially beneficial Unforeseeable Conduct not occurred.
- 18.3 Neither Party shall be entitled to any relief or compensation under this Clause 18 (*Unforeseeable Conduct*) unless the economic consequences of the Unforeseeable Conduct exceed zero point five per cent (0.5%) of the sum of all Early Operating Energy Payments and Deemed Energy Payments (if any) and Commercial Energy Payments made to the Seller during the preceding twelve (12) month period.
- 18.4 The Party claiming the occurrence of the Unforeseeable Conduct ("**Claiming Party**") shall give written notice to the other Party ("**Receiving Party**") containing reasonable particulars of such conduct and its likely economic consequences to the Seller, whether adverse or beneficial.
- 18.5 Subject to Clause 18.6, the Receiving Party shall have sixty (60) Business Days from the date of receipt of such notice to effect a remedy for the Unforeseeable Conduct, which restores the general economic position of the Seller to that which it would have been in if such Unforeseeable Conduct had not occurred. If the Receiving Party does not effect such a remedy within such period, the Parties shall consult within thirty (30) Business Days after the expiration of such period with a view to reaching a mutually satisfactory resolution of the situation. If a mutually satisfactory resolution has not been reached within such thirty (30) Business Day consultation period, the matter shall be dealt with in accordance with Clause 25 (*Dispute Resolution*).

- 18.6 If the Seller is the Claiming Party, and the remedy contemplated by the Buyer under Clause 18.5 is monetary compensation, the Buyer shall have the option to compensate the Seller as a result of the Unforeseeable Conduct either:
- 18.6.1 in one lump-sum payment, payable within sixty (60) Business Days of its receipt of the notice contemplated in Clause 18.5 from the Seller; or
- 18.6.2 in equal monthly instalments for the remainder of the Term, commencing within sixty (60) Business Days of its receipt of the notice contemplated in Clause 18.5 from the Seller, provided that interest shall accrue on the full amount due and payable, at the Agreed Interest Rate, from the Due Date to, but excluding, the date of final payment.
- 18.9 In so far as the Seller is the Claiming Party, it shall use all reasonable endeavours to minimise and mitigate the effects of any Unforeseeable Conduct, including, (where practicable and possible) if the conduct relates to a change in the Codes, making application in accordance with NERSA's procedures to NERSA to be exempted from such change.

19. CHANGE IN LAW

19.1 Change in Law report

- 19.1.1 If the Seller claims the existence of a Change in Law which:
- (a) has prevented, hindered or delayed or will in the opinion of the Seller (acting reasonably) materially adversely affect the performance by the Seller of its obligations under this Agreement;
 - (b) involves additional capital expenditure equal to at least 10% (ten per cent) of the capital expenditure as originally contemplated or incurred (and notified to the Buyer as part of the Seller information) to mitigate, avoid, overcome and remove the adverse consequences of such Change in Law on its performance or to comply with the Change in Law, or involves a decrease in projected capital expenditure equal to at least 10% (ten per cent) of the capital expenditure as originally contemplated or incurred (and notified to the Buyer as part of the Seller Information); and
 - (c) will result in a change of at least 20% (twenty per cent) in the Seller's operating expenditure in order for the Seller to mitigate, avoid, overcome and remove the adverse consequences of such Change in Law on its performance or to comply with the Change in Law, or a decrease of at 20% (least twenty per cent) in the Seller's operating expenditure (as notified to the Buyer as part of the Seller Information),
 - (d) the Seller shall serve a notice on the Buyer as soon as reasonably practicable after becoming aware of the Change in Law informing the Buyer of the existence and nature of the Change in Law, together with a report (the "**Change in Law report**") detailing:

- (e) the extent to which the Seller's performance of its obligations under this Agreement has been, is being, or will be prevented, hindered or delayed as a direct result of such Change in Law;
- (f) the amount of the capital expenditure (if any) incurred or to be incurred by in accordance with the standards of a Reasonable and Prudent Operator (seeking to mitigate such expenditure) in order to mitigate, avoid, overcome and remove the adverse consequences of such Change in Law, or the quantum of decrease in projected capital expenditure;
- (g) the amount of the change (if any) in the operating costs of the Seller (acting at all times as a Reasonable and Prudent Operator and seeking to mitigate such costs as are incurred) in order to mitigate, avoid, overcome and remove the adverse consequences of such Change in Law on its performance or to comply with the Change in Law, or the decrease in the Seller's operating expenditure; and
- (h) the steps which the Seller intends to take, or will take to mitigate, avoid, overcome and remove the adverse consequences of such Change in Law, including by undertaking any works necessitated by such Change in Law during Scheduled Outages and by otherwise using all reasonable endeavours to mitigate the potential expenditure or costs resulting from such Change in Law that may be passed through to the Buyer pursuant to this Clause 19.

19.1.1 If the Buyer Claims the existence of a Change in Law which satisfies the requirements of Clause 19.3, then the Buyer may serve a notice on the Seller as soon as reasonably practicable after becoming aware of the Change in Law informing the Seller of the existence and nature of the Change in Law and requesting the Seller, who shall then be obliged to do so, to deliver (at the Buyer's cost) to the Seller a Change in Law report in respect of such Change in Law in accordance with the provisions of Clause 19.3.

19.2 Burden of proof

19.2.1 The Affected Party shall have the burden of proving the existence of any Change in Law.

19.2.2 The Seller shall also have the burden of proving the reasonableness of the steps taken by it in mitigation of the consequences of such Change in Law, and the negative effect (both as to the nature and extent) of any such Change in Law on its performance in terms of this Agreement.

19.2.3 The Buyer shall also have the burden of proving any benefit (both as to the nature and extent) of any such Change in Law it will acquire under this Agreement.

19.3 Consequences of Change in Law

Extension of time

- 19.3.1 If as a result of a Change in Law the Seller is prevented, hindered or delayed in achieving the COD by the scheduled COD and this could not be mitigated by the Seller (acting as a Reasonable and Prudent Operator), then, provided that the Seller has complied with its obligations in terms of Clause 19 the Scheduled COD shall be extended day for day by a period equal to the period that the Seller reasonably requires to comply with the Change in Law.
- 19.3.2 If a Change in Law occurs after the COD and this could not be mitigated by the Seller (acting as a Reasonable and Prudent Operator), then, provided that the Seller has complied with its obligations in the preceding provisions of Clause 19 the Seller shall not be liable for any failure to perform or delay in performance of any of its obligations under this Agreement resulting as a consequence of such Change in Law.

Adjustment of price

- 19.3.3 The Commercial Energy Price shall be adjusted so that the overall balance of rights, obligations, risks and rewards between the Parties shall remain the same in all material respects and Parties are in no better or worse position than they were in before such Change in Law.

19.4 Change in Law related disputes

If the Parties are unable to agree as to any matter related to or arising out of a Change in Law or an event which either Party alleges amounts to a Change in Law (including the existence of change of Law), within 60 (sixty) Business Days after the receipt by the Buyer of the Change in Law report, then, provided the Parties are unable to agree, then the Parties shall refer the dispute to an Expert for determination in accordance with Clause 25.4. The Expert shall have the same powers as the Expert envisaged in Clause 25.4 below to make an award with regard to the Replacement Arrangements but subject always to the limitations of the Change in Law and the proviso contained in this Clause 19.4.

20. MARKET CHANGE

- 20.1 If either Party becomes aware, at any time during the term of a Market Change, such Party shall provide written notice thereof to the other Party.
- 20.2 Following delivery of such notice, each Party shall use Reasonable Efforts to negotiate and settle, in good faith, amendments to this Agreement or a replacement to this Agreement which will come into force on the date upon which such Market Change takes effect in order that the overall balance of rights, obligations, risks and rewards between the Parties shall remain the same in all material respects and Parties are in no better or worse position than they were in before such Market Change (such arrangements being referred to as the "**Replacement Arrangements**").
- 20.3 If the Parties are unable to settle the Replacement Arrangements by the date being 90 days prior to the date on which such Market Change is to take effect (or such longer period as the Parties may agree in writing), the matter shall be referred at the request of either Party to an Expert for determination in accordance with Clause 25.4.
- 20.4 The term of the Replacement Arrangements shall commence with effect of and from the date on which the Market Change takes effect and shall continue in force until the end of

the Term provided that, pending execution of the Replacement Arrangements, the Parties shall continue to comply with the terms and conditions of this Agreement.

20.5 The proviso contained in Clause 0 shall apply equally to any replacement arrangement.

21. TERMINATION

21.1 No Termination

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

21.2 Government Default

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

21.3 Seller Events of Default

21.1.1 Subject to Clause 21.1.2 each of the following events shall be an event of default by the Seller (each, a “**Seller Event of Default**”), which, if not remedied within the time permitted (if any) under Clause 21.5, shall give rise to a right on the part of the Buyer to terminate this Agreement pursuant to Clause 21.6:

- (a) an Event of Insolvency in relation to the Seller;
- (b) the failure of the Seller to achieve the Commercial Operation date on or before the Last COD;
- (c) except for the assignment to the Lenders contemplated under Clause 24 the assignment or transfer of the Seller's rights or obligations in this Agreement or interest in the Facility to any person or any direct or indirect Change of Control of the Seller without the prior approval of the Buyer;
- (d) the merger, consolidation, amalgamation or reconstruction of Seller without the prior consent of Purchaser (such consent not to be unreasonably withheld where Seller can reasonably demonstrate that Seller (or any successor entity) shall continue to be able to meet Seller's obligations under this Agreement);
- (e) the sale by the Seller to a third party, or diversion by the Seller for any use (other than unavoidable Electrical Energy Losses and on-Site use) of Contracted Capacity or Contract Energy;
- (f) the Seller's abandonment of the Construction or Operation of the Facility;
- (g) the failure of the Seller to achieve the Last COD by the last stipulated COD date;
- (h) the Seller's persistent failure to operate, maintain, modify or repair the Facility in accordance with the standards of a Reasonable and Prudent Operator, such that the safety of persons and property, the Facility or the Buyer's service to its customers is adversely affected;

- (i) any representation or warranty made by Seller in this Agreement proving to have been false or misleading in any material respect when made or ceasing to remain true during the term of this Agreement if such cessation results in a material adverse impact on the Buyer;
- (j) termination by the Buffalo City Metropolitan Municipality of the Implementation Agreement as a consequence of the Seller's default under the Implementation Agreement;
- (k) termination of a Project Agreement, other than due to the expiry of its term, that has a material adverse impact on the Seller's ability to perform its obligations under this Agreement in the event that Seller fails to procure a substitute agreement that will enable the Seller properly to fulfil its obligations under this Agreement within 60 days (or such longer period as the Buyer may in its discretion (acting reasonably) allow) after the date of notice from the Buyer to the Seller and (if applicable) to the Lenders' representative as provided for in the Direct Agreement.
- (l) the Seller's failure to make any payment required to be made by it under this Agreement within [30] days of the relevant Due Date;
- (m) any material breach by the Seller of this Agreement, which breach has a material and adverse impact on the Buyer; or
- (n) any Environmental Failure as follows:
 - (i) where, as a result of an Environmental Failure on the part of or attributable to the Seller, a Seller Approval is withdrawn by the Competent Authority rendering it unlawful for the Seller to carry on any activity for which such activity is required;
 - (ii) where, as a result of an Environmental Failure on the part of or attributable to the Seller, a directive or order is made by any Competent Authority or any court for the cessation of any of the Seller's activities, in either case rendering it unlawful for the Seller to perform any material obligations under this Agreement; or
 - (iii) in the event of any persistent or recurring Environmental Failures over a period of at least six (6) consecutive Months, in respect of which the Seller has received a final warning to desist from a Competent Authority, with which the Seller has not complied;

21.3.2 No such event referred to in Clause 21.3.1 shall be Seller Event of Default if it substantially results from:

- (a) a breach by the Buyer of this Agreement; or
- (b) the occurrence of a Force Majeure Event where Seller has complied with Clause 17.1.1 (but only to the extent that the Force Majeure Event affects the ability of the Seller to perform its obligations under this Agreement).

21.4 Buyer Events of Default

21.4.1 Subject to Clause 21.4.2, each of the following events shall be an event of default by the Buyer (each, a “**Buyer Event of Default**”), which if not remedied within the time period permitted (if any) under Clause 21.5, shall give rise to the right of Seller to terminate this Agreement pursuant to Clause 21.6:

- (a) an Event of Insolvency in relation to the Buyer;
- (b) any default or defaults by the Buyer in paying any or all of the Payments required to be made by it in terms of this Agreement within [30] days of the relevant Due Date;
- (c) a representation or warranty made by the Buyer in this Agreement proving to have been false or misleading in any material respect when made or ceasing to remain true during the term of this Agreement if such cessation results in a material adverse impact on the Seller; or
- (d) any material breach by the Buyer of this Agreement, which breach has a material and adverse impact on the Seller.

21.4.2 No such event referred to in Clause 21.4.1 shall be a Buyer Event of Default if it substantially results from:

- (a) a breach by Seller of this Agreement or the Implementation Agreement; or
- (b) the occurrence of a Force Majeure Event where Buyer has complied with Clause 17.1.1 (but only to the extent that the Force Majeure Event affects the ability of Buyer to perform its obligations under this Agreement).

21.5 Notice and Cure

In the case of a Buyer Event of Default or a Seller Event of Default (each, an “**Event of Default**”), as the case may be, set forth in Clause 21.3 or Clause 21.4, the defaulting Party shall have forty-five (45) days to cure the Event of default, to the extent that Event of Default can be cured. If such Event of Default is incapable of being cured within that period, the defaulting Party may request from the non-defaulting Party an additional Period of fifteen (15) days to cure the Event of Default, and approval by the non-defaulting Party of such request shall not be unreasonably withheld or delayed. The defaulting Party shall furnish to the non-defaulting Party during any cure period weekly reports on its progress in curing the Event of Default.

21.6 Termination due to Event of Default

21.6.1 Should an Event of Default not be cured within the timeframe permitted pursuant to Clause 21.5, the non-defaulting Party may terminate this Agreement by serving a Termination Notice on the defaulting Party specifying a date, which shall be between 30 and 45 days after the notice thereof to the defaulting Party, upon which this Agreement shall terminate.

- 21.6.2 If the Buyer is the non-defaulting Party, it shall (if applicable) copy its termination notice to the Lenders' representative.
- 21.6.3 The exercise of the right of a Party to terminate this Agreement does not preclude such Party from exercising other remedies that are available to such Party under this Agreement or, subject to this Agreement, otherwise available at Law.
- 21.6.4 The remedies available to a Party under this Agreement or at Law are cumulative, save where this Agreement otherwise provides an exhaustive remedy, penalty or right in respect of a particular breach, and the exercise of, or failure to exercise, one or more of them by a Party shall not limit or preclude the exercise of, or constitute a waiver of, the simultaneous or later exercise of other remedies by such Party.

21.7 Rights and Obligations Upon Termination

Until the date of termination of this Agreement, as notified under Clause 21.6.1 or otherwise occurring, Seller shall be obliged to deliver Net Electrical Output in response to Purchaser's Dispatch Instructions, notwithstanding the existence of a default, event or notice that would, with the passage of time, become an Event of Default or result in termination.

22. PROJECT INSURANCE

22.1 Insurances and Information

- 22.1.1 The Seller shall, in accordance with this Clause 22 (*Project Insurance*), obtain and maintain in effect, at its own cost and expense, such insurance coverage as is required by:
- (a) any laws;
 - (b) the standards of a Reasonable and Prudent Operator; and
- 22.1.2 The Seller shall take reasonable steps to ensure that it and its Contractors obtain and maintain in effect at all times insurances as is appropriate for a reasonable and prudent contractor.
- 22.1.3 The Seller undertakes to provide the Buyer with any information the Buyer may require in order to determine the Seller's compliance or non-compliance with this Clause 22 (*Project Insurance*).

22.2 Application of insurance proceeds

Unless the Buyer (acting reasonably) otherwise agrees in writing, the Seller shall apply all proceeds of any insurance claim made due to loss or damage to the Project or any part of the Facility (other than Claims under any loss of revenue policies) towards reinstatement, reconstruction, replacement, repair or renewal of such loss or damage in the first instance.

23. INTELLECTUAL PROPERTY OF THE PARTIES

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

23.2 Neither Party shall, without the prior written consent of the other Party utilize or hold out to be the proprietor or owner of any Intellectual Property belonging to the Buyer and/or the Seller and shall not display any such Intellectual Property on their premises or otherwise utilize such Intellectual Property.

24. ASSIGNMENT

Neither Party may sell, cede, delegate, assign, transfer or otherwise dispose of (collectively "**Assign**") of all or any part of its rights and/or obligations hereunder to a third Party without the prior written approval of the other Party, save that the Seller shall be entitled, without the prior consent of the Buyer, to assign its rights hereunder to any third Party financier of the Seller that is or will be financing the Project.

25. DISPUTE RESOLUTION

25.1 Referable Disputes

The provisions of this Clause 25 (*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.

25.2 Notice of Dispute

In the event that any Dispute arises between the Parties, or this Agreement deems there to be a Dispute, the Party wishing to declare a Dispute shall deliver to the other Party a notice identifying the issue in Dispute.

25.3 Mutual Discussion

25.3.1 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:

- (a) all disputes shall first be referred to a meeting of the liaison officers or other designated executives from each Party who are actively involved in the Project, and have sufficient authority to be able (if necessary with consultation back to their respective organisations) to resolve it; and
- (b) if the Parties have been unable to resolve the dispute within fifteen (15) days of referral to the persons specified in Clause 25.3.1 (a), 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.

25.3.2 In attempting to resolve the dispute in accordance with the provisions of this Clause 25.3 (*Mutual Discussion*), 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.

- 25.3.3 In the event that the Parties representatives referred to in Clause are unable to reach agreement within fifteen (15) days of the Dispute being referred to them (or such longer period as they may agree), then either Party may refer the matter to an Expert in accordance with Clause 25.4 or, if the Dispute is not a Technical Dispute, commence arbitration of the Dispute in accordance with Clause 25.5.

25.4 Referral to an Independent Expert

- 25.4.1 In the the event that the Parties are unable to resolve a Technical Dispute in accordance with Clause 25.3, then any Party may refer the Technical Dispute to an Independent Expert for determination. In the event that the Parties cannot agree within ten (10) days as to whether a Dispute falls within the definition of a Technical Dispute, this Clause 25.4 shall not be used to resolve the Dispute and the Parties shall proceed directly to arbitration under Clause 25.5 to resolve the Dispute.
- 25.4.2 The Independent Expert shall have demonstrated expertise in the area to which the Technical Dispute relates and shall not directly or indirectly be associated with either Party as agent, employee, consultant, contractor or otherwise.
- 25.4.3 The Party initiating submission of a Technical Dispute to an Independent Expert shall provide the other Party with a notice stating that it is submitting the Technical Dispute to an Independent Expert and nominating the person it proposes to be the Independent Expert. The other Party shall, within fifteen (15) days of receiving such notice, notify the initiating Party as to whether the proposed Independent Expert is acceptable. If the non-initiating Party fails to respond or notifies the initiating Party that the proposed Independent Expert is not acceptable, either Party may request the Engineering Council of South Africa (ECSA) or the South African Institute of Chartered Accountants (SAICA), as the case may be, to nominate an Independent Expert as quickly as possible. If the ECSA or SAICA, as the case may be, is unwilling or unable to appoint an Independent Expert, the Dispute shall not be referred to an Independent Expert and either Party may, by notice to the other Party, refer the Dispute to arbitration in accordance with Clause 25.5.
- 25.4.4 The Independent Expert shall be engaged on such reasonable terms as the Independent Expert shall accept.
- 25.4.5 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.
- 25.4.6 The Parties shall promptly provide the Independent Expert and each other with all such evidence and information within their respective possession or control as the Expert may consider necessary for determining the Dispute or which is relevant to and bears upon the Dispute.

- 25.4.7 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.
- 25.4.8 The Independent Expert shall set the date for the hearing, choose the venue (which must be a venue in South Africa) for the hearing and determine all matters regarding any aspect of the hearing. Moreover, the Independent Expert shall have the power to 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 shall be guided by considerations of fairness, the cost-effective resolution of the Dispute, and the need to resolve the Dispute quickly.
- 25.4.9 The Independent Expert shall provide both Parties with his decision on the Dispute in writing, 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 decision, if so requested by either Party.
- 25.4.10 If the Independent Expert shall fail to give his decision within the period specified in Clause 25.4.9, either Party may by notice to the other require that the Dispute is decided by reference to arbitration pursuant to Clause 25.5, whereupon the Independent Expert shall be instructed not to consider the matter further.
- 25.4.11 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.
- 25.4.12 The Independent Expert shall act impartially and may take the initiative in ascertaining the facts and the Law.
- 25.4.13 Should the need arise for either Party to seek interim or temporary relief before the determination by the Independent Expert is finalised, that Party may apply to the Independent Expert to grant order or the required temporary relief and the Independent Expert shall have the power to do so as if the matter were 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 the Independent Expert then, and then only, should the Parties refer such matter to such High Court.
- 25.4.14 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 (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

or where the Independent Expert has been instructed not to consider the matter further as set forth in Clause 25.4.10.

- 25.4.15 The Independent Expert shall not be liable for anything done or omitted to be done 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.
- 25.4.16 The Independent Expert shall not act as arbitrator and shall decide the Dispute referred to him using his skill, experience and knowledge and with regard to such matters as are expressly specified in this Agreement to be considered by him. The decision of the Independent Expert pursuant to this Clause 25.4 shall (subject to Clause 25.5) be final and binding on the Parties, save in respect of fraud or manifest error.

25.5 Arbitration

- 25.5.1 Either Party may refer, by notice to the other Party, any Dispute that is not resolved pursuant to Clause 25.3 or Clause 25.4 or is not required by this Agreement to be determined by an Independent Expert under Clause 25.3 to arbitration in accordance with the AFSA Rules and the Arbitration Act 42 of 1965, as amended from time to time].
- 25.5.2 Any such arbitration shall be conducted by a panel of three arbitrators. Each Party shall nominate one arbitrator and the two arbitrators so appointed shall appoint a third arbitrator who shall preside over the panel. In the event that the Parties do not agree over these appointments, the arbitrators shall be appointed by the Secretariat of the AFSA.
- 25.5.3 The arbitrators shall possess skills in the interpretation, negotiation or implementation of power purchase and supply contracts or financial and economic analysis (as appropriate) and shall not, directly or indirectly, be associated with either Party as officer, employee, consultant, contractor or otherwise.
- 25.5.4 The arbitration shall be conducted in Johannesburg and the language of the arbitration shall be English.
- 25.5.5 The arbitration award or decision rendered shall be in writing and shall set forth in reasonable detail the facts of the Dispute and the reasons for the arbitrators' decision.
- 25.5.6 Each Party hereby undertakes to be bound by any final decision or award of the arbitrators duly appointed under this Agreement and to implement such award or decision.
- 25.5.7 Except as awarded by the arbitrators, each Party shall be responsible for its own costs incurred by it in connection with an arbitration under this Agreement.
- 25.5.8 Except as otherwise provided in this Clause 25.5, the rights of the Parties to proceed with dispute resolution under this Clause 25.5 shall be independent of their rights or the rights of related entities to proceed with dispute resolution under any of the other Project Agreements or Financing Agreements.

25.6 Continued Performance

During the pendency of any Dispute being handled in accordance with this Clause 25 (*Dispute Resolution*):

- 25.6.1 the Seller shall continue to perform its obligations under this Agreement to deliver the Net Energy Output;
- 25.6.2 the Buyer shall continue to pay all the amounts due in accordance with Clause 8 (*Tariff and Other Charges*) that are not in dispute; and
- 25.6.3 neither Party shall invoke any other remedies hereunder arising by virtue of the matters in dispute.

26. LIMITATION OF LIABILITY

26.1 Direct losses

- 26.1.1 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.
- 26.1.2 Notwithstanding anything 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.
- 26.1.3 Save as expressly provided elsewhere in this Agreement, neither Party shall be liable to the other Party for any losses, liabilities, expenses, damages, costs and Claims suffered or claimed which arise out of, under or in connection with any alleged breach of any statutory duty or delictual act or omission or otherwise.
- 26.1.4 The Seller shall not be liable to Purchaser for any Losses for interruptions to the provision of Contracted Capacity, Net Electrical Output or Ancillary Services except where expressly stated in this Agreement.
- 26.1.5 This Clause 26.1 does not constitute a waiver of any rights of one Party against the other with regard to matters unrelated to this Agreement or any activity not contemplated by the Project Documents.

26.2 Mitigation

The Parties shall make all reasonable efforts to mitigate any losses, expenses, damages or costs they may suffer as a result of the breach of any of the other Party's material obligations under this Agreement.

26 THIRD PARTY INDEMNITY

Each Party (the "**Indemnifying Party**") shall indemnify and hold harmless the other Party, its Affiliates and their respective officers, directors, agents, representatives, employees, consultants, contractors and sub-contractors (the "**Indemnified Parties**") from and 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 suffered by the relevant third party, to the extent resulting from any negligent act or omission of the Indemnifying Party and its respective directors, agents,

representatives, employees, consultants, contractors and sub-contractors, 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

28.1 Confidential information

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

28.2 Exclusions to confidential information

For the purposes of this Clause 28 (*Confidentiality*), the term "**Confidential Information**" shall not include information which:

- 28.2.1 at the time of disclosure or at any time thereafter is in, or becomes part of, the public domain other than through a breach of this Clause 28 (*Confidentiality*);
- 28.2.2 the Party receiving the information can prove was already known to it, or was independently acquired or developed by it without being in breach of its obligations under this Clause 28 (*Confidentiality*);
- 28.2.3 became available to the Party receiving the information from another source in a non-confidential manner otherwise than in breach of an obligation of confidentiality; or
- 28.2.4 is published by, or the publication of which is required by, a Competent Authority or any court.

28.3 Permitted disclosure of confidential information

Notwithstanding the provisions of Clause 28.1 (*Confidential Information*), the Confidential Information may be disclosed:

- 28.3.1 by either Party to any Competent Authority (where for the purposes of this Clause 28.3 (*Permitted disclosure of Confidential Information*) such definition shall be limited to South Africa but shall apply to any Government, any sphere thereof, any ministry, any executive, legislative, administrative or quasi-governmental regulator, department, body, instrumentality, agency or authority in any relevant jurisdiction) or to any of the shareholders (direct or indirect), agents, consultants, contractors, advisers, financiers, potential financiers, investors, potential purchasers of the interests of a shareholder (direct or indirect), insurers or lenders of such Party or its Affiliates, in any such case for the purpose of enabling the disclosing Party to comply with its obligations under this Agreement, provided that:

- (a) 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
 - (b) 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;
- 28.3.2 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;
- 28.3.3 by either Party as may be necessary to comply with any obligation under any applicable Law;
- 28.3.4 by the either Party to the Distributor or Eskom, as applicable, as may be necessary to enable the Distributor or Eskom (as the case may be) 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:
- (a) only Confidential Information which is necessary for such purpose is disclosed by such Party to the Distributor or Eskom, as applicable; and
 - (b) the disclosing 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;
- 28.3.5 by either Party if required by any court, any arbitrator or administrative tribunal or an Expert in the course of proceedings before it to which the disclosing Party is a Party; or
- 28.3.6 by either Party, if so agreed in writing by the Parties prior to the disclosure.

28.4 Ownership and Treatment

- 28.4.1 Save for Project Data, all information supplied by or on behalf of a Party shall remain the sole and exclusive property of such Party and this Agreement shall not operate to transfer ownership or any interest whatsoever therein and the other Party shall, if requested by the Party disclosing the information following Termination of this Agreement, promptly return to such Party all documents and any copies, extracts, notes or similar materials containing such information.
- 28.4.2 The Parties shall, insofar 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.

28.5 Public Announcements

Subject to this Clause 28 (*Confidentiality*), no public announcement or statement regarding the signature, performance or termination of, or otherwise in relation to, this Agreement shall be issued or made by a Party unless the other Party shall have first been furnished with a written copy of the proposed announcement or statement and shall have approved it (such approval not to be unreasonably withheld or delayed).

28 GOVERNING LAW AND JURISDICTION

29.1 This Agreement shall be governed by, and construed in accordance with, the Laws of the Republic of South Africa.

29.2 Subject to Clause 25 (*Dispute Resolution*), the Parties hereby submit to the exclusive jurisdiction of the High Court of the Republic of South Africa.

29 NOTICES

30.1 Methods of Delivery

Unless otherwise provided in this Agreement, all notices, requests, statements and other communications required or permitted between the Parties by this Agreement shall be in writing and either hand-delivered or sent by pre-paid registered post or facsimile to the address or number within South Africa of the Party concerned set out in Clause 30.2 (*Addresses*) or such other address or number as contemplated in Clause 30.4 (*Change in address*). No communication shall be effective until received by the addressee and a communication shall be deemed to have been received:

30.1.1 if delivered by hand during ordinary business hours, to its physical address in Clause 30.2 (*Addresses*), when so delivered;

30.1.2 if delivered by pre-paid registered post, to its postal address in Clause 30.2 (*Addresses*) seven (7) Business Days after posting, subject to proof of posting; and

30.1.3 if delivered by facsimile, upon sending, subject to confirmation of uninterrupted transmission on a transmission report and provided that a hard copy is promptly dispatched to the recipient in the manner provided in Clause 0 above.

30.2 Addresses

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

30.2.1 The Seller:

Postal Address: [•]

Physical Address: [•]

Email Address: [•]

Facsimile No: [•]

Telephone No: [•]

Att: [•]

- 30.2.2 The Buyer:
- Postal Address: [•]
 - Physical Address: [•]
 - Email Address: [•]
 - Facsimile No: [•]
 - Telephone No: [•]
 - Att: [•]

30.3 Domicilium citandi et executandi

The Parties choose the physical address set out opposite their names in Clause 30.2 (*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*.

30.4 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

31.1 Seller warranties

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

- 31.1.1 it is a limited liability company, duly incorporated and validly existing under the Laws and has taken all necessary actions to authorise its execution of and to fulfil its obligations under this Agreement and the Project Documents;
- 31.1.2 it has the purpose, object and business of undertaking the Project and selling Energy in terms of this Agreement;
- 31.1.3 it has fully investigated the Project Site and has satisfied itself as to the Project Site's adequacy and suitability for the purposes of the Project and this Agreement;
- 31.1.4 its obligations under this Agreement and its rights and obligations under the Project Agreements to which it is a party are legal, valid and binding and enforceable against it, in accordance with the terms of this Agreement and such Project Agreements to which it is a party;
- 31.1.5 it has obtained all the Seller Approvals;
- 31.1.6 all the Project Agreements have been duly executed on proper authority and are in full force and effect as at the Signature Date, save for those Project

Documents identified in Schedule 10 (*Project Documents*) that will be executed in the Agreed Form after the Signature Date on proper authority;

- 31.1.7 the execution and performance of any Project Agreements do not and will not contravene any provision of this Agreement, the memorandum of incorporation of the Seller as at the Signature Date, or any order or other decision of any Competent Authority or arbitrator that is binding on the Seller as at the Signature Date;
- 31.1.8 all Consents required for the conduct of the Project are in full force and effect as at the Signature Date, save for any Consents which are not required under the Laws to be obtained by the Signature Date, provided that the Seller warrants that it knows of no reason (having made all reasonable enquiries in this regard) why any such Consent will not be granted on reasonable terms by the time it is required to obtain such Consent;
- 31.1.9 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 conduct the Project;
- 31.1.10 the Seller is not subject to any obligation or non-compliance which is likely to have a material adverse effect on its ability to conduct the Project;
- 31.1.11 no proceedings or any other steps have been taken or, to the best of the knowledge of the Seller (having made all reasonable enquiries), threatened for the winding-up or liquidation (whether voluntary or involuntary, provisional or final), judicial management (whether provisional or final), business rescue or deregistration of the Seller or for the appointment of a liquidator, judicial manager or similar officer over it or over any of its assets;
- 31.1.12 all information disclosed by or on behalf of the Seller to the Buyer at any time up to the Signature Date and, in particular, during the bid process preceding the award of this Project to the Seller, is true, complete and accurate in all material respects and the Seller is not aware of any material facts or circumstances not disclosed to the Buyer which would, if disclosed, be likely to have an adverse effect on the Buyer's decision (acting reasonably) to enter into this Agreement with the Seller; and
- 31.1.13 copies of all the Project Agreements have been or will be delivered to the Buyer in accordance with the terms of this Agreement, and are or will be true and complete copies of such Project Agreements, and there are no other documents replacing or relating to any such Project Agreements, which would materially affect the performance of these Project Agreements or this Agreement.

31.2 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:

- 31.2.1 it is an organ of state and has the right, power and authority to enter into this Agreement and to perform its obligations hereunder;
- 31.2.2 the execution and performance of this Agreement by it has been duly authorised by all necessary corporate action, and its obligations hereunder constitute valid, binding and enforceable obligations;
- 31.2.3 it has obtained all the Buyer Approvals it is required by applicable Law to obtain; and
- 31.2.4 there are no judgments outstanding against the Buyer and no Claim is pending or threatened against it that could reasonably be expected materially and adversely to affect the financial condition of the Buyer or the Buyer's ability to perform its obligations under this Agreement.

32. REPRESENTATIVES

32.1 Buyer's Representative

- 32.1.1 The Buyer shall appoint from the Signature Date until the Expiry Date an individual (the "**Buyer's Representative**") whose identity shall be notified to the Seller to act as the Buyer's duly authorised representative for all purposes connected with this Agreement. The Buyer shall notify the Seller in writing forthwith upon the replacement at any time of the Buyer's Representative and such replacement shall not be effective until notice has been given.
- 32.1.2 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.
- 32.2.3 Any notice, instruction or information required to be given by or made to the Buyer shall only be valid if given by the Buyer's Representative or delivered to the Buyer's Representative.

32.2 Seller's Representative

- 32.2.1 The Seller shall appoint from the Signature Date until the Expiry Date an individual (the "**Seller's Representative**") whose identity shall be notified to the Buyer to act as the Seller's duly 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 notice has been given.
- 32.2.2 The Seller'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 Buyer and references in this Agreement to the Seller's Representative shall be construed to include such persons.

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

33. MISCELLANEOUS

33.1 No partnership or agency

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

33.2 No amendment or variation

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

33.3 Waiver

33.3.1 The failure or delay by any Party to exercise any right, power or remedy shall not constitute a waiver thereof, nor shall any partial exercise preclude any further exercise of the same, or of some other right, power or remedy.

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

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

33.4 Third parties

The Parties intend that terms and conditions of this Agreement shall be solely for the benefit of the Parties and their respective successors, and shall not confer any rights upon any third parties (including without limitation, on the owner, if applicable).

33.5 Counterparts

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

33.6 Entire agreement

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

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

33.7 Further assurances

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

33.8 Direct Agreement

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

33.9 Language

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

33.10 Costs

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

33.11 Severability

If any provision of this Agreement is held by a court or other Competent Authority to be unlawful, void or unenforceable, it shall be deemed to be deleted from this Agreement and shall be of no force and effect and this Agreement shall remain in full force and effect as if such provision had not originally been contained in this Agreement. In the event of any such deletion the Parties shall negotiate in good faith in order to agree the terms of a mutually acceptable and satisfactory alternative provision in place of the provision so deleted.

THE NEXT PAGE IS THE SIGNATURE PAGE

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

THEZI-LANGA PROPRIETARY LIMITED

By:

Name:

Title:

Date:

BUFFALO CITY METROPOLITAN MUNICIPALITY

By:

Name:

Title:

Date:

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