



NERSA Consultation Paper

Renewable Energy Feed - In Tariff Phase 2 July 2009

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GLOSSARY OF TERMS AND ABBREVIATIONS

GLOSSARY

AREA LOAD CONTROL CENTER

A function responsible for the operational control of the electricity network and dispatch of the generations in a defined load control area

AVOIDED COST

Avoided Cost is the marginal cost for the same amount of energy acquired through another means such as the construction, finance and operation of new efficient generation facility or purchase from an alternate supplier.

CABEERE

A joint project between the Governments of South Africa and Denmark, CaBEERE aimed at building capacity in energy efficiency and renewable energy.

CENTRALLY DISPATCHED GENERATION UNIT

The expected energy produced by the unit **can be determined** ahead of time (hour, day, week, etc) and **the energy output of the unit can be controlled** by the area load control centre. The unit can be placed in an appropriate place in the priority loading order and the expected energy calculated.

COGENERATION

Cogeneration is the simultaneous generation of electricity and useful thermal energy (heat) at a single plant. This occurs either through the use of thermal energy during electricity generation or via the use of waste energy for electricity during heating processes. Cogeneration is also referred to as combined heat and power (CHP). In a South African context, cogeneration can also refer to the production of electricity as a by product of an industrial process, without the need for a combined heat and power system to necessarily be in place.

DISTRIBUTION

Distribution refers to the conveyance of electricity through a Distribution System.

TRANSMISSION

Transmission refers to the conveyance of electricity through a Transmission System.

DISTRIBUTION SYSTEM

An electricity network consisting of assets operated at a nominal voltage of 132 kV or less.

TRANSMISSION SYSTEM

An electricity network consisting of assets operated at a nominal voltage of above 132 kV.

DISTRIBUTOR

A Distributor is a legal entity that owns or operates/distributes electricity through a Distribution System. This includes Eskom, municipalities and private distributors.

TRANSMITTER

A Transmitter is a legal entity that owns or operates/distributes electricity through a Transmission System. This includes Eskom, municipalities and private transmitters.

EMBEDDED GENERATORS

A legal entity who operates a unit, other than a co-generator, that is not connected to the TS.

GIGA WATT HOUR (GWh)

An energy unit in which electricity consumption is measured. 1 GWh = 3,600 GJ (Gigajoule) (Joule, unit of energy).

GREENHOUSE GAS

Gases primarily carbon dioxide, methane, and nitrous oxide in the earth's lower atmosphere that trap heat, thus causing an increase in the earth's temperature and leading towards the phenomenon of climate change.

INDEPENDENT POWER PRODUCER (IPP)

IPPs are defined as typically limited-liability, investor owned enterprises that generate electricity either for bulk sale to an electric utility or for retail sale to industrial or other customers with certain conditions.

NATIONAL INTEGRATED RESOURCE PLAN (NIRP)

The NIRP is a least cost plan that assesses a variety of demand and supply side options to meet customer electricity needs under environmental and social considerations

NATIONAL TRANSMISSION COMPANY (NTC)

The South African legal entity licensed to execute the national transmission responsibility. It consists of a System Operator and a national transmission network service provider.

PRODUCER SURPLUS

Producer surplus is the difference between the total income derived from the sale of a product and the costs involved in its production. In the context of REFIT, this refers to the potential surplus as a result of differences in the cost of production due to the varying sizes and scales of technology adopted. For small scale projects, producer surplus will be low, for larger scale projects producer surplus will be higher. The potential for a producer surplus is balanced against the need to develop a non-complex and simple to implement mechanism.

REFIT

Renewable Energy Feed-In Tariff: a mechanism to promote the deployment of renewable energy that places an obligation on specific entities to purchase the output from qualifying renewable energy generators at pre-determined prices.

RENEWABLE ENERGY (from White Paper on Renewable Energy, 2003, DME)

Renewable energy harnesses naturally occurring non-depletable sources of energy, such as solar, wind, biomass, hydro, tidal, wave, ocean current and geothermal, to produce electricity, gaseous and liquid fuels, heat or a combination of these energy types.

Solar energy can be used to generate electricity; heat water; and to heat, cool and light buildings. For example, photovoltaic systems capture the energy in sunlight and convert it directly into electricity. Alternatively, sunlight can be collected and focused with mirrors to create a high intensity heat source that can be used to generate electricity by means of a steam turbine or heat engine.

Wind energy uses the naturally occurring energy of the wind either directly as in windmills or to generate electricity, and can be used, for example, to charge batteries or pump water.

Large modern wind turbines operate together in 'wind farms' to produce electricity for utilities. Small turbines are used to meet localised energy needs.

Biomass energy (from organic matter) can be used to provide heat, make liquid fuels, gas and to generate electricity. Fuel wood is the largest source of biomass energy, generally derived from trees. However, fuel wood is used unsustainably when new trees are not planted to replace ones that are used. Fuel wood derived unsustainably cannot be properly defined as renewable. However, as is practiced in many parts of the world, when fuel wood is planted and harvested sustainably, it is renewable. Other types of biomass include plants, residues from agriculture, food production, animal feed production or forestry, and organic components in municipal and industrial wastes. A major source of renewable electricity in many parts of the world derives from agricultural and animal waste, either through direct combustion, or through the production of biogas (anaerobic digestion of agricultural or animal wastes) to generate methane which, in turn, is combusted to generate electricity (and often heat and electricity – i.e. cogeneration). Landfill gas is considered to be a biomass source.

Bio-fuels in liquid form can be produced from the conversion of biomass and used, for example, for transportation. The two most common bio-fuels are ethanol and bio-diesel. Fermenting any biomass that is rich in carbohydrate, such as maize, makes ethanol. Bio-diesel is made using vegetable oils, animal fats and algae.

Hydropower uses the movement of water under gravitational force to drive turbines to generate electricity.

Wave power, tidal power and ocean currents can be used to drive turbines to generate electricity. Technologies to harness these forms of power are presently being developed to the stage of commercialisation.

Geothermal activity in the earth's crust derives from the hot core of the earth. Examples are the natural geysers and hot water sources employed for power generation and space heating or using deep hot dry rock as heat exchangers by pumping water through the natural rock fissures to produce steam for power generation.

REDs

Regional Electricity Distributors are proposed to be established through an Electricity Supply Industry restructuring bill which will combine Eskom Distribution and South Africa's municipal suppliers into six regional electricity distributors.

SELF – DISPATCHED GENERATION UNIT

The expected energy output of the unit **cannot be determined** ahead of time (hour, day, week, etc) due to the intermittent nature of the primary energy input (wind, solar, water) and **the energy output of the unit cannot be controlled** by the area load control centre.

SOUTH AFRICAN DISTRIBUTION CODE

The South African Distribution Code was approved by the grid Code Secretariat in September 2007 and comprises the following codes:

- Distribution Information Exchange Code
- Distribution Metering Code
- Distribution Network Code
- Distribution System Operating Code
- Distribution Tariff Code

SOUTH AFRICAN GRID CODE (SAGC)

The Grid Code is intended to establish the reciprocal obligations of industry participants around the use of the TS and operation of the interconnected power system (IPS).

TARIFF EQUALISATION

The process whereby the amount of financial subsidy required for implementation of a feed-in tariff is borne by all Eskom electricity customers through existing 'pass-through' arrangements which are currently in place for IPPs.

TRANSMISSION SYSTEM (TS)

The TS consists of all lines and substation equipment where the nominal voltage is above 132 kV. All other equipment operating at lower voltages are either part of the Distribution System or classified as transmission transformation equipment.

WATT

1 Joule per second of energy consumption or dissipation (1 MW = 1,000,000 W).

ABBREVIATIONS

BEE	Black Economic Empowerment
CDM	Clean Development Mechanism
CEF	Central Energy Fund
CO ₂	Carbon Dioxide
CHP	Combined Heat and Power (co-generation)
COD	Commercial Operation Date
DME	Department of Minerals and Energy
DPE	Department of Public Enterprises
DTI	Department of Trade and Industry
EDC	Energy Development Corporation
EIA	Environmental Impact Assessment
ESI	Electricity Supply Industry
Eskom	The national regulated electricity utility
FIT	Feed-In Tariff
GW	Giga Watt
GWh	Giga Watt Hour
IPP	Independent Power Producer
MTOE	Million Tons of Oil Equivalent
MW	Mega Watt
MYPD	Multi Year Price Determination
NERSA	National Energy Regulator of South Africa (also NER)
NIRP	National Integrated Resource Plan
PNCP	Pilot National Cogeneration Programme
PPA	Power Purchase Agreement
PV	Photovoltaic
PWG	Project Working Group
RED	Regional Electricity Distributor
RE	Renewable Energy
REFIT	Renewable Energy Feed-In Tariff
REFSO	Renewable Energy Finance and Subsidy Office
REPA	Renewable Energy Purchasing Agency
RSA	Republic of South Africa
SANERI	South African National Energy Research Institute
SARS	South African Revenue Service
TOR	Terms of Reference
TREC	Tradable Renewable Energy Certificate
TWh	Terawatt Hour
WACC	Weighted Average Cost of Capital

1. INTRODUCTION AND BACKGROUND

In June 2007 the Energy Regulator commissioned the study of the Renewable Energy Feed – In Tariff to support renewable energy in South Africa which culminated with the approval of the REFIT guidelines on 26 March 2009. The main aspects of the approved REFIT include:

- 1) The Feed – In Tariffs (FITs) based on the Levelised Cost of Electricity, as illustrated in Table 1 below:

Table 1: REFIT Phase I Tariffs – 2009 (R/kWh)

Technology	Unit	REFIT
Wind	R/kWh	1.25
Small hydro	R/kWh	0.94
Landfill gas	R/kWh	0.90
Concentrated solar	R/kWh	2.10

- 2) The Levelised Cost of Electricity to be used as a methodology to calculate the Feed – In Tariffs (FITs)
- 3) The term of the REFIT Power Purchase Agreement be twenty (20) years
- 4) The REFIT to be reviewed every year for the first five-year period of implementation and every three years thereafter and the resulting tariffs will apply only to new projects.
- 5) A Reduction Rate to be excluded from REFIT.
- 6) Carbon revenue from the Clean Development Mechanism (CDM) be excluded from the REFIT.
- 7) Other REFIT qualifying technologies to be considered for inclusion in six (6) months time.
- 8) The Renewable Energy (RE) Power Purchase Agency (REPA) to be housed in Eskom's Single Buyer Office.
- 9) Monitoring and Verification to be the responsibility of the REPA.
- 10) The Medium Term Power Purchase Program (MTPPP) standard Power Purchase Agreement (PPA) to be used as a basis for the REFIT standard PPA
- 11) NERSA will facilitate the adoption of the PPA for REFIT purposes.

2. PURPOSE

The purpose of the current consultation paper is to provide continuation of the work done under Phase I in terms of qualifying principles and tariffs for additional renewable energy technologies as well as define the terms of the renewable energy power purchase agreement. It will constitute an Appendix 4 to the approved regulatory guidelines. All regulatory concepts and principles adopted in the regulatory guidelines remain unchanged and applicable to REFIT Phase II.

The current consultation paper is organized into two main sections as follows:

- 1) Qualifying principles, technologies and tariffs for additional renewable energy technologies such as biomass, biogas, concentrated solar without storage, photovoltaic (PV), geothermal, wave and tidal
- 2) REFIT PPA (non-dispatchable sources) derived from the MTPPP PPA providing the general terms of REFIT contract

3. REFIT PHASE II QUALIFYING TECHNOLOGIES & PRINCIPLES

3.1 Purchase Obligation

The Renewable Energy Purchasing Agency (REPA) will be obliged to purchase the energy delivered by the renewable energy projects licensed by the NERSA under REFIT Phase I and II.

In order to support wide green electricity market, renewable energy independent power producers (IPPs) are permitted to sell power directly to buyers willing to purchase renewable energy outside of the REFIT mechanism, provided that a generation licence has been granted by NERSA.

3.2 Qualifying principles for Renewable Energy Feed – In Tariff Phase 2

In order for a project to qualify as Renewable Energy, the electricity should be produced by means of naturally occurring non-depletable sources of energy such as solar, wind, biomass, hydro, tidal, wave, ocean current, and geothermal. These sources can be harnessed to produce electricity, gaseous and liquid fuels, heat or a combination of these energy types.

A qualifying Renewable Energy Power Generator under Phase II shall be defined as a new investment in electricity generation using the following technologies:

- i. Concentrated solar power plant without storage

- ii. Biomass (solid)
- iii. Biogas
- iv. Photovoltaic systems (Large ground- or roof-mounted)
- v. Concentrating photovoltaic (CPV)
- vi. Concentrated solar power (CSP) central tower

The details of the qualifying technologies under REFIT Phase II are provided in the following sections below.

In line with the international practice and the biomass renewable energy definition pulp and paper, sugar bagasse and projects based on mill waste from industrial process power generation are classified as cogeneration and have been excluded from the Phase II REFIT. They utilize waste products and fuels obtained as an output from an industrial processes as the primary energy source to generate electricity.

The wave, tidal and geothermal technologies have been excluded, since these technologies are not commercially available at present. Inclusion of these as well as other renewable energy technologies in the subsequent years may be considered during the annual REFIT review.

All RE Generators under REFIT require a Generation Licence issued by NERSA under the Electricity Regulation Act, 2006 (Act No. 4 of 2006).

Specific licence conditions for RE Generators will include:

- i. Reporting requirements on the amount of renewable energy generated and non-renewable energy;
- ii. Monitoring and verification to ensure the credible production of renewable energy;
- iii. Termination conditions for non-compliance on the production of renewable energy.

REFIT Phase II only includes power generation from generators connected to the National Transmission System and Distribution System and excludes off – grid power generation.

3.3 Description of Qualifying Technologies

3.3.1 Biomass

Biomass energy (from organic matter) can be converted in various forms of fuel that can be used to supply energy and to generate electricity. Fuel wood is the largest source of biomass energy, generally derived from trees. Other types of biomass include plants, residues from agriculture, food production, animal feed production or forestry, and organic components in municipal and industrial waste (waste to energy). The main

categories of technology used for waste to energy conversion include: physical, thermal and biological methods.

A major source of renewable energy electricity in many parts of the world is derived from agricultural and animal waste, either through direct combustion, or through the production of biogas (anaerobic digestion of agricultural or animal wastes) to generate methane which, in turn, is combusted to generate electricity (and often heat and electricity – i.e. cogeneration).

Following international practices biomass is grouped into two categories: **Biomass (solid)** and **Biogas** (anaerobic digestion of agricultural or animal wastes).

Biomass (solid) description for Phase 2 REFIT

The Biomass solid category is based on 100% forest wood with no mill waste, plants and residues from agriculture as well as tree residues. It also covers power generation based on solid fuel (pellets, bricks) produced as a result of physical processing of municipal waste. It is also assumed that these projects will be located in a close proximity of the biomass source.

The cost and performance of the reference biomass (solid) plant in the model is shown in Table 3 below.

3.3.2 Biogas

The biogas category includes power projects using fuels derived from biological treatment of waste.

Essentially, biogas can be obtained from two different forms of technologies, namely, anaerobic digestion and Landfill Gas (LFG). Anaerobic digestion to produce biogas can occur naturally (landfill gas) or in a specific biogas plant. Another difference between the biogas through anaerobic digestion and LFG, determined in Phase I of REFIT, is the content of the methane in the gas. The content of methane in the LFG is between 45% and 55%, while in advanced digester systems the methane content could reach up to 95%.

The tariff provided under Phase 2 for biogas covers power plants fueled by biogas produced in a dedicated anaerobic digester systems.

For anaerobic digestion of municipal waste the resource is readily available at the waste treatment plant. Livestock operations within a close proximity to the digester system are necessary to provide a sufficient flow of manure to the facility.

The schematic diagram on Fig. 1 below further illustrates the difference between biogas obtained through anaerobic digester process and that extracted from Landfill sites.

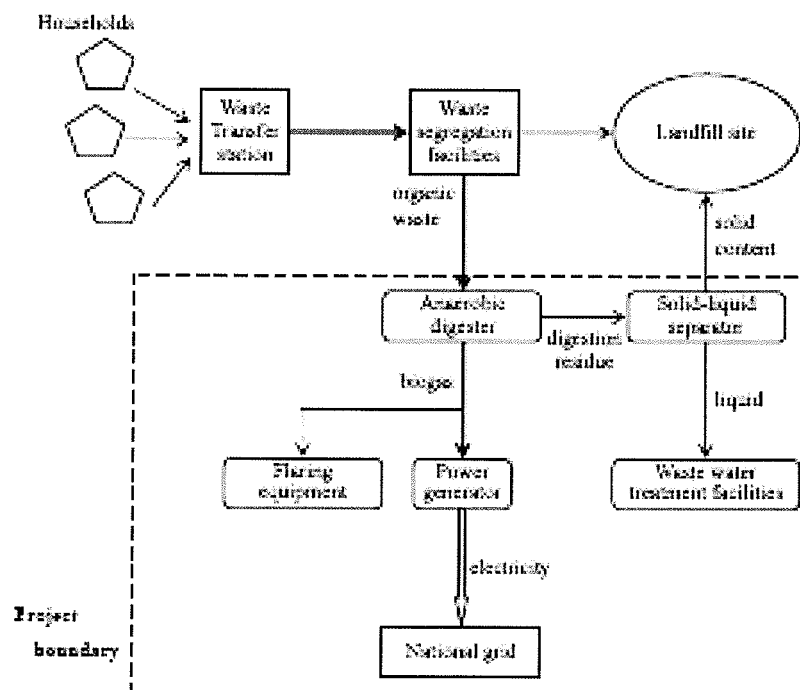


Fig. 1: Process diagram of biogas electricity generation Can Tho City, Vietnam

Anaerobic Digestion

Anaerobic digestion is a series of processes in which micro-organisms break down biodegradable material in the absence of oxygen. The byproducts include gas with **up to 95% percent methane** content. The most common applications of anaerobic digestion use wastewater, grass clippings, leftover food, animal manure, or human sewage as the organic resource. The exception to this is woody wastes that are largely unaffected by digestion as most anaerobes are unable to degrade lignin. The most common types of digesters are plug flow, covered lagoon and complete mix digesters.

Anaerobic digestion is commonly used in municipal wastewater treatment as a first stage treatment process for sewage sludge. Digesters convert the organic material or sewage sludge into safe and stable bio-solids and methane gas.

In agricultural applications, anaerobic digesters can be installed anywhere where there is a clean, continuous source of manure. Dairy, and hog farms both fit this description. Dairy farms use all three types of digesters depending upon the type of manure handling system in place at the farm and the land area available for the digester. Hog farms typically use slurry technologies because the manure have low solid contents and is more easily handled as slurries.

Along with direct heat applications, the biogas produced by anaerobic digestion can be used for power generation. Reciprocating engines are the most common conversion devices, although trials with micro-turbines are underway. A 300 to 500 head dairy farm generally produces sufficient manure to generate about 85 kW. Hog farms typically generate approximately 50 kW for every 500 swine. Digesters frequently satisfy the power demands for the farm on which they are installed.

For on-farm anaerobic digestion of livestock manure the resource is readily accessible and only minor modifications are required to existing manure management techniques. For central plant anaerobic digestion of livestock manure the availability of a large enough number of livestock operations within a close proximity is necessary to provide a sufficient flow of manure to the facility. For anaerobic digestion of municipal wastes the resource is readily available at the waste treatment plant.

For the purpose of REFIT phase 2, Biogas is considered to be based on water waste, animal waste or manure, agricultural manure. These fuel stocks are considered to be suitable for the anaerobic digestion process described above as they contain some water and do not have lignin which anaerobes cannot digest.

The cost and performance of the reference biogas plant in the model is shown in Table 3 below.

3.3.3 Photovoltaic

Photovoltaic (PV) refers to the direct conversion of light into electricity. In order for this conversion to occur a photovoltaic device (or cell) consisting of two semiconductor layers (in its simplest form) is used. The two layers are doped oppositely so as to create a net voltage across the terminals of the cell. The electric field within the vicinity of the interface of the two layers is responsible for “pushing” charges and thereby creating electricity when the device is connected to a load under the presence of light.

A photovoltaic system is made up of two components: PV module, inverter and support structure. The **photovoltaic solar modules** are the fundamental part of the installation that converts solar radiation into electricity by means of the photovoltaic effect. The photovoltaic modules can be connected to each other in series and several series strings are connected in parallel in order to reach the desired voltage and current levels.

The **inverter** transforms the direct current (DC) generated by the photovoltaic field into alternating current (AC) in order to inject it into the electricity distribution grid, in such a way that this energy is consumed in the place where it is generated and the surrounding area. This type of system is termed grid-connected PV system.

The **support structure** ensures that the photovoltaic modules are secured. The structures normally used for industrial premises are made up of aluminum or hot-

galvanized steel profiles in addition to the corresponding joints. They are attached to strong elements of the roof with the appropriate orientation and inclination.

PV Grid-connected systems can range from **small** 2 kW home systems to a few megawatts.

In terms of installation the PV panels can be classified into two categories: **building (roof)-mounted and ground-mounted**.

In terms of the size of the installations PV is broken down i to small, medium and large (>1MW).

PV description for Phase 2 REFIT

Due to economies of scale REFIT Phase II only considers **Large-scale PV systems (>1 MW)**. The inclusion of small scale PV system may be considered at a later stage during the annual REFIT review.

3.3.4 Concentrated solar plant without storage

The REFIT Phase I considered concentrated solar power (CSP) plant with storage of 6 hours as one of the qualifying technologies. Phase II of the REFIT consider the same technology but without storage.

The cost and performance of the reference CSP without storage is shown in Table 3 below.

3.3.5 Concentrating Photovoltaic

Concentrating photovoltaic (CPV) is a term used when sunlight is concentrated onto photovoltaic surfaces for the purpose of electrical power production. Solar concentrators of all varieties may be used for this, often mounted on a solar tracker in order to keep the focal point upon the cell as the sun moves across the sky.

Compared to conventional flat panel solar cells, CPV is advantageous because the solar collector is less expensive than an equivalent area of solar cells. Semiconductor properties allow PV cells to operate more efficiently in concentrated light, as long as the PV cell junction temperature is kept cool by suitable heat sinks. CPV operates most effectively in sunny weather, since clouds and overcast conditions create diffuse light which essentially cannot be concentrated. Large CPV systems are not typically fixed on a position. The CPV needs the direct light to efficiently produce power and hence two axis tracker is a requirement.

In Phase 2 of the REFIT the CPV plant is defined as the plant producing more than 10 MW. The array will be mounted on a 2-Axis tracker on the ground. The cost and performance of the reference CPV without storage is shown in Table 3 below.

3.3.6 Concentrated Solar Power (Central Tower)

Concentrating Solar Plant (CSP) central tower uses many large, sun-tracking mirrors or heliostats to focus sunlight on a receiver at the top of a tower. A heating transfer fluid heated in the receiver is used to generate steam which, in turn, is used in a conventional turbine-generator to produce electricity.

In the past CSP towers used steam as a heat transfer fluid but nowadays molten salt is used due to its superior heat transfer and energy storage capabilities.

The cost and performance of the reference CSP (central tower) with 6 hours storage per day is shown in Table 3 below.

3.4 Tariffs Phase 2

The financial assumption adopted in Phase I of the REFIT has been retained for REFIT Phase II as follows:

Table 2: Financial Assumptions

Financial parameter	Unit	Value
Debt	%	70
Equity	%	30
Nominal cost of debt	%	14.90
Inflation	%	8
Real cost of debt before tax	%	6.39
Tax rate	%	29
Real return on equity after tax	%	17
Real Weighted Average Cost of Capital (WACC)	%	12

The proposed REFIT prices are derived from local and international sources providing most recent information.

Table 3: Market conditions, reference technology cost and performance assumptions

PARAMETER	UNITS	CSP power trough without storage	PV Ground/Building- mounted > 1 MW	BIOMASS (solid)	BIOGAS	Concentrating PV without storage	CSP (tower) with storage of 6 hrs per day
Capital cost: engineering procurement & construction (EPC)	\$/kW	4700	4900	3000	2750	6841	5638
Land cost	%	2%	2%	2%	2%	2%	2%
Allowance for funds under construction (AFUC)	%	4.4%	0.0%	4.4%	4.4%	4%	4.4%
Tx/Dx integration cost	%	3%	3%	3%	3%	3%	3%
Storage (CSP)	%						
TOTAL INVESTMENT COST	\$/kW	5152	5145	3289	3015	7499	6180
Fixed O&M	2009\$/kW/yr	66	16.19	54	170	64	66
Variable O&M	2009\$/kWh			0.0032	0.00001		
Economic life	years	20	20	20	20	20	20
Discount rate real after tax	%	12%	12%	12%	12%	12%	12%
Plant lead time	years	2	1	2	2	2	2
Fuel type		renewable	renewable	renewable	renewable	renewable	renewable
Fuel cost	\$/10 ⁶ BTU			3			
Fuel cost	\$/kWh						
Heat rate	BTU/kWh			15750			
Assumed load factor	%	25%	16%	80%	80%	20%	40%
Levelised cost of electricity	\$/kWh	0.3132	0.4488	0.1181	0.0962	0.5481	0.2308
Exchange Rate R/\$	ZAR/\$	10	10	10	10	10	10
Levelised cost of electricity	R/kWh	3.132	4.488	1.181	0.962	5.481	2.308

4. GENERIC REFIT PPA

The proposed REFIT PPA, shown in Appendix A, has been derived from the MTPPP PPA. The proposed REFIT PPA outlines the general terms applicable to non-dispatchable renewable energy power producer.

The key features of the PPA are shown below:

Buyer is Eskom Holdings Limited or successor Company assigned as a purchaser of the IPP production

Owner: The PPA has been structured in a manner so as to permit a seller to be an intermediary with no generating assets itself, but with contractual access to capacity and energy which it can in turn sell to Eskom.

Term: 20 years consistent with the term of the REFIT

Project Site and Construction: The seller takes (or shall procure that the owner takes) all responsibility for obtaining and maintaining the use and possession of the project site including such associated rights as may be necessary to undertake the project and perform its obligations under the PPA. Where the seller is not the owner of the source facility, the seller is required to obtain and maintain (at its cost and risk) all contractual and associated rights as may be necessary to enable it to fulfill its obligations under the PPA. The seller is required to procure the construction of the source facility in accordance with the construction programme, all applicable Laws and the standards of a reasonable and prudent operator.

Capacity and Energy: Following the commercial operation date (COD), the seller shall make available the net capacity to the buyer and generate and sell energy relating to the net capacity to the buyer at the point of metering, on a self dispatch basis. Title in and risk of loss of the commercial energy sold to the buyer in accordance with the PPA shall pass to the buyer at the delivery point. The seller is not permitted to undertake energy sales to third party from the net capacity earmarked for the buyer without prior agreement with the buyer.

Availability and Dispatch: The Seller is required to provide the buyer with monthly and weekly generation forecasts and with an availability declaration on a daily basis. The facility is to operate on a self-dispatch basis with both parties required to comply with the dispatch procedures.

Commercial Energy Payments: The buyer shall pay to the seller the commercial energy payment for all commercial energy calculated under the REFIT.

Pass through Costs: The Buyer shall also be liable for the Pass Through Costs (limited to Use of System Costs) to the Seller for each Month in the Term.

Holding Payment: The buyer shall pay to the seller the holding payment derived as per Schedule 8 of the PPA during any period when the seller is unable to deliver power as a result of a buyer failure.

Fuel: The seller is solely responsible for the supply (including delivery) of fuel and other consumables necessary for the operation of the facility. The buyer bears no cost or risk associated with the use of any alternative fuel.

Emissions Credits: The buyer shall have no rights or obligations in respect of any emissions credits relating to the PPA or received by the seller or the owner of the source facility.

5. STAKEHOLDERS INPUTS REQUESTED

Stakeholders are requested to provide comments on the following:

1. Renewable Energy Feed – In Tariff Phase 2 qualifying principles and tariffs
2. Content, structure and risk allocation between the seller and the buyer of the REFIT PPA
3. Any other comments or proposals to the Energy Regulator related to the Renewable Energy Feed – in Tariff guidelines

6. NERSA PROCESS FOR APPROVAL OF REFIT PHASE 2

The following process and timelines have been served to the Energy Regulator for approval of the REFIT Phase 2:

Table 6: Timelines for approval of REFIT Phase 2

TIMELINES FOR APPROVAL OF RENEWABLE ENERGY FEED IN TARIFF PHASE 2	
ITEM/ACTIVITY	ACTUAL/TARGET DATE
1.Completion of the consultation paper REFIT Phase 2	06-07-09
2.Electricity Subcommittee meeting approves process, timelines and consultation paper	15-07-09
3. Publication of NERSA consultation paper and invitation for written public comments	20-07-09
4. Deadline for submitting written public comments to NERSA	20-08-09
5.Closing date for registering to attend and/or present at the Public Hearing on REFIT Phase 2	20-08-09
6. Public Hearing on REFIT Phase 2	03-09-09
7.Electricity subcommittee consider recommending to the Energy Regulator	14-10-09
9. Energy Regulator approval of the Renewable Energy Feed – In Tariff 2	29-10-09

Stakeholders are invited to comment on the NERSA Renewable Energy Feed – In Tariff Phase 2 Consultation paper and the comments should be sent to the following: Mr Sibusiso Zungu at 526 Vermeulen Street, Kulawula House, Arcadia, Pretoria or PO Box 40343, Arcadia 0007 Pretoria, or email at refit2009@nersa.org.za. The consultation documents will be available on the NERSA Web site: www.nersa.org.za

The deadline for submission of comments on the Renewable Energy Feed – In Tariff is 20 August 2009.

APPENDIX A: REFIT POWER PURCHASE AGREEMENT

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Note: Draft only. This document may be amended to reflect such changes that an Independent Power Producer and Renewable Purchasing Agency may deem necessary, including on account of internal and external governance and approval processes.

Dated [●], 200[●]

POWER PURCHASE AGREEMENT

between

THE SELLER
as defined herein

and

Renewable Energy Purchasing Agency
as Buyer

RENEWABLE ENERGY FEED IN TARIFF

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PREAMBLE:

THIS RENEWABLE ENERGY FEED – IN TARIFF POWER PURCHASE AGREEMENT dated *[insert]* (this “**Agreement**”) is made by and between:

- (1) **THE INDEPENDENT POWER PRODUCER** identified in Schedule 1: Part 1 (the “**Seller**”); and
- (2) **RENEWABLE ENERGY PURCHASING AGENCY (REPA) WHICH IS CURRENTLY UNDER ESKOM HOLDINGS LIMITED, AS A SINGLE BUYER OFFICE**, a limited liability company (Registration No. 2002/015527/06) incorporated under the laws of the Republic of South Africa and having its principal place of business at Megawatt Park, Maxwell Drive, Sunninghill, in the Republic of South Africa (the “**Buyer**”);

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

RECITALS:

- (A) The Independent Power Producer (IPP) has been awarded the right to participate in the Renewable Energy Feed – in Tariff (REFIT) scheme, which has been formulated by the National Energy Regulator of South Africa (NERSA) and to sell electricity to Eskom Single Buyer Office at the Tariff available under REFIT framework as stipulated in Schedule 1, Part 4.
- (B) The IPP will or does hold the necessary license permitting it to generate electricity.
- (C) The IPP wishes to sell the Net Energy Output from the Source Facility to the Renewable Energy (RE) Purchasing Agency (REPA). The REPA, acting in accordance with its role as the Single Buyer of electricity within the Republic of South Africa, wishes to purchase the Net Energy Output of the Source Facility from the generator on the terms and conditions of this agreement.
- (D) Any Wheeling Charges incurred in purchasing power under the REFIT shall be at the cost of REPA.
- (E) REPA shall be obliged to record the total annual cost of power purchased under REFIT including Wheeling Charges, calculate the difference with the cost of the same quantity of power produced at Avoided Cost, and to pass on this cost to consumers using the approved “pass through” arrangement.
- (F) The parties intend to record their Agreement to the terms and conditions governing the sale and purchase of Energy.
- (G) The IPP has proposed to the Buyer that the Seller shall design, engineer, construct or refurbish (as the case may be), finance, insure, commission, operate and maintain the Renewable Energy Feed – in Tariff (REFIT) power facility.

-
- (H) The IPP wishes to sell and the Buyer wishes to purchase the Net Energy Output (as defined below) generated by the facility on a self-dispatch basis on the terms and conditions contained in this Agreement.
- (I) The parties acknowledge that the Seller is entering into this Agreement to enable it to carry on its ordinary course of business of supplying electrical energy to its customers from time to time, and that the supply by the Seller to the Buyer of the Net Energy Output generated by the facility will assist the Buyer in carrying out its business.

THE PARTIES AGREE as follows:

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In so far as the context admits, terms and expressions not defined in this Agreement shall have the meaning ascribed to them in the Codes (as defined below). Additionally, in this Agreement the following capitalised words and expressions shall have the following meanings (and cognate expressions shall have corresponding meanings):

“Affected Party” has the meaning given to it in Clause 15.4 (*Notification Requirements*);

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

“AFSA” means the Arbitration Foundation of Southern Africa;

“AFSA Rules” means the Rules of the AFSA from time to time in force;

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

“Assign” shall have the meaning given to it in Clause 23.1(a) (*Assignment*) and the term **“Assignment”** shall be construed accordingly;

“Auxiliary Consumption” means such part of the Energy produced at the Source Facility as is consumed exclusively within the Source Facility itself for the sole purposes of generating Energy, related services and auxiliaries;

“Availability Declaration” has the meaning given to it in Clause 7.3 (*Availability Declaration*);

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

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

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

“Buyer Approval” means any permission, permit, approval, consent, licence, authorisation, registration, grant, acknowledgement, exemption or agreement to be obtained from any Competent Authority by the Buyer under any Law, including internal approval processes which may include approval by the Buyer's board of directors to enable the Buyer to undertake its obligations under this Agreement;

“Buyer Failure” means any failure of the Buyer to comply with its obligations under this Agreement, save where such failure is occasioned or caused by:

- (a) a failure by the Seller to perform its obligations under this Agreement;
- (b) Force Majeure; or
- (c) a Change in Law;

“Capacity” means, at any time and from time to time, the capacity (expressed in kW) of a generation facility to generate and provide Energy;

“Change in Law” has the meaning given to it in Clause 16.1 (*Definition of Change in Law*);

“Change in Law Report” has the meaning given to it in Clause 16.3 (*Change in Law Report*);

“Check 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 the Buyer;

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

“**Code**” means, as applicable, the South African Grid Code or the South African Transmission/Distribution Code in force from time to time;

“**Commercial Energy**” means the Net Energy Output delivered by the Seller to the Buyer less Energy relating to the Own Generation Profile on or after the Commercial Operation Date provided that the Net Energy Output volume shall not exceed the Contracted Capacity;

“**Commercial Energy Payment**” means, in relation to each Billing Period, an amount (excluding VAT) that shall be due and payable by the Buyer to the Seller for the Commercial Energy delivered in that Billing Period, which payment shall be calculated with reference to the Commercial Energy Rate or, in the case of Commercial Energy referred to in Clause 10.2 (*Commercial Energy Payments*), the rate which is the product of zero point three (0.3) and the Commercial Energy Rate and otherwise in accordance with Schedule 3: Part 2 (*Commissioning Energy*);

“**Commercial Energy Rate**” means the rate applicable to all Commercial Energy, being the FIT (after Indexation in part, and inflation adjustment with reference to the correct CPI or another suitable inflation index per annum, all in accordance with Schedule 3: Part 2 (*Commissioning Energy*);

“**Commercial Operation Date**” or “**COD**” has the meaning given to it in Clause 6.3 (*Commercial Operation Date*);

“**Competent Authority**” means the Government, any sphere thereof, any ministry, any executive, legislative, administrative or quasi-governmental regulator, department, body, instrumentality, agency or 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;

“**Connection Agreement**” means the connection agreement entered into (or to be entered into) between the Distributor or the NTC, as the case may be, and the Seller (or the Owner, if applicable) in connection with the Connection Works;

“**Connection Works**” means the Construction of the physical connection by which the Source Facility will be connected (whether directly or indirectly) to the System and all associated works and activities;

“**Consumer Price Index in South Africa or CPI in RSA**” is a measure of the average price of consumer goods and services purchased by households. A CPI measures a price change for a constant market basket of goods and services from one period to the next within the same area (city, region or nation).

“**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 Industry Development Board**” means the Construction Industry Development Board established pursuant to the Construction Industry Development Board Act, 2000;

“**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 Source Facility as set out in Schedule 1: Part 3 (*Construction Programme*), which specifies certain Milestones for the Construction of the Source Facility and the Scheduled Dates for such Milestones;

“**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 calendar year, provided that the first Contract Year shall commence at 00:00 hours on the Commercial Operation Date and shall end at 24:00 hours on the following 31 March and the last Contract Year shall end on the Termination Date;

“**Contractor**” means any contractors engaged by the Seller (or by the Owner, if applicable) to undertake the whole or any part of the Construction, Operation and Maintenance of the Source Facility, and any other suppliers or contractors appointed by the Seller (or by the Owner, if applicable) in connection with the Project, including any subcontractors appointed by any person who falls within this definition;

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

“**Control Under - recovery**” means any under-recovery by the Buyer of any costs incurred by it under this Agreement from its allowed revenues; provided that such under – recovery (a) is not the result of the Buyer failure, (b) could not have been (including by reasonable anticipation) avoided or overcome by the Buyer acting as Reasonable and Prudent Operator, and (c) is otherwise without fault or negligence on the part of the Buyer;

“**Delivery Point**” means the physical point where the Net Energy Output is to be delivered by the Seller to the Buyer as described in Schedule 1: Part 2 (*Description of Source Facility*);

“Direct Loss” means:

- (a) for the Seller, any loss of payment which would have been due to it; and
- (b) for the Buyer, any direct loss incurred by it;

“Dispute” has the meaning given to it in Clause 28.1 (*Mediation*);

“Distributor” has the meaning given to it in the South African Distribution Code;

“Due Date” has the meaning given to it in Clause 11.4 (*General principles as regards invoicing*);

“Effective Date” means the date of this Agreement;

“Emissions 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 Source Facility (excluding any and all costs and expenses associated with applicable consents or regulations) including greenhouse gases (including CO₂), NO_x or SO₂ (or any other liquid, solid or gas) and including the cost or benefit of any and all authorisations and allocations under international treaties or domestic laws to produce or to offset any emissions in any period and including any rights or interests recognised under Article 6, 12 or 17 of the Kyoto Protocol or any successor international agreement;

“Embedded Generator’s authorized person” means the person appointed by the Embedded Generator in terms of the appropriate act to sanction the return to service of plant after major maintenance;

“Embedded Generator’s responsible person” means the person appointed by the embedded Generator in terms of the appropriate act to sanction the return to service of plant after major maintenance or repair;

“Embedded Generator” means a legal entity that operates or desires to operate a generating plant that is or will be connected to the Distribution network. This definition includes all types of connected generation, including co-generators and renewables. Alternatively, the item of generating plant that is or will be connected to the Distribution network;

“Encumbrance” means:

- (a) any mortgage, pledge, lien, assignment or cession conferring security, hypothecation, security interest, preferential right or trust arrangement or other encumbrance securing any obligation of any person;
- (b) any arrangement under which money or claims to, or for the benefit of,

a bank or other account may be applied, set off or made subject to a combination of accounts so as to effect discharge of any sum owed or payable to any person; or

- (c) any other type of preferential agreement or arrangement (including any title transfer and retention arrangement), the effect of which is the creation of a security interest;

“End User Amendment Agreements” means a collective reference to amendment agreements required to be executed in respect of all electricity supply agreements between any suppliers of electricity (whether this is the Buyer in that capacity, a Distributor, municipality, a municipal entity or any other licensed electricity supplier) of the one part and end-use customers or customers who are part of the supply chain that supplies electricity to end-use customers (in either case where these end-use customers provide full or partial load to the Source Facility) of the other part, in order to ensure that there is no over-recovery whatsoever by the Seller and/or any such customers as a result of any electricity supplied to these customers flowing, whether in whole or in part, from the Source Facility;

“Energy” means energy produced, flowing or supplied by the Source Facility and measured in kWh;

“Environment” means:

- (a) air, including air within natural or man-made structures above or below ground;
- (b) water, including territorial, coastal and inland waters, subterranean and groundwater, and water in drains and sewers;
- (c) land, including any sea bed or river bed, surface land and sub-surface land;
- (d) micro-organisms, plant and animal life; and/or
- (e) properties and conditions of paragraphs (a) to (d) above which may influence human health or safety;

“Environmental Credits” means, all financial benefits of an environmental nature that are created or otherwise arise from the Renewable Energy Facility's generation of energy. 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, offsets, allowances, or similar products or rights, howsoever entitled, (i) 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, and (ii) attributable to the generation, purchase, sale, or use of energy from or by the Renewable Energy, or otherwise attributable to the Renewable Energy Facility during the Term. Environmental credits shall include those currently existing or arising during the Term under Law or international 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 programmes, law or regulations involving or administered by the Department of Water and Environmental Affairs (DWEA) or any other Competent Authority;

“Environmental Failure” means:

- (a) any non-compliance by either Party (or any of its Affiliates and Contractors and its 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 its and their respective directors, officers, employees and agents) and that 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 in respect of which any investigation, impact assessment, remediation or other responsive measure is required to be taken under any applicable Law;

“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 judicial management or for the appointment of a judicial manager, 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;

“Expert” means an expert in the area under dispute appointed pursuant to Clause 24 (*Expert Dispute Resolution*);

“Expiry Date” means the date so defined in Schedule 1: Part 2 (Description of Source Facility), provided that such date may not fall after the date falling twenty (20) years after the Scheduled COD, as such date may be extended in accordance with Clause 2.2 (Make-up Term). Following the completion and end of the duration of the REFIT tariff, the Generator shall be required to negotiate tariffs under market conditions applying at the times;

“Financial Close” means the date when the Financial Agreement have been duly executed and the Buyer has received a certificate from or on behalf of the Lenders confirming that all the suspensive conditions to the initial drawdown of funds thereunder have been satisfied or waived and the initial drawdown has occurred¹;

“Financial Agreement” means (a) the agreements pursuant to which any loans, credit facilities, commercial paper, bonds, letters of credit or other funds will be made available to the Seller to finance or refinance the Project (except any equity or equity – related funds including loan funds made available by the shareholders of the Seller to fund their investment in the Project), and (b) any security agreements and hedging agreements, in respect of any indebtedness incurred or to be incurred by the Seller under any of the agreements in paragraph (a) ;]²;

“Fixed Term” means the period stated in Schedule 1: Part 2 – (*Description of Source Facility*), which shall be twenty (20) years and shall commence on the Scheduled COD;

As defined here, the fixed term is a period of the time of fixed duration starting at Scheduled COD. The Term (see its definition) ends at the end of the Fixed Term. If COD is later than the Scheduled COD, the economic/generating life of the plant is reduced, i.e. the seller:

- Pays Liquidated Damages (LD’s);
- loses part of the Emission Credit Incentives (ECI); and
- loses income due to the reduced economic life of the plant.

It would be more favourable to the seller (and indifferent to the Buyer) to start the fixed term at actual COD.

“Force Majeure” has the meaning given to it in Clause 15.1 (*Definition of Force Majeure*);

¹ Note to RE Generators: this will only be relevant Project is to be financed on a project finance basis, and will otherwise be deleted.

² Note to RE Generators: this will only be relevant if the Project is to be financed on a project finance basis, and will otherwise be deleted.

“Force Majeure Day” has the meaning given to it in Clause 2.2 (*Make-up Term*);

“Force Majeure Event” has the meaning given to it in Clause 15.2 (*Specific inclusions*);

“Force Majeure Notice” has the meaning given to it in Clause 15.4 (*Notification Requirements*);

“Fuel” means the fuel described in Schedule 1: Part 2 (*Description of Source Facility*);

“Fuel Supplier” means the supplier of the Fuel who is identified in Schedule 1: Part 2 (*Description of Source Facility*);

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

“Gross Capacity” means the gross ‘nameplate’ Capacity of the Source Facility and shall be as stated in Schedule 1: Part 2 (*Description of Source Facility*)³;

“Holding Payment” means an amount calculated in accordance with Schedule 8 (*Holding Payment*);

“Holding Period” means any period falling within the Operating Period during which period the Source Facility cannot Operate at the Forecasted Generation Profile and deliver Net Energy Output for that period as set forth in the Forecasted Generation Profile solely as a result of a Buyer Failure, provided that the Source Facility would have been able to Operate at the Forecasted Generation Profile and deliver Net Energy Output for that period as set forth in the Forecasted Generation Profile for such period had there been no Buyer Failure;

“Independent Power Producer or IPP” means any undertaking by any person or entity, in which the government of South Africa does not hold a controlling ownership interest (whether direct or indirect), of new generation capacity at a generation facility;

“Invoice” has the meaning given to it in Clause 9.2 (*Post-Commercial Operation Date Invoices*);

“Kyoto Protocol” means the Protocol to the United National Framework Convention on Climate Change (UNFCCC) adopted at the Third Conference of

³ Note to RE Generators: This is the net incremental capacity, excluding any pre-existing capacity made available for commercial supply (whether for own use or to any Affiliate or third party).

the Parties to the UNFCCC in Kyoto, Japan on 11 December 1997, as the same may be amended from time to time;

“Last COD” means the date which falls three hundred and sixty five (365) days after the Scheduled COD;

“Law” means:

- (a) any constitution, statute, ordinance, treaty, decree, proclamation or subordinated legislation or other legislative measure, as well as the common law and customary law and any judgment, decision, order or rule of any court or tribunal with relevant jurisdiction, in each case having the force of law in South Africa; and
- (b) any present or future directive, requirement, instruction, request, order, regulation, condition of or limitation in any necessary approval, permission, permit, approval, consent, licence, authorisation, registration, grant, acknowledgement, exemption or agreement to be obtained from any 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;

“Lender” means a bank, financial institution or other lender and its designated successors and assigns, who (a) is a party to any of the Financial Agreements and provides financing to the seller thereunder, or (b) provides credit support or credit enhancement for any financing to be made available under the Financing Agreements; 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;⁴

“Maintain” means to maintain in good working order and condition and, as necessary, to inspect, refurbish, repair, replace, modify, reinstate, overhaul and test so that the plant, machinery, equipment or facility concerned may be Operated at all material times as required by Clause 25 (*General Seller undertakings*) and the term **“Maintenance”** shall be construed accordingly;

“Make-up Period” has the meaning given to it in Clause 2.2 (*Make-up Term*);

“Market Change” means a significant change 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 in the structure of

⁴ Note to RE Generators: this will only be relevant if the Project is to be financed on a project finance basis, and will otherwise be deleted.

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 Buyer for the purposes of this definition);

“Metering Installation” means metering equipment (including an electronic main meter) conforming with the requirements of and standards set out in the Code and otherwise specified by the Buyer;

“Milestone” means the key stages of the Construction Period as are identified in the Construction Programme;

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

“National Transmission Company” or **“NTC”** means Eskom Holdings Limited acting through its Transmission Division;

“NERSA” means the National Energy Regulator of South Africa as established by section 3 of the National Energy Regulator Act No. 40 of 2004;

“Net Capacity” means the Gross Capacity of the Source Facility, net of Energy consumed within the Source Facility as Auxiliary Consumption and shall be as stated in Schedule 1: Part 2 (Description of Source Facility);⁵

“Net Energy Output” means the Energy (expressed in kWh) delivered to the Delivery Point of metering or as agreed in the connection agreement in accordance with Clause 12 (*Metering*);

“Notice of Commencement” has the meaning given to it in Clause 5.3 (*Commercial Operation Date*);

“Operate” means to dispatch the Source Facility and otherwise operate as required by Clause 22 (

Project) and the term **“Operation”** shall be construed accordingly;

“Operating Period” means the period from the Commercial Operation Date to the Termination Date;

-**“Owner”** means, where the Seller is not the owner of the Source Facility, the owner of the Source Facility;

⁵ Note to RE Generators: This is the net incremental capacity, excluding any pre-existing capacity made available for commercial supply (whether for own use or to any Affiliate or third party).

“Pass Through Costs” means, in relation to each Month, an amount equal to the aggregate of all amounts (excluding VAT) paid by the Seller under its Use of System Agreement (but excluding, for the purposes of clarity, any liquidated or other damages, fines, penalties or fees, which fee would not have been payable had the Seller (or the Owner, if applicable) acted in accordance with the standards of a Reasonable and Prudent Operator and complied with its obligations under the Use of System Agreement), capped at the lesser of: (1) the Eskom Monthly Pass Through Limit; and (2) an amount equal to the aggregate of all amounts (excluding VAT) paid (or payable) by the Seller under its Use of System Agreement which amounts have not already been included in the FIT;

–“Pollution” means any change in the Environment caused by Potentially Hazardous Substances emitted from any activity, including the storage or treatment of waste, construction and the provision of services, where the change has an adverse effect on the Environment;

“Potentially Hazardous Substances” means any natural or artificial substances, whether in solid, liquid or gaseous form, or condition such as noise, odour, dust or heat causing or capable of causing harm to the Environment, including any electromagnetic waves and any toxic, radioactive, poisonous, noxious, corrosive, explosive, dangerous or other hazardous substances or conditions regulated by, or for which any liability or any responsibility is imposed pursuant to, any Law which regulates activities which impact on the Environment;

“Power Conservation Programme” means any statute or other legislative measure, regulation, decision, programme, scheme or policy developed, introduced or adopted for any duration by NERSA or any Competent Authority whose purpose is directed towards the sustainable reduction in energy consumption and/or the efficient use, transmission or distribution of electricity as such legislative measure, regulation, decision, programme, scheme or policy may be amended, replaced or varied from time to time;

“Power Purchase Program or PPA” means this Renewable Energy Power Purchase Agreement between the Seller and the Buyer which is a legal contract between a Renewable Energy Generator and the Buyer (e.g. host utility, Single Buyer, Distributor, etc) that purchases energy and/ or capacity. Such agreements play a key role in the financing of electricity generating assets as they set out the key terms and conditions of supply of and payments for power;

“PPA Term” means the term of the REFIT Power Purchase Agreement between the Seller and the Buyer which is for the period of twenty (20) years. The REFIT PPA will not operate after its expiry; however any rights that have accrued to either Party under the PPA before its termination will be enforceable thereafter;

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

“**Project Insurances**” has the meaning given to it in Clause 20 (*Project Insurance*);

“**Project Site**” means the site upon which the Source Facility is to be Constructed and Operated as more fully described and defined in Schedule 1: Part 2 (*Description of Source Facility*);

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

“**Renewable Energy (from White Paper on Renewable Energy, 2003, Department of Minerals and Energy)**” means Renewable Energy harnesses naturally occurring non depletable sources of energy, such as solar, wind, biomass, hydro, tidal, wave, ocean – current and geothermal, to produce electricity, gaseous and liquid fuels, heat or a combination of these energy types;

“**REFIT**” means the Renewable Energy Feed – in Tariff: a mechanism to promote the deployment of renewable energy that places an obligation on specific entities to purchase the output from qualifying renewable energy generators at pre-determined prices;

“**Renewable Energy Generator**” means a legal entity that operates or desires to operate a generating plant that is or will be connected to Distribution/Transmission network. This has the same meaning as the Seller.

“**Renewable Energy Payment Rate**” means the annual rate (expressed in 2009 Rand) as defined in Schedule 1, Part 4 of this REFIT PPA;

“**Reasonable and Prudent Operator**” means a person seeking in good faith to perform its 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 internationally experienced developer, contractor, owner or operator complying with all Law, 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, 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 18(b)(*Market Change*);

“Scheduled COD” means the date which corresponds to the stated Scheduled COD in Schedule 1: Part 3 (*Construction Programme*), as extended in accordance with clause 18 (*Force Majeure*) and Clause 19 (*Change in Law*);

“Schedule Date” means the date upon which a Milestone is scheduled to occur or commence as specified in the Construction Programme (as that date may be extended or amended in accordance with the terms of this Agreement);

“Scheduled Outage” means any period in which the Source Facility is scheduled for planned Maintenance in accordance with Schedule 5 (*Planned Maintenance Schedule*);

“Seller Approval” means any permission, permit, 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) under any Law to enable the Seller (or the Owner, if applicable) to undertake its obligations in respect of the Project, including the licences granted or to be granted to the Seller (or to the Owner, if applicable) under the Electricity Regulation Act No. 4 of 2006 to operate the Source Facility and to trade in the supply of Capacity and Energy from such Source Facility;

“Seller Information” means all information provided on or prior to the Effective Date, by the Seller and/or by 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;

“Seller Security” means any one or combination of the following:

- (a) an on-demand, unconditional and irrevocable bank guarantee issued by a bank acceptable to the Buyer (acting reasonably), in the form provided in Schedule 7: Part 1 of (*Form of Bank Guarantee*);
- (b) an on-demand, unconditional and irrevocable stand-by letter of credit issued by a bank acceptable to the Buyer (acting reasonably), in the form provided in Schedule 7: Part 2 of (*Form of Letter of Credit*);
- (c) one or more on-demand, unconditional and irrevocable parent guarantee(s) from the principal shareholder or shareholders of the Seller, in the form provided in Schedule 7: Part 3 of (*Form of Principal Shareholder Guarantee*);

and satisfactory to the Buyer (acting reasonably);

“Self Dispatch Generation Unit” means the expected energy output cannot be determined (but can be forecasted with a certain level of accuracy) ahead of time due to the intermittent nature of primary energy input and the energy output of the unit cannot be controlled by the area load centre, as described in Clause 7.

“Source Facility” means the generation facility located at the Project Site and comprising all plant, machinery and equipment, all associated buildings, structures, roads and other appurtenances, as further described in Schedule 1: Part 2 (*Description of Source 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;

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

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

“System” means, as applicable, the network for the conveyance of electrical energy to which a Source Facility will be connected, whether the national transmission system of the NTC 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 described in Schedule 1: Part 2 (*Description of Source Facility*), 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 Source Facility and customers of the NTC or any Distributor);

“System Agreements” means the Connection Agreement and the Use of System Agreement;

“System Event” means any constraint or congestion on, any delay in, or any unavailability, interruption, curtailment, breakdown, inoperability or failure of, the whole or any part of the System;

“System Operator” has the meaning given to it in the South African Grid Code;

“Term” has the meaning given to it in Clause 2.1 (*Basic Term*) as such period of time may be extended in accordance with Clause 19 (*Termination*);

“Termination Date” means the Expiry Date or the date of the earlier termination of this Agreement in accordance with Clause 19 (*Termination*);

“**Termination Notice**” means a written notice of intention to terminate this Agreement served by the Buyer or by the Seller pursuant to Clause 19 (*Termination*);

“**Use of System Agreement**” means the agreement entered into (or to be entered into) between the Distributor or the NTC and the Seller (or by the Owner, if applicable) in connection with the use by the Seller (or by the Owner, if applicable) of the System;

“**Use of System Charges or UoSC**” means unbundled regulated tariffs charged by the Distributor/Transmitter to the Distribution/Transmission network services customers for making capacity available and for use of Distribution/Transmission system;

“**VAT**” means value-added tax levied in terms of the VAT Act; and

“**VAT Act**” means the Value-Added Tax Act No. 89 of 1991.

1.2 Interpretation

In this Agreement, unless otherwise specified:

- (a) the index and headings of Clauses of this Agreement are for ease of reference only and shall be ignored in constructing this Agreement;
- (b) words importing the singular shall include the plural and vice versa and words importing one gender shall include the other genders;
- (c) references to any Recital, Clause, paragraph, Schedule or Annex are to those contained in this Agreement, and references to a part of a Schedule are to the part of the Schedule in which the reference appears, and all Schedules and Annexes to this Agreement are an integral part of this Agreement. If there is any conflict between the provisions of the main body of this Agreement and the provisions of any of the Schedules, the provisions of the main body shall prevail;
- (d) unless otherwise specified, all references to any time shall be to the time of day in Johannesburg, South Africa;
- (e) “**person**” includes a corporation, company, firm, government, state or agency of a state or any association or partnership (whether or not having separate legal personality) of any of the foregoing that is recognised by Law as the subject of rights and duties, and references to a “**person**” (or to a word incorporating a person) shall be construed so as to include that person’s successors in title and assigns or transferees;
- (f) in computation of periods of time from a specified day to a later specified day, “**from**” means from and including and “**until**” or “**to**”

means to and including;

- (g) “**include**”, “**including**” and “**in particular**” shall not be construed as being by way of limitation, illustration or emphasis only and shall not be construed as, nor shall they take effect as, limiting the generality of any preceding words. The words “**other**” and “**otherwise**” shall not be construed so as to be limited or defined by any preceding words, where a wider construction is possible;
- (h) references to a “**Party**”, the “**Seller**” or the “**Buyer**” shall include its successors and permitted assignees;
- (i) 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;
- (j) references to “**Indexed**”, “**Indexed to RSA-CPI**” or “**Indexation**”, in relation to any value, shall mean that such value has been expressed in April 2010 prices and shall be escalated annually as at 1 April in 2009 and 1 April in each year thereafter with reference to the then most recent publication of RSA-CPI for the twelve (12) Month period ending 31 December in the year immediately preceding each such 1 April date, subject to adjustments for any rebasing or recalculation thereof in accordance with Clause 13 (*RSA-CPI*);
- (k) references to legislation include any statute, by-law, regulation, rule, subordinate or delegated legislation or order, and 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;
- (l) 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;
- (m) the rule of construction that, in the event of ambiguity, an agreement shall be interpreted against the Party responsible for the drafting thereof, shall not apply in the interpretation of this Agreement;
- (n) the expiration or termination of this Agreement shall not affect such of the provisions of this Agreement as expressly provide that they will operate after any such expiration or termination or which of necessity must continue to have effect after such expiration or termination, notwithstanding that these provisions do not expressly state this; and
- (o) if any provision in Clause 1.1 (*Definitions*) is a substantive provision conferring rights or imposing obligations on either Party then, notwithstanding that such provision is contained in such Clause, effect shall be given thereto as if such provision were a substantive provision

in the body of this Agreement.

1.3 Units of measurement

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

1.4 Rounding up

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

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

2. TERM

2.1 Basic Term

Subject to Clause 3 (*Conditions Precedent*) and Clause 2.2 (*Make-up Term*), this Agreement shall be effective from the Effective Date until the earlier of:

- (a) its termination in accordance with Clause 19 (*Termination*); or
- (b) the Expiry Date;

(such period, the “**Term**” of this Agreement).

2.2 Make-up Term

- (a) If on any day during the Operating Period:
 - (i) the Seller has not been able to deliver Net Energy Output corresponding to one hundred per cent. (100%) of the Net Capacity; or
 - (ii) the Buyer has been unable to take Net Energy Output corresponding to one hundred per cent. (100%) of the Net Capacity,

for reasons attributable solely to Force Majeure (such day, a “**Force Majeure Day**”), the Term shall be deemed extended by a number of days equal to the number of Force Majeure Days during such Term (the period of such extension, the “**Make-up Period**”).

- (b) The “**Term**” for the purposes of this Agreement shall be deemed extended by the duration of the Make-up Period and the expression “**Expiry Date**” for the purposes of this Agreement shall be deemed to refer to the last date of the Make-up Period.
- (c) The occurrence of Force Majeure during the Make-up Period shall give rise to a further extension of the Term.
- (d) All terms and conditions contained in this Agreement and the respective rights and obligations of the Parties shall remain unchanged for the duration of the Make-up Term.⁶

3. CONDITIONS PRECEDENT

3.1 Effectiveness of rights and obligations

Save for Clause 1 (*Definitions and Interpretation*), Clause 2 (*Term*), this Clause 3 (*Conditions Precedent*), Clause 19.3 (*Termination* by the National Energy Regulator of South Africa

In addition to the Generation Licensing conditions, the Generation Licence may be terminated by the Energy Regulator should the following apply to the RE Generator:

- (i) Evidence of production of energy from non-renewable sources;
- (ii) Evidence of over inflation of the amount of renewable energy generated.

Termination), Clause 21 (*ASGI-SA obligations*), Clause 22 (

General Seller undertakings), Clause 23 (*Assignment and Change in Control*), Clause 24 (*Expert Dispute Resolution*), Clause 25 (*General Dispute*

⁶ Note to RE Generators: The REFIT for any Make-Up Period shall be the same as the REFIT applicable in the last year of the Term of the Agreement, immediately prior to any Make-Up Period, as the same is set out Schedule 1 Part 4 (REFIT) and as indexed in accordance with Schedule 3 Part 1 (Indexation). Further the generation profile for any month during any Make-Up Period shall be the same as the generation profile for such month in the immediately preceding Contract Year as the same is declared in pursuant to Clause 9 (Availability and Self Dispatch).

Resolution), Clause 28 (*Confidentiality*), Clause 29 (*Governing Law*), Clause 30 (*Notices*), Clause 31 (*Warranties*) and Clause 32 (*Miscellaneous*), which shall come into full force and effect on and from the Effective 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 enumerated in Clause 3.2 (*Conditions precedent*) have either been fulfilled or duly waived in accordance with Clause 3.4 (*Waiver of a condition precedent*).

3.2 Conditions precedent

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

- (a) the System Agreements and any agreements required for the Construction, Operation and Maintenance of the Source Facility (if required) shall have been entered into, and shall be in full force and effect, valid and binding;
- (b) if applicable, the Seller shall have executed an agreement with the Owner to source Energy to be sold by the Seller to the Buyer pursuant to and in accordance with the terms and conditions of this Agreement;
- (c) the Seller shall have secured the issuance and grant of all Seller Approvals and shall have provided the Buyer with certified true copies of all such Seller Approvals; and
- (d) the Seller shall have provided to the Buyer a certificate signed by a duly authorised officer of the Seller stating, in a form satisfactory to the Buyer (acting reasonably), that all the above conditions precedent have been satisfied;
- (e) the Buyer shall have secured the issuance and grant of all Buyer Approvals.

3.3 Responsibilities as regards conditions precedent

- (a) The Seller shall be responsible at its own expense for satisfying and procuring the satisfaction of the conditions precedent referred to in Clause 3.2 (*Conditions precedent*).
- (b) The Seller shall use all reasonable endeavours to cause the conditions precedent enumerated in Clause 3.2 (*Conditions precedent*) to be satisfied within eighteen (18) Months after the Effective 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.

3.4 Waiver of a condition precedent

The Buyer may waive the requirement on the Seller to satisfy and procure the satisfaction of the conditions precedent enumerated 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*).

3.5 Reports

- (a) The Seller shall notify the Buyer in writing at least once a Month on the progress made in satisfying the conditions precedent enumerated in Clause 3.2 (*Conditions precedent*) for which it is responsible. The Seller shall promptly inform the Buyer in writing when any condition precedent has been satisfied or duly waived.

4. PROJECT SITE AND CONSTRUCTION

4.1 Project Site

- (a) Where the Seller is the owner of the Source Facility, the Seller shall obtain and maintain the peaceful use and possession of the Project Site and such associated rights as may be necessary for the purposes of undertaking and implementing the Project for the duration of the Term. The Seller shall acquire such other land and/or rights in respect of land as it requires to perform its obligations under this Agreement and all such land and rights shall be deemed to form part of the Project Site and shall be at the sole risk of the Seller.
- (b) Where the Seller is not the owner of the Source Facility, the Seller shall obtain and maintain (at its cost and risk) all contractual and associated rights and arrangements as may be necessary or appropriate for the purposes of fulfilling its obligations under this Agreement for the duration of the Term. The Seller shall ensure on its own account or through a third party, that the Seller or the Owner obtains and maintains the peaceful use and possession of the Project Site and such associated rights as may be necessary for the purposes of undertaking and implementing the Project for the duration of the Term. The Seller shall further ensure on its own account or through a third party that the Owner acquires such other land and/or rights in respect of land as are required in order for the Seller to be able to perform its obligations under this Agreement.
- (c) The facility shall be located at the area generally described as:

Project Name :

Village :
Location/District :
Longitude and Latitude :

A scale map that identifies the location of the project facility, project transmission and substation, interconnection facility, and significant ancillary facilities including the facilities at point of deliver, is included in Annexure I.

4.2 Risk and liability

- (a) The Seller shall be (or shall procure that the Owner, if applicable, is) fully responsible for the suitability of the Project Site, for the conduct of the Project and for the condition of the Project Site, including but not limited to its geological condition, any Pollution or archaeological remains on the Project Site, the adequacy of the road and rail links to the Project Site and the availability of adequate supplies of utilities.
- (b) The Seller shall (or shall procure that the Owner, if applicable, will) assume all risks and liabilities associated with the Project Site, regardless of when or how arising and the Seller shall not be relieved from any of its obligations under this Agreement or be entitled to any extension of time or financial compensation by reason of the unsuitability of the Project Site for whatever reason.

4.3 Buyer inspection rights

The Buyer shall have the right from time to time, on not less than twenty-four (24) hours' written notice, to designate not more than four (4) of the Buyer's representatives who shall be entitled to have access to the Project Site at reasonable times for the purposes of viewing the Source Facility and verifying the Seller's compliance with its obligations under this Agreement; provided that the Buyer shall ensure that its representatives shall comply with all Project Site health and safety precautions and standards and shall not interfere with the Construction of the Source Facility.

4.4 General Construction Obligations

- (a) The Seller shall procure the Construction of the Source Facility in accordance with (i) the Construction Programme, (ii) all applicable Laws, including the Seller Approvals, and (iii) the standards of a Reasonable and Prudent Operator.
- (b) The Seller shall provide or procure all plant, equipment, machinery consumables, parts, materials and services whatsoever required for the Construction of the Source Facility as provided in paragraph (a) above.

-
- (c) No later than thirty (30) 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 Source Facility with reference to all the Milestones.⁷
 - (d) Notwithstanding any review or inspection of, or recommendation in respect of, any preliminary or detailed design, plan or report, the Project Site, the Construction contract(s) or any Construction report (each as may be amended) on the part of the Buyer or its representatives, the Seller shall be (or shall procure that the Owner is, if applicable) solely responsible for all aspects of the Construction of the Source Facility. The Seller shall not be obliged to (or procure that the Owner is obliged to, if applicable) assume any obligation to implement or address any comments or recommendations of the Buyer arising from the Buyer's review or inspection as aforesaid, except that the Seller may (in its sole discretion and at its sole risk) take such comments and recommendations into consideration whether with or without incurring any additional costs or resultant delays in the Construction Programme.

4.5 Construction Programme

- (a) The Seller shall achieve the Commercial Operation Date on or before the Scheduled COD in accordance with Clause 5.3 (*Commercial Operation Date*).
- (b) The Seller shall comply with (and shall procure that the Owner complies with, if applicable) the Construction Programme and shall without any unreasonable delay notify the Buyer in writing of any failure to do so, including any failure to comply with paragraph (a) above, which notice shall identify:
 - (i) the nature of and reason for the failure;
 - (ii) the impact which such failure has had, or in the reasonable opinion of the Seller (acting as a Reasonable and Prudent Operator), is likely to have, on its ability to achieve any Milestone on the applicable Scheduled Date; and
 - (iii) the steps which the Seller (acting as a Reasonable and Prudent Operator) (or which the Owner, if applicable) has taken, is taking and will take to mitigate the adverse consequences of such failure.

⁷ Note to RE Generators: Eskom may specify a separate address for the submission of these reports and if so this will be added in this Agreement.

5. TESTING AND COMMISSIONING

5.1 Synchronisation with and connection to the System

- (a) Guaranteed access to the network are essential components of the REFIT. However inline with this, Renewable Energy generators are obliged to adhere to national standards for connection, operation and reporting under the Distribution standard for the interconnection of Embedded Generation, South African Distribution Grid Code and the South African Transmission Grid Code as appropriate.
- (b) Renewable Energy (RE) Generators situated within Municipality distribution area will be viewed as the System Operator network provider (which is currently Eskom) supply point in addition to any other supply points where the Distributor receives power from the System Operator network provider (which is currently Eskom).
- (c) The cost of connecting at the appropriate voltage level, ie shallow connection, shall be borne by the RE Generator in accordance with the Distribution standard for the interconnection of Embedded Generation, Distribution Tariff Code and Transmission Tariff Code. Such costs may be financed by the Distributor/Transmitter in accordance to the Distribution/Transmission Tariff Code.
- (d) The Seller shall give the Buyer at least sixty (60) days' advance written notice of the date on which it intends to procure the synchronisation and/or connection of the Source Facility with the System, as the case may be.
- (e) The Seller may only procure the synchronisation and/or connection of the Source Facility with the System in accordance with the Codes and provided that:
 - (i) the Metering Installation has been installed, tested and successfully commissioned in accordance with the minimum testing standards referred to in the Codes and any additional testing standards as may apply in relation thereto;
 - (ii) the System Agreements are in full force and effect and any conditions precedent to their effectiveness have either been fulfilled or duly waived in accordance with their terms; and
 - (iii) the Connection Works referred to in the System Agreements have been completed and commissioned in accordance with the terms of the Connection Agreement and the Codes.

5.2 Testing and commissioning

- (a) Following connection and/or synchronisation, as the case may be, of

the Source Facility with the System as described in Clause 5.1 (*Synchronisation with and connection to the System*) the Seller shall (or shall procure that the Owner will, if applicable) test and commission the Source Facility in accordance with the Codes, the System Agreements, the standards of a Reasonable and Prudent Operator and the Construction Programme, so as to cause the Commercial Operation Date to fall on or before the Scheduled COD.

- (b) The Seller shall provide the Buyer in writing for each day during testing and commissioning by no later than 09:00 hours on the preceding day, its forecast (and non-binding) level of generation of Commissioning Energy for each hour (the first such hour starting at 00:00 and ending at 00:60 minutes) in the day (starting at 00:00 hours and ending at 24:00 hours) in such format as may be prescribed by the Buyer.
- (c) The Buyer shall use all reasonable endeavours, consistent with the requirements of the Codes and acting as a Reasonable and Prudent Operator, to accept Commissioning Energy into the System so as to facilitate the testing and commissioning of the Source Facility as described above.

5.3 Commercial Operation Date

- (a) Subject to this Clause 5.3 (*Commercial Operation Date*), the “**Commercial Operation Date**” shall be the first Business Day starting at 00:00 hours following the day upon which the Buyer receives from the Seller notice (the “**Notice of Commencement**”) in the form of Schedule 2 (*Form of Notice of Commencement*).
- (b) The Seller shall give the Buyer no less than twenty-one (21) days’ prior written notice of its intention to issue the Notice of Commencement, failing which the Commercial Operation Date shall be deemed to be the first Business Day following the expiry of the period of twenty-one (21) days after the date of delivery of the Notice of Commencement.
- (c) If the Commercial Operation Date or deemed Commercial Operation Date is not achieved by the Last COD, then:
 - (i) the Commercial Operation Date shall not have occurred; and
 - (ii) the Buyer shall be entitled to terminate this Agreement in accordance with Clause 19.1(d) (*Termination by Buyer*).

5.4 Sales and Purchase of Renewable Energy

- (i) Sales and Purchase must be at the beginning on the Commercial Operating Date, Seller shall generate from the facility, deliver to the Point of Metering or as agreed in the connection agreement, and sell to REPA, at the applicable price

set forth in Schedule 1, Part 4, all Renewable Energy generated by the Facility. For the avoidance of doubt, except as otherwise expressly provided for herein, this PPA shall not be construed to constitute a “take or pay” contract and REPA shall have no obligation to pay for any energy that has not actually been generated by the Facility resulting as the “Seller” failure.

- (ii) The Net Renewable Energy is [] kilowatt hours (kWh) of Renewable Energy delivered to REPA in any Commercial Operation Year.
- (iii) The Seller shall be deemed to be in control of the Renewable Energy and Test Energy output from the facility up to and until delivery and receipt at the Point of Metering or as agreed in the connection agreement and REPA shall be deemed to be in control of such energy from and after delivery and receipt at the Point of Metering or as agreed in the connection agreement. Title and Risk of loss related to the Renewable Energy and Test Energy shall transfer from Seller to REPA at the Point of Metering.
- (iv) System Operator’s Right to Curtail Renewable Energy, the System Operator shall have the right to notify Seller, by telephonic communication from the Renewable Energy Purchasing Agency Office, to curtail the delivery of Renewable Energy to REPA from the Facility and to the Point of Metering, and Seller shall immediately comply with such notification. System Operator together with REPA may provide such notification for any reason and in its sole discretion.

5.5 Curtailment Energy Payment Rate

If the Net Energy delivery from the source facility is curtailed by the System Operator or REPA pursuant to Clause 5.4 (iv), then

- (a) The Parties shall determine the quantity of Net Energy that would have been produced by the Facility and delivered to the Point of Metering had its generation capacity not been so curtailed (“Curtailed Energy”) and
- (b) The REPA shall pay to the Seller for such Curtailed Energy (i) all amounts that Seller would have received from REPA under this PPA had production not been so curtailed, plus (ii) the amount of any associated CDM credits to which Seller would have been entitled but did not receive as a result, on a grossed basis.

5.6 Coordination with Distributors

To the extent that the Source Facility is connected with or shall be connected with such part of the System as is owned, operated or administered by a

Distributor, in addition to complying with the other requirements of this Clause 5 (*Testing and Commissioning*), the Parties shall (and the Seller shall procure that the Owner will, if applicable):

- (a) provide the Distributor such information as may be necessary, requested by the relevant Distributor or mandated by the standards of a Reasonable and Prudent Operator in respect of; and
- (b) collectively discuss and coordinate with the Distributor;

the actions contemplated in this Clause 5 (*Testing and Commissioning*) and shall additionally comply with such reasonable requests and instructions as may be received from the Distributor from time to time.

6. CAPACITY AND ENERGY

6.1 Sale of Capacity and Energy

- (a) Subject to and in accordance with the terms and conditions set out in this Agreement, following the Commercial Operation Date:
 - (i) the Seller shall make available the Net Capacity to the Buyer and generate (or procure that the Owner generates, if applicable) and sell Commercial Energy to the Buyer at the Point of Metering or as agreed in the connection agreement, on a self-dispatch basis, and subject only to the Codes and the standards of a Reasonable and Prudent Operator; and
 - (ii) The Buyer shall pay for Commercial Energy.
- (b) Title in, and risk of loss of, the Commercial Energy sold to the Buyer in accordance with this Agreement shall pass to the Buyer at the Delivery Point.

6.2 Restrictions on sale of Capacity and Energy

- (a) Subject to the express and mandatory requirements of the Code, the Seller shall not make available any part of the Net Capacity to, or sell any relatable Energy to, any person other than the Buyer (save for Energy consumed by the Source Facility as Auxiliary Consumption) (or permit the Owner to do so, if applicable) without the Buyer's prior written consent.
- (b) The Seller must ensure that all Energy required by the Source Facility for Auxiliary Consumption while the Source Facility is generating Energy to meet the Seller's obligations under this Agreement, is supplied by the Source Facility itself and not by any other supplier, including any other supplier which supplies Energy to the private

network of customers which may provide load to the Source Facility.

6.3 Holding Payment

(a) Notwithstanding anything contained to the contrary in this Agreement, payment by the Buyer of the Holding Payment to the Seller shall evidence full and final discharge of any and all obligations of the Buyer to take and accept Net Energy Output:

(i) which the Seller was unable to deliver to the Buyer during the relevant Holding Period; and

(ii) in respect of which the Buyer paid the Holding Payment.

Specifically, the Seller may not seek to terminate this Agreement for failure of the Buyer to take Net Energy Output if a relatable Holding Payment has been made by the Buyer to the Seller and the Buyer shall not be liable to make any additional or further payments to the Seller, including pursuant to Clause 26.3(a) (*Sole remedy*) or Clause **Error! Reference source not found.** (*Consequences of termination*), in respect of any Buyer Failure to the extent that Holding Payments have already been paid by the Buyer in respect of such Buyer Failure.

7. AVAILABILITY AND SELF DISPATCH

7.1 Monthly generation forecast

(a) The Seller shall provide the Buyer in writing for each Month in the Operating Period (save during Scheduled Outages), by no later than 09:00 hours on the 25th of the preceding Month, the forecast level of generation of the Net Energy Output for each hour (starting at 00:00 hours on the first day of the Month and ending at 24:00 hours on the last day of the Month, on the hour every hour) in the Month in such format as may be prescribed by the Buyer from time to time.

(b) In the event that the Seller fails to provide the forecast for any Month, then the last monthly forecast provided by the Seller in accordance with paragraph (a) above shall be deemed to be the monthly forecast for such Month.

7.2 Weekly generation forecast

(a) The Seller shall provide the Buyer in writing for each week in the Operating Period (save during Scheduled Outages), by no later than 09:00 hours on the preceding Friday, the forecast level of generation of the Net Energy Output for each hour (starting at 00:00 hours on the Monday and ending at 24:00 hours on the Sunday, on the hour every

hour) in the week in such format as may be prescribed by the Buyer from time to time.

- (b) In the event that the Seller fails to provide its forecast for any week, then the last weekly forecast provided by the Seller in accordance with paragraph (a) above shall be deemed to be the weekly forecast for such week.

7.3 Availability Declaration

- (a) The Seller shall provide the Buyer in writing for each day in the Operating Period (save during Scheduled Outages), by no later than 09:00 hours on the preceding day, the forecast level of generation of the Net Energy Output for each hour (the first such hour starting at 00:00 and ending at 00:60 minutes) in the day (starting at 00:00 hours and ending at 24:00 hours) in such format as may be prescribed by the Buyer from time to time (the “**Availability Declaration**”).⁸
- (b) In the event that the Seller fails to provide the Availability Declaration for any day, then the last Availability Declaration provided by the Seller in accordance with paragraph (a) above shall be deemed to be the daily forecast for such day.
- (c) Subject to the terms and conditions of this Agreement, the Seller shall declare the Source Facility available for generation of Energy except:
 - (i) for reasons of Scheduled Outages or unscheduled outages; or
 - (ii) where to do so would not be in accordance with the standards of a Reasonable and Prudent Operator; or
 - (iii) in circumstances relating to safety (of either personnel or the Source Facility or apparatus); or
 - (iv) to the extent of any illegality, in circumstances where to do so would be unlawful; or
 - (v) for reasons of Force Majeure; or
 - (vi) in any other circumstances, with the Buyer’s approval.

If applicable, the Seller shall ensure and procure that the Owner complies with this requirement as well.

⁸ Note to RE Generators: Eskom may specify a separate address for the submission of these daily forecasts and if so this will be added in this Agreement.

7.4 Other relevant data

So far as possible, by 20:00 hours on the day preceding the day in respect of which the Seller has issued an Availability Declaration, the Seller shall submit to Buyer in written form details of any special factors which in the reasonable opinion of the Seller may have a material effect on the ability of the Source Facility to produce Energy or provide the Net Energy Output.

7.5 Further revisions

- (a) The Seller shall, as soon as is reasonably practicable, make revisions to the Availability Declaration submitted to the Buyer should circumstances affecting the operation of the Source Facility or its operating characteristics change at any time.
- (b) Should circumstances change such that the original or then current Availability Declaration is no longer a reasonable estimate made in good faith, the Seller must, as soon as is reasonably practicable:
 - (i) make revisions to the data submitted to the Buyer under Clause 7.3 (*Availability Declaration*) and Clause 7.4 (*Other relevant data*);
 - (ii) notify the Buyer of any revisions to any previously submitted data; and
 - (iii) notify the Buyer of any special factors of which it becomes aware.

8. FEED IN TARIFF AND OTHER CHARGES

8.1 Commissioning Energy Payments

The Buyer shall pay to the Seller the Commercial Energy Payment for all Commercial Energy sold by the Seller and purchased by the Buyer in terms of Clause 5.2(c) (*Testing and commissioning*) in any Month prior to the Commercial Operation Date.

8.2 Commercial Energy Payments

- (a) 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 relating to up to one hundred per cent (100%) of the Net Generation Profile, at the Feed – in Tariff rate in accordance with Schedule 3.
- (b) 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 relatable to above one hundred per cent (100%) of the Forecasted Net Generation Profile of the Source Facility, at the Feed – in Tariff rate.

- (c) The Buyer shall not be liable to make any payments to the Seller for Commercial Energy sold by the Seller and purchased by the Buyer during each Billing Period relatable to Capacity in excess of the Net Capacity of the Source Facility.

8.3 Holding Payments

The Buyer shall pay to the Seller the Holding Payment as compensation for any Energy that the Seller is unable to deliver to the Buyer at the Delivery Point during a Holding Period.

9. INVOICING

9.1 Pre-Commercial Operation Date invoices

Prior to the Commercial Operation Date, the Seller may, within ten (10) days of the end of a Month during which the Seller sold and the Buyer purchased Net Energy, submit to the Buyer a tax invoice meeting the requirements of the VAT Act, denominated in Rand, which is in the form of Schedule 4 (*Form of Invoice*) for the Net Energy Payment and Pass Through Costs accrued during such Month. The Seller shall prepare the invoice for the Month based on the billing data obtained by it from the Metering Installation for that Month. The Buyer shall pay to the Seller the amount of such invoice within fifteen (15) Business Days of receipt thereof. The remaining provisions of Clauses 9.4(b) to 9.5(b) (*Billing disputes*) shall apply to any invoice submitted under this Clause 9 (*Invoicing*), *mutatis mutandis*.

9.2 Post-Commercial Operation Date Invoices

The Seller shall, within ten (10) days of the end of a Billing Period, submit to the Buyer for that Billing Period a tax invoice meeting the requirements of the VAT Act (an “**Invoice**”), denominated in Rand, which is in the form of Schedule 4 (*Form of Invoice*) and specifies:

- (a) the Holding Payments (if any) due to the Seller for such Billing Period, setting out the Holding Periods for which, and the calculations upon which, such Holding Payments are based;
- (b) the Commercial Energy Payment (if any) due to the Seller for such Billing Period, setting out the calculations upon which such Commercial Energy Payment is based; and
- (c) the Pass Through Costs.

The Seller shall prepare the Invoice for the Billing Period based on the billing data obtained by it from the Metering Installation for that Billing Period.

9.3 Supplementary invoices

During the Term:

- (a) and prior to the Commercial Operation Date:
 - (i) the Seller may, within ten (10) days of the end of a Month, submit to the Buyer; and
 - (ii) the Buyer may, within ten (10) days of the end of a Month, submit to the Seller; and
- (b) and after the Commercial Operation Date:
 - (i) the Seller may, within ten (10) days of the end of a Billing Period, submit to the Buyer;
 - (ii) the Buyer may, within ten (10) days of the end of a Billing Period, submit to the Seller,

a tax invoice meeting the requirements of the VAT Act denominated in Rand, for any sums payable by the Seller or the Buyer to the Buyer or the Seller, as the case may be, which sums are not the subject of Clause 9.1 (*Pre-Commercial Operation Date invoices*) or 9.2 (*Post-Commercial Operation Date Invoices*), including any sums payable on account of Clause 26.3 (*Sole remedy*) and Clause 27 (*Third party indemnity*).

9.4 General principles as regards invoicing

- (a) 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.
- (b) If there are any discrepancies in the billing data obtained by the Seller from the Metering Installation and any data or records of the Buyer, then unless these discrepancies are resolved by agreement between the Parties they shall be resolved with reference to the data and records of the most recent test held in accordance with Clause 12 (*Metering*). As soon as such discrepancies have been resolved, the Seller shall issue an amended Invoice (if such resolution confirms the existence of discrepancies) together with a credit note for any overpayment based on the original Invoice and each Party shall be entitled to set off (against amounts due and payable to the other Party) reconciliation payments, together with interest at the Agreed Interest Rate, from the date the amount would have been payable under the original Invoice to the date the amended Invoice is issued as necessary

to reconcile the payments made based on the original invoice and the actual payments due and payable.

- (c) Subject to paragraph (e) below, the Buyer shall pay to the Seller the amount of each Invoice within fifteen (15) Business Days of receipt of such Invoice (the “**Due Date**”).
- (d) All payments due by either Party to the other under this Agreement shall be made:
 - (i) in Rand in immediately available funds to such bank account in South Africa as the recipient shall from time to time nominate; and
 - (ii) 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.
- (e) If any payment is not paid by the Due Date, interest shall accrue daily on the full amount properly due and payable at the Agreed Interest Rate from the Due Date to but excluding the date of payment, such interest to accrue from day to day on the basis of a year of three hundred and sixty (360) days and to be compounded Monthly.

9.5 Billing disputes

- (a) A Party shall notify the other Party in writing if it disputes (in good faith) a payment demand or Invoice before the Due Date for such payment specifying the specific amount in dispute and providing appropriate details of the basis of the dispute. The disputing Party shall only be required to pay the undisputed amount of such payment (if any) on the Due Date, and if it is agreed or determined that all or part of a disputed amount:
 - (i) 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 with interest at the Agreed Interest Rate from the date of such overpayment to but excluding the date of payment; or
 - (ii) which was not paid, should have been paid, then such amount shall be paid within five (5) Business Days of such agreement or determination with interest at the Agreed Interest Rate from the date on which such amount should have been paid to but excluding the date of payment.
- (b) 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 9.5 (*Billing disputes*) was served, either Party shall be entitled to refer the dispute

to an Expert for determination in accordance with Clause 24 (*Expert Dispute Resolution*), provided that the Expert shall take into account the data and records of the most recent test held in accordance with Clause 12 (*Metering*).

- (c) The NERSA will also resolve any Disputes and Remedies arising from REFIT in accordance to Chapter V of the Electricity Regulation Amendment Act, 2006 (including Regulations).

10. SCHEDULED OUTAGES

- (a) The Seller shall comply with (and shall procure that the Owner complies with, if applicable) the requirements of Schedule 5 (*Planned Maintenance Schedule*) in relation to Scheduled Outages.
- (b) Subject to paragraph (a) above, the Seller shall be entitled to (and shall be entitled to permit the Owner to) remove the Source Facility from service over the Scheduled Outage to carry out its planned Maintenance.
- (c) The Seller shall be responsible for (or shall procure that the Owner is responsible for, if applicable) all costs incurred by it in connection with or arising from any Maintenance carried out by it or on its behalf on the Source Facility.

11. REPORTS, RECORDS, PLANS AND MONITORING

11.1 Data and records

The Seller shall maintain (and shall cause the Owner to maintain, if applicable) 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, updated daily, in a format reasonably acceptable to the Buyer, with records of:

- (a) for each hour in the day, the Net Energy Output;
- (b) the number and causes of all trips occurring in the day;
- (c) changes in Operating status during the day;
- (d) the number of outages in the day, the duration of each outage and the reason for each outage; and
- (e) any unusual conditions found during Maintenance inspections.

11.2 Record keeping

All such data and records shall be maintained at the Project Site for a minimum of sixty (60) Months after the creation thereof and for any additional length of time as may be required by any Competent Authority.

11.3 Inspection rights

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 such data and records at any time during normal business hours (at the Buyer's own cost).

11.4 The Regulator Rights

- (a) The Regulator is responsible for the administration of the REFIT.
- (b) The Regulator shall act as the overall authority for verification of electricity production from renewable energy sources. Inspections shall be carried out by the Buyer.

12. METERING

12.1 Metering agents

The Buyer may, by written notification to the Seller, appoint a third party (including, to the extent Buyer deems necessary, a Distributor) to act as a metering agent and to perform and fulfil the Buyer's rights and obligations pursuant to this Clause 12 (*Metering*).

12.2 Metering Installation

- (a) The Buyer shall, acting as a Reasonable and Prudent Operator, procure, install, test, commission, operate and maintain the Metering Installation at the Point of Metering.
- (b) The purpose of the Metering Installation under this Agreement shall be to measure the Net Energy Output delivered by the Seller to the Buyer pursuant to this Agreement and in accordance with the procedures set out in the Code and the System Agreements.
- (c) The Buyer shall use all reasonable endeavours to procure, install, test and commission the Metering Installation by no later than ninety (90) days prior to the Scheduled COD. The Buyer shall notify the Seller no less than two (2) Business Days in advance, in writing, of the date when the Metering Installation shall be commissioned.
- (d) Meters shall be capable of measuring and recording the following

parameters for various time/frequency blocks as per Prudent Utility Practices. Meters shall have provision to download and transmit following real time data to Supervisory Control and Data Acquisition (SCADA) system in form and format suitable for SCADA

- i. Active Energy (kWh) and Reactive Energy (kVARh);
- ii. Instantaneous voltage, current, power factor;
- iii. Frequency;
- iv. Maximum demand in kVA/kW for each demand period and for the total period since the last reset;
- v. kWh/kVARh since last reading;
- vi. Real time and time of day metering; and
- vii. Number of resets

12.3 Check Metering Installation

- (a) The Seller shall, acting as a Reasonable and Prudent Operator, procure, install, test, commission, operate and maintain a Check Metering Installation identical to the Metering Installation adjacent to the Metering Installation at the Delivery Point, at its sole cost.
- (b) The purpose of the Check Metering Installation shall be to monitor the accuracy and correctness of the Metering Installation.
- (c) The Seller shall use all reasonable endeavours to procure, install, test and commission the Check Metering Installation by no later than ninety (90) days prior to the Scheduled COD. The Seller shall notify the Buyer no less than two (2) Business Days in advance, in writing, of the date when the Check Metering Installation shall be commissioned.
- (d) In the event that the Seller does not install the Check Metering Installation by the date falling forty-five (45) days prior to Scheduled COD, the Buyer may, at its option, procure, install, test, commission, operate and maintain the Check Metering Installation at the Delivery Point, at the Seller's cost prior to the Scheduled COD.

12.4 Testing and inspection

- (a) The Metering Installation shall be tested by the Buyer and the Check Metering Installation shall be tested by the Seller (acting as Reasonable and Prudent Operators) as often as may be necessary but in any event within thirty (30) days of receipt of written request for such test. Save on reasonable grounds, the Seller shall not be entitled to call for more than one test of the Metering Installation in any period of

twelve (12) Months, and the Buyer shall not be entitled to call for more than one test of the Check Metering Installation in any period of twelve (12) Months.

- (b) The Parties shall provide each other with not less than seven (7) days' prior written notice of any such test, which shall be held between 09:00 and 17:00 hours on any Business Day. Both Parties shall have the right to be represented at the conduct of any such test.
- (c) Parties shall promptly provide each other with copies of test reports including all supporting metering data and records, if so requested in writing. Parties shall answer any questions as regards the test report promptly and in full.
- (d) The Metering Installation and Check 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. If the measure of error is outside the maximum tolerance for the meters then such meters shall be recalibrated immediately.
- (e) If any set of meters, monitoring equipment or associated circuits is found not to comply with the requirements of the relevant standards, they shall be repaired or replaced at the expense of the Party which owns them as soon as practicably possible.

12.5 Sealing

- (a) The Metering Installation and Check Metering Installation shall be sealed in the presence of duly authorised representatives of both Parties immediately after the commissioning of the Metering Installation and Check Metering Installation.
- (b) Seals shall only be broken for the purposes of inspection, testing, maintenance or adjustment in the presence of duly authorised representatives of both Parties.

12.6 Readings and inaccuracy

- (a) The Buyer shall be responsible for interrogating and retrieving data from the Metering Installation for billing purposes on the last Business Day of each Billing Period in the presence of authorised and experienced representatives of the Seller and at a time mutually agreed between the Parties.
- (b) If the readings are significantly different from each other and/or demonstrate a level of inaccuracy outside acceptable limits pursuant to the relevant standards, the Metering Installation and the Check Metering Installation shall be jointly tested by representatives of the Buyer and the Seller and the following rules shall apply:

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- (i) Should the Metering Installation fail to register or, upon test, be found not to be within the accuracy standards established in the relevant standards, the Net Energy Output shall, for the period referred to in paragraph (iii) below, be measured on the basis of the value registered by the Check Metering Installation.
 - (ii) Should both the Metering Installation and the Check Metering Installation fail to register or, upon test, be found not to be within the accuracy standards established in the relevant standards the meters shall be recalibrated and the Net Energy Output shall, for the period referred to in paragraph (iii) below, be agreed between the Parties on the basis of such correction procedure as they may agree and in the absence of agreement shall be referred to the Expert.
 - (iii) The period referred to in paragraphs (i) and (ii) above is the actual period during which inaccurate measurements were made if such period can be determined from the logged records or, if not readily determinable, the period immediately preceding the test of the Metering Installation equal to one-half of the time from the date of the last previous test of the Metering Installation or, in the case of paragraph (ii) above, of the Metering Installation or Check Metering Installation, whichever was most recently tested.

12.7 Miscellaneous

- (a) The Seller shall not and shall ensure that its Contractors do not (and shall procure that the Owner and its contractors do not), interfere in any manner whatsoever with the proper functioning of the Metering Installation save in the course of an inspection, testing, maintenance or agreed adjustment in the presence of duly authorised representatives of both Parties.
- (b) The Metering Installation and Check Metering Installation shall not be relocated without the prior written agreement of both Parties.
- (c) Notwithstanding anything to the contrary in this Agreement, the Buyer shall be under no obligation to purchase any Commissioning Energy or Commercial Energy until the successful completion of the commissioning of the Metering Installation in accordance with the Code.

13. RSA-CPI

13.1 Unavailability or discontinuation

If, at any time:

- (a) the RSA-CPI becomes unavailable or is discontinued (whether permanently or temporarily); or
- (b) the RSA-CPI is re-based, re-weighted or re-classified,

then the Parties shall seek to agree upon an amendment to or replacement for the RSA-CPI so as to ensure that the amended or replaced index produces as nearly as possible the same economic effect for each of the Parties as the RSA-CPI would have done had the relevant event or circumstances not occurred.

13.2 Disputes

If the Parties are unable to agree upon such amended or replaced index within one (1) Month (or such other period as they may agree) after the occurrence of the relevant event or circumstance, then either Party may refer the matter to an Expert in accordance with Clause 24 (*Expert Dispute Resolution*) to determine what, if any, amendment to or replacement of the RSA-CPI shall be made.

13.3 Provisional application of RSA-CPI

Unless the Parties otherwise agree, the value of the RSA-CPI at the time at which it was last published before the occurrence of the relevant event or circumstance shall continue to be used provisionally in determining or adjusting the relevant payment until such time as an amendment or replacement of the RSA-CPI is agreed or determined, whereupon the relevant payment shall be re-determined (on the basis of the amended or replacement index) and shall apply retrospectively, and appropriate payment adjustments shall be made, together with interest accrued thereon at the Agreed Interest Rate from the original Due Date.

14. EMISSION CREDITS

- (a) The Parties agree and acknowledge that the Buyer shall have no rights or obligations in respect of any Emissions Credits relating to this Agreement or the benefits and title to any Emissions Credits received by the Seller or the Owner.
- (b) Subject to paragraph (a) 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 or the Owner to

exercise its rights and obligations in connection with Emissions Credits.

15. FORCE MAJEURE

15.1 Definition of Force Majeure

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

- (a) is beyond the reasonable control of the Affected Party;
- (b) is without fault or negligence on the part of the Affected Party and is not the result of a breach by the Affected Party of any of its obligations under any contract in respect of the Project to which it is a party, including this Agreement, any System Agreement or under applicable Law;
- (c) could not have been (including by reasonable anticipation) avoided or the effects of which could not have been overcome or mitigated by the Affected Party, acting in accordance with the standards of a Reasonable and Prudent Operator; and
- (d) prevents, hinders or delays the Affected Party in its performance of all or a material part of its obligations under this Agreement.

15.2 Specific inclusions

Without limiting the generality of the foregoing, a Force Majeure Event may include any of the following acts, events or circumstances, but only to the extent that each of the requirements set out in paragraphs (a) to (d) of Clause 15.1 (*Definition of Force Majeure*) is satisfied:

- (a) an act of God, including drought, earthquake, volcanic eruption, landslide, flood, storm, lightning strike, cyclone, tornado, typhoon or other natural disasters;
- (b) fire, explosion, radioactive contamination or chemical contamination;
- (c) epidemic or plague;
- (d) air crash, shipwreck or train crash;
- (e) war, hostilities, acts of terrorism, sabotage, civil commotion, riot, revolution or insurrection;
- (f) import restrictions, rationing or allocation, or closure of harbours, docks or other facilities for the use of, or services to, shipping or navigation;

- (g) any act, event or circumstance of a nature analogous to any of the foregoing;
- (h) (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;
- (i) (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 (other than paragraph (i) above) affecting the Source Facility or the Owner in such a manner that, had the Seller been the owner of the Source Facility instead of the Owner, the Seller would have been entitled to relief under this provision;
- (j) (in the case of the Buyer alone) any act, event or circumstance of a nature analogous to any of the foregoing (other than paragraphs (i) and (j) above) affecting a Distributor in such a manner that, had the Buyer been performing the functions of the Distributor itself rather than through the affected Distributor, the Buyer would have been entitled to relief under this provision; or
- (k) (in the case of the Buyer alone) any action or inaction of a Distributor which results in or amounts to breach by the Distributor of any contractual or associated arrangements between the Buyer and such Distributor as regards Energy to be supplied under this Agreement.

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

15.3 Specific exclusions

The following shall not constitute Force Majeure except to the extent that they result directly from a Force Majeure Event:

- (a) late delivery or interruption in the delivery of machinery, equipment, materials, spare parts or consumables (including Fuel or any alternative fuel);
- (b) a delay or failure by a third party (including any Contractor) which prevents, hinders or delays the Seller in the performance of its obligations under this Agreement (or the Owner in the performance of its obligations towards the Seller, if applicable), save where the cause of such delay or failure by the third party would constitute a Force Majeure Event pursuant to this Agreement;
- (c) any technical or operational problems with the Source Facility arising from a fault in the Construction, Operation and/or Maintenance of the

Source Facility;

- (d) any delay in the performance by the Seller caused by the Seller's or any Contractor's (or the Owner's or the Owner's contractor's, if applicable) failure to engage appropriately qualified contractors or an adequate number of personnel for the performance of the relevant tasks;
- (e) any failure by either Party to obtain and/or maintain an Approval;
- (f) strikes, lockouts and other industrial action by the Affected Party's employees, save for any industrial action that is nationwide or industry-wide;
- (g) wear and tear, flaws, breakdown in or degradation of, any equipment or machinery;
- (h) any inability or failure to pay money, any inability to raise finance or any changes in price or market conditions;
- (i) any failure by the Seller to deliver, replenish, replace or maintain the Seller Security; and
- (j) any delay or failure in the completion of Connection Works pursuant to a Connection Agreement with an entity other than the NTC.

15.4 Notification Requirements

- (a) If either Party is unable to perform all or a material part of its obligations under this Agreement by reason of Force Majeure (the "**Affected Party**"), then the Affected Party shall, as soon as reasonably practicable but in any event within five (5) Business Days, notify the other Party in writing (a "**Force Majeure Notice**") setting out:
 - (i) full particulars of the Force Majeure;
 - (ii) the impact of the Force Majeure on the Affected Party's obligations under this Agreement;
 - (iii) the Affected Party's reasonable estimate of the length of time by which its performance has been and will continue to be affected by such Force Majeure; and
 - (iv) the steps which it is taking, intends to take, or will take to remove or mitigate the adverse consequences of the Force Majeure on its performance hereunder.
- (b) The Affected Party shall give the other Party regular written reports on the progress of the removal and mitigation measures it is taking and written notice promptly of the cessation of the Force Majeure.

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- (c) The Affected Party shall have the burden of proving both the existence of any Force Majeure Event and the effect (both as to nature and extent) which any such Force Majeure Event has on its performance in terms of this Agreement.
 - (d) If the Parties are unable to agree as to the existence or as to the effect of Force Majeure by the date falling twenty (20) days after the receipt by the non-Affected Party of the Force Majeure Notice, then either Party may refer the matter to dispute resolution in accordance with Clause 25 (*General Dispute Resolution*).

15.5 Implications of Force Majeure

- (a) If it is agreed or determined that a Force Majeure Event has occurred, then the Affected Party shall, provided that it has complied with the requirements of this Clause 15 (*Force Majeure*), not be liable for any failure to perform an obligation under this Agreement as a consequence of such event but to the extent only that:
 - (i) such performance is prevented, hindered or delayed by Force Majeure; and
 - (ii) such failure could not have been removed or mitigated by the Affected Party (acting as a Reasonable and Prudent Operator).
- (b) If the Affected Party's performance of all or a material part of its obligations under this Agreement is prevented, hindered or delayed by a Force Majeure Event occurring prior to the Commercial Operation Date, then, provided that the Affected Party has complied with the requirements of this Clause 15 (*Force Majeure*), the time limits for the performance of those obligations shall be extended, and the Scheduled Dates for the affected Milestones correspondingly amended, by a period equal to the period by which its performance is prevented, hindered or delayed by such Force Majeure Event.
- (c) If the Affected Party's performance of all or a material part of its obligations under this Agreement is prevented, hindered or delayed by Force Majeure occurring after the Commercial Operation Date, then, provided that the Affected Party has complied with the requirements of this Clause 15 (*Force Majeure*), the Term shall be extended in the manner described in Clause 2.2 (*Make-up Term*).

16. CHANGE IN LAW

16.1 Definition of Change in Law

In this Agreement, a “**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 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 the Owner, if applicable) to comply with any condition set out therein; or
 - (iii) as a result of any act or omission of the Seller, any Affiliate of the Seller or any of the Contractors (or of the Owner, any Affiliate of the Owner or any of the Owner’s contractors, if applicable); or
- (c) any licence, permit or similar approval for which the Seller (or the Owner, if applicable) makes a proper application at the appropriate time to the Competent Authority, and which application the Seller (or the Owner, if applicable) diligently pursues, not being granted, by either: (1) Scheduled COD in relation to those licences, permits or approvals required to commence operations or, (2) in relation to any other licences, permits or approvals, by the end of the period proposed by the Seller and approved by the Buyer (which approval shall not be unreasonably withheld); 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;
 - (ii) could (including by reasonable anticipation) reasonably have been or be avoided or overcome by the Seller (or the Owner, if applicable) acting as a Reasonable and Prudent Operator; or
 - (iii) is the result of any act or omission of the Seller, any Affiliate of the Seller or any of the Contractors (or of the Owner, any Affiliate of the Owner or any of the Owner’s contractors, if applicable).

16.2 Exclusions to Change in Law

“Change in Law” shall not include:

- (a) the enactment of any Bill, but only if such Bill is enacted without any material changes being made to the contents of such Bill from the form published in the Gazette (as defined in the Interpretation Act of 1957) as at the Effective Date;
- (b) 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;
- (c) 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;
- (d) 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; or
- (e) 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.

16.3 Change in Law Report

- (a) If the Seller claims the existence of a Change in Law which:
 - (i) 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 (or the Owner of its obligations towards the Seller, if applicable);
 - (ii) involves additional capital expenditure equal to at least ten per cent. (10%) 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 ten per cent. (10%) of the capital expenditure as originally contemplated or incurred (and notified to the Buyer as part of the Seller Information); and

- (iii) will result in a change of at least twenty per cent. (20%) in the Seller's (or the Owner's, if applicable) 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 least twenty per cent. (20%) in the Seller's operating expenditure (as notified to the Buyer as part of the Seller Information),

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:

- (iv) the extent to which the Seller's (or Owner's, if applicable) 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;
- (v) the amount of 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 on its performance or to comply with the Change in Law, or the quantum of decrease in projected capital expenditure;
- (vi) the amount of the change (if any) in the Operating costs of the Seller (or the Owner, if applicable) (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 (or Owner's, if applicable) operating expenditure; and
- (vii) the steps which the Seller is (or is procuring that the Owner is) taking, 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 Clause 17 (*Consequences of Change in Law*).

16.4 Buyer notification of Change in Law

If the Buyer claims the existence of a Change in Law which satisfies the requirements of Clause 16.3 (*Change in Law Report*), 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 Seller's cost) to the Buyer a Change in Law Report in respect of such Change in Law within no less than thirty (30) Business Days of the Buyer's notice.

16.5 Burden of proof

The Party claiming the occurrence of any Change in Law shall have the burden of proving the existence of any Change in Law. If such Party is the Seller, then 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 effect (both as to nature and extent) of any such Change in Law on its performance in terms of this Agreement.

17. CONSEQUENCES OF CHANGE IN LAW

17.1 Extension in time

- (a) If as a result of a Change in Law the Seller is prevented, hindered or delayed in achieving the Commercial Operation Date 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 the preceding provisions of Clause 16 (*Change in Law*), 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.
- (b) If a Change in Law occurs after the Commercial Operation Date 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 16 (*Change in Law*) 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.

17.2 Change in Law related disputes

- (a) 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 Change in Law (including the existence of Change in Law), by the date falling sixty (60) Business Days after the receipt by the Buyer of the Change in Law Report, then, provided the Parties agree, the Parties shall refer the dispute to an Expert for determination in accordance with Clause 24 (*Expert Dispute Resolution*).

- (b) Failing any such agreement, either Party may refer the matter for dispute resolution in accordance with Clause 25 (*General Dispute Resolution*).

18. MARKET CHANGE

- (a) If either Party becomes aware, at any time during the Term of a Market Change, such Party shall provide notice thereof to the other Party.
- (b) 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**”).
- (c) If the Parties are unable to settle the Replacement Arrangements by the date being ninety (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 24 (*Expert Dispute Resolution*).
- (d) 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.

19. TERMINATION

Termination of the REFIT shall be inline with the Electricity Regulation Amendment Act, 2006 and the Generation Licence.

19.1 Termination by Buyer

The Buyer shall be entitled to terminate this Agreement by serving a Termination Notice on the Seller upon the occurrence of any of the following events, unless such occurrence results from: (i) a Buyer Failure; (ii) except as provided in paragraph (e) below, a Change in Law; (iii) except as provided in paragraphs (e) and (f) below, Force Majeure; or (iv) the Buyer's negligence or wilful misconduct (each, a "**Seller Event of Default**"):

- (a) an Event of Insolvency in relation to the Seller or, where the Seller is not the owner of the Source Facility, in relation to the Owner;
- (b) a material breach by the Seller of any of its obligations under this Agreement (other than a breach of any obligations for which a specific right to terminate is provided under the remaining provisions of this Clause 19.1 (*Termination by Buyer*));
- (c) 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 permission 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;
- (d) the failure of the Seller to achieve the Commercial Operation Date on or before the Last COD;
- (e) the Commercial Operation Date is delayed beyond the original Scheduled COD (excluding any extensions for Force Majeure or Change in Law) for reason solely of one or more Force Majeure Events or Change in Law by more than eighteen (18) Months;

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- (f) after the Commercial Operation Date, any of the following events occurs:
 - (i) a Force Majeure Event prevents the Seller from performing all or a material part of its obligations under this Agreement for a consecutive period of more than twelve (12) Months; or
 - (ii) at least three Force Majeure Events, each with a continuing duration of no less than sixty (60) days, occur in a continuous period of eighteen (18) Months and each such Force Majeure Event prevents the Seller from performing all or a material part of its obligations under this Agreement;
 - (g) the Seller fails for two (2) successive Contract Years to deliver Net Energy Output equal to one hundred percent. (100%) of the forecast Commercial Energy for such Contract Years as provided in the Contracted Generation Profile in Schedule 1: Part 5 (*Operating Period: Generation Profile*);
 - (h) a breach by the Seller of the provisions of Clause 6.2(a) (*Restrictions on sale of Capacity and Energy*);
 - (i) a Seller warranty in Clause 31.1 (*Seller warranties*) ceases to be true or accurate; or
 - (j) a breach by the Seller of its obligations in Clause 23 (*Assignment and Change in Control*).

The Seller shall, to the extent that it has knowledge of the same, promptly notify the Buyer in writing of the occurrence of any Seller Event of Default.

19.2 Termination by Seller

The Seller shall be entitled to terminate this Agreement by serving a Termination Notice on the Buyer upon the occurrence of any of the following events, unless such occurrence results from: (i) a breach by the Seller of any provision of this Agreement; (ii) except as provided in paragraph below, Force Majeure; or (iii) the Seller's negligence or wilful misconduct (each, a "**Buyer Event of Default**"):

- (a) an Event of Insolvency in relation to the Buyer;
- (b) a material breach by the Buyer of any of its obligations under this Agreement (other than a breach of any obligations for which a specific right to terminate is provided under the remaining provisions of this Clause 19.2 (*Termination by Seller*));
- (c) a failure by the Buyer to pay any undisputed amount due under this Agreement where such failure continues for a period of more than sixty

(60) days;

- (d) after the Commercial Operation Date, any of the following events occurs:
 - (i) a Force Majeure Event prevents the Buyer from performing all or a material part of its obligations under this Agreement for a consecutive period of more than twelve (12) Months; or
 - (ii) at least three Force Majeure Events, each with a continuing duration of no less than sixty (60) days, occur in a continuous period of eighteen (18) Months and each such Force Majeure Event prevents the Buyer from performing all or a material part of its obligations under this Agreement;
- (e) a Buyer warranty in Clause 31.2 (*Buyer warranties*) ceases to be true, complete or accurate in any material respect; or
- (f) a breach by the Buyer of any of its obligations in Clause 23 (*Assignment and Change in Control*).

The Buyer shall, to the extent that it has knowledge of the same, promptly notify the Seller in writing of the occurrence of any Buyer Event of Default.

19.3 Termination by the National Energy Regulator of South Africa

In addition to the Generation Licensing conditions, the Generation Licence may be terminated by the Energy Regulator should the following apply to the RE Generator:

- (i) Evidence of production of energy from non-renewable sources;
- (ii) Evidence of over inflation of the amount of renewable energy generated.

19.4 Termination

- (a) If all the conditions precedent enumerated in Clause 3.2 (*Conditions precedent*) have not been satisfied or duly waived within twenty (20) months after the Effective Date, either Party may terminate this Agreement by giving a written notice of termination to the other Party.

19.5 Termination Date

- (a) A Termination Notice served by either Party in accordance with Clause 19.1 (*Termination by Buyer*) or Clause 19.2 (*Termination by Seller*) shall:
 - (i) in the case of a termination as contemplated in Clause 19.1(b) or Clause 19.2(b), have the effect of terminating this Agreement upon the expiry of a sixty (60) day period from the date of such

Termination Notice, unless the defaulting Party has prior to the expiry of such period:

- (A) remedied the default or circumstance; or
- (B) agreed a remedial programme with the non-defaulting Party and has begun to implement that programme;

provided that, if the defaulting Party ceases to comply with or fulfil the remedial programme at any time, the non-defaulting Party may by further notice terminate this Agreement with immediate effect; and

- (ii) in the case of a termination other than as contemplated in paragraph (i) above, have the effect of terminating this Agreement with immediate effect or, at the election of the terminating Party, by any later date specified in the Termination Notice.

- (b) A Termination Notice served by either Party in accordance with Clause 19.3

19.6 Consequences of termination

- (a) Where this Agreement is terminated by Buyer on any of the grounds in Clause 19.1 (*Termination by Buyer*) or by the Seller on any of the grounds in Clause 19.2 (*Termination by Seller*), the Defaulting Party shall, subject to Clause 26 (*Liability*), be liable to compensate the non-Defaulting Party for all of its Direct Losses. Neither Party shall have any further rights or obligations pursuant to this Agreement and this Agreement shall, except in respect of provisions expressly described as surviving expiry or termination, cease to be of any force or effect.
- (b) When this Agreement by either Party on the ground specified in Clause 19 (Termination) neither Party shall have any further rights or obligations pursuant to this Agreement and this Agreement shall, except in respect of provisions expressly described as surviving expiry or termination, cease to be of any force or effect.

In addition to the Generation Licensing conditions, the Generation Licence may be terminated by the Energy Regulator should the following apply to the RE Generators:

- (i) Evidence of production of energy from non-renewable sources;
- (ii) Evidence of over inflation of the amount of renewable energy generated.

19.7 Surviving obligations and Clauses

Save as otherwise expressly provided in this Agreement:

- (a) termination of this Agreement shall be without prejudice to any accrued rights and obligations under this Agreement as at the Termination Date; and
- (b) termination of this Agreement shall not affect the continuing rights and obligations of the Parties under Clause 1 (*Definitions and Interpretation*), this Clause 19 (*Termination*), Clause 21 (*ASGI-SA obligations*), Clause 24 (*Expert Dispute Resolution*), Clause 25 (*General Dispute Resolution*), Clause 26 (*Liability*), Clause 28 (*Confidentiality*), Clause 29 (*Governing Law*), Clause 30 (*Notices*), Clause 31 (*Warranties*) or Clause 32 (*Miscellaneous*) or under any other provision of this Agreement which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

20. PROJECT INSURANCE

20.1 Insurances and information

- (a) The Seller shall (or shall procure that the Owner will, if applicable), in accordance with this Clause 20 (*Project Insurance*), obtain and maintain in effect, at its own cost and expense, such insurance coverage as is required by:
 - (i) any Laws; and
 - (ii) the standards of a Reasonable and Prudent Operator,(together with insurances procured pursuant to paragraphs (b) and (c) below, the “**Project Insurances**”).
- (b) The Seller shall take reasonable steps to ensure that it, the Owner and the Seller's and Owner's Contractors obtain and maintain in effect at all times such insurance cover as is appropriate for a contractor acting as a Reasonable and Prudent Operator.
- (c) Nothing in this Clause 20 (*Project Insurance*) shall prevent the Seller (or the Owner, if applicable) from procuring additional insurance cover, over and above such insurance coverage as it is required to procure pursuant to this Clause 20.1 (*Insurances and information*).
- (d) The Seller shall (and shall procure that the Owner will, if applicable) provide a copy of all Project Insurances, along with such documentation as may be necessary to evidence that the Project

Insurances are in full force and effect and otherwise in compliance with the other requirements of this Clause 20 (*Project Insurance*).

- (e) Not later than twenty (20) days after the date on which the policy for any Project Insurance is issued, amended to any material extent or renewed in accordance with its terms, the Seller shall cause (and shall procure that the Owner will cause, if applicable) its insurers or agents to provide the Buyer with such documentation as may be reasonably necessary to evidence that such policy is in force and the amount of the cover thereunder.
- (f) The Seller shall provide the Buyer, from time to time, with copies of receipts or statements from the Seller's (and the Owner's, if applicable) insurers or agents evidencing payment by the Seller (or the Owner, if applicable) of the premiums in respect of each Project Insurance and the amount of cover.

20.2 Endorsements and clauses

- (a) The Seller shall cause its (and the Owner's, if applicable) insurers to waive all rights of subrogation against the Buyer and the Seller (and the Owner, if applicable) in respect of a claim arising under any of its Project Insurances (except, in so far as the waiver of such rights against the Seller (or the Owner, if applicable) is concerned, in circumstances where the Seller (or the Owner, as the case may be) has by its act or omission vitiated the Project Insurances).
- (b) The Seller shall (and shall procure that the Owner will, if applicable) ensure that the policy for each of its Project Insurances contains a provision:
 - (i) naming the Buyer as additional insured thereunder (other than in respect of loss of revenue related Project Insurances);
 - (ii) that each additional insured shall be separately indemnified in respect of claims by them under the Project Insurances, provided that the liability of the insurer concerned shall not be increased beyond the amount for which the insurer would have been liable for in the absence of such separate indemnity provision;
 - (iii) for automatic reinstatement of the sum insured on the basis that the sum insured shall not be reduced by the amount of any claim whether paid or due and payable; and
 - (iv) recording that such Project Insurance is primary insurance and shall not be subject to contribution by any other insurance.

20.3 Application of insurance proceeds

Unless the Buyer otherwise agrees in writing, the Seller shall (or shall procure that the Owner will, if applicable) apply proceeds of any insurance claim made due to loss or damage to the Project or any part of the Source 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.

21. ASGI-SA OBLIGATIONS

The Seller shall (or shall procure that the Owner will, if applicable) comply with the requirements of Schedule 6 (*ASGI-SA Obligations*).

22. GENERAL SELLER UNDERTAKINGS**22.1 Project**

- (a) As between the Parties and save as otherwise expressly provided for in this Agreement, at all times during the Term, the Seller shall exercise its rights and perform all of its obligations (or shall procure that the Owner exercises its rights and performs all of its obligations in respect of the Project, if applicable) as provided for in this Agreement, including the Construction, Operation and Maintenance of the Source Facility at its (or at the Owner's, if applicable) sole cost and risk and in compliance with the requirements of:
 - (i) applicable Law;
 - (ii) the Codes;
 - (iii) the Seller Approvals;
 - (iv) the terms and conditions of this Agreement;
 - (v) the terms and conditions of the System Agreements;
 - (vi) the standards of a Reasonable and Prudent Operator; and
 - (vii) relevant manufacturers' guidelines and instructions.
- (b) The Seller shall (or shall procure that the Owner will, if applicable), register the Project with, and shall further cause all Contractors (to the extent necessary) to also register with, the Construction Industry Development Board.

22.2 Responsibility for the supply of utilities

At all times during the Term, the Seller shall be responsible for (or shall procure that the Owner is responsible for, if applicable) securing all supplies of electricity, water, sanitation, telecommunications, waste disposal services and all other utilities required for the Construction, Maintenance and Operation of the Project.

23. ASSIGNMENT AND CHANGE IN CONTROL

23.1 Assignment

- (a) Save as provided in paragraph (b) below, neither Party may sell, cede, delegate, assign, transfer or otherwise dispose of (collectively, “**Assign**”) all or any part of its rights and/or obligations hereunder without the prior written approval of the other Party.
- (b) Notwithstanding paragraph (a) above:
 - (i) where the Seller has financed the Project on a limited recourse basis, the Seller may Assign its rights under this Agreement to its lenders for the purpose of providing security under relevant financing agreements concluded with such lenders; provided that the Seller notifies the Buyer in writing of any such Assignment within five (5) Business Days of such Assignment;
 - (ii) the Seller may, at any time after the expiry of the second Contract Year, Assign all (and not less than all) of its rights and obligations under this Agreement to a creditworthy Affiliate with the prior written approval of the Buyers which shall not be unreasonably withheld, conditioned or delayed;
 - (iii) the Buyer may at any time Assign all (and not less than all) of its rights and obligations under this Agreement to an Affiliate; and
 - (iv) the Buyer shall be entitled to Assign its rights and obligations under this Agreement to a third party as part of and pursuant to:
 - (A) the dissolution, restructuring, amalgamation, reorganisation of the Buyer or its businesses or the occurrence of an analogous event; or
 - (B) the transfer of all or a material part of the Buyer’s business, property, assets and/or undertaking to one or more third parties and/or successor entities;

which, in either case, is required by the Government and/or NERSA or is permitted by the terms of a Buyer Approval.

- (c) Any actual, attempted or purported Assignment by either Party of any of its rights or obligations or interests in, under or pursuant to this Agreement that does not comply with this Clause 23.1 (*Assignment*) shall be null and void and have no legal force or effect.

23.2 Change in Control

The Seller shall procure that it does not suffer a change in Control during the Term without the prior written consent of the Buyer, which consent shall not be unreasonably withheld.

24. EXPERT DISPUTE RESOLUTION

24.1 Reference to an Expert

If the Parties are in dispute as to any matter concerning this Agreement and this Agreement expressly provides for, or the Parties at the time agree upon, Expert determination of such matter, then either Party shall be entitled to refer the dispute to an Expert for determination and not to arbitration in the first instance.

24.2 Procedure for appointment

The procedure for the appointment of an Expert shall be as follows:

- (a) the Party wishing to appoint or to refer a matter to an Expert shall give notice to that effect to the other Party within thirty (30) days of the dispute arising or such other period as may be expressly provided in this Agreement which notice shall give details of the reason for the appointment of, and the matter to be referred to the Expert;
- (b) the Parties shall meet and endeavour to agree upon a person to be the Expert;
- (c) if, within twenty-one (21) days from the date of the notice under paragraph (a) above, the Parties have failed to agree upon an Expert, the matter shall forthwith be referred by the Party wishing the appointment to be made to the President of the South African Association of Consulting Engineers (the “**Appointer**”) who shall be requested to make the appointment of the Expert within thirty (30) days and, in so doing, may take such independent advice as he thinks fit;
- (d) upon a person being appointed as Expert under the foregoing provisions, the Parties forthwith shall notify such person of his selection and shall request him to confirm within fourteen (14) days whether or not he is willing and able to accept the appointment;
- (e) if such person is unwilling or unable to accept such appointment, or

shall not have confirmed his willingness and ability to accept such appointment within such period of fourteen (14) days, then (unless the Parties are able to agree upon the appointment of another Expert) either Party may, in the manner aforesaid, request the Appointer to make an appointment or (as the case may be) a further appointment and the process shall be repeated until a person is found who accepts the appointment as Expert; and

- (f) if there shall be any dispute between the Parties as to the remuneration to be offered to the Expert, then such amount shall be determined by the Appointer whose decision shall be final and binding on the Parties.

24.3 Qualifications and disqualifications

A person shall not be appointed as the Expert:

- (a) unless he is qualified by education, experience and training to determine the matter in dispute;
- (b) if he has an interest or duty which would materially conflict with his role (including being a director, officer, employee, consultant or supplier to either Party, Contractor or to any Affiliate of either Party or Contractor); or
- (c) if he is an employee or agent or former employee or agent of such person.

24.4 Procedures

- (a) The following procedures shall apply where an Expert's determination is sought:
 - (i) the Expert shall have the powers given to an arbitrator under section 14 of the Arbitration Act, No. 42 of 1965 and, if such Arbitration Act or section is no longer in force, then the Expert shall have similar powers under any statutory provision which replaces such section, and if none does, the Expert shall have similar powers as if that section of such Arbitration Act were still in force;
 - (ii) each Party shall supply to the Expert such information as the Expert may request;
 - (iii) the Expert shall (subject to paragraph (v) below) make his decision as soon as reasonably practicable after receiving data, information and submissions which shall be supplied and made to him by the Parties not later than thirty (30) days after he has confirmed to the Parties acceptance of his appointment;

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- (iv) the Expert shall ignore any data, information or submissions supplied and made after the thirty (30)-day period referred to in paragraph (v) above unless furnished in response to a specific request from him;
 - (v) the Expert shall be entitled to obtain such independent advice and secretarial assistance as he may reasonably require; and
 - (vi) the Expert shall give full written reasons for his decision.
- (b) An Expert's decision rendered in accordance with this Clause 24 (*Expert Dispute Resolution*) shall be final and binding on the Parties save in the case of fraud, negligence or manifest error.
 - (c) All communications between either Party and the Expert and/or the Appointer shall be made in writing and a copy thereof provided simultaneously to the other Party. No meeting between the Expert and/or the Appointer and the Parties or either of them shall take place unless both Parties have a reasonable opportunity to attend any such meeting.
 - (d) The Expert shall be deemed not to be an arbitrator but shall render his decision as an expert.
 - (e) Each Party shall bear the costs of providing all data, information and submissions given by it, and the costs and expenses of all counsel, witnesses and experts retained by it, but (unless the Expert shall make any award of such costs and expenses) the cost and expenses of the Expert and any independent advisers to the Expert, and any costs of his appointment, if he is appointed by the Appointer, shall be borne equally by the Parties.

24.5 Further recourse

If there is any further disagreement as between the Parties in relation to a decision of the Expert, or the ability of the Expert to hear any particular matter, or to render a decision, or on related matters, or if either Party alleges or states that the Expert's decision is not binding, the Parties may only further agitate the matter under and in accordance with the arbitration-related provisions of Clause 25.2 (*Arbitration*).

25. GENERAL DISPUTE RESOLUTION

25.1 Mediation

- (a) In the event that the Parties, notwithstanding the use of reasonable endeavours to do so, are unable to resolve a dispute between them

arising out of, or in connection with, this Agreement (including, without limitation, any question regarding its existence, validity or termination) within thirty (30) days of such dispute (“**Dispute**”) arising, then either Party may with the written consent of the other Party refer such Dispute to the NERSA for mediation.

- (b) If the Parties do not refer the Dispute to the NERSA for mediation or if within 30 (thirty) days of such referral to the NERSA the Parties are unable to agree on a resolution to the Dispute with the mediation of the NERSA, then, save as contemplated in Clause 24 (*Expert Dispute Resolution*), either of them may refer the Dispute to arbitration in accordance with Clause 25.2 (*Arbitration*).

25.2 Arbitration

- (a) Where either Party wishes to refer a Dispute to arbitration, it shall serve a written notice on the other Party to that effect and the AFSA Rules shall govern such arbitration.
- (b) Any such arbitration shall be conducted in the city of Pretoria in South Africa, in English and by a panel of three arbitrators, one of whom shall be appointed by the Seller, the second by the Buyer and the third by the Parties’ appointees or, absent any agreement between these appointees, by the Secretariat of the AFSA.
- (c) The Parties acknowledge that the AFSA Rules require arbitrators to be appointed from the relevant panel held by the AFSA. Notwithstanding this, the Parties agree that, if one Party wants to appoint as an arbitrator an individual who is not on the relevant panel, both Parties shall make appropriate representations to the AFSA in that individual’s favour and use all reasonable efforts to ensure that such individual is appointed to the relevant AFSA panel.
- (d) Any arbitral award made shall be final and binding on the Parties.
- (e) Should the need arise for either Party to seek interim or temporary relief before the arbitration is finalised, that Party may apply to the High Court of South Africa (Witwatersrand Local Division) for such relief.

26. LIABILITY

26.1 Direct losses

- (a) Notwithstanding anything contained to the contrary in this Agreement, neither Party shall be liable to the other Party for any Special Loss suffered by such other Party as a result of the first Party’s breach of this Agreement, save to the extent that such Special Loss was suffered

or caused by the wilful misconduct or gross negligence of such first Party.

- (b) Save as expressly provided elsewhere in this Agreement, neither Party shall be liable to the other Party for any damages or losses 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.

26.2 Mitigation

The Parties shall make all reasonable endeavours to mitigate any loss, cost or expense they may suffer as a result of the breach of any of the other Party's material obligations under this Agreement.

26.3 Sole remedy

- (a) The Seller's sole remedy against the Buyer's non-performance or breach of Buyer's obligations under this Agreement (in addition to its right to terminate this Agreement in accordance with Clause 19 (*Termination*)) shall be a claim for Direct Loss as specified in this Agreement, provided that the Seller's sole remedy in respect of any Buyer Failure on account of which the Seller was unable to deliver Net Energy Output to the Seller shall be the right to receive Holding Payments as specified in this Agreement.
- (b) The rights and remedies of the Buyer contained in this Agreement are cumulative and are not exclusive of any other rights or remedies provided by Law or otherwise. In particular, besides asserting a claim for Direct Loss as specified in this Agreement and/or terminating this Agreement in accordance with Clause 19 (*Termination*), the Buyer may additionally seek specific performance of the Seller's obligations under this Agreement.

27. THIRD PARTY INDEMNITY

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

avoid the death, injury, loss or damage in question.

- (b) The Seller shall indemnify and hold harmless the Buyer, its Affiliates and their respective officers, employees, consultants, agents and representatives against any and all Claims which may be asserted against the Buyer, its Affiliates, and their respective officers, employees, consultants, agents and representatives by the Owner, or suffered by any of them on account of the Owner or in relation to any matter connected with the Owner whatsoever.

28. 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.

28.2 Exclusions to Confidential Information

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

- (a) 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*);
- (b) the Party receiving the information can prove was already known to it, or which was independently acquired or developed by it without being in breach of its obligations under this Clause 28 (*Confidentiality*);
- (c) 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
- (d) 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:

- (a) by either Party to any Competent Authority (where for the purposes of this Clause 28.3 (*Permitted disclosure of Confidential Information*) such

definition shall not be limited to South Africa but shall instead 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:

- (i) 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
 - (ii) 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;
- (b) 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;
- (c) by either Party as may be necessary to comply with any obligation under any applicable Law;
- (d) by the Buyer to the Distributor or NTC, as applicable, as may be necessary to enable the Distributor or NTC to operate the System and carry out its obligations in relation thereto as a Reasonable and Prudent Operator (including in relation to the application by any person for connection to the System), provided that:
 - (i) only Confidential Information which is necessary for such purpose is disclosed by the Buyer to the Distributor or NTC, as applicable; and
 - (ii) the Buyer notifies the recipient at or about the time of such disclosure that the information is confidential and should not be disclosed by the recipient to third parties;
- (e) 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

- (f) by either Party, if so agreed in writing by the Parties prior to the disclosure.

28.4 Ownership and treatment

- (a) 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.
- (b) The Parties shall, in so far as is reasonably practicable, ensure that any copies of the Confidential Information, whether in hard copy or computerised form, shall clearly identify the Confidential Information as confidential.

28.5 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).

29. GOVERNING LAW

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

30. 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:

-
- (a) if delivered by hand during ordinary business hours, to its physical address in Clause 30.2 (*Addresses*), when so delivered;
 - (b) 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
 - (c) 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 paragraph (a) or (b) above.

30.2 Addresses

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

(a) **The Seller:**

As set forth in Schedule 1: Part 1, 3 (*Notices and Domicilium*).

(b) **The Buyer:**

Postal Address: PO Box 1091
Johannesburg 2000
South Africa

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

Fax No.: +27 11 800 5503

Tel No.: +27 11 800 5639

Attention: General Manager
Legal Department, Corporate Services Division

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.

31. WARRANTIES

31.1 Seller warranties

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

- (a) it is duly incorporated under the laws of the Republic of South Africa and has the right, power and authority to enter into this Agreement and to perform its obligations hereunder;
- (b) 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;
- (c) the Seller Information is true, accurate and complete in all material respects;
- (d) it has obtained all the Seller Approvals it is required by applicable Law to so obtain;
- (e) it has fully investigated the Project Site and has satisfied itself as to the Project Site's adequacy and fitness for the purposes of the Project and this Agreement, or, to the best of the Seller's knowledge, the Owner has fully investigated the Project Site and has satisfied itself as to the Project Site's adequacy and fitness for the purposes of the Project and this Agreement;
- (f) there are no Encumbrances over the Source Facility or the Project Site;
and
- (g) to the best of its knowledge and belief, there are no judgments outstanding against the Seller and no Claim is pending or threatened that could reasonably be expected materially and adversely to affect the financial condition of the Seller or the Seller's ability to perform its obligations under this Agreement.

31.2 Buyer warranties

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

- (a) it is duly incorporated under the laws of the Republic of South Africa and has the right, power and authority to enter into this Agreement and to perform its obligations hereunder;
- (b) 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;
- (c) it has obtained all the Buyer Approvals it is required by applicable Law to so obtain; and
- (d) to the best of its knowledge and belief, there are no judgments outstanding against the Buyer and no Claim is pending or threatened 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. MISCELLANEOUS

32.1 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.

32.2 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.

32.3 Waiver

No failure or delay by any Party to exercise any right, power or remedy shall operate as a waiver of it nor shall any partial exercise preclude any further exercise of the same, or of some other right, power or remedy.

32.4 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).

32.5 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.

32.6 Entire Agreement

- (a) 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, including the RFP.
- (b) 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 Effective Date, unless it is expressly set out in this Agreement, or has been submitted by the Seller to the Buyer pursuant to the RFP, or constitutes Seller Information.

32.7 Further assurances

- (a) 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.
- (b) In the event that the Seller is the owner of the Source Facility and intends to finance the Project on a limited recourse or project finance basis, the Buyer agrees that it shall enter into good faith negotiations with the Seller's lenders regarding conclusion and execution of a direct agreement on customary terms. The Buyer shall not be required by virtue of this paragraph (b) to execute any direct agreement or other agreement with the Seller and/or with its lenders pending conclusion of negotiations described above or on terms and conditions not acceptable to the Buyer (acting reasonably).

32.8 Language

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

32.9 Costs

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

32.10 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.

[Remainder of this page left blank intentionally.]

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

[NAME OF SELLER]

By: _____,

Name:

Title:

Date:

ESKOM HOLDINGS LIMITED

By: _____,

Name:

Title:

Date:

SCHEDULE 1**Details of Seller and Source Facility****Part 1
Seller⁹**

1. Full Name:
2. CIPRO Registration Number and Registered Address:
3. Notices and Domicilium:
 - 3.1 Postal Address:
 - 3.2 Physical Address:
 - 3.3 Fax No.:
 - 3.4 Tel No.:
 - 3.5 Attention:
4. Contact Person:
 - 4.1 Full Name:
 - 4.2 Designation:

**Part 2
Description of Source Facility**

1. Source Facility:
 - 1.1 Description (including a detailed single line diagram attached as Annex I to this Schedule): _____
 - 1.2 Gross Capacity (i.e. gross Capacity): _____ (kW)
 - 1.3 Net Capacity: _____ (kW)
2. Generating Technology:
3. Street Address of Project Site:

⁹ Note to RE Generators: Specify street address, title deed description, size, owner and all Encumbrances. Also provide detailed site diagram.

4. Legal description of Project Site:
5. Expiry Date:
6. System to which the Source Facility will be connected and nearest substation:
7. Distributor or NTC:
8. Delivery Point:

Part 3
Construction Programme¹⁰

No.	Milestone	Scheduled Date
1.	Legal Close (Effective Date): Conclusion of the Agreement Delivery of Seller Security	[●]
2.	Appointment of independent consultants to conduct the environmental impact assessment ("EIA")	_____
3.	Completion of EIA	_____
4.		Within two hundred and seventy (270) days after Effective Date
5.	Delivery to the Buyer of certified copies of the executed System Agreements	Within two hundred and seventy (270) days after Effective Date
6.	Delivery to the Buyer of certified copies of all the licences issued to the Seller in respect of the Source Facility under the Electricity Regulation Act No. 4 of 2006	Within two hundred and seventy (270) days after Effective Date
8.	Placing of orders for plant and main equipment	_____
9.	Commencement of Construction	_____
10.	Issue of notice to conduct proposed commissioning tests	Not later than twenty-one (21) days before the proposed date

¹⁰ Note to RE Generators: Proposed Scheduled Date to be inserted in relation to items # 2, 3, 8, 9, 13 and 14.

No.	Milestone	Scheduled Date
		for the tests
11.	Confirmation of local fire service approval of Fire Detection and Protection Systems at the Source Facility	Not later than seven (7) days before the proposed test date in the notice in # 10
12.	Issue of prior notice of Notice of Commencement	Not less than twenty-one (21) days prior to # 13
13.	Issue of Notice of Commencement	_____
14.	Scheduled COD	_____
15.	Last COD	Not later than (two hundred and seventy days) (270) days after the Scheduled COD

Part 4

Feed – in Tariff

The Renewable Feed – in Tariffs as approved by the NERSA are to be applied as the REFIT Energy Payment Rate commencing on the Commercial Operating Date of the Facility, Buyer shall pay the Seller for Renewable Energy delivered to Buyer by Seller the following FITs¹¹:

Technology	Unit	REFIT
Wind	R/kWh	1.25
Small hydro	R/kWh	0.94
Landfill gas	R/kWh	0.90
Concentrated solar	R/kWh	2.10

For all Renewable Energy delivered by Seller to the Buyer at the Point of Metering or as agreed in the connection agreement, the Buyer shall pay Seller at the price indicated above.

¹¹ Upon approval of the other REFIT qualifying technologies, they will be added in the above table.

For avoidance of doubt, and except as specifically provided for under Schedule 1, Part 4, the Buyer shall not be obliged to make any payment to Seller under Schedule 1, Part 4 for any energy which, regardless of reason affecting either party, does not qualify as Renewable Energy.

Part 5 Operating Period: Generation Profiles

The Seller should also indicate the Scheduled maintenance programme assumed to prepare his forecast generation forecast.

Part 6

1. Forecasted Monthly Energy Profile:

Month ¹²	kWh
1 Oct	
2 Oct	
3 Oct	
4 Oct	
4 Oct	
5 Oct	
6 Oct	
7 Oct	
8 Oct	
9 Oct	
10 Oct	
11 Oct	
12 Oct	
13 Oct	
14 Oct	
15 Oct	
16 Oct	
17 Oct	
18 Oct	
19 Oct	
20 Oct	
21 Oct	
22 Oct	
23 Oct	
24 Oct	
25 Oct	
26 Oct	
27 Oct	
28 Oct	

¹² Note to RE Generator: The month can be changed to be inline with the Commercial Operating Date

Month ¹²	kWh
29 Oct	
30 Oct	
31 Oct	

2. Weekly Forecasted Generation Profile:

	Time (hours)		kWh
Day 1	00:00	01:00	
	01:00	02:00	
	02:00	03:00	
	03:00	04:00	
	04:00	05:00	
	06:00	07:00	
	07:00	08:00	
	08:00	09:00	
	09:00	10:00	
	10:00	11:00	
	11:00	12:00	
	12:00	13:00	
	13:00	14:00	
	14:00	15:00	
	15:00	16:00	
	16:00	17:00	
	17:00	18:00	
	18:00	19:00	
	19:00	20:00	
	20:00	21:00	
	21:00	22:00	
	22:00	23:00	
	23:00	24:00	
Day 2	00:00	01:00	
	01:00	02:00	
	02:00	03:00	
	03:00	04:00	
	04:00	05:00	
	06:00	07:00	
	07:00	08:00	
	08:00	09:00	
	09:00	10:00	
	10:00	11:00	
	11:00	12:00	
	12:00	13:00	
	13:00	14:00	
	14:00	15:00	
	15:00	16:00	

	Time (hours)		kWh
Day 3	16:00	17:00	
	17:00	18:00	
	18:00	19:00	
	19:00	20:00	
	20:00	21:00	
	21:00	22:00	
	22:00	23:00	
	23:00	24:00	
	00:00	01:00	
	01:00	02:00	
	02:00	03:00	
	03:00	04:00	
	04:00	05:00	
	06:00	07:00	
	07:00	08:00	
	08:00	09:00	
	09:00	10:00	
	10:00	11:00	
	11:00	12:00	
	12:00	13:00	
	13:00	14:00	
	14:00	15:00	
	15:00	16:00	
	16:00	17:00	
	17:00	18:00	
	18:00	19:00	
	19:00	20:00	
	20:00	21:00	
	21:00	22:00	
	22:00	23:00	
	23:00	24:00	
Day 4	00:00	01:00	
	01:00	02:00	
	02:00	03:00	
	03:00	04:00	
	04:00	05:00	
	06:00	07:00	
	07:00	08:00	
	08:00	09:00	
	09:00	10:00	
	10:00	11:00	
	11:00	12:00	
	12:00	13:00	
	13:00	14:00	
	14:00	15:00	
	15:00	16:00	
	16:00	17:00	
	17:00	18:00	
	18:00	19:00	

	Time (hours)		kWh
Day 5	19:00	20:00	
	20:00	21:00	
	21:00	22:00	
	22:00	23:00	
	23:00	24:00	
	00:00	01:00	
	01:00	02:00	
	02:00	03:00	
	03:00	04:00	
	04:00	05:00	
	06:00	07:00	
	07:00	08:00	
	08:00	09:00	
	09:00	10:00	
	10:00	11:00	
	11:00	12:00	
	12:00	13:00	
	13:00	14:00	
	14:00	15:00	
	15:00	16:00	
	16:00	17:00	
	17:00	18:00	
	18:00	19:00	
	19:00	20:00	
	20:00	21:00	
	21:00	22:00	
	22:00	23:00	
	23:00	24:00	
Day 6	00:00	01:00	
	01:00	02:00	
	02:00	03:00	
	03:00	04:00	
	04:00	05:00	
	06:00	07:00	
	07:00	08:00	
	08:00	09:00	
	09:00	10:00	
	10:00	11:00	
	11:00	12:00	
	12:00	13:00	
	13:00	14:00	
	14:00	15:00	
	15:00	16:00	
	16:00	17:00	
	17:00	18:00	
	18:00	19:00	
	19:00	20:00	
	20:00	21:00	
	21:00	22:00	

	Time (hours)		kWh
Day 7	22:00	23:00	
	23:00	24:00	
	00:00	01:00	
	01:00	02:00	
	02:00	03:00	
	03:00	04:00	
	04:00	05:00	
	06:00	07:00	
	07:00	08:00	
	08:00	09:00	
	0900	10:00	
	10:00	11:00	
	11:00	12:00	
	12:00	13:00	
	13:00	14:00	
	14:00	15:00	
	15:00	16:00	
	16:00	17:00	
	17:00	18:00	
	18:00	19:00	
	19:00	20:00	
	20:00	21:00	
	21:00	22:00	
	22:00	23:00	
	23:00	24:00	

ANNEX I: SINGLE LINE DIAGRAM¹³

¹³ Note to RE Generators: to be inserted by Seller.

SCHEDULE 2
Form of Notice of Commencement

[on the letterhead of the Seller]

Date: [_____]

Eskom Holdings Limited
Megawatt Park,
Maxwell Drive,
Sunninghill
South Africa

CC copy to Fax No.: +27 11 800 5503

Attention: [●]¹⁴

Notice of Commencement of Operating Period

Dear Sirs

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

This notice (“**Notice**”) is the Notice of Commencement referred to in Clause 5.3(a) (*Commercial Operation Date*) of the PPA. Unless otherwise defined herein, capitalised terms used in this Notice shall have the meanings assigned to them in the PPA.

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

- (i) Written notice of the intention to issue this Notice was given to the Buyer at least twenty one (21) days’ prior to this Notice.
- (ii) We have obtained all of the Seller Approvals required for the Operation and Maintenance of the Source Facility, all of which remain in full force and effect, and we know of no reason why any such Seller Approval may be withdrawn or terminated.
- (iii) All agreements, including the System Agreements, required for the Construction, Operation and Maintenance of the Source Facility and the performance by the Seller of its obligations under the PPA have been entered into, are in full force and effect and remain valid and binding.

¹⁴ Note to RE Generators: REPA to insert appropriate designation on or before the execution of this Agreement.

-
- (iv) The amendment agreements to all electricity supply agreements between any suppliers of electricity (whether this is the Buyer in that capacity, a municipality, a municipal entity or any other licensed electricity supplier) of the one part, and end-use customers or customers who are part of the supply chain that supplies electricity to end-use customers (in either case where these end-use customers provide full or partial load to the Source Facility) of the other part, which ensure that there is no over-recovery whatsoever by the Seller and/or any such customers as a result of any electricity supplies to these customers flowing, whether in whole or in part, from the Source Facility, are in full force and effect and remain valid and binding.
 - (v) The Metering Installation has been procured, installed, tested and successfully commissioned in accordance with the NERSA's minimum testing standards then in force.
 - (vi) The Source Facility has been commissioned successfully and the Net Capacity (as stated in Schedule 1: Part 2, 1.3 (*Description of Source Facility*) not taking into account any reduction by PCP Capacity) is no less than one hundred per cent. (100%) of the Net Capacity.
 - (vii) None of the events entitling the Buyer to terminate the PPA in accordance with Clause 19 (*Termination*) have occurred and are continuing.
 - (viii) All of the Project Insurances required pursuant to Clause 20 (*Project Insurance*) of the PPA are in place and in full force and effect.

Yours faithfully,

[NAME OF SELLER]

Representative of the Seller

SCHEDULE 3 Feed – in Tariff

Part 1 Indexation

Starting in 2010, and for the duration of the Term of this Agreement, the Feed – in Tariff will be indexed on the 1st of April every year with reference to the approved FITs by the Energy Regulator.

1. Indexation

- 1.1 One hundred per cent (100%) of the Feed – in Tariff will be adjusted for changes in the RSA-CPI on 1 April every year starting in 2010. The formula for Indexation is:

$$\text{Indexed Feed – in Tariff}_j = \text{Feed – in Tariff}_{\text{Apr 09}} \times \left(\frac{\text{RSA – CPI}_j}{\text{RSA – CPI}_{2010}} \right)$$

Where:

“**Indexed Feed – in Tariff_j**” means the Feed – in Tariff in the financial year or Contract Year ‘j’¹⁵;

“**Feed – in Tariff_{Apr 09}**” means the Feed – in Tariff;

“**RSA-CPPI_j**” means the RSA-CPI for the twelve (12) months up to 31 December of the year immediately preceding financial year or Contract Year ‘j’; and

“**RSA-CPI_{Apr 09}**” means the RSA-CPI for the twelve (12) months up to 31 December of the year immediately preceding April 2010.

¹⁵ Note to RE Generator: financial year refers to the period 1 April to 31 March in the period preceding the Commercial Operation Date. Contract Year also coincides with such financial year, save for the first and last Contract Year, which may be shorter.

SCHEDULE 4 Form of Invoice

To:

Eskom
VAT No:
Contact:
Tel No:
Fax No:
E-mail:

Details:

Invoice #:
Invoice for:
Reg. No:
Vat No :
Tel No :
Fax No :
E-mail:

		Unit	Peak	Off-Peak	Value
	<u>Section 1- Energy Rates</u>				
a	Feed – in Tariff	c/kWh			
b	Feed – in Tariff with CPI index	#			
	<u>Section 2 – Net Energy Output</u>				
c	Commercial Energy delivered (kWh)	kWh			
	<u>Section 3 – Energy Payments</u>				
d	Commercial Energy payments	Rand			
	<u>Section 4 – Other Payments</u>				
e	Pass Through Costs	Rand			
f	Holding Payments	Rand			
g	Other	Rand			

Total Payments

h	Exclusive Total Payments for the Month	Rand		–
i	VAT @ 14%	%		14.0%
	Inclusive Total Payments for the Month ($q*(1+r)$)	Rand		–

SCHEDULE 5
Planned Maintenance Schedule

- 1 Not later than one hundred and twenty (120) days prior to the commencement of each Contract Year (save for the first Contract Year for which the corresponding period shall be sixty (60) days), the Seller shall submit its Scheduled Outages for that Contract Year following consultation with the Buyer regarding the Buyer's anticipated major maintenance outages in that Contract Year.
- 2 The Buyer may on no less than thirty (30) days' prior written notice, request the Seller to reschedule a Scheduled Outage to an alternative Month and the Seller shall use all reasonable endeavours to accommodate such rescheduling if it is consistent with the standards of a Reasonable and Prudent Operator.
- 3 The Seller may on no less than thirty (30) days' prior written notice reschedule a Scheduled Outage to an alternative Month; provided that such rescheduling is consistent with the standards of a Reasonable and Prudent Operator.

SCHEDULE 6 ASGI-SA Obligations

1. **ASGI-SA Commitments**

- 1.1 The Seller shall during the Term, take all steps and do all things required so as to demonstrate that it is using its best endeavours to achieve the ASGI-SA Commitments.

2. **Preliminary ASGI-SA Report**

- 2.1 Within one hundred and eighty (180) days after the Effective Date, the Seller shall prepare and deliver to REPA an implementation schedule which will incorporate: (a) a detailed programme showing the planned timing for the achievement of the ASGI-SA Commitments; (b) a list of all contracts concluded or to be concluded for the Project (including all subcontracts) which shall also state the full names of the parties to each such contract and their respective Local Content, BWO, BEE and SME status, as well as the Contract Value of each such contract and the goods and/or services acquired or to be acquired thereunder; and (c) the estimated Total Spend (the “**Preliminary ASGI-SA Report**”).
- 2.2 The Seller shall deliver to the Buyer within thirty (30) days of each calendar quarter, an updated Preliminary ASGI-SA Report to reflect: (a) any revisions in the estimated Total Spend; (b) the total expenditure in respect of the Project (Indexed to RSA-PPI) accrued as of the end of such quarter; and (c) the percentage portion of such expenditure in paragraph (b), which shall count towards the achievement of each of its ASGI-SA Commitments.
- 2.3 The Buyer shall be entitled on not less than fifteen (15) Business Days’ written notice to the Seller to request the Seller to deliver to the Buyer any supporting documentation reasonably evidencing the information stated in the Preliminary ASGI-SA Report or any updated Preliminary ASGI-SA Report.

3. **Final ASGI-SA Report**

- 3.1 No later than thirty (30) days prior to the anticipated end of the Term, the Seller shall deliver to the Buyer a report specifying:
- (a) the Total Spend;
 - (b) the Local Content Value;
 - (c) the percentage portion of the Local Content Value paid to BEE, BWO and SME contractors, subcontractors and suppliers for goods and/or services required in connection with the Source Facility; and
 - (d) a list of all contracts concluded in respect of the Project (including all subcontracts), which shall also state the full names of the parties to

each such contract and their respective Local Control, BWO, BEE and SME status, as well as the Contract Value of each such contract and the goods and/or services acquired thereunder.

- 3.2 Such report shall be accompanied by supporting documentation, including invoices and statements and a certificate by an independent certifier confirming the contents of such report (the “**Final ASGI-SA Report**”).

4. **Other Definitions**

“**ASGI-SA Commitments**” means, collectively, the Local Content Commitment, BEE Commitment, BWO Commitment and SME Commitment;

“**BEE**” or “**black empowering enterprise**” means an enterprise with an annual turnover of more than twenty-five million Rand (ZAR 25,000,000) which is at least ten per cent. (10%) beneficially owned by Black People who also hold at least ten per cent. (10%) of the voting control of such enterprise;

“**BEE Commitment**” means the portion (expressed as a percentage) of the Local Content Value which the Seller shall pay to BEE contractors, subcontractors and suppliers for goods and/or services required in connection with the Construction of the Source Facility, which portion is set forth in Annex 1 hereto (*Schedule of ASGI-SA Commitments*);

“**Black People**” means African, Coloured and Indian South African citizens;

“**Black Women**” means female African, Coloured and Indian South African citizens;

“**BWO**” or “**black women-owned enterprise**” means an enterprise with an annual turnover of less than twenty-five million Rand (ZAR 25,000,000) which is at least fifty per cent. (50%) beneficially owned by Black Women who also hold at least fifty per cent. (50%) of the voting control of such enterprise;

“**BWO Commitment**” means the portion (expressed as a percentage) of the Local Content Value which the Seller shall pay to BWO contractors, subcontractors and suppliers for goods and/or services required in connection with the Construction of the Source Facility, which portion is set forth in Annex 1 hereto (*Schedule of ASGI-SA Commitments*);

“**Contract Value**” means, in relation any contract in connection with the Project concluded or to be concluded between the Seller and each of its contractors as amended, the total value (expressed in April 2008 Rand terms) of all amounts for goods and services paid or to be paid by or on behalf of the Seller to such contractor, excluding penalties, damages and default interest;

“**Local Content**” means the portion (expressed as a percentage) of the Total Spend paid or to be paid to contractors, subcontractors and suppliers who are Locally Controlled;

“Local Content Value” means the value of the Local Content (expressed in Rand);

“Local Control” means, in relation to any person, that the majority beneficial ownership of such person is ultimately held by South African persons;

“SME” or **“small and medium enterprise”** means an enterprise with an annual turnover of twenty-five million Rand (ZAR 25,000,000); provided that if such supplier is principally a supplier of construction and building materials then the turnover limit shall be deemed to be one hundred million Rand (ZAR 100,000,000);

“SME Commitment” means the portion (expressed as a percentage) of the Local Content Value which the Seller shall pay to SME contractors, subcontractors and suppliers for goods and/or services required in connection with the Construction of the Source Facility, which portion is set forth in Annex 1 hereto (*Schedule of ASGI-SA Commitments*); and

“Total Spend” means the total expenditure incurred or to be incurred by the Seller in respect of the Project (expressed in Rand). This expenditure shall be determined with reference to the aggregate Contract Value of all contracts concluded by the Seller in respect of the Project.

ANNEX I TO SCHEDULE 6

Schedule of ASGI-SA Commitments

	Criteria	ASGI-SA Commitment
1.	Local Content	___% (i.e. the portion (expressed as a percentage) of the Total Spend paid or to be paid to contractors, subcontractors and suppliers who are Locally Controlled)
2.	BEE	___% (i.e. the portion (expressed as a percentage) of the Local Content Value which the Seller shall pay to BEE contractors, subcontractors and suppliers for goods and/or services required in connection with the Source Facility)
3.	BWO	___% (i.e. the portion (expressed as a percentage) of the Local Content Value which the Seller shall pay to BWO contractors, subcontractors and suppliers for goods and/or services required in connection with the Source Facility)
4.	SME	___% (i.e. the portion (expressed as a percentage) of the Local Content Value which the Seller shall pay to SME contractors, subcontractors and suppliers for goods and/or services required in connection with the Source Facility)

SCHEDULE 7
Seller Security

Part 1
Form of Bank Guarantee

[on the letterhead of the Issuing Bank]

Date: _____

Eskom Holdings Limited
Megawatt Park, Maxwell Drive,
Sunninghill, South Africa

CC copy to Fax No.: +27 11 800 5503

Attention: [●]¹⁶

Dear Sirs

We refer to the power purchase agreement dated *[insert]* (the “**PPA**”) between our client, _____ (the “**Seller**”) and REPA (the “**Buyer**”). On the instructions of our client, the undersigned issuing bank (the “**Issuing Bank**”) hereby irrevocably and unconditionally as an independent primary obligation undertakes to pay the Buyer on demand without objection or argument sums not exceeding the maximum aggregate amount of ZAR *[insert]*¹⁷ (the “**Guaranteed Sum**”).

Subject to the other provisions contained in this guarantee (the “**Bank Guarantee**”), the Buyer may request payment of the Guaranteed Sum from the Issuing Bank in full (or in such part thereof as may be demanded) by submitting a written demand on the letterhead of the Buyer (each such request, a “**Payment Demand**”), specifying the amount of payment demanded and stating that the Buyer has the right to receive such payments from the Seller pursuant to the terms of the PPA. For the avoidance of doubt, the Buyer shall be entitled to submit as many Payment Demands as it deems appropriate, it being understood that, where the amount demanded under any Payment Demand, or the aggregate of the amounts demanded under all Payment Demands submitted, exceeds the Guaranteed Sum, the Issuing Bank shall only be required to pay to the Buyer an amount equal to the Guaranteed Sum.

¹⁶ Note to RE Generators: REPA to insert appropriate designation on or before the execution of this Agreement.

¹⁷ Note to RE Generators: Amount equal to Delay LDs cap to be inserted.

The Issuing Bank shall honour each Payment Demand made by the Buyer under the terms of this Bank Guarantee, and agrees to pay the corresponding amount upon first demand and delivery of any Payment Demand notwithstanding the Seller's insolvency, winding-up, liquidation, judicial management, dissolution or deregistration, whether provisionally or finally, provided that the form of the Payment Demand and the manner in which it is submitted conform to the provisions established in the preceding paragraph and that such Payment Demand is submitted before the Expiration Date (as defined below).

Each Payment Demand must be submitted to the Issuing Bank during days and hours when the Issuing Bank is open for business in South Africa. The Issuing Bank irrevocably and unconditionally undertakes to pay the funds requested in each corresponding Payment Demand to the Buyer in immediately available funds no later than forty-eight (48) hours after the hour in which the Payment Demand was submitted by the Buyer, excluding any hours during days on which the Issuing Bank is not open for business in South Africa, and provided that the documentation presented satisfies the requirements contained in this Bank Guarantee. All amounts to be paid under this Bank Guarantee shall be made without any deduction, set-off, counterclaim, withholding or deferment of any kind. If the Payment Demand fails to comply with any of the requirements established in this Bank Guarantee, the Issuing Bank will immediately and in any event not later than the following Business Day after the date such demand is made) notify the Buyer in writing at the address listed herein for the Buyer, or at the address provided in writing by the Buyer to the Issuing Bank for such purpose. The Issuing Bank shall explain in such notice why it rejected the Payment Demand and shall return the Payment Demand to the Buyer. The Buyer may resubmit any Payment Demand amended to address the reasons for rejection (whether after an initial or any subsequent rejection). All payments that the Issuing Bank makes to the Buyer hereunder shall be made by electronic transfer in immediately available funds to the bank account specified by the Buyer in the corresponding Payment Demand.

This Bank Guarantee shall expire on [insert]¹⁸ (the “**Expiration Date**”), provided that, such date shall automatically be extended by that number of days equal to the duration of any event of *force majeure* or *casus fortuitus* preventing performance by the Issuing Bank. The Buyer may not submit any Payment Demand to the Issuing Bank once this Bank Guarantee has expired, nor shall the Issuing Bank be obligated to make any payment hereunder in respect of any Payment Demand submitted after this Bank Guarantee has expired.

This Bank Guarantee shall be returned to the Issuing Bank upon payment of the Guaranteed Sum. The Buyer's rights under this Bank Guarantee are not transferable.

All charges of the Issuing Bank related to the issuance or performance of this Bank Guarantee (including, but not limited to, the negotiation, payment, extension or

¹⁸ Note to RE Generators: This date is to be fixed with reference to a date falling at least thirty (30) days after the Last COD.

transfer hereof) shall be borne by the Seller and under no circumstances shall be charged to the Buyer by the Issuing Bank.

This Bank Guarantee shall be governed by and interpreted in accordance with the laws of South Africa. The Division of the High Court of South Africa having jurisdiction over the Issuing Bank shall have non-exclusive jurisdiction over any dispute arising hereunder, to which jurisdiction all parties hereto consent and submit. Any communication from the Buyer with respect to this Bank Guarantee shall be in writing and delivered by hand, with receipt confirmed, to the address at which Payment Demands are to be delivered.

Yours faithfully,

Issuing Bank

Representative of the Issuing Bank

Part 2 Form of Letter of Credit

To:

Eskom Holdings Limited
Megawatt Park, Maxwell Drive,
Sunninghill, South Africa

(the “**Beneficiary**”)

CC copy to Fax No.: +27 11 800 5503

Attention: [●]¹⁹

Our irrevocable standby letter of credit number [insert]

We, [insert name of bank], [insert address] hereby issue in favour of the Beneficiary, our Irrevocable Standby Letter of Credit No. [insert] [on the instructions and on

¹⁹ Note to RE Generators: REPA to insert appropriate designation on or before the execution of this Agreement.

behalf of *[insert Seller's name]* of *[insert address]* for ZAR *[insert]*²⁰ (the “**Guaranteed Sum**”) in the aggregate. This standby letter of credit shall expire on *[insert]*²¹ (“**Expiry Date**”) (other than in respect of a Demand made hereunder and not yet settled by us prior to the Expiry Date).

This Irrevocable Standby Letter of Credit is available for payment at sight upon presentation by the Beneficiary of a duly completed and executed “**Demand**” in writing stating as follows:

“We hereby claim an amount of [●] under the Irrevocable Standby Letter of Credit Number *[insert]* issued by you on *[insert]*. We certify that such sums are payable by the Seller by way of Delay Liquidated Damages (as defined in the Power Purchase Agreement executed between us and the Seller dated *[insert]*) to us.”

OR

“We hereby claim an amount of [●] under the Irrevocable Standby Letter of Credit Number *[insert]* issued by you on *[insert]*. We certify that such sums are payable to us on account of the Seller having failed in its obligation to provide to us a replacement Seller Security (as defined in the Power Purchase Agreement executed between us and the Seller dated *[insert]*)”

Each Demand shall be in writing, and, unless otherwise stated, may be made by letter, fax or telex and must be received in legible form by us at the address and by the particular department or office as follows:

[insert]

Subject only to receipt by us of a duly completed and executed Demand, we hereby irrevocably and unconditionally agree to pay to the Beneficiary the amount claimed in such Demand, for value, by telegraphic transfer to the *[insert]* account of the bank selected by the Beneficiary, no later than two (2) business days after receipt of such Demand.

Special conditions

- (1) Partial drawings are permitted provided that the aggregate amount claimed in respect of all drawings hereunder shall not at any time exceed the face amount of this Standby Letter of Credit.
- (2) All drawings shall be in ZAR only.
- (3) We hereby undertake to the Beneficiary that a Demand made in conformity with the terms of this Standby letter of Credit will be duly honoured upon presentation for payment at our above counters.

²⁰ Note to RE Generators: Amount equal to Delay LDs cap to be inserted.

²¹ Note to RE Generators: This date is to be fixed with reference to a date falling at least thirty (30) days after the Last COD.

- (4) A Demand made in conformity with the terms of this Standby Letter of Credit will also be acceptable if made by a Beneficiary by way of authenticated SWIFT or tested Telex.

On the Expiry Date this Irrevocable Standby Letter of Credit will become null and void for all purposes (other than in respect of a Demand made hereunder and not yet settled by us prior to the expiry date).

Except to the extent it is inconsistent with the express terms of this Standby Letter of Credit, this Standby Letter of Credit is subject to the International Standby Practices (ISP 98), International Chamber of Commerce Publication No. 590.

This Standby Letter of Credit is governed by the Laws of the South Africa.

Part 3 Form of Principal Shareholder Guarantee

[●] Energy Facility
Contract Reference: _____

[Name of Seller to be inserted] **Principal Shareholder Guarantee**

THIS GUARANTEE is made this *[insert]* day of *[insert]*:

With *[insert name of guarantor to be inserted]* as “**Guarantor**” in favour of REPA.

1. **Definitions**

In this Guarantee, unless specifically defined below, capitalised words and expressions shall have the meaning ascribed to them in the PPA (as defined below). Additionally, in this Guarantee the following words and expressions shall have the following meanings:

“**PPA**” means the power purchase agreement entered into between Buyer and the Seller, on or about the *[insert]* day of *[insert]* (Contract Reference No. *[insert]*) as amended, varied, restated, novated or substituted from time to time;

“**Guarantee**” means this Principal Shareholder Guarantee;

“**Guarantor**” means *[insert]*, a company registered in accordance with the laws of *[insert]*, under Registration Number *[insert]*²²; and

“**Guarantor’s Address**” means *[insert]*²³.

²² Note to RE Generators: Name and details of Principal Shareholder to be inserted.

2. **Introduction**

- 2.1 The PPA requires that the Seller procure from its Principal Shareholder, a guarantee in favour of the Buyer on substantially the same terms and conditions as set out in this Guarantee, by way of security for Delay Liquidated Damages which may become payable by the Seller under the PPA and remain unpaid.
- 2.2 The Guarantor is [the][one of the] [Principal Shareholder[s]] of the Seller²⁴.
- 2.3 The Guarantor has agreed to provide the required guarantee in favour of Buyer on the terms and conditions set out hereunder.

3. **Guarantee Undertaking**

- 3.1 The Guarantor hereby absolutely, unconditionally and irrevocably in favour of the Buyer and its successors, endorsees and assigns undertakes by way of primary obligation, to make payment to the Buyer of such amounts as may be payable by the Seller to Buyer under the terms of the PPA by way of Delay Liquidated Damages.
- 3.2 The Guarantor agrees to make such payment upon first written demand from the Buyer without set-off or counterclaim and without any legal formality such as protest or notice being necessary and waives all privileges or rights which it may have as a guarantor, including any right to require the Buyer to claim payment or to exhaust remedies against the Seller or any other person. All payments to be made by the Guarantor under this Guarantee shall be made in the currency in which they are due under the written demand and without withholding or deduction on account of taxes or if the Guarantor is obliged to make any withholding or deduction, the Guarantor shall gross up the payment so that the net sum received by the Buyer includes the sum demanded.

4. **Terms of Undertaking**

- 4.1 The Buyer shall be entitled from time to time, as it, in its absolute discretion, deems fit, and without prejudice to any of its rights hereunder and without any further consent from the Guarantor to release any securities given to it by or on behalf of the Seller and/or to arrange its affairs with the Seller in any manner which it sees fit, without advising the Guarantor and without affecting the Guarantor's liability under this Guarantee. This includes, without limitation, any extensions, indulgences, release or compromise granted to the Seller or any variation under or to the PPA. The Guarantor's obligations under this

²³ Note to RE Generators: Guarantor's physical address to be inserted.

²⁴ Note to RE Generators: Actual relationship to be described as appropriate.

Guarantee shall be in addition to and independent of every other security which Buyer may hold in respect of the Seller's obligations under the PPA.

- 4.2 All acknowledgements of indebtedness and admissions by the Seller in respect of or in connection with Delay Liquidated Damages shall be binding on the Guarantor. Similarly all determinations, awards and the like made against the Seller pursuant to the PPA shall be binding on the Guarantor.
- 4.3 The Guarantor renounces the benefits of *excussion*, division, *non numeratae pecuniae*, revision of accounts, no value received and cession of action, the full meaning and effect of which it knows and understands.
- 4.4 Should Buyer cede its right of action against the Seller to any third party where such cession is permitted under the PPA, then the Buyer shall be entitled to cede to such third party the rights of the Buyer under this Guarantee, and the Buyer shall notify the Seller of any such cession.
- 4.5 The Guarantor's obligations in terms of this Guarantee are as co-principal debtor and without limitation shall not be discharged, impaired or otherwise affected by reason of:
- (a) Any disability, incapacity or any change in the shareholding, status, control or ownership in or of the Seller or the Seller no longer being its subsidiary at any point in time;
 - (b) the Seller being placed under provisional or final liquidation or suffering or labouring under any similar disability at any time;
 - (c) any time, forgiveness or other indulgence granted to the Seller or any alteration, amendment or variation in terms of any agreement or other commitment to which it is or may become a party or otherwise bound;
 - (d) any illegality, invalidity or unenforceability in or of the terms of any agreement or commitment to which the Seller is or may become a party or otherwise bound;
 - (e) any dispute or disagreement whatsoever under or in relation to the PPA;
 - (f) any forbearance or delay on Buyer's part in asserting any of its rights against the Seller; or
 - (g) any other act, event or omission which but for this Clause 4 might operate to discharge, impair or otherwise affect of any of the obligations of the Guarantor contained in this Guarantee or any of the rights, power or remedies conferred on Buyer by the PPA or by law.
- 4.6 Notwithstanding any past performance of any obligation by the Guarantor, or on the Guarantor's behalf, the Guarantor shall have no right to any cession of

action in respect of such past performance until the obligations of the Seller to Buyer have been discharged in full.

- 4.7 If any performance which has the effect of reducing or discharging the liability of the Guarantor is set aside under any insolvency law or for any reason whatsoever by order of court, or refunded to the Seller, or the trustees or liquidator of the Seller by agreement, or if any security held by the Buyer is set aside by a court or released by agreement, the Guarantor shall be liable to the Buyer as Guarantor for the Seller in respect of the obligations of the Seller to the Buyer arising from, revived by or which becomes unsecured as a result of the setting aside, refund or release of such security notwithstanding that it may take place after the termination of the liability of the Guarantor in respect of those obligations howsoever such termination happened.
- 4.8 All references in this Guarantee to obligations of the Seller are accordingly deemed to include any obligation arising from or revived by the setting aside, refund or release of any such performance, payment or security.
- 4.9 The Guarantor's obligations as guarantor under this Guarantee are and shall be continuing obligations notwithstanding any settlement of account or other matter whatsoever and without limitation shall not be considered satisfied by any partial performance of any or all of the duties, obligations and undertakings of the Seller under the PPA. The Guarantor further agrees that it shall not be entitled to withdraw or cancel this Guarantee unless and until all of the obligations of the Seller in respect of which this Guarantee has been given, have been fully discharged or extinguished, as the case may be, to the satisfaction of the Buyer.
- 4.10 This Guarantee contains the entire agreement between the Parties in regard to the subject matter thereof. No variation, amendment, or consensual cancellation of this Guarantee or any provision or term hereof shall be binding or have any force or effect unless reduced to writing and signed on behalf of the Guarantor and the Buyer (by duly authorised representatives).
- 4.11 No extension of time or waiver or relaxation of any of the provisions or terms of this Guarantee shall operate as an *estoppel* against Buyer in respect of any of its rights in terms of this Guarantee.
- 4.12 No failure by the Buyer to enforce any provision of this Guarantee shall constitute a waiver of such provisions or affect in any way the Buyer's rights to require the performance of such provision at any time in the future, nor shall a waiver of a subsequent breach nullify the effectiveness of the provision itself.
- 4.13 If any provision of this Guarantee is rendered void, illegal or unenforceable in any respect under any law, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.
- 4.14 This Guarantee shall be governed by and construed in accordance with the laws of the Republic of South Africa.

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- 4.15 The Division of the High Court of South Africa (Witwatersrand Local Division) shall have non-exclusive jurisdiction over any dispute or difference between the Buyer and the Guarantor in connection with or arising from this Guarantee, to which jurisdiction all parties hereto consent and submit.

For the purpose hereof 'dispute' means any dispute or difference between Buyer and the Guarantor in connection with or arising from this Guarantee in the widest sense, including any dispute or difference in connection with or in respect of the conclusion or existence of this Guarantee, the carrying into effect of this Guarantee, the interpretation or application of the provisions of this Guarantee, the respective rights and/or obligations of Buyer and the Guarantor in terms of and/or arising out of this Guarantee and/or the validity, enforceability, rectification, termination and/or cancellation, whether in whole or in part, of this Guarantee.

- 4.16 The Guarantor chooses *domicilium citandi et executandi* for all purposes in connection with this Guarantee at the Guarantor's Address.
- 4.17 the Buyer shall not be required to communicate to the Guarantor its acceptance of this Guarantee.

SIGNED at [insert] on [insert]

For: [insert]

Signatory: [insert]
Capacity: [insert]
Authority: [insert]

SIGNED at [insert] on [insert]

For: Eskom Holdings Limited

Signatory: [insert]
Capacity: [insert]
Authority: [insert]

SCHEDULE 8 Holding Payment

The “**Holding Payment**” for the purposes of this Agreement shall be determined in accordance with the following formula:

$$\text{HP} = \{\text{ANEQ} - \text{NEQ}\} \times \text{H} \times \text{ABER}$$

Where:

- (1) “**HP**” is the Holding Payment;
- (2) “**ANEQ**” is:
 - (a) If the Holding Period occurs in the first Billing Period, the average forecast hourly Commercial Energy per FIT for the first Billing Period set forth in the Forecasted Generation Profile;
 - (b) If the Holding Period occurs after the first Billing Period but on or before the end of the first Contract Year, the average hourly Commercial Energy per FIT in the period up to the day preceding the start of the Holding Period (but excluding all hours in all preceding Holding Periods and Force Majeure Days occurring in such period);
 - (c) If the Holding Period occurs thereafter, the average hourly Commercial Energy per FIT over the twelve (12) Billing Periods preceding the start of the Holding Period (but excluding all Holding Periods and Force Majeure Days occurring in such twelve (12) Billing Periods)
- (3) “**NEQ**” is the average hourly Commercial Energy per FIT over the Holding Period (excluding all Force Majeure Days);
- (4) “**H**” is the total number of hours per FIT in the Holding Period; and
- (5) “**ABER**” is hundred per cent. (100%) of the Renewable Energy Feed – in Tariff, Indexed to RSA-CPI and adjusted by the FIT (as applicable), provided that, if the HP is a negative number, it shall be deemed to be zero.