

SUBJECT TO LENDER COMMENTS

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**Operations and Maintenance Agreement
for a 3 x 350 MW (Gross) 981.5 MW (Net) Coal-Fired Power Facility
at Manda Bay, Lamu County, Kenya**

Dated

Amu Power Company Limited
(the Project Company)

CHD Power Plant Operation Company
(the Operator)

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Operations and maintenance agreement

Dated

Between

- (1) **Amu Power Company Limited**, a limited liability company incorporated in the Republic of Kenya with its registered office at 4th Floor, Geminia Insurance Plaza, P.O. Box 61872-00200, Nairobi, Kenya (the **Project Company** which expression shall include its successors in title and assigns); and
- (2) **[CHD Power Plant Operation Company**, a company incorporated in the People's Republic of China whose registered office is at No.2 Xuanwumen, Xicheng District, Beijing City, People's Republic of China (the **Operator**).]¹

Recitals

- A The Project Company is developing and financing a 3 x 350 MW (Gross), 981.5 MW (Net) supercritical, pulverised coal-fired power plant at Manda Bay, Lamu County, Kenya (the **Project**). The Project Company has entered into the Power Purchase Agreement in relation to the Project with KPLC and the EPC Contract with the EPC Contractor.
- B The Operator has represented that it has the experience, expertise, capability and know-how to carry out and perform Operational Services in accordance with this Agreement.
- C The Project Company shall engage the Operator to carry out and perform the Services, and the Operator agrees to carry out and perform the Services, on the terms and conditions of this Agreement.
- D The Operator acknowledges that the Project Company has entered into or will enter into Financing Agreements with Lenders for the financing of the Project.
- E The Project Company desires that the Services should be carried out and performed by the Operator, and has accepted a proposal by the Operator for the provision of operating and maintenance services to the Facility in accordance with the terms and conditions of this Agreement.

It is agreed

1 Definitions and interpretation

1.1 Definitions

The terms used in this Agreement shall have the meanings stated below, unless the context otherwise requires:

Additional Services means any work or services additional to the Services which the Project Company may so instruct the Operator to carry out and the Operator shall be entitled to additional reasonable compensation in respect thereof.

¹ Note: Identity of O&M Contractor (i.e. whether a local subsidiary needs to be established) is to be confirmed. Performance security requirements to be reviewed once the identity of the O&M Contractor has been confirmed.

Affiliate means any person or legal entity who directly or indirectly controls, or is controlled by or is under common control with, the Project Company or the Operator or within the same "group" (as defined under section 474 of the Companies Act 2006).

Annual Availability means the availability of the Facility as defined in Schedule 11 (Testing Requirements).

Annual Availability Guarantee means the guarantee that the Annual Availability shall not be lower than the value as set forth in Schedule 11 (Testing Requirements).

Annual Budget means in relation to each Operating Year the revenue and expense budget report for the operation of the Facility in the form set out in [Part 2 of Schedule 5].

Annual Maintenance Plan means the plan of programmed maintenance produced by the Operator in respect of each twelve (12) month period commencing on the Full Commercial Operation Date.

Annual Operating Plan means, in relation to each Operating Year, the Annual Budget together with a comprehensive programme for the operation and maintenance of the Facility under the headings specified in Part 1 of Schedule 8 (Annual Operating Plan).

Anti-Corruption Laws and Regulations means all applicable Laws relating to corruption or bribery.

Applicable Engineering Standards means the codes, practices and standards specified in Schedule 1 (Project Company Requirements).

Applicable Requirements means the Law, or any Operator's Approvals, Project Company Approvals, African Development Bank's Integrated Safeguards System, African Development Bank's Gender Considerations in the Energy Sector, World Bank and International Finance Corporation Environmental, Health and Safety Guidelines for Thermal Power Plants 2008 and International Finance Corporation Environmental and Social Performance Standards including any conditions attached.

Approved Annual Operating Plan means the Annual Operating Plan submitted by the Operator and approved by the Project Company in accordance with Clause 6.8.

Authorisation means any approval, consent, licence, permit, authorisation or other permission to be granted by a Governmental Authority required for the enforcement of rights or performance of obligations under any Project Agreement, Financing Agreement and/or the Project, and including any approval required to be given by the Energy Regulatory Commission.

Availability means the ability of the Facility or any Unit (as appropriate) at a particular instant or over a particular period of time, to deliver electricity to the KPLC System at the Delivery Point and the terms **Available** and **Unavailable** shall be construed accordingly.

Available Capacity means the Capacity Available in any Settlement Period being the Declared Capacity unless there has been an Availability Failure in respect of the Plant in that Settlement Period in which event the Available Capacity shall be the Net Electrical Output delivered in response to a Despatch Instruction(s) for that Settlement Period multiplied by two.

Availability Failure has the meaning given to it under the Power Purchase Agreement.

Average Availability means the average of the Available Capacity in any given period.

Back-Up Metering Equipment means the equipment for check metering and monitoring the output of the Facility [to be provided by and installed by the EPC Contractor and transferred to KPLC pursuant to schedule 2 of the PPA].

Capacity means the capacity of the Facility expressed in MW to generate and deliver electricity.

Change in Law means any of :

- (a) the adoption, promulgation, enactment (including with retroactive application), bringing into effect, repeal, expiration, revocation, amendment, change in application or enforcement of, change in interpretation, re-interpretation or modification of any Laws by any Governmental Authority (excluding relating to any Taxes);
- (b) any change in any Authorisation required in connection with this Agreement or the Project or any additional requirements or conditions imposed by any Governmental Authority in connection with the issuance, extension, replacement, variation or renewal of any Authorisation required in connection with this Agreement or the Project, provided that in respect of the issuance, extension, replacement, variation or renewal of any Authorisation required in connection with this Agreement or the Project, the party requiring the relevant Authorisation has first diligently attempted to obtain such Authorisation and if the processes required by such duty of diligence have not been exhausted, such processes have been and are still being diligently pursued by that Party,

in each case occurring after the Effective Date and which despite the exercise of Prudent Operating Practice by the Project Company or the Operator:

- (i) results in a material increase in the operating costs incurred by the Operator in performing its obligations under this Agreement; or
- (ii) imposes requirements for the operation or maintenance of the Facility that are materially more onerous than the requirements in effect as of the Effective Date and that affect the Operator's performance under this Agreement; or
- (iii) results in a material decrease in the operating costs incurred by the Operator in performing its obligations under this Agreement; or
- (iv) makes the Operator unable generate electricity and/or perform its obligations under this Agreement.

Change in Tax means the adoption, promulgation, bringing into effect, repeal, expiration, revocation, amendment, reinterpretation by a Governmental Authority, change in application from the provisions of the relevant legislation, change in interpretation or modification of any Laws or Authorisations, relating to any Taxes which differs from any Laws or Authorisations relating to any Taxes in effect on the Effective Date excluding any Taxes imposed in respect of the income of employees of the Operator.

Coal Receiving and Handling Facilities means the coal receiving and handling facilities which are to be procured by the Project Company from the Coal Receiving and Handling Facilities Contractor.

Coal Receiving and Handling Facilities Contractor means the contractor engaged by the Project Company (who, for the avoidance of doubt, is not the EPC Contractor) to design, construct and commission the Coal Receiving and Handling Facilities.

Coal Receiving and Handling Facilities Procurement and Construction Contract means the contract entered into by the Project Company and the Coal Receiving and Handling Facilities Contractor on or around the date of this Agreement for design, procurement, construction and commissioning of the Coal Receiving and Handling Facilities.

Colony means the accommodation and facilities for the Operator's personnel on Site.

Commissioning has the meaning given to that term in the EPC Contract.

Confidential Information has the meaning given thereto in Clause 21.1.1.

Consumables means those parts normally replaced due to wear and tear and chemicals and consumables associated with the day-to-day maintenance (routine, preventive and corrective), scheduled maintenance, inspection and overhauls of the Facility which require regular attention, and those items which have to be changed, refilled, replenished or re-loaded on a periodic basis, to meet Availability or efficiency targets.

Contracted Capacity means:

- (a) at the Effective Date, an intended Capacity of 3 x 350 MW (gross), 981.5 MW (net);
- (b) at the Full Commercial Operation Date, the Contracted Capacity certified by the Independent Engineer (as defined in the EPC Contract) pursuant to the terms of the EPC Contract.

Contracted Capacity Test means the test of the normal full load capacity of the Facility carried out in accordance with the requirements of Section [**] of Part [**] of Schedule 11 (Testing Requirements).

Cost means all expenditure reasonably incurred (or to be incurred) by the Operator whether on or off the Site, including overhead and similar charges, but does not include profit.

Declared Capacity has the meaning given to it under the Power Purchase Agreement.

Defect means any defect or deficiency of the Facility (excluding any repair or replacement of the Facility required as part of the Services) which does not result from an act or omission on the part of the Operator or any failure by the Operator to comply with its obligations under this Agreement and which causes the Facility not to comply with performance, capacity, efficiency and emissions requirements set out in the EPC Contract, Coal Receiving and Handling Facilities Procurement and Construction Contract or in any provision of this Agreement or the PPA.

Delivery Point means the point of common coupling at which the Net Electrical Output from the Facility is delivered to the KPLC System being the point specified in Schedule 18 (Delivery Point).

Designated Party means any person:

- (a) whose name is published in any resolution of or list issued by the GOK or the United Nations designating such person as a terrorist or a terrorist organisation;
- (b) whose assets are blocked, frozen or ordered forfeited by the GOK or the United Nations as a direct consequence of:
 - (i) that person being a terrorist or belonging to a terrorist organisation;
 - (ii) the violation of applicable Law pertaining to money laundering or international anti-terrorism laws;
- (c) who is or was found guilty (without the right of further appeal) or against whom a final judgment or order was entered or whose assets were seized, blocked, frozen or ordered forfeited as a consequence of any proceedings relating to:
 - (i) the violation of Law pertaining to money laundering;
 - (ii) the violation of Anti-Corruption Laws and Regulations; or
 - (iii) the violation of United Nations sanctions,

and in respect of whom information relating to that person's guilt, final judgment, order or seizure of assets is publicly available or has been notified to the Operator by the Project Company.

Despatch Instruction means an instruction given by KPLC to the Project Company in relation to the operation of the Facility in accordance with the terms of the Power Purchase Agreement.

Diffuser Pipe means [the pipe shown on the positions marked in [red] on the plan at Schedule [3]]².

Direct Agreement means the agreement to be entered into between the Project Company, the Operator and the Lenders under which the Lenders may exercise step-in rights in respect of this Agreement in the form set out in Schedule 17 (Form of Lender Direct Agreement).

Dispute has the meaning specified in Clause 25.3.1.

Effective Date means the date of this Agreement.

Environmental Law means any applicable Law governing or relating to (i) the protection of the environment or harm to, or the protection of, human, animal or Facility life, the air, or to any water body or system, (ii) the release of, or threatened release of, Hazardous Substances including investigations, monitoring and abatement of such release or (iii) the manufacture, handling, transport, use, treatment, storage or disposal of Hazardous Substances.

Environmental Licences means any licence, authorisation and approval or consent in relation to Environmental Matters which applies to the Facility and the operation and maintenance thereof.

² Note: Definition to be provided

Environmental Matters means any of the following:

- (a) any release, entry or introduction of any Hazardous Substance into the environment;
- (b) any deposit, disposal, keeping, treatment of any waste or Hazardous Substance or any importation, exportation, transportation, handling, processing, manufacture, collection, sorting or presence of any Hazardous Substance; or
- (c) nuisance, noise, defective premises, health and safety at work, industrial illness, industrial injury due to environmental factors, environmental health problems, the conservation, preservation or protection of the natural or built environment or of man or any living organisms supported by the environment or any other matter whatsoever affecting the environment or any part of it.

EPC Contract means the engineering, procurement and construction contract between the Project Company and the EPC Contractor for the design, construction, Commissioning, testing and acceptance of the Facility entered into on or around the date of this Agreement.

EPC Contractor means Sichuan Electric and Consulting Company Limited and Power Construction Corporation of China jointly and severally liable.

Event of Default means an Operator Event of Default or a Project Company Event of Default.

Expected Full Commercial Operation Date means a date falling between 1 April 2019 and 31 December 2019, as such date may be extended from time to time only in cases that the EPC Contractor is entitled to such extension in accordance with the terms of the EPC Contract.

Expert means an expert appointed in accordance with Clause 25.4.

Expiry Date means, subject to Clause 18, the date falling twelve (12) years after the Full Commercial Operation Date, or as such period may be extended in accordance with Clause 3.2.

Facility means the coal fired power station, capable of 3 x 350MW (gross), 981.5MW (net) of capacity including the Units, Jetty, Coal Receiving and Handling Facilities, Colony, Seller's Connection Facilities (as defined in the PPA), the Metering System, the Diffuser Pipe and all associated facilities.

Facility Manager means the individual with day-to-day primary responsibility for the provision of the Services so named in Schedule 12 (Key Personnel).

Fee means the Mobilisation Fee and the Service Fee.

Financing Agreements means all agreements (including any security) for the financing or refinancing of the construction and operation of the Facility entered into by the Project Company or any other Person with the Lenders or any agent, trustee or administrator acting for and on behalf of the Lenders together with any document entered into from time to time under or in accordance with any other such agreement or security.

Force Majeure has the meaning given thereto in Clause 16.

Fuel means the fuel types used by the Facility including, without limitation, coal and fuel oil.

Fuel Supply Agreement means any agreement entered into by the Project Company relating to the supply and transportation of Fuel or limestone (as the case may be) to the Facility.

Full Commercial Operation Date means the date the Project Company takes over the Facility following completion of the design and construction thereof in accordance with the terms of the Power Purchase Agreement.

Functional Specification means the functional specification for the Facility and each Unit as specified in [part A of schedule 1 of the EPC Contract].

GOK means the government of Kenya.

GOK Letter means the letter of comfort to be issued by GOK to the Project Company in relation to the Facility.

Governmental Authority means GOK, any ministry, authority (including any regional and local authorities of Kenya and including any implementing executive organ or other branches of government) or division thereof, any agencies owned or controlled by GOK including the Energy Regulatory Commission, any legislative organ, any court, tribunal, any securities exchange, any other body in Kenya having (i) statutory competence to promulgate rules and regulations governing or touching and concerning matters, transactions and issues contained or relating to this Agreement or any of the other Project Agreements; or (ii) any other competence or powers to impose or vary regulations relating to permits or standards and/or to impose Taxes.

Hazardous Substance means any material that is categorised to be "hazardous" under the Law or according to Governmental Authorities having authority under the Law to rule on such matters including hazardous, dangerous, toxic, poisonous, noxious, radioactive, offensive, flammable, explosive, infectious, contaminating or polluting substances including any substance or waste included under or regulated by any Environmental Laws relating to matters within the scope of the definition of Environmental Matters or anything made using such substances.

[Incentive Payments means the incentive payments payable by the Project Company to the Operator in accordance with Part 3 of Schedule 10 (Performance Requirements).]³

Increased Costs means any costs or expenses relating to the Services that are incurred or suffered by the Operator resulting from, or otherwise attributable to:

- (a) a Change in Law and/or Change in Tax for which the Project Company is in receipt of financial compensation under the PPA;
- (b) a Force Majeure event for which the Project Company is in receipt of financial compensation under the PPA or GOK Letter, or
- (c) a default or failure to perform its obligations on the part of the Project Company.

Initial Mobilisation Payment has the meaning given in Clause 11.1.1(b)(i)(aa).

³ Calculation of incentive payments to be discussed between the Parties (Term Sheet, 30).

Initial Spare Parts means those operating spare parts for the first two (2) years of the Operational Period and recommended strategic parts as listed in Part 1 of Schedule 6 (Spare Parts and Special Tools).

Initial Spare Parts Payment has the meaning given in Clause 11.1.1(c).

Insolvent means, in relation to any person, any of the following:

- (a) that person:
 - (i) suspends payment of its debts, is unable to pay its debts as they fall due within the meaning of section 123 of the Insolvency Act 1986 or admits its inability to pay its debts as they fall due;
 - (ii) begins negotiations with any creditor with a view to the readjustment or rescheduling of any of its indebtedness other than in the case of the Project Company in relation to any refinancing in circumstances where the Project Company remains capable of discharging its debts where they fall due;
 - (iii) has a voluntary arrangement proposed under section 1 of the Insolvency Act 1986;
 - (iv) convenes any meeting of creditors generally or proposes, enters into or makes a general assignment, composition or other arrangement for the benefit of its creditors generally or any class of creditors; or
 - (v) declares a moratorium on the payment of all or a substantial part of any of its indebtedness;
- (b) any action is taken or any legal proceedings are started or any other steps are taken (including the presentation of any petition or the convening of any meeting to consider a resolution) for:
 - (i) that person to be adjudicated or found insolvent;
 - (ii) the winding-up, liquidation or dissolution of that person other than in connection with a solvent reconstruction, the terms of which have been previously approved in writing by the other party; or
 - (iii) the appointment of a trustee, receiver, administrative receiver, examiner, liquidator or similar officer in respect of that person or any of its assets;
- (c) any adjudication, order or appointment is made under or in relation to any of the actions, proceedings and steps referred to in paragraph (b) above;
- (d) any application is made to the court for an administration order under the Insolvency Act 1986 with respect to that person;
- (e) any lien or encumbrance over any of the assets of that person becomes enforceable;
- (f) any creditor or encumbrancer attaches or takes possession of, or a diligence, distress, execution, sequestration or other process is levied or enforced upon or sued out against, any of the assets of that person and such process is not discharged within thirty (30) days;

- (g) that person suspends, ceases or threatens to suspend or cease to carry on all or a substantial part of its business; or
- (h) any event or circumstance occurs with respect to that person in any jurisdiction to which it is subject which has an effect equivalent or similar to any of the events referred to in paragraphs (a) to (g) (inclusive) above.

Insurance Policies means the policies of insurance set out in Schedule 14 (Insurances) as amended from time to time in accordance with Clause 15.1.1 and/or 15.1.4.

Jetty means the unloading berth and all structures and components that form the coal delivery system to the first transfer tower including all buoys, markers and navigational items along the Kenyan Navy's Jetty at Manda Bay (including those items required by Kenya Port Authority) that need to be maintained to deliver coal to the Jetty.

KETRACO Connection Facilities has the meaning given to it under the Power Purchase Agreement.

KETRACO Transmission Interconnector means the approximately 520 kilometre 400kV transmission line from Lamu to Nairobi to be constructed by the Kenya Electricity Transmission Company Limited.

Key Personnel means those personnel of the Operator employed to perform the roles as described in Schedule 12, including the Facility Manager.

Key Subcontractors means those Subcontractors whose appointments have been pre-approved by the Project Company as listed in Schedule 13.

KPLC means the Kenya Power and Lighting Company Limited.

KPLC System means the high voltage transmission system operated by KPLC, together with all the distribution system(s) and ancillary electrical Facility and equipment connected to such transmission and distribution systems including the KETRACO Transmission Interconnector and the KETRACO Connection Facilities.

Late Payment Rate means US\$ LIBOR per annum plus 300 basis points.

Laws means all national (or state) legislation, statutes, ordinances and other laws, and regulations and by-laws of any legally constituted public authority, and shall include constitutional law, national law, provincial law, county law, state law, local law, statute, by-law, ordinance, decree, directive, regulation, standard, circular, guideline, rule, code, delegated or subordinated legislation, judicial act or decision, judgment, order, proclamation, directive, executive order, other legislative measure or enactment from time to time.

Lease means the lease of the Site entered into or to be entered into by the Project Company and KPLC on or about the signature date of the Power Purchase Agreement.

Lenders means those Persons, being parties to the Financing Agreements, together with their respective successors, transferees and assigns including any security agent or trustee (whether by operation of Law, assignment, novation or any other method of transfer of rights or obligations, or both, permitted under the Financing Agreements) that agree to provide or guarantee finance to the Project Company or its Project Companies for the purpose of financing the construction of the Facility [or pursuant to any agreement by which equipment and machinery is incorporated into the Facility.]

LIBOR means the London Inter-Bank Offered Rate administered by ICE Benchmark Administration Limited giving an average rate at which a leading bank can obtain unsecured funding for a given period in a given currency in the London market.

Licence means the licence permitting the operation of the Facility, to be issued to the Project Company.

Low Availability has the meaning given to it in Clause 6.10.

Main Metering Equipment means equipment for metering and monitoring the operation and output of the Facility, which equipment is operated and maintained by the Operator under this Agreement.

Maintenance Management System has the meaning given to it in Clause 9.3.1.

Metering System means the Main Metering Equipment and the Back-Up Metering Equipment.⁴

Mobilisation Date means the date set out in the Mobilisation Notice issued by the Project Company in accordance with Clause 5.1.1, as the date on which the Mobilisation Period starts.

Mobilisation Fee has the meaning given in Clause 11.1.1(b).

Mobilisation Notice means the notice issued by the Project Company in accordance with Clause 5.1.1.

Mobilisation Period means the [twelve (12)] month period starting on the Mobilisation Date.

Mobilisation Services means the services set out in Part 1 of Schedule 2 (Services).

Monthly Operations Report means the monthly report produced by the Operator in the form set out in Schedule 7.

Net Electrical Output means electrical energy measured in kWh at the Delivery Point and which is generated by the Facility and delivered to the Project Company in accordance with Despatch Instructions.

Operating Characteristics means the performance and operating characteristics of the Facility and each Unit and delivered to KPLC in accordance with Despatch Instructions.

Operating Manual means the complete equipment and system instructions for the start-up, operation, maintenance and repair of the Facility.

Operating Year means a twelve (12) month period commencing on the Full Commercial Operation Date and each successive period of twelve (12) months thereafter, provided that the final Operating Year shall end on the last day of the Operational Period.

Operational Period means the twelve (12) year period commencing on the Full Commercial Operation Date and expiring on the Termination Date.

⁴ Provision for additional metering systems for coal, limestone, fuel oil, desalinated water production and chemical usage to be included in this Agreement.

Operational Services means all of the works, services, supply, obligations, duties and responsibilities to be provided by the Operator as necessary for the operation, maintenance and repair of the Facility during the Operational Period in accordance with this Agreement, including those specified in Part 2 of Schedule 2 (Services).

Operator Event of Default has the meaning specified in Clause 19.2.

Operator's Approvals has the meaning specified in Clause 12.

Operator's Personnel means the staff and labour, local or otherwise, employed by the Operator for the purpose of fulfilling its obligations under this Agreement.

Parent Company Guarantee has the meaning specified in Clause 4.8.

Parts means the spare parts, tools, machinery, apparatus, materials, articles and goods of all kinds necessary for the performance of the Services for incorporation into the Facility, including the Initial Spare Parts and the Special Tools, but excludes any equipment or material that is owned by the Operator and which is not intended for incorporation into the Facility.

Performance Bond has the meaning specified in Clause 4.9.1.

Performance Levels means the performance levels to be maintained by the Operator as set out in Part 1 of Schedule 10 (Performance Requirements).

Performance Liquidated Damages means the performance liquidated damages payable by the Operator to the Project Company in the event that the Performance Levels are not achieved as set out in Part 2 of Schedule 10 (Performance Requirements).

Permitted Emissions Level means the permitted levels of emissions from the Facility as set forth in the design requirement section of the EPC Contract and part A of schedule 1 of the PPA and as allowed under the Operator's Approvals and Project Company's Approvals (including the Environmental Impact Assessment) and applicable Environmental Laws.

Permitted Liquid Discharge Level means the permitted levels of liquid discharge from the Facility in accordance with the Operator's Approvals and the Project Company's Approvals, applicable Environmental Laws and the Environmental Impact Assessment.

Permitted Noise Level means the permitted level of noise of the Facility as set forth in schedule [X] of the EPC Contract and as allowed under the Operator's Approvals and the Project Company's Approvals, applicable Environmental Laws and the Environmental Impact Assessment.

Person means any individual, corporation, partnership, firm, association, joint stock company, trust, unincorporated organisation, joint venture, state, government or political subdivision or agency thereof.

Planned Maintenance means all maintenance and/or periodic overhauls of the Units and other equipment incorporated into the Facility which have been scheduled in accordance with the Annual Operating Plan and the Annual Maintenance Plan as per [OEM]⁵ guidelines.

⁵ Note: To be defined.

Political Event means any event or circumstance whether arising from an action or inaction of GOK or any Governmental Authority or otherwise howsoever arising which adversely affects the Project Company, the Operator, any Subcontractor, any Lender, KPLC or the shareholders of the Project Company including each of the following events and circumstances:

- (b) any blockade, embargo, riot, insurrection, civil commotion, or any acts of sabotage, where such event has occurred in Kenya;
- (c) war or act of foreign enemy;
- (d) any Change in Law;
- (e) any Change in Tax;
- (f) an event of Force Majeure affecting KPLC;
- (g) any expropriation (including any series of events collectively constituting creeping expropriation), confiscation, or compulsory acquisition, of all or a portion of the properties or assets of the Project Company or of all or any part of its share capital where such event has occurred in Kenya;
- (h) the imposition of any onerous or restrictive conditions in any of the Authorisations; and
- (i) any failure by a Governmental Authority to issue or renew any of the Authorisations required in connection with the GOK Letter, the Lease, the Project, any Project Agreements or any Financing Agreements on a timely basis (including without limitation, where any Authorisation has been revoked, suspended or terminated as a result of any change in the direct or indirect ownership of shares in or control of the Project Company whether pursuant to an enforcement of the security constituted by the Lenders' security package or otherwise or where new Authorisations are required by any transferee of the Project Company to whom this Agreement and other Project Agreements are being transferred pursuant to the Direct Agreement), provided that in respect of any such failure it shall first be necessary for the affected Party to demonstrate that it is not prohibited by law (other than as a consequence of a change in the Laws) from obtaining such Authorisation and that it has first used reasonable endeavours to obtain such Authorisations (which endeavours shall include full and timely compliance with all the prescribed procedural requirements relating to the issue of such Authorisations, and with all the Laws of Kenya which relate to the Project Company's (or such other Party's as appropriate) activities within Kenya), and solely as the result of lack of the Authorisation, the Operator or the Project Company cannot make its capacity available, generate electricity and/or perform its obligations under this Agreement or any other Project Agreement, any Financing Agreement and/or the Project, or in each case, cannot do so without a material increased cost or a material loss of revenue⁶.

⁶ Note: CHD suggested that limbs (f) and (g) should both be absorbed by the Change in Law definition. As the PPA separately provides for limbs (e), (f) and (g), we have left these as separate limbs.

Power Purchase Agreement or PPA means the power purchase agreement dated [**] between the Project Company and KPLC for the sale and purchase of electric power from the Facility.

Prohibited Act means:

- (a) offering, giving or agreeing to give to any government official any gift or consideration of any kind, for the purpose of, and to the extent that the person offering, giving or agreeing to give such gift or consideration knows or has reasonable grounds for believing that all or a portion of the gift or consideration is for the purpose of an inducement or reward for:
 - (i) influencing any act or decision of a government official in relation to the Agreement or any other contract relating to the Agreement; or
 - (ii) showing or not showing favour or disfavour to the Operator in respect of the Agreement or in respect of any other contract relating to the Agreement; or
 - (iii) doing or not doing any act in relation to the obtaining or performance of the Agreement or any other contract relating to the Agreement;
- (b) entering into the Agreement or any other contract in connection with the Services, in relation to which commission has been paid or has been agreed to be paid by the Operator or on its behalf, or to its knowledge, unless, before the relevant contract is entered into, particulars of any such commission and of the terms and conditions of any such contract for the payment thereof have been disclosed in writing to the Project Company;
- (c) committing any offence:
 - (i) under any Anti-Corruption Laws and Regulations;
 - (ii) under any applicable Laws of Kenya creating offences in respect of fraudulent acts; or
 - (iii) at common law (applicable in Kenya) in respect of fraudulent acts in relation to the Agreement or any other contract relating to the Agreement;
- (d) defrauding or attempting to defraud or conspiring to defraud the Project Company or the GOK; or
- (e) any other act or omission that would constitute a failure to satisfy the standards required under the UK Bribery Act 2010.

Prohibited Transaction means:

- (a) the receipt, transfer, transportation, retention, use, structuring, diverting, or hiding the proceeds of any criminal activity whatsoever, including drug trafficking, fraud, or the engaging in any transfer of funds or financial transaction to promote such an activity; or
- (b) engaging or becoming involved in, financing or supporting financially, sponsoring, facilitating, or giving aid to any Designated Party for the purposes of the matters referred to in paragraph (a) of this definition.

Project has the meaning specified in recital A.

Project Agreements means the following proposals, contracts and agreements, together with any amendments, supplements or modifications thereto from time to time:

- (a) the Direct Agreement;
- (b) the Fuel Supply Agreement[s];
- (c) the EPC Contract;
- (d) the Power Purchase Agreement;
- (e) the Coal Receiving and Handling Facilities Procurement and Construction Contract;
- (f) this Agreement;
- (g) the Lease;
- (h) the GOK Letter;
- (i) any other document relating to the construction and/or operation of the Facility that may be disclosed, from time to time, by the Project Company to the Operator.

Project Company Event of Default has the meaning specified in Clause 19.1.

Project Company's Approvals has the meaning specified in Clause 12.2.

Project Company's Requirements means the Project Company's requirements as set out in Schedule 1 (Project Company's Requirements), specifying the purpose, scope and/or other technical criteria for the performance of the Services.

Prolonged Mobilisation Fee has the meaning given in Clause 5.1.3.

Prudent Operating Practice means standards of practice obtained by exercising that degree of skill, diligence, prudence and foresight which could reasonably be expected from:

- (a) a skilled and experienced operator engaged on an international basis in the same type of undertaking under the same or similar circumstances including in respect of the construction, operation and maintenance of the Plant; and/or
- (b) a skilled operator operating and/or maintaining a plant or facility similar in size and the performance and operating characteristics of the Facility and each Unit for which values are specified in the Functional Specification.

Punch List Items means those items of a minor nature as described in sub-Clause 10.1.3(a) [*Taking Over of the Works*] of the EPC Contract.

Reportable Injury means an injury reportable to any Governmental Authority as a result of applicable Law in force at the time of such injury.

Service Fee means the fee payable to the Operator in accordance with Clause 11.1.1(c).

Services means the Mobilisation Services and the Operational Services.

Settlement Period a period of thirty (30) minutes beginning on the hour or the half-hour, as the case may be.

Site means the land on which the Services are to be performed as described in Schedule 3 (Site).

Spare Parts Inventory means all those spare parts that:

- (a) form the stock of Initial Spare Parts approved pursuant to Clause 6.6.1; and
- (b) are necessary for the continuing operation and maintenance of the Facility including all strategic spare parts necessary to cover Facility breakdown and limit outages.

Special Tools means the special tools listed in Part 2 of Schedule 6 (Spare Parts and Special Tools).

Subcontractor means any or all subcontractors and suppliers engaged by the Operator in connection with the provision of the Services.

Successor Operator means the Person nominated and appointed by the Project Company and/or the Lenders to become the operator on the Termination Date.

Tax means a tax, levy, impost, deduction, charge, royalty, withholding or duty (however described) imposed by any Governmental Authority (including, without limitation, stamp and transaction duties) together with any related interest, penalty, fine or other charge.

Term means the term of this Agreement as set out in Clause 3 subject to extension or early termination in accordance with the terms of this Agreement.

Termination Date means the date upon which this Agreement terminates in accordance with Clause 18 or the expiry date of the Term, whichever occurs earlier.

Threshold Availability means the Average Availability expressed as a percentage of the Contracted Capacity as at the Full Commercial Operations Date or as determined under Schedule 10 (Performance Requirements) of not less than seventy-eight per cent (78%).

Unit means a generating unit and related facilities as described in part [] of [Schedule 1] of the Project Company's Requirements.

Working Day means a day which is defined as a business or working day by the Law.

1.2 Interpretation

In this Agreement, unless the context otherwise requires:

- (a) reference to this Agreement includes Schedules and Annexes and references to Clauses, Sub-clauses, Schedules and Annexes, are references to clauses, sub-clauses, schedules and annexes of, to or contained in this Agreement;
- (b) words in the singular shall be interpreted as including the plural and vice versa, and words denoting natural persons shall be interpreted as referring to any Person and any organisation or entity having legal capacity and vice versa;

- (c) references to **Party** mean a party to this Agreement and **Parties** shall be construed accordingly;
- (d) the terms **including** and **in particular** shall be construed as being by way of illustration or emphasis only and shall not be construed as, nor shall they take effect as, limiting the generality of any preceding words;
- (e) in the event of any conflict between the Clauses and the Schedules and/or the Annexes, the Clauses shall prevail;
- (f) clause and other headings are for convenience only and shall not affect the construction of this Agreement;
- (g) if an obligation is required to be performed by a specified time and is not so performed, such obligation shall continue until performed notwithstanding that the time specified for its performance has elapsed;
- (h) references to time shall be to the time of day in Kenya;
- (i) where a word is defined, cognate words and expressions shall be construed accordingly; and
- (j) references to "Subcontractors" shall include subcontractors of any tier.

2 Conditions precedent

2.1 Conditions precedent to Mobilisation Date

2.1.1 Subject to Clause 2.2, all rights, obligations and liabilities of the Parties under this Agreement are conditional upon the issuing of the Mobilisation Notice.

2.1.2 If the Project Company does not issue the Mobilisation Notice by the date falling [^{**}] months before the Expected Full Commercial Operation Date, then the Project Company may terminate this Agreement within seven (7) days. Subject to Clause 2.1.3, each Party shall bear its own costs incurred in relation to the Agreement and the Parties shall not owe any liabilities or obligations to each other following a termination under this Clause 2.1.

2.1.3 Notwithstanding Clause 2.1.2, if:

- (a) the termination of this Agreement pursuant to Clause 2.1.2 is not due to:
 - (i) a breach by the Operator of this Agreement; or
 - (ii) a failure to achieve financial close in respect of the Project; and
- (b) following such termination, the Project Company appoints another operation and maintenance contractor to provide the Services in relation to the Project that would but for such termination have been provided by the Operator pursuant to this Agreement,

then the Project Company shall pay to the Operator the costs and expenses reasonably and directly incurred by the Operator in the preparation, negotiation, execution and performance

of this Agreement before the date of termination, provided that no such payment shall exceed [US\$ []]⁷.

2.2 Provisions effective upon execution of this Agreement

Notwithstanding the provisions of Clause 2.1, the rights and obligations of the Parties in relation to Clause 2.1.2 (Conditions precedent to Mobilisation Date), Clause 2.1.3, Clause 20 (Assignment and subcontracting), Clause 21 (Confidential Information), Clause 22 (Publicity and Anti-Bribery), Clause 24 (Governing law and resolution of Disputes) and Clause 26 (Miscellaneous) shall come into full force and effect immediately upon execution of this Agreement.⁸

3 Term of the Agreement

3.1 The Term

Subject to Clauses 2 and 3.2, this Agreement shall continue in full force and effect from the Effective Date until the Expiry Date, unless it is terminated in accordance with Clause 18.

3.2 Extension of the Term

3.2.1 No earlier than twenty-four (24) months and no later than twelve (12) months before the twelfth (12th) anniversary of the Full Commercial Operation Date until the Expiry Date, either Party may notify the other Party in writing that it wishes to extend the Term of this Agreement together with its proposals for extending the Term of the Agreement including any revised Service Fee that it requires for such extended Term and any amendments to the provisions of this Agreement that it requires. The Parties shall negotiate in good faith for up to three (3) months in order to agree on such revised provisions. If the Parties fail to agree an extension to the Term at the end of this three (3) month period, the Project Company may appoint an Expert to determine the length of any extension to the Term, which shall be between [**] and [**] months.

3.2.2 If the Term is extended in accordance with this Clause 3.2, the Operator shall ensure that the benefit of any warranties which remain effective at the end of the Term relating in any respect to the provision of the Operational Services is also extended so that the warranties cover a period of time equal to any extended Term.

4 General obligations of the Operator

4.1 O&M obligations

4.1.1 In addition to the Mobilisation Services to be provided by the Operator during the Mobilisation Period in accordance with Clause 5, the Operator shall be responsible for the testing, start-up, operations and maintenance of the Facility and shall perform or cause to be performed the Services and related activities provided for in this Agreement from the Full Commercial Operation Date. The Operator shall cause the Facility to be operated and maintained and the Services to be performed in accordance with:

- (a) the Project Company's obligations under the PPA;

⁷ Note: Cap to be inserted.

⁸ Note: To be reviewed before signature to confirm that this list is complete.

- (b) the Licence;
- (c) the terms of the other Project Agreements and to ensure that the Facility is operated and utilised in accordance with the relevant Applicable Requirements, in a safe, efficient and reliable manner;
- (d) Prudent Operating Practices;
- (e) Despatch Instructions with a view to making the Contracted Capacity Available to KPLC;
- (f) the Operating Characteristics;
- (g) Applicable Requirements;
- (h) all manufacturers' manuals, instructions and guidelines including the Operating Manual;
- (i) Applicable Engineering Standards;
- (j) Environmental Laws;
- (k) all Authorisations;
- (l) all relevant safety requirements that relate to the performance of the Services;
- (m) the requirements of any relevant insurance policies;
- (n) other terms and conditions of this Agreement,

so as to:

- (i) minimise any normal wear and tear;
- (ii) minimise forced outages;
- (iii) optimise the Availability of the Facility; and
- (iv) not put the Project Company in breach of any Project Agreement, reduce the rights or entitlement of the Owner under any Project Agreement or give rise to any third party claim under any Project Agreement.

In addition, the Operator shall make all reasonable and practical efforts to ensure that the Facility shall at all times be kept in good and clean condition.

4.1.2 The Operator shall:

- (a) monitor the use of coal and limestone provided pursuant to the Fuel Supply Agreements and provide inventories of any such coal and limestone to the Project Company; and

- (b) notify the Project Company on a regular basis and at least once per [week]⁹ as to the use of and ordering requirements for such coal and limestone provided pursuant to the Fuel Supply Agreements,

in each case to enable the Project Company to :

- (i) fulfil its obligations under Clause 10.8;
- (ii) submit orders under the Fuel Supply Agreements in a reasonable time for any such coal and limestone required for the Facility; and
- (iii) manage the Fuel Supply Agreements.

4.1.3 The Operator shall be responsible for:

- (a) subject to Clause 10.8, the provision of all Fuel (other than coal and fuel oil) and lubricants required at the Facility and/or the Site, for the purpose of performing the Services and operating and maintaining the Facility; and
- (b) handling, deposit, disposal, keeping and treatment of any waste (including lubricant oil) produced by the Facility and/or in relation to the performance of the Services.

4.2 Access to the Facility

The Operator shall permit full and free access to the Facility and the Site at all times to all Persons duly authorised by the Project Company, KPLC, the Lenders and any other authorities or persons who are party to any of the Project Agreements for the purpose of exercising their respective rights under the Project Agreements and the Financing Agreements.

4.3 Local contracts

The Operator shall, where possible, give a fair and reasonable opportunity to Subcontractors with existing operations in Kenya and suppliers of materials and services with existing operations in Kenya to be appointed as Subcontractors provided that the quality, delivery times, warranties, guarantees, price and other terms are comparable to those offered by international manufacturers, contractors and/or suppliers working to international standards.

4.4 Co-operation and co-ordination

4.4.1 The Operator shall, as specified in the Agreement or as instructed by the Project Company, co-operate with and allow appropriate opportunities for carrying out work to:

- (a) the Project Company's personnel;
- (b) any other contractors employed by the Project Company; and
- (c) the personnel of any legally constituted public authorities,

who may be employed in the execution on or near the Site of any work not included in the Agreement.

⁹ Note: Reporting period to be confirmed.

- 4.4.2 The Operator shall be responsible for its activities on the Site, and shall co-ordinate its own activities with those of other contractors to the extent (if any) specified in the Project Company's Requirements.
- 4.4.3 The Operator shall provide the Project Company with all assistance that it requires to keep KPLC informed of activities at the Site and to co-ordinate such activities with KPLC to ensure:
- (a) that any activities at the Site or at any adjacent site being undertaken by or on behalf of KPLC are not interfered with or disrupted; and
 - (b) the safety of personnel.

4.5 Safety procedures and security

- 4.5.1 The Operator shall at all times:
- (a) comply with all applicable safety regulations (whether contained in applicable Law, the Operating Manual or otherwise);
 - (b) take care for the safety of all persons entitled to be on the Site;
 - (c) use reasonable efforts to keep the Site clear of unnecessary obstruction so as to avoid danger to these persons;
 - (d) ensure that all Facility and equipment is operated in a manner safe to workers, the general public and within the design limits of the Facility and the environment;
 - (e) comply with its obligations in respect of security of the Site as set out in Schedule []; and
 - (f) [operate the Facility in accordance with OSHA 1910.269 or similar quality standard]¹⁰.

4.6 Operating practices

The Operator shall upon the issue of the Mobilisation Notice perform the Services and without prejudice to the generality of the foregoing shall mobilise, maintain, operate, test and inspect the Facility in such a manner as to:

- (a) keep the Facility in good working order and in a fit state to continue safe and efficient operation until the Termination Date; and
- (b) optimise the Availability and maximise the long-term profitability of the Facility.

4.7 Lenders

- 4.7.1 The Operator agrees to provide such information as the Project Company may reasonably request. During the performance of the Services, the Operator agrees to provide information to the Lenders on the progress of the Services, as the Project Company or the Lenders may reasonably request.

¹⁰ Note: Amu is considering whether the definition of "Applicable Requirements" means that the proposed new Clause 4.5.1(f), which required the Operator to operate the Facility in accordance with OSHA 1910.269 or similar quality standard, is no longer required.

4.7.2 The Operator agrees to provide such notices and consents as may be reasonably requested by the Project Company or the Lenders for the transfer or assignment of this Agreement to the Lenders, or their agents or nominees¹¹.

4.7.3 The Operator shall enter into a Direct Agreement upon request as a condition precedent to the funding of the Project by the Lenders.

4.8 Parent Company Guarantee

4.8.1 The Operator shall cause to be delivered to the Project Company on the Effective Date of this Agreement:

- (a) a parent company guarantee in the form set out in Schedule 15 (Parent Company Guarantee)¹², which shall be:
 - (i) provided by such guarantor as may be acceptable to the Project Company¹³;
 - (ii) executed in favour of the Project Company in respect of the Operator's obligations and financial liabilities under this Agreement;
 - (iii) effective from the date on which the Mobilisation Notice is issued, (the **Parent Company Guarantee**); and
- (b) a legal opinion thereon in relation to the due execution and binding nature of such Parent Company Guarantee.¹⁴

4.9 Performance Bond

4.9.1 [Notwithstanding Clause 11.1.1(b)(i)(aa), as a condition precedent to payment of the Initial Mobilisation Payment by the Project Company to the Operator, the Operator shall deliver to the Project Company a performance bond in the form set out in Schedule 16 (Performance Bond) for an aggregate amount equal to [US\$], which shall:

- (a) be issued directly by a financially sound and reputable first class international bank being rated at least A by Standard & Poor's (the **Bond Provider**);
- (b) become effective on the date on which the Bond Provider receives notice from the Project Company confirming that payment of the Initial Mobilisation Payment has been made to the Operator; and
- (c) be valid until [].

4.9.2 If any Performance Bond in place from time to time will expire or cease to be in effect, the Operator shall extend such bond or procure a replacement Performance Bond (as the case

¹¹ Note: CHD to revert

¹² Note: Amu is considering the proposal that the PCG is provided at the Effective Date but does not have effect until the issue of the Mobilisation Notice. If acceptable, this mechanism for bringing the PCG into effect will be contained in the form of PCG.

¹³ Note: Identity of the Guarantor to be confirmed. It should be a trading company with a stronger covenant strength than CHD.

¹⁴ This will be an English law guarantee.

may be). If any such replacement bond is provided, such bond shall be issued by a financially sound and reputable financial institution being rated at least A by Standard & Poor's and delivered to the Project Company not later than the fifteenth (15th) day prior to the date of expiry or cessation of the original Performance Bond.

4.9.3 If any such extension of any Performance Bond, or any replacement thereof, shall not have been delivered to the Project Company on or before the fifteenth (15th) day prior to the expiry of the original Performance Bond or any replacement thereof, the Project Company shall be entitled to draw the full amount of the Performance Bond then available for drawing and retain the same by way of security until such time as the Project Company shall receive such replacement bond whereupon, subject to the terms of this Agreement, the Project Company shall refund to the Operator the full amount of such drawing less any sums then properly due to the Project Company in accordance with the terms of this Agreement.

4.9.4 The Project Company is only entitled to claim under the Performance Bond in respect of breach by the Operator of its obligations under the Agreement or insolvency of the Operator occurring on or before the expiry of the Performance Bond in accordance with 4.9.1¹⁵.

4.10 Documentation

All documentation submitted by the Operator under or in connection with this Agreement shall be in English.

5 The Operator's obligations during the Mobilisation Period

5.1 Commencement of Mobilisation Services

5.1.1 The Project Company shall issue a Mobilisation Notice to the Operator, which shall specify the date on which the Mobilisation Services are to commence, at least [three (3) months] prior to the date on which the Mobilisation Services are to commence.

5.1.2 The Operator shall commence the provision of the Mobilisation Services upon the date specified in the Mobilisation Notice issued pursuant to Clause 5.1.1, and shall complete the Mobilisation Services by no later than the Expected Full Commercial Operation Date.

5.1.3 [If the Full Commercial Operation Date occurs more than [] days after the Expected Full Commercial Operation Date due to reasons that are not attributable to the Operator:

- (a) the Operator shall be entitled to the payment of an amount equal to [US\$] for each day of delay calculated from the date falling [] days after the Expected Full Commercial Operation Date until the Full Commercial Operation Date (the **Prolonged Mobilisation Fee**); and
- (b) such Prolonged Mobilisation Fee shall become due and payable to the Operator upon the occurrence of Full Commercial Operation Date]¹⁶.

¹⁵ Note: As discussed, the Performance Bond needs to be an on demand bond. This reflects the position set out in paragraph 31 of the Heads of Terms.

¹⁶ Note: Amu is considering this proposal and will revert.

5.2 Despatch procedures¹⁷

- 5.2.1 The Parties shall meet not later than [one hundred (100) Days] prior to the Expected Full Commercial Operation Date to agree such further procedures as shall be necessary in accordance with Prudent Operating Practice and any applicable Laws for the despatch of the Facility and operational communications between the Parties. The Operator shall assist the Project Company in reaching agreement with KPLC on such further procedures as shall be necessary in accordance with Prudent Operating Practice and any applicable Laws for the despatch of the Facility and operational communications between the Parties. The Operator acknowledges that where the Project Company (with the assistance of the Operator) and KPLC are unable to agree such specific procedures on or before the date falling [**] days prior to the Expected Full Commercial Operation Date and these are referred to an Expert for determination, the Operator agrees to be bound by such procedures determined by the Expert. The Operator acknowledges that whilst the Expert is adjudicating the matter, the Operator shall abide by the existing KPLC procedures existing at that time.
- 5.2.2 If circumstances arise after the Full Commercial Operation Date, which either Party deems to require changes in despatch procedures, the Parties shall work together in good faith to establish procedures satisfactory to both Parties, giving due consideration to issues of safety and any economic effect on the Parties which might result from such revised procedures then the Project Company shall (with the assistance of the Operator) use its reasonable endeavours to agree such procedures with KPLC in accordance with the provisions of the Power Purchase Agreement. The Operator acknowledges that if the Project Company and the KPLC are unable to agree on any such procedures relating to matters of safety then these shall be referred to an Expert pursuant to the PPA. While the Expert is adjudicating the matter the Operator shall abide by existing procedures or if there are none applicable, any applicable procedures existing at the time.

6 The Operator's obligations during the Operational Period

6.1 Commencement of Operational Services

The Operator shall commence the provision of the Operational Services upon the Full Commercial Operation Date.

6.2 Operational Services

The Operator shall provide the Operational Services in accordance with this Clause 6 and the Annual Operating Plan.

6.3 Despatch Instructions¹⁸

- 6.3.1 The Operator shall during the Operational Period operate the Facility in compliance with Despatch Instructions with a view to making the Contracted Capacity available to the Project Company and the Operator shall operate the Facility in accordance with the Operating Characteristics.
- 6.3.2 In accordance with the operating and despatch procedures agreed between the Parties the Operator shall keep KPLC on behalf of the Project Company and the Project Company

¹⁷ Despatch Procedures subject to further review and development.

¹⁸ Despatch Instructions subject to further review and development.

informed by regular daily declarations of Availability or on any other interval as agreed, together with prompt declarations of any changes, of the Availability and any impairment of the Operating Characteristics, provided that during Planned Maintenance of a Unit that Unit shall be deemed to be declared to be Unavailable unless the Operator makes a contrary declaration. If the Operator fails to give a declaration in respect of Available Capacity, then the Available Capacity shall be deemed to be equal to zero until such time as a declaration of Available Capacity is subsequently made.

6.4 Defects¹⁹

- 6.4.1 The Operator shall notify the Project Company immediately or as soon as practicable upon becoming aware of any Defects to the Facility.
- 6.4.2 The Operator shall not be liable for the repair, replacement or remediation of any Defect which is discovered before or after the Defects Notification Period (as defined in the EPC Contract), provided always that the Operator has acted in accordance with Prudent Operating Practice and taken all measures necessary to mitigate the effects of any Defect on the performance of the Services and the performance of the Facility.
- 6.4.3 During the Defects Notification Period (as defined in the EPC Contract), the Operator shall comply with the Operating Manual and shall ensure that it does not thereby prejudice any rights which the Project Company may have against the EPC Contractor.

6.5 Metering

The Operator shall, on behalf of the Project Company, carry out meter readings as directed by the Project Company and as required under the Power Purchase Agreement and shall conduct or attend and witness the testing of the Metering System as directed by the Project Company. Where any such test reveals the need for any such meter to be re-calibrated pursuant to the Power Purchase Agreement, the Operator shall in the case of the Project Company's meters perform such re-calibration in accordance with the standards established by the operational code and the Power Purchase Agreement.

6.6 Spare Parts and Special Tools

- 6.6.1 The Operator shall prepare as part of the Annual Maintenance Plan for approval by the Project Company the Spare Parts Inventory.
- 6.6.2 The Spare Parts Inventory may be amended at any time by the Operator subject to approval of the Project Company.
- 6.6.3 [The Operator will be responsible for purchasing, at its own cost and expense and in consideration for the Initial Spare Parts Payment, all Initial Spare Parts and will consult with the Project Company prior to making such purchases²⁰].

¹⁹ Note: Reasons for Unavailability will be addressed in the revised draft of Schedule 10.

²⁰ Note: We understand that a separate stock of strategic spare parts will be provided under the EPC Contract, but this is to be confirmed by the technical teams. If strategic spares are to be provided under the EPC Contract, the following will need to be picked up: (a) the definition of the Spare Parts Inventory will need to be expanded to capture the spare parts provided under the EPC Contract as well; and (b) the EPC Contract will need to be updated accordingly.

- 6.6.4 The Operator shall maintain at the Site and throughout the Term of this Agreement, at its own cost and expense a stock of spare parts that meets the requirements of the Spare Parts Inventory.
- 6.6.5 Title to the Initial Spare Parts and the stock of Spare Parts maintained pursuant to Clause 6.6.4 shall pass to the Project Company on the earlier of:
- (a) payment by the Operator for such Spare Part; and
 - (b) delivery of such Spare Part to the Site.
- 6.6.6 As part of the Monthly Report, the Operator shall provide the Project Company with details of the number and type of Spare Parts used for the continuing operation and maintenance of the Facility (including all strategic spares necessary to cover Facility breakdown and limit outages), and where so required by the Project Company, shall provide any further information requested by the Project Company in relation to the use of such Spare Parts.
- 6.6.7 On the expiry of the Term of this Agreement, the Operator shall immediately transfer the stock of Spare Parts maintained pursuant to Clause 6.6.4 to the Project Company.
- 6.6.8 [The Operator shall arrange at its own cost and expense the first set of Special Tools. The Operator will be responsible for repairing or replacing, at its own cost and expense, the Special Tools²¹.]

6.7 Testing

- 6.7.1 The Operator shall develop the testing procedures in accordance with the terms and requirements of the Power Purchase Agreement. The Operator acknowledges that the testing procedures will fulfil, as a minimum, the requirements of the PPA in respect of the performance tests.
- 6.7.2 The Project Company shall have the opportunity to review and to direct the Operator in respect of such testing procedures at such regular intervals to be agreed between the Parties.
- 6.7.3 Third parties including without limitation the KPLC, other authorities, the Lenders and their respective consultants, agents and employees shall have the right to attend any tests.
- 6.7.4 Not less than once in every period of twelve (12) months following the Full Commercial Operation Date, the Operator shall conduct a Contracted Capacity Test. Following a Contracted Capacity Test the Contracted Capacity shall be revised in accordance with the results of such test provided that the Contracted Capacity may not be greater than one hundred per cent (100%) of the Contracted Capacity as at the date of the Power Purchase Agreement or the Contracted Capacity determined pursuant to clause 6.10 of the PPA.²²
- 6.7.5 The Operator acknowledges that it may be requested from time to time by the Project Company to perform an additional Contracted Capacity Test and the provisions of Clause 6.7.4 (other than the first sentence thereof) shall apply mutatis mutandis.
- 6.7.6 The Operator shall do everything necessary to enable the Project Company to comply with clause 8.12 of the Power Purchase Agreement and, to the extent it fails to do so due to

²¹ Requirement for Special Tools to be discussed.

²² Testing regime subject to further review and development.

reasons attributable to the Operator, an amount equal to any amount deducted from any payments that would otherwise have become due under the Power Purchase Agreement shall be deducted from payments due to the Operator pursuant to Clause 11.1.1(d).

6.8 Annual Operating Plan

- 6.8.1 The Operator shall no later than eighty (80) Working Days prior to the Expected Full Commercial Operation Date, prepare and submit to the Project Company, for its review and approval, a proposed Annual Operating Plan. If the Project Company proposes alternative dates in respect of the Planned Maintenance, the Parties shall use commercially reasonable endeavours to agree between themselves and KPLC such alternative dates.²³ By no later than [forty (40)] Working Days before the start of each Operating Year the Operator shall deliver to the Project Company for approval in accordance with Clause 6.8.3 an Annual Operating Plan in respect of that Operating Year. The Operator acknowledges that where no agreement is reached, the Project Company shall be obliged to comply with the dates proposed by KPLC under the PPA.
- 6.8.2 Each Annual Operating Plan submitted to the Project Company in accordance with Clause 6.8.1 shall:
- (a) be in the form set out in Schedule 8 (Annual Operating Plan);
 - (b) demonstrate the Operator's good faith best estimates with a reasonable contingency (taking into account the Operator's experience of providing the Services and operating the Facility) of the cost of operating the Facility and of providing the Services and of maintenance and planned outages during the period to which it relates; and
 - (c) take account of the terms of clause 8.2 and schedule 4 of the Power Purchase Agreement and ensure that each Unit is not withdrawn from operation for planned maintenance and inspection in each Operating Year for a period in excess of those agreed by the Project Company with KPLC.
- 6.8.3 The Project Company shall, as soon as practicable after receiving the Operator's Annual Operating Plan, respond with approval, disapproval or comments. The Operator shall not delay any Services whilst awaiting a response. If the Project Company responds with disapproval or comments, the Operator shall submit a revised Annual Operating Plan to the satisfaction of the Project Company.
- 6.8.4 The Operator shall operate and maintain the Facility in accordance with the last preceding Approved Annual Operating Plan. If any event occurs that means that the Facility is not operated and maintained in accordance with the last preceding Approved Annual Operating Plan, the Operator shall as soon as reasonably practicable notify the Project Company of the nature of such event and its affect on the operation and maintenance of the Facility.
- 6.8.5 The Parties shall co-operate and use their reasonable endeavours to accommodate any reasonable request by either Party to reschedule any Planned Maintenance in any Operating Year.

²³ Initial proposal for review and ongoing development.

6.8.6 The Operator shall upon the occurrence of forced, partial forced and unforeseen outages, notify the Project Company of the existence, nature, and to the extent possible, expected duration of the such outage as soon as practical. The Operator shall inform the Project Company of changes in the expected duration of such outage. Without prejudice to the foregoing the Operator shall ensure that a root cause analysis is performed in respect of:

- (a) all forced, partial forced and unforeseen outages which exceed twenty-four (24) hours; and
- (b) all serious failures that cause chronic outage problems or expensive replacements of parts or equipment.

This root cause analysis shall include any proposed preventive actions to be taken to avoid a reoccurrence of the stoppage for the same reason. A comprehensive report shall be part of the Monthly Operations Report to the Project Company within sixty (60) days or any other date as agreed between the Parties.

6.8.7 **KPLC and/or KETRACO maintenance**

In the event that the Project Company or the Operator becomes aware of any maintenance to be performed by KPLC and/or KETRACO which impacts on the planned maintenance of the Facility, the Operator acknowledges that it may be required to adjust the dates of its planned maintenance and shall comply with the Project Company's instructions accordingly.

6.9 **Not used**

6.10 **Availability restoration**

If in any period of three (3) consecutive months after the Full Commercial Operation Date the Average Availability is less than [eighty-three per cent (83%)]²⁴ of the Contracted Capacity as at the date of the Power Purchase Agreement (the **Low Availability**), except where this is due to Defects, Force Majeure and/or Project Company Event of Default, then the Operator shall (without prejudice to the rights of the Project Company pursuant to Clause 18 within two (2) weeks provide and implement a programme to restore Availability to the Annual Availability Guarantee.

6.11 **Threshold Availability**

If the Operator fails to achieve the Threshold Availability for four (4) months consecutively after the Full Commercial Operation Date other than due to a Defect, Force Majeure event , and/or Project Company Event of Default, the Operator shall be deemed not to have acted in accordance with Prudent Operating Practice and the Project Company may terminate this Agreement for Operator default pursuant to Clause 19.2 (The Operator Events of Default).

7 **Performance Levels and Environmental Matters**

7.1 **Performance Levels**

The Operator shall maintain the Performance Levels set out in Part 1 of Schedule 10 (Performance Requirements).

²⁴ Note: To be confirmed

7.2 Performance Liquidated Damages and Incentive Payments

7.2.1 In the event that the Operator fails to achieve the Performance Levels, the Operator shall be liable to the Project Company for the payment of Performance Liquidated Damages in accordance with Part 2 of Schedule 10 (Performance Requirements).²⁵

7.2.2 Without prejudice to Clause 19.2(f) and Clause 19.5, the payment of such Performance Liquidated Damages pursuant to Clause 7.2.1 shall be the Operator's sole and exclusive liability and the Project Company's sole and exclusive remedy for damages arising out of performance shortfall and are in lieu of actual damages.

7.2.3 [In the event that the Operator achieves the performance of the Facility above the Performance Levels, the Project Company shall make the [Incentive Payments] to the Operator in accordance with Part 3 of Schedule 10 (Incentive Payment).]²⁶

7.3 Governmental authorisations and environmental matters

7.3.1 The Operator shall ensure that the Facility shall not exceed the:

- (a) Permitted Emissions Level;
- (b) Permitted Liquid Discharge Level; and
- (c) Permitted Noise Level.

7.3.2 If the Facility exceeds the Permitted Emissions Level, the Permitted Liquid Discharge Level and/or the Permitted Noise Level then the Operator shall as soon as practicable (but in any event in less than fifteen (15) days) undertake such measures to ensure that the Facility complies with and does not exceed the relevant permitted levels.

7.3.3 If Clause 7.3.2 applies and:

- (a) the cause of the relevant breach of the Permitted Emissions Level, the Permitted Liquid Discharge Level and/or the Permitted Noise Level is not a Defect; or
- (b) until the date falling []²⁷ after the Full Commercial Operations Date only, the cause of the relevant breach of the Permitted Emissions Level, the Permitted Liquid Discharge Level and/or the Permitted Noise Level is a Defect for which the rectification cost is less than ten thousand US dollars (US\$10,000),

then the Operator shall fulfil its obligations pursuant to Clause 7.3.2 at its own cost.

7.3.4 The Operator shall be responsible for all legal costs, fees and penalties incurred by the Project Company in respect of the enforcement of any Environmental Laws by any Governmental Authority.

7.3.5 The Operator shall promptly provide the Project Company with copies of all Environmental Licences relating to the Project Company or the Operator received by the Operator from time

²⁵ Under the Heads of Terms the rates of liquidated damages are to be agreed between the parties.

²⁶ Note: To be developed in Schedule 10. The Incentive Payment will only relate to certain items, and will be subject to a cap.

²⁷ Note: Relevant period to be discussed.

to time and the terms and conditions thereof, including all orders, notices, directions, applications, appeals and reports and any other communication relating to or in connection with any Environmental Licence.

- 7.3.6 The Operator shall promptly upon receiving notice thereof inform the Project Company of any claim, accusation, notice of violation, demand, action, abatement or other order (conditional or otherwise) which has been made against the Operator, the Project Company or any director, secretary, manager or other similar officer (in his capacity as such) of the Operator or the Project Company.
- 7.3.7 The Operator shall as soon as practicable inform the Project Company of any expenditure required to comply with any condition attached to any Environmental Licence or any notice, demand or order made pursuant to such Environmental Licence and, insofar as such items arising under Clause 7.3.1 are not already included as part of an approved Annual Operating Plan or such items arise under Clause 7.3.6, such expenditure shall not be incurred without the Project Company's prior approval.
- 7.3.8 The Project Company shall provide the Operator with full assistance and co-operation in obtaining and maintaining all Authorisations.

8 Provision of personnel

8.1 Engagement of staff and labour

The Operator shall except as otherwise stated in the Project Company's Requirements, make arrangements for the engagement of all staff and labour, local or otherwise, and for their payment, housing (at the Colony, subject to Clause 10.7 or otherwise), feeding and transport.

8.2 Rates of wages and conditions of labour

The Operator shall pay rates of wages, and observe conditions of labour, which are not lower than those established for the trade or industry where the work is carried out. If no established rates or conditions are applicable, the Operator shall pay rates of wages and observe conditions which are not lower than the general level of wages and conditions observed locally by employers whose trade or industry is similar to that of the Operator, provided always that, in complying with this Clause, the Operator shall at all times ensure provision with the African Development Bank's standards set out in Schedule 4 (African Development Bank's standards for Wages and Conditions of Labour).

8.3 Persons in the service of others

The Operator shall not recruit, or attempt to recruit, staff and labour from amongst the Project Company's personnel.

8.4 Labour Laws

- 8.4.1 The Operator shall comply with all the relevant labour Laws applicable to the Operator's Personnel, including Laws relating to their employment, health, safety, welfare, immigration and emigration, and shall allow them all their legal rights.
- 8.4.2 The Operator shall require its employees to obey all applicable Laws, including those concerning safety at work.

8.5 Working hours

The Operator shall operate the Facility twenty four (24) hours a day, seven (7) days a week.

8.6 Facilities for staff and labour

8.6.1 Except as otherwise stated in the Project Company's Requirements, the Operator shall provide and maintain all necessary accommodation and welfare facilities for the Operator's Personnel. The Operator shall also provide facilities for the Project Company's personnel as stated in the Project Company's Requirements.²⁸

8.6.2 The Operator shall not, save in respect of the Colony, permit any of the Operator's Personnel to maintain any temporary or permanent living quarters within the structures forming part of the Facility.

8.7 Health and safety

8.7.1 The Operator shall at all times take all reasonable precautions to maintain the health and safety of the Operator's Personnel. In collaboration with local health authorities, the Operator shall ensure that medical staff, first aid facilities, sick bay and ambulance services are available at all times at the Site and at any accommodation for the Operator's and the Project Company's personnel, and that suitable arrangements are made for all necessary welfare and hygiene requirements and for the prevention of epidemics.

8.7.2 The Operator shall appoint an occupational health and safety officer at the Site, responsible for maintaining safety and protection against accidents. This person shall be qualified for this responsibility, and shall have the authority to issue instructions and take protective measures to prevent accidents. Throughout the execution of the Services, the Operator shall provide whatever is required by this person to exercise this responsibility and authority.

8.7.3 The Operator shall send to the Project Company details of any accident as soon as practicable (but in any event within twenty-four (24) hours) after its occurrence. The Operator shall maintain records and make reports concerning health, safety and welfare of persons, and damage to property, as the Project Company may reasonably require.

8.8 Operator's superintendence

8.8.1 Throughout the performance of the Services, the Operator shall provide all necessary superintendence to plan, arrange, direct, manage, inspect and test the Services.

8.8.2 Superintendence shall be given by a sufficient number of persons having adequate knowledge of the English language and of the operations to be carried out (including the methods and techniques required, the hazards likely to be encountered and methods of preventing accidents), for the satisfactory and safe execution of the Services.

8.9 Operator's Personnel

8.9.1 The Operator's Personnel shall be appropriately qualified, skilled and experienced in their respective trades or occupations. The Project Company may require the Operator to remove

²⁸ Confirmation required as to whether the Colony or any other facilities will be handed over from the EPC Contractor to the O&M Contractor. If so, the requirements for handover (for example, condition of the facilities) are to be discussed.

(or cause to be removed) any person employed on the Site, including the Facility Manager if applicable, who:

- (a) persists in any misconduct or lack of care;
- (b) carries out duties incompetently or negligently;
- (c) fails to conform with any provisions of the Agreement;
- (d) persists in any conduct which is prejudicial to safety, health, or the protection of the environment; and/or
- (e) does not have the required work permit to enter or work in Kenya.

8.9.2 If appropriate, the Operator shall then appoint (or cause to be appointed) a suitable replacement person.

8.9.3 [Prior to the Mobilisation Date]²⁹, the Operator shall provide the Project Company with:

- (a) an organogram showing:
 - (i) the number of Operator's Personnel; and
 - (ii) the role of each such Operator's Personnel,

and thereafter the Operator shall provide an updated version of such organogram to the Project Company as and when the organogram no longer reflects the number and roles of the Operator's Personnel engaged by the Operator;

- (b) the job specification for each role of the Operator's Personnel; and
- (c) [a mobilisation plan for employment of the Operator's Personnel]³⁰.

8.9.4 The Operator shall:

- (a) as at the Mobilisation Date, ensure that at least 60% of the Operator's Personnel (at all levels of the Operator's business) are local staff and employees from Kenya; and
- (b) by the date falling five (5) years after the Mobilisation Date, ensure that at least 80% of the Operator's Personnel (at all levels of the Operator's business) are local staff and employees from Kenya.

8.9.5 At least [] Working Days before the Full Commercial Operations Date, Operator shall submit to the Project Company an administrative procedures manual that provides such administrative information regarding Operator's procedures, including:

- (a) the organisation of the Operator's Personnel and the reporting requirements for such Operator's Personnel;
- (b) correspondence and review procedures;

²⁹ Note: Date on which the organogram is to be provided is to be confirmed.

³⁰ Note: Contents of the mobilisation plan to be discussed.

- (c) limits of authority;
- (d) procurement and contracting procedures;
- (e) accounting, bookkeeping and record keeping systems;
- (f) personnel procedures; and
- (g) procedures for the receipt and implementation of the notices and directions issued by the Project Company under this Agreement and the Services to be provided hereunder,

which shall be the **Administrative Procedures Manual**.

8.9.6 The Operator shall give prompt written notice to the Project Company of any revision to the Administrative Procedures Manual.

8.10 Records of Operator's Personnel and equipment

The Operator shall submit, to the Project Company, details showing the number of each class of Operator's Personnel and of each type of Operator's equipment on the Site. Details shall be submitted each calendar month, in a form approved by the Project Company.

8.11 Disorderly Conduct

The Operator shall at all times take all reasonable precautions to prevent any unlawful, riotous or disorderly conduct by or amongst the Operator's Personnel, and to preserve peace and protection of persons and property on and near the Site.

8.12 Key Personnel

8.12.1 The Operator shall provide Key Personnel who are suitably qualified, experienced and competent to carry out the roles assigned to them in Schedule 12 (Key Personnel). The Operator shall provide to the Project Company, at the Project Company's request, evidence of the competency of such Key Personnel including details of previous experience and qualifications.

8.12.2 The Operator shall notify the Project Company if, at any time, it intends to replace the Facility Manager and the Project Company shall have the right to refuse such appointment if it is not reasonably satisfied with the ability of the replacement individual. If a member of the Key Personnel is appointed and subsequently reasonably appears to the Project Company to be incapable of performing to the standards expected of such a position, the Project Company shall be entitled to request his dismissal and the Operator shall use its best endeavours to find a suitable replacement.

8.12.3 Subject to Clause 8.12.2, the Operator shall be responsible for the selection, hiring and supervision of its personnel.

8.12.4 The Operator shall ensure that Key Personnel and supervisory personnel shall be fluent in English.

8.13 Training of personnel

8.13.1 The Operator shall:

- (a) on or before the date falling six (6) months before the Full Commercial Operations Date, provide or procure a training plan which sets out the Operator's programme for training and developing the Operator's Personnel;
- (b) on or before the date falling three (3) months before the Full Commercial Operation Date, ensure that the Operator's Personnel that are required for the taking over of the Facility have been adequately trained for their respective roles;
- (c) on or before the Full Commercial Operations Date, complete the training of the Operator's Personnel required for their respective roles and shall continue such training throughout the Term of this Agreement,

and in each case the provision of all training for Operator's Personnel shall be in accordance with the training plan produced or procured pursuant to Clause (a), this Agreement and Prudent Operating Practice.

9 Reporting obligations and records

9.1 Reporting requirements

- 9.1.1 The Operator shall, on behalf of the Project Company, comply with and perform all reporting requirements pursuant to clause 19 of the PPA and any requirements imposed by any Lender, that are related to the performance of the Services. The Operator shall also comply with additional reporting requirements relating to the operation and maintenance of the Facility set out in this Agreement, including those set out in the Operating Manual.
- 9.1.2 The Operator shall provide the Project Company with monthly and annual reports in accordance with Clauses 9.1.2(a) and (b). The Project Company shall be entitled to require modifications to the format of monthly and annual reports at any time. Monthly reports shall be provided during both the Mobilisation Period and the Operational Period and annual reports shall be provided during the Operational Period.
 - (a) The Operator shall provide monthly reports to the Project Company by the [tenth (10th)] Working Day of each month following the relevant month in respect of which the monthly report relates. Such reports shall include any information which under the terms of this Agreement is required to be supplied to the Project Company or as may be reasonably required by the Project Company.
 - (b) The Operator shall provide an annual report to the Project Company in respect of each Operating Year within [forty (40)] Working Days of the end of each Operating Year. Such reports shall include detailed information on the operations and performance of the Facility during the relevant Operating Year including all items under the Annual Operating Plan and other information as may be reasonably required by the Project Company.
- 9.1.3 The Operator shall report to the Project Company any incident occurring at the Facility which involves a Reportable Injury within twenty-four (24) hours of its occurrence.
- 9.1.4 The Operator shall provide to the Project Company all such other occasional reports as may be reasonably required by the Project Company and shall provide access to such other information as may be reasonably required by the Project Company.

9.2 Records

- 9.2.1 The Operator shall maintain complete and accurate books and records of all transactions and operations in respect of the Facility and performance of the Services. All such records maintained by the Operator shall be available for inspection by the Project Company at all times and the Project Company shall be entitled to take copies of any such records or any part thereof.
- 9.2.2 The Operator shall maintain all records for at least [five (5)] years and will not thereafter destroy, discard or otherwise part with possession of any such records without first obtaining the approval of the Project Company and shall if so requested by the Project Company pursuant to Clauses 10.5.1 and 10.5.2 hand such records to the Project Company rather than destroying, discarding or otherwise parting with possession of them.

9.3 Maintenance Management System

- 9.3.1 From the Full Commercial Operation Date the Operator shall implement a computerised maintenance and operations management system that is fully developed for all maintenance and operations activities and shall use the system as the basis for all maintenance and operations activities (the **Maintenance Management System**).
- 9.3.2 The Operator grants the Project Company an irrevocable, non-exclusive licence to use and to reproduce the information stored in the Maintenance Management System as may be required in connection with the Facility.

9.4 Provision of information

- 9.4.1 The Operator is deemed to have satisfied himself as to the conditions affecting the Facility and provision of the Services and accepts such conditions and the Project Company appoints the Operator, and the Operator accepts such appointment, to perform the Services on the terms and conditions set out in this Agreement.
- 9.4.2 The Operator shall keep itself fully and properly informed of all matters concerning the operation and maintenance of the Facility (including proposals for Facility improvements and modifications which would or may result in improved performance and operation of the Facility).
- 9.4.3 The Operator shall (so far as it is able to do so without being in breach of any undertaking given to any third party, excluding any agreement which results in a conflict of interest with the Operator's obligations to the Project Company under this Agreement) promptly notify the Project Company of all such matters of which the Operator is aware and which are material to the interests of the Project Company and furnish to the Project Company upon request copies of all correspondence, reports and other documents within the power, possession or control of the Operator which may be relevant in such regard provided that the Operator shall not incur expenditure on third party costs without approval pursuant to an Approved Annual Operating Plan or otherwise.

9.5 Compliance, co-ordination and communications

- 9.5.1 The Operator shall:
- (a) ensure that it is familiar with the Project Agreements and the obligations of the respective parties thereunder and shall not do or omit to do anything which may cause the Project Company to be in breach of its obligations thereunder to the extent

they relate to the operation and maintenance of the Facility. For the avoidance of doubt the Operator shall:

- (i) manage the capacity and energy planning process with [^{**}*specify who else will be involved in managing capacity and the energy planning process*], as provided for in the [^{**} *principal off-take agreement*];
 - (ii) manage Fuel and limestone weighing and sampling in compliance with the Fuel Supply Agreements;
 - (iii) monitor compliance by the EPC Contractor with its obligations under the EPC Contract to clear the Punch List Items; and
 - (iv) carry out any capacity testing and metering as required under the [*principal off-take agreement*].
- (b) subject to the provisions of this Clause 9.5, have all such authority to act on behalf of the Project Company as is necessary to carry out the Services and its other obligations under this Agreement and the Annual Operating Plan;
 - (c) with the full co-operation of the Project Company, and to the extent it is within the Operator's reasonable capacity and control in connection with the provision of the Services under the Agreement, ensure that all notices, steps and matters required to be addressed or undertaken by the Project Company in connection with the Project Agreements are reviewed, prepared and/or properly actioned by the Operator and are acted on by the Project Company in a timely fashion;
 - (d) not negotiate or enter into any agreements with any bank, finance, or lending institution (including any Lender) or any other entity in connection with the Facility, except in accordance with this Agreement and the approved Annual Operating Plan, without the written approval of the Project Company;
 - (e) propose agreements to be entered into by the Project Company for the purpose of improving the efficiency and profitability of the Facility, which shall be reviewed by the Project Company and shall be subject to the approval of the Project Company;
 - (f) with the full co-operation of the Project Company, and to the extent it is within the Operator's reasonable capacity and control, co-ordinate the provision of the Services with the Project Company's obligations under the Project Agreements, applicable Laws and Authorisations; and
 - (g) communicate with the Project Company accordingly.

9.5.2 Without prejudice to its obligations under Clause 9.4.3, the Operator shall at all times communicate with and provide such information as is reasonably requested by the EPC Contractor.

9.5.3 If the approval of the Project Company is given in relation to any new agreement prepared by the Operator, in accordance with Clause 9.5.1(e) the Operator shall with the full co-operation of the Project Company, and to the extent that it is within the Operator's reasonable capacity and control, negotiate and agree any such agreement to be entered into by or on behalf of the Project Company.

9.6 Emergencies

9.6.1 In the event of an emergency endangering life or property or the proper functioning of the Facility, the Operator shall take such action as it reasonably considers necessary or desirable to prevent or minimise injury, damage or loss, and shall:

- (a) as soon as reasonably practicable following the occurrence of the emergency, liaise with the Project Company about the nature of the emergency and with a view to limiting the costs incurred as a consequence of the emergency;
- (b) promptly report to the Project Company the nature of the emergency and the action taken by the Operator in response thereto and any loss or damage which has been caused by that emergency;
- (c) take all steps necessary to notify any applicable Governmental Authority, insurers and/or any other Persons required by the Project Agreements to be notified by the Project Company or the Operator in the event of an emergency;
- (d) take such steps as reasonably requested by the Project Company pursuant to Clauses 10.5.1 and 10.5.2 or by any Governmental Authority to overcome the emergency; and
- (e) be entitled to procure such goods and services as are reasonably required in the circumstances to overcome the emergency, even if the cost of such goods and services has not been included in the relevant approved Annual Budget and the Project Company shall reimburse the proper cost thereof provided that the Operator shall use all reasonable endeavours to obtain any spares or services at the best available price.

9.6.2 Notwithstanding Clause 10.5.2, the Operator shall be entitled to obtain spare parts which may not have been included in the Spare Parts Inventory if in the reasonable opinion of the Operator an emergency situation exists at the Facility and such spare parts are required to maintain continuity of operation of the Facility provided that such an emergency situation has not been caused by an act or omission by the Operator. The documented costs of such Spare Parts shall be reasonably and properly incurred by the Operator on the following basis:

- (a) if the aggregate cost of the spare parts to be obtained shall be [USD][**] or less, the Operator shall be deemed to have authority to incur the expenditure and obtain such spare parts in such manner as the Operator may reasonably consider appropriate; and
- (b) if the aggregate cost of the spare parts to be obtained shall exceed [USD] [**] the Operator shall obtain the approval of the Project Company prior to obtaining such spare parts, which approval shall not be unreasonably withheld or delayed.

9.7 Services and acceleration

9.7.1 The Project Company may by notice instruct the Operator to perform any Additional Services or omit any part of the Services identified in such notice.

9.7.2 Within ten (10) Working Days of receipt of a notice pursuant to Clause 9.7.1 in respect of Additional Services, the Operator may give notice to the Project Company stating that it considers that performance of such Additional Services shall require an adjustment to the Fee. In such notice the Operator shall set out its estimate of the adjustment to the Fee (which

may include a reasonable element of overhead and profit) which is required to take into account the cost of performing such Additional Services. The Operator and the Project Company shall then discuss in good faith and seek to agree the amount to be paid to the Operator in respect of the performance of such Additional Services and any agreement so reached shall be binding upon the Operator and the Project Company. The Operator shall, after agreement is reached, immediately commence performance of such Additional Services.

9.7.3 If, following the issue of a notice given by the Operator in accordance with Clause 9.7.2, agreement on the adjustment to the Service Fee cannot be reached by the Parties within [ten (10)] Working Days, then:

- (a) the Project Company may nevertheless confirm the instruction to perform the Additional Services identified in the notice given pursuant to Clause 9.7.1 and the Operator shall forthwith commence performance of such Additional Services in which case, subject to Clause 9.7.4, the amount due shall be valued in accordance with the schedule of rates set out in Schedule 5 (Fees) unless good cause can be shown by the Operator as to why such rates are not applicable to the Additional Services, in which case the Project Company shall pay to the Operator a fair and reasonable amount in respect of compliance with such instruction; or
- (b) the Project Company may withdraw the notice given pursuant to Clause 9.7.1 in which case the Operator shall have no claim arising out of or in connection with such instruction.

9.7.4 The Operator shall not be entitled to any additional payment:

- (a) in respect of any notice given pursuant to Clause 9.7.1 and complied with by the Operator where the Operator has not given a notice in accordance with Clause 9.7.2; or
- (b) where and to the extent that any Additional Services identified in a notice given pursuant to Clause 9.7.1 have been necessitated in whole or in part by any negligence, omission or default on the part of the Operator.

9.7.5 If the Project Company has given a notice pursuant to Clause 9.7.1 and the Operator has given a notice in accordance with Clause 9.7.2 then upon:

- (a) the parties agreeing the amount to be paid to the Operator in respect thereof; or
- (b) the Project Company confirming the instruction in accordance with Clause 9.7.3(a),

the Additional Services identified in such notice given pursuant to Clause 9.7.1 shall thereafter be deemed to be part of the Services (and part of the Mobilisation Services and/or the Operational Services (as applicable) and the amount to be paid to the Operator pursuant to Clause 9.7.2 or 9.7.3(a) (as the case may be) in respect of such instruction shall be added to the Service Fee). The Project Company shall immediately thereafter notify the Operator of a fair and reasonable adjustment to the instalments referred to in Schedule 5 (Fees) to reflect the Service Fee (as so adjusted) and Schedule 5 (Fees) shall be deemed amended accordingly. The instalments as so adjusted shall be the instalments payable for the

purposes of Clause 10 and references in this Agreement to Schedule 5 (Fees) shall be deemed to be references to Schedule 5 (Fees) as so amended.³¹

- 9.7.6 If having received a notice from the Project Company under Clause 9.7.1 the Operator does not give a notice in accordance with Clause 9.7.2 then Additional Services identified in such notice given pursuant to Clause 9.7.1 shall at the expiry of the ten (10) Working Days' period referred to in Clause 9.7.2 be deemed to be part of the Services and there shall be no adjustment to the Fee in respect thereof.
- 9.7.7 Within [five (5)] Working Days of receipt of a notice pursuant to Clause 9.7.1 in respect of any omission to the Services, the value of such omission shall be assessed in accordance with the principles of Clauses 9.7.2 and 9.7.3 and deducted in accordance with Clause 11.5.
- 9.7.8 The Operator shall not be entitled to any payment in respect of any services required to be performed as a result of any negligence, omission or default in the performance of the Operator's obligations under this Agreement.
- 9.7.9 The Operator accepts that the nature of the Services to be provided under this Agreement are such as may require an amount of abortive work, re-working, re-negotiation and repetition the extent of which cannot be accurately forecast. The Operator agrees that no amount of such abortive work, re-working, re-negotiation or repetition shall entitle the Operator to any additional fee whether due to instruction of the Project Company or otherwise.

10 The Project Company's obligations

10.1 Access to Site

- 10.1.1 The Project Company shall on and from the date of issue of the Mobilisation Notice or, if later, the date so specified in the agreed implementation schedule, provide the Operator with access to the Site. The Project Company shall not be liable to the extent that the Operator is prevented from accessing the Site by any act, omission or breach by:
- (a) the EPC Contractor, where the EPC Contractor comprises one or both of Sichuan Electric and Consulting Company Limited and Power Construction Corporation of China;
 - (b) the Coal Receiving and Handling Facilities Contractor, where the Coal Receiving and Handling Facilities Contractor is [].
- 10.1.2 The Project Company shall use reasonable endeavours to assist the Operator in relation to the Operator's coordination with the EPC Contractor and the Coal Receiving and Handling Contractor with regard to accessing the Site.
- 10.1.3 All rents, amounts, fees, levies and charges payable under the Project Agreements or at Law for the occupation and use of the above sites during the Term shall be for the account of the Project Company.

³¹ This clause contemplates Additional Services becoming part of the Operating Services permanently. To be discussed.

10.2 Compliance and approvals

10.2.1 The Project Company shall comply with its obligations as the Project Company of the Facility under:

- (a) all Authorisations; and
- (b) the Project Agreements save to the extent that the Operator has by this Agreement undertaken to perform such obligations on the Project Company's behalf in connection with its provision of Services under this Agreement.

10.2.2 The Project Company shall exercise its rights to grant or withhold any approval required to be given under this Agreement in a reasonable and timely fashion and in accordance with:

- (a) all Authorisations; and
- (b) the Project Agreements.

10.2.3 The Project Company shall liaise with the GOK and other local authorities in Kenya as reasonably required by the Operator to allow the Operator to perform the Services in accordance with the terms of this Agreement.

10.3 Security

The Project Company shall procure the provision of armed security patrols of the Facility perimeter including the area immediately outside the perimeter fence on a continuous basis twenty-four (24) hours a day³².

10.4 Documentation

10.4.1 The Project Company shall ensure the provision to the Operator of the Operating Manual and other relevant documents and drawings relating to the Facility.

10.4.2 As soon as practicable after the Effective Date, the Project Company shall supply the Operator with copies of the executed versions of each of the Project Agreements and a copy of the Licence.

10.4.3 The Project Company shall, at the request of the Operator, at the Operator's cost, provide reasonable assistance in relation to the Operator's applications for any work permits, for the Operator's personnel and visas required for the Operator's Chinese personnel to enter into Kenya.

10.5 Emergencies: direction by the Project Company

10.5.1 Notwithstanding Clause 9.6.1 if the Project Company reasonably considers that there is an emergency endangering life or property or the proper functioning of the Facility and in its sole and reasonable discretion believes that the Operator is not taking the necessary and proper steps to overcome the emergency, the Project Company shall for so long as such emergency or the consequences thereof continue to affect the Facility be entitled to direct the Operator to provide all or any of the Services in such manner and/or at such times and/or to provide such other services as the Project Company shall consider to be necessary to maintain the proper

³² Security obligations of the Operator to be discussed.

operation and/or maintenance of the Facility or to reduce the risk to life or property, provided always that the Project Company may not require the Operator to operate or maintain the Facility contrary to the requirements of any Authorisation or any of the Project Agreements.

- 10.5.2 If the Project Company considers that an emergency situation exists at the Facility and any spare parts are required to maintain continuity of operation of the Facility, the Project Company shall give a written direction to the Operator specifying the action which it requires to be taken and the spare parts which it requires the Operator to obtain. The Operator shall comply with such direction with all due diligence and the Operator's reasonable additional costs of doing so (together with the costs of any spare parts obtained by the Operator pursuant to such direction) shall be for the Project Company's account.

10.6 Transfer of the Facility and Parts

- 10.6.1 The Project Company will provide the Facility when it has reached the Full Commercial Operations Date. To the extent the Project Company accepts and takes over the Facility before the Full Commercial Operations Date has been reached and requires the Operator to perform the Services at that time, the Parties shall agree on an equitable adjustment to the Performance Levels under this Agreement.

The Project Company will provide and pass on to the Operator the recommended strategic spare parts and Special Tools or other apparatus handed over by the EPC Contractor at the Full Commercial Operation Date.

10.7 Colony and Accommodation Facilities

[The Project Company shall provide the Colony at or close to the Facility for use by the Operator's Personnel free of charge, and will provide permanent building structures as previously built and used by the EPC Contractor].

10.8 Coal and limestone

[Subject to Clause 4.1.2, the Project Company shall:

- (a) be responsible for the coal, fuel oil, power, water and limestone required by the Operator to perform the Services and operate and maintain the Facility, as notified by the Operator to the Project Company at least [seven (7)] days in advance of the date on such coal, fuel oil, power, water and limestone (as the case may be) is required; and
- (b) ensure that any coal supplied to the Operator falls within the [specification] for such coal as set out in []³³.

11 Payments

11.1 Fees

- 11.1.1 Subject to Clause 11.1.2 and provided that the Operator has provided a valid invoice, the Operator shall be entitled to receive and the Project Company undertakes to pay the Operator for the Services as calculated as follows:

³³ Note: Requirements to be discussed

- (a) [during the period from the Effective Date until the date of the Mobilisation Notice, one hundred thousand dollars (US\$100,000) respectively on:
- (i) the Effective Date; and
 - (ii) each anniversary of the Effective Date until [],
- (the **Advance Payment**)]³⁴, and each such instalment of the Advance Payment shall become due for payment following the issue of a valid invoice by the Operator to the Project Company on the date of each such instalment;
- (b) during the Mobilisation Period:
- (i) a fixed lump sum payment of four million US dollars (USD 4,000,000), of which:
 - (aa) one million US dollars (USD 1,000,000) shall become due for payment following the issue of a valid invoice by the Operator to the Project Company on the date of the Mobilisation Notice (the **Initial Mobilisation Payment**);
 - (bb) one million US dollars (USD 1,000,000) shall become due for payment following the issue of a valid invoice by the Operator to the Project Company on the Mobilisation Date; and
 - (cc) the balance of two million US dollars (USD 2,000,000) plus any Prolonged Mobilisation Fee shall become due for payment in equal monthly instalments in arrears following the issue of a valid invoice by the Operator to the Project Company for each such month during the Mobilisation Period,

provided that the Advance Payment shall be deducted from the Initial Mobilisation Payment; and
 - (ii) any Prolonged Mobilisation Fee payable pursuant to Clause 5.1.3 due to a delay to the Full Commercial Operations Date,
- which together shall be the **Mobilisation Fee**; and
- (c) a payment of five million US dollars (USD 5,000,000) on the Mobilisation Date for the Initial Spare Parts, which shall become due for payment following the issue of a valid invoice by the Operator to the Project Company on the Mobilisation Date (the **Initial Spare Parts Payment**);
- (d) during the Operational Period, the Project Company, subject to Clause 11.1.2, will pay to the Operator:
- (i) a fixed annual payment as set out in Schedule 5 (Fees) for the applicable Operating Year in twelve (12) equal monthly instalments and;

³⁴ Note: Dates on which the \$100,000 payments are to be confirmed (including the date on which such payments stop being made). Amu and CHD are to consider the requirement for security in relation to the Advance Payments.

- (ii) a monthly variable fee based on the per megawatt hour of net electrical output delivered to KPLC pursuant to any Despatch Instruction, as measured at the Metering System or Back-Up Metering Equipment (as applicable) during the number of hours of operations in the particular month as stated in Schedule 5 (Fees),

each of which shall become due for payment following the issue of a valid invoice by the Operator to the Project Company in accordance with Clause 11.2.

11.1.2 The Fee shall be the contract price for the carrying out of the Services by the Operator and shall not be adjusted in any way whatsoever other than by reason of:

- (a) any Increased Costs;
- (b) costs incurred as a result of a suspension pursuant to Clause 17;
- (c) any Performance Liquidated Damages pursuant to the operation of Part 2 of Schedule 10 (Performance Requirements);
- (d) any Incentive Payments pursuant to the operation of Part 3 of Schedule 10 (Performance Requirements); and
- (e) any adjustment to the Fee required pursuant to Clause 9.7;
- (f) as otherwise agreed by the Project Company and the Operator pursuant to the terms of this Agreement.

11.1.3 [The Operator acknowledges that there shall be no adjustment to the Fee for fluctuations in exchange rates or for changes to rates applying to labour and materials, unless:

- (a) such fluctuations are the direct consequences of a Change in Law or Change in Tax; and
- (b) the Project Company has recovered an amount equivalent to such fluctuations from KPLC pursuant to the terms of the PPA].

11.1.4 Where so requested by the Operator and provided that the Operator pays the Project Company's costs and expenses incurred as a result of any such request, the Project Company shall use reasonable endeavours to enforce its rights under the PPA to recover under the PPA an amount equivalent to the fluctuations set out in Clause 11.1.3.³⁵

11.2 Invoicing and payment

11.2.1 In relation to:

- (a) the payments set out in Clauses 11.1.1(a), 11.1.1(b) and 11.1.1(c), the Operator shall submit to the Project Company an itemised invoice for such payment or the instalment of such payment (as the case may be) on the relevant date specified in Clauses 11.1.1(a), 11.1.1(b) and 11.1.1(c); and

³⁵ Note: CHD to revert.

- (b) the payments set out in Clause 11.1.1(d), the Operator shall submit to the Project Company an itemised monthly invoice for the preceding month no earlier than the seventh (7th) day of each month.

11.2.2 Each invoice prepared by the Operator shall contain the following information:

- (a) any amounts due pursuant to Clause 11.1.1(d); and
- (b) any other additions or deductions which may have become due under this Agreement, including without limitation those under Clause 24.

11.2.3 The Project Company shall within seven (7) days after receiving an invoice and supporting documents, give to the Operator notice of any items in the invoice with which the Project Company disagrees, with supporting particulars. Payments due shall not be withheld, except that:

- (a) if any thing supplied or work done by the Operator is not in accordance with the Agreement, the cost of rectification or replacement may be withheld until rectification or replacement has been completed; and/or
- (b) if the Operator was or is failing to perform any work or obligation in accordance with the Agreement, and had been so notified by the Project Company, the value of this work or obligation may be withheld until the work or obligation has been performed.

11.2.4 The Project Company may, by any payment, make any correction or modification that should properly be made to any amount previously considered due. Payment shall not be deemed to indicate the Project Company's acceptance, approval, consent or satisfaction.

11.2.5 Subject to Clauses 11.2.3 and 11.6, the Project Company shall pay to the Operator the amount which is due in respect of each invoice within fifteen (15) days after receiving the invoice and supporting documents as may be required, including (to the extent that the Project Company will be making an equivalent application under the PPA) any necessary data and/or support documentation that may be required pursuant to part F of schedule 6 to the PPA³⁶.

11.2.6 The payments made by the Project Company shall not be considered as an acceptance of the Services or as a waiver of any rights, claims and actions the Project Company may have against the Operator.

11.3 Taxes³⁷

11.3.1 [The Fee includes and the Operator shall bear and pay all Taxes by all Governmental Authorities in connection with the Operator's performance of the Services (excluding any customs duties levied on imported Parts constituting the Facility)]³⁸.

11.3.2 [The Project Company shall use all reasonable efforts to assist the Operator in customs clearance of the imported Parts and extend to the Operator the benefit of any preferential tax treatment which it has obtained, and in case there is no preferential tax treatment applied on

³⁶ Note: Inclusion of audit rights to be considered.

³⁷ Note: CHD has noted that the legal entity to enter into this O&M should be considered as it relates significantly the type of taxes that Operator shall be liable to pay.

³⁸ Note: Amu to revert. CHD are looking for a waiver of VAT and customs duties amongst others.

the imported Parts, pay such Taxes related to the imported Parts to the relevant Governmental Authority]³⁹.

11.4 Late payments

If any sum due under this Agreement remains unpaid after the final date for payment set out in Clause 11.2.5, such sum shall accrue interest on a daily basis at the Late Payment Rate on any monies due under an invoice calculated from the final date for payment set out in Clause 11.2.5 until the day before the actual date of payment. The right of either the Project Company or the Operator to receive interest in respect of the late payment of any sum due shall be without prejudice to any other rights which either the Project Company or the Operator may have in respect of such late payment.

11.5 Set-off

11.5.1 In the event of the Operator being liable to the Project Company under this Agreement for payment of:

- (a) any Performance Liquidated Damages; or
- (b) any other amounts,

in each case that have become due and payable under this Agreement, the Project Company shall be entitled to set-off such liability against any liability of the Operator to the Project Company under this Agreement.

11.6 Disputed Payment

If any sum or part of any sum shown on an invoice rendered by the Operator is disputed in good faith by the Project Company then payment of any undisputed sums or parts shall not be withheld and shall be paid to the Operator when due. The Project Company shall be entitled to withhold payment of any disputed sums and interest at the Late Payment Rate shall be payable on any disputed sum subsequently agreed or determined by an Expert to be due in accordance with Clause 25.4, from and including the date when the sum in question was due until, but excluding, the date when it is received by the Operator.

12 Approvals

- 12.1 The Operator shall be responsible for procuring and maintaining all Authorisations in relation to the Services including without limitation all business permits, customs clearances for any equipment importation and entry permits for foreign employees (**Operator's Approvals**) and including those listed in Part 1 of Schedule 9 (Approvals).
- 12.2 The Project Company shall be responsible for procuring and maintaining those Authorisations necessary for the Facility to be legally operated at the Site listed in Part 2 of Schedule 9 (Approvals) as the Project Company's responsibility, including the effluent discharge licence (**Project Company's Approvals**).
- 12.3 The Operator and the Project Company shall reasonably assist the other Party in the procurement and maintenance of their respective approvals.

³⁹ Note: CHD to consider and revert, on the basis that Amu have stated that there is no tax exemption for imported spares.

13 Title

- 13.1 Title to the coal, fuel oil, limestone and the Facility shall at all times remain with the Project Company.
- 13.2 Title to Parts provided by the Project Company, including the Initial Spare Parts and the Special Tools (and their replacement), shall at all times remain with the Project Company.
- 13.3 Title to Parts provided by the Operator, including the Initial Spare Parts and the Special Tools (and their replacement), shall transfer to the Project Company on the earlier of delivery to the Site or payment in respect of such Parts by the Project Company.
- 13.4 Title to tools, equipment, products and material used for the performance of the Services, shall at all times remain with the Operator.
- 13.5 In respect of any software provided by the Operator, only the licence to the software shall transfer to the Project Company and title to leased equipment shall remain at all times with the Operator.

14 Indemnity and liability

14.1 Indemnity

14.1.1 Subject to Clause 14.4:

- (a) the Party causing any physical damage to any part of the Facility, shall be responsible for the value of the damage;
- (b) each Party shall indemnify and hold harmless the other Party, the Lenders, and their respective officers, directors, agents, representatives and employees (collectively, the **Indemnified Parties**) from and against all losses, claims and/or liabilities for:
 - (i) loss and damage to property (including property belonging to KPLC);
 - (ii) third party actions, claims and/or demands brought against a Party; and
 - (iii) death or injury to any persons,

to the extent caused by:

- (aa) in the case of the Operator: (1) the Operator's act or omission; (2) any act or omission of the Operator's Subcontractors; and/or (3) any act or omission of any Affiliates, agents, directors, officers or employees of the Operator or the Operator's Subcontractors; or
- (bb) in the case of the Project Company: (1) the Project Company's act or omission; (3) any act or omission of the Project Company's Contractors or subcontractors; (3) [KPLC]; (4) other than the Operator, a counter party to any Project Agreement; and/or (5) any Affiliates, agents, directors, officers or employees of the Project Company or such entities,

[provided that the Project Company shall only be obliged to indemnify and hold harmless the Operator pursuant to this Clause 14.1.1 in respect of

[KPLC] to the extent that the Project Company is in receipt of financial compensation under the PPA pursuant to an equivalent indemnity under the terms of the PPA].

14.1.2 Without limiting the foregoing, each Party shall indemnify and hold harmless the other from and against any loss or claim resulting from a breach of any Law (including any Environmental Law) by a Party or:

- (a) in the case of the Operator, the Operator's Subcontractors; or
- (b) in the case of the Project Company: (1) the Project Company's Contractors or subcontractors; (2) [KPLC]; or (3) other than the Operator, a counter party to any Project Agreement,

[provided that the Project Company shall only be obliged to indemnify and hold harmless the Operator pursuant to this Clause 14.1.2 in respect of [KPLC] to the extent that the Project Company is in receipt of financial compensation under the PPA pursuant to an equivalent indemnity under the terms of the PPA].

14.1.3 Without limiting the foregoing, the Operator shall indemnify and hold harmless the Project Company and its Lenders from and against:

- (a) any loss or claim arising from the presence, discharge, disposal or release of any Hazardous Substance to the extent attributable to the Operator or any of its Subcontractors;
- (b) any loss or claim arising from the Project Company not being able to recover under the insurances which it is required to take out and maintain as a result of fraud, material misrepresentation, non-disclosure or breach by the Operator of any warranty or condition in the insurances of the Facility;
- (c) any claim by an employee of the Operator or any of its Subcontractors; and
- (d) any claim made against the Project Company for infringement of a third party's intellectual property rights arising out of or in connection with the software licensed to the Project Company under Clause 13.⁴⁰

14.1.4 Without limiting the foregoing, the Project Company shall indemnify and hold harmless the Operator any losses or damages from and in connection with any claim made against the Project Company for infringement of a third party's intellectual property rights arising out of or in connection with any part of the Facility to which the Operator perform Services under this Agreement.

14.2 Notice of proceedings

Each Party shall promptly notify the other Party of any claim or proceeding in respect of which it is entitled to be indemnified under this Clause 14 (including those in respect of which it

⁴⁰ Note: On reflection, we have considered the proposed indemnity in favour of the Operator for the Project Company's infringement of a third party's intellectual property rights arising out of the EPC Contractor's obligations, and do not think that it is appropriate. To be discussed.

would be entitled to be indemnified but for the provisions of Clause 14.3). Such notice shall be given as soon as possible and in any event within [ninety (90)] Working Days after the relevant Party becomes aware of such claim or proceeding.

14.3 No consequential losses

14.3.1 Subject to Clause 14.3.2 in no event shall either Party be liable for any indirect, incidental, consequential, special losses or exemplary damages, loss of profits, damages or expenses of the other Party or any other Person, whether arising under claims in contract or under applicable Law (including negligence) unless such liability is pursuant to Clause 14.1.1 and in respect of liability for loss of or damage to property due to the wilful misconduct or gross negligence of the indemnifying Party or for personal death or injury.

14.3.2 Termination amounts to be paid to the Operator under Clause 19.6(b) or Performance Liquidated Damages shall not constitute consequential or indirect losses and recovery under such provisions shall not be precluded on account of the exclusion of consequential and indirect losses.

14.4 Limitation of the Operator's liability

14.4.1 Subject to Clause 14.4.2, the total aggregate liability of the Operator to the Project Company for:

- (a) [the period from the Effective Date until the Mobilisation Date under this Agreement shall not exceed [●]]⁴¹;
- (b) during the Mobilisation Period under this Agreement shall not exceed [●], provided that where the Prolonged Mobilisation Fee is payable, the total aggregate liability shall increase by [] per day⁴²;
- (c) each Operating Year under this Agreement shall not exceed [●];
- (d) [on termination of this Agreement pursuant to Clauses 19.2 to 19.5 shall not exceed [●]]⁴³; and
- (e) Performance Liquidated Damages shall not exceed [●].

14.4.2 The limitations on liability referred to in Clauses 14.4.1(b) to 14.4.1(d) shall not apply to any liability in relation to:

- (a) death or personal injury;
- (b) any liability for fraud or wilful misconduct;
- (c) the Operator's indemnities set out in Clause 14.1 and any other indemnities set out in this Agreement; or
- (d) any amounts paid out by an insurance company in relation to breaches, acts or omissions.

⁴¹ Note: Liability in relation to the Advance Payment to be considered.

⁴² Note: The limit on liability is likely to be a percentage of Mobilisation Fee

⁴³ Note: Overall cap on termination to be considered.

14.5 Exclusive remedies

The remedies arising out of this Agreement in respect of or in consequence of any breach of contract, any negligent act or omission, death or personal injury or loss or damage to any property are to the exclusion of any other remedy that a Party may otherwise have against the other Party under applicable Law.

15 Insurance

15.1 Cover maintained by the Project Company

15.1.1 Without prejudice to any liability of either Party and any indemnity given by the Project Company under this Agreement the Operator shall in the name of the Project Company [(and name the Operator itself and such other Persons as the Project Company may by any Project Agreement be required to include as co-insured parties under such policies)]⁴⁴, throughout the term of this Agreement maintain at the Project Company's expense the Insurance Policies with effect from the Full Commercial Operation Date. The Project Company may amend the requirements set out in Schedule 14 (Insurances) from time to time by written notice to the Operator⁴⁵.

15.1.2 The Insurance Policies referred to in Clause 15.1.1 shall provide cover without unduly onerous terms and shall be with a well-established insurance office or underwriter of repute to be approved by the Project Company, such approval not to be unreasonably withheld.

15.1.3 The Operator shall furnish copies of all relevant insurance policies to the Project Company and shall immediately notify the Project Company in the event that any of the Insurance Policies cease for any reason to be available giving full reasons of the same.

15.1.4 The amounts of the insurance and the amounts of the excesses and limitations under the policies referred to above shall be reviewed by the Operator as part of the preparation of each Annual Operating Plan and, where appropriate, increased or decreased by such amount as may be approved by the Project Company.

15.2 Rights of subrogation and notice of cancellation

All policies of insurance shall contain a provision to the effect that the insurers have agreed to waive all rights of subrogation against the Operator, [its Subcontractor and any of their respective employees]⁴⁶ and shall provide for [ninety (90)] Working Days' notice to be given to the Operator and the Project Company prior to any cancellation, non-renewal or material modification of any such policy.

15.3 Renewal certificates

Renewal certificates shall be obtained as and when necessary to ensure the insurance continues in force and on receipt of any renewal certificates the Operator shall forward copies to the Project Company forthwith.

⁴⁴ Note: CHD to confirm if this wording is problematic.

⁴⁵ Note: Amu to check which policies can include the Operator. Business Interruption Insurance and mechanical breakdown insurance required.

⁴⁶ Note: Amu to check with its insurance advisors as to whether this proposed wording can be accepted.

15.4 The Project Company's rights to insure

If the Operator has not obtained or if it has failed to notify the Project Company that it has so obtained any insurance required to be effected by it under the provisions of this Clause 15 within [twenty (20)] Working Days of the date upon which it is required to effect such insurance or the date upon which the insurance currently held expires the Project Company shall without prejudice to any of its other rights have the right to procure such insurances at the Project Company's expense in which event any extra sums incurred as a result of the Operator's default shall immediately upon notice being given to the Operator become due and payable to the Project Company by the Operator.

15.5 Cover maintained by the Operator

15.5.1 The Operator shall throughout the term of this Agreement maintain the following insurances:

- (a) employer's liability insurance to comply with applicable employment Law; and
- (b) automobile public liability insurance covering all automobiles and automotive equipment owned or leased by the Operator in the performance of the Services under this Agreement for not less than the amount required by applicable Law.

15.5.2 The Operator shall if requested furnish copies of all relevant insurance policies and renewal certificates to the Project Company.

15.6 Notification of claims

15.6.1 The Operator shall give prompt notification to the Project Company of any circumstances or events of which it is or should be aware or which come to its attention and which could reasonably give rise to a claim with respect to any of the insurance policies referred to in this Clause 15 or against any manufacturers' warranties. In such notice the Operator shall:

- (a) identify to the Project Company the reasons why such claim has arisen or the reasons why the Operator cannot identify such reasons;
- (b) propose any method which the Operator acting in accordance with Prudent Operating Practice considers appropriate to prevent further claims; and
- (c) describe the time required to implement any such method and any cost involved.

15.6.2 The Project Company shall be entitled to comment on any such Operator's report in such manner as it may consider appropriate including, at its own expense, obtaining the opinion of any technical expert appointed by the Project Company to review the said report and to advise the Project Company thereon. The Project Company shall advise the Operator of any recommendations the Project Company may have but the Project Company shall not be entitled to take any further action.

15.7 Settlement of claims

15.7.1 Once a claim under the Insurance Policies has been notified to it the Operator shall not voluntarily do anything which would reduce or tend to reduce the scope of the indemnity under the Insurance Policies or the amount of the indemnity monies which would be available thereunder to indemnify the Operator were the claim against it to succeed in full.

15.7.2 The Operator shall not be entitled to effect any settlement of any claim made in respect of the Insurance Policies without the prior approval of the Project Company.

15.8 The Operator's liabilities and obligations

Neither failure to comply nor full compliance with the insurance provisions of this Agreement shall limit or relieve the Operator of its liabilities and obligations under this Agreement and in particular from the Operator's obligation to hold the Project Company harmless in accordance with any indemnity provisions contained in this Agreement.

15.9 Mobilisation Period

During the Mobilisation Period each Party shall comply with all the conditions of the EPC Contractor's or Project Company's (as the case may be) all risk insurance, the EPC Contractor's public liability insurance and all requirements of the EPC Contractor's insurers in connection with the settlement of claims, the recovery of losses and prevention of accidents and shall bear at its own cost the consequences of any failure on its part so to do. Each Party shall procure that all their representatives and respective servants shall do nothing and not omit to do anything which might render unenforceable the said insurance or entitle insurers to avoid liability thereunder.⁴⁷ Notwithstanding the above, the Project Company shall ensure that the Operator, its Subcontractor and any of their respective employees, will be included as one of the co-insured under the EPC Contractor's all risk insurance or the EPC Contractor's public liability insurance, with all policies of such insurance containing a provision to the effect that the insurers have agreed to waive all rights of subrogation against the Operator, its Subcontractor and any of their respective employees.

16 Force Majeure

16.1 Definition of Force Majeure

16.1.1 Subject to Clause 16.2, in this Clause 16, **Force Majeure** means an exceptional event or circumstance:

- (a) not within the reasonable control (directly or indirectly) of the Party affected, and such event or circumstance or its effects cannot be prevented, avoided or removed by such Party acting in accordance with Prudent Operating Practice;
- (b) which is not attributable in any way to the fault or negligence or a breach of the Agreement by the affected Party or its agents or subcontractors.

16.1.2 Force Majeure shall include each of the following events and circumstances:

- (a) an act of God including but not limited to lightning, fire, earthquakes, volcanic activity, floods, storms, cyclones, typhoons or tornadoes;
- (b) epidemics or plagues;
- (c) explosions or chemical contamination (other than resulting from an act of war);

⁴⁷ Note: Whether the Operator can be included as one of the co-insured under the EPC Contractor's all risk insurance or the EPC Contractor's public liability insurance is to be discussed with the EPC Contractor.

- (d) labour disputes including strikes, works to rule or go-slows or lockouts that extend beyond the Facility or are widespread or nationwide;
- (e) to the extent that the Project Company is in receipt of financial compensation under the PPA for such Political Event, any Political Event; and
- (f) terrorism.

16.2 Exclusions from Force Majeure

The following events or circumstances shall not constitute Force Majeure:

- (a) late delivery to the Operator of machinery, equipment, materials, spare parts or Consumables save where such late delivery is due to the action or inaction of any Governmental Authority after the Operator has acted prudently and allowed a reasonable time for all required processes or where the later delivery itself is due to Force Majeure;
- (b) a delay in the performance of any Subcontractor except where the delay itself is due to Force Majeure;
- (c) normal wear and tear of, or random flaws in, materials and equipment or breakdowns of equipment;
- (d) unavailability of funds; and
- (e) unavailability of Fuel and/or limestone to commission, test or operate the Facility, arising solely as a result of a default under one or more of the Fuel Supply Agreements.

16.3 Notice of Force Majeure

16.3.1 If a Party is or will be prevented from performing any of its obligations under the Agreement by Force Majeure, then it shall give notice to the other Party of the event or circumstances constituting the Force Majeure and shall specify the obligations, the performance of which is or will be prevented. The notice shall be given within fourteen (14) days after the Party became aware, or should have become aware, of the relevant event or circumstance constituting Force Majeure.

16.3.2 The Party shall, having given notice, be excused performance of such obligations for so long as such Force Majeure prevents it from performing them.

16.3.3 Notwithstanding any other provision of this Clause, Force Majeure shall not apply to obligations of either Party to make payments to the other Party under this Agreement.

16.4 Duty to minimise delay

16.4.1 Each Party shall at all times use all reasonable endeavours to minimise any delay in the performance of the Agreement as a result of Force Majeure.

16.4.2 A Party shall give notice to the other Party when it ceases to be affected by Force Majeure.

16.5 Consequences of Force Majeure

If the Operator:

- (a) is prevented from performing any of its obligations under this Agreement by Force Majeure of which notice has been given under Clause 16.3; and
- (b) incurs Cost by reason of such Force Majeure,

the Operator shall be entitled, without prejudice to its rights to receive compensation under relevant Insurance Policies, to the extent that the Project Company is in receipt of financial compensation under the PPA or GOK Letter in respect of such event of Force Majeure, to the due proportion of such financial compensation that relates to the scope of Services provided by the Operator under this Agreement.

16.6 Force Majeure affecting Subcontractor

If any Subcontractor is entitled under any contract or agreement relating to the Services to relief from Force Majeure on terms additional to or broader than those specified in this Clause, such additional or broader Force Majeure events or circumstances shall not excuse the Operator's non-performance or entitle the Operator to relief under this Clause.

16.7 Optional termination, payment and release

16.7.1 If the execution of substantially all the Services is prevented for a period of one hundred and eighty (180) days by reason of Force Majeure of which notice has been given under Clause 16.3, then the Parties shall meet in good faith with a view to determining mutually acceptable terms for continuing this Agreement notwithstanding the effects of the event of Force Majeure. If at the end of ninety (90) days, no solution is found, either Party may give to the other Party a notice of termination of the Agreement. In this event, the termination shall take effect seven (7) days after the notice is given, and the Operator shall proceed in accordance with Clause 18.4.

16.7.2 Upon such termination, the Project Company shall pay to the Operator:

- (a) the amounts payable for any Services and Additional Services carried out for which the Fee or price is stated in the Agreement;
- (b) the Cost of [equipment] and [Spare Parts] ordered for the Services which have been delivered to the Operator, or of which the Operator is liable to accept delivery. This equipment and [Spare Parts] shall become the property of (and be at the risk of) the Project Company when paid for by the Project Company, and the Operator shall place the same at the Project Company's disposal;
- (c) any other Cost or liability which in the circumstances was reasonably incurred by the Operator in the expectation of performing the Services;
- (d) the Cost of removal of the Operator's equipment from the Site and the return of these items to the Operator's works in its country (or to any other destination at no greater cost); and
- (e) the Cost of repatriation of the Operator's staff and labour employed wholly in connection with the Services at the Termination Date.

16.8 Release from performance under the Law

Notwithstanding any other provision of this Clause, if any event or circumstance outside the control of the Parties (including, but not limited to, Force Majeure) arises which makes it impossible or unlawful for either or both Parties to fulfil its or their contractual obligations or which, under the law governing the Agreement, entitles the Parties to be released from further performance of the Agreement, then upon notice by either Party to the other Party of such event or circumstance:

- (a) the Parties shall be discharged from further performance, without prejudice to the rights of either Party in respect of any previous breach of the Agreement; and
- (b) the sum payable by the Project Company to the Operator shall be the same as would have been payable under Clause 16.7 if the Agreement had been terminated under Clause 16.7.

17 Suspension of the Services

17.1 Suspension of the Services

The Operator shall upon receiving notice from the Project Company suspend all or part of the Services as specified by the Project Company for such time or times and in such manner as the Project Company may consider necessary and will during such suspension properly protect and secure the Facility so far as is deemed necessary by the Project Company.

17.2 Re-commencement of the Services

Following any such suspension the Operator shall promptly recommence provision of the Services. The Project Company shall keep the Operator advised as to the likelihood of its requiring the Operator to recommence provision of the Services and shall give the Operator reasonable notice of re-commencement.

17.3 Payments in respect of suspension

Any reasonable costs or losses which may be incurred by the Operator arising directly out of such suspension or re-commencement (including costs associated with demobilising and remobilising the Operator's personnel) will be borne and paid by the Project Company unless such suspension is caused by a breach of this Agreement by or a negligent act or omission of the Operator. To the extent that the Project Company requires the Operator to continue providing any part of the Services during any period of suspension the Operator shall be entitled to receive the appropriate portion (taking into account the costs incurred by the Operator in providing such part of the Services) of its costs and fees in respect of such part of the Services.

18 Termination

18.1 Termination

This Agreement may be terminated in any of the following circumstances:

- (a) at the option of the Project Company by giving written notice to the Operator expiring on or after the termination of:
 - (i) the Power Purchase Agreement; or

- (ii) any other Project Agreement, where such Project Agreement is not replaced by an equivalent agreement entered into by the Project Company,

in which case where the termination of the Power Purchase Agreement or any other Project Agreement was:

- (1) through no fault of the Operator, the consequences set out in Clause 16.7.2 shall apply to such termination; or
 - (2) where Clause 18.1(a)(1) does not apply, the consequences set out in Clauses 19.4 and 19.5 shall apply to such termination.
- (b) in accordance with terms of this Agreement.

18.2 Continuation

Notwithstanding any breach, default or omission by either Party hereto, the other Party may elect to continue to treat this Agreement as being in full force and effect and to enforce its rights hereunder and failure of either Party to exercise any right hereunder including the right of termination shall not be deemed a waiver of such right for any continuing or subsequent default.

18.3 Non-prejudice to claims

Termination of this Agreement shall be without prejudice to any claim that either Party may have against the other arising out of breaches of this Agreement prior to such termination.

18.4 Transfer of the Operator's responsibilities

18.4.1 Immediately upon termination of this Agreement by the Project Company the Operator shall hand or deliver to or relinquish custody in favour of the Successor Operator or the Project Company if the Successor Operator has not been appointed by the Project Company:

- (a) all funds held by the Operator as agent or trustee for the Project Company in relation to its role as the Operator; and
- (b) all books, records and inventories including all information stored on the Maintenance Management System and all property of the Project Company relating to the operation and maintenance of the Facility.

18.4.2 If requested to do so by the Project Company, the Operator shall novate to the Successor Operator or the Project Company if the Successor Operator does not exist, effective as of the Termination Date, its rights as the Operator under all contracts entered into in the performance of its obligations under this Agreement on terms acceptable to the Project Company. Pending such novation and in relation to all other contracts relating to the operation and maintenance of the Facility, the Operator shall hold its rights and interests thereunder for the account of and to the order of the Successor Operator or the Project Company as the case may require. Notwithstanding any other Clause of this Agreement, the Project Company shall not be liable to make any payment on termination of this Agreement unless the Operator has fulfilled its obligations pursuant to Clause 18.4.2.

18.4.3 The Operator shall use its best endeavours to transfer the Environmental Licences to the Successor Operator or the Project Company or where it is not possible to transfer the Environmental Licences provide the Successor Operator or the Project Company reasonable

assistance to take out the Environmental Licences necessary to manage, operate and maintain the Facility and provide the Services.

18.5 Continuity of operation

In the event of termination of this Agreement by the Project Company under Clause 19.3 the Operator shall if required by the Project Company continue to operate the Facility for a period specified by the Project Company not exceeding [sixty (60)] Working Days whilst the Successor Operator is installed. During any such period the Operator shall continue to act in all respects in accordance with this Agreement as if the same had not been terminated and the obligations of the Parties hereunder shall continue during such period. The Project Company shall afford the Operator every assistance in redeploying staff or making use of temporary staff to carry out its obligations and shall pay the Operator during such period the same amount as would have fallen due (subject to any rights of set-off the Project Company may have under Clause 11.5 provided that such set-off rights shall not apply to sums payable for reimbursement of costs incurred by the Operator in respect of the employment of staff) during such period if the Agreement had not been terminated.

18.6 Return of Performance Bond

In the event of termination of this Agreement the Project Company shall, provided that no claims are outstanding under the Performance Bond, return the Performance Bond to the Operator to the extent not drawn upon immediately following the Termination Date.

19 Events of Default and remedies

19.1 The Project Company Events of Default

Each of the following events shall constitute a Project Company Event of Default, unless resulting directly or indirectly from (i) an Operator Event of Default, (ii) any other default by the Operator of its obligations under this Agreement; or (iii) an event of Force Majeure:

- (a) the Project Company fails to make any payment due and payable under this Agreement unless the Project Company has cured such breach within thirty (30 days) of the Project Company's receipt of written notice from the Operator;
- (b) the occurrence of the Project Company a material breach or failure of its other obligations under this Agreement unless the Project Company has cured such breach within thirty (30 days) of its receipt of written notice from the Operator; or
- (c) the Project Company becomes Insolvent.

19.2 The Operator Events of Default

Each of the following events shall constitute an Operator Event of Default, unless resulting directly or indirectly from (i) a Project Company Event of Default, (ii) any other default by the Project Company of its obligations under this Agreement; or (iii) an event of Force Majeure:

- (a) failure by the Operator to deliver the Performance Bond in accordance with the terms of this Agreement unless the Operator has cured such breach within thirty (30 days) of the its receipt of written notice from the Project Company;
- (b) the occurrence, as a result of any act or omission of the Operator, of a material breach or failure of its obligations under this Agreement [unless the Operator has

cured such breach within thirty (30 days) of the its receipt of written notice from the Project Company]⁴⁸;

- (c) the Operator, its agents or any Subcontractors give or offer to give (directly or indirectly) to any person any bribe, gift, gratuity, commission or other thing of value, as an inducement or reward:
 - (i) for doing or forbearing to do any action in relation to the Agreement;
 - (ii) for showing or forbearing to show favour or disfavour to any person in relation to the Agreement;
- (d) the Operator reaches the cap on liability during the Mobilisation Period under Clause 14.4.1(a);
- (e) the Operator reaches the cap on liability for any Operating Year under Clause 14.4.1(b);
- (f) the Operator reaches the cap on Performance Liquidated Damages under Clause 14.4.1(c);
- (g) not used;
- (h) the Contractor abandons the Mobilisation Services and/or the Services [for a period of more than consecutive period of [] calendar days], except for reasons permitted under this Agreement;
- (i) the Operator becomes Insolvent;
- (j) the Operator assigns or subcontracts any part or all of this Agreement in contravention of Clause 20; and
- (k) the Operator fails to achieve the Threshold Availability for [four (4) consecutive]⁴⁹ months in accordance with Clause 6.11.

19.3 Termination for Event of Default

19.3.1 Subject to Clause 19.3.2, upon the occurrence of an Event of Default, the Operator, in the case of a Project Company Event of Default, or the Project Company, in the case of an Operator Event of Default, may upon delivery of [thirty (30)] Working Days' prior written notice to the other Party terminate this Agreement without thereby affecting any other right or remedy available to it provided that if the defaulting Party shall have cured such default within such period and shall have notified the non-defaulting Party of the same and of the actions taken to remedy the relevant Event of Default, the notice of termination shall be deemed to have been withdrawn and no longer of any effect.

19.3.2 Either Party may terminate this Agreement with immediate effect in the event that the other Party becomes Insolvent.

⁴⁸ Note: Amu to revert with regard to the relevant time period.

⁴⁹ Note: Parties to discuss

19.4 Liability for Operator Event of Default

Subject always and without prejudice to Clauses 14.3 and 14.4 of this Agreement, where an Operator Event of Default gives rise to the Project Company incurring any liability, cost or expense as a result of breaching any of its obligations under any of the Project Agreements, the Operator shall indemnify and reimburse the Project Company for such liability, cost or expense to the extent that the breach under the relevant Project Agreement arises out of or is caused by such Operator Event of Default.

19.5 Payment following Operator Event of Default

19.5.1 As soon as practicable after a notice of termination under Clause 19.3 for an Operator Event of Default has taken effect, the Project Company shall agree or determine the value of the Services and any other sums due to the Operator for Services executed in accordance with this Agreement.

19.5.2 After a notice of termination under Clause 19.3 for an Operator Event of Default has taken effect, the Project Company may:

- (a) withhold further payments to the Operator until the costs of remedying of any defects, Performance Liquidated Damages, and all other costs incurred by the Project Company, have been established; and/or
- (b) recover from the Operator, subject always and without prejudice to Clauses 14.3 and 14.4:
 - (i) any Costs, losses and damages incurred or suffered by the Project Company under the terminated Power Purchase Agreement and/or the Financing Agreements including, without limitation, breakage costs; and/or
 - (ii) any extra costs of completing the Services, after allowing for any sum due to the Operator under Clause 19.5.1.

19.5.3 After recovering any such losses, damages and extra costs, the Project Company shall pay any balance to the Operator.

19.6 Payment following Project Company Event of Default

After a notice of termination by the Project Company pursuant to Clause 18.118.1(a)(1) or for Project Company Event of Default under Clause 19.3, the Project Company shall:

- (a) pay the Operator in accordance with Clause 16.7.2; and
- (b) pay the Operator the amount of any loss of profit or other loss or damage sustained by the Operator as a result of such termination, provided that payment pursuant to this Clause 19.6(b) shall not exceed [US\$]⁵¹.

⁵¹ Note: Parties to discuss the level of the relevant cap.

20 Assignment and subcontracting

20.1 Assignment

Neither Party shall assign the whole or any part of the Agreement or any benefit or interest in or under the Agreement. However, either Party:

- (a) may assign the whole or any part with the prior agreement of the other Party, at the sole discretion of such other Party; and
- (b) may, as security in favour of the Lenders or any agent or designee of the Lenders, assign its rights under this Agreement.

20.2 Subcontracting

20.2.1 Notwithstanding the provisions of Clause 20.1, the Operator may subcontract any part of the Services subject always to:

- (a) compliance with applicable Laws;
- (b) compliance with the requirements of the PPA; and
- (c) the prior written consent of the Project Company, save that the Project Company's consent shall not be required where the subcontracting is to any Key Subcontractors or where the contract value of the subcontract relating to the Operational Services does not exceed [USD 1,700,000].

20.2.2 All Services that are subcontracted by the Operator are included in the Fee.

20.2.3 In respect of any Key Subcontractors that are replaced and any Subcontractors falling under Clause 20.2.1(c) above, the Operator shall give the Project Company not less than twenty-eight (28) days' notice of:

- (a) the intended appointment of the Subcontractor, with detailed particulars which shall include its relevant experience; and
- (b) the intended commencement of the Subcontractor's services on the Site.

20.2.4 The Operator shall remain:

- (a) responsible to the Project Company for the performance of the Services by any Subcontractor as if the activities of such Subcontractor were being carried out by the Operator; and
- (b) solely responsible and liable for the actions, inactions, default and non-performance of any of its Subcontractors.

20.2.5 [The Operator shall:

- (a) ensure that all Subcontracts shall be assignable to the Project Company and the Lenders without the consent of the relevant Subcontractor being required;

- (b) [on or before the date that the relevant Key Subcontract is entered into, provide an executed collateral warranty to the Project Company in the form set out in Schedule [] from each Key Subcontractor;
- (c) procure and assign to the Project Company manufacturer's warranties in relation to each Subcontractor providing key Parts for the Services;
- (d) on or before the date that the relevant Key Subcontract is entered into, provide an executed collateral warranty to the Lenders in the form set out in Schedule [] from each Key Subcontractor; and]⁵²
- (e) ensure that the Operator's rights under this Agreement are fully and properly protected under all Subcontracts and ensure that all Subcontracts are consistent with the requirements under the Project Documents].

21 Confidential Information

21.1.1 Each Party agrees that it shall, and shall ensure that its employees, officers and directors shall, hold in confidence this Agreement and all information, documentation, data and know-how disclosed to it by the other Party and designated in writing as "confidential" both before and after the date of this Agreement (**Confidential Information**), and shall not disclose to any third party or use Confidential Information other than in connection with the performance of this Agreement or any part thereof without the other Party's prior written approval, provided that:

- (a) this Clause shall not apply to Confidential Information which is in the public domain other than by reason of a breach of this Clause 21, or was already in the rightful possession of the recipient Party, or was obtained by the recipient Party in good faith from a third party entitled to disclose it;
- (b) a Party may disclose Confidential Information in accordance with any legal requirement to do so, or to its Affiliates, directors, officers, employees, consultants and Subcontractors (subject to obtaining undertakings of confidentiality except where professional duties already impose an obligation of confidentiality) whose duties reasonably require such disclosure save that the Project Company shall be entitled to disclose, such Confidential Information as it reasonably considers necessary, to its customers in connection with enquiries raised by customers in relation to the Project Company's tariffs or in circumstances where the Project Company is obliged to disclose Confidential Information in connection with the determination of tariff values or establishment of the Project Company's tariffs applicable to its customers; and
- (c) a Party may disclose Confidential Information, subject to obtaining an undertaking to keep the same confidential, to:
 - (i) any prospective assignee of the Party and its advisers;
 - (ii) to any bank or financial institution or investor from whom the Party is seeking finance, provided that such entity shall not be required to give such undertaking but shall nevertheless be expected to keep such information confidential; and

⁵² Note: Requirements for Collateral Warranties and manufacturers' warranties to be discussed.

(iii) to any Expert or arbitrator under this Agreement.

21.1.2 The provisions of this Clause 21 shall survive the termination or expiry of this Agreement.

22 Publicity and anti-bribery

22.1 Photography

The Operator shall not take or permit to be taken photographs of the Facility without the Project Company's prior approval except where necessary in the event of an emergency or for the purposes of maintenance of insurance or progress records.

22.2 Publicity

No publicity shall be undertaken in relation to this Agreement by the Operator without the Project Company's prior agreement.

22.3 Corrupt gifts and fraud

22.3.1 The Operator shall, in accordance with Prudent Operating Practice, establish and operate, and shall procure that any Subcontractors establish and operate, the following in accordance with Prudent Operating Practice in relation to each of their activities relating to the Agreement:

- (a) a compliance programme to prevent and detect violations of Anti-Corruption Laws and Regulations;
- (b) an education and training programme for its employees and agents in relation to the requirements and prohibitions of the Anti-Corruption Laws and Regulations; and
- (c) due diligence arrangements to seek to minimise the risk of the Operator:
 - (i) entering into agreements or arrangements with a Designated Party;
 - (ii) employing a Designated Party; and
 - (iii) entering into a Prohibited Transaction.

22.3.2 The Operator shall, on reasonable written notice, provide details and demonstrate to the Project Company its compliance with the obligations set out in Clause 22.3.1.

22.3.3 If the Project Company reasonably believes that a Prohibited Act has been committed, either directly or indirectly, by the Operator or by any Operator's personnel:

- (a) it shall provide to the Operator such information as it has in its possession in relation to the alleged Prohibited Act including:
 - (i) the nature of the Prohibited Act;
 - (ii) the identity of the party whom it believes has committed the Prohibited Act; and
 - (iii) the activity in connection with the Agreement that the Prohibited Act related to; and

- (b) upon provision of such information, the Operator shall co-operate in good faith with the Project Company and its representatives in determining whether a Prohibited Act has been committed.

22.3.4 If the Operator or any of the Operator's personnel are convicted of a Prohibited Act, then the Project Company shall be entitled to act in accordance with the following provisions:

- (a) if a Prohibited Act is committed by the Operator, then the Project Company shall be entitled, but shall not be obliged, to give notice to the Operator requesting that the Operator take or procure such reasonable action as is notified by the Project Company to remedy the effects of the Prohibited Act (excluding payment of compensation for any loss suffered by the Operator) and to seek to avoid any re-occurrence including compliance with specific procedures within thirty (30) days of receipt of such notice;
- (b) if the Prohibited Act is committed by an employee of the Operator acting independently, then the Project Company may give notice to the Operator requiring it to immediately remove the relevant person from any further involvement with the Services or the Agreement and (if necessary) procure the performance of such part of the Services performed by the employee by another person; and
- (c) if the Project Company has given notice in accordance with any of Clauses 22.3.4(a) to (b) that the Operator is required to take or procure certain actions and the Operator has failed to take or procure such actions as are notified by the Project Company within the time period specified, then the Operator shall compensate the Project Company for any and all loss suffered by the Project Company arising from such failure.

22.3.5 Any notice given by the Project Company under Clause 22.3.4 shall specify:

- (a) the nature of the Prohibited Act;
- (b) the identity of the party whom the Project Company believes has committed the Prohibited Act; and
- (c) the activity in connection with the Agreement that the Prohibited Act related to.

22.3.6 In exercising its rights in this Clause 22.3 the Project Company shall act in a reasonable and proportionate manner having regard to such matters as the gravity of the Prohibited Act and the identity of the person committing the Prohibited Act.

23 Intellectual property

23.1 Intellectual and industrial property rights

23.1.1 In this Clause 23.1, **infringement** means an infringement (or alleged infringement) of any patent, registered design, copyright, trade mark, trade name, trade secret or other intellectual or industrial property right relating to the Services; and **claim** means a claim (or proceedings pursuing a claim) alleging an infringement.

23.1.2 Whenever a Party does not give notice to the other Party of any claim within twenty-eight (28) days of receiving the claim, the first Party shall be deemed to have waived any right to indemnity under this Clause.

- 23.1.3 The Project Company shall indemnify and hold the Operator harmless against and from any claim alleging an infringement which is or was:
- (a) an unavoidable result of the Operator's compliance with the Project Company's Requirements; or
 - (b) a result of any Services being used by the Project Company:
 - (i) for a purpose other than that indicated by, or reasonably to be inferred from, this Agreement; or
 - (ii) in conjunction with any thing not supplied by the Operator, unless such use was disclosed to the Operator prior to the date of this Agreement or is stated in this Agreement.
- 23.1.4 The Operator shall indemnify and hold the Project Company harmless against and from any other claim which arises out of or in relation to (i) the Operator's execution of the Services, (ii) the use of Operator's equipment, or (iii) the proper use of the Services.
- 23.1.5 If a Party is entitled to be indemnified under this Clause 23, the indemnifying Party may (at its cost) conduct negotiations for the settlement of the claim, and any litigation or arbitration which may arise from it. The other Party shall, at the request and cost of the indemnifying Party, assist in contesting the claim. This other Party (and its personnel) shall not make any admission which might be prejudicial to the indemnifying Party, unless the indemnifying Party failed to take over the conduct of any negotiations, litigation or arbitration upon being requested to do so by such other Party.

24 Financing

The Operator hereby acknowledges as fundamental to this Agreement:

- (a) that the Project Company's claims and rights under this Agreement, the Performance Bond, the Parent Company Guarantee and the insurances may be fully or partially pledged or assigned as security, in one or successive instances, to the Lenders;
- (b) the possibility that the Project Company's discretions, but not the performance of the Project Company's obligations, under this Agreement may be submitted to prior written consent of the Lenders;
- (c) [that the Direct Agreement, providing the Lenders, inter alia, with "step-in" rights will have to be executed by the Parties and the Lenders;]
- (d) the essential nature of subscribing the insurance policies upon the terms of the report issued by the Lenders;
- (e) that the Lenders and their advisers (including the technical adviser and any other adviser of the Lenders) have the right to reasonable access to the Site and/or the Facility, or any other place where the materials or equipment are located or are being worked on, in order to inspect the performance of the Services contemplated under this Agreement;
- (f) that any amendment of this Agreement, which causes a change of the Services and/or of the Fees may be subject to prior written approval of the Lenders; and

- (g) the Operator's obligation to pay any amounts owed to the Project Company under this Agreement to an account, if any, shall be indicated in writing by the Lenders.

25 Governing law and resolution of Disputes

25.1 Governing law and language

25.1.1 The rights and obligations of the Parties under or in accordance with this Agreement shall be governed by and construed in accordance with the laws of England and Wales and the defined terms shall govern the interpretation of this Agreement.

25.1.2 The governing language of this Agreement shall be the English language.

25.2 Operator's claims

25.2.1 If the Operator considers itself to be entitled to any additional payment, under any Clause of this Agreement or otherwise in connection with the Agreement, the Operator shall give notice to the Project Company, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than six (6) months after the Operator became aware, or should have become aware, of the event or circumstance.

25.2.2 The Operator shall also submit any other notices which are required by the Agreement, and supporting particulars for the claim, all as relevant to such event or circumstance.

25.2.3 The Operator shall keep such contemporary records as may be necessary to substantiate any claim, either on the Site or at another location acceptable to the Project Company. Without admitting liability, the Project Company may, after receiving any notice under this Clause, monitor the record-keeping and/or instruct the Operator to keep further contemporary records. The Operator shall permit the Project Company to inspect all these records, and shall (if instructed) submit copies to the Project Company.

25.2.4 Within fifty-four (54) days after the Operator became aware (or should have become aware) of the event or circumstance giving rise to the claim, or within such other period as may be proposed by the Operator and approved by the Project Company, the Operator shall send to the Project Company a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed. If the event or circumstance giving rise to the claim has a continuing effect:

- (a) this fully detailed claim shall be considered as interim;
- (b) the Operator shall send further interim claims at monthly intervals, giving the accumulated delay and/or amount claimed, and such further particulars as the Project Company may reasonably require; and
- (c) the Operator shall send a final claim within twenty-eight (28) days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the Operator and approved by the Project Company.

25.2.5 Within forty-two (42) days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Project Company and approved by the Operator, the Project Company shall respond with approval, or with disapproval and detailed comments. The Project Company may also request any necessary

further particulars, but shall nevertheless give its response on the principles of the claim within such time.

25.2.6 Each interim payment shall include such amounts for any claim as have been reasonably substantiated as due under the relevant provision of the Agreement. Unless and until the particulars supplied are sufficient to substantiate the whole of the claim, the Operator shall only be entitled to payment for such part of the claim as it has been able to substantiate.

25.2.7 The Project Company shall proceed to agree or determine the additional payment (if any) to which the Operator is entitled under the Agreement.

25.2.8 The requirements of this Clause are in addition to those of any other Clause which may apply to a claim. If the Operator fails to comply with this or another Clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this Clause.

25.3 Amicable settlement

25.3.1 In the event of any claim, dispute or disagreement arising out of, in connection with or relating to this Agreement (**Dispute**), that the Parties hereto have been unable to settle or agree upon within a period of thirty (30) days after the dispute or disagreement arises, each Party shall nominate a senior officer of its management to meet at a mutually agreed time and place not later than forty-five (45) days after the dispute or disagreement has arisen to attempt to resolve such dispute or disagreement.

25.3.2 Should a resolution of such claim, dispute or disagreement not be obtained within seventy-five (75) days of the dispute or disagreement arising, either Party may then by notice to the other submit the dispute to arbitration in accordance with the provisions of Clause 25.5.

25.4 Expert determination

25.4.1 Where the Agreement provides that any dispute or other matter shall be referred to an Expert or the Parties otherwise so agree the following provisions shall apply:

- (a) the Dispute shall be administered in accordance with the rules of procedure of the International Chamber of Commerce (provided that in the event of any inconsistency or contradiction between such rules and the terms of this Agreement, the latter shall prevail);
- (b) each Party shall act in a transparent manner and provide to the Expert all information in its possession requested by the Expert for the purposes of making its determination;
- (c) the Expert shall be an independent person with relevant experience and willing to act, agreed between the Parties, or if not agreed within fourteen (14) days of a request in writing by either Party, appointed by the International Chamber of Commerce;
- (d) for a period of forty-two (42) days after the appointment of the Expert or such other period as the Parties may agree, each Party may make such written submissions as it wishes to the Expert and shall simultaneously provide a copy to the other Party, and at the end of such forty-two (42) day period each Party shall have a period of twenty-one (21) days to make counter-submissions to the Expert (with a copy to the other Party) in reply to the other Party's written submissions made during the

aforementioned forty-two (42) day period provided that neither Party shall during such twenty-one (21) day period make any written counter-submission which purports to reply to, raise or refer to, any new matters not raised or referred to in any submission made during the aforementioned forty-two (42) day period;

- (e) at the end of the twenty-one (21) day period referred to in paragraph (d) above, and no later than twenty-one (21) days thereafter, either Party may, with the consent of the Expert and at a time and place decided by the Expert, make an oral presentation to the Expert in the presence of the other Party commenting on or explaining matters previously submitted to the Expert in writing;
- (f) the Expert shall render his determination in writing within fourteen (14) days of the completion of the oral presentation given in accordance with paragraph (c) above and give reasonable details of the reasons for his determination;
- (g) subject to paragraph (k) below, the decision of the Expert shall be final and binding on the Parties save in the event of fraud or manifest error;
- (h) the Expert shall act as an expert and not as an arbitrator;
- (i) the costs of the Expert shall be borne as determined by the Expert or, in default of such determination, equally by the Parties;
- (j) in the case of invoices disputed by the Project Company in accordance with the periods in Clauses 25.4.1 (d) and (e) shall be reduced respectively to ten (10) Working Days instead of forty-two (42) days and five (5) Working Days instead of twenty-one (21) days; and
- (k) any Party that wishes to challenge a decision of the Expert must initiate arbitration in accordance with Clause 25.5 of this Agreement within ninety (90) days of its receipt of the decision and set forth one or more of the limited grounds set forth in Clause 20.3.1(g) as the basis of its challenge in its request for arbitration, failing which the decision shall be final and binding.

25.5 Arbitration

25.5.1 Subject to Clause 25.4, all disputes arising out of or in connection with this Agreement including but not limited to its validity and any purported breach or termination shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce which Rules are deemed to be incorporated by reference into this Clause 25.5. It is hereby agreed that:

- (a) the seat of the arbitration shall be [London, England]⁵⁴;
- (b) there shall be three (3) arbitrators;
- (c) the language of the arbitration shall be English;
- (d) the award rendered shall apportion the costs of the arbitration;

⁵⁴ Note: CHD has suggested that the seat of arbitration should be in Singapore. For an English law contract involving multi national parties, the preference is that the seat of arbitration is in London.

- (e) the award shall be in writing and shall set forth in reasonable detail the facts of the dispute and the reasons for the tribunal's decision;
- (f) the award in such arbitration shall be final and binding upon the Parties and judgment thereon may be entered in any Court having jurisdiction for its enforcement; and the Parties renounce any right of appeal from the decision of the tribunal insofar as such renunciation can validly be made; and
- (g) if any dispute arising out of or in connection with this Agreement raises issues which are substantially the same as or in connection with the other Project Agreements (a **Related Project Dispute**) then:
 - (i) if arbitrators have not already been appointed in relation to the dispute under the other Project Agreements the Project Company shall consult with the Operator and shall give due consideration to, but shall not be bound by, the Operator's proposals in relation to the appointment of arbitrators in relation to the Related Project Dispute);
 - (ii) if arbitrators have been appointed in relation to the dispute under the other Project Agreements, either Party may, by written notice to and upon written consent of the other Party and by written notice to the arbitrators who have already been agreed or appointed hereunder, require the dispute to be referred to and finally settled by the arbitral tribunal appointed under the other Project Agreements provided that the arbitration in respect of the Related Project Dispute is an arbitration under the Rules of Arbitration of the International Chamber of Commerce (or any other rules reasonably satisfactory to the Project Company) and Clauses 25.5.1(a) through 25.5.1(g) (both inclusive) apply and the arbitral tribunal appointed under the other Project Agreements has the necessary expertise and is otherwise qualified to arbitrate the dispute arising out of or in connection with this Agreement.

25.5.2 Subject to Clause 25.5.1(g), each Party will appoint an arbitrator within thirty (30) days of the date of the request to initiate arbitration who will then jointly appoint a third arbitrator within thirty (30) days of the date of the appointment of the second arbitrator, which third arbitrator shall not be a citizen of:

- (a) Kenya;
- (b) the country where the controlling shareholder of the Project Company or the controlling shareholder of the Operator are located or operated; or
- (c) the country of the Operator,

and no arbitrator shall have any existing or prior relationship with either Party, to act as Chairman of the tribunal. Arbitrators not appointed within the time limits set forth in the preceding sentence shall be appointed by the ICC Court of Arbitration (as defined in the ICC Rules).

25.5.3 If there is a conflict between this Agreement and the said Rules, this Agreement shall prevail.

26 Miscellaneous

26.1 Notices

26.1.1 Except as otherwise expressly provided in this Agreement, all notices or other communications (together **Notices**) to be given or made hereunder shall be in writing, shall be addressed for the attention of the Person indicated below and shall either be delivered by hand (against receipt) or sent by mail or courier or by e-mail transmission. The addresses for service of Parties shall be:

(a) in the case of the Operator:

Address: [**]

Email.: [**] and [**]

Attention: [**]

(b) in the case of the Project Company:

Address: [**]

Email.: [**] and [**]

Attention: [**]

or such other addresses as either Party may previously have notified to the other Party in accordance with this Clause 26.1.

26.1.2 Notices shall be deemed to have been served and received:

(a) if delivered by hand, post or courier, upon receipt; or

(b) if sent by e-mail transmission, upon receipt by the sender of confirmation of correct transmission of the e-mail by way of a read-receipt from at least one of the two e-mail addresses specified above.

26.2 Severability of provisions

If at any time any provision of this Agreement is or becomes invalid, illegal or unenforceable in any respect under the law of any jurisdiction, that shall not affect or impair:

(a) the validity, legality or enforceability in that jurisdiction of any other provision of this Agreement; or

(b) the validity, legality or enforceability under the law of any other jurisdiction of that or any other provision of this Agreement.

26.3 Waiver

26.3.1 No waiver by either Party of any default by the other Party in the performance of any of the provisions of this Agreement:

- (a) shall operate or be construed as a waiver of any other or further default, whether of a like or a different character; or
- (b) shall be effective unless given as a declaration of waiver, duly executed by a duly authorised representative of such Party.

26.3.2 Neither the failure by either Party to insist on any occasion on the performance of the terms, conditions and provisions of this Agreement, nor time or other indulgence granted by one Party to the other shall act as a waiver of such breach or acceptance of any variation except where the same has been expressly waived in writing.

26.4 Amendment

This Agreement may only be amended or modified by a written instrument signed by both Parties.

26.5 Entire agreement

This Agreement including the Schedules sets out the entire agreement between the Parties, and supersedes any previous agreement between them in relation to the subject matter of this Agreement and the Schedules.

26.6 Further acts and assurances

Each of the Parties agrees to execute and deliver all such further instruments and to do and perform all such further acts and things as may be necessary or desirable to carry out the provisions of this Agreement.

26.7 Other contractual arrangements

Each Party shall be entitled to enter into contractual arrangements with other parties but only to the extent that such arrangements do not prevent it from fulfilling its obligations hereunder.

26.8 Binding nature

This Agreement shall be binding upon the Parties hereto and their respective successors and assigns.

26.9 Third party rights

The parties do not intend that any term of this Agreement shall be enforceable solely by virtue of the Contracts (Rights of Third Parties) Act 1999 by any person who is not a party to this Agreement. The Parties may rescind, vary, waive, release, assign, novate or otherwise dispose of all or any of their respective rights or obligations under this Agreement without the consent of any person who is not a party to this Agreement.

In witness whereof the Parties have executed this Agreement as of the date first above written.

SIGNED by: _____ (authorised signatory)

_____ (print name)

duly authorised for and on behalf of the **Project Company** in the presence of:

Witness:

_____ (signature)

_____ (print name)

_____ (print address)

SIGNED by: _____ (authorised signatory)

_____ (print name)

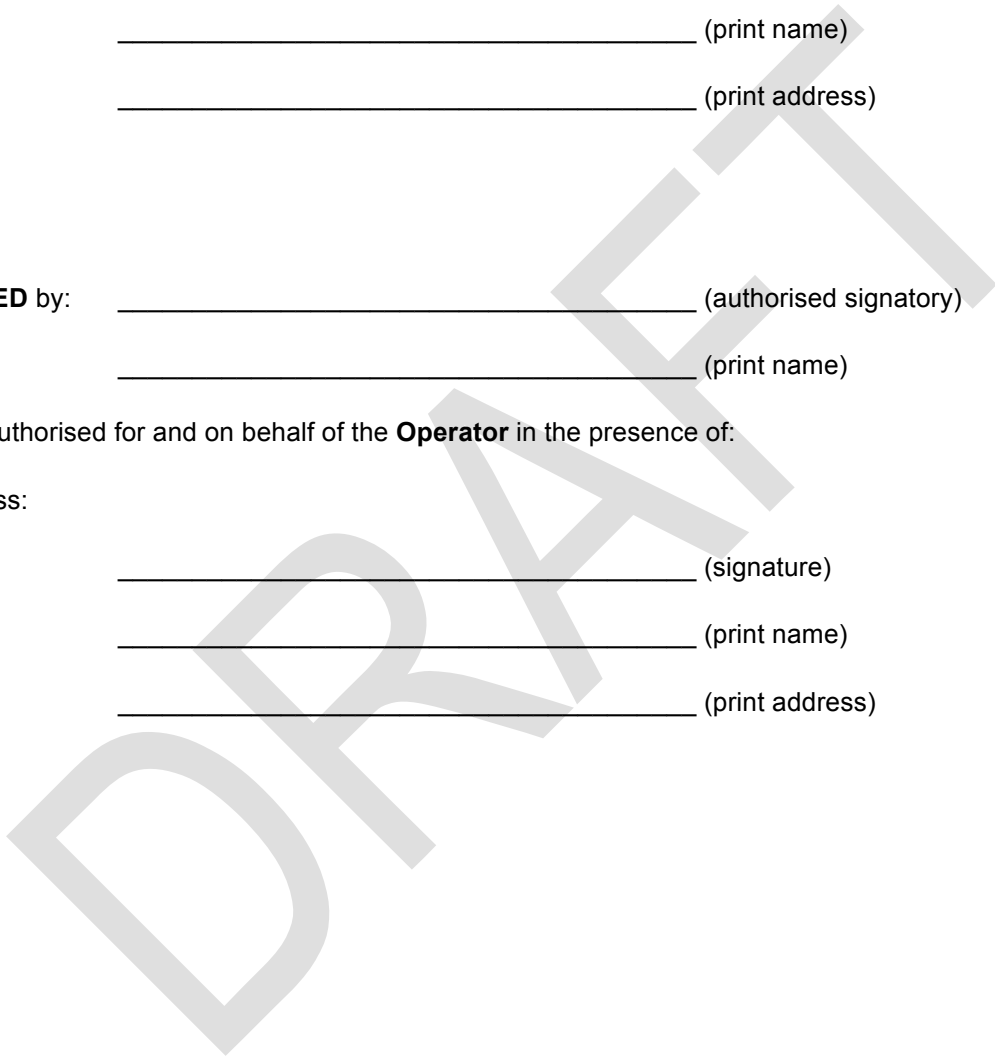
duly authorised for and on behalf of the **Operator** in the presence of:

Witness:

_____ (signature)

_____ (print name)

_____ (print address)



Schedule 1 – Project Company Requirements

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Schedule 2 – Services

Part 1 – Mobilisation Services⁵⁵

Mobilisation Services⁵⁶

During the Mobilisation Period, the Operator shall provide the following Mobilisation Services:

- (a) co-ordination of staffing requirements with the Project Company. In particular, the Operator shall employ and train sufficient qualified and skilled personnel to enable the Operator to perform the Services during the Operational Period;
- (b) development of the Annual Maintenance Plan setting out the programme of planned preventative maintenance for the twelve (12) month period following the Full Commercial Operation Date. [The Annual Maintenance Plan shall be consistent with the requirements of this Agreement. The Annual Maintenance Plan shall cover the regular inspection, testing, calibration and servicing of the equipment, instrumentation and components utilised in connection with the operation of the Facility. The Annual Maintenance Plan shall establish a reporting system which shall include: (i) the scheduling and tracking of preventive maintenance work, including the timely ordering of spare parts, to be performed in relation to the Facility; (ii) the documentation of any major maintenance problems encountered when undertaking such preventive maintenance work; and (iii) the documentation of the preventive maintenance work performed. The Operator shall provide the first Annual Maintenance Plan to the Project Company as soon as possible following the Mobilisation Date, but in no event later than the Full Commercial Operation Date;
- (c) development of operational and budgetary procedures for the Facility;
- (d) obtain the [Operator's Approvals] (if any);
- (e) liaise with the EPC Contractor and provide input, as applicable to the Services, on the relevant documents, manuals and drawings supplied by the EPC Contractor;
- (f) establish an operations office;
- (g) prepare a start-up plan for the Facility;
- (h) assist the Project Company in taking over the Facility at the Full Commercial Operation Date;
- (i) collect and assemble a library with all necessary technical documents, manuals and procedures from any manufacturers and the EPC Contractor in relation to the Facility; and
- (j) assist the Project Company with developing the list of Punch List Items for incomplete construction tasks under the EPC Contract.

The following are additional Mobilisation Services not in the Term Sheet for consideration:

- (k) *Required Goods and Services. The Operator shall review the list of all goods, tools and services which are to be procured by the Project Company pursuant to the EPC Contract to*

⁵⁵ Note: CHD has stated that this is to be further confirmed by the commercial and technical team of the Operator.

⁵⁶ Each of the Mobilisation Services to be developed in further detail.

ascertain that such goods, tools and services are sufficient for the Project Company to ensure the safe and reliable operation of the Facility during the term of this Agreement.

- (l) [Spare Parts Inventory control and tracking system].*
- (m) [Despatch procedures].*
- (n) [Monitor performance testing].*
- (o) [Annual Operating Plan].*
- (p) [Customs clearance].*
- (q) [Compliance with requirements].*
- (r) [Safety procedures].*

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Part 2 – Operational Services

Operational Services from the Full Commercial Operation Date⁵⁷

As from the Full Commercial Operation Date the Operator shall, amongst other things:

- (a) operate, maintain and repair the Facility on a seven (7) day per week, twenty-four (24) hour per day basis in a manner consistent with the PPA and this Agreement and in accordance with the Operator's Approvals and the Project Company's Approvals, and the Law and subject to the Despatch Instructions;
- (b) employ in and at the Facility, all safety devices and safety practices required by the PPA, the Law and all insurance policies;
- (c) operate, maintain and repair the Facility so as to prevent the release or leaching of any Hazardous Substances over, under, in or otherwise affecting the Project Company's land or the surrounding environs (including the soil, subsoil, surface water, groundwater or seawater);
- (d) ensure that an appropriate number of its employees who shall be responsible for operating the Facility after the Full Commercial Operation Date are on duty at the Facility on or before the commencement of the Mobilisation Period;
- (e) schedule, co-ordinate, and handle deliveries of Fuel and limestone, and manage the coal stockpile, limestone storage and fuel oil tanks;
- (f) prepare a long-term operating plan and annual budget and provide annual reports of actual costs incurred against budgeted costs;
- (g) assist the Project Company and EPC Contractor in obtaining and renewing any consents, permits or approvals in as far as they concern the Operational Services;
- (h) test the coal to determine if it meets the required coal specifications;
- (i) handle and store the ash produced by the Facility;
- (j) test the performance of the Facility in accordance with the PPA at the times required by the PPA; and
- (k) perform scheduled and unscheduled maintenance to the Facility when necessary.

[other Operation Services to be further developed]

⁵⁷ Note: CHD has stated that this is to be further confirmed by the commercial and technical team of the Operator.

Schedule 3 – Site

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**Schedule 4 – African Development Bank's standards for
Wages and Conditions of Labour**

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Schedule 5 – Fees

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Schedule 6 – Spare Parts and Special Tools

Part 1 – Initial Spare Parts

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Part 2 – Special Tools

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Schedule 7 – Reporting

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Schedule 8 – Annual Operating Plan

Part 1 – Annual Operating Plan

Contents and format

Budget report

The Annual Budget.

Capital improvements plan

This should be a month-by-month, project-by-project breakdown of costs with a complete description of the projects to be undertaken and the benefits to be had from each of them.

Major maintenance plan

Timing and resource requirements for scheduled maintenance.

Spare Parts Inventory plan

This Plan will describe the level and key items of spare parts and tools to be kept in and added to the inventory during the year.

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Part 2 – Pro forma Annual Budget for Annual Operating Plan

| | Jan | Feb | Mar | Apr etc |
|---|-----|-----|-----|---------|
| 1. Revenue – Total | | | | |
| Power Purchase Agreement Payments | | | | |
| Ancillary Services | | | | |
| Interest | | | | |
| Other | | | | |
| 2. Expenditure | | | | |
| 3. Estimated Incentive Fee | | | | |
| 4. Premiums under the Insurance Policies | | | | |
| 5. Debt Service | | | | |
| - Interest (Sr) | | | | |
| - Principal (Sr) | | | | |
| - Interest (Sub) | | | | |
| - Principal (Sub) | | | | |
| 6. Capital Expenditure (not included in the Operator's Budget) | | | | |
| 7. Net Revenue before Tax | | | | |
| 8. Tax | | | | |
| 9. Net Revenue | | | | |

Schedule 9 – Approvals

Part 1 – Operator Approvals

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Part 2 – Project Company Approvals

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Schedule 10 – Performance Requirements

Part 1 – Performance Levels⁵⁸

Performance Levels: In respect of the Facility during the Full Commercial Operation Period, the Operator shall achieve:

- a capacity (being the net generation per unit) no lower than the Contracted Capacity delivered by the EPC Contractor and verified at the Full Commercial Operation Date;
- [a degradation in the Specific Net Heat Rate for coal no less than levels provided in the PPA;]
- [Average Availability of no lower than 85% per annum of the Contracted Capacity at the signature of the PPA (981.5MW Net) specific provisions to provide back-to-back cover with the terms of the PPA will be incorporated in the O&M Contract];
- [Limestone and water consumption - to be discussed]
- The Minimum Performance Levels for the Facility are [to be discussed].
- Bonuses for additional Performance Levels are [to be discussed]

Part 2 – Performance Liquidated Damages [To discuss – Term Sheet 30]

[Without prejudice to the Project Company's rights to terminate this Agreement, the fee deductions agreed are the sole and exclusive liability for damages arising out of performance shortfall and are in lieu of actual damages.

The maximum annual deduction from the Service Fee will be capped at [●] in the same way as the Service Fee.

In the event that this cap is reached, the Project Company shall be entitled to terminate the O&M Contract.]

Part 3 – Incentive Payments [Term sheet 30]

[The calculation of the Incentive Payments (which may operate as an additional payment to the Operator or as liquidated damages) shall be agreed subsequently.]

Part 4 – Permitted outages

[Details of annual outage allowance to be passed down from the PPA].

⁵⁸ Note: CHD has stated that this is to be further confirmed by the commercial and technical team of the Operator.

Schedule 11 – Testing Requirements

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Schedule 12 – Key Personnel

Facility Manager

[other Key Personnel to be confirmed]

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Schedule 13 – Key Subcontractors

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Schedule 14 – Insurances

[To be developed – Term Sheet provisions are as follows:

[The Operator shall provide the following Operator insurances:

- the Operator's equipment on site and during transportation (if any);
- workers' compensation;
- automobile insurances for the Operator's vehicles;
- employer's liability;
- water-borne vessels (if applicable).

The Project Company shall provide the following Project Company insurances:

- all risks physical damages;
- all risks physical damages (following acts of political sabotage or terrorism);
- third party liability;
- marine cargo (covering war risk);
- automobile insurances for the Project Company's vehicles;
- machinery breakdown and consequential loss insurance.

This Agreement shall contain details associated with critical elements of these policies.

All policies shall provide for waivers of subrogation, to the extent that such waiver is available on commercially reasonable terms, in favour of each other insured and their respective officers and employees, as their interests may appear, and provide a severability of interests or cross-liability clause.]

Schedule 15 –Performance Bond

Performance Bond – Term Sheet requirements:

The Performance Bond shall be in an amount equal to [●] monthly payment instalments of the Service Fee applicable during the Full Commercial Operation Period.

[The Performance Bond shall be issued to the Project Company on or before receipt of the Initial Mobilisation Payment. The Performance Bond shall become effective on the date on which the Bond Provider receives notice from the Project Company confirming that payment of the Initial Mobilisation Payment has been made to the Operator]⁵⁹.

The Project Company will release the Performance Bond (to the extent not drawn upon) [immediately]⁶⁰ following the Termination Date, unless a claim has been made under the O&M Contract and remains outstanding.

The Performance Bond is to be issued by an international bank or financial institution acceptable to the Project Company and the Lenders rated "A" S&P (or equivalent).

The Performance Bond shall constitute a first demand, unconditional commitment to pay. It shall be issued for one year or longer as agreed and renewed annually. The circumstances in which the Project Company shall be entitled to call on the Performance Bond shall include:

- breach by the Operator of its obligations under the O&M Contract;
- if it is due to expire and the Operator fails to provide a satisfactory replacement at least thirty (30) days before the expiry date;
- if the issuing bank's credit rating falls below the rating requirements in this Section 31 [Performance Bond] and the performance bond is not replaced within [thirty (30)] days of the credit rating downgrade;
- insolvency of the Operator;
- any failure by the Operator to pay an amount which has fallen due under the O&M Contract, including Performance Liquidated Damages; and
- termination of the O&M Contract pursuant to Clause 19.3 for an Operator Event of Default.

⁵⁹ Note: To follow Clause 4.9

⁶⁰ Note: To be confirmed

Schedule 16 – Performance Bond

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Schedule 17– Form of Lender Direct Agreement

[Note - The direct agreement will, among other things:

- (a) contain an acknowledgment by the Operator of the security taken over the Agreement under the security documents;
- (b) require the Operator to give prior notice to the Lenders of its intention to terminate the Agreement;
- (c) permit the Lenders, or their nominee, to cure a default on the part of the Project Company; and
- (d) permit the Lenders, or their nominee, to take over the Agreement and be treated in all respect as the Project Company in the event of a default by the Project Company entitling the Operator to terminate the Agreement or in the event of a default by the Project Company under the Financing Agreements if such default is not remedied within the applicable cure period] [and subject always to an undertaking by the Lenders (or their agent or trustee) to pay all sums due and payable to the Operator and discharge all the obligations and liabilities of the Project Company under the Agreement]⁶¹.

⁶¹ Note: Form of Direct Agreement to be discussed.

Schedule 18 – Delivery Point

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