



REPUBLIC OF MALAWI

## MINISTRY OF NATURAL RESOURCES, ENERGY AND MINING



### INDEPENDENT POWER PRODUCER (IPP) FRAMEWORK FOR MALAWI



The IPP Framework was made possible through a grant given by the people of United States of America to Malawi through the Millennium Challenge Corporation under the terms of a compact signed between the two countries.

# **INDEPENDENT POWER PRODUCER (IPP) FRAMEWORK FOR MALAWI**

**MINISTRY OF NATURAL RESOURCES, ENERGY  
AND MINING**

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# Volume 1: Main Report

## Table of Contents

<b>Glossary .....</b>	<b>iii</b>
<b>Acronyms .....</b>	<b>x</b>
<b>Executive Summary .....</b>	<b>xii</b>
<b>1.0 Introduction .....</b>	<b>1</b>
1.1 Policy and Legislation .....	1
1.2 Key IPP Contacts and Resources .....	2
<b>2.0 The IPP Framework: Structure and Composition .....</b>	<b>5</b>
<b>3.0 Roles and Responsibilities .....</b>	<b>5</b>
3.1 IPP Solicitation Process, Evaluation and Financial Modelling and Negotiation .....	5
3.2 The IPP Framework Procurement Process .....	5
3.3 The IPP Framework Pro-Forma Project Agreements .....	5
3.4 Roles and Responsibilities .....	6
<b>4.0 Rules of Engagement .....</b>	<b>11</b>
<b>5.0 IPP Solicitation Processes .....</b>	<b>11</b>
5.1 IPP Procurement Processes .....	11
5.2 Solicited IPP Procurement Processes .....	18
5.3 Unsolicited IPP Assessment .....	19
5.4 Detailed IPP Processes and Documentation .....	20
<b>6.0 IPP Evaluation and Financial Modelling .....</b>	<b>22</b>
6.1 IPP Evaluation Approach .....	22
6.1.1 SIPP Procurement Evaluation Financial Modelling .....	23
6.1.2 UIPP Procurement Evaluation Financial Modelling .....	23
6.2 Tariff Structure .....	23
6.2.1 Dispatchable IPP Tariffs .....	23
6.2.2 Non-Dispatchable IPP tariffs .....	24
6.3 Tariff evaluation.....	24
6.3.1 Solicited IPP Tariff Evaluation .....	24
6.3.2 Unsolicited IPP Tariff Evaluation .....	24
<b>7.0 Tender Evaluation Process .....</b>	<b>24</b>
7.1 Overview of Process for Selecting Solution .....	25
7.2 Evaluation Process .....	25
7.3 Evaluation schedule .....	25
7.4 General Code of Conduct during Evaluation .....	25
<b>7.5 Technical evaluation .....</b>	<b>26</b>
7.6 Commercial Evaluation .....	26
7.7 Financial Evaluation .....	26

<b>Figure 1: Malawi's Power Restructuring .....</b>	<b>6</b>
<b>Figure 2: Roles and Responsibilities of Key Participants in IPP Framework .....</b>	<b>7</b>
<b>Figure 3: Summarised IPP Framework Solicitation .....</b>	<b>12</b>
<b>Figure 4: Solicited IPP Procurement Processes.....</b>	<b>18</b>
<b>Figure 5: Unsolicited IPP Initial Assessment .....</b>	<b>19</b>
<b>Figure 6: IPP Processes .....</b>	<b>21</b>
<b>Figure 7: Evaluation Approach .....</b>	<b>25</b>

### **Annexures to the IPP Framework for Malawi**

Annexure A	Expression of Interest (Pre-qualification): Information Requirements
Annexure B	Pro-forma Tender Document
Annexure C	IPP Framework Due Diligence and Risk Assessment
Annexure D	Non-dispatchable Renewable IPP Risk Allocation Matrix
Annexure E	Dispatchable Thermal IPP Risk Allocation Matrix
Annexure F	The Environmental Impact Assessment Process in Malawi
Annexure G	Transmission Application to Connect (Generation)
Annexure H	Pro-forma Transmission Connection Agreement (TCA)
Annexure I.	1-I.2 Pro-forma Power Purchase Agreement (PPA) for Hydros and Thermal
Annexure J	Pro-forma Implementation Agreement (IA)
Annexure K	Pro-forma Land Lease Agreement (LLA)
Annexure L	Generation Licence Application

## Glossary<sup>1</sup>

**Arbitration** - a dispute resolution mechanism where the matter in dispute is referred for determination by an arbitral panel in accordance with a pre-agreed set of rules.

**Assignment** - a legal term describing the act of transferring the rights, but not obligations, of a party under an agreement to another party. The right of a party to assign its rights under an agreement will be subjected to restrictions and limitations set out in the relevant agreement and may require the prior consent of other parties to the agreement.

**Back to Back** - mirrored contract provisions in different contracts to pass risk to another party. More precisely, in relation to an obligation, means the ability of the obligor to pass on the risk of such obligation to another party. This is normally achieved through third party contracts.

**Base load Power or Capacity** - generating capacity within a national or regional grid network that the off taker or grid operator tends to dispatch or utilise on a continuous basis.

**Capacity Payment** - a payment for capacity by the off taker which is based on the ability of the power plant to generate a certain amount. The payment is designed to allow the producer to recover their fixed costs (capital costs and fixed operating costs) and agreed-upon profit. These charges are paid so long as the power plant is made available or deemed available for dispatch, regardless of whether the power plant is actually dispatched.

**Carry Forward** - an amount of entitlement that is not immediately utilised by the party so entitled, which is added to the entitlement of the party in the next period of entitlement.

**Collateral** - property, contract rights, or other assets in which a borrower grants a security interest to a lender in order to secure the repayment of a loan.

**Commercial Operations Date or COD** - a key milestone date defined in the PPA when the power plant commences commercial operation.

**Concentrated Solar Power or CSP** - a form of solar power generation whereby a circular arrangement of solar panels is focused onto a water tower to create steam to enable generation of electricity through a steam turbine.

**Concession** - the right granted by the host government to build and operate the power plant and sell electricity in the host country for a number of years. A concession agreement is the agreement by which the concession is granted to the project company. An implementation agreement serves a similar purpose.

**Conditions Precedent** - a set of conditions that must be fulfilled before a contract or parts of it become effective.

**Consequential Loss** - please refer to the definition of Direct Loss.

**Contingent Liability** - a liability that has not yet materialised but which may materialise in the future.

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<sup>1</sup> Derived from Understanding Power Purchase Agreements – Version 1.3 Published Under the Creative Commons, Attribution-Non-commercial-Share Alike 4.0, International License (cc by no sa).

**Corporate Finance** - used to distinguish Project Finance (see below). Corporate finance implies that the lender has recourse to the shareholders of the relevant borrower and/or to assets over and above the asset being financed.

**Cure Period** - the time period during which a defaulting party has a chance to correct a breach which would otherwise lead to an event of default.

**Curtailement** - an instruction by the off taker or grid operator to the power producer of a non-dispatchable power plant to reduce generation. This may be motivated by end-user demand, the availability of alternative generation resources, transmission network capacity and/or grid stability.

**Debt Service Reserve Account or DSRA** - in the context of the loan agreement, a special debt reserve account denominated in the currency of the loan, which the project borrower funds with available project cash flow, up to an amount that is sufficient to cover the scheduled debt service obligations of the project borrower over an agreed period of time.

**Decommissioning** - the obligation of the project company to dismantle and clean up the project site upon the expiry of the term of the concession.

**Deemed Capacity** - the capacity that a power plant would have been able to make available, but for the occurrence of an event or circumstance for which the off taker bears the risk.

**Deemed Completion** - the date on which a power plant would, but for the occurrence of an event for which the off taker bears the risk, have achieved the COD.

**Deemed energy** will be the energy that would have been available if not for the breach caused by the buyer.

**Deemed Generation**- the electricity that a power plant would have been able to generate, but for the occurrence of an event or circumstance for which the off taker bears the risk.

**Delivery Point** - the point to which a producer is responsible for delivering electricity generated by on the high voltage side of the step-up transformers. The electricity that is generated by a power plant is measured at the delivery point.

**Developer** - see **Sponsor**.

**Development Finance Institutions** - financial institutions with a mandate to finance projects that achieve development outcomes. Examples include the World Bank, AfDB, OPIC, FMO, DEG, CDC, DBSA and Proparco.

**Direct Agreements** -contracts or agreements between lenders and counterparties of the project company (including the off taker and, where relevant, the host government), under which the relevant project counterparty acknowledge the security interests granted by the project company to the lenders, and allows lenders the opportunity to step in to remedy breaches by the project company. Direct Agreements may also be used to clarify/amend the underlying project contract.

**Direct Loss** - a loss arising directly as a result of a defaulting party's failure to perform its obligations under the agreement.

**Dispatch** - an instruction by the off taker or grid operator to the power plant to produce electricity.

**Dispatchable Plant** - a power plant that is capable of responding to the instructions of the transmission company on demand to vary its output on short notice. Plants that fall within this category include coal-fired plants, gas-fired plants, and renewable plants with a relatively constant or storable source of energy such as a hydro plant with reservoir and/or a biomass plant.

**Draw down** - in the context of a loan, means the advance of funds from the lender to the borrower.

**Effective Date** - the date on which the PPA comes into effect. The conditions to the effective date will vary from project to project, but will often include financial close.

**Energy Payment** - a payment for electricity by the off taker which is based on the actual amount of power generated and dispatched. The payment is designed to allow the producer to recover fuel costs and variable operating costs.

**Engineering, Procurement and Construction Contract or EPC Contract** - one or more contracts to be entered into between the EPC contractor and the project company for the purpose of setting out terms and conditions for the design, engineering, procurement of materials and equipment, the construction and commissioning of the power plant.

**Equator Principles** - risk management framework adopted by financial institutions for determining, assessing and managing environmental and social risk in projects, primarily intended to provide a minimum standard for due diligence to support responsible risk decision making.

**Equity** - money invested by the sponsors in the project that is not borrowed by the project company. The term “Equity” may sometimes be used to include shareholder subordinated debt (which is finance made available to the project company by the sponsors or shareholders of the project company, which is subordinated to debt made available by the lenders).

**Equity Contribution Agreement** - obliges the owners of the power plant to make equity or subordinated of the power plant not being financed by third party lenders.

**Event of Default** - a default that the parties to a contract agree is a material default. The occurrence of an Event of Default usually grants the non-defaulting party the right to terminate the contract if such default is not cured within any applicable cure period.

**Feasibility Study** – a technical and financial study of the viability of the proposed power project.

**Financial Closing** - either (i) the execution of the Financing Documents, or (ii) the execution of the Financing Documents and the satisfaction of all of the conditions for disbursement of the project loans.

**Financing Documents** - the set of contracts and agreements the project documents (including the Loan Agreements Direct Agreements and Security Agreements), that define the rights and obligations of the lenders and the project company in relation to the financing of the power plant.

**Force Majeure Event** - an event beyond the control of the affected party that prevents it from performing one or more of its obligations under relevant contract. Events constituting force majeure are generally further classified into Political Force Majeure Events and Non-Political Force Majeure Events, with different financial and



contractual consequences to the contracting parties. Natural Force Majeure falls within the latter category.

**Fuel Supplier** - a supplier of fuel used to generate electricity.

**Fuel Supply Agreement** - the agreement between the project company and the fuel supplier (in the case of a conventional PPA), or between the off taker and the fuel supplier (in the case of a tolling agreement or energy conversion agreement), under which the fuel supplier supplies fuel to the project company.

**Fuel Transportation Agreement** - an agreement providing for the transportation of fuel from the fuel supplier to the project company. **Generator** - see **Seller**.

**Grid** - a system of high tension cables by which electrical power is distributed throughout a region.

**Grid Code** – asystematic, consistent and regulated formulation of the standards, rules and requirements applicable to all participants in the electricity industry. The Grid Code will be promulgated by the regulator, and given the force of government regulation though gazetting. Grid Code compliance will be a condition of any relevant licence and parties cannot contract out of its requirements (but may mutually agree to impose additional or stricter requirements).

**Heat Rate** - a measurement of the efficiency of a power plant in converting a unit of fuel into a unit of energy. Heat rates are typically described in terms of MMBtu (LHV) per kWh or GJ (LHV)/kWh.

**Host Government** - the government of the country in which the power plant is located.

**IFC Performance Standards** - a set of standards developed by the IFC that are designed to help identify, avoid, mitigate, and manage any adverse social or environmental impacts that may be created by a power project.

**Implementation Agreement**- Provides for direct contractual obligations and undertakings between the Government and the supplier or project company.

**Independent Power Producer** - a privately-owned producer of electric power.

**Insolvency** - the inability of an entity to pay its debts when or as they become due.

**Interconnection** - the point at which the transmission system and the power plant interconnect.

**Interconnection Agreement** - an agreement between the project company and the transmission system operator providing for the connecting of the power plant to the transmission system.

**Internal Rate of Return** or **IRR** – the annualised effective compounded rate of return earned on an investment over a period of time.

**Investor** - see **Sponsor**.

**Kilowatt Hour** - a measurement of energy which is equal to 1,000 watts of electricity being generated or consumed continuously for a period of one hour.

**Lenders** - the providers of loan financing to the project company.

**Liquidated Damages** - a contractually agreed, fixed amount of damages to compensate one party to a contract for a breach by the other party.

**Liquidity** - the availability of cash and cash equivalents to cover a party's short-term financial obligations.

**Loan Agreement** - creates the commitment of the lender to make a loan to the producer to finance the power project, and the obligations of the producer/borrower to repay the loan with interest and to comply with various covenants set forth in the loan agreement.

**Long-Stop Date** - the final dead line for the achievement of a significant mile stone in a contract, such as the fulfilment of the conditions precedent to the parties' obligations under the agreement, the achievement of financial closing, or the achievement of the commercial operations date.

**Long Term Service Agreement or LTSA** – an agreement under which the equipment supplier will provide certain maintenance services on a power plant at regular intervals during the term of a PPA and/or will provide certain spare parts that are necessary in order to operate and maintain the power plant.

**Make-whole** - the act of putting a party in the same position as if the event that caused a loss or reduction of benefit has not occurred.

**Material Breach** - a serious breach by a party of its obligations under an agreement.

**Megawatt** - a measurement of power meaning 1,000,000 watts.

**Merchant Power Plant** - a power plant that sells electricity to a competitive wholesale market instead of under a PPA. The off taker of electricity from a merchant power plant is governed by market forces, thereby exposing the project company to market risk.

**Misrepresentation** - a statement or representation made by one party to another which is proved to be untrue.

**Net Electrical Output** - the net electrical energy, typically expressed in MWh, which is generated by a power plant and delivered to the delivery point, as measured by the metering system located at the delivery point.

**Non-dispatchable Plant** - a power plant that is not capable of responding to instructions from a transmission system operator to vary its output.

**Non-Political Force Majeure Events** - a force majeure event that is not a Political Force Majeure Event.

**Non-Recourse Financing** - financing that will be repaid solely from an identified source of revenues. Non-recourse financing is usually provided to a special-purpose vehicle. The obligations of the shareholders in the special-purpose vehicle are usually limited to their obligation to contribute capital and, in some cases, to provide other limited and well-defined support to the special-purpose vehicle.

**Novation** - a legal mechanism by which the rights and obligations of a party under a contract are transferred to third party.

**Offtaker**- the party to a PPA whose obligation is to purchase the capacity made available and the electricity generated by the power plant, subject to the terms and conditions of the PPA. Also referred to as the Buyer.

**Operating and Maintenance Agreement or O&M Agreement** – the agreement between the project company and the operator under which the operator operates and maintains the power plant.

**Pass Through** - in relation to a cost, a mechanism under which the producer passes such cost on to the off taker by operation of the tariff.

**Political Force Majeure Event** - a force majeure event that is political in nature. Typically these would include any act of war, conflict, act of foreign enemy, blockade, embargo, or revolution, strikes of a nationwide or politically motivated character, changes in law, and the revocation or non-issuance of concessions or other authorizations.

**Power Purchase Agreement or PPA** - a contract between two parties, one of which produces or generates power for sale (the seller/producer) and one of which purchases power (the buyer/off taker). This contract is sometimes referred to as an "off taker" agreement.

**Producer** - see **Seller**.

**Project Company** - See **Seller**.

**Project Documents** - the contracts or agreements required for the construction, operation and maintenance of the power plant. Typically this will include the Power Purchase Agreement, EPC Contract, Fuel Supply Agreement, Operations and Maintenance Agreement, and the Interconnection Agreement.

**Project Finance** - see Non-Recourse Financing.

**Project Loan** - a loan from one or more lenders to the project company, made for the purpose of financing a power project.

**Project Works** - the civil works and electro-mechanical equipment that will, once completed, constitute a power plant.

**Public Private Partnerships** - arrangements between the public and private sectors whereby a service or piece of infrastructure that is ordinarily provided by the public sector is provided by the private sector, with clear agreement on the allocation of associated risks and responsibilities.

**Regulator** - competent authority of the host government having the statutory right to regulate the Project and the project company.

**Request For Proposal** - an invitation from the host government, the off taker, or in some markets, the Regulator, to potential investors to submit a proposal to develop a power project.

**Run of the River** - in the context of a hydro-electric plant, a hydro-electric plant without a reservoir of any significant size.

**Security Documents** - the documents that grant the security interests, mortgages, pledges and other security rights that secure the repayment of the project loans in favour of the lenders.

**Seller** - The entity which is selling power under the PPA. Also referred to as the **Project Company**, **Power Producer** or **Generator**.

**Several Liability** - means that each party is separately responsible for its own performance and the consequences of its failure to perform.

**Site** - the land upon which the power plant is located.

**Sovereign Support Agreements** - can include sovereign guarantees, comfort letters, put and call option agreements and other forms of sovereign support that enhance the credit worthiness of the off taker and other government entities involved in the project.

**Special-Purpose Vehicle** - a corporate entity established specifically for the purpose of pursuing a specific project which is prohibited from undertaking any activity beyond the project in question. Often called the project company for the **Sponsor** - a shareholder or other parties affiliated with the shareholders of the project company, also known as the **Investor** or **Developer**.

**Spot Market** - in the context of the supply of electricity, the wholesale electricity market into which the project company can sell electricity other than under a long-term PPA. In the context the market from which the project company can acquire fuel without entering into long-term fuel purchase obligations.

**Step-in Rights** - the rights granted to the lenders under a Direct Agreement to step-in and cure a default by the project company, under a project agreement, before the counterparty to the project company may take any action to contract.

**Take and Pay** - in the context of a PPA, the obligation of the off taker to accept delivery of and pay for electricity actually generated by the power plant.

**Take or Pay** - in the context of a PPA, the obligation of the off taker to pay for electricity made available by the power plant regardless of whether electricity is actually generated, but excluding electricity that is dispatched by the transmission system operator but not delivered by the producer.

**Term** - the period of time during which a contract will remain in force, unless terminated earlier by either party in accordance with the terms and conditions of the contract. The term of a PPA is usually expressed to run until a date falling a fixed number of years after COD.

**Tolling Agreement** - in the context of power projects, an agreement under which a party, usually the off taker, agrees to provide fuel to the power producer that will be converted into electricity for the benefit of the off taker.

**Volts** - a derived unit for electrical potential.

## Acronyms<sup>2</sup>

<b>AfDB</b>	African Development Bank
<b>CE mark</b>	Conformité Européenne conformity marking
<b>COD</b>	Commercial Operations Date
<b>CSP</b>	Concentrated Solar Power
<b>DEA</b>	Director of Environmental Affairs
<b>DSRA</b>	Debt Service Reserve Account
<b>ECA</b>	Export Credit Agency
<b>ESIA</b>	Environmental and Social Impact Assessment
<b>EOI</b>	Expression of Interest
<b>EPC</b>	Engineering, Procurement and Construction (contract)
<b>FM</b>	Force Majeure
<b>FSA</b>	Fuel Supply Agreement
<b>GoM</b>	The Government of the Republic of Malawi
<b>GJ</b>	Giga joule
<b>ICA</b>	Infrastructure Consortium for Africa
<b>IE</b>	Independent Engineer
<b>IFC</b>	International Finance Corporation
<b>IPP</b>	Independent Power Producer/Project
<b>kW</b>	Kilowatt
<b>kWh</b>	kilowatt hour
<b>LCOE</b>	Levelised cost of energy
<b>LD</b>	Liquidated Damages
<b>LHV</b>	lower heating value
<b>LC</b>	Letter of Credit
<b>LLA</b>	Land Lease Agreement
<b>LTSA</b>	Long Term Service Agreement
<b>MERA</b>	Malawi Energy Regulatory Authority
<b>MITC</b>	Malawi Investment and Trade Centre
<b>MLHUD</b>	Ministry of Lands, Housing and Urban Development
<b>MMBtu</b>	Million British Thermal Units
<b>MNREM</b>	Ministry of Natural Resources Energy and Mining

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<sup>2</sup> Based on list in Understanding Power Purchase Agreements – Version 1.3 Published Under the Creative Commons, Attribution-Non-commercial-Share Alike 4.0, International License (cc by no sa)

<b>MoF</b>	Ministry of Finance
<b>MW</b>	Megawatt
<b>MWh</b>	Megawatt hour
<b>O&amp;M</b>	Operations and Maintenance
<b>OPIC</b>	Overseas Private Investment Corporation
<b>PPA</b>	Power Purchase Agreement
<b>PRI</b>	Political Risk Insurance
<b>RFT</b>	Request for Tender
<b>SB</b>	Single Buyer
<b>SMO</b>	System and Market Operator
<b>SCADA</b>	Supervisory Control and Data Acquisition system operated by ESCOM
<b>SIPP</b>	Solicited IPP
<b>Tx</b>	Transmission
<b>UIPP</b>	Unsolicited IPP
<b>USD</b>	United States dollar
<b>VAT</b>	Value Added Tax

## **Executive Summary**

The Government of Malawi has introduced a set of reforms to the Malawian power sector with the goal of increasing the availability of reliable electricity supply in the country. Current low electricity access rates and supply deficits mean that there is significant room for growth, and the Government views private investment as critical to achieving its goals for the power sector. With this in mind, the Government and other stakeholders developed an Independent Power Producer (IPP) Framework to provide interested parties with a clear understanding of how to invest in Malawi's power sector. The IPP Framework is a commitment of the Government and other stakeholders to establish a clear, robust process for securing investment in the power sector that balances the interests of consumers for cost-effective, reliable power supply with the commercial interests of private investors.

The IPP Framework forms part of a larger reform agenda launched by the Government which has restructured the power market in Malawi to level the playing field for IPPs by unbundling the generation business from the national utility, ESCOM, and establishing a new business unit – the Single Buyer – with responsibility for leading the planning and execution of generation supply procurement. This reform is underpinned by changes to the policy, legislation and regulations which provide the IPP policy and legislative context for the IPP Framework.

An updated tariff regime that reflects the new market structure, and commits Malawi to cost reflective pricing, has also been introduced to strengthen the commercial viability of power sector participants, including prospective IPPs. An Integrated Resource Plan (IRP) converted into a technically- and commercially-sound annual generation procurement plan developed by the Single Buyer will provide the guidance for sector growth.

The IPP Framework presented herein provides information on the roles and responsibilities, structures, and processes that are relevant to developers considering investments in Malawi. This includes an IPP Framework summary and Structures and Processes covering IPP Roles, Responsibilities and Rules of Engagement. It also covers step-by-step IPP Framework Solicitation Processes including for Solicited IPP (SIPP) procurement and Unsolicited IPP procurement (UIPP). In addition, it provides information on the process for project evaluation, including steps such as risk assessment and due diligence, technical evaluations, tariff structures and analysis, and financial evaluation. Lastly, the Framework includes various project template documents including the IPP Framework Template Procurement Documents and the IPP Framework Pro-Forma Project Agreements.

## 1.0 Introduction

Malawi has one of the lowest electrification rates in Sub-Saharan Africa; its 365 MW installed capacity, mostly from hydroelectric power plants on the Shire River, provides electricity to less than 10% of Malawi's population. The Government of Malawi (GoM) intends to increase installed electricity capacity to around 719 MW by 2020 and increase access to electricity to around 30% of the population by 2030. Malawi government believes that with private sector participation in the power sector, the set targets in installed capacity and access to electricity is achievable.

To further these objectives the GOM has introduced a set of reforms to the Malawian power sector with the overall goal of increasing the availability of reliable electricity supply in the country. Current low electricity access rates and supply deficits mean that there is significant room for growth, and the Government views private investment as critical to achieving its goals for the power sector. With this in mind, the Government and other stakeholders developed an Independent Power Producer (IPP) Framework to provide interested parties with a clear understanding of how to invest in Malawi's power sector.

The overall IPP environment can be viewed as the policy, legislation, procedures and processes which taken together provide the environment in which IPPs can be incorporated into a Malawi's power system. The IPP Framework in this document describes the procedures and processes which taken together with the relevant policy and legislation provide the environment in which IPPs can be incorporated into a Malawi's power system. The IPP Framework is intended to guide prospective IPPs on the Malawian environment for private power development.

### 1.1 Policy and Legislation

The IPP framework needs to be understood in the context of the relevant policy and legislation. The key elements of the policy and legislative environment supporting the IPP Framework are outlined in the table below.

Legislation	Regulatory	Policy & Operational Instruments
Malawian Electricity Act (Electricity Act No. 22 of 2004)	Grid Code	Malawian Energy Policy
Electricity (Amendment) Act 2016	Market Rules	Integrated Resource Plan (IRP) <sup>1</sup> and Annual Generation Procurement Plan
Energy Regulation Act 2004	Generation Licence	Cost Reflective Pricing
Public Procurement Act No. 8 of 2003	Public Procurement Regulations (2004)	Credit Enhancement and Forex Support

The IPP framework depends on the amendments to the Electricity Act 2004 in the Electricity (Amendment) Act 2016 (the Act) which were specifically promulgated to:

- Allow private sector participation in the electricity sector; and

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<sup>1</sup> The first IRP is being developed by the Malawian Government as the Single Buyer (SB) has not yet been established. The responsibility for the IRP and its updates will revert to the SB on its establishment.



- Enable the restructuring of the Electricity Supply Corporation of Malawi (ESCOM) by making state power generation the responsibility of an independent company (EGENCO) and establishing two new functions, the System and Market Operator (SMO) and the Single Buyer (SB) within ESCOM.

These amendments also provide the following components specifically relevant to IPP procurement:

- Defining the Grid Code and IPPs;
- Clarifying some important licensing issues;
- Requiring ESCOM to perform transmission planning in consultation with IPPs;
- Providing for the SB to undertake:
  - demand forecasting;
  - least cost long term generation and transmission expansion planning (Essentially undertaking future IRPs and generation procurement planning); and
  - IPP procurement (both solicited and unsolicited)
- Providing for the SMO to guarantee to all generation fair and non-discriminatory access to the transmission system and undertake:
  - Short term planning;
  - Generation dispatch; and
  - Ensuring open access to all participants.

The Energy Regulation Act 2004 provides the legislative framework promulgating the role and functions of the Malawi Energy Regulatory Authority (MERA). Of particular significance is MERA's role issuing generation licences to IPPs and to set and adjust electricity tariffs.

The Public Procurement Act 2003 and Public Procurement Regulations (2004) specifies in detail how publicly owned entities such as ESCOM and by extension the SB should procure electricity.

The Grid Code is currently in draft form and, when adopted (and revised to include specific renewable generation components), it will govern the behaviour of all industry participants utilising the transmission grid. Similarly, when adopted, the Market Rules will govern the commercial interactions between industry participants and the SB.

The GoM decided that the first stage of the power sector restructuring would be limited to a separation of ESCOM generation and the creation of a SB and SMO within ESCOM. The GoM has also committed to a policy of cost reflective electricity tariffs which is a significant policy facilitating IPP confidence in contracting within Malawi's electricity market. To create an IPP enabling environment credit enhancement of ESCOM's value chain will be provided and together with appropriate foreign exchange protection will be part of Implementation Agreement (IA) undertakings.

## **1.2 Key IPP Contacts and Resources**

The following table outlines the contacts and resources to assist potential IPP developers.

Area	Responsible Entity		Function	Resources	Contacts
Foreign investment information, Site requirements	GOM	MITC	One Stop Investment centre	Investors guide Investment Certificate Application	The Chief Executive Officer Malawi Investment and Trade Centre (MITC) Aquarius House – First floor Private Bag 302, Capital City, Lilongwe 3 MALAWI Tel : (265) 1 770 800 / 771 315 E-mail : <a href="mailto:ceo@mitc.mw">ceo@mitc.mw</a> / <a href="mailto:enquiries@mitc.mw">enquiries@mitc.mw</a> Website: <a href="http://www.mitc.mw">www.mitc.mw</a>
IPP framework, Government Energy Policy		MNREM – Dept. of Energy Affairs	Policy	Policy documentation	Ministry of Natural Resources, Energy and Mining Energy Affairs. Private Bag 309 Lilongwe
Environmental approvals		MNREM - Environment		ESIA Information	Ministry of Natural Resources, Energy and Mining Environment and Climate Change Private Bag 304 Lilongwe
Government support, IA		MOF	Credit & Risk support	IA Information	Ministry of Finance, Economic Planning & Development Finance Building, Capital Hill, P O Box 30049, Lilongwe 3 MALAWI E-mail: <a href="mailto:msowoyan@finance.gov.mw">msowoyan@finance.gov.mw</a> Telephone: +265 1 789 355 <a href="http://www.finance.gov.mw">http://www.finance.gov.mw</a>
Generation plans IPP	ESCOM	SB	Power buyer	IRP, Generation procurement plan PPA	Electricity Supply Corporation of Malawi Ltd 9 Haile Selassie Road P. O. Box 2047, BLANTYRE

Area	Responsible Entity	Function	Resources	Contacts
procurement processes Current tenders			Current procurement information	Phone: (+265) 1 822 000, Fax: (+265) 1 822 008 Email: info@escom.mw Web: www.escom.mw
Transmission connection Construction supply		Transmission Tx connection	Transmission connection procedures, TCA (TBC), Supply agreements	
Scheduling and Dispatch		SMO	Market & System Operation Market rules (TBC)	
Legislation, Licensing & Regulation	MERA	Regulation	Generation licence application, Grid Code (TBC)	Malawi Energy Regulatory Authority (MERA) Private Bag B496, Capital City, Lilongwe 3, Malawi Tel: +265 (0) 1 775 810, Fax: +265 (0) 1 772 666 Email: mera@meramalawi.mw, Website: www.meramalawi.mw

## **2.0 The IPP Framework: Structure and Composition**

GoM through the MNREM is therefore encouraging the participation of the private investors in power sector investment to complement the Government efforts in a form of independent power producers (IPPs). GoM is committed to providing an environment necessary that promotes IPPs through this IPP framework which outlines the rules of engagement for all participants in the power sector.

The IPP Framework (the framework) is made up of the following documents:

- The IPP Framework Structures and Processes covering, the IPP Roles, Responsibilities and Rules of Engagement
- The IPP Framework Template Procurement Documents
- The IPP Framework Pro-Forma Project Agreements
- IPP Framework Solicitation Processes covering, General IPP procurement processes; Solicited IPP (SIPP) procurement; and Unsolicited IPP procurement (UIPP)
- Project evaluation covering: Risk assessment and due diligence, Comprehensive evaluation approach and procedures, Tariff structures and analysis, Financial evaluation,
- Project template documents including: The IPP Framework Template Procurement Documents and The IPP Framework Pro-Forma Project Agreements, IPP Framework Due Diligence and Risk Assessment Detail

## **3.0 Roles and Responsibilities**

This section contains detailed diagrams and tables illustrating the IPP framework roles and responsibilities for the parties.

### **3.1 IPP Solicitation Process, Evaluation and Financial Modelling and Negotiation**

The Framework Structures and Process includes a description of the IPP procurement structures and processes and the roles of the various industry participants as well as evaluation processes.

### **3.2 The IPP Framework Procurement Process**

The IPP procurement process is described in detail below. Basic principles that are reflected in this IPP Framework include:

- Preference for Solicited IPP Procurements to provide for competition to achieve the best outcomes for the Malawian public;
- Where applicable, the unsolicited IPP procurement process shall be pursued in the public interest; and
- All IPP procurements shall be done according to the Public Procurement Act 2003 and other relevant legislations, including the Electricity Act, as amended in 2016, which provides for the ESCOM Single Buyer to take the leading role in procuring new power generation.

### **3.3 The IPP Framework Pro-Forma Project Agreements**

The pro-forma documents provided are:

- A pro-forma transmission connection agreement (TCA)

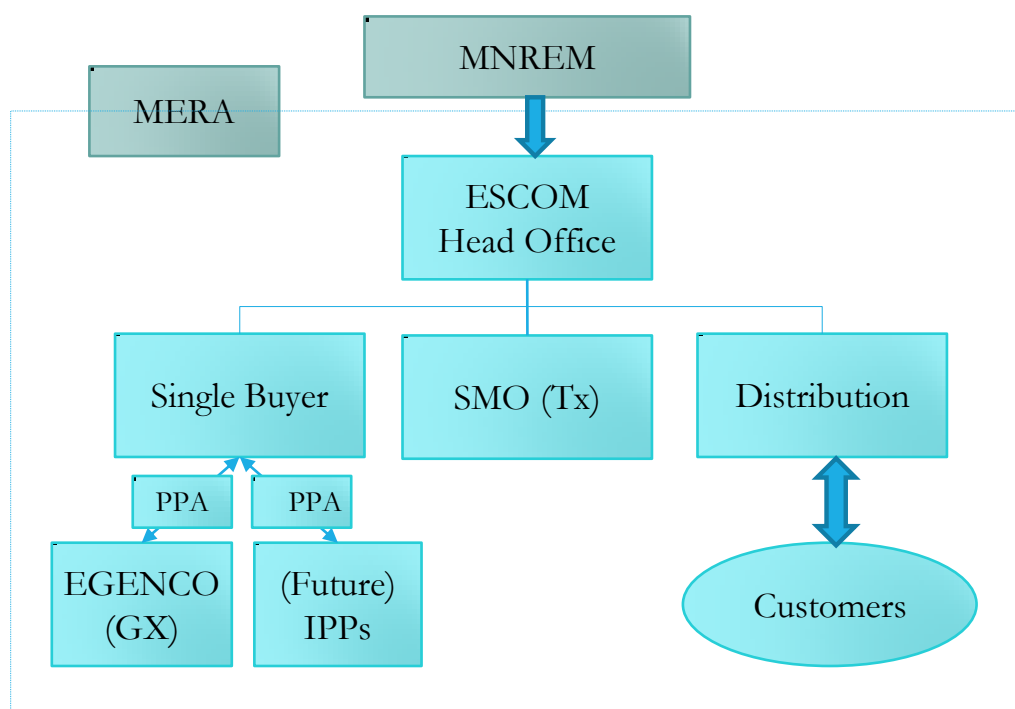
- A pro-forma power purchase agreement (PPA)
- A pro-forma implementation agreement (IA)
- A pro-forma land lease agreement (LLA)

### 3.4 Roles and Responsibilities

Following the amendment of the Electricity Act in 2016, the power market in Malawi was restructured as described in Figure 1 below.

The primary stakeholders are:

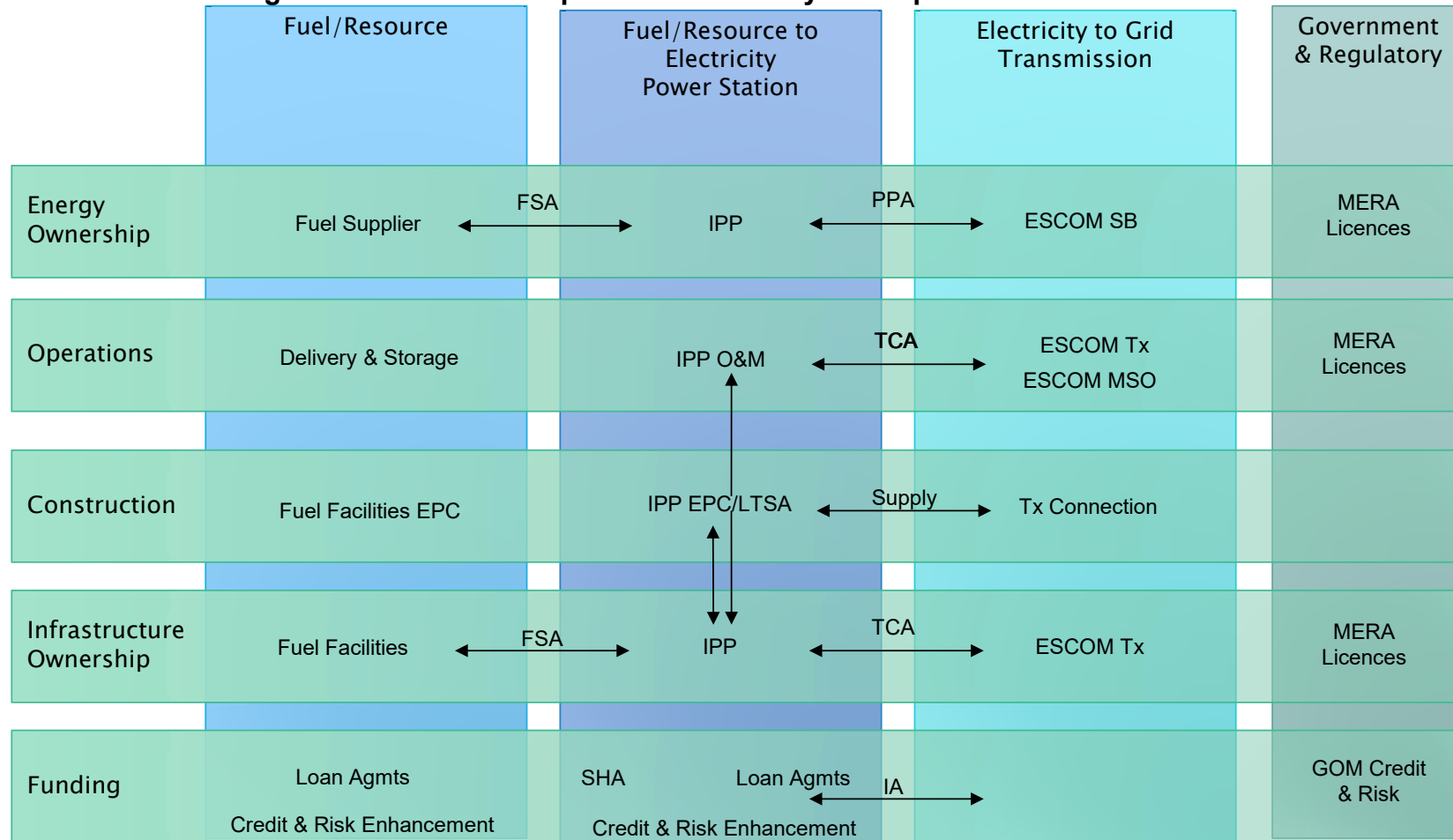
**Figure 1: Malawi's Power Restructuring**



1. The GoM represented by the MNREM;
2. MERA – the energy sector regulator;
3. ESCOM – national electricity utility with business units including Single Buyer, System/Market Operator (SMO) and Distribution; and
4. EGenco – national electricity utility with generation units unbundled from ESCOM in 2017.

The roles and specific responsibilities for the Framework parties, namely: Government and Regulators, Funders, Infrastructure Owners, Constructors, Operators and Energy Owners are depicted in Figure 2 below and described in Table 1 below. These are ultimately governed by legislation as well as regulations and contractual agreements. Some specific rules of engagement are included in Section 4.0.

**Figure 2: Roles and Responsibilities of Key Participants in IPP Framework**



**Table 1: Roles and Responsibilities of Key Participants in IPP Framework**

Entity type	Entity	Roles	Responsibility
Project Development Sponsors	Fuel Supply	Develop fuel supply	Secure all requirements to make fuel supply feasible and bankable
	IPP	Develop power project	Secure all requirements to make project feasible and bankable
	Transmission	Develop transmission connection	Administer connection application
Government	Government of Malawi (GoM) including MOF and MITC	Electricity Policy Support for Investment Guidance to prospective IPP developers/investors	Structural Reform Support for Cost Reflective Pricing Legislative Reform Support for ESCOM SB Counterparty for Implementation Agreement (IA) Counterparty for any Land Lease
Fuel Supplier	Fuel supplier or IPP	Ensure fuel supply availability Counter party for fuel supply contract (FSA)	Provide and deliver fuel Counter party for fuel supply contract
Power Station	IPP	Energy: Contract for fuel purchase and electricity sales Infrastructure: Connection to fuel supply and transmission Secure finance, government support and ownership agreements Contract with GoM for Implementation and land rights/lease	Counterparty for EPC contract Counterparty for O&M contract Counterparty for any LTSA contract
Power Buyer	ESCOM SB	Contract for power purchase (PPA)	Ensure payment responsibilities met

Entity type	Entity	Roles	Responsibility
Power Station Operations and Maintenance	IPP Operator	Ensure plant is maintained and operated as contractually agreed	Operate to contractual standards in O&M contract.
Transmission	ESCOM Transmission/Distribution	Transmission Connection for Offtake Construction supply for IPP	Build or contract for Connection development Agree transmission connection agreement (TCA) Administer connection agreement Grid Operations and Maintenance
Construction	Power station builder (EPC)	Build power station	Build without defect on time. Contract for EPC and any LTSA.
	Original Equipment Manufacturer (OEM)	Provide power station equipment	Provide equipment without defect on time (stands behind LTSA)



	Fuel supply builder (EPC)	Build fuel supply	Build without defect on time
	Transmission builder (EPC)	Build transmission developments required	Build without defect on time
Regulation	MERA	Economic and technical regulation of the electricity sector	Economic regulation Technical regulation Approval of PPAs, award generation licence. Industry behaviour & rules governance Supporting Cost Reflective Pricing policies Grid code development
Owners	IPP Owners	Ownership	Equity investment (contingent equity for completion)
	Fuel Supply Owners	Ownership	Equity investment (contingent equity for completion)
Lenders	Power Station lenders	Financiers	Provide finance for power station Counterparty for loan agreements
	Fuel Supply lenders	Financiers	Provide finance for fuel supply Counterparty for loan agreements
Market and System operator	ESCOM MSO	Power station scheduling and dispatch	Responsible for scheduling all power generation and responsible for dispatching generation whilst protecting the integrity of the transmission system

The GoM offers its support for certain arrangements aimed at providing comfort to IPPs regarding government support for their business activities; non-discriminatory pledges that international investors require from emerging country governments; and a commitment to an enabling framework which includes cost-reflective tariffs and ability to repatriate foreign exchange.

In addition, investors may seek GoM support on commercial (PPAs) guarantees for ESCOM/SB's obligations including in particular; liquidity and termination payments. GoM support for each IPP project will be assessed on individual merits and may require credit and risk support from other stakeholders.

## **4.0 Rules of Engagement**

In order to facilitate private power involvement in the Malawian electricity sector the following rules of engagement shall apply:

- 4.1 MNREM shall review the IRP every 5 years. The Single Buyer (SB) agrees to develop an annual generation procurement plan outlining the specific approach to be taken to power generation in the next twelve (12) months and updating as appropriate the material in the IRP. The IRP and annual generation procurement plan can be obtained directly from the ESCOM SB.
- 4.2 All parties in the Malawi power sector shall offer open and equitable access to the Malawi power system.
- 4.3 MERA to act as adjudicator in the event of disputes regarding open access.
- 4.4 The Malawi Government shall provide appropriate levels of credit and risk guarantees to IPPs to underwrite the ESCOM SB's commitments.
- 4.5 The Malawi Government shall provide timely and impartial responses to all other IPP requests and applications for government approvals and other government support.
- 4.6 The SB, ESCOM Transmission and MERA shall set maximum response target times for stages of IPP evaluation, generation licence applications and transmission connections and agree to sign a charter codifying these response times.
- 4.7 The SB, ESCOM Transmission and MERA are, at their absolute discretion, entitled to set the required information and due diligence levels at which they will accept IPPs and advance them through the stages of the IPP procurement and generation licence application processes.
- 4.8 No Malawi Government entities will be liable for any costs incurred by IPPs for any reason except as agreed in the terms and conditions of any legally binding executed contracts.

## **5. IPP Solicitation Processes**

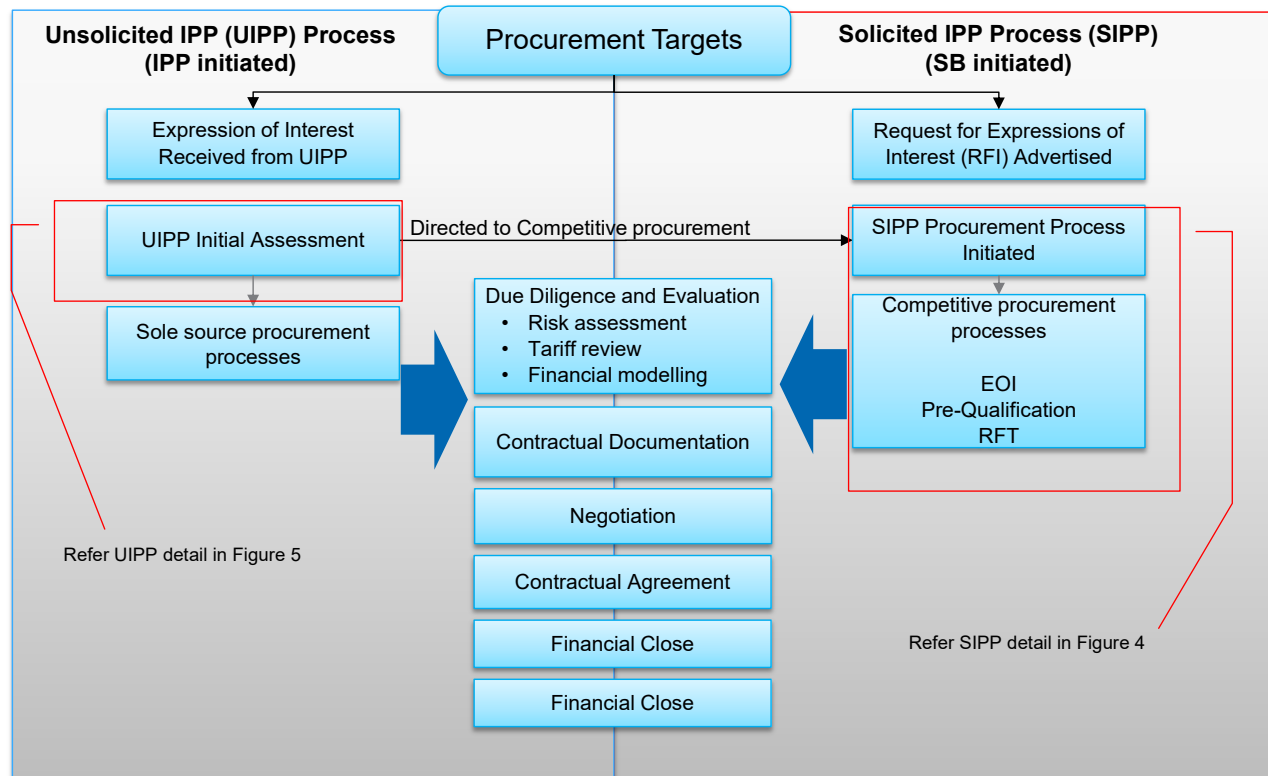
### **5.1 IPP Procurement Processes**

The IPP solicitation process shall be in line with the IRP as well as the annual Generation Procurement Plan that will be prepared by the Single Buyer.

The IPP Framework provides for processes and structures for both solicited and unsolicited IPP procurement processes. The IPP procurement processes have been developed to be consistent with Malawi's Public Procurement Act 2003 and the Public Procurement Regulations 2004. This means that solicited procurements by international competitive bidding will be the default procurement approach for Malawi's power sector. The IPP Framework includes a process to execute unsolicited procurements in the event such an approach is warranted so that such projects are beneficial to the public. Each procurement type is summarised in the

adjacent Figure 3 and the step by step process flow is documented in the following tables.

**Figure 3: Summarised IPP Framework Solicitation**



**Table 2: IPP Framework General Procurement Processes**

Stages	Parties	Action	Reference
Annual power Generation Procurement Plan	SB	The SB develops and publishes the Power Generation Procurement Plan at the beginning of each annual cycle.	Annual Generation Procurement Plan

**Table 3: IPP Framework Solicited Procurement Processes**

Stages	Parties	Action	Reference
SIPP Prefeasibility	GoM	GoM undertake prefeasibility studies	
Full Feasibility Study	GoM	GoM performs full feasibility study, completing all tasks possible at this stage	
Request for EOIs (RFI)	SB	The SB develops and RFI and RfT and advertises RFI	Annexure A
EOIs prepared	IPP	Candidate IPPs submit EOIs	Annexure A
SIPP Initial Assessment	SB	Initial due diligence and evaluation carried out by SB on SIPPs and prequalified SIPP shortlist developed	Annexure C
Request for Tender (RfT)	SB	SB releases RfT to prequalified SIPPs	Annexure B
Environmental Project Brief	IPP	IPP undertakes and submits Environmental Project Brief	Annexure F
Environmental Project Brief	DEA	Environmental Project Brief reviewed by Director of Environmental Affairs (DEA) and Technical Committee on the Environment	Annexure F
Transmission Connection	ESCOM Tx	IPP applied for transmission connection and ESCOM transmission (Tx) evaluates the application and responds	Annexure H

Stages	Parties	Action	Reference
Regulatory Assessment	IPP/MERA	IPP submits licence application and applies for interim licence or notice of any shortcomings. MERA provides IPP with indicative requirements for a licence to be awarded.	Annexure L
Due diligence	SB	SB updates due diligence while short-listed bidders complete RfT requirements.	Annexure C
Tender	IPP	RfT submitted by IPPs	Annexure B
Tender Evaluation	SB	SB carries out full tender evaluation	Annexure B
Preferred SIPPs selected	SB	SB selected preferred bidder/s and reserve bidder and notifies all bidders of next steps	
Transmission Connection Agreed	SB/ESCOM Tx	The SB agrees to the terms of ESCOM Tx's transmission connection offer	Annexure H
Negotiations on PPA	IPP/SB	The IPP and the SB negotiate the specific terms of the PPA	Annexure I
Negotiations on IA	IPP/MoF	The IPP and the MoF negotiate the specific terms of the IA	Annexure J
Land Lease contract	IPP/MLHUD	IPP requiring a land lease applies for and signs a land lease with the Ministry of Land, Housing and Urban Development (MLHUD).	Annexure K
Generation Licence	IPP/MERA	MERA provides IPP with a conditional generation licence which becomes effective upon satisfaction of conditions precedent	Annexure L
Environmental Assessment (EIA) Impact	IPP	IPP undertakes EIA	Annexure F

Stages	Parties	Action	Reference
EIA Reviewed	DEA	Review by Director of Environmental Affairs (DEA) and Technical Committee on the Environment	Annexure F
Financial Close and Project Agreements Effective	IPP	IPP secures financing for project and Project Agreements become effective	Figure 3 Summarised IPP Framework Solicitation

Table 4: IPP Framework Unsolicited Procurement Processes

Stages	Parties	Action	Reference
Expression of Interest received from IPP	IPP/SB	The Single Buyer (SB) receives an EOI from an IPP	
EOI reviewed	SB	SB reviews EOI and confirms UIPP is consistent with the current generation procurement plan and IRP.	
UIPP Prefeasibility	IPP	If UIPP prefeasibility not completed this is undertaken by the IPP	
Environmental Project Brief (prep)	IPP	IPP undertakes and submits Environmental Project Brief	Annexure F
Environmental Project Brief (submission)	DEA	Environmental Project Brief reviewed by Director of Environmental Affairs (DEA) and Technical Committee on the Environment	Annexure F

Stages	Parties	Action	Reference
UIPP Initial Assessment	SB	UIPP assessed by SB to determine where it will be directed	
Eligible UIPP Processes	SB	SB initiates sole or multi-party UIPP evaluation processes for any eligible UIPP it selects. UIPPs without valid unique characteristic directed to a competitive solicited process.	
Due Diligence and Evaluation	SB	Initial due diligence and evaluation carried out by SB on IPP	Annexure C
Transmission Connection	ESCOM Tx	IPP applied for transmission connection and ESCOM transmission (Tx) evaluates the application and responds	Annexure G
Full Feasibility Study	IPP	IPP performs full feasibility study, completing all tasks possible at this stage	
Regulatory Assessment	IPP/MERA	IPP submits licence application and applies for interim licence or notice of any shortcomings. MERA provides IPP with indicative requirements for a licence to be awarded.	Annexure L
Due diligence updated and Full Valuation	SB	SB updates due diligence work and carries out full evaluation	Annexure C
Environmental Impact Assessment (EIA)	IPP/EAD	IPP undertakes EIA	Annexure F
EIA Reviewed	DEA	Review by Director of Environmental Affairs (DEA) and Technical Committee on the Environment	Annexure F
Transmission Connection Agreed	SB/ESCOM Tx	The SB agrees to the terms of ESCOM Tx"s transmission connection offer	Annexure H

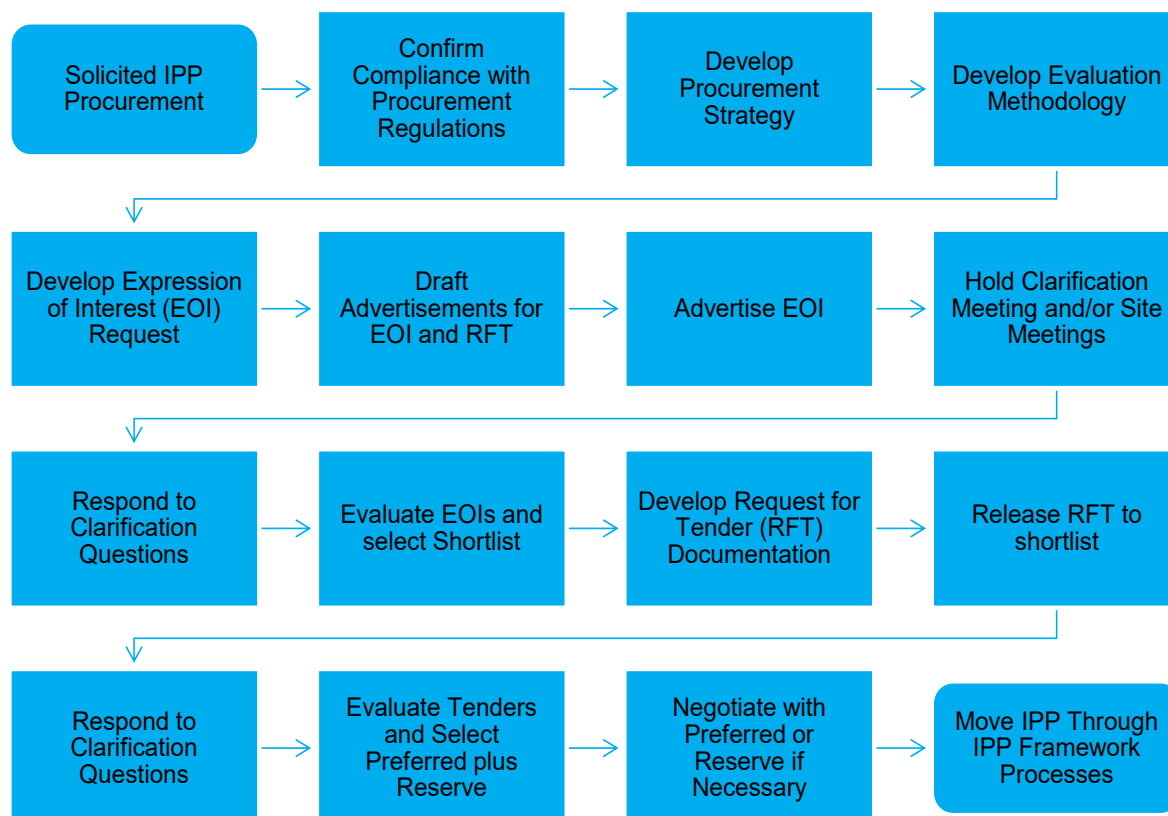
Stages	Parties	Action	Reference
Negotiations on PPA	IPP/SB	The IPP and the SB negotiate the specific terms of the PPA	Annexure I
Negotiations on IA	IPP/MoF	The IPP and the MoF negotiate the specific terms of the IA	Annexure J
Land Lease contract	IPP/MLHUD	IPP requiring a land lease applies for and signs a land lease with the Ministry of Land, Housing and Urban Development (MLHUD).	Annexure K
Generation Licence	IPP/MERA	MERA provides IPP with a conditional generation licence which becomes effective upon satisfaction of conditions precedent	Annexure L
Financial Close and Project Agreements Effective	IPP	IPP secures financing for project and Project Agreements become effective	Figure 3 Summarised IPP Framework Solicitation



## 5.2 Solicited IPP Procurement Processes

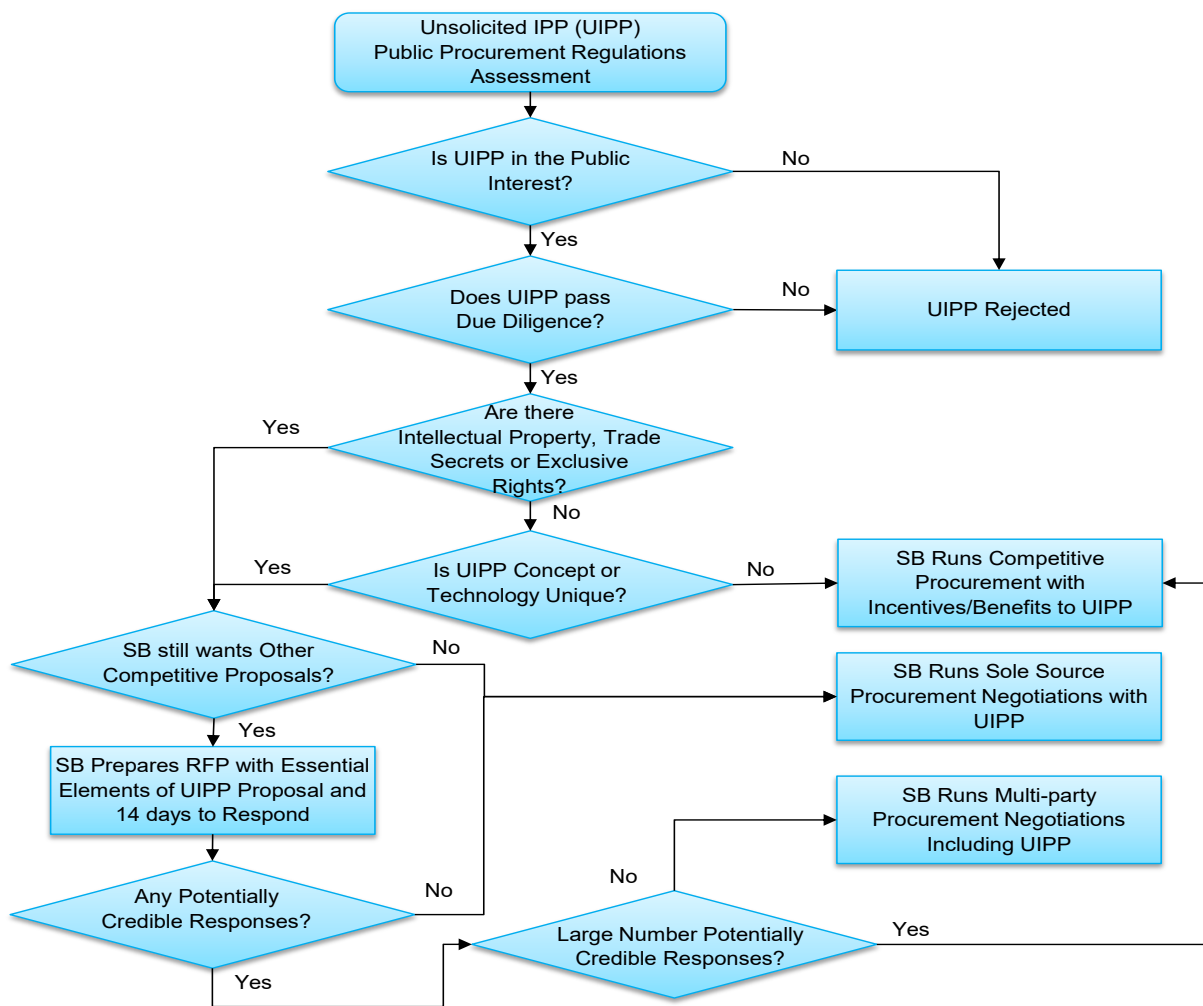
To bring solicited IPPs into the IPP framework the procurement processes shall follow the steps outlined in Figure 4 below. The EOI stage can be dropped when ESCOM is satisfied it does not need the process to obtain more information about potential bidders and are confident bidders will also proceed to a tender without it (e.g. because of unsolicited interest in the projects to be tendered).

**Figure4: Solicited IPP Procurement Processes**



The SB will determine the procurement strategy and get this signed off by GoM. Within the structure of that procurement strategy an evaluation methodology will be developed with an appropriate weighting for technical expertise and experience and a financial component ensuring the project represents good value.

**Figure 5: Unsolicited IPP Initial Assessment**



IPPs will be procured using a two stage process namely technical and financial proposals. Clarification meetings and site visits (where applicable) will be part of the procurement processes. The ultimate tender evaluation processes will be formal with strict probity rules governing these assessments.

The proposed overall IPP framework approach to evaluating IPPs and establishing required milestone agreements is illustrated in Figure 4:

### 5.3 Unsolicited IPP Assessment

The UIPP assessment is carried out to determine if the UIPP can be contracted with (subject to due diligence and evaluation) and if the UIPP can be sole sourced or whether it will be directed into a competitive process (when a suitable process is scheduled). The first step is confirming that the UIPP's expression of interest is consistent with the generation procurement plan and the IRP. After this, as outlined in the adjacent diagram an initial assessment will be carried out to determine the treatment of the IPP.

Key steps are to determine:

- Is contracting with UIPP in the public interest?

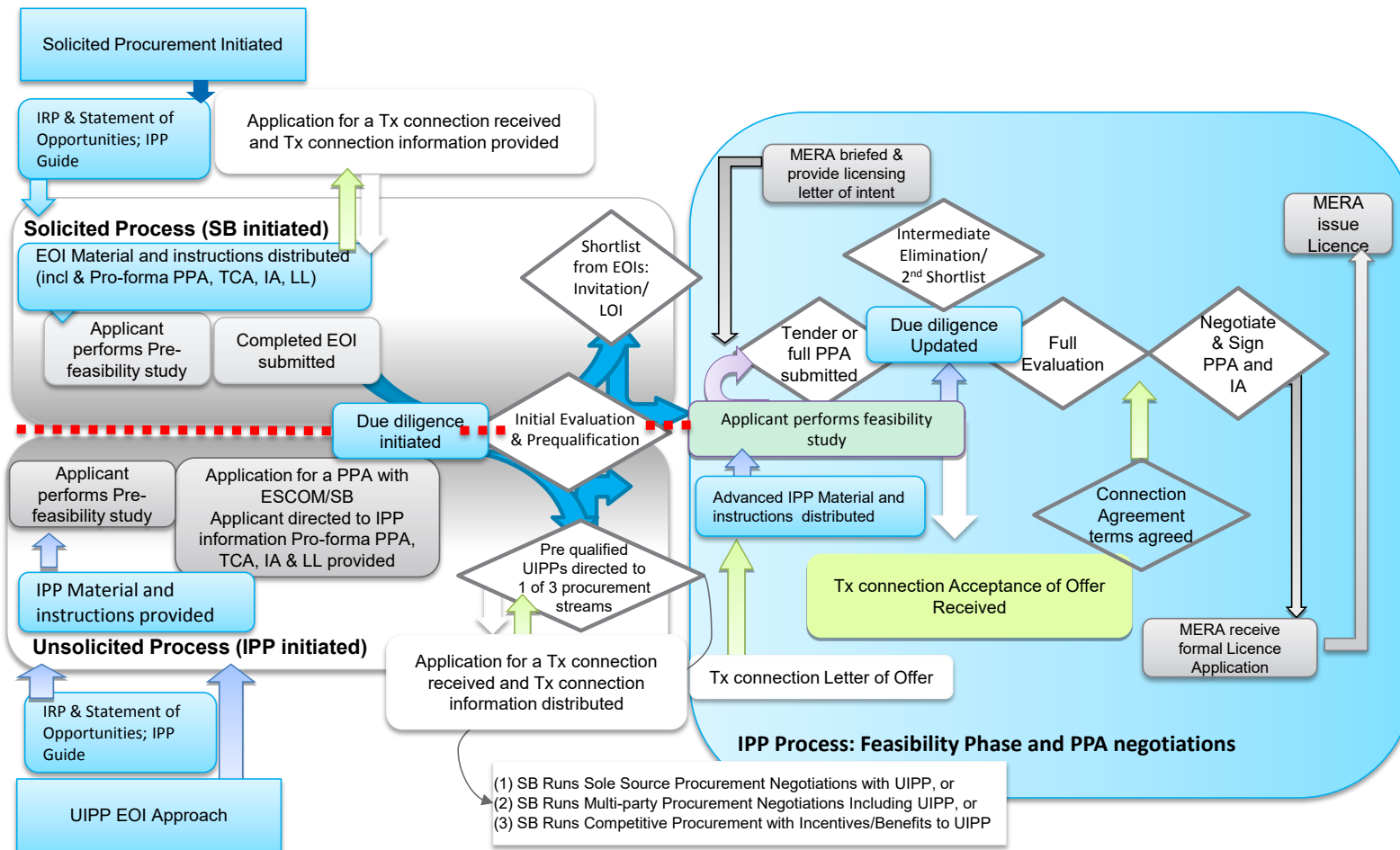
- Does the UIPP have particular and specific/unique intellectual property, trade secrets, exclusive rights or some unique aspect?
- Value for money
- Proven technology
- Emergency

If the UIPP satisfies these requirements it will be moved through into the full evaluation and negotiation phase.

#### **5.4 Detailed IPP Processes and Documentation**

The detailed IPP framework processes are illustrated below:

**Figure 6: IPP Processes**



## **6. IPP Evaluation and Financial Modelling**

### **6.1 IPP Evaluation Approach**

The evaluation approach will typically be carried out in five stages:

#### **i. Preliminary (Mandatory) compliance**

Mandatory procurement requirements are useful to limit bidders quickly by eliminating unacceptable bids at an early stage. All bids shall be assessed to see if they comply with the requirements that they were instructed would be mandatory such as tender compliance, corporate viability evidence, reference site information. A failure by any bidder to provide the required information at the necessary level will result in that bidder being excluded from further consideration.

#### **ii. Technical evaluation**

The technical evaluation is carried out to determine if bidders have the capability and experience to deliver the respective project. Technical evaluation shall consider experience and expertise and the overall technical fit for purpose of the bids. Consideration shall be given to adequacy of reference projects, history of reliability and availability, environmental performance and site specific issues. Developers who do not meet a minimum level in the technical evaluation will not be taken further in the evaluation.

#### **iii. Due diligence**

The due diligence process is designed to assist decision making by assessing the potential risk of conducting business with a particular party. The purpose of the due diligence and risk assessment process is to make an objective assessment of the likelihood of the developer and associated parties being a reasonable party for Single Buyer to deal with from an ethical, legal, financial and technical perspective. The result of the due diligence will be a view by Single Buyer of the risk it faces in entering into further discussions with the developer.

If, in Single Buyer's view, the risk of involvement with the developer is high then Single Buyer may decline to continue discussions. Alternatively, Single Buyer shall determine that the developer represents an acceptable risk but shall require further assurance or checks before it ultimately considers contracting with the developer. It is important to remember that the due diligence is only the first step in determining if Single Buyer will contract with the developer.

The due diligence process shall continue in some form throughout the period that the Single Buyer is evaluating the IPP proposal and negotiating with the prospective developer. The Single Buyer shall have an opportunity to protect itself against various contractual problems through the contracts and the due diligence process is not intended to provide a full evaluation of the project itself or against other projects.

#### **iv. Commercial evaluation**

A commercial component shall be included which shall ask bidders to respond to pro-forma contracts and advise what changes they might require (if any). An indication of the expected level of government support shall be considered across the board in the evaluation at this point.

## **v. Financial assessment**

Financial modelling for IPP evaluation shall be different for UIPP and SIPP evaluations.

### **6.1.1 SIPP Procurement Evaluation Financial Modelling**

The SIPP bidders take responsibility for their financial proposals. ESCOM will take steps to satisfy itself that the offers are robust and based on realistic assumptions. The financial evaluation is focussed on comparing the offered tariffs using a normalised cost.

### **6.1.2 UIPP Procurement Evaluation Financial Modelling**

The UIPP shall provide audited financial model for the SB to review. The SB shall assess the financial proposal from an UIPP by assessing the following items:

- All project agreements, including but not limited to agreements (where applicable) for the following:
  - EPC
  - O&M
  - FSA
  - Site & Land use
  - Shareholders
  - Financing
  - Transmission connection
- Assumptions categorised as:
  - Economic
    - Foreign exchange
    - Inflation
    - Tax
  - Financial
    - Equity and Debt levels
    - Debt cost
    - Equity return
  - Fuel or resource
    - Fuel consumption
    - Fuel efficiency
    - Resource level assumptions
  - Technical
    - Capital Cost
- Model operation
- Price and Returns

## **6.2 Tariff Structure**

Tariff structures vary depending on whether the power station is dispatchable or non-dispatchable.

### **6.2.1 Dispatchable IPP Tariffs**

Dispatchable tariffs usually consist of a capacity charge and an energy charge. The capacity charge is a fixed charge made to cover the fixed costs of the generator regardless of whether the generator has dispatched or not. The energy charge is

variable (per MWh) for energy that is dispatchable to the off-taker. The capacity charge shall be reduced if tested capacity does not reach contracted levels or capacity availability is below contracted levels. A contract breach and possible PPA termination may result from a significant decline in power station capacity or persistent lower than contracted availability of power station capacity as well as a long sustained period of power station capacity unavailability.

### **6.2.2 Non-Dispatchable IPP tariffs**

A non-dispatchable IPP will typically recover all its costs through a variable MWh charge. This means that the IPP will recover the risk that the IPP is dependent on and that the reliability of the generation plant will be sufficient to allow the IPP to recover its costs based on a forecast operating regime and capacity of the power station. If the off-taker or transmission system curtail the operation of the non-dispatchable IPP or delay its commissioning then typically a deemed energy charge will be payable. A deemed energy payment will be payable to a non-dispatchable IPP under the PPA if the buyer cannot take power that is available from the IPP or if the buyer has caused delayed commissioning of the IPP. Deemed energy will be calculated using measurement equipment to assess the energy that could have been generated if not for the breach. The deemed energy payment shall be based on the agreed energy charge applied to the deemed energy.

## **6.3 Tariff evaluation**

An evaluation of the tariff structures shall be different for an UIPP and a SIPP. Both evaluations may involve the review of the audited project financial model to ensure reasonableness and robustness of price bids.

### **6.3.1 Solicited IPP Tariff Evaluation**

In solicited IPP evaluations the tariff structures will be reviewed to understand the mix of fixed and variable. However, generally the combined tariffs will be converted to a levelised cost of energy (LCOE) and this will be a primary factor in the evaluation of the solicited IPP bids.

The LCOE formula is as follows:

$$LCOE = \frac{\text{Net Present Value of Lifetime Project Costs}}{\text{Net Present Value of Lifetime of Project Output}}$$

### **6.3.2 Unsolicited IPP Tariff Evaluation**

The evaluation of an unsolicited IPP's tariff offer will be substantially more intrusive because there is no competitive tension ensuring the price offered is reasonable and fair. Consequently, evaluation of an UIPP requires that the financial model is first audited by an independent expert and then provided by the UIPP to the SB for review. The SB will also need to be satisfied that the project returns of the IPP are in line with what an IPP should receive given the country, power market and other risks. In addition, the SB must be satisfied that the tariff reflects the reasonable cost of the project, a reasonable return and the SB's own review of the reasonableness of the UIPP's financial model.

## **7. Tender Evaluation Process**

The section outlines sample arrangements for a transparent, professional, efficient and inclusive evaluation of a solicited IPP Tender.

### **7.1 Overview of Process for Selecting Solution**

The tender to select the preferred solution for power supply is being managed by SB. The SB is responsible for preparing the Request for Tender, which is issued in accordance with SB's procurement procedures.

The SB shall establish an evaluation team to complete an evaluation of the bids received, conduct a quality control check on the evaluation results and present a recommendation as to the preferred solution to Internal Procurement Committee for approval.

### **7.2 Evaluation Process**

The SB determines that separate envelop bids are required, so that the technical and financial evaluation of compliant bids can be conducted separately. A secure venue shall be utilised with controlled and restricted access to the members of the evaluation team only.

### **7.3 Evaluation schedule**

Two separate evaluation periods shall be required.

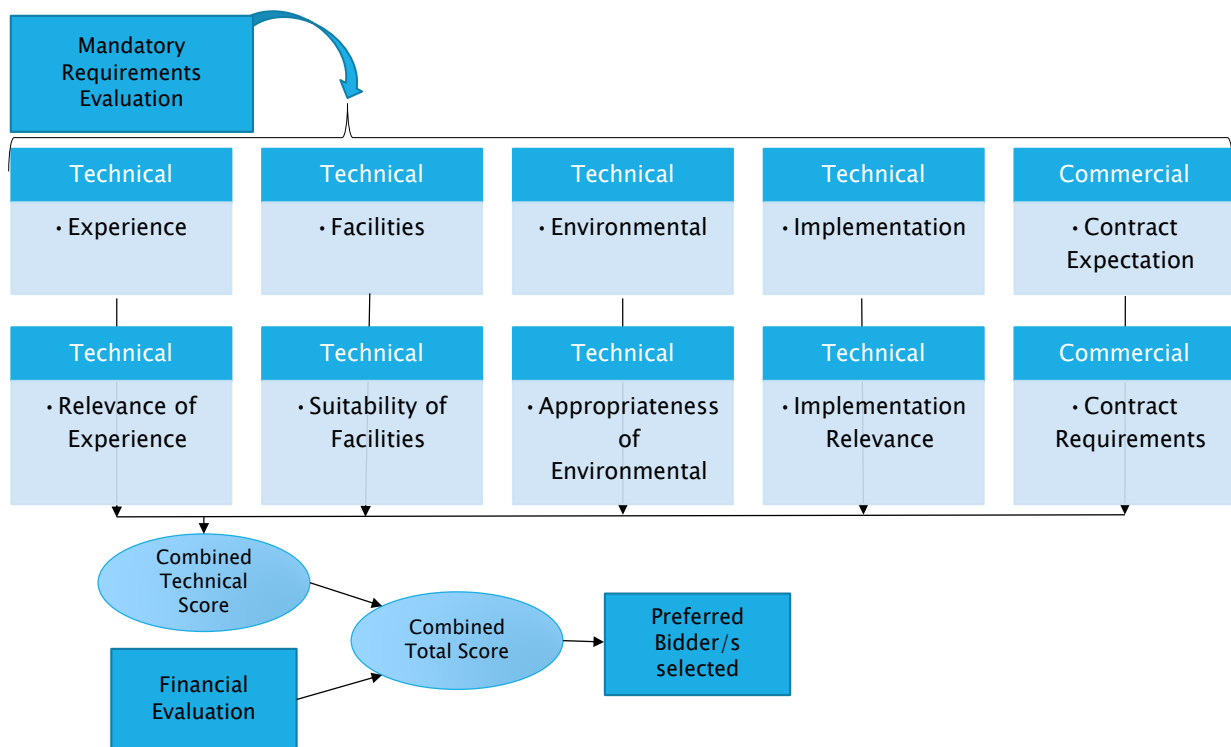
The first stage of the evaluation shall focus on compliance and technical evaluation. The second stage shall focus on the financial evaluation.

### **7.4 General Code of Conduct during Evaluation:**

The evaluation shall be done according to the laid down guidelines as per the Procurement Act 2003 and the 2004 Regulations. The overall process for the tender evaluation is illustrated below.



**Figure 7: Evaluation Approach**



## 7.5 Technical evaluation

The evaluation comprises four components, as follows.

**Mandatory compliance evaluation**

Mandatory compliance is assessed on a positive (yes/no) response to every parameter. Bidders shall not proceed to the next level if they fail any one of the mandatory requirements.

The technical evaluation will typically comprise an assessment of four elements:

- **Experience**  
Scored on the basis of a series of yes/no questions relating to reference sites.
- **Site considerations**  
A two part evaluation:
  - Adequacy of response scored on the basis of a series of yes/no questions.
  - An evaluation of the technical „fit-for-purpose“ of the proposed technical solution.
- **Implementation Process**  
A two part evaluation:
  - Adequacy of responses, scored on the basis of a series of yes/no questions.
  - An evaluation of the technical „fit-for-purpose“ of the proposed implementation process and timelines.

- Environmental

A two part evaluation:

- Adequacy of responses, scored on the basis of a series of yes/no questions.
- An evaluation of the environmental acceptability of the proposed solution.

## 7.6 Commercial Evaluation

A two part evaluation:

- Responses to specific information requests, scored on the basis of a series of yes/no questions.
- An evaluation of the extent of any changes requested to the pro-forma PPA and TCA.

## 7.7 Financial Evaluation

The financial evaluation shall consist of a determination of the Levelised Unit Cost of Electricity calculated using common fuel prices and exchange rates over the project life.

The following shall also be considered:

Implementation Timelines

Parameter	Evaluation Criterion
<b>Adequacy of Timelines</b>	
• Includes provision for site preparation	Yes/No
• Includes provision for equipment delivery	Yes/No
• Includes provision for equipment installation	Yes/No
• Includes provision for equipment commissioning/ connection	Yes/No
• Includes provision for delivery/installation of transformers	Yes/No
• Includes provision for fuel supply contracting	Yes/No
• Includes provision for construction of storage	Yes/No
• Includes provision for supply of raw water	Yes/No
<b>Technical Fit-for-Purpose</b>	
• Credibility	Score out of 15
• Speed of implementation	Score out of 15

## Environmental

Parameter	Evaluation Criterion
<b>Adequacy of Information Provided</b>	
• Identifies typical noise levels	Yes/No
• Confirms waste water complies with standards	Yes/No
• Confirms engines comply with World Bank standards	Yes/No
• Provides guaranteed max. SO <sub>2</sub>	Yes/No
• Provides guaranteed max. NO <sub>2</sub>	Yes/No
• Provides guaranteed max. CO	Yes/No
• Provides guaranteed max. unburned hydrocarbons	Yes/No
• Provides guaranteed max. particulate matter	Yes/No
• Provides example EMP	Yes/No
• Provides details of process to obtain ECC	Yes/No
<b>Technical Fit-for-Purpose</b>	
• Environmental suitability	Score out of 10

## Commercial Bid Evaluation

<b>Contractual Acceptability</b>	
• Accepts Malawian/English Law?	Yes/No
• Provides details of proposed insurance?	Yes/No
• Accepts dispute resolution?	Yes/No
• Delay LDs > US\$100k/day?	Yes/No
• Aggregate delay LDs ≥ USD10 million	Yes/No
• Threshold for change in costs ≥ USD 1 million	Yes/No
• Indemnity ≥ USD 20 million	Yes/No
• Contracted Availability ≥ 98.5%	Yes/No
<b>Extent of GoM support required</b>	
• Does NOT require an Implementation Agreement	Yes/No
• Does NOT require government guarantee of PPA payments	Yes/No
• Does NOT require change-in-tax pass-through	Yes/No

<b>Contractual Modifications Required</b>	
• Acceptability of IA	Score out of 10
• Extent of modification to pro-forma PPA	Score out of 10
• Extent of modification to pro-forma TCA	Score out of 10

**Evaluation Team:**

The evaluation team is set out as below.

<b>Specialist Area</b>	<b>Evaluators</b>
General compliance evaluation	
Technical evaluation – information provided	
Technical evaluation – Fit-for- purpose	
Commercial evaluation	
Financial evaluation	
Legal evaluation	

## **VOLUME 2: Annexures to the IPP Framework for Malawi**

Annexure	A	Expression of Interest (Pre-qualification): Information Requirements
Annexure	B	Pro-forma Tender Document
Annexure	C	IPP Framework Due Diligence and Risk Assessment
Annexure	D	Non-dispatchable Renewable IPP Risk Allocation Matrix
Annexure	E	Dispatchable Thermal IPP Risk Allocation Matrix
Annexure	F	Environmental Impact Assessment Process in Malawi
Annexure	G	Transmission Application to Connect (Generation)
Annexure	H	Pro-forma Transmission Connection Agreement (TCA)
Annexure	I	1-1.2 Pro-forma Power Purchase Agreement (PPA)for Hydros and Thermal
Annexure	J	Pro-forma Implementation Agreement (IA)
Annexure	K	Pro-forma Land Lease Agreement (LLA)
Annexure	L	Generation Licence Application

## **Annexure A: Expression of Interest (Pre-qualification): Information Requirements**

### **1.1 Purpose of this Document**

The Expression of Interest (EOI) is for IPPs to provide initial basic information about an IPP project either:

- Initiated by the IPP developer for consideration by Malawi's electricity buyer (ESCOM SB) as an unsolicited IPP, (UIPP); or
- In response to a request by the ESCOM SB calling for EOIs from interested parties to participate in a tender for an IPP project(s) (Solicited IPPs). In which case the due date for EOIs will be included.

### **1.2 Applicants**

Any applicant who sends an EOI should have already undertaken a pre-feasibility study, and can provide all the relevant information, further described below in this paper to the ESCOM SB to enable decisions to be taken.

### **1.3 General Information**

Information provided in the EOI should be of sufficient detail to demonstrate the applicant's ability to proceed with further development of the project, to establish the proposed project as a potentially bankable project, all subject to a full feasibility study being completed subsequently, an associated environmental and social impact assessment (ESIA) being accepted by all the competent authorities, and a proper PPA being duly signed under the tariff structures proposed herein.

### **1.4 Specific Information**

The EOI should at a minimum contain the information listed below. An EOI received with incomplete information may be rejected.

#### **1.4.1 Particulars of the Application:**

- Is this a UIPP or a response to a solicitation?
- Include the solicited RFI reference.

#### **1.4.2 Particulars of the Applicant:**

Listing of key elements of the identity and commercial structure of the applicant, to the extent applicable:

- Name of Applicant (Business/Entity/Group)
- Type of Entity (sole proprietorship, private limited partnership, public limited partnership, corporation, joint venture, other)
- Date of Incorporation
- Head Office Address
- Telephone #
- Fax #

- E-Mail
- Website
- Copy of most recent annual report and/or audited accounts;
- Main Business Activities
- Authorized Share Capital where applicable
- Business/Entity ownership and shareholding structure, identifying parent and subsidiary companies, where applicable
- Implementation Agreement or Concession Agreement, if any, for the project
- Shareholder's Agreement, if applicable
- Articles and By-Laws of the Single Purpose Vehicle, if created for the project
- Business/Entity Registration Certificate
- Income Tax Registration Certificate
- VAT Registration Certificate

#### **1.4.3 UIPP Specific Information**

A UIPP should provide evidence (if appropriate) of any unique or specific Intellectual Property, Trade Secrets or Exclusive Rights utilised in the proposed project or any Unique Concept or Technology,

#### **1.4.4 Project Site Location:**

Description of the project site location giving sufficient details to enable the IPP Committee to easily identify the site, including but not limited to:

- Site name
- GPS and/or geographical co-ordinates
- Nearest urban center
- Location/Division/Region

#### **1.4.5 Site and Land Ownership and Control:**

Indication of the site ownership and, if applicant is not the owner of the land, indication of how the project developers intend to control the site either through long term lease, or other arrangements.

#### **1.4.6 Technology:**

Description of the technology to be employed:

#### **1.4.7 Pre-Feasibility Study:**

Covering the preliminary study or collection of preliminary studies associated with the planning of a contemplated plant and the related data to assess,

- the nature and quality of the energy resource base to be used;
- the technology to be applied;
- the installed capacity contemplated for the plant;
- the transmission voltage level at which the plant is to connect;
- its associated capital and operating costs;
- the capacity factor at which the plant is expected to operate;
- the availability and expected annual electricity sales;
- the proposed financial plan including amounts of debt, equity (and grants, if any);
- the likely sources of finance;
- the loan security arrangements contemplated, including loan guarantees, trustee arrangements, escrow accounts, assignments of rights/proceeds from project revenues associated with project agreements such as the PPA, security interests in project support guaranties, etc.;
- the expected financial viability along with financial projections on the project, if any;
- the environmental impact;
- the social impact;
- the economic impact;
- basic information on advisors, if any, to assist the applicant.

The information from the pre-feasibility study should provide a sufficient basis for the ESCOM SB to determine that a viable project is very likely to be developed and executed subject to the successful completion of the full feasibility and development activities.

#### **1.4.8 Project Sponsors and Developers**

Including the following:

- Background and experience with similar projects, plants, and technologies
- Audited financial statements of the developer, partners, and key sponsors
- Governance and accountability arrangements

#### **1.4.9 Project Development and Implementation Plan:**

An outline of project development and implementation plan, including time schedules for major tasks and milestones, type of contract for implementation, including type of Engineering, Procurement and Construction (EPC) Contract if such is contemplated, plus contractor's experience, procurement and tendering arrangements, and project completion support and cost overrun coverage guarantees contemplated, if any.



#### **1.4.10 Environmental and Social Impact:**

Covering a preliminary ESIA and any remedial action plan contemplated.

#### **1.4.11 Insurance**

Including a description of insurance arrangements contemplated during construction and during operation, if any.

#### **1.4.12 Foreign Investor Provision**

Confirm foreign investor's compliance with relevant laws governing foreign investments.

### **1.5 Next Steps**

#### **1.5.1 UIPP**

The ESCOM SB will consider any UIPP EOI against the Malawian IPP power procurement policy targets. If the UIPP is consistent with the timing, type and capacity targets then it will be subject to an initial evaluation by the ESCOM SB. The UIPP will then be notified of the outcome of the assessment within a period of [ ] days

#### **1.5.2 Solicited IPPs**

The ESCOM SB will undertake an evaluation of all EOIs received by the deadline and select a shortlist of candidates based on due diligence and evaluation procedures. The shortlisted candidates will receive a full tender pack including an RFT and template documents.

## **Annexure B: Pro-forma Tender Document**

This is a sample RfT using a notional solar project as an example

### **1.6 Purpose of this Document**

This document is a request for tender (RfT) provided to pre-qualified candidates who have submitted expressions of interest (EOIs) to Malawi's ESCOM SB and have been invited to participate in the tender of up between 20 and 60 MW of Solar Photo Voltaic (PV) made up of a minimum of [1] and maximum of [4] sites with a minimum of [10] MW and a maximum of [20] MW at each site.

### **1.7 Background to the Project**

Malawi has one of the lowest electrification rates in Sub-Saharan Africa; its 351 MW installed capacity, mostly from hydroelectric power plants on the Shire River, provides electricity to less than 10% of Malawi's population. The Malawian government (GoM) has indicated that it will attempt to increase installed electricity capacity to 1,851 MW by 2020 and increase access to electricity to 30% of the population by 2030.

The GoM believes that private sector participation in the power sector is a critical piece of expanding access to electricity in Malawi. In this context the Millennium Challenge Account (MCA) Malawi is supporting the Ministry of Natural Resources, Energy and Mining (MNREM) in seeking to encourage private sector investment in new electricity generation in Malawi. The MNREM is therefore actively seeking out developers who might be willing to become or fund independent power producers (IPPs). Encouragingly Malawi already has received a variety of unsolicited proposals for IPPs.

MCA and the MNREM believe that in order to provide the environment necessary to encourage IPPs a key component is the development of an IPP framework to define the rules of engagement for all participants in the power sector.

### **1.8 Request for Tender**

The SB invites fully documented bids from eligible and qualified companies, joint ventures and associations with suitable experience in the provision of generation capacity.

The bids received in response to the RfT will be evaluated by the SB on the basis of their ability to demonstrate the necessary financial, legal, technical, environmental soundness, management expertise, project references, insurability, compliance, quality assurance, time frame and other requirements as detailed in this RfT. Only parties that submit responses to this RfT and meet the minimum requirements of this RfT will be considered eligible to supply power to Malawi as part of this tranche of procurement.

- Issue date [ ]
- Closing Date [ ]
- Written clarifications will only be provided to queries submitted before. Any clarification request received seven (7) days or less before the closing date and time stated above will not be considered.

- A voluntary clarification meeting will be held on [ ] at the following address [ ]. Tenders are required to notify ESCOM SB of their intention to attend and the number of their representatives attending by no later than [ ]. The SB will provide letters of invitation on request to facilitate any application for a visa by persons attending the clarification meeting.
- Site visits will be arranged to coincide with the clarification meeting.
- Bidders will be advised by [ ] of the results of their bids.
- No reasons shall be given for the decision.

## **1.9 Scope**

*More detail provided on nature of generation type sought if applicable*

## **1.10 Sites**

*Site detail (if applicable)*

## **1.11 Malawian Legislative Framework**

Bidder should make themselves familiar with the following Malawian legislative and regulatory instruments which are available via the following link [ ]:

- a) Malawian IRP
- b) ESCOM SB Annual Generation Procurement Plan
- c) IPP Framework 2017
- d) Electricity Act 2004
- e) Energy Regulation Act 2004.
- f) Electricity Amendment Act 2016
- g) Malawian Grid Code
- h) Electricity Generation Licence Application

## **1.12 The Procurement Process**

Tenderers have been selected after prequalification via a response to the SB's RFI. Tenders must be received by [ ] and will then be evaluated over the period [ ].

Bidders will be contacted for clarification as necessary and negotiations are scheduled to be held with a selection of preferred bidders by [ ].

Contracts are scheduled to be signed with successful bidder (s) by [ ]

## **1.13 Instructions to Bidders**

### **1.13.1 Bids by Joint Ventures, Consortiums and Associations**

Joint venture, consortium or association respondents must comply with the following requirements:

- a) Any tender shall be signed so as to legally bind all joint venture partners, jointly and severally, and any tender shall be submitted with a copy of the joint venture agreement providing for joint and several liability with respect to the contract.

- b) The selection of a joint venture, consortium or association does not necessarily imply selection of any of its partners individually or as a partner in any other joint venture, consortium or association. In case of dissolution of a joint venture, consortium or association the SB reserves the right to reject a bid that had been accepted from that joint venture, consortium or association.

### **1.13.2 Probity**

The SB requires that clients as well as tenderers, suppliers, contractors, concessionaires and consultants, observe the highest standard of ethics during the procurement and execution of such contracts. In pursuance of this policy, the SB:

- a) defines, for the purposes of this provision, the terms set forth below as follows:
  - i. "corrupt practice" means the offering, giving, receiving, or soliciting of anything of value to influence the action of a public official, or the threatening of injury to person, property or reputation, in connection with the procurement process or in contract execution in order to obtain or retain business or other improper advantage in the conduct of business; and
  - ii. "fraudulent practice" means a misrepresentation of facts in order to influence a procurement process or the execution of a contract to the detriment of the client, and includes collusive practices among tenderers (prior to or after tender submission) designed to establish tender prices at artificial, non-competitive levels and to deprive the client of the benefits of free and open competition;
- b) will reject a proposal for pre-qualification if it determines that a respondent recommended for pre-qualification has engaged in corrupt or fraudulent practices in competing for the contract in question;
- c) will declare a firm ineligible indefinitely or for a stated period of time, to be pre-qualified if it at any time determines that:
  - i. the firm has engaged in corrupt or fraudulent practices in competing for, or in executing, a contract; or
  - ii. the firm has been found by a judicial process or other official inquiry to have engaged in corrupt or fraudulent practices.

### **1.13.3 Evaluation Process**

Evaluation of bids will be performed by the SB on the basis of companies meeting the necessary financial, legal, technical, environmental soundness, management expertise, project references, insurability, compliance, quality assurance, time frame, and other requirements as detailed in this RfT.

### **1.13.4 SB Reservations**

The SB reserves the right to:

- a) amend the scope and value of any contract(s) to be negotiated;
- b) reject or accept any response;
- c) cancel the procurement process and reject all applications;
- d) not accept and not award the lowest priced or highest scoring response;

- e) waive any minor irregularities or informalities in the pre-qualification and RFI process;
- f) meet and/or negotiate with any respondent to the exclusion of others without being under any obligation to involve any other bidders or inform any other bidders of the negotiations and without incurring any obligations to any respondent;
- g) amend this RfT, or any associated documents;
- h) request any bidder to re-submit a response on a revised or alternative basis.

The SB shall neither be liable nor be under any obligation to inform the bidders of the grounds for such action.

#### **1.13.5 Costs of Preparing Bids**

Any and all costs incurred by respondents in preparing their responses to this RfT shall be borne by the respondents, and the SB shall have no liability for such costs.

The SB will not bear any expenses or losses incurred by respondents in compiling and submitting their bids.

#### **1.13.6 Contact Details:**

The SB's designated contact person for any queries in association with this RfT is:

[The Tender Administrator,

Tel:

Fax:

Email: ]

#### **1.13.7 Confidentiality**

All RfT documents obtained by prospective respondents shall be considered as their personal documents and shall not be transferred to a third party.

Information contained in the RfT documentation shall be regarded as confidential and may not be divulged to third parties except as reasonably required for preparation of a response, irrespective of whether a response is submitted or not.

All RfT responses shall be treated as confidential and their contents shall not be disclosed to any third party, other than to:

- a) any regulatory bodies that may require such information for the purposes of providing regulatory consents; or
- b) as required by the execution of a court order by a competent Malawian court.

#### **1.13.8 Addenda**

Any amendments, interpretations or modifications to this RfT will only be made by formal written addenda issued by the SB no later than 7 days prior to the due date for submission of responses.

Each addendum issued will be distributed to all the firms or organisations that have registered with the retrieval/collection of the RfT. All addenda issued will be considered part of the RfT.

### **1.13.9 Requests for Clarifications by Prospective Respondents**

Should prospective respondents be in doubt as to the true meaning or understanding of any part of the Pre-qualification and Request for Information document, they should seek clarification, in writing, from the SB„s designated representative, identified in Section 1.13.6 above.

The SB will respond by email to all requests for clarifications received in the period ending seven (7) days prior to the closing date, and such clarifications shall be distributed to all registered respondents.

The SB will not divulge the identity of the respondent requesting any clarification.

### **1.13.10 Tender language**

All information, data and documents constituting any part of bids shall be in English.

### **1.13.11 Number of copies**

The response documents shall be prepared in one original, two photocopy sets and one set on an USB memory stick of the fully completed RfT response document. The documents shall be marked „Original“ and „Copy“ as appropriate.

### **1.13.12 Format**

Response documents should be submitted in typescript format.

Respondents may reproduce the standard forms which are required to be submitted as per the requirements set out in this document, provided that the wording of these standard forms are not changed in any way, except where these forms provide for the respondents to modify the text to reflect their particulars.

### **1.13.13 Currency of Financial Information**

Except where explicitly stated to the contrary, financial information in respect of company performance submitted by respondents must be submitted in USD, Euro, PDS, or Malawian kwacha

### **1.13.14 Contents and Structure of Response Documents**

Bids shall provide the information set out in Section 1.14 Contents of Bids. Failure to supply information requested, or in the form requested, may result in disqualification of a bid.

### **1.13.15 General and Financial Responses in Separate Envelopes**

Response Documents should be submitted in two envelopes:

- a) Responses to the Sections 2.1 (Letter of Application), 2.2 (Probity), 2.3 (General Company Information), 2.4 (Reference Sites), 2.5 (Technical Information), 2.6 (Commercial Information), and 2.7 (Implementation Timeline) should be on one envelope, labelled “[Bid for the Provision of Solar PV Power Supply to Malawi: Technical Response]”, and
- b) Responses to Section 2.8 (Pricing) should be in a separate envelope, labelled “[Bid for the Provision of Solar PV Power Supply to Malawi: Financial Response]”.

#### **1.13.16 Submission of Response Documents**

At the SB's discretion, the submission date may be extended. Should the SB deem it necessary to grant such an extension an announcement via the same media as the release of this RfT shall be made at least seven (7) days before the submission date.

#### **1.13.17 Delivery of Bids**

Bid documents should be provided in a sealed envelope marked "[**Bid for the Provision of Solar PV Power Supply to Malawi**]" and addressed to the Tender Administrator, at the address given in Clause 1.13.6.

The submission is to be deposited into the SB's tender box located at [ ].

Each copy of each bound file that forms part of the bid documents shall be clearly marked with the name of the respondent.

#### **1.13.18 Opening of Bids**

There will be a public opening of Response documents.

#### **1.13.19 Clarification of the Contents of Bids**

The SB reserves the right to seek clarification from individual bidders on aspects of their bids.

#### **1.13.20 Selected Bids**

The successful bidder(s) will receive notification from the SB with a request to acknowledge. Only companies who acknowledge receipt of the notification and confirm their intention to participate further in the procurement process will be invited to do so.

Unsuccessful respondents will be informed that they have been unsuccessful.

### **1.14 Contents of Bids**

#### **1.14.1 Letter of Application**

All bids shall be accompanied by a signed Letter of Application in the form set out in A.1.

#### **1.14.2 Probity**

All bids shall be accompanied by a signed Covenant of Integrity.

#### **1.14.3 General Company Information**

For each company associated in a bid whether individually or as part of a consortium, joint venture or partnership please provide the following information:

##### **1.14.3.1 Contact Details**

- a) Address to which any correspondence / documentation should be sent:
- b) Company Official to whom any query regarding this questionnaire and related matters should be directed:

#### **1.14.3.2 Organisation Details**

- a) Company Name;
- c) Registered Office;
- d) Registered Number;
- e) A copy of the company registration certificate;
- f) Legal Form of Organisation;
- g) Country of Incorporation;
- h) Date of Incorporation; and

To the extent relevant:

- a) Parent Company Name;
- b) Registered Office of Parent Company;
- c) If part of a Group of Companies, an organisation chart of the group.

#### **1.14.3.3 Financial Details**

- a) A statement is enclosed from your external auditors (or equivalent) certifying that the company is a going concern.
- b) One copy of the audited accounts in English for the last financial year is enclosed.
- c) Confirmation that the company has a liquidity ratio (current assets/current liabilities) of not less than 1.02.
- d) Confirmation that the company has a solidity ratio (equity/total assets) of not less than 0.3.
- e) Please indicate the annual turn-over for the last three years for services/works of a similar nature to your potential supply in this tender.
- f) Evidence is enclosed as to your financial rating as rated by an internationally recognised rating agency or similar evidence of your financial strength and nature of credit standing.
- g) A certificate of good standing from the Malawian Revenue Authority (or equivalent) is enclosed as evidence that your company has fulfilled its obligations in relation to payment of taxes in Malawi (if applicable) and country of registration.

#### **1.14.3.4 Resourcing**

In respect of the organisation carrying out the Works:

- a) Details of the organisation structure;
- b) Details of the management expertise, legal, technical, financial and economic capacity/resources to carry out the Works;
- c) Details of the total manpower resource availability that will be committed to the Project, together with current manpower commitments to demonstrate their ability to carry out the Works. This is to be presented in the form of a histogram showing current and projected work load and available capacity to carry out the Works;

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<sup>2</sup>Financial ratios shall be rounded up to this level of precision.



- d) Information on numbers of appropriately trained qualified and experienced ex-patriate personnel that will be located in Malawi during the provision of the Works;
- e) An indication of the level to which work would be subcontracted or carried out through affiliates or associates;
- f) A statement of the experience and expertise of subcontractors or affiliates in similar services provided.

#### **1.14.3.5 Quality Assurance**

- a) Copies of the certificates of approval for ISO 9000 (or equivalent) and ISO 14001 (or equivalent) quality and environmental assurance systems applicable to the delivery of the Works.
- b) Evidence that all major equipment will satisfy internationally recognised certification such as CE marking, ASME standards, or equivalent requirements.

#### **1.14.3.6 Environmental Performance**

#### **1.14.3.7 Health and Safety**

#### **1.14.3.8 Guarantees**

- a) A statement confirming willingness to offer guarantees to meet delivery schedules and output and to accept liquidated damages for failure to meet the guarantees.

### **1.15 Reference Sites**

Respondents shall provide the following details on not less than two (2) reference sites each with an installed capacity in excess of 10 MW.

- a) Location of site (at a minimum, country, region, nearest city/town);
- b) Site area (m<sup>2</sup>);
- c) Installed capacity (MW);
- d) Supply conditions (kV, Hz);
- e) Fuel (including minimum specification thereof);
- f) Date of installation;
- g) Time from contract signature to completion of commissioning (days);
- h) Hours of operation per month (typical);
- i) Availability of station over operating life;
- j) Generation equipment manufacturer;
- k) Employer (and power off-taker, if different);
- l) Contact details of two representatives that can be contacted at Employer and/or power off-taker (name, position, phone number, email); and
- m) Confirmation that SB staff can visit the site in the twelve (12) week period immediately following submission of the Respondent's response.

## **1.16 Technical Information**

### **1.16.1 Site**

Bidders are to provide the following site information:

- a) Conceptual layout of site, showing location of generators, transformers, switchgear, control room and amenities.
- b) Required site conditions: ground preparation; drainage system; trenching, fencing.
- c) Utilities

Bidders are to provide details of:

- a) Quantities of raw water required and proposed on-site raw water storage and water treatment facilities; and
- d) External power supply required during construction and operation.

### **1.16.2 Generation Equipment and Output**

The bidder shall install PV panels, inverters and other components that meet international standards. In addition the PV panels that meet a minimum performance of [ ] kWh/m<sup>2</sup> per year, assuming the total insolation is not less than [1,800] kWh/m<sup>2</sup>/year

Bidders are to provide:

- a) Manufacturers specifications and performance data including claimed energy output and availability underpinning the offer with detail of assumptions made about
- e) Total solar panel Area (m<sup>2</sup>);
- f) Solar panel yield (%);
- g) Annual average solar radiation on tilted panels; and
- h) Performance ratio, coefficient for losses.
- i) Confirmation the plant will satisfactorily operate in the environmental conditions reasonably envisaged at the sites provided, including a temperature range from 0°C to 45°C.

### **1.16.3 Electrical System**

Bidders are to provide:

- a) A single-line diagram for the installation;
- b) Manufacturer's specifications for transformers, generators and engines;
- c) Manufacturer's specifications for switchgear, protection, monitoring and control.
- d) Confirmation that the electrical system will satisfactorily operate in the environmental conditions reasonably envisaged at the sites provided, including a temperature range from 0°C to 45°C.

#### **1.16.4 Installation Information**

Please identify:

- a) Method of delivery of generation equipment to Malawi site e.g. ship, rail, truck;
- b) Minimum specifications of trucks required for equipment delivery to site;
- c) Specifications of any crane required for installation;
- d) Indicative commissioning regime (MW generated, frequency and duration on in-feed);
- e) Standard connection tests required by supplier.

#### **1.16.5 Environmental Information**

If available, please provide a typical Environmental Management Plan.

#### **1.16.6 Commercial Information**

##### **Commercial Agreements**

The SB anticipates that the minimum contractual arrangements shall consist of a Power Purchase Agreement (PPA) (counterparty SB), a Transmission Connection Agreement (TCA) (counterparty ESCOM), a Land Lease Agreement (LLG) (Counterparty MLHUD) and an Implementation Agreement (IA) (Counterparty Ministry of Finance).

- a) A pro-forma form of contract for the PPA is attached
- b) A pro-forma form of contract for the TCA is attached. To this contract would be appended a formal Offer Letter from ESCOM setting out site-specific requirements for connection to the Malawian grid.
- c) A pro-forma form of contract for the LLA is attached.
- d) A pro-forma form of contract for the IA is attached.

Bidders are requested to provide, by mark-up or otherwise, an indication of changes that they would seek to the standard terms and conditions set out in these pro-forma agreements.

General issues for which the SB seeks comment from bidders are:

- a) The acceptability of English Law as governing any contract awarded;
- b) The nature of insurance cover proposed or held for equipment delivery and during operations;
- c) The acceptability of dispute resolution Specific values in the PPA for which the SB is seeking a proposal from the Bidder are:
- d) Delay liquidated damages ;
- e) the aggregate Delay Liquidated Damages ;
- f) the threshold for application of any Change in Cost remedy and the cost elements that should be considered;
- g) the Indemnity cap.

### **1.16.7 Government Support**

Bidders must identify any requirements for governmental support not identified in the pro-forma IA, or which are identified in the IA but are not required by the bidder. Bidders are advised to minimise any GoM support required.

### **1.16.8 Implementation Timeline**

### **1.16.9 Pricing**

Bidders are required to provide a firm bid for power pricing. Pricing should be on the basis of the operating regime as set out in Section 1.16.2 above.

Prices should be valid until [ ].

### **1.16.10 Tariff Structure**

Bidders should present the proposed pricing in accordance with Annexure C of the pro-forma PPA.

- a) Energy Payment
- b) Transmission use of System Payment
- c) Levies

### **1.16.11 Tariff Escalation**

The bidder should consider and comment on the proposed mechanism for price escalation in Annexure C of the pro-forma PPA.

The tariffs will only escalate once per year, to coincide with annual tariff increases granted by MERA.

### **1.17 Additional Information**

Please provide any further information that you consider relevant to the evaluation of your bid.

### **1.18 Evaluation Criteria and Methodology**

The relative weighting for the purposes of evaluating bids shall be:

- a) Weighting for technical evaluation: 70%
- b) Weighting for financial evaluation: 30%.

Bids shall be assessed as follows.

#### **1.18.1 Step 1: Mandatory Requirements and Fatal Floor Evaluation**

Any bid that fails to meet the following mandatory requirements shall be discarded. Each item listed in this section 1.13.1 constitutes a mandatory requirement, and all such requirements must be met.

The SB reserves the right to waive minor deviations, if they do not materially affect the capability of a respondent to perform the contract. In general subcontractors' experience and resources shall be taken into account in determining the respondent's compliance with the qualifying criteria.

If the SB becomes aware that any of the information provided by a bidder is deliberately false, incomplete or misleading, then it shall be grounds for the bid to be discarded.

#### **1.18.1.1 Compliance with Tender**

The bid documents include:

- a) A valid executed copy of the Letter of Application;
- b) A valid executed copy of the Covenant of Integrity;
- c) A copy of the bidder's company registration certificate;
- d) A copy of the bidder's audited accounts in English for the last financial year.

#### **1.18.1.2 Corporate Viability**

- a) The bidder must provide a commitment that it accepts sole contract liability or if a consortium, it includes a service provider with the ability which accepts joint and several contract liability;
- b) Where a bidder is dependent on another company (e.g. parent company) to meet financial commitments the bidder includes a copy of evidence of the agreement of the other company to provide financial support to the bidder;
- c) The bidder accepting contract liability has a liquidity ratio (current assets/current liabilities) of not less than 1.0;
- d) The bidder accepting contract liability has a solidity ratio (equity/total assets) of not less than 0.3;
- e) The bidder accepts joint and several liability with suppliers of other services required to implement and operate the power supply;
- f) Confirmation that the bidder is willing to conduct all business in English and to provide all documents in the English language.

#### **1.18.1.3 Reference Sites**

Details of at least two (2) similar projects with installed capacity of not less than 10 MW performed by your company or consortium in the last five (5) years, and which can be visited by the SB.

#### **1.18.2 Step 2: Technical Evaluation**

The technical details of the bids shall be evaluated as follows:

Criteria	Comment	Maximum score
Experience and Expertise	Preference will be given to bidders able to demonstrate successful implementation in sub-Saharan Africa, and less to remote implementation experience.	[30]
Site	Proposals for each site shall be assessed separately for the detail and adequacy of site layout and information provided.	[10]
Implementation Timetable	Where assessed to be credible, faster implementation timelines will be preferred.	[30]
Environmental Approvals	Preference shall be given to bids for which the environmental approval process is adjudged to be more rapid.	[10]
Extent of Governmental Support Required	Preference shall be given to bids that require less explicit support from the Government.	[20]

### 1.18.3 Step 3: Calculation of Financial Score

The tariffs (including transmission UOS charges and levies) shall be used to determine a levelised unit cost of electricity (LCOE) on the basis of a range of potential dispatch scenarios.

The LOCE values of each bid shall be ranked and the minimum LCOE bid value determined. The score for each bid shall then be determined where the lowest LCOE value is allocated 30 points, and other bids are scored proportionally.

### 1.18.4 Step 4: Composite Score

The composite score for each bid shall be determined by site. The SB reserves the right to select any combination of bidders and sites.

## A.1 Form of Letter of Application

*[Letterhead of the Respondent, or partner responsible for a joint venture, including full postal address, telephone no., fax no., and e-mail address]*

Date: *[insert date]*

To:

ESCOM SB

*[address]*

Attention:

Dear Sir/Madam,

### **Request for Tender: Power Supply for Malawi**

1. Being duly authorised to represent and act on behalf of *[insert name]* (hereinafter referred to as “the Respondent”), and having reviewed and fully understood all the information provided in the Request for Tender (RfT), the undersigned hereby submit the following bid for the design, supply, operation, maintenance, decommissioning and removal of a [Solar PV Power Supply Project] for Malawi.
2. The SB and its authorised representatives are hereby authorised to conduct any inquiries or investigations to verify the statements, documents, and information submitted in connection with this bid, and to seek clarification from our clients regarding any financial and technical aspects. This Letter of Application will also serve as authorisation to any individual or authorised representative of any institution referred to in our supporting information, to provide such information deemed necessary and requested by yourselves to verify statements and information provided in this application, or with regard to resources, experience, and competence of the respondent.
3. The SB and its authorised representatives may contact the following persons for further information: *[insert names and details]*
4. The application is made with full understanding that:
  - the evaluation of the bid may be based only on the information submitted;
  - only the firms or joint ventures selected on the basis of this RfT will be invited to finalise the terms and conditions for the implementation of a Power Supply Project for Malawi; and
  - the SB reserves the right to reject any bid in the event that it is unable to establish contractual conditions of supply satisfactory to the SB

5 <sup>Note 1</sup> Appended to this application we give details of the participation of each party, including the professional input, profit/loss agreements, and the liability to the joint venture or association. We also specify on a preliminary basis the commitment in terms of percentage of the input value of each party.

6. <sup>Note 2</sup> We confirm that in the event that we further participate in the procurement process, any submission as well as any resulting contract will be:
- signed as to legally bind all partners, jointly and severally, and
  - submitted with a joint venture agreement providing the joint and several liability of all partners in the event the contract is awarded to us.
7. The undersigned declare[s] that the statements made and the information provided in the duly completed and signed application (including the forms and attachments thereto) are complete, true, and correct in every detail.

For and behalf of: *[insert name of Respondent]*

Name: *[insert name with company stamp]*

Signed: *[signature]*

For and behalf of: *[insert name of Partner(s)]*

Name: *[insert name with company stamp(s)]*

Signed: *[signature(s)]*

*[Note 1: Respondents who are not joint ventures should delete the paragraphs number 5 and 6 and the partner signatures in their Letter of Application.]*

Form of Covenant of Integrity

*[Letterhead of the Respondent, or partner responsible for a joint venture, including full postal address, telephone no., fax no., and e-mail address]*

Date: *[insert date]*

To:

ESCOM SB

*[ address]*

Attention

Dear Sir/Madam,

**Covenant of Integrity:  
Power Supply for Malawi**

We declare and covenant that neither we nor anyone, including any of our directors, employees or agents, acting on our behalf with due authority or with our knowledge or consent, or facilitated by us, has engaged, or will engage, in any Prohibited Practice (as defined below) in connection with the tendering process or in the execution or supply of any works, goods or services for the [Solar PV Power Supply Project] (the "Contract" ) and covenant to so inform you if any instance of any such



Prohibited Practice shall come to the attention of any person in our organisation having responsibility for ensuring compliance with this Covenant.

"Prohibited Practice" means:

- (i) the offering, giving, receiving, or soliciting of anything of value to influence the action of a public official, or the threatening of injury to person, property or reputation, in connection with the procurement process or in contract execution in order to obtain or retain business or other improper advantage in the conduct of business; or
- (ii) a misrepresentation of facts in order to influence a procurement process or the execution of a contract to the detriment of the client, and includes collusive practices among tenderers (prior to or after tender submission) designed to establish tender prices at artificial, non-competitive levels and to deprive the client of the benefits of free and open competition.

We shall, for the duration of the tender process and, if we are successful in our tender, for the duration of the Contract, appoint and maintain in office an officer, who shall be a person reasonably satisfactory to you and to whom you shall have full and immediate access, having the duty, and the necessary powers, to ensure compliance with this Covenant.

If:

- (i) we have been, or any such director, employee or agent acting as aforesaid has been, convicted in any court of any offence involving a Prohibited Practice in connection with any tendering process or provision of works, goods or services during the five years immediately preceding the date of this Covenant, or
- (ii) any such director, employee or agent has been dismissed or has resigned from any employment on the grounds of being implicated in any Prohibited Practice,
- (iii) we give details of that conviction, dismissal or resignation below, together with details of the measures that we have taken, or shall take, to ensure that neither this company nor any of our directors, employees or agents commits any Prohibited Practice in connection with the Contract.

*[Give details if necessary].*

In the event that we are awarded the Contract, we grant the SB and auditors appointed by them, as well as any authority having competence under Malawian law, the right of inspection of our records. We accept to preserve these records generally in accordance with applicable law but in any case for at least six years from the date of substantial performance of the Contract.

For and behalf of: *[insert name of Respondent]*

Name: *[insert name with company stamp]*

Signed: *[signature]*

## **Annexure C: IPP Framework Due Diligence and Risk Assessment**

### **1.19 Introduction**

It is important that the ESCOM and the ESCOM SB (SB) is not embarrassed or its credibility undermined by having advanced contractual discussions with an inappropriate party. The intention of the due diligence is to provide, and continue to provide, the SB with sufficient assurance that the developer and relevant stakeholders are of good character and financially and technically capable of completing the project in its proposed form.

Consequently the SB is establishing a due diligence process to assess proposals by independent power producers (IPPs) to develop new generation projects and sell power to the SB. ESCOM's roles in such project, if they proceed, are as:

- 1) SB/Power purchaser; and
- 2) Transmission services provider.

### **1.20 Purpose**

The due diligence process is designed to assist decision making by assessing the potential risk of conducting business with a particular party. The purpose of the due diligence and risk assessment process is to make an objective assessment of the likelihood of the developer and associated parties being a reasonable party for ESCOM to deal with from an ethical, legal, financial and technical perspective.

The due diligence process mainly focuses on the integrity and reputational aspects of contracting with an IPP developer. The result of the due diligence will be a view by ESCOM of the risk it faces in entering into further discussions with the developer. If, in ESCOM's view, the risk of involvement with the developer is high then ESCOM may decline to continue discussions. Alternatively, ESCOM may determine that the developer represents an acceptable risk but may require further assurance or checks before it ultimately considers contracting with the developer.

It is important to remember that the due diligence is only the first step in determining if ESCOM will contract with the developer. The due diligence process will continue in some form throughout the period that the SB is evaluating the IPP proposal and negotiating with the prospective developer. The SB will have an opportunity to protect itself against various contractual problems through the contracts and the due diligence process is not intended to provide a full evaluation of the project itself or against other projects. The detailed project evaluation will only proceed if the developer progresses past the due diligence assessment.

**The due diligence is not a full evaluation of the IPP proposal and a positive outcome from the due diligence process does not necessarily mean that ESCOM will contract with the developer.**

### **1.21 Due Diligence Process**

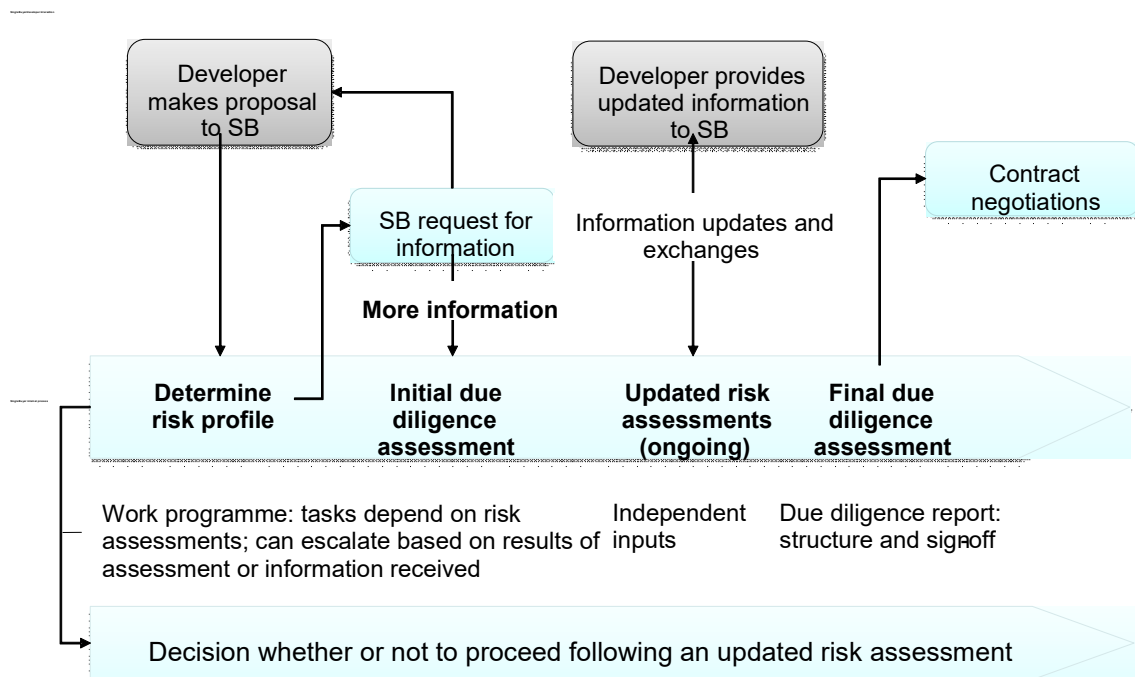
The due diligence process is ongoing but there are two key points in the process:

- 1) an initial due diligence, carried out when the proposal is in its feasibility stage; and
- 2) a final due diligence which, if the proposal meets all ESCOM's due diligence criteria, is carried out immediately prior to entering into PPA negotiations.

The process is illustrated below, where there are ongoing processes of:

- 1) Application by developer
- 2) Initial Risk profile determination by ESCOM
- 3) Information gathering by ESCOM and exchanges of updated information between ESCOM and the developer;
- 4) ESCOM regularly updates its risk assessment based on results of testing or information received;
- 5) Each risk assessment by ESCOM gives rise to a work programme that focuses on areas most at-risk and independent inputs are obtained as required;
- 6) Following each updated risk assessment, ESCOM may make a decision on whether or not to continue with the developer's project.

### Due Diligence and Risk Assessment Framework



If the project passes all risk assessments, ESCOM will produce a (final) due diligence report which will be signed off by management and the ESCOM Board of Directors before proceeding to contract negotiations with the developer.

The due diligence work program and reporting should be the responsibility of an evaluation team headed by a senior manager. The evaluation team should have sufficient expertise to assess the risk areas identified. Where the team does not have sufficient expertise, independent opinions should be sought and the evaluation team should have sufficient expertise to evaluate the independent advice.

## 1.22 Determine Risk Profile

The idea of the development of an initial risk profile by ESCOM is that it determines the level of due diligence that should be undertaken. If a developer and development is determined to be low risk then a lower level of due diligence will be required to form an opinion about the suitability of that party to contract or otherwise with ESCOM.

Once the result of the risk assessment is determined then the work due diligence programme must be equivalent or greater than that set down for that risk category. The risk assessment might ultimately result in an IPP proponent being deemed to be a lower risk than initially thought but the due diligence work programme cannot be less than that set down for the original risk classification.

In assessing the risk profile, we consider the risk to ESCOM of involvement with the developer, other stakeholders and the project. The key criteria we assess are:

- Stakeholder suitability
- Financial Risk
- Project Profile
- Technical Risk

ESCOM has developed a risk assessment approach based on the four categories above. In the table below draft categories for assessing the initial risk and the basis for allocating risk scoring to the IPP proponents are outlined. After this exercise is carried out the risk score is added up and a due diligence programme developed to match the perceived risk.

The outcome of the risk assessment is that the party is of low, medium, high or very high risk and the testing regime will be as set out in the table below.

Risk	
Low	We expect this party to be a reasonable counter party. Due diligence level is low PROVIDED no red flags emerge
Medium	We have some concerns about aspects of this party or project. A detailed due diligence is carried out to try to determine if there are any issues/red flags.
High	This is a risky party or project. We will carry out extensive due diligence and will need an extremely positive result to consider working with this counterparty
Very High	This party/project has a very high probability of causing problems for us. We will not get involved with this party at this stage.

If the result of a particular due diligence test is negative then this should be recorded and additional enquires/tests should be carried out to see if these results mitigate the findings of the test.

The following template is the risk profiling tool developed for ESCOM's due diligence of potential IPP developers. The output from the risk profiling results in a risk score.

The risk score will determine which due diligence procedures should be carried out according to the table below.

### Total Risk Score

Any 3 scores of 10 means developer is **rejected** for now

Any score of 10 in any test means we apply **high risk** due diligence procedures




Any total score of >20 means we apply **high risk** due diligence procedures

A total score from 15-20 means we can apply **medium risk** due diligence procedures

A total score < 15 means we can apply **low risk** due diligence procedures

Risk Profiling Model Template					
Risk Assessment					
Developer has applied to ESCOM/SB					
	Risk				
Assessment	Low	Med	High	V High	
Quantitative	1	2	4	10	
Stakeholder					
Developer/corporate entity					
Standing					
					Low
					Med
					High
					V High
Major company Main stream experienced generation (incl. the type proposed) developer, good profile					
Minor company Main stream experienced generation (incl. the type proposed) developer or major company low generation (incl. the type proposed) experience, some significant regional project, good profile					
Some experience in generation (incl. the type proposed), no significant regional project					
Never developed generation (incl. the type proposed) before					
Key Personnel					
					Low
					Med
					High
					V High
Experienced, No problematic Political connections, No Relevant Personal Issues					
Some Experience, No problematic Political connections, No Relevant Personal Issues					
No Experience, No problematic Political connections, No Relevant Personal Issues					
No Experience, problematic Political connections, Significant Relevant Personal Issues					

Shareholding	<div><div></div><div></div><div></div><div></div></div>	Low	Listed /simple/transparent
		Med	Listed /complex/transparent
		High	Private /simple/opaque/potential conflict of interest
		V High	Private and or small/complex/Opaque/political investors/potential conflict of interest
Financial			
Size of Project \$m	<div><div></div><div></div><div></div><div></div></div>		USD m
		Low	<10
		Med	10-50
		High	50-200
		V High	> 200
Size of Project \$m cf. company size	<div><div></div><div></div><div></div><div></div></div>		compared to size of counterparty
		Low	<5%
		Med	5-50
		High	50-100
		V High	>100%
Counterparty \$	<div><div></div><div></div><div></div><div></div></div>		
		Low	Major Company, Investment grade+ rating
		Med	Significant Company or small company Investment grade+ rating or Major company no rating

		<u>High</u> <u>V High</u>	Small company or significant company with no rating Individual
Counterparty Public Measures of Certified Credibility		<u>Med</u> <u>High</u>	external certification on best practices without certification
<b>Project Public Profile</b>			
Environment/Public Perception/Location		<u>Low</u> <u>Med</u> <u>High</u> <u>V High</u>	Green project/low controversy/easy location Neutral project/some controversy/easy location Polluting project/some controversy/easy location /high controversy & low pollutant Polluting project/high controversy/city or environmental location
<b>Technical</b>			
Type of Generation Plant and site/plant mix		<u>Low</u> <u>Med</u> <u>High</u> <u>V High</u>	Proven technology/international & regional examples Proven technology/regional or international examples Unproven technology/successful pilot plants Unproven technology/1st time



## Size of Generation Plant



MW

**Low**

<10

**Med**

10-100

**High**

100-250

**V High**

> 250

### **1.23 ESCOM Request for Information**

The project developer shall provide ESCOM with the documents identified in the risk assessment and may include:

- Pre-feasibility and feasibility studies of the project carried out by or for the developer;
- All draft project contracts between the developer and its technical advisers, suppliers, contractors and any other relevant parties;
- Drafts of any documents relating to funding arrangements made by the developer for the project;
- Developer's (and any other participants') financial accounts and shareholder details;
- Techno-economic and bank/funding models prepared by or for the developer to evaluate the project; and
- Any other reports, technical and background studies prepared by or for the developer relating to the project.

Where the developer is required to provide to ESCOM a contract or document, if the contract or document has yet to be finalised ESCOM requires the most recent draft of the contract or document and the developer's expectation of the final form of that contract or document. The developer will be required to keep ESCOM informed as to the conduct of ongoing contract negotiations and updating of documents.

The information provided should cover the key areas outlined in Section 1.6 below.

At the close of this initial evaluation, ESCOM will select a preliminary short list made up of the most attractive proposals. These selected proposals will move on to the second phase of the evaluation process for portfolio evaluation and additional due diligence based on the same five primary criteria. The portfolio evaluation is designed to assess the interaction and risk levels of the most promising resources and

Those proposals which provide the greatest benefit to ESCOM's supply portfolio will be placed on the final short list for further discussion with the respondent(s). Such proposals may potentially move forward to negotiations of the terms and conditions of Definitive Agreements.

During this process ESCOM will update its economic and risk evaluation on an ongoing basis until ESCOM and the respondent might execute Definitive Agreements.

### **1.24 Due Diligence Assessment: Procedures and Red Flags**

For the first phase of the evaluation, ESCOM will evaluate the completeness of the information in order to determine whether the information received is of sufficient quality to allow a detailed evaluation to be carried out. ESCOM will examine the information provided to determine whether they are complete, and whether all information requested has been provided and all documents have been signed off.

Due diligence procedures will be carried out to determine if there are any reasons that ESCOM should not engage in potential contract discussions with an IPP

developer applicant. After the risk assessment described above the due diligence procedures should be selected. The procedures are then carried out with the officer carrying out the due diligence looking for red flags.

### **1.24.1 Procedures**

The following are recommended due diligence procedures to be carried out on prospective IPP developers. The procedures represent those due diligence procedures which should be carried out for every application to ESCOM plus additional procedures which should be employed if the risk profile determines the developer has a greater risk profile than the minimum (low).

The Due Diligences Procedures Table which follows the list of procedures provides a guide on which procedures should be carried out for different risk assessments.

### **1.24.2 Stakeholder Suitability**

In the due diligence of a particular proposal and its developer, the most important aspect is the suitability of the stakeholder (developer/project party/consortium) and their project as a counterparty with ESCOM. Consequently, the most effort should be spent on determining the suitability of that stakeholder/developer group.

Some or all of the following topics should be considered:

- Qualifications, corporate membership of professional bodies: Verify authenticity from issuing body and if necessary cases verify authenticity of the issuing body itself, e.g. is there a qualifying requirement or does the member simply pay a joining fee for membership? Does the organisation exist as a registered place of study?
- Business references: Obtain independent confirmation concerning the potential associate's effectiveness, reputation, government or political relationships and integrity. If the potential associate has provided written references, verification should be obtained directly from the referee.
- Management skills and integrity should be assessed: Is the developer experienced in the technology and business and are they regarded as trustworthy.
- Official registry of organisations: Check ownership of companies etc., directorships, accounts and other relevant official documentation.
- Electoral records, local government business records, etc.: Verify the associate is recorded at the address given.
- Criminal records: Check records for associate company and key management personnel or individual (if legally permissible in the country concerned).
- Court judgments: Check associate company and key management personnel or individual.
- Debarred or restricted parties lists: Check to see that the prospective associate or individual does not appear on any local, national or international listing of restricted parties or of organisations debarred from bidding (e.g. World Bank).
- Media search: The use of free and/or subscription databases to research the associate or an individual is recommended. If the associate or individual has a

website, this should be examined, as should useful government sites such as anti-cartel or anti-fraud, etc.

- Local legal advice: If in-house advice is not available, a reputable local legal firm should be engaged to provide advice regarding the laws governing the relationship between the principal and the associate in the particular country concerned. Local attorneys can often assist in verification of local corporate registrations, or criminal or civil court records. Since this may result in considerable expense to the company, careful instructions and limitations of the scope of the work should be agreed in advance.
- Field work: Some information regarding associates may only be discovered via discreet and sensitive research carried out by qualified professionals. Considerable caution needs to be exercised when using others to conduct this research since it must be carried out ethically and legally. This may also result in considerable expense to the company. Careful instructions and limitations of the scope of the work should be agreed in advance.
- Does the developer and associated parties have adequate anti-corruption policies in place (management and Board members signed up to anti-corruption policies, transparent public tendering procurement processes, etc.)?

#### **1.24.3 Financial Risk**

- Financial references: If audited financial records for the previous two years are not available, a third party financial referee may be requested to state the length of the relationship and provide an opinion of reliability, financial capabilities and probity.
- Credit rating: It is recommended that one of the reputable commercial sources be utilised (depending on the country involved) to check the credit rating for the associate or individual.
- Litigation search, to see if any action is being taken against the business or its key personnel
- Review of size and term of long term liabilities and extent of contingent liabilities
- How much have the key personnel personally invested (\$, % of total funds invested)?

#### **1.24.4 Project Profile**

- Media Search: The results of a press search (including internet) linking Company (and associates and key personnel) and environment (specifically) and public consultation processes, and specific projects.
- Reference Site reviews: Contact stakeholders in reference sites to assess how well potential party managed stakeholder affairs particularly environmental affairs and public relations
- Debarred or restricted parties lists: Check to see that the prospective associate or individual does not appear on any local, national or international listing of restricted parties because of:

- Activities involving harmful or exploitative forms of forced labour/harmful child labour, discriminatory practices, or practices which prevent employees from lawfully exercising their rights of association and collective bargaining.
- Activities prohibited by host country legislation or international conventions relating to the protection of biodiversity resources or cultural heritage
- Shipment of oil or other hazardous substances in tankers which do not comply with IMO requirements
- Media search for publicity concerning:
- Activities within, adjacent to, or upstream of land occupied by indigenous peoples and/or vulnerable groups including lands and watercourses used for subsistence activities such as livestock grazing, hunting, or fishing
- Activities within, adjacent to, or upstream of designated protected areas under national law or international conventions, sites of scientific interest, habitats of rare/endangered species, fisheries of economic importance, and primary/old growth forests of ecological significance
- Activities which may affect adversely sites of cultural or archaeological significance
- Activities involving involuntary resettlement
- Mitigation and Communication Plans: What stakeholder communication and issue mitigation plans do the developers have? If development has a high probability of causing concern amongst environmental or other public stakeholder groups this is critical.

#### **1.24.5 Technical Risk**

- If ESCOM is experienced with this technology then assign technical expert to review proposal and reference site information to determine whether technology and use of technology is “mainstream” or alternative. If ESCOM is not experienced with the technology then an independent view should be sought.
- Reference Site reviews: Contact stakeholders in reference sites to assess the technical aspects of the power station development addressing particularly: completion time, capacity, and availability/reliability.

The following table gives an example of the testing required for different initial risk assessments.

Due Diligence Procedures:				
	Low Risk	Med Risk	High Risk	V High Risk
Stakeholder suitability	Representation and warranty letter from Management and Board Minimum Internet search for information & news For a Malawian company check company articles of association			Reject Applicant for now
		Reference checking of credible parties including auditors etc. Review relevant project experience Review partner credibility Key personnel references		
		Formal comprehensive (independent?) report		
Financial Risk	Representation letter from Management and Board			
		Additional information about financing or financing partners		
		Due diligence on financial partners		

<b>Project Profile</b>	<div>Environmental/Public policy statement from Management and Board</div> <div>High level value chain assessment of environmental risks</div> <div>Mitigation plans</div>	
<b>Technical Risk</b>	<div>Representations and reference sites from management/board</div> <div>Review all references at specific Site</div> <div>If a small plant what is the R&amp;D/pilot project status</div>	

### 1.24.6 Red Flags

“Red flags” are results from due diligence procedures which raise questions. Red flags need to be documented and the recommended action recorded and followed up. A red flag may be a specific problem or simply a result or set of results which doesn’t seem right. The results of a red flag will either be further activity to clear the flag or ultimately an opinion on the effect of the red flag on the suitability of the IPP developer as a potential contracting party with ESCOM.

### 1.24.7 Red Flag Examples

The following are some examples of red flags which should raise concerns for the officer (s) carrying out the due diligence enquiries.

- A public official holds company shares or other interests in the company in ***his own right***.
- A foreign official has recommended the applicant, particularly if that official has discretionary authority over the business at issue.
- An officer, senior executive or key employee of the company has an interest in another company that might be considered a competitor.
- An officer, senior executive or key employee of the company is related to an officer, senior executive or key employee of a company that might be considered a competitor.
- There are uncertainties in the business or financial references.
- The normal terms of business quoted by the company or individual differ to a material extent to local business terms and conditions.
- Payment instructions quoted by the company or individual include split payments, payments to an apparently unrelated third party, or to a bank account in an off shore tax regime.
- The company auditors have qualified the accounts produced by the applicant for reasons that are relevant to the application.
- There has been a criminal conviction of a current employee of the company for bribery, corruption or a similar criminal offence, or a civil action regarding bribery or corruption has been unsuccessfully defended by the company.
- There is a current or outstanding criminal case regarding bribery, corruption or a similar criminal offence, or a current or outstanding civil action regarding bribery or corruption, against a current employee of the company.
- The company or individual discloses previous involvement in insolvency proceedings.
- There is a significant difference between the remuneration rate quoted by the company or individual and local market rates for similar goods or services.



- The applicant advises that he is unable to sign a commitment to abide by all local and international laws regarding bribery and corruption or he is unable to sign a commitment that he cannot abide by the principal's business ethics policy.
- The applicant requires that his identity, or if the applicant is a company, the identity of the directors, owners or employees, not be disclosed.
- Qualifications claimed by the company or individual are denied by the issuing body.
- The issuing body for the claimed qualifications is not a bona fide educational establishment or professional body, e.g. the company or individual can simply purchase the qualification without sitting examinations or proving standards of competency.
- The applicant is found to have had little or no experience in the industry concerned.
- There are significant variances between the written business references and the interview of the referees.
- Financial referees express reservations regarding the financial probity of the company or individual in question.
- Due diligence reveals, that the applicant is a shell company or has some other unorthodox corporate structure.
- The records from the official registry of companies do not agree with the information given by the applicant regarding ownership of the company, directorships or details in any of the other required official documentation filed regarding the organisation.
- The company or its immediate or ultimate holding company are registered in an off shore tax haven renowned for its lack of corporate or banking transparency.
- The owners and/or directors of the company are discovered to be nominees and the applicant refuses to disclose the real owners/directors.
- Electoral or local business records show a different location for the company or individual.
- An official body advises a criminal conviction and this conviction has not been disclosed by the individual. (Note: This information is not legally available in all jurisdictions).
- Official checks reveal a criminal conviction for bribery, corruption or a similar offence, or a civil action where the company or individual has unsuccessfully defended their actions and the applicant has not disclosed this case.

- Official checks reveal a current or outstanding criminal case involving bribery, corruption or a similar offence, or a current or outstanding civil action, which has not been disclosed by the applicant.
- A reputable credit agency has provided a poor credit rating on the company or individual or has advised previous liquidity problems not disclosed by the applicant.
- The individual or company appears on a list of those debarred from bidding on local, national or international contracts.
- Media searches reveal potentially damaging information regarding the applicant.
- Research work uncovers close associations with local or national politicians, potential competitors, criminal or political activists, etc.

## **1.25 Due diligence reports**

### **1.25.1 Due diligence opinion**

This is the opinion of the manager responsible for the due diligence work signing off their opinion on the suitability or otherwise of the IPP proponent as a business partner. The opinion should also be signed off by the [Managing Director or Board of Directors?] indicating agreement (or otherwise) with the opinion.

The due diligence opinion should state that:

- Based on the work performed;
- The opinion of the due diligence manager is either:
  - Satisfied that the IPP proponent and project meet ESCOM's criteria for a potential PPA; or
  - Not satisfied that the IPP proponent and project meet ESCOM's criteria for a potential PPA and the following additional evidence would be required to change that opinion:
- That the due diligence is ongoing;
- That the due diligence is not an evaluation of the project feasibility

### **1.25.2 IPP Description**

This section should describe the project under the following categories:

- The generation project: power station type, fuel type, location, MW, approximate cost
- The generation stakeholders: Ownership structure, EPC, OEM, Financier, other important stakeholders

### **1.25.3 A Summary of the work performed**

This summary should include all the information obtained and the findings of the review of that information. This section should include the following:

- Risk Assessment: level and rationale
- Primary Due Diligence Assessment: procedures, tests and results highlighting:
  - “Red flags”; and
  - Any omissions, rationale and alternative test carried out
- Any follow up due diligences work carried out: tests and results
- Any recommendations

### **1.26 Information Checklist for Diligence and Risk Assessment**

It indicates the type of information (project and company related) that should be provided by the developer to enable ESCOM to assess its involvement and role in the project.

No	Topic	Level of information required (project /developer specific)	Detail	Information available and provided for verification and analysis (√)
a)	<b>General information on the developer and other participants in the project</b>	<b>Developer</b>	<ul style="list-style-type: none"> <li>• Provide company profile including history and strategy</li> <li>• Ownership (major shareholding)</li> <li>• Confirm entities legal status,</li> <li>• Provide all relevant company information, memo and articles of association (including parent/holding company)</li> <li>• Provide details of corporate structure</li> <li>• Board of Directors profile</li> <li>• Contact details of key management</li> <li>• Professional history of key management</li> <li>• Other ownership or interest held by the counterparty, or key management or family</li> <li>• Describe the proposed or existing company in case of SPV, its capital structure, land ownership details, nature of major activities, audited financial statements for the past five years or certified management accounts, bank references, etc.;</li> <li>• Financial evaluation of strength of developer, sponsor</li> <li>• Confirm whether the sponsors has the financial and resource capacity to deliver the project</li> <li>• Provide prior and current projects background, role, nature of involvement and result</li> </ul>	

No	Topic	Level of information required (project /developer specific)	Detail	Information available and provided for verification and analysis (√)
	<b>Business / Financial References</b>	<b>Developer</b>	<ul style="list-style-type: none"> <li>• Provide at least two references from a reputable company who has done business with your company</li> <li>• Provide reference from a reputable financier who has provided finance to your company</li> <li>• Please indicate if you have any objection in ESCOM contacting referee</li> </ul>	
<b>b)</b>	<b>Commercial Aspects</b>	<b>Project</b>	<ul style="list-style-type: none"> <li>• Provide production forecasts;</li> <li>• Provide detailed price structure, subsidies, rebates, import regulations, governmental involvement, etc.</li> </ul>	
<b>c)</b>	<b>Technical Aspects</b>	<b>Project and Developer</b>	<ul style="list-style-type: none"> <li>• Provide information supporting the technical feasibility of the proposal including independent engineers/technical experts reports</li> <li>• Grid code compliance, site investigations, strategies and programs, resource assessment, O &amp; M policy, health &amp; safety and decommissioning</li> <li>• Provide details on technical, construction or other aspects of putting together the project, including the technical process, conceptual design and layout, the basis for its selection, suitability, relative costs, describe processes, rated capacity and anticipated output; and</li> <li>• The envisaged detailed and/or existing key contractual arrangements.</li> </ul>	

No	Topic	Level of information required (project /developer specific)	Detail	Information available and provided for verification and analysis (√)
			<ul style="list-style-type: none"> <li>• Technical history of the applicant's experience with this technology including three reference sites and referee reports</li> <li>• Please indicate if you have any objection in ESCOM contacting referee</li> </ul>	
d)	Infrastructure	Project and Developer	<ul style="list-style-type: none"> <li>• Provision of an overview of the adequacy and cost of power, communication, water and other utilities, as well as transportation facilities, including an estimation of possible installation delays</li> </ul>	
e)	Environmental Aspects	Project	<ul style="list-style-type: none"> <li>• A detailed description of the project's effect on the physical and social environment; including the possible requirements of resettlements of communities, as well as what project sponsors are doing to mitigate these effects; waste disposal systems. etc.</li> <li>• EIA's and records of decision</li> <li>• Environmental management plans</li> <li>• Application for carbon credits.</li> </ul>	
f)	Organizational structure of project vehicle	Project	<ul style="list-style-type: none"> <li>• Provide the project's description and rationale;</li> <li>• Structure of the project vehicle, management structures, equity participation, etc. Board, Management and key operational units;</li> <li>• Information regarding the organization of the project construction and supervision, the determination and negotiation of cost, and the construction schedule;</li> <li>• Details of technical assistance or management contracts or other agreements;</li> </ul>	

No	Topic	Level of information required (project /developer specific)	Detail	Information available and provided for verification and analysis (√)
			<ul style="list-style-type: none"> <li>Information regarding the availability of appropriately skilled workers who will be directly involved on the project etc.</li> </ul>	
g)	<b>Government's role, taxation, regulation, insurance, special incentives, etc.</b>	<b>Project</b>	<ul style="list-style-type: none"> <li>Description of Government's role in the project, whether direct or indirect, as well as what the licenses, servitudes, permits and certificates are required and their current status;</li> <li>Indicate whether there are any investment incentives or privileges accorded to the project and any support for the project;</li> </ul>	
h)	<b>Project Investment Cost and Financing Plan</b>	<b>Project</b>	<ul style="list-style-type: none"> <li>Capital cost estimates, including land, buildings, earthworks, machinery, equipment, licensing, permanent working capital, interest during construction, and contingencies, allocate cost according to local and foreign currency requirements;</li> <li>The financing plan, including details of current shareholding structure, envisaged source of loan funds and loan conditions; and</li> <li>Proposed financing from [ ] including the anticipated disbursement schedule and rationale.</li> </ul>	
i)	<b>Financial and Economic Evaluation</b>	<b>Project</b>	<ul style="list-style-type: none"> <li>Projection of output, revenues, cost and profits at least for the duration of the PPA (<i>cost items should include raw materials, labour, power and other utilities, repair and maintenance, administration expenses, sales expenses, depreciation, taxes, etc.</i>);</li> <li>Complete financial evaluation of the project including computation of financial internal rate of return, profit and loss, balance sheet</li> </ul>	

No	Topic	Level of information required (project /developer specific)	Detail	Information available and provided for verification and analysis (√)
			<p>and cash flow for duration of the project, along with detailed assumptions; and</p> <ul style="list-style-type: none"> <li>Economic evaluation of the project, calculating the economic rate of return and stating the assumptions used ( substantiation of inputs and assumptions, sensitivities, key value drivers, areas of risk, CAPEX, OPEX and forecast revenue(s))</li> </ul>	
j)	<b>Risk and Safeguards</b>	<b>Project</b>	<ul style="list-style-type: none"> <li>Assessment of the risks involved in carrying out the project, including environmental considerations, regulation, construction, cost overruns, technology, schedule delays, government, and other factors, and proposed mitigation measures.</li> </ul>	
k)	<b>Management Representation</b>	<b>Developer</b>	<ul style="list-style-type: none"> <li>Please provide a letter indicating: <ul style="list-style-type: none"> <li>That the management understand what the due diligence is for and why ESCOM is doing it</li> <li>Details of any involvement by the business or member of management in any insolvency proceedings (whether current, past or future)</li> <li>Details of any involvement by the business or member of management in any criminal investigations or civil litigation</li> <li>Details of any criminal convictions by any member of management</li> <li>Confirmation that they have provided all information requested and that they are not aware of any other information that they should make known to ESCOM that may be relevant</li> </ul> </li> </ul>	



No	Topic	Level of information required (project /developer specific)	Detail	Information available and provided for verification and analysis (√)
I)	Provide copies of the following	Project and Developer	a) Audited financial statements for the past five years; b) Copies of relevant legal documents e.g. Memorandum of Incorporation and Articles of Association; c) Maps; d) Rainfall/seasonal data e) List of affiliated companies; f) Information on individual shareholders and managers; g) Detailed process, equipment or product descriptions; h) Financial schedules etc.,	

## **1.27 Detailed Evaluation**

The detailed evaluation is not part of the due diligence process; but is part of the overall evaluation of a potential IPP.

The detailed evaluation will be done in two stages: a) qualitative evaluation and b) quantitative evaluation based on weighting designed to reasonably compare proposals with diverse attributes. This process might require the use of various models and ESCOM will have the right to obtain independent inputs from independent advisers in the evaluation of the technical, financial, environmental and commercial and legal risk assessment.

Qualitative analysis uses word form of descriptive scales – e.g. low, medium or high risk - to describe the magnitude of potential consequences and the likelihood that those consequences will occur.

Quantitative analysis uses numerical values for both consequences and likelihood using data from a variety of sources. The quality of the analysis depends upon the accuracy and completeness of the numerical inputs used. Consequences may be estimated by modelling the outcomes of an event or set of events, or by extrapolation from experimental studies or past data. Consequences may be expressed in terms of monetary, technical or human criteria.

Each proposal will be evaluated based on its compliance with the request for proposals/tenders (RFP or RFT) (including the term sheet and contractual provisions exhibited in the RFP/RFT) and according to the following set of primary criteria:

- Compatibility with Resource Need
- Cost
- Risk Management
- Public Benefits
- Strategic and Financial Considerations

Each of the primary criteria is further delineated with sub-criteria as detailed in the checklist. Initially, proposals will be evaluated based on an individual proposal cost and on the qualitative criteria.

An evaluation committee may form one or more of the following working groups to assist it in its deliberations:

- Quantitative Analysis (modelling)
- Structuring and Pricing (Incl.. 3rd party engineering consultant as required)
- Business & Commercial Issues
- Environmental & Permitting
- Transmission & Integration
- Fuel Supply
- Credit
- Legal

- Independent Evaluators (as required)
  - Financial
  - Technical
  - Environmental
  - Legal
  - Risk Management
- Benchmark Team
- Integrated Resource Planning (IRP) Team
  - provides a shared resource for the evaluation and benchmark teams

After the final due diligence assessment the evaluation committee will make a recommendation to the Project Steering Committee which will in turn make a recommendation to the Board of Directors before the contract negotiations commence in earnest.

## Annexure D: Non-dispatchable Renewable IPP Risk Allocation Matrix

The following risk matrix is a table prepared to show the potential contractual risk allocation in an IPP chain of contracts for a non-dispatchable renewable IPP; from the IPP PPA to the SB and with a connection contract to ESCOM Transmission (ESCOM Tx). The table assesses events impacting the IPP, the SB and ESCOM Tx and the contractual implications of the risk outcomes on affected parties under those contracts.

Type	What can go Wrong	Mitigation Parties: Mitigant	Primary Risk Bearer	Secondary Risk Bearers
<b>IPP affected party</b>				
<b>IPP EPC</b>				
EPC Completion Risk	Delay in completion	IPP: Receive damages IPP/SB: Make alternative power arrangements	EPC damages capped at % of EPC value	IPP Equity if liability exceeds damages, lower returns. SB needs alternative power
EPC Completion Risk	Additional cost to complete IPP EPC fault	IPP: EPC pays probably up to a notional cap	EPC capped	IPP Equity if EPC stops work. IPP Debt
EPC Completion Risk	Additional cost to complete Owners variation	IPP: Owners pay	IPP Equity	IPP Debt under some circumstances
EPC Completion Risk	Additional cost to complete Change in Law	IPP: Pass additional cost to SB	SB pay deemed energy PPA payments	
EPC Capacity	Capacity lower than contracted value	IPP: Receive damages	EPC damages capped at % of EPC/OEM contract value	IPP Equity if liability exceeds damages, lower returns. SB get less power
Operational Capacity	Capacity lower than expected value	SB: Pay less for energy	IPP Equity if liability exceeds damages, lower returns. SB get less power	

Type	What can go Wrong	Mitigation Parties: Mitigant	Primary Risk Bearer	Secondary Risk Bearers
Operational Availability	Availability worse than expected value	SB: Pay less for energy	IPP Equity if liability exceeds damages get lower returns SB lower power supply availability	
IPP Termination				
PPA Termination	Termination, IPP fault	SB: Alternative power arrangements, SB/GoM may get IPP. IPP: may get transfer payment	SB/GoM may make transfer payment,	IPP Equity lose IPP. IPP Debt May get some transfer payment. SB needs alternative power
IPP Force Majeure (FM)				
IPP FM caused delay	Delay in commissioning resulting in delayed COD due to FM	SB: No PPA payment, Alternative power arrangements, SB/IPP: Insurance	IPP Equity lower returns	IPP Debt. SB needs alternative power
IPP FM interruption or supply reduction	Power output is reduced due to FM	SB: Reduced PPA payments, Alternative power arrangements, SB/IPP: Possible Insurance	IPP Equity lower returns	IPP Debt. SB needs alternative power
IPP FM caused termination	Termination due to FM	SB/IPP: Alternative power arrangements, Possible Insurance. IPP: may get transfer payment, SB/GoM may get IPP	SB/GoM may make transfer payment & needs alternative power	IPP Equity not fully compensated by transfer payment. SB needs alternative power

Type	What can go Wrong	Mitigation Parties: Mitigant	Primary Risk Bearer	Secondary Risk Bearers
IPP Political Event (PE)				
IPP PE caused delay	Delay in commissioning resulting in delayed COD due to PE	IPP: GoM payment	GoM may make good to IPP	SB needs alternative power
IPP PE caused supply disruption	IPP output is reduced due to PE	IPP: PPA payments as if no supply reduction	SB Continue to make IPP deemed energy payments	SB needs alternative power
IPP PE caused increase in costs	IPP cost is increased due to general Change in Law (PE)	IPP: Claim after tax impact	GoM May be asked to make economic stabilisation payments	
IPP PE caused increase in costs	IPP cost is increased due to discriminatory Change in Law (PE)	IPP: Claim after tax impact	GoM Would be expected to make economic stabilisation payments	
IPP PE caused termination	PPA is terminated due to PE	SB: Alternative power arrangements, SB/IPP: may get transfer payment, Possible Insurance. SB/GoM may get IPP.	GoM may make transfer payment	SB needs alternative power
SB affected party				
SB				
Market	Power sales revenue lower than cost SB still make energy payments	IPP: energy payments still made.	SB Make normal PPA payments	

Type	What can go Wrong	Mitigation Parties: Mitigant	Primary Risk Bearer	Secondary Risk Bearers
Forex	Forex change could mean forex denominated cost exceeds revenue. SB still make energy payments	IPP: energy payments still made.	<b>SB</b> Make normal PPA payments	
<b>ESCOM Tx affected party</b>				
ESCOM Tx Transmission				
Transmission Delay	Delay in transmission completion	IPP: deemed energy payments made SB: Alternate power	<b>SB</b> pay deemed energy PPA payments	<b>SB</b> needs alternative power
Transmission Availability	Transmission not available	IPP: deemed energy payments made SB: Alternate power	<b>SB</b> pay deemed energy PPA payments	<b>SB</b> needs alternative power
ESCOM Tx Termination				
PPA Termination	Termination, ESCOM Tx fault	SB: Alternative power arrangements	<b>GoM/SB</b> may make transfer payment	<b>SB</b> needs alternative power
ESCOM Tx FM				
ESCOM Tx FM caused delay	Delay in commissioning resulting in delayed COD	IPP: deemed energy payments received, SB: Alternative power, Possible Insurance	<b>SB</b> pay deemed energy PPA payments	<b>SB</b> needs alternative power

Type	What can go Wrong	Mitigation Parties: Mitigant	Primary Risk Bearer	Secondary Risk Bearers
ESCOM Tx Short Term FM caused interruption	IPP Power output is reduced	IPP: deemed energy payments received, SB: Alternative power, Possible Insurance	SB pay deemed energy PPA payments	SB needs alternative power
ESCOM Tx Long Term FM caused interruption	IPP Power output is reduced	IPP: deemed energy payments received, SB: Alternative power, Possible Insurance	SB pay deemed energy PPA payments	SB needs alternative power
ESCOM Tx FM caused termination	Termination due to FM	SB: Alternative power, get IPP, IPP: Possible Insurance,	GoM/SB may make transfer payment & SB needs alternative power	IPP Equity not fully compensated by transfer payment.
ESCOM Tx PE				
ESCOM Tx PE Delay	Delay in commissioning resulting in delayed COD	IPP: GoM payments, Possible Insurance	SB pay deemed energy PPA payments	SB needs alternative power
ESCOM Tx PE caused interruption	IPP Power output is reduced	IPP: deemed energy payments received, SB: Alternative power, Possible Insurance	SB pay deemed energy PPA payments	SB needs alternative power
ESCOM Tx PE caused termination	PPA is terminated due to PE	IPP: GoM may make transfer payment GoM may get IPP SB: Alternative power,	GoM may make termination payment to IPP	SB needs alternative power



## Annexure E: Dispatchable Thermal IPP Risk Allocation Matrix

The following risk matrix is a table prepared to show the potential contractual risk allocation in an IPP chain of contracts for a dispatchable thermal IPP; from Fuel Supply Agreement (FSA), where applicable, to the IPP and from IPP PPA to the SB and with a connection contract to ESCOM Transmission (ESCOM Tx). The table assesses events impacting the Fuel Supply, IPP, the SB and ESCOM Tx and the contractual implications of the risk outcomes on affected parties under those contracts.

Type	What can go Wrong	Mitigation Parties: Mitigant	Primary Risk Bearer	Secondary Risk Bearers
<b>Fuel Supplier (FS) affected party</b>				
FS EPC/O&M				
Fuel supply delay	Delay in Fuel for commissioning resulting in delayed COD, due to FS EPC	IPP: Find alternative fuel	FS/IPP Equity Damages maybe payable (capped) & No capacity/fuel payment received	IPP Equity lower returns. [IPP Debt] SB needs alternative power
Fuel Supply shortfall	Fuel supply is reduced, due to FS operations	IPP: Find alternative fuel SB reduced capacity/fuel payments made	FS./IPP Equity Damages maybe payable (capped) & Reduced capacity/fuel payment received	IPP Equity lower returns. [IPP Debt] SB needs alternative power
FS Market				
Commodity Price	Fuel cost higher than sale price	FS: long term contracts.	FS costs exceed revenue	
Forex	Forex change could mean forex denominated cost exceeds revenue.	FS: hedges or other forex mitigation.	FS costs exceed revenue	
FS Termination				

Type	What can go Wrong	Mitigation Parties: Mitigant	Primary Risk Bearer	Secondary Risk Bearers
Fuel Supply termination	Fuel Supply Agreement (FSA) is terminated due to FS fault	SB/GoM: may get IPP, IPP: may receive transfer payment, IPP: Alternative fuel,	<b>FS.</b> Damages payable (capped) <b>IPP Equity</b> alternative fuel if feasible.	<b>IPP Equity</b> some equity lost, <b>SB/GoM</b> may make some transfer payment.
FS Force Majeure (FM)				
Fuel FM delay	Delay in Fuel for commissioning resulting in delayed COD; due to FM	IPP: Alternative fuel, Possible Insurance	<b>FS</b> No fuel payment <b>SB</b> Reduced IPP capacity/fuel payments	<b>IPP Equity</b> lower returns. <b>SB</b> needs alternative power
Fuel FM Fuel supply reduction	Fuel supply is reduced, due to FM	IPP: Alternative fuel, IPP: Possible Insurance	<b>FS.</b> Reduced fuel payment <b>SB</b> Reduced IPP capacity/fuel payments	<b>IPP Equity</b> lower returns. <b>SB</b> needs alternative power
Fuel FM supply termination	FSA is terminated through FM	SB/GoM: may get IPP, IPP: Possible Insurance, may get transfer payment SB: Alternative fuel	<b>SB/ GoM</b> may make transfer payment.	<b>IPP Equity</b> some equity lost. <b>SB</b> needs alternative power
Fuel Supply Political Event (PE) delay	Delay in Fuel for commissioning resulting in delayed COD; due to PE	IPP: Alternative fuel, IPP: Normal capacity/fuel payment, Possible Insurance	<b>SB/ GoM</b> Make IPP capacity/fuel payments	<b>SB</b> needs alternative power or fuel
Fuel Supply PE disruption	Fuel supply is reduced; due to PE	IPP: Alternative fuel, IPP: Normal capacity/fuel and Fuel payment, Possible Insurance	<b>SB/ GoM</b> Make IPP capacity/fuel	<b>SB</b> needs alternative power or fuel

Type	What can go Wrong	Mitigation Parties: Mitigant	Primary Risk Bearer	Secondary Risk Bearers
Fuel Supply PE termination	FSA is terminated; due to PE	GoM/SB: may get IPP, IPP: get transfer payment SB: Alternative fuel.	GoM may make transfer payment	SB needs alternative fuel or power
<b>IPP affected party</b>				
IPP EPC				
EPC Completion Risk	Delay in completion	IPP: Receive damages IPP/SB: Make alternative power arrangements	EPC damages capped at % of EPC value	IPP Equity if liability exceeds damages, lower returns. SB needs alternative power
EPC Completion Risk	Additional cost to complete IPP EPC fault	IPP: EPC pays probably up to a notional cap	EPC capped	IPP Equity if EPC stops work. IPP Debt
EPC Completion Risk	Additional cost to complete Owners variation	IPP: Owners pay	IPP Equity	IPP Debt under some circumstances
EPC Completion Risk	Additional cost to complete Change in Law	IPP: Pass additional cost to SB	SB pay higher PPA capacity payments	
EPC Capacity	Capacity lower than contracted value	IPP: Receive damages SB: Pay less for capacity	EPC damages capped at % of EPC/OEM contract value	IPP Equity if liability exceeds damages, lower returns. SB get less power (compensated)
EPC Efficiency	Efficiency worse than contracted value	IPP: Receive damages	EPC damages capped at % of EPC/OEM contract value	IPP Equity if liability exceeds damages, lower returns. SB may get less power over life of contract (compensated)

Type	What can go Wrong	Mitigation Parties: Mitigant	Primary Risk Bearer	Secondary Risk Bearers
IPP O&M/LTSA				
O&M/LTSA Capacity	Capacity lower than contracted value	IPP: Gets damages SB: Pay less for capacity	LTSA/O&M Operator capped damages	IPP Equity if liability exceeds damages, lower returns. SB get less power
O&M/LTSA Efficiency	Efficiency worse than contracted value	IPP: Gets damages SB: Compensated	LTSA/O&M Operator capped damages	IPP Equity if net liability exceeds damages get lower returns. SB may get less power over life of contract and possibly higher fuel cost
O&M/LTSA Availability	Availability worse than contracted value	IPP: Gets damages SB: Pay less for capacity	LTSA/O&M Operator capped damages	IPP Equity if liability exceeds damages get lower returns SB lower power supply availability
O&M/LTSA Mis-declaration	Reliability worse than contracted value	IPP: Gets damages SB: Gets damages	LTSA/O&M Operator capped damages	IPP Equity if liability exceeds damages gets lower returns. SB power supply unreliable
IPP Termination				
PPA Termination	Termination, IPP fault	SB: Alternative fuel/ power arrangements, SB/GoM may get IPP. IPP: may get transfer payment	SB/GoM may make transfer payment,	IPP Equity lose IPP. IPP Debt May get some transfer payment. SB needs alternative power

Type	What can go Wrong	Mitigation Parties: Mitigant	Primary Risk Bearer	Secondary Risk Bearers
IPP FM				
IPP FM caused delay	Delay in commissioning resulting in delayed COD due to FM	SB: No PPA payment, Alternative power arrangements, SB/IPP: Insurance	IPP Equity lower returns	IPP Debt. SB needs alternative power
IPP FM interruption or supply reduction	Power output is reduced due to FM	SB: Reduced PPA payments, Alternative power arrangements, SB/IPP: Possible Insurance	SB Make reduced IPP capacity/fuel payments IPP Equity lower returns	IPP Debt. SB needs alternative power
IPP FM caused termination	Termination due to FM	SB/IPP: Alternative power arrangements, Possible Insurance. IPP: may get transfer payment, SB/GoM may get IPP	SB/GoM may make transfer payment & needs alternative power	IPP Equity not fully compensated by transfer payment. SB needs alternative power
IPP PE				
IPP PE caused delay	Delay in commissioning resulting in delayed COD due to PE	IPP: GoM payment	GoM may make good to IPP	SB needs alternative power
IPP PE caused supply disruption	IPP output is reduced due to PE	IPP: PPA payments as if no supply reduction	SB Continue to make IPP capacity/fuel payments	SB needs alternative power

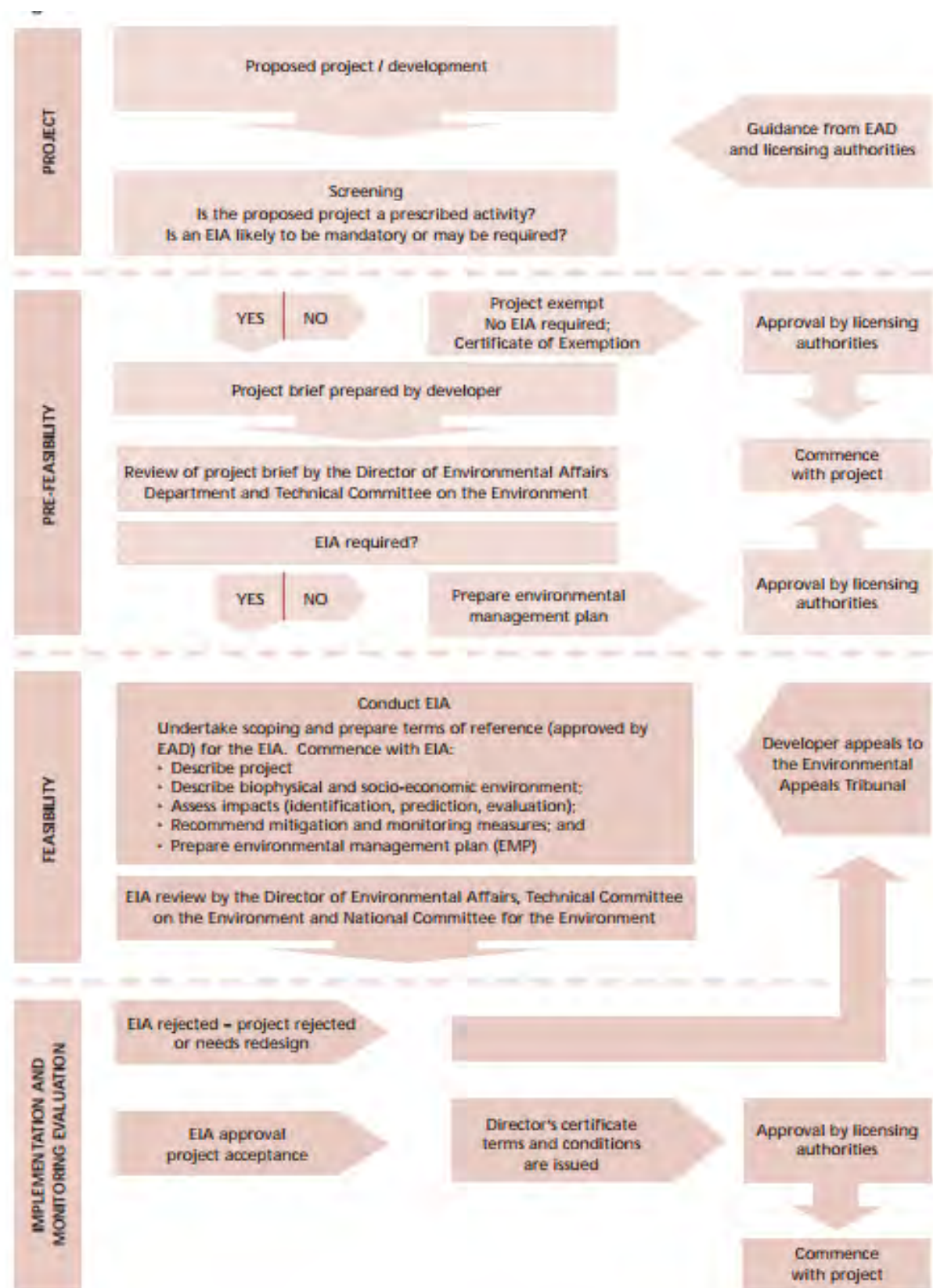
Type	What can go Wrong	Mitigation Parties: Mitigant	Primary Risk Bearer	Secondary Risk Bearers
IPP PE caused increase in costs	IPP cost is increased due to general Change in Law (PE)	IPP: Claim after tax impact	GoM May be asked to make economic stabilisation payments	
IPP PE caused increase in costs	IPP cost is increased due to discriminatory Change in Law (PE)	IPP: Claim after tax impact	GoM Would be expected to make economic stabilisation payments	
IPP PE caused termination	PPA is terminated due to PE	SB: Alternative power arrangements, SB/IPP: may get transfer payment, Possible Insurance. SB/GoM may get IPP.	GoM may make transfer payment	SB needs alternative power
<b>SB affected party</b>				
SB				
Market	Power sales revenue lower than cost SB still make capacity/fuel payments	IPP: capacity/fuel payments still made.	SB Make normal PPA payments	
Forex	Forex change could mean forex denominated cost exceeds revenue. SB still make capacity/fuel payments	IPP: capacity/fuel payments still made.	SB Make normal PPA payments	

Type	What can go Wrong	Mitigation Parties: Mitigant	Primary Risk Bearer	Secondary Risk Bearers
<b>ESCOM Tx affected party</b>				
ESCOM Tx Transmission				
Transmission Delay	Delay in transmission completion	IPP: capacity/fuel payments still made  SB: Alternate power	<b>SB</b> Make normal PPA payments	<b>SB</b> needs alternative power
Transmission Availability	Transmission not available	IPP: capacity/fuel payments still made  SB: Alternate power	<b>SB</b> Make normal PPA payments	<b>SB</b> needs alternative power
ESCOM Tx Termination				
PPA Termination	Termination, ESCOM Tx fault	SB: Alternative power arrangements	<b>GoM/SB</b> may make transfer payment	<b>SB</b> needs alternative power
ESCOM Tx FM				
ESCOM Tx FM caused delay	Delay in commissioning resulting in delayed COD	IPP: capacity/fuel payments still received, SB: Alternative power, Possible Insurance	<b>SB</b> Make normal PPA payments	<b>SB</b> needs alternative power
ESCOM Tx Short Term FM caused interruption	IPP Power output is reduced	IPP: capacity/fuel payments still received, SB: Alternative power, Possible Insurance	<b>SB</b> Make normal PPA payments	<b>SB</b> needs alternative power

Type	What can go Wrong	Mitigation Parties: Mitigant	Primary Risk Bearer	Secondary Risk Bearers
ESCOM Tx Long Term FM caused interruption	IPP Power output is reduced	IPP: capacity/fuel payments still received, SB: Alternative power, Possible Insurance	SB Make normal PPA payments	SB needs alternative power
ESCOM Tx FM caused termination	Termination due to FM	SB: Alternative power, get IPP, IPP: Possible Insurance,	GoM/SB may make transfer payment & SB needs alternative power	IPP Equity not fully compensated by transfer payment.
ESCOM Tx PE				
ESCOM Tx PE Delay	Delay in commissioning resulting in delayed COD	IPP: GoM payments, Possible Insurance	GoM to make payment to IPP	SB needs alternative power
ESCOM Tx PE caused interruption	IPP Power output is reduced	IPP: capacity/fuel payments still received, SB: Alternative power, Possible Insurance	SB Make normal PPA payments	SB needs alternative power
ESCOM Tx PE caused termination	PPA is terminated due to PE	IPP: GoM may make transfer payment GoM may get IPP  SB: Alternative power,	GoM may make termination payment to IPP	SB needs alternative power



## Annexure F: The Environmental Impact Assessment Process in Malawi



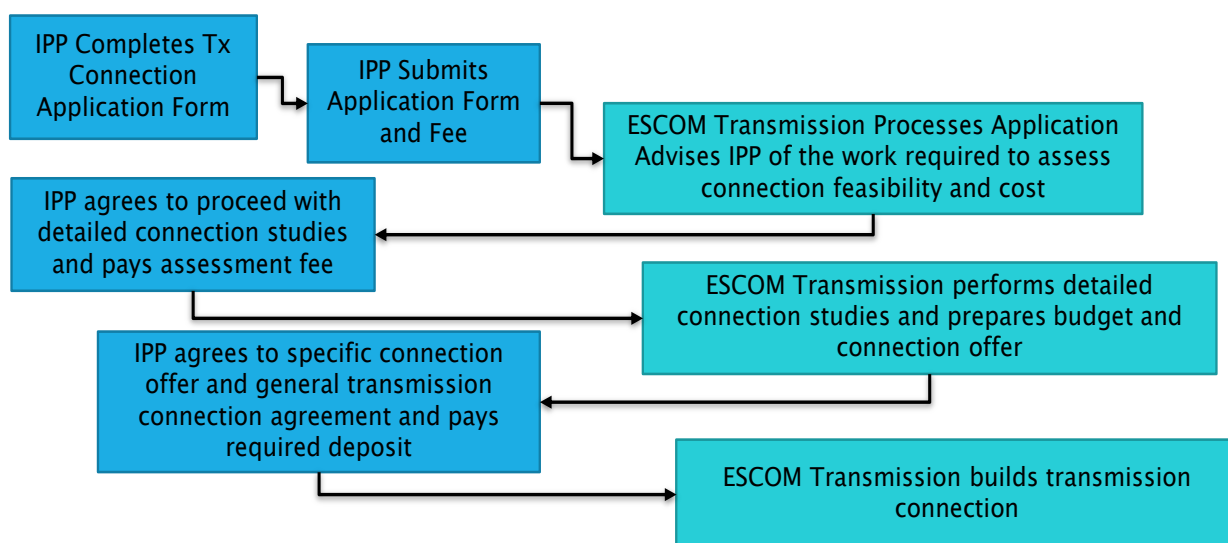
## Annexure G: Transmission Application to Connect (Generation)

This annexure describes a typical transmission connection application process and includes a typical transmission connection application form.

### A.3 Transmission Connection Process

The diagram below illustrates how the transmission connection process is typically dealt with and how it is expected to work.

- The IPP completes and lodges a connection application and fee for a generation transmission connection.
- ESCOM assesses what studies and costs the connection application process
- The IPP agrees to continue the process and pays the fee for transmission connection studies
- ESCOM Transmission performs the studies required and provides the IPP with a connection offer.
- The IPP agrees to both the general connection agreement and the specific terms of the connection offer and pays a deposit.
- SCOM Transmission proceeds with construction of the connection.



### A.4 APPLICATION TO CONNECT (GENERATION CUSTOMER)

Please return completed form to:

Tel:

Fax:

Email:

## **PREAMBLE**

This Application Form has been prepared by ESCOM to enable customers to make an application for connection to the Malawian Transmission System. An application for connection is required by:

- a new customer;
- an existing customer without an agreement with ESCOM to connect to the Transmission System and who does not have an alternative arrangement with ESCOM that is inclusive of connection services (for example, export of electricity and purchased through a Power Purchase Agreement by ESCOM); or
- an existing customer who requires to change the agreement to connect to the Transmission System (for example, if it requires an increase in export facilities at its point of connection).

After receiving the application ESCOM will respond to the applicant with an offer setting out the Specific Terms and Conditions for connection. These together with ESCOM's General Terms and Conditions for Connection will form the Connection Agreement.

The offer will be based on the information provided by the applicant in the completed Application Form. However, ESCOM may request further information from the applicant to enable ESCOM to fully assess the application before preparing an offer.

The offer once accepted by the customer will be incorporated into Specific Terms and Conditions for Connection (Connection Agreement) which, together with the General Terms and Conditions for Connection, will govern the terms and conditions for the customer's connection to ESCOM's Transmission System.

## SECTION A: PARTICULARS OF APPLICANT

A.1 Full name of applicant:

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A.2 Identity number of applicant, or in the case of a body corporate, registration number:

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A.3 Nationality of applicant, or in the case of a body corporate, country of registration:

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A.4 Physical of applicant, or in the case of a body corporate, the registered head office:

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A.5 Postal address (if different from the above):

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A.6 Telephone number of applicant:

( ) \_\_\_\_\_  
\_\_\_\_\_

A.7 Fax number of applicant:

( ) \_\_\_\_\_

A.8 E-mail of applicant (if any):

\_\_\_\_\_

A.9 Duly authorised representative of the applicant (for contact in relation to this application):

Name:

\_\_\_\_\_  
\_\_\_\_\_

Title:

\_\_\_\_\_  
\_\_\_\_\_

(e.g. owner, director)

Telephone Number: \_\_\_\_\_

Fax Number: \_\_\_\_\_

E-mail: \_\_\_\_\_

A.10 Date of application: \_\_\_\_\_

A.11 Applicant's signature: \_\_\_\_\_

## **SECTION B: PARTICULARS OF GENERATING STATION**

### **B.1 Name of generating station**

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### **B.2 Address of generating station**

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### **B.3 Contact person at generating station**

Name: 

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Title: 

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Telephone Number: 

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Fax Number: 

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E-mail: 

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### **B.4 Location of generating station**

Provide a map showing the location where the applicant intends to construct (or alter, where this application relates to a change to an existing connection) plant. The map should be 1:50,000 scale minimum with the location of the plant clearly marked with an "X". The map coordinates of the location should be provided and clearly defined (coordinate system, map projection, spheroid, latitude/longitude reference coordinates). For ease of identification the coordinates should also be converted to WGS 84 in the format deg min sec.sss.

### **B.5 Electrical configuration of generating station, auxiliary plant and electrical equipment**

Provide a single line diagram of the proposed plant and surrounding electrical system which the applicant intends to construct or alter, detailing all significant items of plant. Mark on the single line diagram the proposed operational control boundary between the applicant's plant and ESCOM.

### **B.6 Site Plan**

Provide a plan of the site showing the area within which the applicant intends to carry out the activities. The site layout plan should be on a 1:200 scale indicating the proposed location of the point of connection, generators, transformers, auxiliary plant, site buildings etc.

## SECTION C: FINANCIAL DETAILS AND REQUIREMENTS

The applicant must satisfy ESCOM that the applicant will be capable of paying the charges that may become payable by the applicant to ESCOM.

The applicant is required to pay to ESCOM an amount equal to the estimated cost to conduct integration studies and initial designs before ESCOM undertakes such studies and designs. The Application Fee is only valid for 12 months from date of first Offer made by ESCOM and will not be refundable. The Application Charge, which the applicant must pay on returning this application is shown in table C1 below:

C.1 The following Application Fees are applicable:

REQUIRED LOAD/GENERATION (MW)	APPLICATION FEE (Kwacha) VAT INCLUDED)
0 – 10MW	100 000-00
11 – 50MW	3,000 000-00
51 – 100MW	4,500 000-00
101 – 200MW	6,000 000-00
201 – 500MW	7,500 000-00

Additional payments may be required as further studies, design work, equipment ordering and construction is undertaken. Should the applicant fail to pay the Application Charge within 60 days from date of invoice, the application shall be cancelled automatically and the applicant has to submit a new application.

As evidence of the applicant's ability to make such payments, the application must provide:

C.2 Applicant's credit rating or three years annual audited financial statements and of all major shareholders

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C.3 Details of bonds and/or guarantees issued by a Malawian financial institution that the applicant is able to provide to ESCOM. (Note: ESCOM will only accept bonds and/or guarantees from financial institutions acceptable to ESCOM)

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## SECTION D: TECHNICAL DETAILS

ESCOM will be required to do integrations studies which will be based on the information provided by the customers as part of this application, additional information could be required from the customer from time to time ESCOM.

Large Power Stations need to commission integration studies to determine whether Power System Stability (PSS) is required and to assist with the final engineering of control circuits.

- D.1 Type of generating station (e.g. thermal, nuclear, hydro, pumped storage, gas turbine, diesel generator, alternative/other)

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- D.2 Number, capacity and technical details of each unit<sup>3</sup>.  
The applicant is required to provide ESCOM with all technical data as requested below and Annexure A of the Application.

	Unit 1	Unit 2
Normal maximum continuous generation capacity (MW)		
Normal maximum continuous export capacity (MW)		
Maximum (peaking) generating capacity (MW)		
Maximum (peaking) export capacity (MW)		
Minimum continuous generating capacity (MW)		
Minimum continuous export capacity (MW)		
Generator rated MVA		
Normal minimum lagging power factor		
Normal minimum leading power factor		
Generator voltage (kV)		

- D.3 Reliability of Connection  
Provide details of reliability of connection requested (number of connecting circuits e.g. one, two, ... ((n, n – 1).... ) (subject to technical and system security and reliability standards)

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<sup>3</sup>If the applicant has more than two units please provide this information in a separate table



- 
- 
- D.4 Black Start  
Provide the black start ability and/or black start requirements
- 
- 

- D.5 Supply to Site  
Provide the following details if a separate transmission connection is required to supply the generating station site and specify:

Maximum Import Capacity required		MW
Maximum Import Capacity required		MVar
Load under normal operating conditions		MW
Load under normal operating conditions		MVar

## SECTION E: CONNECTION AND OPERATIONS

- E.1 Target connection date (month/year)
- 

- E.2 Projected period from connection date to operational date (months)
- 

- E.3 Maximum Export Capacity (MW) expected to be required over the period specified in E.2 of this application.

Material changes	Date	Maximum Export Capacity required (MW)
Connection date		
Operational date		

*Insert dates as required to show material changes in maximum export capacity required*

- E.4 Period for which the applicant desires the connection (from the connection date to date on which the power station will be disconnected from ESCOM's Transmission System):

---

- E.5 Maintenance Programme  
Provide details of any proposed major maintenance programmes, including the time and duration.

Maintenance	Date/Time	Duration (hours)

**SECTION F: PERMISSION FROM GOVERNMENT DEPARTMENTS OR REGULATORY AUTHORITIES**

Provide a list of permits and approvals required for the generation project, progress as at the date of this application and expected dates by which the applicant expects to obtain each permit or approval.

Permits / Approvals	Progress	Expected date

**SECTION G: ADDITIONAL INFORMATION**

Provide any other relevant information which the applicant wishes to include with this application.

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## CHECKLIST COMPLETION FORM

Section A		X
Section B	B.1 to B.3	
	B.4 Map (1:50,000) with location marked and map coordinates stated and correct	
	B.5 Electrical single line diagram with operational control boundary marked	
	B.6 Site plan (1:200) showing locations of point of connection, generators, transformers and buildings	
Section C	C.1 Payment enclosed	
Section D		
Section E		
Section F		
TECHNICAL INFORMATION (GENERATION)		

### A.5 TECHNICAL INFORMATION (GENERATION)

#### Synchronous Generating Unit Parameters

Rated terminal volts (kV)	
Rated MVA	
Rated MW	
Minimum Generation MW	
Short circuit ratio	
Direct axis synchronous reactance	
Direct axis transient reactance	
Direct axis sub-transient reactance	
Direct axis short-circuit transient time constant	
Direct axis short-circuit sub-transient time constant	
Quadrature axis synchronous reactance	
Quadrature axis sub-transient reactance	
Quadrature axis short-circuit sub-transient time constant	
Stator time constant	
Stator leakage reactance	
Armature winding direct-current resistance	
Turbo generator inertia constant (MWsec/MVA)	
Rated field current (amps) at Rated MW and Mvar output and at rated terminal voltage	
Field current (amps) open circuit saturation curve for Generating Unit terminal voltages ranging from 50% to 120% of rated value in 10% steps as derived from appropriate manufacturers test certificates	

### Parameters for Generating Unit Step-up Transformers

Rated MVA	
Voltage ratio	
Positive sequence reactance (at max, min, & nominal tap)	
Positive sequence resistance (at max, min, & nominal tap)	
Zero phase sequence reactance	
Tap changer range	
Tap changer step size	
Tap changer type: on load or off circuit	

### Excitation Control System parameters

Excitation System Nominal Response	
Rated Field Voltage	
No-Load Field Voltage	
Excitation System On-Load Positive Ceiling Voltage	
Excitation System No-Load Positive Ceiling Voltage	
Excitation System No-Load Negative Ceiling Voltage	
Details of Excitation System (including PSS if fitted) described in block diagram form showing transfer functions of individual elements.	
Details of Over-excitation Limiter described in block diagram form showing transfer functions of individual elements	
Details of Under-excitation Limiter described in block diagram form showing transfer functions of individual elements	

**Governor Parameters:** Incremental Droop values (in %) are required for each Generating Unit at six MW loading points (MLP1 to MLP6):

- Designed Minimum Operating Level	
- Minimum Generation	
MLP3 - 70% of Registered Capacity	
–MLP4 - 80% of Registered Capacity	
–MLP5 - 95% of Registered Capacity	
–MLP6 - Registered Capacity	

(this data item need only be provided for Large Power Stations)

(i) Governor and associated prime mover Parameters - All Generating Units

Governor Block Diagram showing transfer function of individual elements including acceleration sensitive elements	
• Governor Time Constant (in seconds)	
• Speeder Motor Setting Range (%)	

• Average Gain (MW/Hz)	
• Governor Dead band (this data item need only be provided for Large Power Stations)	
○ Maximum Setting (Hz)	
○ Normal Setting (Hz)	
○ Minimum Setting (Hz)	
Where the Generating Unit governor does not have a selectable dead band facility, then only the actual value of the dead band needs to be provided	

(ii) Governor and associated prime mover Parameters - Steam Units

HP Valve Time Constant (in seconds)	
HP Valve Opening Limits (%)	
HP Valve Opening Rate Limits (%/second)	
HP Valve Closing Rate Limits (%/second)	
HP Turbine Time Constant (in seconds)	
IP Valve Time Constant (in seconds)	
IP Valve Opening Limits (%)	
IP Valve Opening Rate Limits (%/second)	
IP Valve Closing Rate Limits (%/second)	
IP Turbine Time Constant (in seconds)	
LP Valve Time Constant (in seconds)	
LP Valve Opening Limits (%)	
LP Valve Opening Rate Limits (%/second)	
LP Valve Closing Rate Limits (%/second)	
LP Turbine Time Constant (in seconds)	
Reheater Time Constant (in seconds)	
Boiler Time Constant (in seconds)	
HP Power Fraction (%)	
IP Power Fraction (%)	

(iii) Governor and associated prime mover Parameters - Gas Turbine Units

Inlet Guide Vane Time Constant (in seconds)	
Inlet Guide Vane Opening Limits (%)	
Inlet Guide Vane Opening Rate Limits (%/second)	
Inlet Guide Vane Closing Rate Limits (%/second)	
Fuel Valve Constant (in seconds)	
Fuel Valve Opening Limits (%)	
Fuel Valve Opening Rate Limits (%/second)	
Fuel Valve Closing Rate Limits (%/second)	
Waste Heat Recovery Boiler Time Constant (in seconds)	

(iv) Governor and associated prime mover Parameters - Hydro Generating Units

Guide Vane Actuator Time Constant (in seconds)	
Guide Vane Opening Limits (%)	
Guide Vane Opening Rate Limits (%/second)	
Guide Vane Closing Rate Limits (%/second)	
Water Time Constant (in seconds)	

### Unit Control Options

The following data items need only be supplied with respect to Large Power Stations:

Maximum Droop %	
Normal Droop %	
Minimum Droop %	
Maximum Frequency deadband (Hz)	
Normal Frequency deadband (Hz)	
Minimum Frequency deadband (Hz)	
Maximum output deadband (MW)	
Normal output deadband (MW)	
Minimum output deadband (MW)	
Frequency settings between which Unit Load Controller Droop applies:	
Maximum Hz	
Normal Hz	
Minimum Hz	
State if sustained response is normally selected.	

### Plant Flexibility Performance

The following data items need only be supplied with respect to Large Power Stations, and should be provided with respect to each Genset:

Run-up rate to Registered Capacity	
Run-down rate from Registered Capacity	
Synchronising Generation,	
Regulating range	
Load rejection capability while still Synchronised and able to supply Load	

## **Annexure H: Transmission Connection Agreement**

*Note: This document may be amended to reflect such changes that ESCOM TL may deem necessary, including on account of internal and external governance and approval processes.*

### **TRANSMISSION CONNECTION AGREEMENT**

**BETWEEN**

**ESCOM TL**

**AND**

**[IPP]**

## CONTENTS

<b>Contents.....</b>	<b>105</b>
<b>Preamble .....</b>	<b>108</b>
<b>Recitals: .....</b>	<b>108</b>
<b>1. Definitions and Interpretation .....</b>	<b>109</b>
1.1 Definitions.....	109
1.2 Interpretation .....	116
<b>2. Duration of Agreement .....</b>	<b>117</b>
2.1 Term.....	117
<b>3. Conditions Precedent .....</b>	<b>117</b>
3.1 Charges and Security .....	117
3.2 Consents and Approvals .....	117
3.3 Scope of this Agreement .....	119
<b>4. Charges and Security .....</b>	<b>119</b>
<b>5. Responsibilities of Customer .....</b>	<b>119</b>
<b>6. Delays in Scheduled Connection Date .....</b>	<b>120</b>
<b>7. Connection Services.....</b>	<b>121</b>
7.1 Connection Services .....	121
7.2 Operation of Customer's Facility and Transmission System .....	122
7.3 Maintenance and Outage Coordination.....	123
<b>8. Ownership of Equipment.....</b>	<b>125</b>
<b>9. Charges and Payments for Connection Works .....</b>	<b>125</b>
9.2 Final Costs .....	126
9.3 Charges.....	126
<b>10. Invoicing and Payment .....</b>	<b>126</b>
10.1 Invoicing .....	126
10.2 Payment .....	126
10.3 Disputed Amounts .....	127
10.4 Default Interest.....	127
<b>11. Customer's Facility .....</b>	<b>127</b>
11.1 Technical Specifications .....	127
11.2 Amendments to ESCOM TL Technical Specifications and Requirements and Grid Code .....	128
11.3 Modifications .....	128
<b>12. Metering System.....</b>	<b>129</b>
12.1 Metering Installations .....	129
12.2 Meter Tests .....	129
12.3 Adjustment of Invoices .....	130



<b>13. Protection .....</b>	<b>130</b>
13.1 Equipment to be Installed .....	130
13.2 Signalling and Indications.....	131
<b>14. Rights of Access .....</b>	<b>131</b>
14.1 Customer to Grant Consents.....	131
14.2 Access at Times to be Agreed.....	131
14.3 Access at Any Time.....	131
14.4 ESCOM TL to grant consents.....	132
<b>15. De-Energisation.....</b>	<b>132</b>
15.1 Circumstances of De-Energisation .....	132
15.2 Energisation Following De-Energisation.....	132
15.3 Cost of De-Energisation and Energisation .....	133
<b>16. Force Majeure .....</b>	<b>134</b>
16.1 Definition of Force Majeure .....	134
16.2 Procedure .....	135
16.3 Consequences of Force Majeure .....	135
16.4 Termination on Account of Force Majeure .....	136
<b>17. Breach of this Agreement and the Grid Code.....</b>	<b>136</b>
17.1 Notice of Breach.....	136
17.2 Notice to Remedy.....	137
17.3 Right to Terminate .....	137
<b>18. Termination.....</b>	<b>137</b>
18.1 Circumstances of Early Termination.....	137
18.2 Termination and Disconnection .....	138
<b>19. Liability for Damage or Loss .....</b>	<b>138</b>
19.1 Indemnity.....	138
19.2 Damages .....	139
<b>20. Dispute Resolution.....</b>	<b>139</b>
20.1 Procedure.....	139
20.2 Reference of Technical Disputes to Independent Expert .....	139
20.3 Arbitration .....	140
20.4 Obligations during Disputes.....	141
20.5 Proceedings in Confidence.....	141
<b>21. Cession and Assignment .....</b>	<b>141</b>
21.1 Prior Consent .....	141
21.2 Restructuring .....	141
<b>22. Confidentiality .....</b>	<b>142</b>
22.1 Confidential Information .....	142
22.2 Duty to Maintain Confidentiality .....	142

22.3	Exclusions .....	142
22.4	Disclosure.....	143
<b>23.</b>	<b>Survival on Termination .....</b>	<b>143</b>
<b>24.</b>	<b>Notices .....</b>	<b>143</b>
24.1	Giving of Notices .....	143
24.2	Address for Notices .....	143
24.3	Notice of Change of Address.....	144
<b>25.</b>	<b>Miscellaneous.....</b>	<b>144</b>
25.1	No Partnership .....	144
25.2	No Waiver of Rights .....	144
25.3	No Third Party Rights .....	144
25.4	Direct Agreement .....	145
25.5	Severability .....	145
25.6	Amendments .....	145
25.7	Counterparts.....	145
25.8	Anti-Corruption Measures .....	145
25.9	Applicable Law and Jurisdiction .....	145
25.10	Change in Law .....	146
25.11	Waiver of Immunity.....	146

## PREAMBLE

**THIS TRANSMISSION CONNECTION AGREEMENT** dated [ ] is made by and between:

- (1) **ELECTRICITY SUPPLY CORPORATION OF MALAWI**, a company incorporated under the laws of the Republic of Malawi with registration number [ ] and having its registered office [ ] ("**ESCOM TL**"), acting in accordance with the Transmission Licence issued by the Malawi Energy Regulatory Authority and tasked with the responsibility of owning, operating and maintaining the Transmission System; and
- (2) [**IPP**] a company incorporated in terms of the Laws of Malawi (registered under company registration number: [ ]) and having its registered offices at [ ], Malawi (hereinafter referred to as the "**Customer**") and/or, subject to the Electricity Act's requirements on the transfer of a licence, its Affiliate and/or a wholly owned Malawian subsidiary to be set specifically for the purposes of this Agreement, a company incorporated under the laws of the Republic of Malawi (Registration Number: [ ]) and having its registered office at [ ].

(together, the "**Parties**" and "**Party**" shall mean either of them)

## RECITALS:

- (A) ESCOM TL owns and operates the Transmission System and may enter into agreements with legal entities licensed to undertake the generation of electrical energy (i) for the connection of their licensed power plants to the Transmission System (as such term is defined below); (ii) for the use by such licensed entities of the Transmission System in connection with their generation undertakings; and (iii) for matters relating to the operational interface between such licensed power plants and the Transmission System;
- (B) The Customer has applied for and been granted a Generation Licence under the Electricity Act, [Act No ];
- (C) The Customer and ESCOM TL acknowledge that this Agreement is entered into pursuant to the Independent Power Producer ("**IPP**") Programme of the Government of the Republic of Malawi;
- (D) The Customer has applied to ESCOM TL for connection of the Customer's Facility to be developed by the Customer at [ ] in the [ ] region in Malawi (hereinafter referred to as the "**Project Site**") to the Transmission System (as such term is defined herein);
- (E) ESCOM TL submitted a connection offer letter to the Customer, which the Customer has accepted (the "**Connection Offer Letter**"), of which an executed copy is attached hereto as Annexure I, such Connection Offer Letter being subject to the conclusion and coming into effect of this Agreement;
- (F) ESCOM TL has agreed to the connection of the Customer's Facility to the Transmission System at the Point of Connection, for the use by the Customer of the Transmission System in connection with their generation undertakings and for other matters relating to the operational interface between such licensed Customer's Facility and the Transmission System in accordance with this Agreement;

- (G) This Agreement, among other, sets out the terms and conditions upon which (a) ESCOM TL and/or the Customer shall undertake the connection works which will physically connect the Customer's Facility (as such term is defined below) to the Transmission System; (b) ESCOM TL shall permit the Customer to use the Transmission System in connection with its licensed generation undertaking at the Customer's Facility; (c) the Parties shall cooperate with each other in relation to the operational interface between the Customer's Facility and the Transmission System; and (d) Each Party shall pay to the other Party the required charges as set out in this Agreement.
- (H) [The Parties further acknowledge that the Malawi Energy Regulatory Authority ("**MERA**") oversight extends to amendments to this Transmission Connection Agreement (TCA) and that any amendments to this TCA must be submitted to MERA for regulatory oversight prior to signature thereof.]

**IT IS HEREBY AGREED** as follows:

## **1. Definitions and Interpretation**

### **1.1 Definitions**

In this Agreement, except where the context requires otherwise, the following capitalised words and expressions shall have the meanings assigned to them below, and cognate words and expressions shall have corresponding meanings; terms that are not defined shall have the meaning specified in either the Power Purchase Agreement ("**PPA**") or the Connection Offer Letter:

<b>"Affected Party"</b>	has the meaning given to it in Clause 16.1.1;
<b>"Affiliate"</b>	means in respect of either Party, any Person (excluding any government), hereinafter referred to as "company" which directly or indirectly: (a) is controlled by such Party; or (b) controls such Party; or (c) is controlled by a company which directly or indirectly controls such Party. For the purposes of the foregoing definition: (i) a company is directly controlled by another company or companies, if the latter company holds shares, quotas or voting rights, carrying in the aggregate the majority (more than fifty percent) of the votes exercisable at shareholders' meetings of the former company or companies, and (ii) a particular company is indirectly controlled by a company or companies, hereinafter called the "parent company" or "parent companies", if a series of companies can be specified, beginning with the parent company or parent companies and ending with the particular

	company, so related that each company of the series, except the parent company or parent companies, is directly controlled by one or more of the companies earlier in the series;
<b>"AFSA"/ UNCITRAL"</b>	<i>[means the Arbitration Foundation of Southern Africa];[means United Nations Commission on International Trade Law]</i>
<b>"AFSA Rules"/ "UNCITRAL Rules"</b>	means the arbitration rules of AFSA/ UNCITRAL in force from time to time;
<b>"Agreed Interest Rate"</b>	means the [ ];
<b>"Agreement"</b>	means this Transmission Connection Agreement (TCA) between ESCOM TL and the Customer;
<b>"Annexures"</b>	means the documents annexed to this Agreement as: <ul style="list-style-type: none"> <li>(a) Connection Offer Letter, including: <ul style="list-style-type: none"> <li>(i) Single Line Diagrams;</li> <li>(ii) the Connection Facilities – HV Lines and Substations;</li> <li>(iii) the Project Monitoring;</li> </ul> </li> <li>(b) the Construction Programme: <ul style="list-style-type: none"> <li>(i) Customer Construction Programme;</li> <li>(ii) ESCOM TL Construction Programme;</li> <li>(iii) Connection Works Milestone dates</li> </ul> </li> <li>(c ) the Transmission Charges;</li> <li>(d) the ESCOM TL Technical Specifications and Requirements;</li> <li>(e) the ESCOM TL Transmission Tariff Structure;</li> <li>(f) Form of Bank Guarantee;</li> </ul>
<b>"Auxiliary Power"</b>	means power purchased by the Customer from ESCOM TL and imported to the Customer's Facility, for the Customer's own use;
<b>"Bank Guarantee"</b>	means a bank guarantee substantially in the form set out in Annexure H (Form of Bank Guarantee) which (a) is issued by a bank which holds an Approved Credit Rating and is registered under applicable Law to carry on the business of a bank in Malawi, and (b) constitutes an on-demand, unconditional and irrevocable commitment to pay by the bank by which it is issued;
<b>"Bond Amount"</b>	As provided in the Connection Offer Letter in Annexure 1;

"Breaching Party"	has the meaning given to it in Clause 17.1.1;
"Business Day"	means any day except a Saturday, a Sunday or a public holiday in Malawi;
"Change in Costs"	has the meaning given to it in the PPA;
"Change in Law"	has the meaning given to it in the PPA ;
"Charge" or "Charges"	means the Transmission Charges specified in Annexure E of the Connection Offer Letter and as they may be amended from time to time pursuant to Clause 9.5, charges approved by the MERA and any additional charges that may become applicable pursuant to Clause 9.6;
"Commercial Operation Date of the Customer's Facility"	means the day determined to be the Commercial Operation Date of the Customer's Facility under the PPA;
"Confidential Information"	has the meaning given to it in Clause 22.1;
"Connection"	means the connection of the Customer's Facility to the Transmission System;
"Connection Date"	means the date of connection of the Customer's Facility to the Transmission System;
"Connection Facilities"	means the transmission plant and equipment forming part of the Transmission System that are required to provide Connection for the Customer's Facility;
"Connection Offer Letter"	means the connection offer letter to the Customer, as attached hereto as Annexure 1;
"Connection Works"	means the ESCOM TL Connection Facilities and the Customer's Facility Connection Equipment;
"Consents"	has the meaning given to it in the PPA, mutatis mutandis;
"Construction Programme"	As per Annexure 1 to this Agreement which will include the activities from the Effective Date to the Commercial Operation Date of the Connection Works;
"Contract Year"	means each period of one (1) calendar year which falls within the term of this Agreement, provided that:  the first Contract Year shall commence on the Effective Date of this Agreement; and  the last Contract Year shall commence on the first day of the calendar year in which the term of this Agreement is due to end and shall end (unless this Agreement is terminated early in accordance with its terms) on the Termination Date;
"Customer's Facility"	Means the power plant to be established by the Customer to generate electricity as specified in the PPA, including any facilities ancillary thereto,

	whether completed or at any stage of development and construction, that is or will be connected to the Transmission System at the Point of Connection;
"Customer's Facility Connection Equipment"	means the transmission connection equipment under the responsibility of the Customer as in Annexure A and Annexure B of the Connection Offer Letter in Annexure 1;
"Daylight Hours"	has the meaning given to it in the PPA;
"Deemed Energy Payment"	shall have the meaning given to it under the PPA;
"De-Energise"	means the operation of any isolator, breaker or switch so as to prevent active power and reactive power to be transferred through the Point of Connection from or to the Customer's Facility to or from the Transmission System and "De-Energisation", "De-Energised" and "De-Energising" shall be construed accordingly;
"Disconnect"	means the removal of all or any of ESCOM TL Connection Facilities to such extent that the Point of Connection can no longer be energised and "Disconnection", "Disconnected" and "Disconnecting" shall be construed accordingly;
Distribution License	Is a function within ESCOM TL to develop, operate and maintain the distribution network and supply electricity to the consumers?
"Electricity Act"	means the Malawian Electricity Act, [Act No ], as amended or superseded from time to time;
"Effective Date"	has the meaning given to it in Clause 2.1;
"Force Majeure Event"	has the meaning given to it in Clause 16.1;
"Generation Licence"	has the meaning given to it in the PPA;
"Grid Code"	<i>[means, at any time, the most recent version of the Grid Code published by the MERA pursuant to the Electricity Act];</i>
"Independent Expert"	has the meaning given to it in Clause 20.2;
"Indexed Tariff"	has the meaning given to it in the PPA;
"Law"	has the meaning given to it in the PPA, mutatis mutandis;
"Long Stop Date"	means <i>[twelve (12)]</i> months from the Signature Date of this Agreement;
"Make-up Period"	has the meaning given to it in Clause 2.1.3;
"Market Rules"	means the Malawi's Market Rules, issued by MERA, which contains the set of rules that provide

	the framework for an efficient, transparent and reliable electricity market; to set out the responsibilities of the Market Participants, the TL, the SB and the SMO in relation to trading, co-ordination, dispatch, pricing, metering, settlement and payments and ensure an efficient, transparent and predictable settlement system and set the payment obligations;
"Maximum Export Capacity"	means the maximum capacity (specified in clause 3 of the Connection Offer Letter in Annexure 1) at the Point of Connection of the Customer's Facility for injection into the Transmission System;
"Maximum Import Capacity"	means the maximum capacity (specified in kVA in clause 3 of the Connection Offer Letter in Annexure 1) of the Point of Connection of the Customer's Facility for taking power off the Transmission System;
"Megawatt " or "MW "	means a measure of active electrical power equal to one million watts;
"Megavolt-amperes" or "MVA"	means a measure of active and reactive electrical power equal to one million volt-amperes;
"Malawi Energy Regulatory Authority" or "MERA"	means the Malawi Energy Regulatory Authority constituted and empowered under the Electricity Act;
"Metering Equipment"	means the Main Measuring System and the Check Measuring System for measuring active power, and measuring devices for measuring reactive power;
"Milestone"	means each key stage during the construction period as identified in the Construction Programme;
"Monthly Extension Charges"	As provided in Annexure E to the Connection Offer Letter in Annexure 1;
"MWh"	means a measure of active electrical energy equal to one MW of active electrical power supplied, conveyed or consumed in one hour;
"MVAh"	means a measure of active and reactive energy equal to one MVA of active and reactive electrical power supplied, conveyed or consumed in one hour;
"[currency]"	means the [currency] ;
"ESCOM TL Technical Specifications"	as per Annexure F of the Connection Offer Letter in Annexure 1;
"Non-Breaching Party"	has the meaning given to it in Clause 17.1.1;
"Notifying Party"	has the meaning given to it in Clause 17.1.2;



"Operating Committee"	has the meaning given to it in the PPA;
"Party"	means a party to this Agreement and shall include its successors in title, permitted assignees and permitted transferees;
"Person"	means any individual, company, corporation, firm, partnership, joint venture, undertaking, organisation, trust, government authority or government department (in each case whether or not having separate legal personality);
"Point of Connection"	means the point at which the Customer's Facility is connected to the Connection Facilities as shown in Annexure A of the Connection Offer Letter in Annexure 1;
"Potentially-Breaching Party"	has the meaning given to it in Clause 17.1.2;
"Power Project"	has the meaning as set forth in the PPA;
"Power Purchase Agreement" or "PPA"	means the power purchase agreement for the sale of energy by the Customer to ESCOM TL;
"Project"	the connection of the Customer's Facility to the Transmission System;
"Project Site"	has the meaning as set forth in the PPA;
"Project Costs"	has the meaning given to it in Clause 9.1;
"Project Documents"	means this Agreement, the EPC Agreement, Power Purchase Agreement, the Generation Licence (as determined in the PPA), the Consents (as determined in the PPA), the Operation and Maintenance Agreement, and any other agreements or contracts in relation to the Project;
"Prudent Industry Practice"	has the meaning given to it in the Power Purchase Agreement;
"[IPP Programme/ Framework]"	means the <i>[Independent Power Producer Programme/ Framework]</i> adopted by the Government of the Republic of Malawi through the <i>[Ministry of Natural Resources, Energy and Environment]</i> , and implemented by the MERA and ESCOM TL;
"Remedy Period"	has the meaning given to it in Clause 17.2.2;
"[Safety Code]"	means the <i>[Malawian Electricity Safety Code]</i> ;
"Scheduled Connection Date"	has the meaning set forth in the Connection Offer Letter in Annexure 1.
"Scheduled Transmission System Outage"	means a pre-scheduled interruption in the generating capacity of the Customer's Facility or the transmission capacity of the Transmission System

	(as the case may be) agreed between the Parties (in accordance with Clause 7.4.3 as the case may be);
"Signature Date"	means the date on which the last Party to this PPA signs this Agreement;
Single Buyer or SB	Means a function within ESCOM TL responsible to purchase capacity to generation companies, and resell to the Distribution License.
System and Market Operator or SMO	means a function within ESCOM TL Ltd responsible for operating the system and administering the market, and holds the System and Market Operation licence granted or deemed to be granted by the Authority under the Energy Regulation Act.
"Termination Date"	has the meaning given to it in Clause 2.1.2;
"Transmission Unavailability"	has the meaning given to it in the PPA;
"Transmission Unavailability Threshold"	has the meaning given to it in the PPA;
"Transmission Connection Equipment"	means the Connection Equipment under the responsibility of ESCOM TL, as specified in Annexure A and Annexure B;
"Transmission Default"	means the following events to the extent caused by ESCOM TL which prevents the Customer from exporting power from the Point of Connection or use the Transmission System, namely:  a delay in the Scheduled Connection Date or  Transmission Unavailability exceeding the Transmission Unavailability Threshold as defined in the PPA.
Transmission License or TL	Is a function within ESCOM TL to expand, operate and maintain the Malawi's Transmission System
"Transmission System"	means the electricity transmission infrastructure in Malawi owned and operated by ESCOM TL;
"Transmission Tariff Methodology"	means the method for calculating the charges for the provision by ESCOM TL of transmission-related services as approved from time to time by the MERA. As described in Annexure G to the Connection Offer Letter;
"Unscheduled Transmission System Outage"	means any period when the Customer's Facility or the Transmission System (as the case may be) is out of service to do repair work as a result of an unforeseen equipment failure or for any other reason.

## 1.2 Interpretation

In this Agreement, unless provided otherwise:

- 1.2.1 clause headings used in this Agreement have no effect on the interpretation or construction of any of the terms of the Agreement;
- 1.2.2 if any provision in a definition in this Agreement is a substantive provision conferring rights or imposing obligations on either Party, then, notwithstanding that it is in a definition, effect shall be given to it as a substantive provision of this Agreement;
- 1.2.3 1.2.3 if any provision in the recital is a substantive provision conferring rights or imposing obligations on either Party, then, notwithstanding that it is in the recital, effect shall be given to it as a substantive provision of this Agreement;
- 1.2.4 unless otherwise specified, any reference to a recital, an Annexure or a Clause shall be reference to a recital, an Annexure or Clause in the Agreement;
- 1.2.5 any reference to another agreement or document (including the Grid Code) shall be construed as a reference to that other agreement or document as the same may have been, or may from time to time be, amended;
- 1.2.6 the use of the singular form of a word includes the plural form and the use of the plural form includes the singular;
- 1.2.7 any word or expression, cognate with respect to a word or expression defined in the Agreement shall bear a corresponding meaning;
- 1.2.8 the words “include” and “including” are to be construed without limitation;
- 1.2.9 wherever provision is made for the giving or issuing of any notice, decision, consent, acceptance, agreement, expression of satisfaction, endorsement, approval, certificate, instruction or determination by any Person, unless otherwise specified, such notice, decision, consent, acceptance, agreement, expression of satisfaction, endorsement, approval, certificate, instruction or determination shall be in writing (and writing shall be inclusive of mail transmitted electronically) and the words “notify”, “decide”, “consent”, “accept”, “agree”, “endorse”, “approve”, “certify”, “instruct” or “determine” and other cognate expressions shall be construed accordingly;
- 1.2.10 references to materials, information, data and other records shall be to materials, information, data and other records whether stored in electronic, written or other form;
- 1.2.11 a time of day shall be construed as a reference to Central African Time (CAT);
- 1.2.12 any reference to “month” shall mean a “calendar month”.
- 1.2.13 [In the case of conflict between the provisions of the PPA and this Agreement, the provisions of the PPA shall prevail].Note: Depends on the contracting parties to the PPA.

## **2. Duration of Agreement**

### **2.1 Term**

- 2.1.1 This Agreement shall commence on the date on which the last Party to this Agreement signs this Agreement and shall become effective upon the date that the conditions precedent have been met ("Effective Date") as set out in Clause 2.1.5 (Conditions Precedent).
- 2.1.2 This Agreement, unless terminated earlier by either Party in accordance with the provisions of this Agreement, shall terminate [ ] years following the Commercial Operation Date of the Customer's Facility (the "Termination Date").
- 2.1.3 Without limiting the generality of Clause 2.1, the Term shall be extended by the number of days which is equal to the aggregate number of days or part days during which a Party is unable to perform its obligation pursuant to a Force Majeure Event, and is relieved of its obligations to so perform in accordance with Clause (d) (Force Majeure) (the "Make-up Period").
- 2.1.4 The occurrence of Force Majeure events during the Make-up Period shall give rise to a further extension of the Make-up Period.
- 2.1.5 All terms and conditions contained in this Agreement and the respective rights and obligations of the Parties shall remain unchanged for the duration of the Make-up Period.

## **3. Conditions Precedent**

### **3.1 Charges and Security**

This Agreement shall, subject to Clause 3.2.4, only become effective upon the satisfaction by the Customer or the waiver by ESCOM TL of each of the following conditions precedent:

- 3.1.1 the Customer having provided security to ESCOM TL in accordance with Clause 0 (Charges and Security) in form and substance satisfactory to ESCOM TL; and
- 3.1.2 the fulfilment or waiver by either Party of the conditions precedent mentioned in this Clause 2.1.5.

### **3.2 Consents and Approvals**

- 3.2.1 This Agreement shall, subject to Clause 3.2.4, only become effective following the satisfaction of each of the following conditions precedent by ESCOM TL:
  - (a) the acquiring of all environmental consents required under applicable legislation;
  - (b) the site for the Transmission Connection Equipment and the transmission infrastructure related thereto being made available to ESCOM TL for the life of the Project (at ESCOM TL's TL cost and risk).

3.2.2 This Agreement shall, subject to Clause 3.2.4, only become effective following the satisfaction of each of the following conditions precedent by the Customer:

- (a) the Customer obtaining and holding a Generation Licence and such Generation Licence is in full force and effect and the Customer is in compliance with the conditions attached thereto;
- (b) the Customer having been granted permission to occupy and obtaining the vacant possession of, or full and unencumbered title to, the site for the Customer and all necessary way-leaves and other access rights as are necessary to ensure the connection of the Customer's Facility infrastructure to the Transmission System;
- (c) the acquiring of the environmental consents required by the Customer; and
- (d) the PPA becoming effective.

**3.2.3 Notice**

- (a) The Parties shall notify the other in writing by the [fifteenth (15th)] day of each month on progress made in satisfying the conditions precedent enumerated in this Clause 2.1.5 for which it is responsible.
- (b) The Parties undertake to promptly inform the other party in writing of anything which will or is likely to materially delay or prevent the fulfilment of any of the conditions precedent by the Long Stop Date.
- (c) A Party shall promptly notify the other Party in writing when the conditions precedent have been satisfied or waived in writing by the Party in whose favour the condition precedent are operating.

**3.2.4 Waiver of conditions precedent**

- (a) ESCOM TL shall be entitled to waive any of ESCOM TL's TL conditions precedent, provided that ESCOM TL has received prior written consent by the Customer, of its consent to the waiver of ESCOM TL's relevant condition precedent.
- (b) The Customer shall be entitled to waive any of the Customer's conditions precedent, provided the Customer has received prior written consent by ESCOM TL, of its consent to the waiver of the relevant Customer's relevant condition precedent.
- (c) A Party who wishes to waive any condition precedent must provide the other Party with evidence (to the other Party's reasonable satisfaction) that the waiver of such condition precedent will not have a material adverse effect on its ability to satisfy its obligations under this Agreement.

**3.2.5 Non-fulfilment of conditions precedent**

If the conditions precedent are not satisfied or waived on or before the Long Stop Date, either Party shall have the right to terminate the

Agreement by issuing a termination notice to the other Party, within a period of [thirty (30) days] after the occurrence of the Long Stop Date. Neither Party shall have any liability whatsoever to the other Party in respect of such termination, except in relation to any antecedent breaches of this Agreement.

### **3.3 Scope of this Agreement**

This Agreement makes provision for: (a) the Connection of the Customer's Facility to the Transmission System; (b) ESCOM TL permitting the Customer to use the Transmission System in connection with its licensed generation undertaking at the Customer's Facility in accordance with this Agreement; (c) the cooperation between the Parties in relation to the operational interface between the Customer's Facility and the Transmission System; and (d) payment by the Customer of the required charges to ESCOM TL as set out in this Agreement, provided that this Agreement shall not govern any other services provided by ESCOM TL to the Customer or by the Customer to ESCOM TL unless specifically contained herein.

## **4. Charges and Security**

4.1 The Customer shall satisfy ESCOM TL that it is capable of effecting the payment in respect of the Connection Facilities, as contemplated in Clause 8.4 (Charges and Payments for Connection Facilities), by:

4.1.1 providing ESCOM TL with evidence of the Customer's credit rating and such credit rating is at ESCOM TL's sole discretion, at a satisfactory level; or

4.1.2 providing a bond or bonds or other form of guarantee (from a Malawian banking institution registered in terms of Malawian laws) approved by ESCOM TL in favour of ESCOM TL; or

4.1.3 a letter from the Customer's lenders, indicating that funds required under this Agreement, shall be available to the Customer.

4.2 If the Customer has provided ESCOM TL with evidence of the Customer's credit rating pursuant to Clause 4.1.1 above and the Customer's credit rating is downgraded or the Customer has reason to believe that its credit rating may be downgraded:

4.2.1 the Customer shall forthwith notify ESCOM TL of same; and

4.2.2 ESCOM TL may on giving the Customer [three (3)] Business Days written notice require the Customer to provide a bond or bonds or other form of guarantee in the form described in Clause 4.1 above.

## **5. Responsibilities of Customer**

Subject to the terms and conditions of this Agreement and its Generation Licence the Customer shall, acting in accordance with Grid Code and Prudent Industry Practice:

5.1 Design, engineer, procure, supply, erect, deliver, construct, install, test commission, operate and maintain the Customer's Facility in accordance with this Agreement and the PPA;

- 5.2 Design, engineer, procure, supply, erect, deliver, construct, install, test, commission, operate and maintain the Customer's Facility and/or the Customer's Facility Connection Equipment in all material respects in accordance with Grid Code and ESCOM TL Technical Specifications and Requirements (attached hereto in Annexure F) and the Grid Code;
- 5.3 Ensure that the Customer's Facility and/or the Customer's Facility Connection Equipment are compliant with the Grid Code and ESCOM TL Technical Specifications and Requirements for connections to the Transmission System;
- 5.4 If ESCOM TL (acting reasonably) believes that the Customer's Facility and/or the Customer's Facility Connection Equipment do not meet the relevant design standards in or referred to in the ESCOM TL Technical Specifications and Requirements and/or the Grid Code and/or may pose a threat to the safety and reliability of the Transmission System, then ESCOM TL may, following consultation with the Customer, and a delivery of a written notice which shall detail its basis, reject the connection of the Customer's Facility. In such a case, if disputed by the Customer as anticipated in clause 20.2, the matter will be referred to an Independent Expert as per the provisions of this Agreement. If the rejection was found by the Independent Expert to be unjustified and the rejection caused a delay in the commissioning of the Customer's Facility as per the Customer Construction Programme, the Customer will be entitled to extension of time for completion and ESCOM TL shall compensate the Customer that the Customer Capacity was available, as specified in the PPA.;
- 5.5 Obtain and maintain all Consents in connection with the design, engineering, procurement, supply, erection, delivery, construction, installation, improvement, testing, commissioning, operation and maintenance of the Customer's Facility and the Customer's Facility Connection Equipment and the injection of electrical energy into the Transmission System at the Point of Connection;
- 5.6 Achieve the construction milestones as provided in Annexure D1 (Customer Construction Programme) by the corresponding dates, so as to enable ESCOM TL to complete the Connection Works in accordance with Annexure D2 (ESCOM TL Construction Programme) and, in particular, to commission the Transmission Connection Equipment by the Scheduled Connection Date. Without limiting the foregoing, the Customer shall promptly notify ESCOM TL in writing of any deviations from any of the milestones as provided in Annexure D1 (Customer Construction Programme).

## **6 Delays in Scheduled Connection Date**

- 6.2 ESCOM TL shall achieve the Connection Date prior to or on the Scheduled Connection Date as provided in Annexure D2 (ESCOM TL Construction Programme), so as to enable the Customer to complete the construction works of the Customer's Facility in accordance with Annexure D1 (Customer Construction Programme) and, in particular, the commissioning of the Connection Works prior to or on the Scheduled Connection Date.
- 6.3 In the event, there is a delay by ESCOM TL in achieving the Connection Date by the Scheduled Connection Date as per the ESCOM TL Construction Programme, due to a Transmission Default, resulting in a corresponding delay

to the Target Commercial Operation Date (as specified in the PPA) of the Customer's Facility, ESCOM TL shall be liable to consider that the Customer's Capacity was available and receive the Capacity Payments in accordance with the terms of the PPA. The aforementioned is subject to the obligation of the Customer to take steps to mitigate its losses.

- 6.4 Without limiting the foregoing, ESCOM TL shall promptly notify the Customer in writing of any deviations from any of the milestones as provided in Annexure D2 (ESCOM TL Construction Program), which notice shall identify:
- (a) the nature of the reason for the deviation;
  - (b) the impact which such deviation has had, or in the reasonable opinion of ESCOM TL (acting as a reasonable and prudent operator), is likely to have, on its ability to achieve any milestone on the applicable due date; and
  - (c) the steps which ESCOM TL (acting as a reasonable and prudent operator) has taken, is taking and will take to mitigate adverse consequences of such deviation.
- 6.5 As soon as a Party becomes aware of any fact, matter or thing that may delay the Scheduled Connection Date, that Party shall as soon as reasonably practicable notify the other Party in writing of the delay, the reasons for the delay, the measures that the notifying Party proposes to take to mitigate, the impact of the delay and an estimate of the likely duration of the delay.
- 6.6 In the event of a delay in the Scheduled Connection Date occurring, the Parties undertake to take all reasonable measures to ensure that any acceptance tests as provided for in Annexure D2 (ESCOM TL Construction Program) or other works necessary to achieve the Scheduled Connection Date shall be undertaken as soon as possible after the circumstances that resulted in such delay, default or circumstance are no longer in place.

## **7 Connection Services**

### **7.2 Connection Services**

- 7.2.1 ESCOM TL shall connect the Customer's Facility at the Point of Connection so as to enable the Customer to inject power into the Transmission System, up to the Maximum Export Capacity and/or to take power from the Transmission System at up to the Maximum Import Capacity.
- 7.2.2 The Customer may take power at the Point of Connection provided that:
- (d) the amount of power taken by the Customer at the Point of Connection does not exceed the Maximum Import Capacity;
  - (e) the Customer has complied and at all times complies with the Grid Code and ESCOM TL Technical Specifications and Requirements and any instructions issued pursuant to the aforesaid documents. In the event of a conflict between the ESCOM TL Technical Specifications and Requirements and the Grid Code, the Grid Code shall prevail; and



- (f) the amount of power taken by the Customer at the Point of Connection shall be limited to Auxiliary Power requirements only.
- 7.2.3 Subject to Clause 0 (De-Energisation), ESCOM TL shall keep the Point of Connection energised at all times subject to any provisions of this Agreement containing anything to the contrary. In the event the Customer suffers any loss or damage as a result of ESCOM TL's failure to keep the Point of Connection energised as a result of a Transmission Default the Customer shall be entitled to compensation according to the Deemed Energy Payment provisions of the PPA.
- 7.2.4 ESCOM TL shall complete the Connection Works by the Scheduled Connection Date according to the schedule specified in section 4 of Annexure D to the Connection Offer Letter.

### **7.3 Operation of Customer's Facility and Transmission System**

- 7.3.1 ESCOM TL shall, at all times, operate the Connection Facilities in accordance with the Safety Code, Grid Code and otherwise in accordance with Prudent Industry Practice for the operation of transmission plant and equipment;
- 7.3.2 ESCOM TL shall be deemed to have acted in accordance with Prudent Industry Practice for the operation of transmission system and equipment if it complies with, observes, or performs all relevant provisions of the Grid Code where such provisions are prescribed in the Grid Code;
- 7.3.3 The Customer shall operate the Customer's Facility and the Customer's Facility Connection Equipment in accordance with the Grid Code and ESCOM TL Technical Specifications and Requirements and otherwise in accordance with Prudent Industry Practice. In the event of a conflict between the ESCOM TL Technical Specifications and Requirements and the Grid Code, the Grid Code shall prevail.
- 7.3.4 The Customer shall be deemed to have acted in accordance with Prudent Industry Practice for the operation of the Customer's Facility and the Customer's Facility Connection Equipment and equipment if it complies with, observes or performs all relevant provisions of the Grid Code and/or ESCOM TL Technical Specifications and Requirements where such provisions are prescribed.
- 7.3.5 ESCOM TL may require the Customer to comply with, observe or perform provisions that are not prescribed in the ESCOM TL Technical Specifications and Requirements and/or the Grid Code if ESCOM TL considers such provisions are necessary to ensure that the operation of the Customer's Facility and the Customer's Facility Connection Equipment is in accordance with Prudent Industry Practice. If ESCOM TL so requires, ESCOM TL shall:
  - (a) provide to the Customer the reasons for requiring such provisions;
  - (b) consult with the Customer on how such provisions may be met;
  - and

- (c) if the Parties cannot agree on the need for such provisions or on how such provisions should be met, refer the matter for resolution by the Independent Expert in terms of clause 0, provided that Customer shall not be required by ESCOM TL to act in contravention of
  - (i) any applicable Laws (including, without limitation, all health, safety and environmental Laws);
  - (ii) Grid Code and Market Rules
  - (ii) Prudent Industry Practice; or
  - (iii) the relevant manufacturer's guidelines and instructions.

Any additional work required from the Customer as a result of any Change in Law which results in a Change of Cost to the Customer, shall be dealt with under the provisions of clause 16 of the PPA (Change in Costs).

**7.3.6 The Customer shall, acting in accordance with Prudent Industry Practice:**

- (a) Unless with the written approval of ESCOM TL, under no circumstances, test or otherwise operate the Customer's Facility or the Customer's Facility Connection Equipment or export any electrical energy from the Customer's Facility prior to the Connection Date;
- (b) Save as per the provisions of this Agreement, not exceed the Maximum Export Capacity when transmitting electrical energy between the Customer's Facility and the Transmission System; and
- (c) Forthwith upon being requested to do so by ESCOM TL on written notice given at any time after the Connection Date, undertake such testing of any Customer's Facility and / or the Customer's Facility Connection Equipment in accordance with the Grid Code and /or ESCOM TL Technical Specifications and Requirements.

**7.4 Maintenance and Outage Coordination**

- 7.4.1 ESCOM TL shall maintain the Connection Facilities in accordance with Prudent Industry Practice for the maintenance of transmission plant and equipment;
- 7.4.2 The Customer shall maintain the Customer's Facility and the Customer's Facility Connection Equipment in accordance with Prudent Industry Practice for the maintenance of the Customer's Facility and the Customer's Facility Connection Equipment connected at the Point of Connection;
- 7.4.3 The Parties agree that the Transmission System may be unavailable for not more than the Transmission Unavailability Threshold annually, during which ESCOM TL shall perform Transmission System maintenance. ESCOM TL shall, not less than [two (2) months] prior to the Scheduled Connection Date and then on an annual basis for the

remainder of the term of this Agreement, the maintenance coordination of all the generation and transmission facilities, as established in the Market Rules. After completion of the Annual Maintenance Schedule, ESCOM SMO shall , provide to the Customer its proposal for Scheduled Transmission System Outages, and shall use its best endeavours to coordinate that the timing of the Scheduled Transmission System Outages shall not be during Daylight Hours (i.e., shall not overlap generation hours). Such schedule shall include:

- (a) the number of expected Scheduled Transmission System Outages; and
- (b) the estimated dates and duration of each Scheduled Transmission System Outage.

7.4.4 The Operating Committee shall meet and coordinate the timing of Scheduled Transmission System Outages for the forthcoming Contract Year, at least [one (1) month] prior to the commencement of that Contract Year.

7.4.5 If there is a requirement to change the dates of any Scheduled Transmission System Outage, ESCOM SMO shall provide the Customer with written notice at least [twenty-eight (28)] days in advance of the relevant Scheduled Transmission System Outage.

7.4.6 ESCOM TL shall be responsible for all costs incurred by it in connection with or arising from any maintenance carried out by it or on its behalf on the Transmission System. The Customer shall not be entitled to any payment and/or indemnification from ESCOM TL in connection with such Scheduled Transmission System Outages.

7.4.7 Subject to having complied with the foregoing provisions of this Clause 7.4, ESCOM TL shall be entitled to shut down the Transmission System from service at the agreed date and time. The Scheduled Transmission System Outages and Unscheduled Transmission System Outages (excluding Force Majeure events) shall not lead to a Transmission Unavailability in excess of the Transmission Unavailability Threshold. Should the Transmission Unavailability be in excess of the Transmission Unavailability Threshold on an annual basis for reasons other than Force Majeure, ESCOM SB will consider that the Customer plants was available and will receive the Capacity Payment as established in the PPA.

**7.4.8 ESCOM TL shall notify the Customer promptly:**

- (a) Upon the occurrence of any event resulting in the Transmission System being unable to operate or events affecting the Transmission System stability; and/or
- (b) If ESCOM TL determines that the maintenance of the Transmission System is required prior to the next Scheduled Transmission System Outage scheduled pursuant to Clause 7.4.3 and that an Unscheduled Transmission System Outage is required.

#### 7.4.9 In each case ESCOM TL shall:

- (a) give the Customer notice of such event as soon as reasonably practicable after the occurrence of such event, or, in the case of an Unscheduled Transmission System Outage, ESCOM TL becoming aware of the need for such outage;
- (b) notify the Customer of the expected duration of the Unscheduled Transmission System Outage; and
- (c) use its best efforts to minimise the duration and effects on the Transmission System of the Unscheduled Transmission System Outage.

### 8 Ownership of Equipment

- 8.2 ESCOM TL shall at all times retain ownership of, risk in, and title to the Transmission Connection Equipment. The Customer shall not encumber or attempt to encumber or cause to be encumbered any of the Transmission Connection Equipment.
- 8.3 The Customer shall at all times retain ownership of, risk in, and title to the Customer's Facility Connection Equipment
- 8.4 The Parties acknowledge and agree that nothing herein, including the payment by the Customer of the Project Costs, shall confer on the Customer any right of ownership or any encumbrance over or other legal or beneficial right in respect of, any of the Connection Works.

### 5.0 Charges and Payments for Connection Works

- 9.1 The Customer shall pay to ESCOM TL the payment of the costs set out in this Clause 9.1 (the "**Project Costs**"). The Project Costs shall be paid according to the following schedule:

Amount [ ] (VAT excluded)	Scheduled and agreed payment dates	In Consideration of
[ ]	Upon the signing the Agreement:	Final design and planning, including ESCOM TL project management and tendering evaluation on materials and project execution.
[ ]	[ ] months from the signing of the Agreement:	Ordering materials, starting with ground and civil works.
[ ]	[ ] months from the signing of the Agreement:	Construction of the Connection Facilities
[ ]	[ ] months from the signing of the Agreement:	Steel works, assembly and erection of the Connection Facilities
[ ]	[ ] months from the signing of the Agreement:	Electrical works, testing of the Connection Facilities
[ ]		<b>Project Costs</b>

**9.1.1 The Project Costs does not include VAT.**

9.1.2 The Project Costs are specified in [currency] as at the date of the Connection Offer Letter and may be adjusted for inflation by ESCOM TL from the date of the Connection Offer Letter to the date on which the amount is invoiced for payment. The inflation - adjusted amounts payable shall be invoiced by ESCOM TL and paid by the Customer in accordance with Clause 0 (Invoicing and Payment) of this Agreement.

**9.2 Final Costs**

The Project Costs indicated in Clause 9.1 above hereto above are based on a fixed capital price. No capital refund or capital shortfall shall be allocated to the Customer's account on completion of the Project.

**9.3 Charges**

The Customer shall pay to ESCOM TL the Charges for the use of the Transmission System and all transmission services to be rendered by ESCOM TL in connection with such use, which Charges shall be as set out in the Connection Offer Letter attached hereto as Annexure I. Invoicing and Payment

**9.4 Invoicing**

ESCOM TL shall invoice the Customer for the Charges monthly. The invoice for each month shall be sent by ESCOM TL to the Customer no later than the [7th day] of each calendar month.

**9.5 Payment**

9.5.1 The Customer shall pay to ESCOM TL the invoiced amount no later than [thirty 30 days] after the date of the invoice ("Due Date"). When the Due Date is other than a Business Day, the Charges shall be due and payable on the first Business Day following.

9.5.2 The Customer shall pay the invoiced amount of the Charges without any set-off, counterclaim or other deduction.

9.5.3 All invoices to ESCOM TL shall be made in [currency], and not indexed to any other currency.

9.5.4 ESCOM TL shall notify the Customer of its Malawian bank account details for payment.

9.5.5 The Customer shall notify ESCOM TL of its Malawian bank account details for payment by ESCOM TL to the Customer.

9.5.6 No Party shall be entitled to offset any amounts payable to the other Party under or in relation to this Agreement.

9.5.7 If the Customer believes the invoice to be in error it shall notify ESCOM TL, in writing, forthwith and:

- (a) if the invoice is in error ESCOM TL shall send the Customer a revised invoice and adjust the Due Date accordingly;
- (b) if the invoice is not in error, ESCOM TL shall advise the Customer, by a written notice forthwith of the same and the Due Date shall be within [fourteen (14)] days of such notice.

9.5.8 All amounts payable under this Agreement shall be paid:

- (a) free of any restriction or condition;
- (b) free and clear of and (except to the extent required by law) without any deduction or withholding for or on account of any bank charge or tax imposed, levied, collected, withheld or assessed by or within Malawi or by any federation or organisation of which Malawi is a member at time of payment.

9.5.9 If either Party must deduct or withhold any such tax or other amount from any amount payable under this Agreement, it will pay such additional amount to the other Party as is necessary to ensure that the other Party receives and retains (free from any liability other than tax on its own net income) a net amount equal to what it would have received and retained had the deduction or withholding not been required or made.

## **9.6 Disputed Amounts**

9.6.1 Should the Customer dispute an amount invoiced by ESCOM TL, the Customer should notify ESCOM TL of the dispute and grounds of the dispute within [ten (10)] Business Days of receipt of such an invoice.

9.6.2 If the Customer disputes the amount invoiced by ESCOM TL the Customer shall pay ESCOM TL the undisputed amount by the Due Date and the dispute shall be resolved in accordance with Clause 0 (Dispute Resolution).

9.6.3 Subject to Clause 9.7, following resolution of a dispute the Party that is liable to pay the other Party shall pay the other Party the amount owing, including default interest, within [five (5)] Business Days of the resolution of the dispute.

## **9.7 Default Interest**

9.7.1 If any amount payable by one Party to the other under this Agreement has not been paid on or before the date specified in this Agreement for payment, the unpaid amount including payments due following resolution of a dispute shall accrue interest from the date on which payment was due until the date on which payment is made.

9.7.2 The interest shall accrue daily and be compounded monthly at a rate equal to the Agreed Interest Rate from the date when payment was due until the amount due is actually received by the payee. Any overpayments by either Party resulting from an invoicing or payment error, will attract interest at the Agreed Interest Rate.

## **10 Customer's Facility**

### **10.1 Technical Specifications**

The Customer undertakes to construct the Customer's Facility and the Customer's Facility Connection Equipment in compliance with the Grid Code and ESCOM TL Technical Specifications and Requirements and any other

technical requirements set out in Annexure I and F, attached hereto. The Customer undertakes to comply with the ESCOM TL Technical Specifications and Requirements and the Grid Code to the extent that same is applicable to the Customer and the Customer's Facility and the Customer's Facility Connection Equipment and acknowledges that for the purposes of Clause 0 (Breach of this Agreement and the Grid Code) a material breach of the ESCOM TL Technical Specifications and Requirements and/or the Grid Code shall be deemed to be a breach of this Agreement.

## **10.2 Amendments to ESCOM TL Technical Specifications and Requirements and Grid Code**

The Customer acknowledges and agrees that the ESCOM TL Technical Specifications and Requirements and/or the Grid Code may be amended from time to time and that the Customer is responsible for any reasonable costs and expenses it may be required to incur arising from such amendments and its obligations to comply with them. An amendment to the ESCOM TL Technical Specifications and Requirements and/or the Grid Code and which results in any increase in costs to the Customer, and which affects all other power plants under the [IPP Framework/ Programme], shall be deemed a Change in Costs in terms of clause 16 of the PPA and that clause shall apply to this Agreement.

## **10.3 Modifications**

- 10.3.1 No material modifications that affect the Transmission System or the Connection Facilities may be made to the Customer's Facility except in accordance with this Clause 10.3 and subject always to the provisions of the ESCOM TL Technical Specifications and Requirements and the Grid Code, to the extent applicable.
- 10.3.2 If the Customer wishes to modify the Customer's Facility the Customer shall submit to ESCOM TL its proposed modification and shall provide to ESCOM TL such information as ESCOM TL reasonably requires to assess the effect of the proposed modification on the Transmission System, as soon as practically possible.
- 10.3.3 ESCOM TL will consider the proposed modification and advise the Customer within [fourteen (14) days] from the date of such proposal:
  - (a) whether ESCOM TL will permit the proposed modification unchanged; or
  - (b) whether ESCOM TL requires the proposed modification to be changed to avoid adverse effects on the operation of the Transmission System; or
  - (c) whether the proposed modification, changed as necessary to avoid adverse effects on the operation of the Transmission System, will result in ESCOM TL being required to modify the Transmission System; and
  - (d) if the Transmission System needs to be modified to accommodate the proposed modification to the Customer's Facility, the estimated cost.

- 11** If the proposed modification of the Customer's Facility requires ESCOM TL to modify the Transmission System, ESCOM TL will provide to the Customer an offer in respect of the modifications to the Transmission System and the provisions of Clause 4.2.2 will apply to the design, construction, commissioning and payment for the modifications to the Transmission System.

## **12 Metering System**

### **12.1 Metering Installations**

- 12.1.1 Unless otherwise agreed between the Parties, ESCOM TL shall install, maintain and operate [revenue class] meters at or in close proximity to the Point of Connection for the purpose of measuring the electrical power injected into or taken from the Transmission System by or through the Customer's Facility. The location of the meters shall be in the location defined in the Connection Offer Letter attached as Annexure I.
- 12.1.2 Metering installations shall be according to Part 5 of the Grid Code, for connections Type 1 and Annexure B of the Connection Offer Letter, as long as this offer does not contradict any specification of the Grid Code.
- 12.1.3 Each Metering Installation shall comprise the number of principal and check meters defined in the Grid Code. These meters shall be suitable for three phase imbalanced loads, and measure power in full four-quadrant mode. The class type and accuracy tolerances shall be in accordance with prevailing standards as are referenced in the Grid Code.
- 12.1.4 The Customer shall have the right to install check metering to monitor the Metering Equipment of ESCOM TL.

### **12.2 Meter Tests**

- 12.2.1 Commissioning, auditing and testing of Metering Installations shall be done in accordance with the Grid Code specifications. Each meter shall be tested:
- (a) Upon installation or following any repair; or
  - (b) when the Customer or ESCOM TL reasonably requires and, in the absence of evidence of malfunction, annual testing shall be deemed reasonable; or
  - (c) when the main and check meters differ by more than [1% (one percent)]; or
  - (d) at least once in every [10 (ten) years], when each meter shall be checked and calibrated against a standard instrument as per the Grid Code.

The cost of testing a meter shall be borne by the Party requesting the test except when the Customer requests a test and the test demonstrates that the meter was more than [1% (one percent)] inaccurate in which case ESCOM TL shall bear the cost.



## **12.3 Adjustment of Invoices**

- 12.3.1 In the event of any meter which has been used for the purpose of calculating amounts payable being found pursuant to any test made pursuant to Clause 12.2 to be exceeding the allowed accuracy range of [one (1) %] or where evidence exists of meter tampering or other interference, all previous invoices for Charges that have been calculated using metered data from the ESCOM TL meter and all future invoices until such time as the faulty meter is replaced or recalibrated shall be recalculated after applying adjustments to correct the metered data for the meter inaccuracy.
- 12.3.2 If the ESCOM TL Meter is faulty and metered data are available from the Customer meter, the metered data from the Customer meter shall be used to calculate the Charges during the period of inaccuracy of the ESCOM TL meter.
- 12.3.3 If any of the Parties has invoiced the other Party for payment of any Charge calculated using metered data from a faulty meter, the relevant Party shall recalculate the relevant Charges. Any additional amount payable by or refund due to the other Party as a result of that recalculation shall be included as an adjustment in the invoice for the month immediately following the receipt of the correct metered data.

## **13 Protection**

### **13.1 Equipment to be Installed**

- 13.1.1 As specified in Annexure 1 (the Connection Offer Letter), the Customer shall, at its own expense, provide and install as part of the Customer's Facility and/or the Customer's Facility Connection Equipment and in accordance with the Grid Code and ESCOM TL Technical Specifications and Requirements and any requirements set out in the Annexures, to this Agreement:
- (a) communication and other equipment, as are reasonably required by the Grid Code and ESCOM SMO for the purposes of operation of the Transmission System. For information purposes only, and without limitation, such equipment may include dial up telephone line connections and/or fibre optic link between the Customer and ESCOM TL SMO and via the public telephone network for voice communication and data collection from the Metering Installation as detailed in the Grid Code and ESCOM TL Technical Specifications and Requirements as specified in Annexure I;
  - (b) power supplies for the operation of metering, operational instrumentation, ESCOM TL's switchgear, control and protection equipment. Such power supplies, unless otherwise advised by ESCOM TL, shall be [230V AC, 50Hz];
  - (c) Control and protection equipment, associated instrument transformers and cabling and power supplies therefore, as specified in Grid Code and Annexure I.

13.1.2 Such equipment, transformers, cabling and power supplies shall be maintained by the Customer throughout the term of this Agreement to the reasonable satisfaction of ESCOM TL and the Customer shall provide to ESCOM TL such evidence as to the completion of such maintenance as is from time to time required by ESCOM TL (acting reasonably).

### **13.2 Signalling and Indications**

The Customer shall provide to ESCOM TL relevant signalling and indications as required by ESCOM TL (acting reasonably). Such signalling and indication shall provide ESCOM TL with parameters of the Customer's Facility including the status of switchgear, power flows and voltages.

## **14. Rights of Access**

The Parties agree that whilst the ESCOM TL Substation shall be located in the ESCOM TL area (as set out in Annexure A), certain ancillary facilities, equipment, lines, cables and wires included in the Transmission Connection Equipment (such as tele-control equipment) may be installed by or on behalf of ESCOM TL at the Customer's Facility.

### **14.1 Customer to Grant Consents**

The Customer shall at its own expense grant to ESCOM TL all consents as are reasonably required to be given by the Customer for the installation, operation, maintenance, inspection, removal of and access to ESCOM TL's plant and equipment situated at or on the Customer's Facility.

### **14.2 Access at Times to be Agreed**

ESCOM TL's employees and/or authorised agents and/or subcontractors may, subject to the Customer's prior written approval, enter at times to be agreed between the Parties the Customer's Facility to enable ESCOM TL to carry out any works, modifications or inspections, or for operating, testing, repairing, renewing, maintaining, isolating, protecting or removing ESCOM TL's equipment, material or temporary works, Disconnecting or De-Energising, monitoring compliance with the terms of this Agreement or the Grid Code, or to enable ESCOM TL to fulfil its obligations under this Agreement and the PPA. ESCOM TL shall give the Customer [forty eight (48) hour] notice prior to requiring access to the Customer's premises, such consent to be given or denied (with reasonable justification) within the [forty eight (48) hour] notice.

### **14.3 Access at Any Time**

In the event of emergency, ESCOM TL's employees and/or authorised agents and/or subcontractors shall be entitled to enter the Project Site and Customer's Facility at any time and, only when in ESCOM TL's opinion such

entry is necessary for the prudent operation of the Transmission System, including in respect of De-Energisation of the Connection.

#### **14.4 ESCOM TL to grant consents**

ESCOM TL shall grant access to the Customer, its employees and/or agents to ESCOM TL's portion of land (excluding the fenced off substation area), and the access road for the purposes of construction, operation and maintenance of the Customer's Facility and/or the Customer's Facility Connection Equipment and the [ ] kV line connecting the Customer's Facility and the ESCOM TL [ ] Substation.

### **15. De-Energisation**

#### **15.1 Circumstances of De-Energisation**

The Point of Connection may be De-Energised:

15.1.1 at the request of the Customer;

15.1.2 subject to Clause 7.4 when ESCOM TL believes there is an emergency which requires it to De-Energise the Point of Connection to connect new plant or equipment or to carry out maintenance of the Transmission System;

15.1.3 if ESCOM TL considers it necessary to prevent loss of life or damage to property or if there is reason to believe that the condition of the Point of Connection poses an immediate threat of injury or death to any person;

15.1.4 if ESCOM TL believes there is an emergency that requires the Point of Connection to be De-energised to maintain the safe operation of the Transmission System;

15.1.5 if the Customer is in material breach of the Grid Code, the ESCOM TL Technical Specifications and Requirements, or any relevant safety regulation or requirement in force at the time and is unable or unwilling to remedy the breach after a [thirty (30) day] prior written notice and the Customer's breach poses a serious threat to the secure operation of the Transmission System;

15.1.6 in the event of a Force Majeure Event;

15.1.7 in the event of default of payment of any amount owed by the Customer to ESCOM TL after a [thirty (30) day] prior written notice and such payment default having occurred on three consecutive occasions and

15.1.8 on the termination of this Agreement.

#### **15.2 Energisation Following De-Energisation**

If the Point of Connection has been De-Energised it shall be energised as soon as practicable, following:

15.2.1 a request from the Customer that it be energised, if the Point of Connection was initially De-Energised at the Customer's request,

- 15.2.2 the completion of maintenance, if the Point of Connection was De-Energised by ESCOM TL to carry out maintenance of the Transmission System,
- 15.2.3 the remedying of a situation causing danger to persons or property if the Point of Connection was De-Energised by ESCOM TL to prevent damage or loss to persons or property,
- 15.2.4 the remedying of an emergency situation on the Transmission System, if the Point of Connection was De-Energised by ESCOM TL to maintain the safe operation of the Transmission System,
- 15.2.5 payment of any amounts due, if the Point of Connection was De-Energised by ESCOM TL because of default of payment of an amount owed by the Customer to ESCOM TL,
- 15.2.6 the Customer's remedying of the breach, if the Point of Connection was De-Energised by ESCOM TL because of the Customer's breach of the ESCOM TL Technical Specifications and Requirements of the Grid Code or any other relevant safety regulation or other requirements in force at the time.

### **15.3 Cost of De-Energisation and Energisation**

#### **15.3.1 The cost of De-energisation and Energisation shall be borne by the Customer:**

- (a) if the Point of Connection was De-Energised and energised at the request of the Customer; or
- (b) if the Point of Connection was De-Energised by ESCOM TL because the Customer was in material breach of the ESCOM TL Technical Specifications and Requirements, the Grid Code or any relevant safety regulation or other requirement in force at the time;
- (c) in the event of a default of payment of any amount owed by the Customer to ESCOM TL as anticipated in Clause 15.1.7; or
- (d) on termination of this Agreement due to the Customer's default.

#### **15.3.2 If the Point of Connection is De-Energised due to:**

- (a) a reason other than those set out in Clause 15.1; or
- (b) ESCOM TL's failure to operate the Transmission System according to Prudent Industry Practice;
- (c) ESCOM TL's negligence;
- (d) maintenance of the Transmission System in excess of the Transmission Unavailability Threshold in any Contract Year, and in the event the Customer suffers any loss or damage as a result of any of De-Energisation and Energisation under this clause 15.3.2, ESCOM TL shall be liable to compensate the Customer in accordance to the Deemed Energy Payments pursuant to the terms of the PPA.

## **16 Force Majeure**

### **16.1 Definition of Force Majeure**

16.1.1 A Force Majeure Event means any event or circumstance which:

- (a) is beyond the reasonable control of the Party affected by the Force Majeure (the “**Affected Party**”) or its Contractors;
- (b) is without fault or negligence on the part of the Affected Party or its Contractors and is not the result of a breach by the Affected Party or its Contractors of any of their obligations under any Project Document (including, in respect of the Affected Party, this Agreement), Consents or applicable Law;
- (c) was not foreseeable, or if foreseeable, could not have been (including by reasonable anticipation) avoided or the effects of which could not have been overcome by the Affected Party or its Contractors, acting in accordance with Prudent Industry Practice; and
- (d) prevents, hinders or delays the Affected Party in its performance of any of its obligations under this Agreement.

16.1.2 If an Affected Party or its Contractors could, by acting in accordance with Prudent Industry Practice, have mitigated an event or circumstance that otherwise satisfies the requirements set out in paragraphs (a) to (d) of Clause 16.1.1, that part of the event or circumstance that could have been mitigated, shall not be Force Majeure.

16.1.3 Without limiting the generality of the foregoing, Force Majeure may include any of the following acts, events or circumstances, but only to the extent that it satisfies the requirements set out in paragraphs (a) to (d) of Clause 16.1.1 and Clause 16.1.2:

- (a) any material effect of the natural elements, including lightning, drought, wind, fire, earthquake, solar flares, volcanic eruption, landslide, flood, storm, tsunami, cyclone, typhoon, tornado, or meteorites; or
- (b) air crash, shipwreck, train wreck or major failure or stoppage of transportation, objects falling from aircraft or other aerial devices, sonic boom, explosions or chemical contamination; or
- (c) epidemic, famine or plague; or
- (d) any event or circumstance constituting Force Majeure under any other Project Document; or
- (e) act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, civil commotion, sabotage, act of terrorism or exercise of military or usurped power; or
- (f) radioactive contamination or ionising radiation; or
- (g) labour unrest, strike, go-slow or other labour action but not those affecting only the personnel of a Party;

provided that the following shall not constitute a Force Majeure Event unless caused by or resulting from Force Majeure:

- (a) a failure or inability to make any payment, any inability to raise finance or any changes in price or market conditions;
- (b) late delivery or interruption in the delivery of machinery, equipment, materials, spare parts or consumables;
- (c) a delay or failure by a third party which prevents, hinders or delays the Affected Party in the performance of its obligations under this Agreement, save where the cause of such delay or failure by the third party would constitute Force Majeure event pursuant to this Agreement; or
- (d) any technical or operational problems with the Power Project arising from a fault in the construction, operation and/ or maintenance of the Customer's Facility which is attributed to any failure by the affected Party to obtain and/or maintain a Consent;
- (e) wear and tear, flaws, breakdown in or degradation of, any equipment or machinery.

## **16.2 Procedure**

16.2.1 If an Affected Party wishes to cite a Force Majeure Event as being the cause of it being unable to meet any or some of its obligations hereunder, the Affected Party shall, as soon as reasonably practicable of it becoming aware of the Force Majeure Event but not later than two days of the occurrence of the event, advise the other Party of the nature, cause and/or likely duration of the Force Majeure Event (to the extent the same can be reasonably determinable at the time of such notice) and, when appropriate or when reasonably requested to do so by the other Party, update such information.

16.2.2 Both Parties shall take such steps as are reasonably available to it to overcome such Force Majeure Event and each Party shall mitigate its effect on the ability of the Affected Party to meet its obligations under this Agreement, and shall consult to develop and implement a remedial plan to minimise each Party's losses.

16.2.3 The Affected Party shall promptly provide notice to the other Party of:

- (a) the cessation of the Force Majeure Event; and
- (b) its ability to immediately recommence performance of its obligations under this Agreement by reason of the cessation of the Force Majeure Event.

16.2.4 During the occurrence of a Force Majeure Event, each Party shall bear its own costs resulting from the occurrence of the Force Majeure Event.

## **16.3 Consequences of Force Majeure**

16.3.1 Notwithstanding any other provisions of this Agreement, to the extent the Affected Party hereto is unable to perform any of its obligations under this Agreement due to a Force Majeure Event then the Affected

Party shall be relieved from liability in respect of such obligations and shall be entitled to suspend performance of such obligations in accordance with and subject to this Clause 16.3.

16.3.2 If it is agreed or determined that a Force Majeure Event has occurred, the Affected Party shall, provided that it has complied with the requirements of Clause 16.2, not be liable for any failure to perform an obligation under this Agreement as a consequence of such Force Majeure Event, to the extent only that -

- (a) such performance is prevented, hindered or delayed by the Force Majeure Event; and
- (b) such failure could not have been mitigated by the Affected Party acting in accordance with Prudent Industry Practice.

16.3.3 Any time period specified in this Agreement for the performance of any obligation shall be extended on a day-for-day basis for each day that the Force Majeure Event prevents, hinders or delays the Affected Party from performing that obligation within the time period, and the term of this Agreement shall be extended accordingly.

#### **16.4 Termination on Account of Force Majeure**

If the event or circumstance of Force Majeure or its direct effect or consequences on the operations of either Party is of such magnitude or will be (or it is more probable than not that it will be) of such duration that after a period of [twelve (12) months] it is unreasonable in all the circumstances for either Party to perform its obligations under this Agreement, either Party may upon not less than [thirty (30) days"] notice terminate this Agreement.

### **17 Breach of this Agreement and the Grid Code**

#### **17.1 Notice of Breach**

17.1.1 If either Party becomes aware that it is or could be in breach of any of the provisions of this Agreement, the Grid Code or any relevant safety regulation or other requirement in force at the time (the "Breaching Party"), then such Breaching Party shall as soon as reasonably practicable, but no later than [fourteen (14) days], notify the other Party (the "Non-Breaching Party") of the breach or potential breach and advise whether in its opinion the breach can be remedied and the timescale for the remedy and giving sufficient details thereof to the Non-Breaching Party to enable it to assess the importance of the breach.

17.1.2 If either Party in its opinion believes (the "Notifying Party") that the other Party is or could be in breach of any of the provisions of this Agreement or the Grid Code or any relevant safety regulation or other requirement in force at the time (the "Potentially Breaching Party") then the Notifying Party shall notify as soon as reasonably practicable, but no later than [fourteen (14) days], the Potentially Breaching Party of the breach or potential breach and request the Potentially Breaching Party to advise whether the breach can be remedied and the timescale for the remedy

and giving sufficient details thereof to enable the Notifying Party to assess the importance of the breach.

## **17.2 Notice to Remedy**

17.2.1 If either Party has determined that the other Party is in breach of this Agreement or the Grid Code or any relevant safety regulation or other requirement in force at the time, the Parties shall discuss the breach in good faith with the aim of agreeing on a means of remedying the breach.

17.2.2 If the breach is capable of remedy the Parties shall agree upon a time period, but in any event no longer than [sixty (60) days], within which the Breaching Party shall remedy the breach (the "Remedy Period") provided that if such failure cannot be remedied by the Breaching or Potentially Breaching Party within such period of [sixty (60) days] with the exercise of reasonable diligence, then such Remedy Period shall be extended by mutual agreement for an additional reasonable period of time (not to exceed a further [sixty (60) days]).

## **17.3 Right to Terminate**

If (a) the breach is capable of remedy but is not remedied before the end of the Remedy Period; or (b) if the breach is incapable of remedy; or (c) the Breaching Party is unwilling to remedy the breach and the breach poses a serious threat to the secure operation of the Transmission System and/or the Connection Facilities and/or the Customer's Facility and/or the Customer's Facility Connection Equipment and /or the Project Site and/or the Point of Connection, the Non-Breaching Party shall have the right to terminate this Agreement on giving the Breaching Party [thirty (30) days] written notice. Nothing in this Clause shall prevent any Party from availing itself of the usual remedies at law and/or to claim damages arising from such breach.

## **18 Termination**

### **18.1 Circumstances of Early Termination**

18.1.1 Notwithstanding Clause 0, ESCOM TL shall have, subject to the lapse of the respective prior notice period as per Clause 0 (Breach of this Agreement and the Grid Code) above, the right to terminate the Agreement:

- (a) if the Customer has failed to make payment of a duly rendered invoice or any other amount due to ESCOM TL under the Agreement and ESCOM TL has given not less than [sixty (60) days"] notice.
- (b) if the Customer is declared bankrupt, placed in curatorship, enters into a scheme of arrangement (other than for the purpose of a solvent reconstruction or amalgamation approved by ESCOM TL (such approval not to unreasonably withheld) and such proceedings were not cancelled within [sixty (60) days] from the date of commencement of such proceedings;



- (c) if the Customer has failed to obtain or maintain any licences, authorisations or other approvals required to generate electricity in Malawi pursuant to Clause 3.2.2;
- (d) on account of a material breach of the Grid Code or ESCOM TL Technical Specification (under Annexure F of the Connection Offer Letter in Annexure 1) pursuant to Clause 17.1; or
- (e) on termination of the PPA.

18.1.2 Notwithstanding Clause 0.the Customer, subject to the lapse of the respective prior notice period as per Clause 0 (Breach of this Agreement and the Grid Code) above, shall have the right to terminate the Agreement:

- (a) if ESCOM TL is declared bankrupt, placed in curatorship, enters into a scheme of arrangement (other than for the purpose of a solvent reconstruction or amalgamation approved by ESCOM TL (such approval not to unreasonably withheld)) and such proceedings were not cancelled within [60 (sixty) days] from the date of commencement of such proceedings ;
- (b) if ESCOM TL has failed to obtain or maintain any licences, authorisations or other approvals required to transmit electricity in Malawi;
- (c) on account of Force Majeure as contemplated under Clause 16.4; or
- (d) on termination of the PPA.

## **18.2 Termination and Disconnection**

ESCOM TL shall be entitled to disconnect the Customers Facility from the Transmission System following the termination of this Agreement.

## **19 Liability for Damage or Loss**

### **19.1 Indemnity**

19.1.1 Subject to Clause 19.1.2, each Party shall indemnify, defend and hold harmless the other Party against all losses, damages, claims, liabilities, costs or expenses which the other Party may suffer or incur by reason of any claim for or in respect of: (i) the death or personal injury of any individual or (ii) damage to property or (iii) any third-party liabilities and damages, arising out of the indemnifying Party's default under this Agreement, save where that default is excused in terms of Clause (d) (Force Majeure) of this Agreement, except to the extent that the Party seeking to be indemnified is at fault or is negligent.

19.1.2 Indemnification required from a Party under Clause 19.1.1 shall be capped at [amount], VAT excluded. In the event that any losses, claims or damages in relation to any death or personal injury arises out of or results from the joint or concurrent negligence or the intentional conduct of both Parties, each Party shall be liable in proportion to its degree of negligence or fault. The Parties shall make all reasonable endeavours to

mitigate any losses they may suffer as a result of the breach of any of the other Party's material obligations under this Agreement.

19.1.3 Neither Party shall be liable for the other Party's losses save as expressly provided for in this Agreement.

## **19.2 Damages**

Other than as provided in this Agreement and in the PPA, in no event shall either Party be liable to the other Party, at law or in equity and whether based on contract, tort or otherwise, for any indirect, incidental, special or consequential damages incurred by such Party or any third party as a result of the performance or non-performance of the obligations imposed pursuant to this Agreement, irrespective of the causes thereof, including fault or negligence. To the extent that any damages required to be paid hereunder are liquidated, the Parties acknowledge that such damages are difficult or impossible to determine, or otherwise obtaining an adequate remedy is inconvenient, and the liquidated damages constitute a reasonable approximation of the harm or loss that may be suffered by the affected Party.

## **20 Dispute Resolution**

### **20.1 Procedure**

20.1.1 If any dispute arises relating to this Agreement or any claims for damages or otherwise are made as the result of breach of any obligation hereunder, the Parties shall meet and use their reasonable efforts to resolve such dispute through good faith negotiation. The Parties acknowledge the MERA's entitlement to mediate the settlement of certain disputes between the Parties as provided in the Generation Licence. The Parties shall follow the applicable dispute resolution as set by the MERA.

20.1.2 Should the Parties fail to resolve such dispute in accordance with Clause 20.1.1 within [seven (7) days] of their meeting or such longer period as the Parties may agree, the matter shall be elevated to chief executive level for resolution.

20.1.3 Should the Chief Executives of the Parties fail to resolve such dispute in accordance with Clause 20.1.2 within [fourteen (14) days] of their meeting or such longer period as the Parties may agree, any Party may refer such dispute or difference (except for a technical dispute which shall be dealt with in accordance with Clause 20.2) to arbitration to be undertaken by three (3) arbitrators agreed to by the Parties in accordance with Clause 20.3. Should the Parties fail to agree on arbitrators within [14 (fourteen) days] of the referral of the dispute to arbitration, the President of the Law Society of Malawi shall appoint the arbitrators from a list of approved arbitrators having the requisite experience and expertise in the field of the dispute.

### **20.2 Reference of Technical Disputes to Independent Expert**

20.2.1 If the Parties are unable to resolve a technical dispute through good faith negotiation or resolution by the Chief Executives, the dispute shall be resolved by an independent person that is a technical expert on the

matter under dispute ("Independent Expert") agreed between and appointed by both Parties.

20.2.2 The Parties agree that the Independent Expert shall act as an expert and not as an arbitrator and shall decide those matters referred or reserved to the Independent Expert under this Agreement by reference to Prudent Industry Practice using the Independent Expert's skills, experience and knowledge and with regard to such other matters as the Independent Expert in the Independent Expert's sole discretion considers appropriate.

20.2.3 The Parties agree they will make every effort to supply whatever information, documents and materials the Independent Expert considers necessary to address the matters referred and will act in good faith regarding matters falling within the ambit of this Clause 20.2.

20.2.4 The Independent Expert will endeavour to provide the Independent Expert's decision within the shortest time possible. In most cases, it is expected that the Independent Expert should be able to supply a decision to the Parties within [fourteen (14) Business Days]. If for any reason, the Independent Expert requires longer than [fourteen (14) Business Days], the Independent Expert will provide the Parties a written explanation for the required extension of time with an estimate of the likely timetable for a decision on the matter referred.

20.2.5 The Parties shall share equally the fees and expenses of the Independent Expert.

20.2.6 Should the Independent Expert fail to resolve such dispute in accordance with this Clause 20.2 within [fourteen (14) Business Days] or such longer period as the Parties may agree, any Party may refer such dispute or difference to arbitration in accordance with the provisions of Clause 20.1.3 and in accordance with Clause 20.3.

## **20.3 Arbitration**

20.3.1 Except where otherwise specifically provided for, any dispute at any time between the Parties or any failure by them to reach agreement in regard to any matter arising out of or in connection with this Agreement or its interpretation or effect, or arising in any way out of the termination or failure of any of them, shall be submitted to arbitration pursuant to the arbitration laws of Malawi. In the event the arbitration laws are deemed insufficient, the [AFSA/ UNCITRAL] rules shall apply.

20.3.2 The decision of the arbitrators shall be given in writing as soon as reasonably possible and not later than [six (6) weeks] from the date on which the hearing, including argument, was concluded. The decision shall be final and binding upon the Parties and shall not be subject to appeal to any court or tribunal of any kind unless manifestly unlawful or unjust, provided however that any Party may take action in any court of competent jurisdiction to enforce the arbitrators' decision, including its award in respect of the costs of arbitration.

20.3.3 Each Party shall bear its own costs and the costs of arbitration shall be borne equally by the Parties, unless the arbitrators decide otherwise.

20.3.4 Arbitration shall be conducted in accordance with the arbitration laws of Malawi and shall be held in [place], Malawi before three (3) arbitrators. The arbitration shall be conducted in the English language.

20.3.5 The Parties may be legally represented and may present evidence by independent experts or as otherwise permitted by the arbitrators.

20.3.6 The aforesaid notwithstanding, any Party shall be entitled to approach any competent court having jurisdiction for urgent relief on an interim basis, pending the finalisation of the resolution of the dispute in terms of this Clause 20.3.

## **20.4 Obligations during Disputes**

20.4.1 While a dispute is continuing, the Parties are required to continue to perform their respective obligations, including the payment of the Energy Payment according to the PPA, under this Agreement until such dispute has been fully and finally resolved.

20.4.2 Where a dispute has been referred for resolution by arbitration in accordance with the arbitration laws of Malawi, then neither of the Parties shall be entitled to exercise any rights or election arising in consequence of any alleged default by the other arising out of the subject matter of the dispute until the dispute has been resolved by the decision of the arbitrators.

## **20.5 Proceedings in Confidence**

All proceedings held by the Parties for the purpose of resolving disputes shall be held in private and except as permitted or required by any other provision of this Agreement, shall not be open to third parties, it being agreed that for the purposes of this Agreement the record and outcome of any proceedings shall also constitute Confidential Information of each Party hereto and safeguarded in accordance with the provisions of Clause 21.2.3 (Confidentiality).

## **21 Cession and Assignment**

### **21.1 Prior Consent**

The Parties shall not be entitled to cede or assign this Agreement or any of its rights and obligations without the prior written consent of the other Party except to the lenders for the purpose of providing security under the Finance Documents or an assignment by the Customer to its Affiliate and/or a wholly owned subsidiary. Such consent shall not be unreasonably withheld: Provided that where such cession or assignment requires approval under the Act, such approval must first be obtained before such cession or assignment becomes effective.

### **21.2 Restructuring**

21.2.1 Notwithstanding the above, ESCOM TL shall be entitled to cede, assign or transfer its rights and obligations under this Agreement to a third party but only in the context of: (i) the dissolution of ESCOM TL; (ii) the restructuring, amalgamation, reorganisation or analogous event of

ESCOM TL; or (iii) the transfer of all or any material part of ESCOM TL's property, assets and undertaking to a third party or successor, provided that, in each case such dissolution, restructuring, amalgamation, reorganisation, analogous event or transfer is at the instruction of or sanctioned by the Government of the Republic of Malawi or any Competent Authority.

21.2.2 In the event of a restructuring or reorganisation of ESCOM TL resulting in the cession or assignment of this Agreement to an Affiliate of ESCOM TL, ESCOM TL shall be jointly and severally liable with the newly created entity for the performance of its obligations in terms of this Agreement.

21.2.3 In the event that the restructuring or reorganisation of ESCOM TL resulting in the cession or assignment of this Agreement to an entity not forming part of the ESCOM TL group of companies, such restructuring or reorganisation shall not take place without the prior written consent of the Seller's lenders, provided that such consent shall not be unreasonably withheld.

## **22 Confidentiality**

### **22.1 Confidential Information**

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

### **22.2 Duty to Maintain Confidentiality**

Each Party will use the same means as it uses to protect its own Confidential Information, but in no event less than reasonable means, to prevent the disclosure and to protect the confidentiality of such information. No information referred to in Clause 22.1 will be disclosed by the recipient Party, its agents, representatives or employees without the prior written consent of the other Party (other than to its advisers and the lenders and their advisers).

### **22.3 Exclusions**

These provisions shall not apply to information which is:

- 22.3.1 publicly known or has become publicly known through no unauthorised act of the recipient Party;
- 22.3.2 rightfully received by the recipient Party from a third party;
- 22.3.3 independently developed by the recipient Party without use of the other Party's information;
- 22.3.4 disclosed by the other Party to a third party without similar restrictions;
- 22.3.5 required to be disclosed pursuant to a requirement of a Competent Authority or any applicable Law, so long as the Party required to

disclose the information gives the other Party prior notice of such disclosure; or

22.3.6 publicly disclosed with the other Party's written consent.

## **22.4 Disclosure**

22.4.1 All media releases, public announcements and public disclosures by any Party or their respective employees or agents relating to this Agreement or its subject matter, including without limitation promotional marketing material, shall be co-ordinated with and approved by each Party prior to the release thereof.

22.5 The foregoing will not apply to any announcement intended solely for internal distribution by any Party or to any disclosure required by legal, accounting or regulatory requirements beyond the reasonable control of the Party in question.

## **23 Survival on Termination**

Termination of this Agreement shall not affect the accrued rights and liabilities of the Parties hereto and the provisions of Clause 0 (Termination), Clause 0 (Dispute Resolution), Clause 21.2.3 (Confidentiality) and Clause 25.9 (Applicable Law and Jurisdiction) shall continue to have effect notwithstanding the termination of this Agreement.

## **24 Notices**

### **24.1 Giving of Notices**

24.1.1 Any notice or other communication given or made under or in connection with the matters contemplated by this Agreement shall be in writing and sent by hand or facsimile. Any such notice or other communication shall be addressed as provided in Clause 24.2 and, if so addressed, shall be deemed to have been duly given or made as follows:

- (a) if sent by hand, upon delivery at the physical address of the relevant Party;
- (b) if sent by facsimile, on the Business Day following the successful transmission of the facsimile;
- (c) if sent by electronic mail, upon receipt by the sender of a "read" receipt or an acknowledgement of receipt of the notice or other communication by the intended recipient.

24.1.2 Each notice, demand, request, statement, instrument, certificate or other communication given, delivered or made by one Party to the other under or in connection with this Agreement shall be in English.

### **24.2 Address for Notices**

The relevant addressee, address and facsimile number of each Party for the purposes of this Agreement subject to Clause 24.3 (Notice of Change of Address) are as follows:

In the case of ESCOM TL

In the case of [IPP]

Addresses:

Fax:

Email:

Attention:

### **24.3 Notice of Change of Address**

Either Party must notify the other Party of a change to its name or relevant address in writing no less than [thirty (30) days] before the change is due to take place provided that a change of address must be to an address in Malawi.

## **25 Miscellaneous**

### **25.1 No Partnership**

This Agreement does not create, nor is it evidence of a partnership or joint enterprise of any kind. Rather, the Parties are and shall remain independent and no Party has the power to bind the other for any purpose (except as otherwise specifically provided in this Agreement). Nothing contained in this Agreement shall be construed to constitute either Party as any of the other Party's attorney, partner or agent.

### **25.2 No Waiver of Rights**

No delay, neglect, grant or extension of time or forbearance on the part of either Party in enforcing against the other Party any provision of this Agreement shall be deemed to be a waiver of or shall in any way prejudice any right of that Party under this Agreement. No waiver by either Party of any default or defaults by the other Party in the performance of any of the provisions of this Agreement shall operate or be construed as a waiver of any other or further default or defaults whether of a like or different character; or shall be effective unless in writing duly executed by a duly authorised representative of the waiving Party. Neither the failure by either Party to insist on any occasion upon the performance of the terms, conditions, and provisions of this Agreement nor time or other indulgence granted by one Party to the other whether in writing or not shall act as a waiver of such breach or acceptance of any variation or the relinquishment of any such right or any other right under this Agreement which shall remain in full force and effect.

### **25.3 No Third Party Rights**

This Agreement is intended solely for the benefit of the Parties. Other than as specifically provided for in this Agreement, nothing in this Agreement shall be construed to create any duty to, or standard of care with reference to, or any liability to any Person not a Party to this Agreement.

#### **25.4 Direct Agreement**

ESCOM TL recognises that the Seller may wish to finance or refinance the Power Project through limited recourse or other financing and that the entering into of the a Direct Agreement shall be a precondition to the provision of such finance. ESCOM TL will co-operate in good faith with the Seller and its Lenders to agree and enter into such a Direct Agreement.

#### **25.5 Severability**

Each Party agrees that it will perform its obligations under the terms of this Agreement in accordance with all applicable Laws, rules and regulations now or hereafter in effect. If any Clause or Clauses of this Agreement is found to be illegal or unenforceable, then the Parties shall take all possible steps to re-negotiate and to re-structure this Agreement in such a manner that it will comply with provisions of such laws. If this cannot be done, the offending Clause or Clauses will be removed and regarded as *pro non scripto*, and the remaining Clauses of this Agreement shall remain binding on the Parties; provided that, where necessary, such remaining Clauses shall be amended as necessary by mutual agreement of the Parties.

#### **25.6 Amendments**

This Agreement may be amended or modified only in writing and such amendment shall executed by the Parties hereto which states specifically that it is intended to amend or modify this Agreement. In the event of changes to the Grid Code, which require changes to this Agreement, the Parties shall negotiate in good faith to incorporate such changes into this Agreement.

#### **25.7 Counterparts**

This Agreement may be executed in any number of identical counterparts, each of which when executed and delivered shall constitute an original, but all the counterparts shall together constitute one and the same agreement. No counterpart shall be effective until each Party has executed at least one part or counterpart.

#### **25.8 Anti-Corruption Measures**

Each Party undertakes not to offer, directly or indirectly, advantage to third parties and not to request, promise or accept for its own benefit or that of a third party, illicit gifts with the purpose of obtaining favourable judgement in the performance of this Agreement or in relation to any other matters between the Parties whether or not directly related to this Agreement. Such undertaking shall bind each Party and its directors, officers, employees, authorised agents, contractors, sub-contractors and professional advisers.

#### **25.9 Applicable Law and Jurisdiction**

This Agreement shall be governed, construed and interpreted in accordance with the laws of Malawi and the Parties consent to the non-exclusive jurisdiction of the High Court of Malawi, subject to the provisions of Clause 0 (Dispute Resolution). The Parties agree that a judgment in any proceedings in



connection with this Agreement by the Malawian courts shall be binding upon them and may be enforced against them in any other jurisdiction.

#### **25.10 Change in Law**

Nothing in this Agreement shall prejudice or affect the rights or powers of either Party under any statute, statutory instrument or regulation for the time being in force. If at any time following the date of signature of this Agreement a change in law results in a Change in Cost as anticipated in the PPA the Parties shall, as soon as is reasonably practical, meet to negotiate the adjustment of this Agreement to ensure that the Customer or ESCOM TL is not prejudiced as a result of such change in cost and the same mechanism of a Change in Costs as set out in the PPA (Clause 16) shall apply to this Agreement with the necessary adjustments.

#### **25.11 Waiver of Immunity**

The Parties hereby unconditionally and irrevocably agree that the entry into and performance of this Agreement by the Parties constitute private and commercial acts and neither of the Parties nor any of their assets is entitled to immunity from arbitration or legal process or jurisdiction on grounds of sovereignty or otherwise.

IN WITNESS WHEREOF this Agreement have been executed as a deed by the Parties with the intent that it is delivered on the day and year first above written:

Executed as a Deed by

ELECTRICITY SUPPLY CORPORATION OF MALAWI (ESCOM TL)

acting by

[name of authorised signatory] .....

Authorised signatory

and

[name of authorised signatory] .....

Authorised signatory

Executed as a Deed by

[IPP]

acting by

[name of authorised signatory] .....

Authorised signatory

and

[name of authorised signatory] .....

Authorised signatory

## **Annexure I.1: Power Purchase Agreement for Hydro Plants**

*Note: This document may be amended to reflect such changes that ESCOM may deem necessary, including on account of internal and external governance and approval processes.*

*Note: If ESCOM SB has not yet been established then contract with ESCOM and allow for Agreement to be ceded in the event of restructuring.*

### **POWER PURCHASE AGREEMENT**

**BETWEEN**

**[Seller]**

**AND**

**ESCOM SINGLE BUYER**

## CONTENTS

<b>Contents.....</b>	<b>148</b>
<b>Preamble:.....</b>	<b>151</b>
<b>Recitals: .....</b>	<b>152</b>
<b>1. Definitions and Interpretation .....</b>	<b>153</b>
1.1 Definitions.....	153
1.2 Interpretation .....	165
1.3 Inclusion of Dates.....	166
1.4 Construction .....	166
1.5 Annexures .....	166
<b>2. Duration of Agreement .....</b>	<b>167</b>
2.1 Term.....	167
2.2 Make-up Term .....	167
<b>3. Conditions Precedent .....</b>	<b>167</b>
3.1 On Signature Date.....	167
3.2 On Effective Date .....	167
3.3 Responsibilities as regards to conditions precedent.....	168
3.4 Notice .....	168
3.5 Non-fulfilment of conditions precedent .....	168
<b>4. Construction and Development of the Power Project .....</b>	<b>169</b>
4.1 Project Site .....	169
4.2 Risk and liability.....	169
4.3 Information regarding Connection Works .....	170
4.4 ESCOM SB"s inspection rights .....	170
4.5 General Construction obligations .....	170
4.6 Construction Programme .....	171
<b>5. Commercial Operation Date.....</b>	<b>171</b>
5.1 Commercial Operation Date .....	171
5.2 Delay in Commercial Operation Date .....	171
5.3 Deemed Commercial Operation Date .....	173
<b>6. Sale and Purchase of Energy.....</b>	<b>173</b>
6.1 Obligations to Sell and Purchase Electrical Energy.....	173
6.2 Restrictions on sale of Energy.....	174
<b>7. Provision of Supply, Metering Equipment and Procedures .....</b>	<b>174</b>
7.1 Delivery Point .....	174
7.2 Metering .....	175
7.3 Periodic Testing of the Power Plant .....	175
<b>8. Payment for Available Capacity.....</b>	<b>175</b>
8.1 Payment for Available Capacity prior to Commercial Operation Date .....	175
8.2 Capacity Payment during the Term .....	175

8.3	Payment during Event of Deemed Availability.....	175
8.4	Indexation of the Capacity Payment.....	175
8.5	Transmission Use of System Charge .....	175
8.6	Settlement of Deviations .....	176
<b>9.</b>	<b>Invoicing and Payment .....</b>	<b>176</b>
9.1	Frequency .....	176
9.2	Payments Free from Tax.....	176
9.3	Deductions Made Whole .....	176
9.4	Invoicing and Payment Procedure .....	176
<b>10.</b>	<b>[Environmental Credits].....</b>	<b>177</b>
10.1	Obtaining Credits .....	178
10.2	Information Sharing.....	178
10.3	Ownership of the credits.....	178
10.4	Payment of Benefits .....	178
<b>11.</b>	<b>Control and Operation of the Power Project.....</b>	<b>178</b>
11.1	Dispatch Procedures .....	178
11.2	Availability Declaration .....	182
11.3	Other relevant data.....	183
11.4	Further revisions .....	183
11.5	Communication of Declarations .....	184
11.6	Coordination.....	184
11.7	Maintenance.....	184
11.8	Scheduled Plant Outages.....	184
11.9	Unscheduled Plant Outages.....	185
11.10	Scheduled and Unscheduled Transmission System Outages.....	186
<b>12.</b>	<b>Additional Obligations .....</b>	<b>186</b>
12.1	ESCOM SB"s obligations.....	186
12.2	General Obligations of the Seller .....	186
<b>13.</b>	<b>Representatons and Warranties .....</b>	<b>187</b>
13.1	The Seller"s warranties.....	187
13.2	ESCOM SB Warranties .....	188
<b>14.</b>	<b>Applicable Law and Jurisdiction.....</b>	<b>189</b>
<b>15.</b>	<b>Change in Costs .....</b>	<b>189</b>
<b>16.</b>	<b>Force Majeure .....</b>	<b>191</b>
16.1	Definition of Force Majeure Event .....	191
16.2	Procedure.....	192
16.3	Consequences of a Force Majeure Event .....	193
16.4	Termination on Account of Force Majeure .....	194
<b>17.</b>	<b>Dispute Resolution.....</b>	<b>194</b>
17.1	Procedure.....	194

17.2	Arbitration .....	195
17.3	Obligations during Disputes .....	196
17.4	Proceedings in Confidence .....	196
<b>18.</b>	<b>Termination.....</b>	<b>196</b>
18.1	Events of Termination .....	196
18.2	Seller Event of Default.....	196
18.6	Notice of Intention to Terminate and Termination Notice .....	198
18.7	Consequences of Termination .....	199
<b>19.</b>	<b>Liability for Damage or Loss .....</b>	<b>200</b>
19.1	Indemnity.....	200
19.2	Liability .....	200
19.3	Damages.....	200
<b>20.</b>	<b>Project Insurances .....</b>	<b>201</b>
20.1	Insurances and information .....	201
20.2	Endorsements and clauses .....	202
20.3	Application of insurance proceeds .....	202
<b>21.</b>	<b>Waiver of Sovereign Immunity .....</b>	<b>202</b>
<b>22.</b>	<b>Cession and Assignment .....</b>	<b>202</b>
22.1	Prior Consent .....	202
22.2	Restructuring.....	203
<b>23.</b>	<b>Direct Agreement .....</b>	<b>203</b>
<b>24.</b>	<b>Severability .....</b>	<b>204</b>
<b>25.</b>	<b>Anti-corruption Measures.....</b>	<b>204</b>
<b>26.</b>	<b>Confidentiality .....</b>	<b>205</b>
26.1	Confidential Information .....	205
26.2	Duty to Maintain Confidentiality .....	205
26.3	Exclusions .....	205
26.4	Disclosure .....	205
<b>27.</b>	<b>Survival on Termination .....</b>	<b>205</b>
<b>28.</b>	<b>Notices .....</b>	<b>206</b>
28.1	Domicilia Citandi et Executandi.....	206
28.2	Address for Notices .....	206
28.3	Delivery of Notices .....	206
28.4	Written Notice.....	207
<b>29.</b>	<b>Shareholding in Seller .....</b>	<b>207</b>
<b>30.</b>	<b>General and Miscellaneous .....</b>	<b>207</b>
30.1	Sole Record of Agreement .....	207
30.2	No amendments except in writing .....	207
30.3	Waivers .....	207
30.4	Approvals and Consents .....	207

<b>Annexure A Consents .....</b>	<b>208</b>
A.1 ESCOM SB"s Consents.....	208
A.2 The Seller"s Consents .....	208
<b>Annexure B Single Line Diagram of Power Plant .....</b>	<b>208</b>
<b>Annexure C - CAPACITy Payment .....</b>	<b>208</b>
C.1 Capacity (whether before or after the Commercial Operation Date).....	208
C.2 Transmission Use of System Charge .....	209
C.4 Monthly Availabilities .....	210
<b>Annexure D Layout Diagram of Power Plant .....</b>	<b>211</b>
<b>Annexure E Sharing of Environmental Credits.....</b>	<b>211</b>
<b>Annexure F Operating Committee .....</b>	<b>211</b>
F.1 Appointment of Committee .....	211
F.2 Responsibilities .....	211
F.3 Meetings.....	212
F.4 Reporting Relationships .....	212
<b>Annexure G Calculation of the Termination Amount .....</b>	<b>212</b>
G.1 Compensation on Termination for ESCOM SB Event of Default.....	214
<b>Annexure H Construction Programme .....</b>	<b>214</b>
<b>Annexure I Commissioning Schedule.....</b>	<b>215</b>
I.1 Acceptance/ Performance Test .....	215
I.2 Synchronisation with and connection to the Transmission System .....	215
I.3 Testing and commissioning .....	215
<b>Annexure J Monthly and Weekly Generation Forecasts .....</b>	<b>216</b>
<b>Annexure K Base Case Financial Model .....</b>	<b>216</b>
<b>Annexure L Provisions of the Direct Agreement.....</b>	<b>216</b>

## **PREAMBLE:**

**THIS POWER PURCHASE AGREEMENT** dated [ ] is made by and between:

- (1) [ ] a company incorporated in terms of the Laws of [Malawi] (registered under company registration number: [ ]) and having its registered office at [ ] (hereinafter referred to as the “**Seller**”); and
  - (2) [ESCOM SINGLE BUYER] a company incorporated in terms of the Laws of Malawi (registered under company registration number: [ ]) and having its registered office at [ ] (hereinafter referred to as “**ESCOM SB**”),
- (together, the “Parties” and “Party” shall mean either of them).

## **RECITALS:**

- (A) The Seller has been issued with an electricity Generation Licence by MERA to generate [ ] MW through [ ] hydroelectric power plant at [ ] in Malawi.
- (B) The Seller intends to develop a [ ] hydroelectric power project of [ ] MW capacity on a site located at the Project Site.
- (C) ESCOM SB is authorised, amongst others, to purchase wholesale electricity from other utilities and/or independent power producers.
- (D) The Seller wishes to sell the Net Energy from the Power Plant to ESCOM SB and ESCOM SB is willing to purchase the Net Energy of the Power Plant from the Seller.
- (E) The Seller has undertaken to deliver electricity at the Delivery Point and to conclude a Transmission Connection Agreement with the Transmission License (TL) of the Electricity Supply Commission of Malawi (ESCOM) for transmitting electricity from the Power Plant at the appropriate voltage level as a requirement of the Transmission System.
- (F) The Parties intend to stipulate in this Agreement the terms and conditions upon and subject to which ESCOM SB agrees to purchase Net Energy from the Seller.
- (H) According with the Market Rules requirement, SB and the Seller accepts that all the operation and settlement related with this PPA will be based on the Grid Code and the Market Rules

**IT IS HEREBY AGREED** as follows:

## 1. Definitions and Interpretation

### 1.1 Definitions

In this Agreement, the following terms shall have the meanings assigned to them hereunder and cognate expressions shall have corresponding meanings:

**“Affected Party”** means a Party affected by a Force Majeure Event as contemplated in Clause 15.9.8;

**"Affiliate"** means in respect of either Party, any person (excluding any government), hereinafter referred to as "company" which directly or indirectly: (a) is controlled by such Party; or (b) controls such Party; or (c) is controlled by a company which directly or indirectly controls such Party. For the purposes of the foregoing definition: (i) a company is directly controlled by another company, if the latter company holds shares, quotas or voting rights, carrying in the aggregate the majority (more than fifty percent) of the votes exercisable at shareholders' meetings of the former company, and (ii) a particular company is indirectly controlled by a company, hereinafter called the "parent company", if a series of companies can be specified, beginning with the parent company and ending with the particular company, so related that each company of the series, except the parent company, is directly controlled by one of the companies earlier in the series;

**“[AFSA/ UNCITRAL]”** means [*the Arbitration Foundation of Southern Africa/ United Nations Commission on International Trade Law*]

**“[ ] Rules”** means the arbitration rule of [**Options:** *AFSA/UNCITRAL – United Nations Commission on International Trade Law*] in force from time to time;

**“[Agreed Interest Rate]”** means [ ]; [**Option:** *LIBOR - London Interbank Offering Rate*]

**“Agreement” or “PPA”** means this Power Purchase Agreement including its recitals and annexures, amended or modified from time to time in accordance with the terms hereof;

**“Annual Indexation”** means the indexation in accordance with paragraph C3 of Annexure C (Capacity Payment);



<b>“Ancillary Services”</b>	Some technical services necessary for the security and quality of the electricity service, that are provided by generators, specially frequency regulation, voltage control and black start.
<b>“Auxiliary Consumption”</b>	means such part of the electrical energy produced at the Power Plant as is consumed exclusively within the Power Plant itself for the sole purpose of generating electrical energy, related services and auxiliaries;
<b>"Availability Declaration"</b>	has the meaning set forth in clause 11.2.1;
<b>“Available Capacity”</b>	Is the maximum power output that the Seller can deliver to the Transmission System.
<b>"Base Case Financial Model"</b>	has the meaning set forth in Paragraph 1 of Annexure H (the Termination Amount ;)
<b>"Base Case IRR"</b>	means the IRR as reflected in the Base Case Financial Model;
<b>"Base Capacity Payment"</b>	has the meaning set forth in Paragraph C1 of Annexure C;
<b>"Billing Period"</b>	means the start of the first day of a month to the end of the last day of the said month, provided that: <ul style="list-style-type: none"> <li>(a) the first Billing Period shall commence on the Connection Date or the Deemed Commercial Operation Date, if applicable and end on the last day of the month in which the Connection Date or the Deemed Commercial Operation Date, if applicable occurs; and</li> <li>(b) the final Billing Period shall commence on the first day of the month in which the Termination Date occurs and end on the Termination Date;</li> </ul>
<b>“Business Day”</b>	means any day except a Saturday, a Sunday or a public holiday in Malawi;
<b>“Capacity Payment”</b>	means the payments based on a fixed capacity rate for the Available Capacity delivered by the Seller to the Buyer, calculated in accordance with clause C.3 of the Annexure C (Capacity Payment).
<b>"Change in Costs"</b>	has the meaning set forth in Clause 15.2;
<b>"Change in Law"</b>	means: <ul style="list-style-type: none"> <li>(a) the adoption, promulgation, modification, repeal or reinterpretation after the</li> </ul>

Signature Date by any Competent Authority of any Law; or

- (b) the imposition by any Competent Authority of any material condition in connection with the issuance, renewal, or modification of, or the revocation or non-renewal (other than for cause) of, any Consents after the Signature Date,

that in either case:

- (i) results in any change in respect of Taxes and duties applicable or passed through to the Seller, the Contractors, or its Lenders;
- (ii) establishes, modifies or abolishes requirements for, or interferes with, the activities of the Seller in connection with the Power Project or the corporate affairs of the Seller that affect the obligations or rights of the Seller, the Contractors, the Lenders or the shareholders of the Seller, or the financial position of the Seller under this Agreement; or
- (iii) renders the performance by the Seller or any other person of its obligations under this Agreement or any other Project Document (including the payment of debt service or the declaration or payment of distributions to the shareholders of the Seller) according to its terms illegal or unenforceable.

**"Commercial  
Operation Date"**

means the date on which the complete Power Plant is commissioned pursuant to the Commissioning Schedule in Annexure I (Commissioning Schedule) and commences commercial operation;

**"Competent Authority"**

means, with respect to the Republic of Malawi, any ministry, department, agency, authority or other organisation under the direct or indirect control of the Government of Malawi, court of competent jurisdiction, or other body exercising legislative, executive, regulatory, administrative or judicial functions or quasi-judicial functions or at any time exercising any form of jurisdiction or *de facto* control over the Parties, the Contractors, the Lenders or the shareholders of

	the Seller, any aspect of the Power Project or this Agreement (or any transaction or agreement contemplated herein);
<b>"Conditions Precedent"</b>	means the conditions set out in Clause 3.2;
<b>"Confidential Information"</b>	shall have the meaning set forth in Clause 26.1(Confidential Information);
<b>"Connection Date"</b>	means the date of connection of the Power Plant to the Transmission System;
<b>"Connection Offer Letter"</b>	has the meaning given to it under the Transmission Connection Agreement;
<b>"Connection Works"</b>	has the meaning given to it under the Transmission Connection Agreement;
<b>"Connection Facilities"</b>	has the meaning given to it under the Transmission Connection Agreement;
<b>"Consents"</b>	means the permits, licences, consents, authorisations, approvals, concessions, acknowledgements, exemptions or like or similar documentation required to be obtained in relation to the entering into any of the Project Documents, the performance of any of the transactions contemplated under any of the Project Documents, or otherwise in relation to the Power Project, including without limitation, those set out in Annexure A (Consents);
<b>"Construction Programme"</b>	means the programme for construction of the Power Project as set out in Annexure H (Construction Programme), which specifies certain Milestones for the construction of the Power Project and the due dates for such Milestones;
<b>"Contractor"</b>	means any supplier or contractor engaged by either Party to undertake the whole or any part of either Party's respective obligations under this Agreement, including any sub-contractors appointed by any person who falls within this definition;
<b>"Contract Year"</b>	means each period of one (1) calendar year which falls within the Term, provided that: <ul style="list-style-type: none"> <li>(a) the first Contract Year shall commence on the Commercial Operation Date and end on the last of the calendar year in which the Commercial Operation Date occurs; and</li> <li>(b) the last Contract Year shall commence on the first day of the calendar year in which</li> </ul>

the Term is due to end and shall end (unless this Agreement is terminated early in accordance with its terms) on the Termination Date;

<b>"Contracted Capacity"</b>	means the Maximum Export Capacity of the Power Plant which shall be [ ] MW as determined in the Transmission Connection Agreement;
<b>Day Ahead Economic Dispatch</b>	means the schedule of sufficient generation and transmission capacity to meet the forecasted load and reserve requirements produced by the SMO the day ahead to the operation day. This dispatch is constrained by reliability, security and quality of service requirements, as indicated in Part V (System Operation Code) of the Grid Code and its associated procedures (in the future taking into consideration any eventual import or export), and Part 6 of the Market Rules and the associated procedures;
<b>"Daylight Hours"</b>	means, for each calendar day, the hours between sunrise and sunset;
<b>"Deemed Commercial Operation Date"</b>	has the meaning given to it in Clause 5.3(Deemed Commercial Operation Date);
<b>"Deemed Commercial Operation Period"</b>	means the period commencing on the Deemed Commercial Operation Date and ending on the Commercial Operation Date;
<b>"Deemed Energy Payment"</b>	has the meaning given to it in Clause 5.3.2 and Paragraphs A2 and A3 in Annexure C (Energy Payment), which shall be applicable in all Events of Deemed Availability, mutatis mutandis;
<b>"Delay Liquidated Damages"</b>	means the liquidated damages payable by the Seller to ESCOM SB for a delay caused by the Seller in achieving the Commercial Operation Date by the Target Commercial Operation Date;
<b>"Delivery Point"</b>	means the battery limit between the Seller and ESCOM [SB] where the Net Energy output is measured and transferred from the Seller to ESCOM [SB] as shown in the Single Line Diagram attached as Annexure B (Single Line Diagram of Power Plant);
<b>"Direct Agreement"</b>	means the agreement to be entered into by the Seller and ESCOM SB with the Lenders in relation to this Agreement;

<b>"Dispute"</b>	means any dispute or disagreement of any kind whatsoever between the Parties arising under, in connection with, or relating to, this Agreement or the transactions contemplated herein;
<b>"MERA"</b>	means the Malawi Energy Regulatory Authority established in terms of the Electricity Act, [Act No.];
<b>"[MERA Levy]"</b>	<i>[means all levies as may be imposed from time to time on the provision of electricity for the benefit of MERA];</i>
<b>"Effective Date"</b>	means the date on which all of the Conditions Precedent have been satisfied or duly waived by both Parties;
<b>"[Environmental Credits]"</b>	<i>[means any and all financial benefits, credits, rights, entitlements or interests of an environmental nature that are created or otherwise arise from the Power Project.]</i>
<b>"EPC Contract"</b>	means the engineering, procurement and construction contract entered into between the Seller and the EPC Contractor;
<b>"EPC Contractor"</b>	means the person appointed by the Seller to undertake the engineering, procurement and construction of the Power Plant;
<b>"Event of Deemed Availability"</b>	means each of the following events: (a) a ESCOM [SB] Transmission Default; (b) a ESCOM [SB] Event of Default;
<b>"Finance Documents"</b>	means the agreements and other documents relating to the provision by the Lenders of the limited recourse credit facilities required by the Seller to finance or refinance the Power Project;
<b>"Financial Close"</b>	means the date on which all of the conditions to the first availability of debt under the Finance Documents have been satisfied or waived;
<b>"Force Majeure Event"</b>	has the meaning given to it in Clause 16.1.1;
<b>"Frequency Regulation Reserves"</b>	Is the set of the Primary, Secondary and Tertiary Regulation Reserves
<b>"Generation Licence"</b>	means the generation licence No [ ] issued to the Seller by MERA and which came into force on [ ] (as the same may be amended from time to time thereafter);
<b>Generation Schedule</b>	means the agreement between Seller and Buyer on the hourly generation of the Plant during a particular week. The Generation Schedule will be base of the Nomination

<b>"Government Action"</b>	<p>means:</p> <p>(a) the expropriation (including creeping expropriation), compulsory acquisition, requisition, confiscation or nationalisation by any Competent Authority of any shares in the Seller or assets of the Power Project; or any material assets or rights of the Seller, or any other similar act of such Competent Authority that materially adversely affects: (i) the enjoyment by the Seller of any of the rights and benefits contemplated by this Agreement, or (ii) the performance by the Seller of any of its obligations under or pursuant to this Agreement, or,</p> <p>(b) <i>[in the case of ESCOM [SB], the reorganisation, restructuring or privatisation of ESCOM [SB] or the sale of the Government's controlling interest in ESCOM [SB], unless the Lenders' consent was given in accordance with Clause 0];</i></p>
<b>"Grid Code"</b>	means, at any time, the most recent version of the grid code published by MERA;
<b>"Indexed Capacity Payment"</b>	[means the Base Capacity Payment indexed as specified in Clauses C.3 of Annexure C (Capacity Payment), as the case may be];
<b>Hydro Plants Optimization Model</b>	is a computer program that aims to determine the generation schedule of the hydro plants of Malawi with the objective to minimise the cost to meet the forecasted electricity demand. This program is used by SB to determine the generation forecast and the Daily Nominations of the Seller's plant
<b>"IRR"</b>	means the real post tax internal rate of return on the equity, taking into account the equity invested into the Power Project and the distributions to the shareholders of the Seller;
<b>"Law"</b>	means any constitution, statute, ordinance, treaty, decree, proclamation, by-law, regulation, notice, circular, code, rule, direction, delegated or subordinated legislation or other legislative measure, the Grid Code and the Consents, as well as the common law and customary law and any judgment, decision, order or ruling of any court or tribunal with relevant jurisdiction, in each case having the force of law in the Republic of Malawi. For the purposes of this definition, "customary law" means those

	customs and practices which, in terms of the common law, have gained the force of law in the Republic of Malawi;
<b>"Lenders"</b>	means the persons from time to time making credit facilities available to the Seller (other than the shareholders of the Seller);
<b>"Long Stop Date"</b>	has the meaning set forth in Clause 3.3.2;
<b>"Losses"</b>	has the meaning set forth in Clause 19.2.1(Liability);
<b>"Make-up Period"</b>	has the meaning set forth in Clause 2.2.1;
<b>"Market Rules"</b>	means the Malawi's Market Rules, issued by MERA, which contains the set of rules that provide the framework for an efficient, transparent and reliable electricity market; to set out the responsibilities of the Market Participants, the TL, the SB and the SMO in relation to trading, co-ordination, dispatch, pricing, metering, settlement and payments and ensure an efficient, transparent and predictable settlement system and set the payment obligations;
<b>"Maximum Export Capacity"</b>	has the meaning given to it in the Transmission Connection Agreement;
<b>"Metering Equipment"</b>	has the meaning given to it in the Transmission Connection Agreement;
<b>"Milestone"</b>	means each key stage during the construction period as identified in the Construction Programme;
<b>"Monthly Generation Forecast"</b>	has the meaning set forth in Clause 12.1.1;
<b>"Monthly Net Energy"</b>	means the Net Energy for a specific month;
<b>"MW"</b>	means Megawatt;
<b>"MWh"</b>	means Megawatt hours;
<b>"Malawian Kwacha"</b>	means the official currency of the Republic of Malawi;
<b>"ESCOM SB Event of Default"</b>	has the meaning set forth in Clause 0;
<b>"ESCOM TL Transmission Default"</b>	means a breach by ESCOM TL under the Transmission Connection Agreement;
<b>"[ESCOM SB's EC Payment]"</b>	shall have the meaning set forth in Annexure E [(Sharing of Environmental Credit)];
<b>"National Control Centre"</b>	means the centre for control and coordination of power flows within Malawi, operated by the SMO;

<b>"Net Energy"</b>	means for any period the electrical output of the Power Plant measured in kWh at the Delivery Point;
<b>(Daily) Nomination</b>	means the declaration issued by Seller to the SMO, indicating the amount of generation to be produced for each hour of the following day.
<b>"Notice of Intention to Terminate"</b>	means a notice issued pursuant to Clause 18.2, 18.4 or 18.6.1;
<b>"Operating Committee"</b>	means the committee described in Clause 0 and Annexure F (Operating Committee); <i>[Note: Refer to comment in Clause 11.6.1]</i>
<b>"Parties"</b>	shall mean the Seller and ESCOM SB, or their successors-in-title, and „Party“ shall be construed accordingly;
<b>"Power Plant"</b>	means the <i>[solar]</i> power plant with the Contracted Capacity, to be located at the Project Site, at which energy will be generated by the Seller and sold to ESCOM SB pursuant to this Agreement;
<b>"Power Project"</b>	means the development, construction and operation of the Power Plant, located at the Project Site;
<b>"Project Documents"</b>	means this Agreement, the EPC Contract, Transmission Connection Agreement, the Generation Licence, the Consents, the Operations and Maintenance Agreement, and any other agreements or contracts in relation to the Power Project;
<b>"Project Insurances"</b>	shall have the meaning set forth in Clause 20.1 (Insurances and Information);
<b>"Project Site"</b>	means the location of the Power Project as described in Clause 5.1;
<b>"Prudent Industry Practice"</b>	means the practices, methods and acts engaged by a utility in the electricity industry in <i>[Southern]</i> Africa having regard to operational and engineering considerations, including manufacturers' recommendations, and to reasonable costs consistent with reliability and safety or a globally leading <i>[solar]</i> energy producer who, in the conduct of its undertaking, exercises that degree of diligence, prudence and foresight reasonably and ordinarily exercised by skilled and experienced internationally recognised operators engaged in the same type of undertaking under the same or similar circumstances and conditions, and includes:



- (i) complying with:
  - (a) recognised standards pertaining to that activity;
  - (b) manufacturers' instructions and operating manuals; and
  - (c) the terms of this Agreement; and
- (ii) taking reasonable steps to ensure that:
  - (a) adequate materials, resources and supplies are available at the necessary places under normal conditions associated with existing operations;
  - (b) sufficient experienced and trained operating personnel are available to operate the Power Plant and the Connection Facilities, as the case requires, properly, efficiently and within manufacturer's guidelines and specifications and are able to respond to emergency conditions;
  - (c) preventative, routine and non-routine maintenance and repairs are carried out to provide long term and reliable operation and are performed by knowledgeable, trained and experienced personnel using proper equipment, tools and procedures in accordance with the manufacturer's recommendations;
  - (d) appropriate monitoring and testing is carried out to ensure that equipment will function properly under normal and emergency conditions;
  - (e) equipment is operated and maintained in a manner safe for workers, the general public, and the environment; and
  - (f) equipment is operated and maintained in accordance with any valid requirement established by legislation or regulation of any governmental agency having jurisdiction with respect to the Power Plant and the Connection Facilities, as the case requires;

**"Power Project Acceptance Test"**

means the acceptance test(s) of the Power Project, to be conducted with respect to all Units simultaneously and to be completed by the

	Seller in accordance with Annexure I (Commissioning Schedule);
<b>Quick Reserve or Tertiary Regulation Reserve</b>	is a reserve that can be activated, on request, within 10 minutes and must be sustainable for at least two hours. Quick Reserve can be provided either by synchronized Generating Units or by Fast Start Generating Units;
<b>Reactive power compensation and voltage control by Generation Units</b>	Is the use of reactive power produced by Generation Units to control the voltage in buses of the Transmission System
<b>Regulating Reserve or Secondary Regulation Reserve</b>	is the reserve that is under Automatic Generation Control (AGC) and can be activated within 10 seconds and be fully deployed within 10 minutes of activation. The Generation Units providing Regulating Reserve shall operate under AGC and shall be able to alter their generation or load under AGC to the performance requirements specified by the SMO.
<b>"Reasonable and Prudent Operator"</b>	means a person seeking in good faith to perform its obligations and, in so doing and in the general conduct of its undertaking, exercising that degree of skill, diligence, prudence, responsibility and foresight which would reasonably and ordinarily be expected from a skilled and internationally experienced developer, contractor, owner or operator complying with all Laws, engaged in the same or a similar type of undertaking, in the same or similar circumstances and conditions;
<b>"Scheduled Connection Date"</b>	means <i>[twelve (12) months]</i> following the Effective Date and has the meaning given to it in the Transmission Connection Agreement;
<b>"Scheduled Outage"</b>	means a Scheduled Transmission System Outage and/or a Scheduled Plant Outage;
<b>"Scheduled Plant Outage"</b>	means a pre-scheduled interruption in the generating capacity of the Power Plant agreed between the Parties (in accordance with Clause 11.7 and Clause 11.8, as the case may be);
<b>"Seller's Revised Capacity Payment"</b>	has the meaning set forth in Clause 15.4;
<b>"Signature Date"</b>	means the date this Agreement is duly signed and dated by the last Party signing it;
<b>"[Solar Photovoltaic]"</b>	<i>[if applicable, means the solar photovoltaic power equipment that uses sunlight for direct conversion into electricity and that is being set</i>

	<i>up by the Seller to provide energy to ESCOM SB as per the terms and conditions of this Agreement];</i>
<b>"[Solar Power]"</b>	<i>[means the solar photovoltaic power generated from the Power Plant];</i>
<b>Spillage Condition</b>	corresponds to a situation when in a set of hours, the reservoir is full and the inflow corresponds to a capacity that exceeds the Capacity of the Plant.
<b>System and Market Operator or SMO</b>	means a function within ESCOM Ltd responsible for operating the system and administering the market, and holds the System and Market Operation licence granted or deemed to be granted by the Authority under the Energy Regulation Act.
<b>System Marginal Price</b>	is the hourly energy price calculated and informed by the SMO, as the variable cost to supply one additional MWh in the node where a plant is connected to the transmission system.
<b>"Taxes"</b>	means any tax, charge, impost, tariff, duty or fee of any kind charged, imposed or levied, directly or indirectly, by any Competent Authority, including any value-added tax, sales tax, gross receipts tax, remittance tax, withholding tax, excise tax, property tax, water tax, vocational tax or environmental, energy or fuel tax, but excluding corporation or personal taxes on income;
<b>"Target Commercial Operation Date"</b>	means the intended Commercial Operation Date being the date falling [ <i>one (1) month</i> ] from the Scheduled Connection Date or as it may be extended in terms of this Agreement;
<b>"Term"</b>	has the meaning set forth in Clause 2.1;
<b>"Termination Amount"</b>	has the meaning set forth in Annexure G (The Termination Amount);
<b>"Termination Date"</b>	means the date of the expiry of the Term or the date of the earlier termination of this Agreement, as the case may be;
<b>"Termination Notice"</b>	means a written notice of termination served by the Seller or ESCOM SB to the other Party pursuant to Clause 3.5 or Clause 18.7 (as the case may be);
<b>"Transmission Connection Agreement"</b>	means the agreement between the Seller and ESCOM Transmission License [ <i>or alternatively: the Parties</i> ] in terms of which the Seller and ESCOM [ <i>or alternatively: the Parties</i> ] shall construct the Connection Works to connect the

	Power Plant with the Transmission System, and the terms and conditions that will regulate such connection and establish the technical specifications for the connection;
<b>Transmission License or TL</b>	Means the area of ESCOM devoted to operate, expand and maintain the Malawi's Transmission System.
<b>"Transmission Maintenance"</b>	means scheduled maintenance of the Transmission System required to be performed by ESCOM [SB];
<b>"Transmission System Outage"</b>	means a disruption or failure of the Transmission System;
<b>"Transmission System"</b>	has the meaning given to it in the Transmission Connection Agreement;
<b>"Transmission Unavailability"</b>	means the aggregate number of Daylight Hours in a Contract Year during which the Transmission System fails to allow the injection and transmission of the electrical energy generated by the Power Plant into and through the Transmission System;
<b>"Unscheduled Outage"</b>	means an Unscheduled Transmission System Outage and/or an Unscheduled Plant Outage;
<b>"Unscheduled Plant Outage"</b>	means any period when the Power Plant is out of service as a result of an unforeseen equipment failure or for any other reason;
<b>"Unscheduled Transmission System Outage"</b>	has the meaning given to it in the Transmission Connection Agreement;
<b>"Week"</b>	means the period between 00:00 hours on a Monday and 24:00 hours on the following Sunday.

## 1.2 Interpretation

In this Agreement, unless the context clearly indicates a contrary intention:

- 1.2.1 The headings are for convenience only and shall not form part of the interpretation of this Agreement;
- 1.2.2 The singular includes the plural and vice versa;
- 1.2.3 References to clauses and annexures are, unless the context otherwise requires or states, references to clauses of, and annexures to, this Agreement; and references to clauses are, unless the context otherwise requires or states, references to clauses in the annexures to this Agreement;
- 1.2.4 References to legislation (including subordinate legislation) and regulations made or licences issued there under are references to such

legislation, regulations and licences as they may be amended from time to time;

- 1.2.5 References to other agreements or documents are, unless the context otherwise requires or states, references to those agreements or documents at the Signature Date and as amended and/or re-enacted and/or consolidated and/or replaced from time to time;
- 1.2.6 A gender shall include the other gender;
- 1.2.7 A natural person shall include a juristic person, and vice versa;
- 1.2.8 All provisions contained in this Agreement are equally valid and enforceable, even if they belong, to a definition or an Annexure. Obligations resulting from a definition or an Annexure will have the same force as if it had been part in the main body of this Agreement;
- 1.2.9 This Agreement shall be binding on and enforceable by the estates, heirs, executors, administrators, trustees, permitted assigns, liquidators or other legal successors of the Parties as fully and effectually as if they had signed this Agreement in the first instance and reference to any Party shall be deemed to include such Party's estates, heirs, executors, administrators, trustees, permitted assigns, liquidators or other legal successors, as the case may be;
- 1.2.10 Where figures are in this Agreement described both in numerals and in words, the words shall prevail in the event of any conflict between the two;
- 1.2.11 Should this Agreement be signed on a date that results in the use of any tenses herein being inappropriate, the terms shall be read in the appropriate tense; and
- 1.2.12 Any reference to a month shall mean a calendar month.

### **1.3 Inclusion of Dates**

When any number of days are prescribed in this Agreement which relates to invoicing and payments, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last falls on a Saturday, Sunday or public holiday in Malawi, in which case the last day shall be the next successive Business Day.

### **1.4 Construction**

The rule of construction that this Agreement shall be interpreted against the Party responsible for the drafting or preparation of this Agreement shall not apply.

### **1.5 Annexures**

The Annexures to this Agreement shall be deemed to be incorporated herein and to form an indivisible part hereof.

## **2. Duration of Agreement**

### **2.1 Term**

This Agreement shall come into force in accordance with Clause 2.2.3 and, subject to the other provisions of this Agreement, shall continue in effect for a period of [twenty five (25) years] from the Commercial Operation Date (the “**Term**”).

### **2.2 Make-up Term**

2.2.1 Without limiting the generality of Clause 2.1, the Term shall be extended on a day-for-day basis for all periods during which an Affected Party is unable to perform its obligation pursuant to a Force Majeure Event, and is relieved of its obligations to so perform in accordance with Clause 15.9.8 (the “**Make-up Period**”).

2.2.2 The occurrence of Force Majeure events during the Make-up Period shall give rise to a further extension of the Make-up Period.

2.2.3 All terms and conditions contained in this Agreement and the respective rights and obligations of the Parties shall remain unchanged for the duration of the Make-up Period.

## **3. Conditions Precedent**

### **3.1 On Signature Date**

Clause 1.2 (Interpretation), Clause 2.2.3 (Conditions Precedent), Clause 11.10.1 (Additional Obligations), Clause 0 (Representations and Warranties), Clause 0 (Applicable Law), Clause 0 (Change in Costs), Clause 15.9.8 (Force Majeure), Clause 0 (Dispute Resolution), Clause 0 (Termination), Clause 18.9 (Liability for Damage or Loss), Clause 20.2.6 (Waiver of Sovereign Immunity), Clause 0 (Cession and Assignment), Clause 0 (Direct Agreement), Clause 0 (Severability), Clause 0 (Anti-Corruption Measures), Clause 0 (Confidentiality), Clause 0 (Survival), Clause 0 (Notices and Domicilium), Clause 0 (Shareholding in Seller), Clause 0 (General and Miscellaneous) shall come into full force and effect on and from the Signature Date. None of the other provisions of this Agreement shall be effective until the Conditions Precedent enumerated in Clause 2.2.3 (Conditions Precedent) have either been fulfilled or waived by the Parties.

### **3.2 On Effective Date**

The remainder of the rights and obligations of the Parties under this Agreement shall come into full force and effect upon the date of fulfilment of all of the following Conditions Precedent or until they have been waived (such date being the “**Effective Date**”):

The Seller having obtained all Consents as listed in paragraph B of Annexure A (Consents) required for it to perform its obligations under this Agreement and all such Consents being in full force and effect;

3.2.1 The Seller and ESCOM having entered into a Transmission Connection Agreement;

- 3.2.2 The Seller obtaining and holding a valid Generation Licence and such Generation Licence is in full force and effect;
- 3.2.3 The Seller having achieved Financial Close and providing a certificate to ESCOM SB from the Lenders (or an agent thereof) in this respect;
- 3.2.4 ESCOM SB receiving all Consents listed in paragraph A of Annexure A (Consents); and
- 3.2.5 [Approval by MERA of the Base Capacity Payment as set out in Annexure C ( Capacity Payment)].
- 3.2.6 [The majority shareholders of the shares in the Seller having transferred shares to the value of at least [percent] to Malawians as defined in].

### **3.3 Responsibilities as regards to conditions precedent**

- 3.3.1 The Parties shall be responsible at their own expense and risk for satisfying and procuring the satisfaction of the Conditions Precedent referred to in Clause 3.2.
- 3.3.2 The Parties shall use their reasonable endeavours to cause the Conditions Precedent enumerated in Clause 3.2 to be satisfied within [six (6) months] from the Signature Date, as the same may be extended by the Parties in writing (the "Long Stop Date"). ESCOM SB shall provide the Seller with such reasonable cooperation as may be necessary to assist the Seller in satisfying the Conditions Precedent listed above.

### **3.4 Notice**

- 3.4.1 Each Party shall notify the other in writing by the [fifteenth (15th)] day of each month on the progress made in satisfying the Conditions Precedent enumerated in Clause 3.2 for which it is responsible.
- 3.4.2 The Parties undertake to disclose promptly to each other in writing anything which will or is likely to materially delay or prevent the fulfilment of any of the Conditions Precedent by the Long Stop Date.
- 3.4.3 A Party shall promptly inform the other Party in writing when any Condition\_Precedent for which it is responsible has been satisfied.
- 3.4.4 A Party shall promptly in writing inform the other Party of its waiver of any Condition Precedent required to be fulfilled by the other Party.
- 3.4.5 A Party who wishes to waive any condition precedent must provide the other Party with evidence (to the other Party's reasonable satisfaction) that the waiver of such condition precedent will not have a material adverse effect on its ability to satisfy its obligations under this Agreement.

### **3.5 Non-fulfilment of conditions precedent**

If the Conditions Precedent are not satisfied or waived on or before the Long Stop Date, then either Party shall have the right to terminate this Agreement by issuing a Termination Notice to the other Party, within a period of [thirty (30) days] after the occurrence of the Long Stop Date. Neither Party shall

have any liability whatsoever to the other Party in respect of such termination, except in relation to any antecedent breaches of this Agreement.

#### **4. Construction and Development of the Power Project**

##### **5.1 Project Site**

5.1.1 The Seller shall use its best endeavours to obtain and maintain the peaceful use and possession of the Project Site and such associated rights as may be necessary for the purposes of undertaking and implementing the Power Project for the duration of the Term. The Seller shall obtain such other land and/or rights in respect of land as it requires to perform its obligations under this Agreement and all such land and/or rights shall be deemed to form part of the Project Site and shall be at the sole obligation and sole responsibility of the Seller.

5.1.2 The Power Plant shall be located at the area generally described as:

Site: [ ]

Town: [ ]

Location/ District: [ ]

GPS Coordinates: [ ]

A scale map that identifies the location of the Project Site, project transmission and substation, Connection Facilities, and significant ancillary facilities including the facilities at the Delivery Point, is included in Annexure B (Single Line Diagram of Project Plant).

##### **5.2 Risk and liability**

5.2.1 The Seller shall be responsible, at its own cost and risk, for:

- (d) obtaining all Consents including those obtained under Clause 0, except for ESCOM SB's Consents, and maintaining all Seller's Consents in full force and effect during the Term of this Agreement;
- (e) the commencement of supply of Net Energy to ESCOM SB no later than the Target Commercial Operation Date excluding delays not attributable to the Seller;
- (f) connecting the Power Plant with the Connection Facilities at the Delivery Point as contemplated in the Connection Offer Letter;
- (g) operating and maintaining the Power Plant throughout the Term of this Agreement free and clear of encumbrances, except those provided to the Lenders under the Finance Documents, and except as expressly permitted under Clause 0 (Cession and Assignment); and



- (h) fulfilling all obligations undertaken by the Seller under this Agreement.

5.2.2 The Seller shall be fully responsible for the suitability of the Project Site and shall assume all risk and liabilities associated with the Project Site.

### **5.3 Information regarding Connection Works**

The Seller shall be required to obtain all information with regard to the Connection Works as is reasonably necessary to enable it to design, install and operate all interconnection plant and apparatus on the Seller's side of the Delivery Point in accordance with the Transmission Connection Agreement and the Grid Code.

### **5.4 ESCOM SB's inspection rights**

ESCOM SB shall have the right from time to time, on not less than [forty eight (48) hours"] written notice, to designate not more than [four (4)] of ESCOM SB's representatives [Note: this could possibly include an ESCOM representative as well] who shall be entitled to have access to the Project Site at reasonable times for the purpose of viewing the Power Plant and verifying the Seller's compliance with its obligations under this Agreement: Provided that ESCOM SB shall ensure that its representatives shall comply with all Project Site health and safety precautions and standards and shall not interfere with the construction, operation and maintenance of the Power Project. Such request from ESCOM SB shall not be unreasonably refused by the Seller.

### **5.5 General Construction obligations**

5.5.1 The Seller shall design, construct, erect, commission, complete and test the Power Plant in accordance with (i) the Construction Programme; (ii) all applicable Laws, including the Seller's Consents; (iii) the Grid Code; (iv) the Market Rules, (v) the Transmission Connection Agreement and (vi) the standard of a Reasonable and Prudent Operator.

5.5.2 The Seller shall provide or procure all plant, equipment, machinery consumables, parts, materials and services whatsoever required for the construction of the Power Plant as provided for in Clause 5.5.1 above. The plant will be able to provide Ancillary Services as agreed with the SB or specified in the Terms of Reference of the tender in which the Seller was awarded.

5.5.3 No later than [thirty (30) days] after the expiry of each calendar quarter in the period from the Effective Date to the Commercial Operation Date, the Seller shall deliver to ESCOM SB a written report setting out the construction activities undertaken in the preceding period as well as the overall progress in the construction of the Power Plant with reference to all Milestones.

5.5.4 Notwithstanding any review or inspection of, or recommendation in respect of, any preliminary or detailed design, plan or report, the Project Site, the construction contract(s) or any construction report

(each as may be amended) on the part of ESCOM SB or its representatives, the Seller shall be solely responsible for all aspects of the construction of the Power Plant. The Seller shall not be obliged to assume any obligation to implement or address any comments or recommendations of ESCOM SB arising from ESCOM SB's review or inspection as aforesaid, except that the Seller may (in its sole discretion and its sole risk) take such comments and recommendations into consideration whether with or without incurring any additional costs or resultant delays in the Construction Programme.

- 5.5.5 For the avoidance of doubt, notwithstanding the above, ESCOM TL shall be solely responsible for the availability and condition of the Transmission System, including the completion of the construction of the Connection Works by the Scheduled Connection Date, in accordance with the Transmission Connection Agreement. In case of delay that impedes the commencement of the commercial operation of the plant, it will be considered that the plant is available and in consequence qualified to receive the Capacity Payment

## **5.6 Construction Programme**

- 5.6.1 The Seller shall achieve the Commercial Operation Date on or before the Target Commercial Operation Date in accordance with Clause 6.1.
- 5.6.2 The Seller shall comply with the Construction Programme as set out in Annexure H (Construction Programme) and shall without any unreasonable delay notify ESCOM SB in writing of any anticipated failure to achieve the Commercial Operation Date on or before the Target Commercial Operation Date, which notice shall identify:
- (i) the nature of the reason for the failure;
  - (j) the impact which such failure has had, or in the reasonable opinion of the Seller (acting as a Reasonable and Prudent Operator), is likely to have, on its ability to achieve any Milestone on the applicable due date; and
  - (k) the steps which the Seller (acting as a Reasonable and Prudent Operator) has taken, is taking and will take to mitigate adverse consequences of such failure.

## **6.0 Commercial Operation Date**

### **6.1 Commercial Operation Date**

The Seller shall use reasonable endeavours to construct and commission the Power Plant to achieve the Commercial Operation Date on or before the Target Commercial Operation Date.

### **5.2 Delay in Commercial Operation Date**

- 5.2.1 If the Commercial Operation Date is not achieved on or before the Target Commercial Operation Date, other than due to an Event of Deemed Availability, Force Majeure, Government Action then the Seller shall pay the Buyer the Delay Liquidated Damages.

- 5.2.2 The Delay Liquidated Damages shall be paid at a rate of [ %] of the total EPC cost (including all contractors, equipment suppliers and service providers), as included in the Base Case Financial Model, for every week or part thereof from the Target Commercial Operation Date to the Commercial Operation Date, such weekly sum to be applied pro rata for any portion of a week between the Target Commercial Operation Date and the Commercial Operation Date.
- 5.2.3 The maximum aggregate payment of the Delay Liquidated Damages under this clause 0 shall not exceed [ %] of the agreed EPC Contract amount.
- 5.2.4 The Parties acknowledge that the Delay Liquidated Damages are a reasonable and genuine pre-estimate of the likely extent of the damages suffered by ESCOM SB as a result of such delays. The Parties agree that the Delay Liquidated Damages shall be the full and final compensation to be paid in respect of a failure of the Seller to meet the Target Commercial Operation Date as stipulated in this Clause 0.
- 5.2.5 In the case of a delay to the Commercial Operation Date as envisioned by this Clause 0, the Seller shall keep ESCOM SB informed of the date upon which it anticipates that it will be able to achieve the Commercial Operation Date.
- 5.2.6 If due to any delay, default or circumstance caused by an Event of Deemed Availability, the Seller's construction and commissioning of the Power Project by the Target Commercial Operation Date is prevented, hindered or delayed as a result of such Event of Deemed Availability, then the Seller, as soon as the Seller becomes aware thereof or should reasonably have become aware thereof, shall give notice to ESCOM SB as soon as practicable after the delay, default or circumstance has occurred setting out the full particulars thereof, its net effect on the Power Project, including any anticipated performance delays, and any measures undertaken or proposed to be undertaken in relation thereto, provided that the Seller shall use its reasonable efforts to minimise any delay, in as far as it is in the Seller's ability, and the effect of any such delay, default or circumstance acting in accordance with Prudent Industry Practice.
- 5.2.7 Following the occurrence of any delay, default or circumstance as contemplated in this Clause 0, the Parties shall confer as to the effect, if any, of such delay, default or circumstance, and the Target Commercial Operation Date shall be extended by a period agreed by the Parties taking into account:
- (l) the effect which the Power Project reasonably demonstrates is properly attributable to such delay, default or circumstance; and
  - (m) the ability of the Parties to reschedule activities to minimise the overall delays to the Commercial Operation Date resulting from such delay, default or circumstance.

### 5.3 Deemed Commercial Operation Date

5.3.1 Notwithstanding the extension to the Target Commercial Operation Date contemplated by Clause 0, if a delay, default or circumstance occurs as a result of an Event of Deemed Availability, and, as a consequence, the Seller is unable to conduct the Power Project Acceptance Tests on the date on which such Power Project Acceptance Tests would otherwise have occurred had such delay, default or circumstance not occurred, the Seller shall be entitled to enjoy certain rights as set out in this Clause 5.3 with effect from the date on which the Commercial Operation Date would have occurred had such delay, default or circumstance not occurred (the "Deemed Commercial Operation Date").

5.3.2 In the case of a delay, default or circumstance as contemplated by Clause 5.3.1:

- (n) each Party shall keep the other informed on a regular basis of the date upon which it anticipates that such delay, default or circumstance will be resolved;
- (o) the Parties shall undertake all reasonable measures to ensure that any Power Project Acceptance Tests delayed due to the circumstances contemplated by Clause 5.3.1 shall be undertaken as soon as possible after the circumstances that resulted in such delay, default or circumstance are no longer in place; and
- (p) Provided that the Seller was ready and in a position to conduct any Power Project Acceptance Tests, which Power Project Acceptance Tests were hindered or obstructed solely as a result of a delay, default or circumstance as contemplated by Clause 5.3.1, ESCOM SB shall pay the Energy Payment to the Seller in respect of the aggregate amount of Net Energy based on maximum output as defined in the Monthly Generation Forecast supplied in accordance with Clause 11.1.1 commencing from the Deemed Commercial Operation Date until the Commercial Operation Date (the "**Deemed Energy Payment**"), which output shall be forecasted in kWh. The Deemed Energy Payment shall be calculated as provided in Paragraph A3 of Annexure C (Energy Payment).

5.3.3 In the event that the delay, default or circumstance contemplated by Clause 5.3.1 is remedied, and the Power Plant fails the Power Project Acceptance Tests, the Seller shall be liable to repay the Deemed Energy Payments paid to it under this Clause 5.3 to ESCOM SB.

## 6 Sale and Purchase of Energy

### 6.3 Obligations to Sell and Purchase Electrical Energy

6.3.1 Subject to and in accordance with the terms and conditions of this Agreement, the Seller commits to sell and supply at the Delivery Point and ESCOM SB commits to take and purchase at the Delivery Point all

Net Energy generated by the Power Plant as from the Commercial Operation Date (or the Deemed Commercial Operation Date). Title to, and risk of loss, for the Net Energy shall pass from the Seller to ESCOM SB at the Delivery Point.

- 6.3.2 Commissioning of the Power Plant and the Connection Works shall be in accordance with the commissioning schedule contained in Annexure I (Testing and Commissioning). The Parties agree that Net Energy will be sold to and purchased by ESCOM SB from the Connection Date. The Term shall only commence upon the Commercial Operation Date in accordance with Clause 2.1. The Energy Payment for Net Energy produced prior to the Commercial Operation Date shall be in accordance with Clause 8.1.
- 6.3.3 The Parties acknowledge that the physical connection of the Power Plant to the Transmission System shall be in accordance with the Transmission Connection Agreement.
- 6.3.4 The Seller will also provide, without additional payment, the ancillary services agreed with the SB, or specified in the Terms of Reference of the tender in which the Seller was awarded. In all the cases, the Seller will provide as requested by the SMO in the Day Ahead Economic Dispatch, Primary Frequency Regulation and reactive power within the limits of its Capability Curve.

#### **6.4 Restrictions on sale of Energy**

- 6.4.1 Subject to the express and mandatory requirement of the Grid Code, the Seller shall not sell any Net Energy to any person other than ESCOM SB (save for electrical energy consumed by the Power Plant as Auxiliary Consumption) without ESCOM SB's prior written consent, with the exception of the additional generation ordered by the SMO for security reasons, to keep the system balance or to avoid Spillage. In this last case, the energy is sold to the market and paid at the System Marginal Price.
- 6.4.1 The Seller must ensure that all electrical energy required by the Power Plant for Auxiliary Consumption while the Power Plant is generating electrical energy to meet the Seller's obligations under this Agreement, is supplied by the Power Plant itself and not by any other supplier, including any other supplier which supplies electrical energy to the private network of customers which may provide load to the Power Plant, other than by ESCOM [SB] as agreed in the Transmission Connection Agreement.

### **7. Provision of Supply, Metering Equipment and Procedures**

#### **7.1 Delivery Point**

The supply from the Seller to ESCOM SB shall be delivered at the Delivery Point in accordance with the Transmission Connection Agreement entered between the Seller and ESCOM TL.

## **7.2 Metering**

The Net Energy generated by the Power Plant and delivered to the Transmission System pursuant to this Agreement shall be monitored, measured and recorded by the Metering Equipment at the Delivery Point in accordance with the provisions of the Grid Code, Market Rules and the Transmission Connection Agreement.

## **7.3 Periodic Testing of the Power Plant**

The Seller shall test the performance and output of the Power Plant on the [fifth anniversary] of the Commercial Operations Date, and every [five years] thereafter on the anniversary of the Commercial Operations Date for the duration of this Agreement, to determine whether the energy yield of the Power Plant is in line with the Power Project Acceptance Tests projections at the commencement of the Power Project, and to assist ESCOM SB for planning and forecasting purposes. The Seller shall give reasonable notice of such testing to ESCOM SB and shall allow ESCOM SB to be present when these tests are performed.

## **8. Payment for Available Capacity**

### **8.1 Payment for Available Capacity prior to Commercial Operation Date**

For each Billing Period prior to the Commercial Operation Date, the Capacity Payment shall be in accordance with Annexure C (Capacity Payment).

### **8.2 Capacity Payment during the Term**

Capacity Payment ESCOM SB shall pay to the Seller: for each Billing Period during the Term (including the Billing Period in which the Commercial Operation Date occurs), the Capacity Payment(as per Annexure C (Capacity Payment))

### **8.3 Payment during Event of Deemed Availability**

Following the Commercial Operation Date, in the event of an Event of Deemed Availability which prevents or hinders the Power Plant from producing Net Energy or from delivering such electrical energy to ESCOM SB or which prevents or hinders ESCOM SB from accepting or receiving such electrical energy in accordance with this Agreement, ESCOM SB shall pay to the Seller the Capacity Payment in respect of the last informed Available Capacity.

### **8.4 Indexation of the Capacity Payment**

The Capacity Payment shall escalate in accordance with the indexation in clause C3 of Annexure C (Capacity Payment).

### **8.5 Transmission Use of System Charge**

The Capacity Payment to be paid by ESCOM SB to the Seller shall include, among other components, transmission charges provided for in the Transmission Connection Agreement including the Transmission Use of System Charge, which is set in [currency] per month and is calculated in accordance with applicable [MERA Generation and Transmission tariff

methodology]. This amount will be reviewed annually in accordance with MERA approval, all as specified in Annexure C (Energy Payment). [Note: The TCA will be between the Seller and ESCOM and ESCOM SB not party to the TCA].

## **8.6 Settlement of Deviations**

The SB will settle the deviations between the Daily Nomination and the metered output of the Seller's plant, according with the market rules and the Market Procedures.

## **9. Invoicing and Payment**

### **9.1 Frequency**

The Capacity Payment and the Settlement of Deviations as established in the Market Rules, as calculated and adjusted in accordance with Clause 0 shall be invoiced in arrears at the end of each Billing Period and shall be invoiced in [currency]. The Seller shall charge ESCOM SB value added tax and any other taxes or surcharges, including the MERA Levy if applicable, in accordance with applicable legislation.

### **9.2 Payments Free from Tax**

All sums payable by either Party under this Agreement shall be paid:

9.2.1 Free of any restriction or condition; and

9.2.2 free and clear of and (except to the extent required by law and as herein below recorded) without any deduction or withholding for or on account of any bank charge or tax imposed, levied, collected, withheld or assessed by or within Malawi or by any federation or organisation of which Malawi is a member at the time of payment.

### **9.3 Deductions Made Whole**

9.3.1 Each Party shall make any payments payable by it under this Agreement, without withholding or deduction of, or in respect of, any Tax, unless required by Law.

9.3.2 If any such withholding or deduction of any Tax is required the Party making the payment shall, when making the payment to which the withholding or deduction relates, pay the receiving Party such additional amounts as will ensure that the receiving Party receives the same total amount that it would have received if no such withholding or deduction had been required.

9.3.3 Clause 0 does not apply in the event where a Party is compensated or allowed to recoup such Tax via alternative mechanisms.

### **9.4 Invoicing and Payment Procedure**

9.4.1 Invoices for all payments due under this Agreement shall be submitted by the Seller to ESCOM SB by the [seventh (7th) day] (or, if such day is not a Business Day, the immediately following Business Day) of each month following that in respect of which they are payable.

- 9.4.2 Each invoice shall be due and payable on or before the [thirtieth (30th) day] after the invoice is received (or, if such day is not a Business Day, the immediately following Business Day). Invoice and payment of deviations will be performed according with the Market Rules and Market Procedures.
- 9.4.3 Any amount properly due from one Party to the other Party pursuant to this Agreement and remaining unpaid after the due date shall bear interest from the date when payment was due, such interest to accrue daily and be compounded monthly at a rate equal to the [Agreed Interest Rate] from the date when payment was due until the amount due is actually received by the payee. Any overpayments by either Party resulting from an invoicing error or an error in payment shall be refunded by the other Party, together with interest at the Agreed Interest Rate and thereafter a new invoice shall be issued.
- 9.4.4 Should ESCOM SB dispute an invoice it shall notify the Seller within [five (5) Business Days] of receipt of such an invoice. ESCOM SB shall not be entitled to defer payment thereof beyond the date specified for payment but shall pay such an invoice except in instances of manifest error. In the event the Parties fail to resolve a dispute regarding an invoice within [fifteen (15) days], either Party shall be entitled to refer the dispute for dispute resolution for a determination. In the event it is found that an error was made on the invoice, such invoice shall be cancelled and thereafter a new invoice shall be issued within [ten (10) days] from the resolution of such dispute.
- 9.4.5 In case of a manifest error on an invoice, ESCOM SB shall immediately notify the Seller, and the Seller shall issue a corrected invoice.
- 9.4.6 Should an invoice be in error as a result of a metering or reconciliation error, as detailed in Annexure D (Metering), the payments shall be recalculated as soon as practicable following the correction of the metering error and any over-payment or under-payment corrected in the invoice for the month following the receipt of the correct metered data.
- 9.4.7 The Seller shall notify ESCOM SB of its bank account details for payment by ESCOM SB to the Seller.
- 9.4.8 In the event that the Seller is required to pay to ESCOM SB any Liquidated Damages [or Environmental Credits], ESCOM SB shall issue an invoice to the Seller in accordance with the procedure described above, mutatis mutandis.
- 9.4.9 ESCOM SB shall notify the Seller of its bank account details for payment by the Seller to ESCOM SB.
- 10 No Party shall be entitled to offset any amounts payable to the other Party under or in relation to this Agreement.

## **10. [Environmental Credits]**

*[Note: Review applicability of this entire clause 10]*



#### **10.4 Obtaining Credits**

The Seller shall use its reasonable efforts to obtain Environmental Credits associated with the electrical energy generated by Power Plant and shall undertake its best endeavours as may be reasonably necessary to apply for and obtain any Environmental Credits, if available.

#### **10.5 Information Sharing**

ESCOM SB undertakes to co-operate with the Seller and its contractor (as the case may be), and to provide such information and assistance as may be reasonably requested of ESCOM SB in relation to the application for and obtaining of Environmental Credits.

#### **10.6 Ownership of the credits**

The Parties agree that the Seller shall be the sole and exclusive owner of all Environmental Credits (if any) derived or generated as a result of the Power Project and, subject to Clause 10.7, shall have all rights to trade, sell or otherwise dispose of, in its sole discretion, any and all Environmental Credits associated with the electrical energy generated by the Power Plant, and further agree, for the avoidance of doubt, that ESCOM SB will have no rights, obligations or liabilities in respect of any Environmental Credits earned by the Seller or deficiency thereof for the duration of this Agreement other than those set out in Clause 10.7 and Annexure E (Sharing of Environmental Credit)

#### **10.7 Payment of Benefits**

Notwithstanding Clause 10.6, payment of the benefits derived by the Seller from the Environmental Credits shall be in accordance with Annexure E (Sharing of Environmental Credit) as per the applicable tariff methodology.

### **11. Control and Operation of the Power Project**

#### **11.1 Dispatch Procedures**

##### **11.1.1 Monthly Generation Forecast**

- (q) The Seller shall provide ESCOM SB in writing for each month from the Commercial Operation Date (including during Scheduled Outages), by no later than [09:00 hours on the 25th] of the preceding month, the forecast level of water inflows to the Sellers power plant, Available Capacity, minimum discharges downstream as requested by environmental rules or other used of water, and the initial reservoir level.
- (r) Based on this information, the SB will run its models for Hydro Plants Optimization Model and will obtain a tentative hourly generation forecast;
- (s) SB shall present the tentative daily generation schedule to the Seller and both will agree on this schedule. In case of lack of agreement, the SB proposal will be applied, unless Seller can demonstrate that it endangers its installations security or does not fulfil its obligations related to environmental aspects or minimum discharges. This activity will be carried out by the Technical Committee;

- (t) Under no circumstance shall an hourly generation forecast included in the Monthly Generation Forecast exceed the Available Capacity of the Power Plant.
- (u) The Monthly Generation Forecast will include the reserve margins that the Seller should maintain to provide Frequency Regulation Reserves
- (v) In the event that the SB fails to provide the Monthly Generation Forecast for any month, then the Seller shall define the Monthly Generation Forecast, which will be valid until SB provides a new Monthly Generation Forecast.

#### 11.1.2 **Weekly Generation Forecast**

- (w) The Seller shall provide to ESCOM SB in writing for each Week from the Commercial Operation Date, by no later than [09:00 hours on the preceding Wednesday], the Seller's estimate made in good faith of the changes of water inflows to the Sellers power plant, the Available Capacity, minimum discharges downstream and initial reservoir level.
- (x) Based on this information, SB will adjust the hourly generation forecast for the rest of the month, that will constitute the Weekly Generation Forecast
- (y) On each Friday, representatives of Seller and SB or the Technical Committee will meet to agree how the Hourly generation Schedule that will be produced during each hour of the week starting the following Monday. This set of hourly generation will constitute the Generation Schedule for the next week that will be nominated to the SMO. In case of disagreement, the opinion of the SB will be adopted, provided it leads to feasible and secure Generation Schedule and has the means that fulfils the requirements of the Grid Code.
- (z) The Seller and SB will inform the SMO about the Generation Schedule that they agreed to be produced each hour of the next week. SMO will verify the feasibility to transfer that energy, and in case it is not possible, will inform Seller and SB, which will have to adapt the Generation Schedule to the SMO instructions.
- (aa) The agreed Generation Schedule will be included in an Agreement on Notifications, which will be signed by the participants of the meeting. Seller becomes responsible to confirm daily to the SMO the Nominations agreed in this document. The parties can agree to replace meetings with interchanges by e-mail.
- (bb) Change in Forecast: in case there is a change in the water availability that lead to a Nomination reduction, the Seller will inform the causes to SB in writing. SB will analyse the reasons and may accept a change in the Nominations.
- (cc) The Weekly Generation Forecast will include the reserve margins that the Seller should maintain to provide Frequency Regulation Reserves

- (dd) In case of high water inflows to the reservoir that may lead to "Spillage Situation", Seller can deliver to the Market any excess of generation that is above the agreed Notifications, provided it is accepted by the SMO.
- (ee) In the event that the SB fails to provide the Weekly Generation Forecast for any Week, then the Seller shall define the Weekly Generation Forecast, which will be valid until SB provides a new Weekly Generation Forecast for such Week.

#### 11.1.3 Daily Generation Forecast

- (ff) The Seller will inform the SMO every day, before 9:00 Malawi's time, or the time requested in the Market Rules, the power it Nominates for each hour of the next day, as well as any other information necessary for the SMO to prepare the Day Ahead and Real Time dispatch. This power should coincide with the Generation Schedule agreed between Seller and SB, according with the procedure described in the previous section on Weekly Generation Forecast. The Seller may introduce changes to the Generation Schedule for verifiable security reasons, or because of a Spillage Situation. Any reduction not based on security reasons will be considered and reduction in the plants Available Capacity.
- (gg) In case the capacity to be injected is lower than the established in the Generation Schedule, the Seller will inform the SB with no less than two hours prior to submitting the information to the SMO.
- (hh) The Seller will be responsible for any reduction in the power to be injected as ordered by the SMO whether it occurs because the information provided to SMO is incomplete or inexact.
- (ii) In accordance with the Market Rules, Grid Code and Market Procedures and any procedures agreed by the parties, the Seller shall keep the SB informed by regular Daily Nominations, together with prompt declarations of any changes, of the Available Capacity and any impairment of the Plant's Operating Characteristics, provided that if the Seller fails to give a declaration in respect of a Unit that Unit shall be deemed to be declared Unavailable unless Seller makes a contrary declaration.
- (jj) SMO, in accordance with the results of the Day Ahead Economic Dispatch shall issue Dispatch Instructions to Seller consistent with and within the Market Rules, Grid Code, Functional Specification and the prevailing Daily Nomination. As part of the Dispatch Instructions, SMO will instruct on the Net Electrical Output to inject each hour, the reserve margins for Frequency Regulation Reserves and the reactive power production. If for some reason the Dispatch Instruction request a Net Electrical Output different than the Nomination, the Seller will immediately inform the SB who will advise on modification

of the Nomination. SMO may require Seller to modify the Nomination or disconnection when:

- i. an Emergency exists, which may require to increase or decrease generation in respect to the Nomination;
- ii. for so long as a disconnection or a reduction in energy deliveries is necessary to enable to construct, install, maintain, repair, or test any part of the Transmission or Distribution Connection facilities, or any other affected part of the Electricity System;
- iii. During necessary short term maintenance outputs agreed between SMO and Seller, and the SB shall be informed;
- iv. A water spillage condition in other plants of the system;
- v. To keep the system balance

The SMO shall notify the Seller prior to the beginning and end of such reduction or disconnection. The SMO shall co-ordinate such reduction or disconnection with Seller. Any action requiring such disconnection or reduction of energy deliveries shall be implemented and completed as soon as reasonably practicable.

- (kk)** The Parties and the SMO shall, not later than the First Implementation Date, agree further procedures as shall be necessary for the Dispatch of the Plant and operational communications between the Parties. Any procedures not agreed by the Parties by the First Implementation Date shall be specified by the SMO in accordance with Grid Code, Market Rules or Procedures or Prudent Operating Practice. If circumstances arise subsequent to the First Implementation Date, which either Party deems to require changes in procedures, the Parties shall work together in good faith to establish procedures satisfactory to both Parties, giving due consideration to issues of safety and that fulfils requirements of Grid Code and Market Rules. If the Parties are unable to agree on any such procedures relating to matters of safety, these shall be referred to an Expert. While the Expert is adjudicating the matter, the Parties shall abide by existing agreed procedures, or if there are none applicable, relevant SB procedures existing at the time.
- (ll)** The SB will calculate the hourly differences between the energy actually delivered by the Transmission System, according to the readings of the metering system and the Daily Nomination communicated as part of the Dispatch instructions to Seller for the day ahead Dispatch. Metering information will be collected by the SMO and informed to SB and Seller
- (mm)** This difference (positive or negative) will be valued at the System Marginal Price of the corresponding hour, as indicated in the Market Rules, at the delivery point into the Transmission System at which the Seller is connected.
- (nn)** The SB will calculate the corresponding accumulated differences that Seller should pay or receive, corresponding to

the previous month. SMO will produce a verification of the communicated values (taking into account the registered contracts).

- (oo) Any notice given by the SMO shall be given in writing and delivered by e-mail, or any electronic means agreed by the Parties, to Seller at the e-mail address and marked for the attention of the persons or such other address or person from time to time as designated by Seller and such notice shall be deemed to be received upon confirmation of uninterrupted transmission by a transmission report provided that such notice shall be confirmed by letter sent by hand or post.
  - (pp) If at any time the supply of electricity to the Agreed Point of Supply does not comply with the applicable requirements of the Grid Code, as a result of the breach by Seller of any such requirements:
    - i. Seller shall immediately take the steps necessary pursuant to Grid Code and Prudent Operating Practice to remedy such non-compliance as soon as possible;
    - ii. if and to the extent that, as a result of such non-compliance, any Unit is unable to generate supply of electricity, that Unit shall be deemed not to be Available or with reduce Available Capacity.
  - (qq) The requirements in (i) and (ii) above shall not be applicable where such deviations from the Grid Code or Day-ahead Dispatch have arisen due to the operating conditions of the Transmission and Distribution Systems, following orders of the SMO.
  - (rr) In the event of any dispute arising between the Parties as to any such non-compliance, the matter in dispute shall be referred to determination by an Expert in accordance with Clause 22.2. The expert shall take into consideration the written opinion of the SMO.
- 11.1.4 All generation forecasts are indicative only, and deviations shall not be regarded as a breach of contract, with the exception of the daily Nominations, that will be considered as deviations and will be settled accordingly.
- 11.1.5 Any non-justified deviations that results in a Net Electrical Output of less than 5% of the Daily Nomination will be considered a reduction in the Available Capacity, and will lead to a reduction in the Capacity Payment, which be calculated according with clause C.3 of Annexure C.

## **11.2 Availability Declaration**

- 11.2.1 The Seller shall provide to ESCOM SB in writing for each Contract Year (after taking into consideration Scheduled Plant Outages), by no later [than 30 (thirty) days prior to the 1 January] of the ensuing Contract Year to which the forecast relates, the forecast level of

generation of the Net Energy for each Contract Year in such format as may be prescribed by ESCOM SB from time to time (the "Availability Declaration"). For the first Contract Year, the Seller shall provide ESCOM SB with an Availability Declaration [thirty (30) days] prior to the Commercial Operation Date.

- 11.2.2 In the event that the Seller fails to provide the Availability Declaration for a Contract Year, then the last Availability Declaration provided by the Seller in accordance with Clause 11.2.1 above shall be deemed to be the Availability Declaration for such Contract Year.
- 11.2.3 Subject to the terms and conditions of this Agreement, the Seller shall declare the Power Plant available for generation of Net Energy except:
  - (ss) for reasons of Scheduled Plant Outages or Unscheduled Plant Outages; or
  - (tt) where to do so would not be in accordance with the standards of a Reasonable and Prudent Operator; or
  - (uu) in circumstances relating to safety (of either a personnel or the Power Project or apparatus); or
  - (vv) to the extent of any illegality, in circumstances where to do so would be unlawful; or
  - (ww) for reasons of Force Majeure; or
  - (xx) in any other circumstances, with ESCOM SB's approval.
- 11.2.4 The Availability Declaration and all generation forecasts, with exception of the Daily Nominations are indicative only, and deviations shall not be regarded as a breach of contract.
- 11.2.5 ESCOM SB shall purchase, all the Energy generated by the Power Plant.

### **11.3 Other relevant data**

So far as possible, by [30 (thirty) days] before each anniversary of the Commercial Operation Date, the Seller shall submit to ESCOM SB in written form details of any material factors which in the reasonable opinion of the Seller may have a material effect on the ability of the Power Plant to produce Net Energy.

### **11.4 Further revisions**

- 11.4.1 The Seller shall, as soon as is reasonably practicable, make revisions to the Availability Declaration submitted to ESCOM SB should circumstances affecting the operation of the Power Plant or its operating characteristics change at any time. Any change in the Available Capacity should be informed also in the Monthly Generation Forecast or Weekly Generation Forecast.
- 11.4.2 Should circumstances change such that the original or the current Availability Declaration is no longer a reasonable estimate made in good faith, the Seller must, as soon as is reasonably practicable:

- (yy) make revisions to the data submitted to ESCOM SB under Clause 11.2 and Clause 11.3;
- (zz) notify ESCOM SB of any revisions to any previously submitted data; and
- (aaa) notify ESCOM SB of any special factors of which it becomes aware.

## **11.5 Communication of Declarations**

Each Party hereby authorises the other Party to record all telephone voice communications relating to Net Energy of the Power Plant received from the other Party and, where recording equipment of a Party has failed, the other Party shall supply, at the request of the first Party, a copy or transcript of any such recording. [Note: or provide any other method which is agreeable to by the Parties.]

## **11.6 Coordination**

11.6.1 The Seller and ESCOM [SB] shall as far as practically possible coordinate the timing for both Scheduled Plant Outages and Scheduled Transmission System Outages.

11.6.2 The Parties shall establish an [Operating Committee] composed of [four (4) members]. The obligations and responsibilities of the [Operating Committee] shall be as set out in [Annexure F (Operating Committee)], however it is hereby agreed that the Operating Committee and/or its members will not have any liability towards the Power Project and/or the Parties. [Note: Parties to agree whether there will be a need for an Operating Committee.]

## **11.7 Maintenance**

The Seller shall, during the Term, carry out such maintenance as shall be commensurate with the proper running of the Power Plant and in accordance with Grid Code and Prudent Industry Practice.

## **11.8 Scheduled Plant Outages**

11.8.1 The Seller shall, not less than [one (1) month] prior to the Commercial Operation Date and on an annual basis for the remainder of the Term, at least [one (1) month] prior to the timeline established in the Market Rules and Market Procedures] its proposals for Scheduled Plant Outages, including any planned interruption or reduction of the Power Plant's Contracted Capacity for the remainder of the Contract Year and the forthcoming Contract Year, as appropriate. Such schedule shall include:

- (bbb) the number of expected Scheduled Plant Outages and the extent of expected reductions in the Contracted Capacity of the Power Plant as a result of such Scheduled Plant Outages; and
- (ccc) the estimated dates and duration of each Scheduled Plant Outage.

- 11.8.2 The [Operating Committee] shall, upon receipt of the proposals contemplated in clause 11.8.1, meet and coordinate the timing of Scheduled Plant Outages for the forthcoming Contract Year, at least as close to [one (1) month] prior to the commencement of that Contract Year as possible.

The Scheduled Plant Outage will be informed to the SMO in the timeline established in the Market Rules or market Procedures. The SMO, based on its Year Ahead Operational planning will may propose changes to this schedule.

The [Operating Committee] will analyse the SMO's request, and can propose an alternative to the SMO, according with the Market Procedures

- 11.8.3 If there is a requirement to change the dates of any Scheduled Plant Outage, the Seller shall provide ESCOM SB with written notice at least [twenty-eight (28) days] in advance of the relevant Scheduled Plant Outage. ESCOM SB will require the SMO's opinion, and if it agrees, may approve such a request for a change of date within [five (5)] days of such request. Such an approval shall not be unreasonably withheld or delayed.
- 11.8.4 Subject to having complied with the foregoing provisions of this Clause 11.8, the Seller shall be entitled to remove any Unit and/or the Power Plant from service at the agreed date and time for the Scheduled Plant Outage.
- 11.8.5 The Seller shall be responsible for all costs incurred by it in connection with or arising from any scheduled maintenance carried out by it or on its behalf on the Power Plant. ESCOM SB shall not be entitled to any payment and/or indemnification and/or reimbursement from the Seller in connection with any Scheduled Plant Outages.

## **11.9 Unscheduled Plant Outages**

- 11.9.1 The Seller shall notify SMO and ESCOM SB promptly:

(ddd) upon the occurrence of any event resulting in the Power Plant being unable to operate; and/or

(eee) if the Seller determines that maintenance of the Power Plant is required prior to the next Scheduled Plant Outage scheduled pursuant to Clause 11.8, and that an Unscheduled Plant Outage is required.

- 11.9.2 In each case, the Seller shall:

(fff) give SMO and ESCOM SB notice of such event as soon as reasonably practicable after the occurrence of such event or, in the case of an Unscheduled Plant Outage, the Seller becoming aware of the need for such outage;

(ggg) notify SMO and ESCOM SB of the expected dates and duration of the Unscheduled Plant Outage;

(hhh) SMO can deny the outage for security reasons, and if delay do not lead to damages to the Seller's equipment.



- (iii) use its best efforts to minimise the duration and effects on the Power Plant of the Unscheduled Plant Outage.

11.9.3 ESCOM SB shall not be entitled to any payment and/or indemnification and/or reimbursement from the Seller in connection with any Unscheduled Plant Outages.

## **11.10 Scheduled and Unscheduled Transmission System Outages**

11.10.1 The Parties agree that if because planned or unplanned outages the Transmission System the Seller cannot deliver its Net Electrical Output, at the effects of the capacity Payment the Sellers plant will be considered as available, with the last Available Capacity informed.

## **12 Additional Obligations**

### **12.1 ESCOM SB's obligations**

ESCOM SB shall, in addition to its other obligations under this Agreement, without cost to the Seller:

- 12.1.1 to the extent ESCOM SB has not done so at the Signature Date, apply in a timely fashion for, obtain, maintain and comply with all Consents required from time to time for ESCOM SB to fulfil its obligations under this Agreement; and
- 12.1.2 reasonably assist the Seller in obtaining any Consents which the Seller requires to construct, commission, operate and maintain the Power Plant under this Agreement; and
- 12.1.3 at all times from the Connection Date until the occurrence of the Commercial Operation Date during which the Seller generates Net Energy from the Power Plant, accept the Net Energy so generated.; and
- 12.1.4 upon the Seller's reasonable request, discuss details of the Power Project with any potential Lender interested in providing financing or refinancing to the Seller in relation to the Power Plant; and
- 12.1.5 upon the Seller's reasonable request, in good faith negotiate and enter into the Direct Agreement with the Seller and the Lenders, on such terms as the Lenders may reasonably require within a reasonable time.

### **12.2 General Obligations of the Seller**

12.2.1 From the Commercial Operation Date and for the remainder of the Term, the Seller shall, in addition to its other obligations under this Agreement, manage, operate and maintain the Power Plant in accordance with:

- (jjj) all relevant Consents required from time to time for the Seller to fulfil its obligations under this Agreement;
- (kkk) all applicable Laws (including, without limitation, all health, safety and environmental Laws);
- (III) Malawi's Grid Code;

- (mmm) In coordination with the SMO maintenance schedule<.
- (nnn) Prudent Industry Practice; and
- (ooo) the relevant manufacturer's guidelines and instructions.

- 12.2.2 In the event of a conflict among any such standards, the most stringent standard shall prevail, provided that in no circumstances shall the Seller be required to control or operate the Power Plant in violation of any of its Consents or any applicable Law, or in a manner contrary to Grid Code, Market Rules and Prudent Industry Practice.
- 12.2.3 As soon as granted and not later than Financial Close, the Seller shall give notice to ESCOM SB of all Consents and approvals necessary in Malawi to allow the Seller to enter into this Agreement and/or operate the Power Plant and to carry out the transactions contemplated hereby.

### **13. Representations and Warranties**

#### **13.1 The Seller's warranties**

The Seller hereby represents and warrants to ESCOM SB that:

- 13.1.1 it is a validly existing legal entity under the Laws of Malawi;
- 13.1.2 it is a limited company, incorporated under the Laws of Malawi which has been in continuous existence since incorporation;
- 13.1.3 it has the full legal capacity and authority to enter into and carry out its obligations under this Agreement and this Agreement constitutes a valid, legally binding and enforceable obligation of the Seller;
- 13.1.4 to the best of the Seller's knowledge and belief, all Consents necessary to allow the Seller to enter into this Agreement and to carry out the transactions contemplated herein, including approval by the board of directors of the Seller, shall be given or received after Signature Date and it shall use its best efforts to keep them remaining in full force and effect for the duration of this Agreement;
- 13.1.5 to the best of the Seller's knowledge and belief there are no applicable Laws in force on the Signature Date or any provisions of any organisational document of the Seller or of any agreement by which the Seller is bound, which restrict or prohibit the ability of the Seller to enter into and perform the terms of this Agreement;
- 13.1.6 this Agreement does not conflict with any provisions of any Law, any regulations of Malawi or any provision of the articles or memorandum of association of the Seller in effect as at the Signature Date;
- 13.1.7 at the Signature Date no litigation, arbitration or administrative proceedings before any court or arbitrator or authority are presently pending or to the best of the Seller's knowledge are being threatened against the Seller or any of its assets, which might materially or adversely affect the Seller's ability to perform its obligations under this Agreement or result in the dissolution of the Seller;

- 13.1.8 execution of this Agreement will not violate, be in conflict with, result in a breach of or constitute (with due notice or lapse of time or both) a default under any indenture, agreement for borrowed money, bond, note, instrument or other agreement to which the Seller is a party or by which the Seller or its property is bound;
- 13.1.9 that it will make use of new equipment supplied by a reputable manufacturer; and
- 13.1.10 it has fully investigated the Project Site and has satisfied itself as to the Project Site's adequacy and fitness for the purposes of the Power Project and this Agreement.

## **13.2 ESCOM SB Warranties**

ESCOM SB hereby represents and warrants to the Seller that:

- 13.2.1 it is a validly existing legal entity under the Laws of Malawi which on the date of this Agreement is [wholly-owned by the Government of Malawi];
- 13.2.2 it is a private limited company incorporated under the Laws of Malawi which has been in continuous existence since incorporation;
- 13.2.3 it has the full legal capacity and authority to enter into and carry out its obligations under this Agreement and this Agreement constitutes a valid, legally binding and enforceable obligation of ESCOM SB;
- 13.2.4 all Consents necessary to allow ESCOM SB to enter into this Agreement and to carry out the transactions contemplated herein have been given or received and remain in full force and effect;
- 13.2.5 it has given notice to the Seller of all Consents necessary in Malawi to allow ESCOM SB to enter into this Agreement and to carry out the transactions contemplated therein;
- 13.2.6 there are no applicable Laws in force on the Signature Date or any provisions of any organisational document of ESCOM SB or of any agreement by which ESCOM SB is bound, which restrict or prohibit the ability of ESCOM SB to enter into and perform the terms of this Agreement;
- 13.2.7 execution of this Agreement does not conflict with any provision of any Law or any provision of the articles or memorandum of association of ESCOM SB in effect as at the Signature Date;
- 13.2.8 at the Signature Date no litigation, arbitration or administrative proceedings before any court or arbitrator or authority are presently pending or to the best of ESCOM SB's knowledge are being threatened against ESCOM SB or any of ESCOM SB's assets, which might materially or adversely affect ESCOM SB's ability to perform its obligations under this Agreement or result in the dissolution of ESCOM SB; and
- 13.2.9 execution of this Agreement will not violate, be in conflict with, result in a breach of or constitute (with due notice or lapse of time or both) a default under any indenture, agreement for borrowed money, bond,

note, instrument or other agreement to which ESCOM SB is a party or by which ESCOM SB or its property is bound.

#### **14. Applicable Law and Jurisdiction**

This Agreement shall be governed, construed and interpreted in accordance with the Laws of Malawi, and the Parties consent to the non-exclusive jurisdiction of the High Court of Malawi, subject to the provisions of Clause 0 (Dispute Resolution). Subject to the provisions of Clause 0 (Dispute Resolution), the Parties agree that a judgment in any proceedings in connection with this Agreement by the Malawian courts shall be binding upon them and may be enforced against them in any other jurisdiction.

#### **15. Change in Costs**

- 15.1 The tariff agreed in this Agreement is approved by MERA, and has an agreed price path, with annual escalations as set out in Annexure C (Capacity Payment).
- 15.2 In the event of any Change in Law resulting in a Change in Costs that materially changes the economic position of the Seller, and more specifically has the effect of an increase in cost or decrease in revenue to the Seller of more than [ ] aggregate, projected over the life of the Power Plant in accordance with the Base Case Financial Model, ESCOM SB and the Seller shall approach MERA to adjust the Capacity Payment in terms of the then applicable tariff methodology to ensure that the Seller's Regulated Equity Return as set out in the Base Case Financial Model is maintained.
- 15.3 The Change in Costs as contemplated in Clause 15.2 must have the effect of (a) impacting one or more of the inputs in the Base Case Financial Model and / or (b) results in one or more changes to the [Grid Code].
- 15.4 In the event of a Change in Law ("Change in Costs") which falls within the ambit of Clause 15.3, the Seller may only claim relief for a Change in Costs in the event:
  - 15.4.1 the principle effect of such Change in Costs is directly borne by:
    - the Power Project;
    - the Seller and not other persons; and
  - 15.4.2 in respect of which the Seller is not entitled to any other relief pursuant to any other provisions of this Agreement; and
  - 15.4.3 which was not foreseen by the Seller on or before the Signature Date or if it was foreseen, the impact on the Power Project was not foreseen; and
  - 15.4.4 which could not reasonably have been foreseen by any person in the position of the Seller on or before the Signature Date or if it could have reasonably have been foreseen, the impact on the Power Project could not reasonably have been foreseen.
- 15.5 An increase in taxes of general application which does not discriminate against the Seller or against the Seller and other parties undertaking projects similar to the Power Project shall not be deemed a Change in Costs.

- 15.6 A Change in Costs shall not include any Law that was enacted or made but not yet in force as at the Signature Date, or any bill that was promulgated for comment at any time before the Signature Date if and to the extent that such bill is materially unchanged when enacted and brought in effect.
- 15.7 If any one or more Changes in Costs as envisaged in Clause 15.1–15.3 (inclusive) takes place, the Parties agree to meet in accordance with Clause 15.9 to quantify the financial implications of the Changes in Costs by reference to the Base Case Financial Model so as to calculate the changes required to the Capacity Payment in Annexure C (Capacity Payment) such that the Seller's Regulated Equity Return, assuming the Change in Costs, is equal to the equity return in the Base Case Financial Model.
- 15.8 Once the then applicable Capacity Payment has been re-calculated in accordance with Clause 15.6, the implementation of such revised Capacity Payment ("Seller's Revised Capacity Payment") is subject to the official approval of MERA. In the event that the MERA does not approve the Seller's Revised Capacity Payment or in the event that MERA determines a revised Capacity Payment which is less beneficial to the Seller than the Seller's Revised Capacity Payment, the Seller shall be entitled to refer the matter to an Expert for a determination.
- 15.9 Process for adjustments to the Capacity Payment because of Change in Costs
- 15.9.1 After a Change in Costs as contemplated in Clause 15.2 and 15.3, the Seller shall submit to ESCOM SB within a reasonable time the re-calculation of the Seller's Revised Capacity Payment derived from the Base Case Financial Model, setting forth in reasonable detail the basis of, and the calculations in the claim for, any necessary adjustments to the Capacity Payment, arising from such Change in Costs.
- 15.9.2 Within [fourteen (14) days] after the date of the re-calculation delivered pursuant to Clause 15.2 ESCOM SB shall notify the Seller whether it agrees or disagrees with Seller's Revised Capacity Payment. If ESCOM SB notifies the Seller of its disagreement, the Parties agree to meet within [seven (7) days] and discuss, in good faith, the Seller's Revised Capacity Payment.
- 15.9.3 In the event that ESCOM SB agrees with the re-calculation delivered pursuant to Clause 15.2 or as negotiated pursuant to Clause 15.6 and subject to the approval of MERA in accordance with Clause 15.7, the calculation of the Capacity Payment shall be amended accordingly.
- 15.9.4 The Seller's Revised Capacity Payment shall apply as from the date on which ESCOM SB's annual tariff revision is approved by MERA and takes effect (falling no later than [twelve (12) months] from the previous ESCOM SB application for tariff review).
- 15.9.5 The Parties shall ask MERA to approve the Seller's Revised Capacity Payment within [fourteen (14) days] pursuant to Clause 15.1 or Clause 15.9.
- 15.9.6 The calculation of the revised Capacity Payment and the Annual Indexation determined pursuant to this Clause 0 (Change in Costs)

shall take into consideration the period from the date of the relevant Change in Costs until the date on which the revised Capacity Payment and the Annual Indexation take effect in accordance with Clause 15.9. In calculating the adjustment, the effect of the Change in Costs from the effective date of such Change in Costs until the date of the final adjustment becomes effective shall be taken into consideration.

15.9.7 In the event, the Parties have met to discuss the re-calculation of the Seller's Revised Capacity Payment pursuant to clause 15.6, and ESCOM SB is in disagreement with the Seller's calculations, the Parties shall be entitled to refer the matter to MERA for mediation. If MERA does not approve the Seller's Revised Capacity Payment or in the event that MERA determines a revised Capacity Payment which is less beneficial to the Seller than the Seller's Revised Capacity Payment, the Parties shall be entitled to refer the matter to an Expert for a determination.

15.9.8 In the event the Expert rules in favour of the Seller, and MERA does not implement the re-calculated Capacity Payment as determined by the Expert, the Seller may terminate this Agreement and ESCOM SB shall not have any claim and/or demand and shall not be entitled to any indemnification and/or reimbursement in connection with such termination. The aforementioned right to termination is subject to ESCOM SB having approved the re-calculation of the tariff in accordance with Clause 15.6.

## **16. Force Majeure**

### **16.1 Definition of Force Majeure Event**

16.1.1 A "Force Majeure Event" means any event or circumstance which:

is beyond the reasonable control of the Party affected by the Force Majeure (the "Affected Party") or its Contractors;

is without fault or negligence on the part of the Affected Party or its Contractors and is not the result of a breach by the Affected Party or its Contractors of any of their obligations under any Project Document (including, in respect of the Affected Party, this Agreement), Consents or applicable Law;

was not foreseeable, or if foreseeable, could not have been (including by reasonable anticipation) avoided or the effects of which could not have been overcome by the Affected Party or its Contractors, acting in accordance with Prudent Industry Practice; and

prevents, hinders or delays the Affected Party in its performance of any of its obligations under this Agreement.

16.1.2 If an Affected Party or its Contractors could, by acting in accordance with Prudent Industry Practice, have mitigated an event or circumstance that otherwise satisfies the requirements set out in paragraphs (a) to (d) of Clause 16.1.1 above, that part of the event or

circumstance that could have been mitigated shall not be a Force Majeure Event.

- 16.1.3 Without limiting the generality of the foregoing, a Force Majeure Event may include any of the following acts, events or circumstances, but only to the extent that it satisfies the requirements set out in paragraphs (a) to (d) of Clause 16.1.1 above:

any material effect of the natural elements, including lightning, drought, wind, fire, earthquake, solar flares, volcanic eruption, landslide, flood, storm, tsunami, cyclone, typhoon, tornado, or meteorites; or

air crash, shipwreck, train wreck or major failure or stoppage of transportation, objects falling from aircraft or other aerial devices, sonic boom, explosions or chemical contamination; or

epidemic, famine or plague; or

any event or circumstance constituting a Force Majeure Event under any other Project Document; or

act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, civil commotion, sabotage, act of terrorism or exercise of military or usurped power; or

radioactive contamination or ionising radiation; or

labour unrest, strike, go-slow or other labour action but not those affecting only the personnel of a Party;

provided that the following shall not constitute a Force Majeure Event unless caused by or resulting from a Force Majeure Event:

a failure or inability to make any payment, any inability to raise finance or any changes in price or market conditions;

late delivery or interruption in the delivery of machinery, equipment, materials, spare parts or consumables;

a delay or failure by a third party which prevents, hinders or delays the Affected Party in the performance of its obligations under this Agreement, save where the cause of such delay or failure by the third party would constitute a Force Majeure Event pursuant to this Agreement; or

any technical or operational problems with the Power Plant arising from a fault in the construction, operation and/ or maintenance of the Power Plant which is attributed to any failure by the Affected Party to obtain and/ or maintain a Consent; or

wear and tear, flaws, breakdown in or degradation of, any equipment or machinery.

## **16.2 Procedure**

- 16.2.1 If an Affected Party wishes to cite a Force Majeure Event as being the cause of it being unable to meet any or some of its obligations

hereunder, the Affected Party shall, as soon as reasonably practicable of it becoming aware of the Force Majeure Event, but not later than [two (2) days] of the occurrence of the event, advise the other Party of the nature, cause and/or likely duration of the Force Majeure Event (to the extent the same can be reasonably determinable at the time of such notice) and, when appropriate or when reasonably requested to do so by the other Party, update such information.

16.2.2 Both Parties shall take such steps as are reasonably available to it to overcome such Force Majeure Event and each Party shall mitigate its effect on the ability of the Affected Party to meet its obligations under this Agreement, and shall consult to develop and implement a remedial plan to minimise each Party's losses.

16.2.3 The Affected Party shall promptly provide notice to the other Party of:  
the cessation of the Force Majeure Event; and  
its ability to immediately recommence performance of its obligations under this Agreement by reason of the cessation of the Force Majeure Event.

16.2.4 During the occurrence of a Force Majeure Event, each Party shall bear its own costs resulting from the occurrence of the Force Majeure Event.

### **16.3 Consequences of a Force Majeure Event**

16.3.2 Notwithstanding any other provisions of this Agreement, to the extent the Affected Party hereto is unable to perform any of its obligations under this Agreement due to a Force Majeure Event then the Affected Party shall be relieved from liability in respect of such obligations and shall be entitled to suspend performance of such obligations in accordance with and subject to Clause 16.3.

16.3.3 If it is agreed or determined that a Force Majeure Event has occurred, the Affected Party shall, provided that it has complied with the requirements of Clause 0, not be liable for any failure to perform an obligation under this Agreement as a consequence of such Force Majeure Event, to the extent only that:

such performance is prevented, hindered or delayed by the Force Majeure Event; and

such failure could not have been mitigated by the Affected Party acting in accordance with Prudent Industry Practice.

16.3.4 Any time period specified in this Agreement for the performance of any obligation, including but not limited to the Long Stop Date, the Target Commercial Operation Date and the Commercial Operation Date, shall be extended on a day-for-day basis for each day that the relevant Force Majeure Event prevents, hinders or delays the Affected Party from performing that obligation within the time period, and the Term shall be extended in accordance with Clause 2.2.



#### **16.4 Termination on Account of Force Majeure**

If the Force Majeure Event or its direct effect or consequences on the operations of either Party is of such magnitude or will be (or it is more probable than not that it will be) of such duration that after a period of [twelve (12) months] it is unreasonable in all the circumstances for the Seller to perform its obligations under this Agreement, the Seller may upon not less than [thirty (30) days"] notice, terminate this Agreement.

### **17. Dispute Resolution**

#### **17.1 Procedure**

- 17.1.1 If any Dispute arises relating to this Agreement or any claims for damages or otherwise are made as the result of breach of any obligation hereunder, the Parties shall meet and use their reasonable efforts to resolve such dispute through good faith negotiation. The Parties acknowledge MERA's rules and entitlement to mediate the settlement of certain disputes between the Parties as provided for in the Generation Licence. The Parties shall follow the applicable dispute resolution as set by MERA.
- 17.1.2 Should the Parties fail to resolve such Dispute in accordance with Clause 0 above within [seven (7) days] of their meeting or such longer period as the Parties may agree, the matter shall be elevated to Chief Executive (or equivalent) level for resolution.
- 17.1.3 Should the Chief Executives (or equivalent) of the Parties fail to resolve such Dispute in accordance with Clause 17.1.2 above within [fourteen (14) days] of their meeting or such longer period as the Parties may agree, any Party may refer such dispute or difference to arbitration to be undertaken by three (3) arbitrators. The Parties shall agree on the identity of the arbitrators. Should the Parties fail to agree on the arbitrators within [fourteen (14) days] of the referral of the dispute to arbitration, the President of the Law Society of Malawi shall appoint the arbitrators from a list of approved arbitrators having the requisite experience and expertise in the field of the Dispute.
- 17.1.4 In the event of a technical dispute between the Parties during the Construction Period, the Parties shall refer the matter to the Chief Executive officers for resolution. In the event of a failure to resolve the Dispute, the matter shall be referred to a technical expert ("Independent Expert") appointed by the Parties.
- 17.1.5 The Parties agree that the Independent Expert shall act as an expert and not as an arbitrator and shall decide those matters referred or reserved to the Independent Expert under this Agreement by reference to Prudent Industry Practice using the Independent Expert's skills, experience and knowledge with regard to such matters as the Independent Expert in his or her sole discretion considers appropriate.
- 17.1.6 The Parties agree they will make every reasonable effort to supply whatever information, documents and materials the Independent Expert considers necessary to address the matters referred and will

act in good faith as regards matters falling within the ambit of this Clause 17.

- 17.1.7 The Independent Expert will endeavour to provide the Independent Expert's decision within the shortest time possible. In most cases, it is expected that the Independent Expert should be able to supply a decision to the Parties within [fourteen (14)] Business Days. If for any reason, the Independent Expert requires longer than [fourteen (14)] Business Days, the Independent Expert will provide the Parties a written explanation for the required extension of time with an estimate of the likely timetable for a decision on the matter referred.
- 17.1.8 The Parties shall share equally the fees and expenses of the Independent Expert.
- 17.1.9 Should the Independent Expert fail to resolve such dispute in accordance with this Clause 17 within [fourteen (14)] Business Days or such longer period as the Parties may agree, any Party may refer such dispute or difference to arbitration in accordance with the provisions of Clause 17.2.

## **17.2 Arbitration**

- 17.2.1 Except where otherwise specifically provided for, any Dispute at any time between the Parties or any failure by them to reach agreement in regard to any matter arising out of or in connection with this Agreement or its interpretation or effect, or arising in any way out of the termination or failure of any of them, shall be submitted to arbitration pursuant to the applicable Malawian arbitration laws. In the event, the arbitration laws are deemed to be found to be insufficient, the [AFSA/ UNCITRAL] Rules shall apply.
- 17.2.2 The decision of the arbitrators shall be given in writing as soon as reasonably possible after the dispute has been referred to the arbitrators but not longer than [six (6) weeks] from the date on which the hearing, including argument, was concluded. The decision shall be final and binding upon the Parties and shall not be subject to appeal to any court or tribunal of any kind unless manifestly unlawful or unjust, provided however that any Party may take action in any court of competent jurisdiction to enforce the arbitrators' decision, including its award in respect of the costs of arbitration.
- 17.2.3 Each Party shall bear its own costs and the costs of arbitration shall be borne equally by the Parties, unless the arbitrators decide otherwise.
- 17.2.4 Arbitration shall be conducted under the Malawian arbitration laws and shall be held in Malawi before three (3) arbitrators. In any event the arbitration shall be conducted in the English language.
- 17.2.5 The Parties may be legally represented and may present evidence by independent experts or as otherwise permitted by the arbitrators.
- 17.2.6 The aforesaid notwithstanding, any Party shall be entitled to approach any competent court having jurisdiction for urgent relief on an interim

basis, pending the finalisation of the resolution of the dispute in terms of this Clause 17.2.

### **17.3 Obligations during Disputes**

17.3.1 While a Dispute is continuing, the Parties are required to continue to perform their respective obligations, including the payment of the Energy Payment and/or Deemed Energy Payment, under this Agreement until such dispute has been fully and finally resolved.

17.3.2 Where a Dispute has been referred for resolution by arbitration in accordance with the Malawian arbitration laws, then neither of the Parties shall be entitled to exercise any rights or election arising in consequence of any alleged default by the other arising out of the subject matter of the Dispute until the Dispute has been resolved by the decision of the arbitrators.

### **17.4 Proceedings in Confidence**

All proceedings held by the Parties for the purpose of resolving Disputes shall be held in private and except as permitted or required by any other provision of this Agreement, shall not be open to third parties, it being agreed that for the purposes of this Agreement the record and outcome of any proceedings shall also constitute Confidential Information of each Party hereto and safeguarded in accordance with the provisions of Clause 0 (Confidentiality).

## **18. Termination**

### **18.1 Events of Termination**

18.1.1 This Agreement shall, subject to the provisions of the Direct Agreement with the Lenders, terminate on the earliest to occur of:

termination due to failure to satisfy the Conditions Precedent, in accordance with Clause 3.2 (On Effective Date); or

termination by the Seller due to a Change in Costs, in accordance with Clause 18.4 (Termination for Change in Costs); or

termination by ESCOM SB following a Seller Event of Default, in accordance with Clause 18.2; or

termination by the Seller following a ESCOM SB Event of Default, in accordance with Clause 18.4; or

on receipt of a notice from the Seller in accordance with Clause 16.4.

### **18.2 Seller Event of Default**

Each of the following shall constitute a “**Seller Event of Default**”, save to the extent excused by Clause 15.9.8 (Force Majeure) of this Agreement, or an ESCOM SB Event of Default or an Event of Deemed Availability, or an ESCOM SB Transmission Default, and shall entitle ESCOM SB to issue a Notice of Intention to Terminate to the Seller:

18.2.1 prior to the Commercial Operation Date, the Seller abandons construction of the Power Plant for a consecutive period of more than

[ninety (90) days], without ESCOM SB's prior written consent, which shall not be unreasonably refused or delayed;

- 18.2.2 following the Commercial Operation Date, the Seller abandons the operation of the Power Plant for a consecutive period of more than [thirty (30) days], without ESCOM SB's prior written consent, which shall not be unreasonably refused or delayed;
- 18.2.3 the Seller fails to cause the Commercial Operation Date to occur by the date falling [six (6) months] after the Target Commercial Operation Date excluding in the event that the Commercial Operation Date did not occur due to any reason not attributable to the Seller;
- 18.2.4 a default is caused by the Seller under the Transmission Connection Agreement and is not remedied within the period, if any, specified for remedy for such breach in the Transmission Connection Agreement and the Transmission Connection Agreement is terminated;
- 18.2.5 the transfer of the Seller's rights or obligations under this Agreement, which are not permitted under Clause 0 (Cession and Assignment) of this Agreement, excluding a transfer to an Affiliate and/or a wholly owned subsidiary;
- 18.2.6 the liquidation or insolvency of the Seller, except for any frivolous or vexatious petitions for winding up or insolvency or any petition for the winding up or insolvency of the Seller which is discharged, stayed or dismissed within [60 (sixty) days] of commencement thereof, or, if earlier, the date on which it is advertised;
- 18.2.7 the Seller is in material breach of its obligations under this Agreement and fails to remedy such breach within [sixty (60) days] of receipt of the notice of breach, provided that if such failure cannot be remedied by the Seller within such period of [sixty (60) days] with the exercise of reasonable diligence, then such cure period shall be extended by mutual agreement for an additional reasonable period of time (not to exceed a further [sixty (60) days]), so long as such failure is capable of being remedied with the exercise of reasonable diligence and the Seller is exercising reasonable diligence to remedy such failure;
- 18.2.8 cancellation of the Generation Licence;
- 18.2.9 failure of the Seller to pay any sum or sums due and owing to ESCOM SB within [thirty (30) days] of the due date therefor;
- 18.2.10 any environmental failure as follows:

where, as a result of an environmental failure on the part of or attributable to the Seller, a Seller Consent is withdrawn by the Competent Authority rendering it unlawful for the Seller to carry on any activity for which such permission is required; or

where, as a result of an environmental failure on the part of or attributable to the Seller, a directive or order is made by any Competent Authority or any court for the cessation of any of the Seller's activities, in either case rendering it unlawful for the Seller to perform any material obligations under this Agreement; or

in the event of any persistent or recurring material environmental failures over a period of at least [six (6) consecutive months], in respect of which the Seller has received a final warning to desist, from a Competent Authority, with which the Seller has not complied.

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

#### **18.4 ESCOM SB Event of Default**

Each of the following shall constitute an “**ESCOM SB Event of Default**” to the extent that it is not caused by a Force Majeure Event or Seller Event of Default and shall entitle the Seller to issue a Notice of Intention to Terminate to ESCOM SB:

- 18.4.1 failure of ESCOM SB to pay any sum or sums due and owing to the Seller within [thirty (30) days] of the due date therefor;
- 18.4.2 ESCOM SB is in material breach of its obligations under this Agreement and fails to remedy such breach within [60 (sixty) days] of receipt of the notice of breach, provided that if such failure cannot be remedied by ESCOM SB within such period of [sixty (60) days] with the exercise of reasonable diligence, then such cure period shall be extended by mutual agreement for an additional reasonable period of time (not to exceed a further [thirty (30) days]), so long as such failure is capable of being remedied with the exercise of reasonable diligence and ESCOM SB is exercising reasonable diligence to remedy such failure, excluding in the event of ESCOM SB's failure to pay any sum or sums due and owing to the Seller under this Agreement, which shall be remedied within [thirty (30) days] of receipt of the notice of breach;
- 18.4.3 a ESCOM [SB] Transmission Default occurs and is not remedied within the period, if any, specified for remedy for such breach in the Transmission Connection Agreement and the Transmission Connection Agreement is terminated; or
- 18.4.4 the liquidation or insolvency of ESCOM SB, except for any frivolous or vexatious petitions for winding up or insolvency or any petition for the winding up or insolvency of ESCOM SB which is discharged, stayed or dismissed within [sixty (60) days] of commencement thereof or, if earlier, the date on which it is advertised.
- 18.5 ESCOM SB shall, to the extent that it has knowledge of the same, promptly notify the Seller in writing of the occurrence of any ESCOM SB Event of Default.
- #### **18.6 Notice of Intention to Terminate and Termination Notice**
- 18.6.1 A Party may serve a Notice of Intention to Terminate on the other Party upon the occurrence of any of the following events:
- in the event that the Conditions Precedent are not satisfied (or waived by both Parties) in accordance with the provisions of Clause 3.2;

in the event that either Party is unable to perform all or a material part of its obligations under this Agreement for reasons for a Force Majeure Event (or the effects thereof) continuing for a consecutive period of more than [twelve (12) months];

in the event that a Change in Costs entitling it to issue such a Notice of Intention to Terminate as provided for in Clause 15.4 or 18.4 (Termination for Change in Costs) occurs; or

in the event of a Seller Event of Default or an ESCOM SB Event of Default (as the case may be).

18.6.2 Following the issue of a Notice of Intention to Terminate pursuant to Clause 18.4.1 or 18.4.2, except if due to a default in payment by ESCOM SB, the Parties shall consult for [thirty (30) days], or such longer period as the Parties may agree, to determine what steps need to be taken to prevent termination of this Agreement. Failing agreement within such time, the Party having given the Notice of Intention to Terminate may terminate this Agreement forthwith by delivering a Termination Notice to the defaulting Party.

18.6.3 The termination of this Agreement shall be subject to the Direct Agreement, and in the event of a conflict, the terms of the Direct Agreement shall prevail.

## **18.7 Consequences of Termination**

18.7.1 Subject to Clause 18.7.2, upon termination of this Agreement, both Parties shall be excused and relieved of all obligations and liabilities under this Agreement, except for payment of all amounts due, and liabilities resulting from any action, inaction or event occurring before the Termination Date or as a result of the termination.

18.7.2 On termination of this Agreement for a ESCOM SB Event of Default, ESCOM SB shall be liable to pay the Seller, within [sixty (60) days], the relevant Termination Amount set out in Annexure G (the Termination Amount), to the account specified by the Seller, which amount shall be payable gross of any applicable withholding or other Taxes, and undertake such other actions in favour of the Seller as are specified in Annexure G (The Termination Amount).

18.7.3 In the event of a termination by ESCOM SB as a result of a Seller Event of Default, ESCOM SB shall be entitled to claim its direct losses and costs arising from such termination. These losses and costs shall be capped at [10%] of the EPC Contract Amount, and calculation thereof shall be based on Monthly Generation Forecasts and the rates as set out in Annexure C (Energy Payment). In such event ESCOM SB, at its sole discretion, shall have the option to acquire the Power Plant (inclusive of stock and inventory) at a price equivalent to outstanding debt for the Power Project owing, at the date of termination, by the Seller to the Lender(s).

18.8 The Seller shall, within [fourteen (14) days] of payment of the Termination Amount as contemplated in Clause 18.7.2 read with Annexure G or in the event where ESCOM SB elects to acquire the Power Plant (inclusive of stock

and inventory) under Clause 18.7.3, sign the necessary agreements, including title documents especially also as regards immovable and movable property and land rights and the like in order to ensure the transfer of the title in the Power Plant and the Connection Facilities to ESCOM SB. The Seller shall ensure that all warranties, guaranties, intellectual property and other rights necessary for the operation of the plant and equipment shall be transferred free of charge to ESCOM SB.

- 18.9 For avoidance of doubt, ESCOM SB shall not assume any liability for termination of this Agreement as a result of a Force Majeure Event, Change in Law, Government Action, or a Seller Event of Default.

## **19 Liability for Damage or Loss**

### **19.1 Indemnity**

19.1.1 Each Party shall indemnify, defend and hold harmless the other Party against all losses, damages, claims, liabilities, costs or expenses which the other Party may suffer or incur by reason of any claim for or in respect of: (i) the death or personal injury of any individual or (ii) damage to property or (iii) any third-party liabilities and damages, arising out of the indemnifying Party's default under this Agreement, save where that default is excused in terms of Clause 15.9.8 (Force Majeure) of this Agreement, except to the extent that the Party seeking to be indemnified is at fault or is negligent.

19.1.2 This amount shall be capped to [ ] but shall not, for the avoidance of doubt, apply to any Termination Amount payable under Clause 18.6 or Annexure G.

### **19.2 Liability**

19.2.1 In the event that any losses, claims or damages ("Losses") in relation to any death or personal injury arises out of or results from the joint or concurrent negligence or the intentional conduct of both Parties, each Party shall be liable in proportion to its degree of negligence or fault. The Parties shall make all reasonable endeavours to mitigate any Losses they may suffer as a result of the breach of any of the other Party's material obligations under this Agreement.

19.2.2 Neither Party shall be liable to the other Party save as expressly provided for in this Agreement.

### **19.3 Damages**

19.3.1 Other than as provided in this Agreement, in no event shall either Party be liable to the other Party, at law or in equity and whether based on contract, tort or otherwise, for any indirect, incidental, special or consequential damages incurred by such Party or any third party as a result of the performance or non-performance of the obligations imposed pursuant to this Agreement, irrespective of the causes thereof, including fault or negligence. To the extent that any damages required to be paid hereunder are liquidated, the Parties acknowledge that such damages are difficult or impossible to

determine, or otherwise obtaining an adequate remedy is inconvenient, and the liquidated damages constitute a reasonable approximation of the harm or loss that may be suffered by the Party affected thereby.

- 19.3.2 For avoidance of doubt, the aforesaid limitation on liability does not affect or limit the Termination Amount payable to the Seller by ESCOM SB pursuant to Clause 18.5 or payment by the Seller to ESCOM SB in case of termination as a result of Seller Event of Default pursuant to Clause 18.7.

## **20 Project Insurances**

### **20.1 Insurances and information**

- 20.1.1 The Seller shall, in accordance with this Clause 19.3.2 (Project Insurance), obtain and maintain in effect, at its own cost and expense, such insurance coverage as is required by:

any Laws; and

the standards of a Reasonable and Prudent Operator,

(together with insurances procured pursuant to Clauses 0 and 0 below, the **"Project Insurances"**).

- 20.1.2 The Seller shall take reasonable steps to ensure that it and its contractors obtain and maintain in effect at all times such insurance cover as is appropriate for a contractor acting as a Reasonable and Prudent Operator.

- 20.1.3 Nothing in this Clause 19.3.2 (Project Insurance) shall prevent the Seller from procuring additional insurance cover, over and above such insurance coverage as it is required to procure pursuant to this Clause 20.1.

- 20.1.4 The Seller shall provide a copy of all Project Insurances to ESCOM SB, along with such documentation as may be necessary to evidence that the Project Insurances are in full force and effect and otherwise in compliance with the other requirements of this Clause 19.3.2 (Project Insurance).

- 20.1.5 Not later than [thirty (30) days] after the date on which the policy for any Project Insurance is issued, amended to any material extent or renewed in accordance with its terms, the Seller shall cause its insurers or agents to provide ESCOM SB with such documentation as may be reasonably necessary to evidence that such policy is in force and the amount of the cover thereunder.

- 20.1.6 The Seller shall provide ESCOM SB, from time to time, with copies of receipts or statements from the Seller's insurers or agents evidencing payment by the Seller of the premiums in respect of each Project Insurance and the amount of cover.



## **20.1 Endorsements and clauses**

20.1.5 The Seller shall cause its insurers to waive all rights of subrogation against ESCOM SB in respect of a claim arising under any of its Project Insurances (except, in so far as the waiver of such rights against the Seller) is concerned in circumstances where the Seller has by its act or omission vitiated the Project Insurances.

20.1.6 The Seller shall ensure that the policy for each of its Project Insurances contains a provision:

naming ESCOM SB as additional insured thereunder (other than in respect of loss of revenue related to Project Insurances);

that each additional insured shall be separately indemnified in respect of claims by them under the Project Insurances, provided that the liability of the insurer concerned shall not be increased beyond the amount for which the insurer would have been liable for in the absence of such separate indemnity provision;

for automatic reinstatement of the sum insured on the basis that the sum insured shall not be reduced by the amount of any claim whether paid or due and payable; and

recording that such Project Insurance is primary insurance and shall not be subject to contribution by any other insurance.

## **20.2 Application of insurance proceeds**

20.2.5 Unless ESCOM SB otherwise agrees in writing, the Seller shall apply proceeds of any insurance claim made due to loss or damage to the Power Plant or any part of the Power Plant (other than claims under business interruption insurance, delay in start-up, any other loss of revenue policies or third party liability policies) towards reinstatement, reconstruction, replacement, repair or renewal of such loss or damage in the first instance.

20.2.6 Notwithstanding the aforesaid, it is acknowledged and agreed that the Lenders will have security over and rights under the insurance policies, and further, the Lenders shall have the right to apply insurance proceeds in excess of the amount agreed under the Finance Documents to prepayment of the outstanding debt under the Finance Documents.

## **21. Waiver of Sovereign Immunity**

The Parties hereby unconditionally and irrevocably agree that the entry into and performance of this Agreement by the Parties constitute private and commercial acts and neither of the Parties nor any of their assets is entitled to immunity from arbitration or legal process or jurisdiction on grounds of sovereignty or otherwise.

## **22. Cession and Assignment**

### **22.1 Prior Consent**

The Parties shall not be entitled to cede or assign this Agreement or any of its rights and obligations without the prior written consent of the other Party

except to the Lenders for the purpose of providing security under the Finance Documents and except as provided in Clause 0 hereto. Such consent shall not be unreasonably withheld.

## **22.2 Restructuring**

- 22.2.1 Notwithstanding the above, ESCOM SB shall be entitled to cede, assign or transfer its rights and obligations under this Agreement to a third party but only in the context of: (i) the dissolution of ESCOM SB; (ii) the restructuring, amalgamation, reorganisation or analogous event of ESCOM SB; or (iii) the transfer of all or any material part of ESCOM [SB's] property, assets and undertaking to a third party or successor, provided that, in each case such dissolution, restructuring, amalgamation, reorganisation, analogous event or transfer is at the instruction of or sanctioned by the Government of the Republic of Malawi or any Competent Authority.
- 22.2.2 In the event of a restructuring or reorganisation of ESCOM SB resulting in the cession or assignment of this Agreement to another entity in the ESCOM [SB] group of companies, ESCOM [SB] shall be jointly and severally liable with the newly created entity for the performance of its obligations in terms of this Agreement.
- 22.2.3 In the event that the restructuring or reorganisation of ESCOM [SB] resulting in the cession or assignment of this Agreement to an entity not forming part of the ESCOM [SB] group of companies, such restructuring or reorganisation shall not take place without the prior written consent of the Seller's Lenders, provided that such consent shall not be unreasonably withheld.

## **23. Direct Agreement**

- 23.1 ESCOM SB recognises that the Seller may wish to finance or refinance the Power Project through limited recourse or other financing and that the entering into of the Direct Agreement shall be a precondition to the provision of such finance. ESCOM SB will co-operate in good faith with the Seller and its Lenders to agree and enter into such a Direct Agreement incorporating as a minimum those matters set out in n Annexure L (Provisions of Direct Agreement).
- 23.2 The Seller may, subject to the prior written approval of ESCOM SB, and subject to prior regularly oversight, refinance or change its financiers in order to obtain financing at better terms. The Parties agree that in such an event the Capacity Payment shall be adjusted, subject to the prior approval of the MERA, in order to ensure that the benefit is passed through to ESCOM SB on a 50/50 basis.
- 23.3 The Seller shall submit to the Buyer within a reasonable time the recalculation of the Seller's Revised Capacity Payment derived from the Base Case Financial Model, setting forth in reasonable detail the basis of and the calculations for any necessary adjustments to the Capacity Payment arising from such Change in Costs.

- 23.4 Within [fourteen (14) days] after the date of the re-calculation delivered pursuant to Clause 23.1 the Buyer shall notify the Seller whether it agrees or disagrees with Seller's Revised Capacity Payment. If The Buyer notifies the Seller of its disagreement, the Parties agree to meet within [7 (seven) days] and discuss, in good faith, the Seller's Revised Capacity Payment.
- 23.5 In the event that the Buyer agrees with the re-calculation delivered pursuant to Clause 23.1 or as negotiated pursuant to Clause 23.3 and subject to the approval of MERA in accordance with Clause 0, the Energy Payment, the Calculation of the Deemed Energy Payment shall be amended accordingly.
- 23.6 The Seller Revised Capacity Payment shall apply as from the date on which the Buyer's annual tariff revision is approved by MERA and takes effect (falling no later than [twelve (12) months] from the previous the Buyer application for tariff review).
- 23.7 In the event, the Parties have met to discuss the re-calculation of the Seller's Revised Capacity Payment pursuant to clause 23.3, and the Buyer is in disagreement with the Sellers calculations, the Parties shall be entitled to refer the matter to MERA for mediation. If MERA does not approve the Seller's Revised Capacity Payment or in the event that MERA determines a revised Capacity Payment which is less beneficial to the Seller than the Seller's Revised Capacity Payment, the Parties shall be entitled to refer the matter to an Expert for a determination.
- 23.8 In the event the Expert rules in favour of the Buyer, and MERA or the Seller does not implement the re-calculated Capacity Payment as determined by the Expert, the Buyer may terminate this Agreement and the Seller shall not have any claim and/or demand and shall not be entitled to any indemnification and/or reimbursement in connection with such termination.

## **24. Severability**

Each Party agrees that it will perform its obligations under the terms of this Agreement in accordance with all applicable Laws, rules and regulations now or hereafter in effect. If any Clause or Clauses of this Agreement is found to be illegal or unenforceable, then the Parties shall take all possible steps to re-negotiate and to re-structure this Agreement in such a manner that it will comply with provisions of such laws. If this cannot be done, the offending Clause or Clauses will be removed and regarded as pro non scripto, and the remaining Clauses of this Agreement shall remain binding on the Parties.

## **25. Anti-corruption Measures**

Each Party to this Agreement undertakes not to offer, directly or indirectly, an advantage to third parties and not to request, promise or accept for its own benefit or for the benefit of a third party, illicit gifts with the purpose of obtaining favourable judgement in the performance of this Agreement or any associated projects or any other negotiations between the Parties not directly related to this Agreement. The Parties undertake to impose and enforce these anti-corruption measures on their employees, Affiliates and agents.

## **26. Confidentiality**

### **26.1 Confidential Information**

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

### **26.2 Duty to Maintain Confidentiality**

Each Party will use the same means as it uses to protect its own confidential information, but in no event less than reasonable means, to prevent the disclosure and to protect the confidentiality of such information. No Confidential Information as referred to in Clause 26.1 will be disclosed by the recipient Party, other than to its agents, representatives or employees, the Lenders and their advisors and to Contractors, without the prior written consent of the other Party.

### **26.3 Exclusions**

These provisions shall not apply to information which is:

- 26.3.1 publicly known or has become publicly known through no unauthorised act of the recipient Party;
- 26.3.2 rightfully received by the recipient Party from a third party;
- 26.3.3 independently developed by the recipient Party without use of the other Party's information;
- 26.3.4 disclosed by the other Party to a third party without similar restrictions;
- 26.3.5 required to be disclosed pursuant to a requirement of a Competent Authority or any applicable Law, so long as the Party required to disclose the information gives the other Party prior notice of such disclosure; or
- 26.3.6 publicly disclosed with the other Party's written consent.

### **26.4 Disclosure**

All media releases, public announcements and public disclosures by any Party or their respective employees or agents relating to this Agreement or its subject matter, including without limitation promotional marketing material, shall be co-ordinated with and approved by each Party prior to the release thereof. The foregoing will not apply to any announcement intended solely for internal distribution by any Party or to any disclosure required by legal, accounting or regulatory requirements beyond the reasonable control of the Party in question.

## **27. Survival on Termination**

Termination of this Agreement shall not affect the accrued rights and liabilities of the Parties hereto and the provisions of Clause 0 (Applicable Law and Jurisdiction),

Clause 0 (Termination), Clause 0 (Dispute Resolution) and Clause 0 (Confidentiality) shall continue to have effect notwithstanding the termination of this Agreement.

## **28. Notices**

### **28.1 Domicilia Citandi et Executandi**

The Parties choose as their domicilia citandi et executandi their respective addresses specified in Clause 28.2 (Addresses) hereof, for all purposes arising out of or in connection with this Agreement, at which addresses all process and notices arising out of or in connection with this Agreement, its breach or termination may be served upon or delivered to the Parties.

### **28.2 Address for Notices**

For the purposes of Clause 28.1 (Domicilia Citandi et Executandi), the Parties' respective addresses shall be:

In the case of the Seller

In the case of ESCOM SB

Addresses:

Fax:

Email:

Attention:

Or at such other postal and physical address in Malawi, not being a post office box or poste restante, or which the Party concerned may notify the other in writing.

### **28.3 Delivery of Notices**

All notices, notifications, requests, demands or other communications given in terms of this Agreement shall be in writing and shall:

28.3.1 if delivered by hand be deemed to have been duly received by the addressee on the date of delivery;

28.3.2 if posted by prepaid registered post be deemed to have been received by the addressee on the 7th (seventh) day following the date of such posting;

28.3.3 if successfully transmitted by facsimile with successful transmission confirmed be deemed to have been received by the addressee one day after dispatch; or

28.3.4 if successfully transmitted by electronic mail and having received a read receipt from the addressee, be deemed to have been received by the recipient on the first Business Day on the day of receiving the confirmation receipt.

## **28.4 Written Notice**

Notwithstanding anything to the contrary contained in this Agreement, a written notice or communication actually received by one Party from the other, including by way of facsimile or electronic mail transmission, shall be adequate written notice or communication to such Party.

## **29. Shareholding in Seller**

The controlling shareholder (holder of not less than fifty-one percent (51%)) of the shares in the Seller at the Signature Date shall not transfer control in the Seller during the period of [three (3) years] after Commercial Operation Date, unless such transfer of control has been approved by ESCOM SB in writing prior thereto, such approval not be unreasonably withheld. ESCOM SB's consent shall not be required in connection with a transfer of shares in the Seller resulting from the enforcement of security provided to the Lenders. However, ESCOM SB shall be notified with respect to such transfer of shares.

## **30. General and Miscellaneous**

### **30.1 Sole Record of Agreement**

This Agreement constitutes the sole record of the agreement between the Parties with regard to the subject matter hereof. No Party shall be bound by any express or implied term, representation, warranty, promise or the like not recorded herein.

### **30.2 No amendments except in writing**

No addition to, variation of, or agreed cancellation of, this Agreement shall be of any force or effect unless in writing and signed by or on behalf of the Parties.

### **30.3 Waivers**

Any relaxation or indulgence which any Party may grant to any other shall not constitute a waiver of the rights of that Party and shall not preclude that Party from exercising any rights which may have arisen in the past or which might arise in future.

### **30.4 Approvals and Consents**

An approval or consent given by a Party under this Agreement shall only be valid if in writing and shall not relieve the other Party from responsibility for complying with the requirements of this Agreement nor shall it be construed as a waiver of any rights under this Agreement except as and to the extent otherwise expressly provided in such approval or consent, or elsewhere in this Agreement.

IN WITNESS, whereof the said Parties have signed this Agreement on the dates and at the places specified hereunder.

On behalf of the Seller by the signatory who warrants that he is duly authorised:

Signed: \_\_\_\_\_ Title: \_\_\_\_\_

Witness: \_\_\_\_\_ Title: \_\_\_\_\_

This \_\_\_\_\_ day of \_\_\_\_\_

At: \_\_\_\_\_

On behalf of ESCOM SB by the signatory who warrants that he is duly authorised:

Signed: \_\_\_\_\_ Title: \_\_\_\_\_

Witness: \_\_\_\_\_ Title: \_\_\_\_\_

This \_\_\_\_\_ day of \_\_\_\_\_

At: \_\_\_\_\_

## **Annexure A Consents**

### **A.1 ESCOM SB's Consents**

- A.1.1 [Transmission licence amendment (if required)] / EIA approvals / Board consent
- A.1.2 Letter of No Objection from ESCOM SB's lenders
- A.1.3 Approval by MERA of the Base Tariff and tariff structure

### **A.2 The Seller's Consents**

- A.2.1 Those stipulated in the conditions of the Licence including suspensive conditions, site permit, EIA, Generation licence

## **Annexure B Single Line Diagram of Power Plant**

## **Annexure C - CAPACITY Payment**

This Annexure sets out the Capacity Payment payable under Clause 0 of this Agreement, for each Billing Period.

The year referred to in this Annexure is the ESCOM SB financial year i.e. [ ] and not a calendar year i.e. from 1st of January to 31st of December.

### **C.1 Capacity (whether before or after the Commercial Operation Date)**

The Capacity Payment shall be composed of the following three (3) components:

- C.1.1 Base Capacity Payment: is the Payment for Capacity Available during the Billed Period shall be based on a base Capacity Payment of [ ] (the "Base Capacity Payment ") as of [ ]. The Base Capacity Payment shall be indexed on an annual basis, according to the formula in Section A4 below. The then applicable Indexed Tariff shall be multiplied by the Available Capacity calculated as in clause C.6 of this annexure during the Billing Period.

*Note: the Base Capacity Payment would arise either from the result of a competitive tender in which Seller was awarded and it offered its value in its economical offer, or of a direct negotiation between the SB and the Seller. It is assumed that this Base Capacity Payment will cover or the fixed costs of the Seller, including CAPEX, OPEX, return on investment (IRR), taxes and any other cost related with the project.*

- C.1.2 Transmission Use of System Charge – as defined in the Transmission Connection Agreement.

- C.1.3 MERA and any other Levies, if any.

Therefore, the Capacity Payment for the Billing Period, from ESCOM SB to the Seller, shall be as calculated in clause C.3 of this Annexure.

to the CPI (last published)

## **C.2 Transmission Use of System Charge**

The Transmission Use of System Charge shall be calculated based on the Connection Agreement between the Seller and ESCOM's TL and the transmission charges are calculated in accordance with MERA Transmission Tariff methodology..

## **C.3 Calculation of the Capacity Payment**

Seller shall be entitled to Capacity Payments in respect of Capacity in each month calculated as follows:

$$CP_p = CCR_p \times CC \times MA$$

Where

$CP_p$  = the Capacity Payment for month p (expressed in MKW);

$CCR_p$  = the Capacity Charge Rate for month p (expressed in MKW/kW);

$CC$  = the Contracted Capacity (expressed in kW).

$MA$ = Monthly Availability

The value of  $CCR_a$  will be adjusted each year according with the formula:

$$CCR_{pa} = CCR_0 \frac{CPI_a}{CPI_0}$$



Where:

$CCR_0$  = [initial value of CCR as agreed by Seller and Purchaser]

$CPI_0$  = [value of CPI at the date of Commencement of the Agreement as established in Clause []]

The Unit Capacity Payment Rate for the term of the Agreement shall be US Dollars [] per MW/yr, before the Output Payments finishes, and [..] after that date.

#### **C.4 Monthly Availabilities**

For each month in each Operating Year, starting with the month in which the Full Implementation Date occurs, there shall be calculated a Monthly Target Availability and an Actual Monthly Availability as follows:

##### **Monthly Target Availability:**

$$MA = AC_{tp} / H_p$$

$AC_{tp}$  =  $\sum$  Actual Available Capacity each hour of the month p in kW

$H_p$  = Hours in month p.

$$MTA_p = (CC \times H_p) - \sum SMA_p - \sum USMA_{pt}$$

where

$MTA_p$  = Monthly Target Availability (expressed in kW);

$CC$  = Contracted Capacity (expressed in kW);

$SMA_p$  = Scheduled Maintenance Allowance in month p (expressed in kW) representing the total capacity not available for delivery due to scheduled maintenance outages computed assuming the Plant would otherwise have been Dispatched at its Contracted Capacity.

$H_{sma}$  = Number of hours of the month p

$USMA_p$  = Unscheduled Maintenance allowance in month p (expressed in kW)

## **Annexure D     Layout Diagram of Power Plant**

## **Annexure E     Sharing of Environmental Credits**

In case that the Power Project will be entitled to receive Environment Credit, the Seller shall pay to ESCOM SB a monthly payment equal to [fifty percent (50%)] of the net benefit received by the Seller from the sale of Environmental Credits ("**ESCOM SB's EC Payment**") in accordance with the Net Energy produced during the Billing Period. The net benefit shall equal the total income from the sale of Environmental Credits minus all the costs and expenses related to such Credits. ESCOM SB's EC Payment shall be made to ESCOM SB only once payment has been received by the Seller for the sale of Environmental Credits.

## **Annexure F     Operating Committee**

[Note: Refer to comment in Clause 11.6.1 of the Agreement]

### **F.1     Appointment of Committee**

Within [five (5) days] of the Signature Date, the Parties shall form an Operating Committee for day-to-day management of this Agreement. Each Party shall appoint [two (2)] representatives and an alternate for the Operating Committee. Within [fourteen (14) days] of the date of this Agreement, each Party shall provide to the other Party notice of the appointment of its Operating Committee representatives and their particulars. The first meeting of the Operating Committee shall be convened no later than [two (2) weeks] after the final appointment. The committee shall maintain and adopt an appropriate record of its deliberations, which record shall in the event of a dispute constitute conclusive evidence of the decisions taken in respect of the subject matter therein.

### **F.2     Responsibilities**

The Operating Committee shall be responsible for (a) coordinating the Construction schedules of each Party's portion of the Power Plant, the Connection Facilities [and any required modifications to the Transmission System], and (b) ongoing coordination of areas of mutual interest and concern involving the Power Plant and the Connection Facilities. Without limiting the generality of the foregoing duties, the Operating Committee shall:

- F.2.1     Coordinate the respective programs of the Parties for the construction, commissioning and testing of facilities and equipment, and the respective commissioning procedures provided that the Operating Committee is not authorized to make any changes to any of such programs, but only to provide its recommendations;

- F.2.2 Without derogating from the Seller's rights to compensation and/or any other remedy under this Agreement, to develop steps to be taken on the occurrence of any event of Force Majeure, or the shutdown or reduction in capacity for any other reason of the Power Plant or the Connection Facilities;
- F.2.3 Coordinate the scheduling of maintenance affecting the operations of the Power Plant;
- F.2.4 Coordination of recommendations for changes in either the Power Plant or the Connection Facilities to affect the operational requirements of ESCOM SMO's control of the Transmission System;
- F.2.5 Discuss the proposal of SB on the Monthly and Weekly generation forecasts. Agree on the Daily Nominations to be informed to SMO, and analyse and approve changes to the Daily Nominations proposed by the SMO;
- F.2.6 Address safety matters affecting the Parties, their Contractors and their respective employees as related to the Power Project and the interconnection between the Power Plant [and Transmission System];
- F.2.7 Recommend to the Parties changes regarding the responsibilities of the Operating Committee.
- F.2.8 However, it is hereby agreed that the Operating Committee and/or its members will not have any liability towards the Power Project and/or the Parties.

### **F.3 Meetings**

The Operating Committee shall only act by unanimous agreement, with the exception of the Monthly and Weekly Generation Forecasts and Daily Nominations, where in case of non-agreement, the opinion of the SB will prevail. The Operating Committee shall develop and implement written policies regarding the frequency of meetings and minutes of meetings. The Operating Committee shall not have authority to modify or alter the rights and obligations of the Parties under this Agreement.

### **F.4 Reporting Relationships**

The Operating Committee shall report their activities and recommendations to the Parties or others designated by the Parties.

## **Annexure G Calculation of the Termination Amount**

In the event of termination as a result of an ESCOM SB Event of Default, ESCOM SB will pay an amount (a "**Termination Amount**") calculated as follows:

<b>"Breakage Costs"</b>	means all Losses that have been or will be reasonably and properly incurred by the Seller and its Contractors as a result of the termination of this Agreement, including (without limitation):
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the cost of any materials or goods ordered for the purpose of the Power Project,

(a) any expenditure incurred in anticipation of the provision of services or the completion of works in the future;

(b) any contracts placed that cannot be cancelled without such Losses being incurred;

(c) the cost of demobilization of the Power Project;

redundancy payments for employees of the Seller and its Contractors that have been or will be reasonably incurred by the Seller or its Contractors as a result of termination of this Agreement.

**"Equity Contributions"**

means at the relevant time, an amount equal to the aggregate value of each of:

1 the paid-in share capital of the Seller;

(d) the principal of Shareholder Debt advanced to the Seller; and

(e) all capital contributions made by the Shareholders to the Seller.

**"Losses"**

means all damages, losses, liabilities, costs, expenses (including legal and other professional charges and expenses), and charges whether arising under statute, contract or at law or in connection with judgments, proceeding, internal costs or demands.

**"Outstanding Debt"**

means the aggregate of:

1 all principal, accrued interest (including without limitation default interest), fees costs, expenses and other liabilities payable under the Finance Documents; and

(f) any amount equal to the amount evidenced by the Lenders as being the cost to it of breaking any funding arrangements or hedging arrangements entered into under the Finance Documents (including, for avoidance of doubt, any costs associated with breaking any fixed rate loan).

**"Reduced Equity IRR"**

means [ %]

**"Relevant Date"**

means, if the date of termination of this Agreement is (i) prior to the Commercial Operations Date, the date of such termination, or (ii) on or after the Commercial Operations Date, the Commercial Operations Date.

<b>"Regulated Equity IRR"</b>	means [ %].
<b>"Shareholder"</b>	means a holder of any share, or any other security giving the right to subscribe for or convert into a share, in the Seller.
<b>"Shareholder Debt"</b>	means at any time any loan or other debt provided by the Shareholders to the Seller and which is subordinated to the Outstanding Debt under the Finance Documents.

## **G.1 Compensation on Termination for ESCOM SB Event of Default**

If this Agreement is terminated for an ESCOM SB Event of Default in accordance with Clause 18.6 then the amount payable by ESCOM SB pursuant to Clause 18.6.2 shall equal the aggregate of the following, calculated at the date of termination:

G.1.1 the Outstanding Debt as at that date;

the aggregate Equity Contributions made as at such date;

an amount which, on the date of payment by ESCOM SB, gives an internal rate of return on the Equity Contributions as at the Relevant Date equal to the Regulated Equity IRR;

any Breakage Costs incurred by the Seller and its Contractors; and

any documented costs and expenses of enforcement or protection or preservation of security properly and reasonably incurred by the Lenders from the date of termination to the date of payment by ESCOM SB.

G.1.2 Title in the Power Plant shall be transferred to ESCOM [SB] from the Seller, within [fourteen (14) days] of payment of the Termination Amount as contemplated in this Annexure.

G.1.3 ESCOM SB shall not assume any liability for termination of this Agreement as a result of a Force Majeure event, Change in Law, Government Action, or a Seller Event of Default.

## **Annexure H Construction Programme**

## **Annexure I      Commissioning Schedule**

### **I.1      Acceptance/ Performance Test**

- I.1.1 Prior to synchronisation of the Power Plant, the Seller shall be required to get the Power Plant certified for the requisite acceptance/ performance test with respect to the entire Power Plant as may be laid down by an agency identified by both Parties to carry out testing and certification for the Power Plant.

### **I.2      Synchronisation with and connection to the Transmission System**

- I.2.1 The Seller shall give ESCOM SB at least [60 (sixty) days"] advanced preliminary written notice and at least [30 (thirty) days] advanced final written notice, of the date on which it intends to synchronise the Power Plant to the Transmission System.
- I.2.2 Subject to Clause 0 above, the Power Plant may only be synchronised and/or connected by the Seller to the Transmission System when it meets all the connection conditions prescribed in any [Grid Code] then in effect and otherwise meets all other legal requirements for synchronisation to the Transmission System and provided that:
  - the Metering Equipment has been installed, tested and successfully commissioned in accordance with the minimum testing standards referred to in the [Grid Code] and any additional testing standards as may apply in relation thereto;
  - the Transmission Connection Agreement is in full force and effect and any conditions precedent to its effectiveness have either been fulfilled or duly waived in accordance with its terms; and
  - the Connection Works referred to in the Transmission Connection Agreement have been completed and commissioned in accordance with the terms of the Transmission Connection Agreement and the [Grid Code].
- I.2.3 The synchronisation equipment shall be installed by the Seller at its generation facility of the Power Plant at its own cost. The Seller shall synchronise its system with the Transmission System only after the approval of synchronisation scheme is granted by the [National Control Centre].
- I.2.4 The Seller shall immediately after each synchronisation/tripping of the Power Plant, inform the [National Control Centre] in accordance with the applicable [Grid Code].

### **I.3      Testing and commissioning**

- I.3.1 Following connection and/or synchronisation, as the case maybe, of the Power Plant with the Transmission System as described in Clause 0 above the Seller shall test and commission the Power Plant in accordance with the [Grid Code], the Transmission Connection Agreement, the standards of a Reasonable and Prudent Operator and

the Construction Programme, so as to cause the Commercial Operation Date to fall on or before the Target Commercial Operation Date.

- I.3.2 The Seller shall be required to conduct the Power Project Acceptance Test for the purposes of, inter alia, achieving the Commercial Operation Date and determining the initial capacity of the Power Plant (and in this regard, the Power Project Acceptance Test shall serve as the dependable capacity Test for the Power Plant).
- I.3.3 The Seller shall give ESCOM SB not less than [ten (10) days'] prior written notice of each of the Power Project Acceptance Tests, and ESCOM SB or its nominated representative shall be entitled to attend and witness the Power Project Acceptance Tests.
- I.3.4 At all times from the Effective Date to the Commercial Operation Date (including during the conduct of the Power Project Acceptance Tests), ESCOM SB shall co-operate with the Seller, provide load for such testing and, subject to the terms of this Agreement, at the request of the Seller, dispatch the Power Plant up to its full available capacity as notified by the Seller to ESCOM SB immediately prior to the Power Project Acceptance Tests.
- I.3.5 Immediately following the Power Project Acceptance Tests, the Seller shall provide ESCOM SB with a copy of all relevant data and reports from the relevant Power Project Acceptance Test, including, in respect of the Power Project Acceptance Test, the determination of the dependable capacity of the Power Plant.
- I.3.6 If a Power Project Acceptance Test has been commenced and the Seller is prevented, hindered or delayed in completing such Power Project Acceptance Test, or any Power Project Acceptance Test is not duly completed, due in either case to a ESCOM SB Event of Default, ESCOM SB shall bear the reasonable costs directly incurred by the Seller in the performance of such prevented, hindered or delayed Power Project Acceptance Test.
- I.3.7 The Seller shall notify ESCOM SB once the Power Project Acceptance Test has been completed and the Seller has issued the completion certificate to the EPC Contractor pursuant to the terms of the EPC Contract.

## **Annexure J Monthly and Weekly Generation Forecasts**

## **Annexure K Base Case Financial Model**

## **Annexure L Provisions of the Direct Agreement**

## **Annexure I.2 : Power Purchase Agreement for Thermal Plants**

*Note: This document may be amended to reflect such changes that ESCOM may deem necessary, including on account of internal and external governance and approval processes.*

*Note: If ESCOM SB has not yet been established then contract with ESCOM and allow for Agreement to be ceded in the event of restructuring.*

### **POWER PURCHASE AGREEMENT**

**BETWEEN**

**[Seller]**

**AND**

**ESCOM SINGLE BUYER**



## CONTENTS

<b>Contents</b>	<b>218</b>
<b>Preamble:</b>	<b>226</b>
<b>Recitals:</b>	<b>226</b>
<b>1. Definitions and Interpretation</b>	<b>227</b>
1.1 Definitions	227
1.2 Interpretation	240
1.3 Inclusion of Dates	240
1.4 Construction	241
1.5 Annexures	241
<b>2. Duration of Agreement</b>	<b>241</b>
2.1 Term	241
2.2 Make-up Term	241
<b>3. Conditions Precedent</b>	<b>241</b>
3.1 On Signature Date	241
3.2 On Effective Date	241
3.3 Responsibilities as regards to conditions precedent	242
3.4 Notice	242
3.5 Non-fulfilment of conditions precedent	243
<b>4. Construction and Development of the Power Project</b>	<b>243</b>
4.1 Project Site	243
4.2 Risk and liability	243
4.3 Information regarding Connection Works	244
4.4 ESCOM SB"s inspection rights	244
4.5 General Construction obligations	244
4.6 Construction Programme	245
<b>5. Commercial Operation Date</b>	<b>246</b>
5.1 Commercial Operation Date	246
5.2 Delay in Commercial Operation Date	246
5.3 Deemed Commercial Operation Date	247
<b>6. Sale and Purchase of Energy</b>	<b>248</b>
6.1 Obligations to Sell and Purchase Electrical Energy	248
6.2 Restrictions on sale of Energy	248
<b>7. Provision of Supply, Metering Equipment and Procedures</b>	<b>249</b>
7.1 Delivery Point	249
7.2 Metering	249
7.3 Periodic Testing of the Power Plant	249
<b>8. Payment for Available Capacity and Produced Energy</b>	<b>249</b>
8.1 Payment for Available Capacity prior to Commercial Operation Date	249

8.2	Capacity and Energy Payment during the Term	249
8.3	Payment during Event of Deemed Availability	250
8.4	Lack of Fuel	250
8.5	Indexation of the Capacity Payment	250
8.6	Transmission Use of System Charge	250
8.7	Energy Payment	250
8.8	Settlement of Deviations	250
<b>9.</b>	<b>Invoicing and Payment</b>	<b>251</b>
9.1	Frequency	251
9.2	Payments Free from Tax	251
9.3	Deductions Made Whole	251
9.4	Invoicing and Payment Procedure	251
<b>10.</b>	<b>[Environmental Credits]</b>	<b>252</b>
10.1	Obtaining Credits	252
10.2	Information Sharing	253
10.3	Ownership of the credits	253
10.4	Payment of Benefits	253
<b>11.</b>	<b>Control and Operation of the Power Project</b>	<b>253</b>
11.1	Dispatch Procedures	253
11.2	Availability Declaration	257
11.3	Other relevant data	258
11.4	Further revisions	258
11.5	Communication of Declarations	259
11.6	Coordination	259
11.7	Maintenance	259
11.8	Scheduled Plant Outages	259
11.9	Unscheduled Plant Outages	260
11.10	Scheduled and Unscheduled Transmission System Outages	261
11.11	The Parties agree that if because planned or unplanned outages the Transmission System the Seller cannot deliver its Net Electrical Output, at the effects of the capacity Payment the Sellers plant will be considered as available, with the last Available Capacity informed.	261
<b>12.</b>	<b>Additional Obligations</b>	<b>261</b>
12.1	ESCOM SB"s obligations	261
12.2	General Obligations of the Seller	261
<b>13.</b>	<b>Representations and Warranties</b>	<b>262</b>
13.1	The Seller"s warranties	262
13.2	ESCOM SB Warranties	263

<b>14. Applicable Law and Jurisdiction</b>	<b>264</b>
<b>15. Change in Costs</b>	<b>264</b>
<b>16. Force Majeure</b>	<b>266</b>
16.1 Definition of Force Majeure Event	266
16.2 Procedure	268
16.3 Consequences of a Force Majeure Event	268
16.4 Termination on Account of Force Majeure	269
<b>17. Dispute Resolution</b>	<b>269</b>
17.1 Procedure	269
17.2 Arbitration	270
17.3 Obligations during Disputes	271
17.4 Proceedings in Confidence	271
<b>18. Termination</b>	<b>271</b>
18.1 Events of Termination	271
18.2 Seller Event of Default	272
18.6 Notice of Intention to Terminate and Termination Notice	274
18.7 Consequences of Termination	274
<b>19. Liability for Damage or Loss</b>	<b>275</b>
19.1 Indemnity	275
19.2 Liability	275
19.3 Damages	276
<b>20. Project Insurances</b>	<b>276</b>
20.1 Insurances and information	276
20.2 Endorsements and clauses	277
20.3 Application of insurance proceeds	277
<b>21. Waiver of Sovereign Immunity</b>	<b>277</b>
<b>22. Cession and Assignment</b>	<b>278</b>
22.1 Prior Consent	278
22.2 Restructuring	278
<b>23. Direct Agreement</b>	<b>278</b>
<b>24. Severability</b>	<b>279</b>
<b>25. Anti-corruption Measures</b>	<b>279</b>
<b>26. Confidentiality</b>	<b>280</b>
26.1 Confidential Information	280
26.2 Duty to Maintain Confidentiality	280
26.3 Exclusions	280
26.4 Disclosure	280
<b>27. Survival on Termination</b>	<b>281</b>
<b>28. Notices</b>	<b>282</b>

28.1	Domicilia Citandi et Executandi	281
28.2	Address for Notices	281
28.3	Delivery of Notices	281
28.4	Written Notice	282
<b>29.</b>	<b>Shareholding in Seller</b>	<b>282</b>
<b>30.</b>	<b>General and Miscellaneous</b>	<b>282</b>
30.1	Sole Record of Agreement	282
30.2	No amendments except in writing	282
30.3	Waivers	282
30.4	Approvals and Consents	282
<b>Annexure A</b>	<b>Consents</b>	<b>283</b>
A.1	ESCOM SB"s Consents	283
A.2	The Seller"s Consents	283
<b>Annexure B</b>	<b>Single Line Diagram of Power Plant</b>	<b>283</b>
<b>Annexure C</b>	<b>- Capacity and Energy Payment</b>	<b>283</b>
C.1	Capacity (whether before or after the Commercial Operation Date)	284
C.2	Transmission Use of System Charge	284
C.4	Monthly Availabilities	285
<b>Annexure D</b>	<b>Layout Diagram of Power Plant</b>	<b>287</b>
<b>Annexure E</b>	<b>Sharing of Environmental Credits</b>	<b>287</b>
<b>Annexure F</b>	<b>Operating Committee</b>	<b>287</b>
F.1	Appointment of Committee	287
F.2	Responsibilities	288
F.3	Meetings	288
F.4	Reporting Relationships	289
<b>Annexure G</b>	<b>Calculation of the Termination Amount</b>	<b>289</b>
G.1	Compensation on Termination for ESCOM SB Event of Default	290
<b>Annexure H</b>	<b>Construction Programme</b>	<b>291</b>
<b>Annexure I</b>	<b>Commissioning Schedule</b>	<b>291</b>
I.1	Acceptance/Performance Test	291
I.2	Synchronisation with and connection to the Transmission System	291
I.3	Testing and commissioning	292
<b>Annexure J.</b>	<b>Monthly and Weekly Generation Forecasts</b>	<b>293</b>
<b>Annexure K</b>	<b>Base Case Financial Model</b>	<b>293</b>
<b>Annexure L</b>	<b>Provisions of the Direct Agreement</b>	<b>293</b>

<b>Contents</b>	<b>294</b>
<b>Preamble:</b>	<b>296</b>
<b>Recitals:</b>	<b>296</b>
<b>31. DEFINITIONS and Interpretation</b>	<b>297</b>
31.1 Definitions	297
31.2 Interpretation	307
<b>32. Duration of Agreement</b>	
<b>33. Implementation of the Project</b>	
<b>34. Acquisition of Site, Transportation and Company Consents</b>	
34.1 Acquisition by the Company of Site and Transportation	309
34.2 Applications by the Company for Consents	309
<b>35. Support of the GOM</b>	
35.1 Grant of Rights	309
35.2 Support to Obtain Company Consents	310
35.3 Conditions to Company Consents	310
35.4 Support for Obligations	311
35.5 Immigration Controls	311
35.6 Procedure	312
<b>36. Construction, Operation, Maintenance and Staffing</b>	
36.1 Construction, Operation, and Maintenance of the PS	
36.2 [Amendments to the PPA]	312
36.3 Delivery of PPA and Amendments	312
36.4 Operation of the PS by the Company	312
<b>37. Liability</b>	
37.1 Limitation of Liability	313
37.2 Indemnification for Fines and Penalties	313
37.3 Double Jeopardy under Power Purchase Agreement	313
<b>38. Insurance</b>	
<b>39. Taxation and Import Controls</b>	
39.1 Taxation of Investors	314
39.2 Right to Import Material, Equipment and Supplies: Customs Duties	314
39.3 Export and Re-import	315
<b>40. Foreign Currency Exchange and Transfer of Funds</b>	
40.1 Foreign Exchange Regulation	316
40.2 Free Transfer and Repatriation of Necessary Funds	316
40.3 Tariff Increased in line with Exchange Risks	316
<b>41. Restrictions on acquisitions and Transfers of Shares and Assets</b>	
41.1 Assurance against Discriminatory Action	316
41.2 Acquisition of Shares or Assets	316

41.3 Non-Discriminatory	317
<b>42. Compensation Events</b>	
<b>43. GoM Guarantee</b>	
43.1 Guarantee	319
43.2 Waiver of Defences	319
43.3 Continuing Guarantee	320
43.4 Additional Security	320
43.5 Preliminary Demand	320
43.6 Certification	320
43.7 Subordination	321
43.8 No Set-Off	321
<b>44. Assignment and Security</b>	
44.1 Assignment	321
44.2 Creation of Security	321
44.3 Delivery of Financing Documents	322
<b>45. Force Majeure</b>	
45.1 Definition	322
45.2 Notification Obligations	324
45.3 Duty to Mitigate	325
45.4 Delay Caused by Force Majeure	325
45.5 Termination for Extended Force Majeure	325
<b>46. Termination</b>	
46.1 Termination for Default	325
46.2 Termination Notices	329
46.3 Notice to the GoM of the Power Purchaser's Default	329
46.4 [Notice to the Lenders of the Company's Default]	330
46.5 Other Termination Rights	332
46.6 Other Remedies	332
47.9 Obligations upon Termination	334
<b>48. Resolution of Disputes</b>	
48.1 Resolution by Parties	335
48.2 Determination by Expert	335
48.3 Negotiation	338
48.4 Arbitration	338
48.5 Commercial Acts	338
48.6 Sovereign Immunity: Jurisdiction	339
<b>49. Confidentiality</b>	
<b>52. Miscellaneous provisions</b>	
52.1 Governing Law	341
52.2 Amendment	341

52.3	Third Parties	341
52.4	No Waiver	341
52.5	Relationship of the Parties	342
52.6	Language	342
52.7	Entirety	342
52.8	Successors and Assigns	342
52.9	No Liability for Review	342
52.10	Affirmation	342
52.11	Counterparts	344
52.12	[Accounts and Reports]	344
<b>Preamble:</b>		<b>349</b>
<b>Recitals:</b>		<b>349</b>
3.1	The Site may be occupied and used by the Lessee exclusively for (i) the [ ] power plant which shall be used for generating electricity, (ii) supply thereto of required utilities (including, inter alia, potable water, power, sewage systems and telecommunications towers) and (iii) for the national grid connection.	350
3.2	The Lessee is not permitted to utilise the Site for any other purpose.	350
4.	Renewal Period	350
8.1	The Lessor has registered the Lease Agreement with the relevant land office as required under applicable Malawian law.	350
8.2	The Lessor has confirmed in writing to the Lessee that the Site has been cleared of any occupants.	350
8.3	[Note: Include any other relevant conditions precedent.]	350
9.	Lessor's Warranties and Representations	350
9.1	The Lessor undertakes that the Lessee shall lawfully, peacefully and freely hold, occupy, use, operate and enjoy the Site in order to fulfil its obligations and exercise its rights in respect of the [ ] power plant without disturbance, nuisance or interference by the Lessor, successors, assigns, agents or creditors.	350
9.2	The Lessor undertakes that no third party shall have a right or claim to the Site during the term of the Lease Agreement.	351
9.3	The Lessor warrants and represents that is has obtained and will maintain all approvals from the [government], the provincial/ municipal authorities and all other applicable government agencies or bodies, needed for the Lessee to lawfully enter into this Lease Agreement and to use the Site for the purpose described in Clause 2 at all times during the term of the Lease Agreement.	351
9.4	The Lessor warrants and represents that it is the lawful and sole owner during the term of the Lease Agreement and that there are no encumbrances, mortgages, liens or security interests on the Site other than those created pursuant to this Lease Agreement.	351

9.5	The Lessor warrants and represents that the Site will be free from any occupants as at the Delivery Date.	351
9.6	The Lessor warrants and represents that the Site is free from pollution, unexploded ordinances and environmental damage.	351
10.	Authorisation to Build	351
12.1	Without limiting the general requirements under the laws of Malawi, the Lessee while using the Site shall ensure, the following during the term of the Lease Agreement:	351
13.1	The Lessee undertakes to maintain the Site in good condition at the Lessee"s own risks and expense and to keep all the Lessee"s belongings inside the Site at all time during the term of this Lease Agreement.	352
13.2	The Lessee undertakes to procure and maintain insurance covering any damages occurring within the Site to third parties and its personal property from fire and other risks, or as required under the applicable laws.	352
13.3	The Lessee undertakes that there will be no illegal or prohibited matters, objects, substances, materials, products and/ or the like allowed to operate, manufactured or held inside the Site.	352
13.4	The Lessee undertakes that the rights under this Lease Agreement shall not be transferred to any third party by any means without written approval from the Lessor.	352
13.5	The Lessee shall return the Site to the Lessor upon termination of this Lease Agreement in good condition.	352
13.6	In the event of termination of the Lease under Clauses 16 and 17 hereof, the Lessee shall within [thirty (30) business days] following the termination date with which to remove all property and fixtures belonging to the Lessee from the Site. [For the avoidance of doubt, the Lessee may leave in situ any improvements to the land, including paths, roading, bunding, water pipelines and electricity supply lines.]	352
14	Taxes	352
14.1	The Lessor agrees to be responsible for payment of any and all taxes or fees levied by applicable laws, or any organ or agency arising from the lease of the Site. Should the Lessor fail to pay any such taxes and the Lessee is held responsible by any organ or agency for paying such tax, the Lessee shall have the right to deduct the amount of the tax from the next lease payment or payments.	352
14.2	The Lessee shall provide written notice to the Lessor prior to making such deduction. The Lessee agrees to be responsible for payment of any and all taxes arising from the Lessee"s operation of the [ ] power plant on the Site, such as sales or tax.	352
15	The Lessor"s Access to the Site	352
17.1	[If the PPA is terminated or does not become effective.]	353
17.2	Any breach by the Lessor of any its material obligations, representations under this Lease Agreement and where the Lessee has failed to take appropriate measures to rectify this breach within	



	[sixty (60) days] after receiving written notices of the breaches from the Lessee.	353
17.3	Failure of the Lessee to use or take possession of the Site for [ninety (90) consecutive days].	353
18.	Registration of the Lease Agreement	353
21.1	This agreement contains the entire agreement of the Parties and supersedes all previous communications, representations and agreements, whether oral or written, with respect to the Site.	353
21.2	This Lease Agreement may not be amended except in writing, signed and acknowledged by both Parties.	353
22.	Heirs and Assignees	354
23.1	The Parties choose as their domicilia citandi et executandi their respective addresses specified in Clause 23.2 (Addresses) hereof, for all purposes arising out of or in connection with this Lease Agreement, at which addresses all process and notices arising out of or in connection with this Lease Agreement, its breach or termination may be served upon or delivered to the Parties.	354
23.2	For the purposes of Clause 23.1 (Domicilia Citandi et Executandi), the Parties' respective addresses shall be:	354
23.3	All notices, notifications, requests, demands or other communications given in terms of this Lease Agreement shall be in writing and shall:	354
23.4	Notwithstanding anything to the contrary contained in this Agreement, a written notice or communication actually received by one Party from the other, including by way of facsimile or electronic mail transmission, shall be adequate written notice or communication to such Party.	355

## PREAMBLE:

**THIS POWER PURCHASE AGREEMENT** dated [ ] is made by and between:

- (1) [ ] a company incorporated in terms of the Laws of [Malawi] (registered under company registration number: [ ]) and having its registered office at [ ] (hereinafter referred to as the "**Seller**"); and
  - (2) [ESCOM SINGLE BUYER] a company incorporated in terms of the Laws of Malawi (registered under company registration number: [ ]) and having its registered office at [ ] (hereinafter referred to as "**ESCOM SB**"),
- (together, the "Parties" and "Party" shall mean either of them).

## RECITALS:

- (A) The Seller has been issued with an electricity Generation Licence by MERA to generate [ ] MW through [ ] hydroelectric power plant at [ ] in Malawi.

- (B) The Seller intends to develop a [ ] hydroelectric power project of [ ] MW capacity on a site located at the Project Site.
- (C) ESCOM SB is authorised, amongst others, to purchase wholesale electricity from other utilities and/or independent power producers.
- (D) The Seller wishes to sell the Net Energy from the Power Plant to ESCOM SB and ESCOM SB is willing to purchase the Net Energy of the Power Plant from the Seller.
- (E) The Seller has undertaken to deliver electricity at the Delivery Point and to conclude a Transmission Connection Agreement with the Transmission License (TL) of the Electricity Supply Commission of Malawi (ESCOM) for transmitting electricity from the Power Plant at the appropriate voltage level as a requirement of the Transmission System.
- (F) The Parties intend to stipulate in this Agreement the terms and conditions upon and subject to which ESCOM SB agrees to purchase Net Energy from the Seller.
- (H) According with the Market Rules requirement, SB and the Seller accepts that all the operation and settlement related with this PPA will be based on the Grid Code and the Market Rules

**IT IS HEREBY AGREED** as follows:

## 1. Definitions and Interpretation

### 1.1 Definitions

In this Agreement, the following terms shall have the meanings assigned to them hereunder and cognate expressions shall have corresponding meanings:

<b>"Affected Party"</b>	means a Party affected by a Force Majeure Event;
<b>"Affiliate"</b>	means in respect of either Party, any person (excluding any government), hereinafter referred to as "company" which directly or indirectly: (a) is controlled by such Party; or (b) controls such Party; or rolled by a company which directly or indirectly controls such Party. For the purposes of the foregoing definition: (i) a company is directly controlled by another company, if the latter company holds shares, quotas or voting rights, carrying in the aggregate the majority (more than fifty percent) of the votes exercisable at shareholders' meetings of the former company, and (ii) a particular company is indirectly controlled by a company, hereinafter called the "parent company", if a series of companies can be specified, beginning with the parent company and ending with the

	particular company, so related that each company of the series, except the parent company, is directly controlled by one of the companies earlier in the series;
<b>"[AFSA/UNCITRAL]"</b>	means [ <i>the Arbitration Foundation of Southern Africa/ United Nations Commission on International Trade Law</i> ]
<b>"[ ] Rules"</b>	means the arbitration rule of [ <b>Options:</b> <i>AFSA/UNCITRAL – United Nations Commission on International Trade Law</i> ] in force from time to time;
<b>"[Agreed Interest Rate]"</b>	means [ ]; [ <b>Option:</b> <i>LIBOR - London Interbank Offering Rate</i> ]
<b>"Agreement" or "PPA"</b>	means this Power Purchase Agreement including its recitals and annexures, amended or modified from time to time in accordance with the terms hereof;
<b>"Annual Indexation"</b>	means the indexation in accordance with paragraph C3 of Annexure C (Capacity and Energy Payment);
<b>"Ancillary Services"</b>	Some technical services necessary for the security and quality of the electricity service, that are provided by generators, specially frequency regulation, voltage control and black start.
<b>"Auxiliary Consumption"</b>	means such part of the electrical energy produced at the Power Plant as is consumed exclusively within the Power Plant itself for the sole purpose of generating electrical energy, related services and auxiliaries;
<b>"Availability Declaration"</b>	has the meaning set previously;
<b>"Available Capacity"</b>	Is the maximum power output that the Seller can deliver to the Transmission System.
<b>"Base Case Financial Model"</b>	has the meaning set forth in Paragraph 1 of Annexure H (the Termination Amount ;)
<b>"Base Case IRR"</b>	means the IRR as reflected in the Base Case Financial Model;
<b>"Base Capacity Payment"</b>	has the meaning set forth in Paragraph C1 of Annexure C;
<b>"Billing Period"</b>	means the start of the first day of a month to the end of the last day of the said month, provided that:  the first Billing Period shall commence on the Connection Date or the Deemed Commercial Operation Date, if applicable and end on the last day of the month in which the Connection Date or

	the Deemed Commercial Operation Date, if applicable occurs; and
	the final Billing Period shall commence on the first day of the month in which the Termination Date occurs and end on the Termination Date;
<b>"Business Day"</b>	means any day except a Saturday, a Sunday or a public holiday in Malawi;
<b>"Capacity Payment"</b>	means the payments based on a fixed capacity rate for the Available Capacity delivered by the Seller to the Buyer, calculated in accordance with clause C.3 of the Annexure C (Capacity and Energy Payment).
<b>"Capacity and Energy Payment"</b>	Are the payments received by the Seller in concept of Available Capacity and Electricity delivered to the Transmission Network
<b>"Change in Costs"</b>	has the meaning set previously;
<b>"Change in Law"</b>	means: <ul style="list-style-type: none"> <li>(a) the adoption, promulgation, modification, repeal or reinterpretation after the Signature Date by any Competent Authority of any Law; or</li> <li>(b) the imposition by any Competent Authority of any material condition in connection with the issuance, renewal, or modification of, or the revocation or non-renewal (other than for cause) of, any Consents after the Signature Date, <ul style="list-style-type: none"> <li>that in either case: <ul style="list-style-type: none"> <li>(i) results in any change in respect of Taxes and duties applicable or passed through to the Seller, the Contractors, or its Lenders;</li> <li>(ii) establishes, modifies or abolishes requirements for, or interferes with, the activities of the Seller in connection with the Power Project or the corporate affairs of the Seller that affect the obligations or rights of the Seller, the Contractors, the Lenders or the shareholders of the Seller, or the financial position of the Seller under this Agreement; or</li> <li>(iii) renders the performance by the Seller or any other person of its obligations under this Agreement or any other Project Document (including the payment of debt service or the declaration or payment of distributions to the shareholders of the</li> </ul> </li> </ul> </li> </ul>

Seller) according to its terms illegal or unenforceable.

<b>"Commercial Operation Date"</b>	means the date on which the complete Power Plant is commissioned pursuant to the Commissioning Schedule in Annexure I (Commissioning Schedule) and commences commercial operation;
<b>"Competent Authority"</b>	means, with respect to the Republic of Malawi, any ministry, department, agency, authority or other organisation under the direct or indirect control of the Government of Malawi, court of competent jurisdiction, or other body exercising legislative, executive, regulatory, administrative or judicial functions or quasi-judicial functions or at any time exercising any form of jurisdiction or <i>de facto</i> control over the Parties, the Contractors, the Lenders or the shareholders of the Seller, any aspect of the Power Project or this Agreement (or any transaction or agreement contemplated herein);
<b>"Conditions Precedent"</b>	means the conditions set out previously;
<b>"Confidential Information"</b>	shall have the meaning set out previously;
<b>"Connection Date"</b>	means the date of connection of the Power Plant to the Transmission System;
<b>"Connection Offer Letter"</b>	has the meaning given to it under the Transmission Connection Agreement;
<b>"Connection Works"</b>	has the meaning given to it under the Transmission Connection Agreement;
<b>"Connection Facilities"</b>	has the meaning given to it under the Transmission Connection Agreement;
<b>"Consents"</b>	means the permits, licences, consents, authorisations, approvals, concessions, acknowledgements, exemptions or like or similar documentation required to be obtained in relation to the entering into any of the Project Documents, the performance of any of the transactions contemplated under any of the Project Documents, or otherwise in relation to the Power Project, including without limitation, those set out in Annexure A (Consents);
<b>"Construction Programme"</b>	means the programme for construction of the Power Project as set out in Annexure H (Construction Programme), which specifies certain Milestones for the construction of the Power Project and the due dates for such Milestones;

<b>"Contractor"</b>	means any supplier or contractor engaged by either Party to undertake the whole or any part of either Party's respective obligations under this Agreement, including any sub-contractors appointed by any person who falls within this definition;
<b>"Contract Year"</b>	means each period of one (1) calendar year which falls within the Term, provided that:  the first Contract Year shall commence on the Commercial Operation Date and end on the last of the calendar year in which the Commercial Operation Date occurs; and  the last Contract Year shall commence on the first day of the calendar year in which the Term is due to end and shall end (unless this Agreement is terminated early in accordance with its terms) on the Termination Date;
<b>"Contracted Capacity"</b>	means the Maximum Export Capacity of the Power Plant which shall be [ ] MW as determined in the Transmission Connection Agreement;
<b>Day Ahead Economic Dispatch</b>	means the schedule of sufficient generation and transmission capacity to meet the forecasted load and reserve requirements produced by the SMO the day ahead to the operation day. This dispatch is constrained by reliability, security and quality of service requirements, as indicated in Part V (System Operation Code) of the Grid Code and its associated procedures (in the future taking into consideration any eventual import or export), and Part 6 of the Market Rules and the associated procedures;
<b>"Daylight Hours"</b>	means, for each calendar day, the hours between sunrise and sunset;
<b>"Deemed Commercial Operation Date"</b>	has the meaning given to it previously;
<b>"Deemed Commercial Operation Period"</b>	means the period commencing on the Deemed Commercial Operation Date and ending on the Commercial Operation Date;
<b>"Deemed Energy Payment"</b>	has the meaning given to it previously and Paragraphs A2 and A3 in Annexure C (Energy Payment), which shall be applicable in all Events of Deemed Availability, mutatis mutandis;
<b>"Delay Liquidated Damages"</b>	means the liquidated damages payable by the Seller to ESCOM SB for a delay caused by the Seller in achieving the Commercial Operation Date by the Target Commercial Operation Date;

<b>"Delivery Point"</b>	means the battery limit between the Seller and ESCOM [SB] where the Net Energy output is measured and transferred from the Seller to ESCOM [SB] as shown in the Single Line Diagram attached as Annexure B (Single Line Diagram of Power Plant);
<b>"Direct Agreement"</b>	means the agreement to be entered into by the Seller and ESCOM SB with the Lenders in relation to this Agreement;
<b>"Dispute"</b>	means any dispute or disagreement of any kind whatsoever between the Parties arising under, in connection with, or relating to, this Agreement or the transactions contemplated herein;
<b>"Energy Payment"</b>	means the payments for the energy produced by the Seller and delivered to the Buyer, calculated in accordance with clause C.5 of the Annexure C (Capacity and Energy Payments).
<b>"MERA"</b>	means the Malawi Energy Regulatory Authority established in terms of the Electricity Act, [Act No.];
<b>"[MERA Levy]"</b>	<i>[means all levies as may be imposed from time to time on the provision of electricity for the benefit of MERA];</i>
<b>"Effective Date"</b>	means the date on which all of the Conditions Precedent have been satisfied or duly waived by both Parties;
<b>"[Environmental Credits]"</b>	<i>[means any and all financial benefits, credits, rights, entitlements or interests of an environmental nature that are created or otherwise arise from the Power Project.]</i>
<b>"EPC Contract"</b>	means the engineering, procurement and construction contract entered into between the Seller and the EPC Contractor;
<b>"EPC Contractor"</b>	means the person appointed by the Seller to undertake the engineering, procurement and construction of the Power Plant;
<b>"Event of Deemed Availability"</b>	means each of the following events: (a) a ESCOM [SB] Transmission Default; (b) a ESCOM [SB] Event of Default;
<b>"Finance Documents"</b>	means the agreements and other documents relating to the provision by the Lenders of the limited recourse credit facilities required by the Seller to finance or refinance the Power Project;

<b>"Financial Close"</b>	means the date on which all of the conditions to the first availability of debt under the Finance Documents have been satisfied or waived;
<b>"Force Majeure Event"</b>	has the meaning given to it previously;
<b>"Frequency Regulation Reserves"</b>	Is the set of the Primary, Secondary and Tertiary Regulation Reserves
<b>"Fuel"</b>	The fossil fuel used by the Seller to produce electricity in its Generation plant.
<b>"Fuel Stock"</b>	The volume of fuel stored by the Seller to ensure the plant operation
<b>"Generation Licence"</b>	means the generation licence No [ ] issued to the Seller by MERA and which came into force on [ ] (as the same may be amended from time to time thereafter);
<b>Generation Schedule</b>	means the agreement between Seller and Buyer on the hourly generation of the Plant during a particular week. The Generation Schedule will be base of the Nomination
<b>"Government Action"</b>	means: <ul style="list-style-type: none"> <li>(a) the expropriation (including creeping expropriation), compulsory acquisition, requisition, confiscation or nationalisation by any Competent Authority of any shares in the Seller or assets of the Power Project; or any material assets or rights of the Seller, or any other similar act of such Competent Authority that materially adversely affects: <ul style="list-style-type: none"> <li>i. the enjoyment by the Seller of any of the rights and benefits contemplated by this Agreement, or</li> <li>ii. the performance by the Seller of any of its obligations under or pursuant to this Agreement, or,</li> </ul> </li> <li>(b) <i>[in the case of ESCOM [SB], the reorganisation, restructuring or privatisation of ESCOM [SB] or the sale of the Government's controlling interest in ESCOM [SB], unless the Lenders' consent was given previously;</i></li> </ul>
<b>"Grid Code"</b>	means, at any time, the most recent version of the grid code published by MERA;
<b>"Indexed Capacity Payment"</b>	[means the Base Capacity Payment indexed as specified in Clauses C.3 of Annexure C (Capacity Payment), as the case may be];



<b>"IRR"</b>	means the real post tax internal rate of return on the equity, taking into account the equity invested into the Power Project and the distributions to the shareholders of the Seller;
<b>"Law"</b>	means any constitution, statute, ordinance, treaty, decree, proclamation, by-law, regulation, notice, circular, code, rule, direction, delegated or subordinated legislation or other legislative measure, the Grid Code and the Consents, as well as the common law and customary law and any judgment, decision, order or ruling of any court or tribunal with relevant jurisdiction, in each case having the force of law in the Republic of Malawi. For the purposes of this definition, "customary law" means those customs and practices which, in terms of the common law, have gained the force of law in the Republic of Malawi;
<b>"Lenders"</b>	means the persons from time to time making credit facilities available to the Seller (other than the shareholders of the Seller);
<b>"Long Stop Date"</b>	has the meaning set out previously;
<b>"Losses"</b>	has the meaning set out previously;
<b>"Make-up Period"</b>	has the meaning set out previously;
<b>"Market Rules"</b>	means the Malawi's Market Rules, issued by MERA, which contains the set of rules that provide the framework for an efficient, transparent and reliable electricity market; to set out the responsibilities of the Market Participants, the TL, the SB and the SMO in relation to trading, co-ordination, dispatch, pricing, metering, settlement and payments and ensure an efficient, transparent and predictable settlement system and set the payment obligations;
<b>"Maximum Export Capacity"</b>	has the meaning given to it in the Transmission Connection Agreement;
<b>"Metering Equipment"</b>	has the meaning given to it in the Transmission Connection Agreement;
<b>"Milestone"</b>	means each key stage during the construction period as identified in the Construction Programme;
<b>"Monthly Generation Forecast"</b>	has the meaning set forth in Clause 12.1.1;
<b>"Monthly Updated Plan"</b>	The update of the Year Ahead Operational Plan carried out by the SMO according with the Market Rules
<b>"Monthly Net Energy"</b>	means the Net Energy for a specific month;

<b>"MW"</b>	means Megawatt;
<b>"MWh"</b>	means Megawatt hours;
<b>"Malawian Kwacha"</b>	means the official currency of the Republic of Malawi;
<b>"ESCOM SB Event of Default"</b>	has the meaning set out previously;
<b>"ESCOM TL Transmission Default"</b>	means a breach by ESCOM TL under the Transmission Connection Agreement;
<b>"[ESCOM SB's EC Payment]"</b>	shall have the meaning set forth in Annexure E [(Sharing of Environmental Credit)];
<b>"National Control Centre"</b>	means the centre for control and coordination of power flows within Malawi, operated by the SMO;
<b>"Net Energy"</b>	means for any period the electrical output of the Power Plant measured in kWh at the Delivery Point;
<b>(Daily) Nomination</b>	means the declaration issued by Seller to the SMO, indicating the amount of generation to be produced for each hour of the following day.
<b>"Notice of Intention to Terminate"</b>	means a notice issued pursuant as out previously stated;
<b>"Operating Committee"</b>	means the committee described previously Annexure F (Operating Committee);
<b>"Parties"</b>	shall mean the Seller and ESCOM SB, or their successors-in-title, and „Party" shall be construed accordingly;
<b>"Power Plant"</b>	means the [solar ] power plant with the Contracted Capacity, to be located at the Project Site, at which energy will be generated by the Seller and sold to ESCOM SB pursuant to this Agreement;
<b>"Power Project"</b>	means the development, construction and operation of the Power Plant, located at the Project Site;
<b>"Project Documents"</b>	means this Agreement, the EPC Contract, Transmission Connection Agreement, the Generation Licence, the Consents, the Operations and Maintenance Agreement, and any other agreements or contracts in relation to the Power Project;
<b>"Project Insurances"</b>	shall have the meaning set out previously;
<b>"Project Site"</b>	means the location of the Power Project as described previously;
<b>"Prudent Industry Practice"</b>	means the practices, methods and acts engaged by a utility in the electricity industry in [Southern] Africa having regard to operational and engineering considerations, including manufacturers"

recommendations, and to reasonable costs consistent with reliability and safety or a globally leading [solar] energy producer who, in the conduct of its undertaking, exercises that degree of diligence, prudence and foresight reasonably and ordinarily exercised by skilled and experienced internationally recognised operators engaged in the same type of undertaking under the same or similar circumstances and conditions, and includes:

- (i) complying with:
  - (a) recognised standards pertaining to that activity;
  - (b) manufacturers' instructions and operating manuals; and
  - (c) the terms of this Agreement; and
- (ii) taking reasonable steps to ensure that:
  - (a) adequate materials, resources and supplies are available at the necessary places under normal conditions associated with existing operations;
  - (b) sufficient experienced and trained operating personnel are available to operate the Power Plant and the Connection Facilities, as the case requires, properly, efficiently and within manufacturer's guidelines and specifications and are able to respond to emergency conditions;
  - (c) preventative, routine and non-routine maintenance and repairs are carried out to provide long term and reliable operation and are performed by knowledgeable, trained and experienced personnel using proper equipment, tools and procedures in accordance with the manufacturer's recommendations;
  - (d) appropriate monitoring and testing is carried out to ensure that equipment will function properly under normal and emergency conditions;
  - (e) equipment is operated and maintained in a manner safe for workers, the general public, and the environment; and
  - (f) equipment is operated and maintained in accordance with any valid requirement

	established by legislation or regulation of any governmental agency having jurisdiction with respect to the Power Plant and the Connection Facilities, as the case requires;
<b>"Power Project Acceptance Test"</b>	means the acceptance test(s) of the Power Project, to be conducted with respect to all Units simultaneously and to be completed by the Seller in accordance with Annexure I (Commissioning Schedule);
<b>Quick Reserve or Tertiary Regulation Reserve</b>	is a reserve that can be activated, on request, within 10 minutes and must be sustainable for at least two hours. Quick Reserve can be provided either by synchronized Generating Units or by Fast Start Generating Units;
<b>Reactive power compensation and voltage control by Generation Units</b>	Is the use of reactive power produced by Generation Units to control the voltage in buses of the Transmission System
<b>Regulating Reserve or Secondary Regulation Reserve</b>	is the reserve that is under Automatic Generation Control (AGC) and can be activated within 10 seconds and be fully deployed within 10 minutes of activation. The Generation Units providing Regulating Reserve shall operate under AGC and shall be able to alter their generation or load under AGC to the performance requirements specified by the SMO.
<b>"Reasonable and Prudent Operator"</b>	means a person seeking in good faith to perform its obligations and, in so doing and in the general conduct of its undertaking, exercising that degree of skill, diligence, prudence, responsibility and foresight which would reasonably and ordinarily be expected from a skilled and internationally experienced developer, contractor, owner or operator complying with all Laws, engaged in the same or a similar type of undertaking, in the same or similar circumstances and conditions;
<b>"Scheduled Connection Date"</b>	means [ <i>twelve (12) months</i> ] following the Effective Date and has the meaning given to it in the Transmission Connection Agreement;
<b>"Scheduled Outage"</b>	means a Scheduled Transmission System Outage and/or a Scheduled Plant Outage;
<b>"Scheduled Plant Outage"</b>	means a pre-scheduled interruption in the generating capacity of the Power Plant agreed between the Parties;

<b>"Seller's Revised Capacity Payment"</b>	has the meaning set out previously;
<b>"Signature Date"</b>	means the date this Agreement is duly signed and dated by the last Party signing it;
<b>"[Solar Photovoltaic]"</b>	<i>[if applicable, means the solar photovoltaic power equipment that uses sunlight for direct conversion into electricity and that is being set up by the Seller to provide energy to ESCOM SB as per the terms and conditions of this Agreement];</i>
<b>"[Solar Power]"</b>	<i>[means the solar photovoltaic power generated from the Power Plant];</i>
<b>Spillage Condition</b>	corresponds to a situation when in a set of hours, the reservoir is full and the inflow corresponds to a capacity that exceeds the Capacity of the Plant.
<b>Spinning Reserve or Primary Regulation Reserve</b>	is the reserve provided by Generating Units which is activated automatically in case of frequency changes due to the action of the speed governors. Allows stabilizing the system frequency to a new balance point through automatic increase or decrease of unit active power output via speed governor in response to a decrease or an increase of the system frequency,
<b>System and Market Operator or SMO</b>	means a function within ESCOM Ltd responsible for operating the system and administering the market, and holds the System and Market Operation licence granted or deemed to be granted by the Authority under the Energy Regulation Act.
<b>System Marginal Price</b>	is the hourly energy price calculated and informed by the SMO, as the variable cost to supply one additional MWh in the node where a plant is connected to the transmission system.
<b>"Taxes"</b>	means any tax, charge, impost, tariff, duty or fee of any kind charged, imposed or levied, directly or indirectly, by any Competent Authority, including any value-added tax, sales tax, gross receipts tax, remittance tax, withholding tax, excise tax, property tax, water tax, vocational tax or environmental, energy or fuel tax, but excluding corporation or personal taxes on income;
<b>"Target Commercial Operation Date"</b>	means the intended Commercial Operation Date being the date falling <i>[one (1) month]</i> from the Scheduled Connection Date or as it may be extended in terms of this Agreement;
<b>"Term"</b>	has the meaning set out previously;

<b>"Termination Amount"</b>	has the meaning set forth in Annexure G (The Termination Amount);
<b>"Termination Date"</b>	means the date of the expiry of the Term or the date of the earlier termination of this Agreement, as the case may be;
<b>"Termination Notice"</b>	means a written notice of termination served by the Seller or ESCOM SB to the other Party;
<b>"Transmission Connection Agreement"</b>	means the agreement between the Seller and ESCOM Transmission License [ <i>or alternatively: the Parties</i> ] in terms of which the Seller and ESCOM [ <i>or alternatively: the Parties</i> ] shall construct the Connection Works to connect the Power Plant with the Transmission System, and the terms and conditions that will regulate such connection and establish the technical specifications for the connection;
<b>Transmission License or TL</b>	Means the area of ESCOM devoted to operate, expand and maintain the Malawi's Transmission System.
<b>"Transmission Maintenance"</b>	means scheduled maintenance of the Transmission System required to be performed by ESCOM [SB];
<b>"Transmission System Outage"</b>	means a disruption or failure of the Transmission System;
<b>"Transmission System"</b>	has the meaning given to it in the Transmission Connection Agreement;
<b>"Transmission Unavailability"</b>	means the aggregate number of Daylight Hours in a Contract Year during which the Transmission System fails to allow the injection and transmission of the electrical energy generated by the Power Plant into and through the Transmission System;
<b>"Unscheduled Outage"</b>	means an Unscheduled Transmission System Outage and/or an Unscheduled Plant Outage;
<b>"Unscheduled Plant Outage"</b>	means any period when the Power Plant is out of service as a result of an unforeseen equipment failure or for any other reason;
<b>"Unscheduled Transmission System Outage"</b>	has the meaning given to it in the Transmission Connection Agreement;
<b>"Week"</b>	means the period between 00:00 hours on a Monday and 24:00 hours on the following Sunday.
<b>"Weekly Ahead Plan"</b>	The operational plan carried out by the SMO for the Generation Forecast for the following week

## **1.2 Interpretation**

In this Agreement, unless the context clearly indicates a contrary intention:

- 1.2.1 The headings are for convenience only and shall not form part of the interpretation of this Agreement;
- 1.2.2 The singular includes the plural and vice versa;
- 1.2.3 References to clauses and annexures are, unless the context otherwise requires or states, references to clauses of, and annexures to, this Agreement; and references to clauses are, unless the context otherwise requires or states, references to clauses in the annexures to this Agreement;
- 1.2.4 References to legislation (including subordinate legislation) and regulations made or licences issued there under are references to such legislation, regulations and licences as they may be amended from time to time;
- 1.2.5 References to other agreements or documents are, unless the context otherwise requires or states, references to those agreements or documents at the Signature Date and as amended and/or re-enacted and/or consolidated and/or replaced from time to time;
- 1.2.6 A gender shall include the other gender;
- 1.2.7 A natural person shall include a juristic person, and vice versa;
- 1.2.8 All provisions contained in this Agreement are equally valid and enforceable, even if they belong, to a definition or an Annexure. Obligations resulting from a definition or an Annexure will have the same force as if it had been part in the main body of this Agreement;
- 1.2.9 This Agreement shall be binding on and enforceable by the estates, heirs, executors, administrators, trustees, permitted assigns, liquidators or other legal successors of the Parties as fully and effectually as if they had signed this Agreement in the first instance and reference to any Party shall be deemed to include such Party's estates, heirs, executors, administrators, trustees, permitted assigns, liquidators or other legal successors, as the case may be;
- 1.2.10 Where figures are in this Agreement described both in numerals and in words, the words shall prevail in the event of any conflict between the two;
- 1.2.11 Should this Agreement be signed on a date that results in the use of any tenses herein being inappropriate, the terms shall be read in the appropriate tense; and
- 1.2.12 Any reference to a month shall mean a calendar month.

## **1.3 Inclusion of Dates**

When any number of days are prescribed in this Agreement which relates to invoicing and payments, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last falls on a Saturday, Sunday or

public holiday in Malawi, in which case the last day shall be the next successive Business Day.

**1.4 Construction**

The rule of construction that this Agreement shall be interpreted against the Party responsible for the drafting or preparation of this Agreement shall not apply.

**1.5 Annexures**

The Annexures to this Agreement shall be deemed to be incorporated herein and to form an indivisible part hereof.

**2. Duration of Agreement**

**2.1 Term**

This Agreement shall come into force in accordance with, subject to the other provisions of this Agreement, shall continue in effect for a period of [twenty five (25) years] from the Commercial Operation Date (the “**Term**”).

**2.2 Make-up Term**

2.2.1 Without limiting the generality, the Term shall be extended on a day-for-day basis for all periods during which an Affected Party is unable to perform its obligation pursuant to a Force Majeure Event, and is relieved of its obligations to so perform (the “Make-up Period”).

2.2.2 The occurrence of Force Majeure events during the Make-up Period shall give rise to a further extension of the Make-up Period.

2.2.3 All terms and conditions contained in this Agreement and the respective rights and obligations of the Parties shall remain unchanged for the duration of the Make-up Period.

**3. Conditions Precedent**

**3.1 On Signature Date**

The following Clauses (Interpretation), (Conditions Precedent), (Additional Obligations), (Representations and Warranties), (Applicable Law), (Change in Costs), (Force Majeure), (Dispute Resolution), (Termination), (Liability for Damage or Loss), (Waiver of Sovereign Immunity), (Cession and Assignment), (Direct Agreement), (Severability), (Anti-Corruption Measures), (Confidentiality), (Survival), (Notices and Domicilium), (Shareholding in Seller), (General and Miscellaneous) shall come into full force and effect on and from the Signature Date. None of the other provisions of this Agreement shall be effective until the Conditions Precedent (Conditions Precedent) have either been fulfilled or waived by the Parties.

**3.2 On Effective Date**

The remainder of the rights and obligations of the Parties under this Agreement shall come into full force and effect upon the date of fulfilment of



all of the following Conditions Precedent or until they have been waived (such date being the “**Effective Date**”):

- 3.2.1 The Seller having obtained all Consents as listed in paragraph B of Annexure A (Consents) required for it to perform its obligations under this Agreement and all such Consents being in full force and effect;
- 3.2.2 The Seller and ESCOM having entered into a Transmission Connection Agreement;
- 3.2.3 The Seller obtaining and holding a valid Generation Licence and such Generation Licence is in full force and effect;
- 3.2.4 The Seller having achieved Financial Close and providing a certificate to ESCOM SB from the Lenders (or an agent thereof) in this respect;
- 3.2.5 ESCOM SB receiving all Consents listed in paragraph A of Annexure A (Consents); and
- 3.2.6 [Approval by MERA of the Base Capacity Payment as set out in Annexure C ( Capacity and Energy Payment)].
- 3.2.7 [The majority shareholders of the shares in the Seller having transferred shares to the value of at least [percent] to Malawians as defined in].

### **3.3 Responsibilities as regards to conditions precedent**

- 3.3.1 The Parties shall be responsible at their own expense and risk for satisfying and procuring the satisfaction of the Conditions Precedent.
- 3.3.2 The Parties shall use their reasonable endeavours to cause the Conditions Precedent to be satisfied within [six (6) months] from the Signature Date, as the same may be extended by the Parties in writing (the “Long Stop Date”). ESCOM SB shall provide the Seller with such reasonable cooperation as may be necessary to assist the Seller in satisfying the Conditions Precedent listed above.

### **3.4 Notice**

- 3.4.1 Each Party shall notify the other in writing by the [fifteenth (15th)] day of each month on the progress made in satisfying the Conditions Precedent for which it is responsible.
- 3.4.2 The Parties undertake to disclose promptly to each other in writing anything which will or is likely to materially delay or prevent the fulfilment of any of the Conditions Precedent by the Long Stop Date.
- 3.4.3 A Party shall promptly inform the other Party in writing when any Condition Precedent for which it is responsible has been satisfied.
- 3.4.4 A Party shall promptly in writing inform the other Party of its waiver of any Condition Precedent required to be fulfilled by the other Party.
- 3.4.5 A Party who wishes to waive any condition precedent must provide the other Party with evidence (to the other Party’s reasonable satisfaction) that the waiver of such condition precedent will not have a material

adverse effect on its ability to satisfy its obligations under this Agreement.

### **3.5 Non-fulfilment of conditions precedent**

If the Conditions Precedent are not satisfied or waived on or before the Long Stop Date, then either Party shall have the right to terminate this Agreement by issuing a Termination Notice to the other Party, within a period of [thirty (30) days] after the occurrence of the Long Stop Date. Neither Party shall have any liability whatsoever to the other Party in respect of such termination, except in relation to any antecedent breaches of this Agreement.

## **4. Construction and Development of the Power Project**

### **4.1 Project Site**

4.1.1 The Seller shall use its best endeavours to obtain and maintain the peaceful use and possession of the Project Site and such associated rights as may be necessary for the purposes of undertaking and implementing the Power Project for the duration of the Term. The Seller shall obtain such other land and/or rights in respect of land as it requires to perform its obligations under this Agreement and all such land and/or rights shall be deemed to form part of the Project Site and shall be at the sole obligation and sole responsibility of the Seller.

4.1.2 The Power Plant shall be located at the area generally described as:

Site: [ ]

Town: [ ]

Location/ District: [ ]

GPS Coordinates: [ ]

A scale map that identifies the location of the Project Site, project transmission and substation, Connection Facilities, and significant ancillary facilities including the facilities at the Delivery Point, is included in Annexure B (Single Line Diagram of Project Plant).

### **4.2 Risk and liability**

4.2.1 The Seller shall be responsible, at its own cost and risk, for:

obtaining all Consents except for ESCOM SB's Consents, and maintaining all Seller's Consents in full force and effect during the Term of this Agreement;

the commencement of supply of Net Energy to ESCOM SB no later than the Target Commercial Operation Date excluding delays not attributable to the Seller;

connecting the Power Plant with the Connection Facilities at the Delivery Point as contemplated in the Connection Offer Letter;

operating and maintaining the Power Plant throughout the Term of this Agreement free and clear of encumbrances, except those provided to the Lenders under the Finance Documents, and except as expressly permitted previously (Cession and Assignment); and

fulfilling all obligations undertaken by the Seller under this Agreement.

4.2.2 The Seller shall be fully responsible for the suitability of the Project Site and shall assume all risk and liabilities associated with the Project Site.

#### **4.3 Information regarding Connection Works**

The Seller shall be required to obtain all information with regard to the Connection Works as is reasonably necessary to enable it to design, install and operate all interconnection plant and apparatus on the Seller's side of the Delivery Point in accordance with the Transmission Connection Agreement and the Grid Code.

#### **4.4 ESCOM SB's inspection rights**

ESCOM SB shall have the right from time to time, on not less than [forty eight (48) hours"] written notice, to designate not more than [four (4)] of ESCOM SB's representatives [Note: this could possibly include an ESCOM representative as well] who shall be entitled to have access to the Project Site at reasonable times for the purpose of viewing the Power Plant and verifying the Seller's compliance with its obligations under this Agreement: Provided that ESCOM SB shall ensure that its representatives shall comply with all Project Site health and safety precautions and standards and shall not interfere with the construction, operation and maintenance of the Power Project. Such request from ESCOM SB shall not be unreasonably refused by the Seller.

#### **4.5 General Construction obligations**

4.5.1 The Seller shall design, construct, erect, commission, complete and test the Power Plant in accordance with (i) the Construction Programme; (ii) all applicable Laws, including the Seller's Consents; (iii) the Grid Code; (iv) the Market Rules, (v) the Transmission Connection Agreement and (vi) the standard of a Reasonable and Prudent Operator.

4.5.2 The Seller shall provide or procure all plant, equipment, machinery consumables, parts, materials and services whatsoever required for the construction of the Power Plant above. The plant will be able to provide Ancillary Services as agreed with the SB or specified in the Terms of Reference of the tender in which the Seller was awarded.

- 4.5.3 No later than [thirty (30) days] after the expiry of each calendar quarter in the period from the Effective Date to the Commercial Operation Date, the Seller shall deliver to ESCOM SB a written report setting out the construction activities undertaken in the preceding period as well as the overall progress in the construction of the Power Plant with reference to all Milestones.
- 4.5.4 Notwithstanding any review or inspection of, or recommendation in respect of, any preliminary or detailed design, plan or report, the Project Site, the construction contract(s) or any construction report (each as may be amended) on the part of ESCOM SB or its representatives, the Seller shall be solely responsible for all aspects of the construction of the Power Plant. The Seller shall not be obliged to assume any obligation to implement or address any comments or recommendations of ESCOM SB arising from ESCOM SB's review or inspection as aforesaid, except that the Seller may (in its sole discretion and its sole risk) take such comments and recommendations into consideration whether with or without incurring any additional costs or resultant delays in the Construction Programme.
- 4.5.5 For the avoidance of doubt, notwithstanding the above, ESCOM TL shall be solely responsible for the availability and condition of the Transmission System, including the completion of the construction of the Connection Works by the Scheduled Connection Date, in accordance with the Transmission Connection Agreement. In case of delay that impedes the commencement of the commercial operation of the plant, it will be considered that the plant is available and in consequence qualified to receive the Capacity Payment

#### **4.6 Construction Programme**

- 4.6.1 The Seller shall achieve the Commercial Operation Date on or before the Target Commercial Operation Date.
- 4.6.2 The Seller shall comply with the Construction Programme as set out in Annexure H (Construction Programme) and shall without any unreasonable delay notify ESCOM SB in writing of any anticipated failure to achieve the Commercial Operation Date on or before the Target Commercial Operation Date, which notice shall identify:

the nature of the reason for the failure;

the impact which such failure has had, or in the reasonable opinion of the Seller (acting as a Reasonable and Prudent Operator), is likely to have, on its ability to achieve any Milestone on the applicable due date; and

the steps which the Seller (acting as a Reasonable and Prudent Operator) has taken, is taking and will take to mitigate adverse consequences of such failure.

## **5. Commercial Operation Date**

### **5.1 Commercial Operation Date**

The Seller shall use reasonable endeavours to construct and commission the Power Plant to achieve the Commercial Operation Date on or before the Target Commercial Operation Date.

### **5.2 Delay in Commercial Operation Date**

5.2.1 If the Commercial Operation Date is not achieved on or before the Target Commercial Operation Date, other than due to an Event of Deemed Availability, Force Majeure, Government Action then the Seller shall pay the Buyer the Delay Liquidated Damages.

5.2.2 The Delay Liquidated Damages shall be paid at a rate of [ %] of the total EPC cost (including all contractors, equipment suppliers and service providers), as included in the Base Case Financial Model, for every week or part thereof from the Target Commercial Operation Date to the Commercial Operation Date, such weekly sum to be applied pro rata for any portion of a week between the Target Commercial Operation Date and the Commercial Operation Date.

5.2.3 The maximum aggregate payment of the Delay Liquidated Damages shall not exceed [ %] of the agreed EPC Contract amount.

5.2.4 The Parties acknowledge that the Delay Liquidated Damages are a reasonable and genuine pre-estimate of the likely extent of the damages suffered by ESCOM SB as a result of such delays. The Parties agree that the Delay Liquidated Damages shall be the full and final compensation to be paid in respect of a failure of the Seller to meet the Target Commercial Operation Date.

5.2.5 In the case of a delay to the Commercial Operation Date, the Seller shall keep ESCOM SB informed of the date upon which it anticipates that it will be able to achieve the Commercial Operation Date.

5.2.6 If due to any delay, default or circumstance caused by an Event of Deemed Availability, the Seller's construction and commissioning of the Power Project by the Target Commercial Operation Date is prevented, hindered or delayed as a result of such Event of Deemed Availability, then the Seller, as soon as the Seller becomes aware thereof or should reasonably have become aware thereof, shall give notice to ESCOM SB as soon as practicable after the delay, default or circumstance has occurred setting out the full particulars thereof, its net effect on the Power Project, including any anticipated performance delays, and any measures undertaken or proposed to be undertaken in relation thereto, provided that the Seller shall use its reasonable efforts to minimise any delay, in as far as it is in the Seller's ability, and the effect of any such delay, default or circumstance acting in accordance with Prudent Industry Practice.

5.2.7 Following the occurrence of any delay, default or circumstance the Parties shall confer as to the effect, if any, of such delay, default or

circumstance, and the Target Commercial Operation Date shall be extended by a period agreed by the Parties taking into account:

the effect which the Power Project reasonably demonstrates is properly attributable to such delay, default or circumstance; and

the ability of the Parties to reschedule activities to minimise the overall delays to the Commercial Operation Date resulting from such delay, default or circumstance.

### **5.3 Deemed Commercial Operation Date**

5.3.1 Notwithstanding the extension to the Target Commercial Operation Date if a delay, default or circumstance occurs as a result of an Event of Deemed Availability, and, as a consequence, the Seller is unable to conduct the Power Project Acceptance Tests on the date on which such Power Project Acceptance Tests would otherwise have occurred had such delay, default or circumstance not occurred, the Seller shall be entitled to enjoy certain rights with effect from the date on which the Commercial Operation Date would have occurred had such delay, default or circumstance not occurred (the "Deemed Commercial Operation Date").

5.3.2 In the case of a delay, default or circumstance:

each Party shall keep the other informed on a regular basis of the date upon which it anticipates that such delay, default or circumstance will be resolved;

the Parties shall undertake all reasonable measures to ensure that any Power Project Acceptance Tests delayed due to the circumstances shall be undertaken as soon as possible after the circumstances that resulted in such delay, default or circumstance are no longer in place; and

Provided that the Seller was ready and in a position to conduct any Power Project Acceptance Tests, which Power Project Acceptance Tests were hindered or obstructed solely as a result of a delay, default or circumstance ESCOM SB shall pay the Energy Payment to the Seller in respect of the aggregate amount of Net Energy based on maximum output as defined in the Monthly Generation Forecast supplied commencing from the Deemed Commercial Operation Date until the Commercial Operation Date, which output shall be forecasted in MW of Available Capacity. The Capacity Payment shall be calculated as provided in Clause C3 of Annexure C (Capacity and Energy Payment).

5.3.3 In the event that the delay, default or circumstance is remedied, and the Power Plant fails the Power Project Acceptance Tests, the Seller shall be liable to repay the Deemed Energy Payments paid to it to ESCOM SB.

## **6. Sale and Purchase of Energy**

### **6.1 Obligations to Sell and Purchase Electrical Energy**

- 6.1.1 Subject to and in accordance with the terms and conditions of this Agreement, the Seller commits to sell and supply at the Delivery Point and ESCOM SB commits to take and purchase at the Delivery Point all Net Energy generated by the Power Plant as from the Commercial Operation Date (or the Deemed Commercial Operation Date). Title to, and risk of loss, for the Net Energy shall pass from the Seller to ESCOM SB at the Delivery Point.
- 6.1.2 Commissioning of the Power Plant and the Connection Works shall be in accordance with the commissioning schedule contained in Annexure I (Testing and Commissioning). The Parties agree that Net Energy will be sold to and purchased by ESCOM SB from the Connection Date. The Term shall only commence upon the Commercial Operation Date in accordance with Clause Error! Reference source not found.. The Energy payment for Net Energy produced prior to the Commercial Operation Date shall be in accordance with previously stated position.
- 6.1.3 The Parties acknowledge that the physical connection of the Power Plant to the Transmission System shall be in accordance with the Transmission Connection Agreement.
- 6.1.4 The Seller will also provide, without additional payment, the ancillary services agreed with the SB, or specified in the Terms of Reference of the tender in which the Seller was awarded. In all the cases, the Seller will provide as requested by the SMO in the Day Ahead Economic Dispatch, Primary Frequency Regulation and reactive power within the limits of its Capability Curve.
- 6.1.5 The parties agree that the Energy Payment is representative of the variable costs incurred by the Seller to produce each KWh, and that the Seller recovers all its fixed costs, including investments, operation and maintenance, taxes, return on investments, transmission charges, payments related with his role of Market Participant through the Capacity Payment. Therefore, the Seller cannot claim for any additional payment because its dispatch.
- 6.1.6 Notwithstanding the previous clause, if it is agreed by the Parties, the SB can accept a minimum monthly energy production and a payment each time the Generation Units are started up, as defined in the Annexure C

### **6.2 Restrictions on sale of Energy**

- 6.2.1 Subject to the express and mandatory requirement of the Grid Code, the Seller shall not sell any Net Energy to any person other than ESCOM SB (save for electrical energy consumed by the Power Plant as Auxiliary Consumption) without ESCOM SB's prior written consent, with the exception of the additional generation ordered by the SMO for security reasons, to keep the system balance or to avoid Spillage. In

this last case, the energy is sold to the market is paid at the System Marginal Price.

6.2.2 The Seller must ensure that all electrical energy required by the Power Plant for Auxiliary Consumption while the Power Plant is generating electrical energy to meet the Seller's obligations under this Agreement, is supplied by the Power Plant itself and not by any other supplier, including any other supplier which supplies electrical energy to the private network of customers which may provide load to the Power Plant, other than by ESCOM [SB] as agreed in the Transmission Connection Agreement.

## **7. Provision of Supply, Metering Equipment and Procedures**

### **7.1 Delivery Point**

The supply from the Seller to ESCOM SB shall be delivered at the Delivery Point in accordance with the Transmission Connection Agreement entered between the Seller and ESCOM TL.

### **7.2 Metering**

The Net Energy generated by the Power Plant and delivered to the Transmission System pursuant to this Agreement shall be monitored, measured and recorded by the Metering Equipment at the Delivery Point in accordance with the provisions of the Grid Code, Market Rules and the Transmission Connection Agreement.

### **7.3 Periodic Testing of the Power Plant**

The Seller shall test the performance and output of the Power Plant on the [fifth anniversary] of the Commercial Operations Date, and every [five years] thereafter on the anniversary of the Commercial Operations Date for the duration of this Agreement, to determine whether the energy yield of the Power Plant is in line with the Power Project Acceptance Tests projections at the commencement of the Power Project, and to assist ESCOM SB for planning and forecasting purposes. The Seller shall give reasonable notice of such testing to ESCOM SB and shall allow ESCOM SB to be present when these tests are performed.

## **8. Payment for Available Capacity and Produced Energy**

### **8.1 Payment for Available Capacity prior to Commercial Operation Date**

For each Billing Period prior to the Commercial Operation Date, the Capacity and Energy Payment shall be in accordance with Annexure C (Capacity and Energy Payment).

### **8.2 Capacity and Energy Payment during the Term**

Capacity and Energy Payment ESCOM SB shall pay to the Seller: for each Billing Period during the Term (including the Billing Period in which the



Commercial Operation Date occurs), the Capacity and Energy Payment as per Annexure C (Capacity and Energy Payment);

### **8.3 Payment during Event of Deemed Availability**

Following the Commercial Operation Date, in the event of an Event of Deemed Availability which prevents or hinders the Power Plant from producing Net Energy or from delivering such electrical energy to ESCOM SB or which prevents or hinders ESCOM SB from accepting or receiving such electrical energy in accordance with this Agreement, ESCOM SB shall, subject to the provisions of Annexure C, pay to the Seller the Capacity Payment in respect of the last informed Available Capacity.

### **8.4 Lack of Fuel**

In case the Seller's plant cannot generate because lack of fuel, it will be considered that the Available Capacity is reduced to the maximum value that the plan can produce each hour, and this reduction will be considered in the calculation of the Monthly Target Availability as defined in the Annexure C.

### **8.5 Indexation of the Capacity Payment**

The Capacity Payment shall escalate in accordance with the indexation in clause C3 of Annexure C (Capacity and Energy Payment).

### **8.6 Transmission Use of System Charge**

The Capacity Payment to be paid by ESCOM SB to the Seller shall include, among other components, transmission charges provided for in the Transmission Connection Agreement including the Transmission Use of System Charge, which is set in [currency] per month and is calculated in accordance with applicable [MERA Generation and Transmission tariff methodology]. This amount will be reviewed annually in accordance with MERA approval, all as specified in Annexure C (Energy Payment). [Note: The TCA will be between the Seller and ESCOM and ESCOM SB not party to the TCA].

### **8.7 Energy Payment**

The Energy Payment to be paid by ESCOM SB to the Seller will be calculated as established in the Annexure C (Capacity and Energy Payment).

### **8.8 Settlement of Deviations**

The SB will settle the deviations between the Daily Nomination or the Generation instructed by the SMO, whichever is the last, and the metered output of the Seller's plant, according with the market rules and the Market Procedures.

## **9. Invoicing and Payment**

### **9.1 Frequency**

The Capacity and Energy Payment and the Settlement of Deviations as established in the Market Rules, as calculated and adjusted in accordance with Annexure C, shall be invoiced in arrears at the end of each Billing Period and shall be invoiced in [currency]. The Seller shall charge ESCOM SB value added tax and any other taxes or surcharges, including the MERA Levy if applicable, in accordance with applicable legislation.

### **9.2 Payments Free from Tax**

All sums payable by either Party under this Agreement shall be paid:

9.2.1 free of any restriction or condition; and

9.2.2 free and clear of and (except to the extent required by law and as herein below recorded) without any deduction or withholding for or on account of any bank charge or tax imposed, levied, collected, withheld or assessed by or within Malawi or by any federation or organisation of which Malawi is a member at the time of payment.

### **9.3 Deductions Made Whole**

9.3.1 Each Party shall make any payments payable by it under this Agreement, without withholding or deduction of, or in respect of, any Tax, unless required by Law.

9.3.2 If any such withholding or deduction of any Tax is required the Party making the payment shall, when making the payment to which the withholding or deduction relates, pay the receiving Party such additional amounts as will ensure that the receiving Party receives the same total amount that it would have received if no such withholding or deduction had been required.

9.3.3 Clause 9.3.2Error! Reference source not found. does not apply in the event here a Party is compensated or allowed to recoup such Tax via alternative mechanisms.

### **9.4 Invoicing and Payment Procedure**

9.4.1 Invoices for all payments due under this Agreement shall be submitted by the Seller to ESCOM SB by the [seventh (7th) day] (or, if such day is not a Business Day, the immediately following Business Day) of each month following that in respect of which they are payable.

9.4.2 Each invoice shall be due and payable on or before the [thirtieth (30th) day] after the invoice is received (or, if such day is not a Business Day, the immediately following Business Day). Invoice and payment of deviations will be performed according with the Market Rules and Market Procedures.

9.4.3 Any amount properly due from one Party to the other Party pursuant to this Agreement and remaining unpaid after the due date shall bear interest from the date when payment was due, such interest to accrue

daily and be compounded monthly at a rate equal to the [Agreed Interest Rate] from the date when payment was due until the amount due is actually received by the payee. Any overpayments by either Party resulting from an invoicing error or an error in payment shall be refunded by the other Party, together with interest at the Agreed Interest Rate and thereafter a new invoice shall be issued.

- 9.4.4 Should ESCOM SB dispute an invoice it shall notify the Seller within [five (5) Business Days] of receipt of such an invoice. ESCOM SB shall not be entitled to defer payment thereof beyond the date specified for payment but shall pay such an invoice except in instances of manifest error. In the event the Parties fail to resolve a dispute regarding an invoice within [fifteen (15) days], either Party shall be entitled to refer the dispute for dispute resolution for a determination. In the event it is found that an error was made on the invoice, such invoice shall be cancelled and thereafter a new invoice shall be issued within [ten (10) days] from the resolution of such dispute.
- 9.4.5 In case of a manifest error on an invoice, ESCOM SB shall immediately notify the Seller, and the Seller shall issue a corrected invoice.
- 9.4.6 Should an invoice be in error as a result of a metering or reconciliation error, as detailed in Annexure D (Metering), the payments shall be recalculated as soon as practicable following the correction of the metering error and any over-payment or under-payment corrected in the invoice for the month following the receipt of the correct metered data.
- 9.4.7 The Seller shall notify ESCOM SB of its bank account details for payment by ESCOM SB to the Seller.
- 9.4.8 In the event that the Seller is required to pay to ESCOM SB any Liquidated Damages [or Environmental Credits], ESCOM SB shall issue an invoice to the Seller in accordance with the procedure described above, mutatis mutandis.
- 9.4.9 ESCOM SB shall notify the Seller of its bank account details for payment by the Seller to ESCOM SB.
- 9.4.10 No Party shall be entitled to offset any amounts payable to the other Party under or in relation to this Agreement.

## **10. [Environmental Credits]**

*[Note: Review applicability of this entire clause 10]*

### **10.1 Obtaining Credits**

The Seller shall use its reasonable efforts to obtain Environmental Credits associated with the electrical energy generated by Power Plant and shall undertake its best endeavours as may be reasonably necessary to apply for and obtain any Environmental Credits, if available.

## **10.2 Information Sharing**

ESCOM SB undertakes to co-operate with the Seller and its contractor (as the case may be), and to provide such information and assistance as may be reasonably requested of ESCOM SB in relation to the application for and obtaining of Environmental Credits.

## **10.3 Ownership of the credits**

The Parties agree that the Seller shall be the sole and exclusive owner of all Environmental Credits (if any) derived or generated as a result of the Power Project and, shall have all rights to trade, sell or otherwise dispose of, in its sole discretion, any and all Environmental Credits associated with the electrical energy generated by the Power Plant, and further agree, for the avoidance of doubt, that ESCOM SB will have no rights, obligations or liabilities in respect of any Environmental Credits earned by the Seller or deficiency thereof for the duration of this Agreement other than those set out previously and Annexure E (Sharing of Environmental Credit).

## **10.4 Payment of Benefits**

Notwithstanding, payment of the benefits derived by the Seller from the Environmental Credits shall be in accordance with Annexure E (Sharing of Environmental Credit) as per the applicable tariff methodology.

# **11. Control and Operation of the Power Project**

## **11.1 Dispatch Procedures**

### **11.1.1 Monthly Generation Forecast**

The Seller shall provide ESCOM SMO, with copy to SB, in writing for each month from the Commercial Operation Date (including during Scheduled Outages), by no later than [09:00 hours on the 25th] of the preceding month, the forecast availability of fuel, the Available Capacity and any other information required in the Market Rules or Market Procedures for the Year Ahead Operational Plan and the Monthly Update.

Based on this information and the information provided by the rest of Market Participants, the SMO will carry out the Monthly Updated Plan from which obtain a tentative hourly generation forecast of the Seller's plant;

SB shall present the tentative daily generation schedule to the Seller and both will agree on this schedule. In case of lack of agreement, the SB proposal will be applied, unless Seller can demonstrate that it endangers its installations security or does not fulfil its obligations related to environmental aspects or minimum discharges. This activity will be carried out by the Technical Committee;

Under no circumstance shall an hourly generation forecast included in the Monthly Generation Forecast exceed the Available Capacity of the Power Plant.

The Monthly Generation Forecast will include the reserve margins that the Seller should maintain to provide Frequency Regulation Reserves

In the event that the SMO or SB fails to provide the Monthly Generation Forecast for any month, then the Seller shall define the Monthly Generation Forecast, which will be valid until SB provides a new Monthly Generation Forecast.

#### **11.1.2 Weekly Generation Forecast**

The Seller shall provide to ESCOM SMO, with copy to SB, as defined in the Market Procedures, for each Week from the Commercial Operation Date, by no later than [09:00 hours on the preceding Wednesday], the Seller's estimate made in good faith of fuel availability, the Available Capacity, and any other information required in the Market Rules or Market Procedures.

Based on this information, SMO will adjust the hourly generation forecast for the rest of the month that will constitute the Weekly Generation Forecast

On each Friday, representatives of Seller and SB or the Technical Committee will meet to agree how the Hourly generation Schedule that will be produced during each hour of the week starting the following Monday. This set of hourly generation will constitute the Generation Schedule for the next week that will be nominated to the SMO. In case of disagreement, the opinion of the SB will be adopted, provided it leads to feasible and secure Generation Schedule and has the means that fulfils the requirements of the Grid Code.

The Seller and SB will inform the SMO about the Generation Schedule that they agreed to be produced each hour of the next week. SMO will verify the feasibility to transfer that energy, and in case it is not possible, will inform Seller and SB, which will have to adapt the Generation Schedule to the SMO instructions.

The agreed Generation Schedule will be included in an Agreement on Notifications, which will be signed by the participants of the meeting. Seller becomes responsible to confirm every day to the SMO the Daily Nominations agreed in this document. The parties can agree to replace meetings with interchanges by e-mail.

In case there is a change in the fuel availability or plant availability that can lead to a Nomination reduction, the Seller will inform the causes to SB in writing. SB will analyse the reasons and may accept a change in the Nominations. This new Daily Nominations will be informed to the SMO.

The Weekly Generation Forecast will include the reserve margins that the Seller should maintain to provide Frequency Regulation Reserves as requested by the SMO in the Weekly Ahead Plan.

In case of high water inflows in the Malawi's reservoirs that may lead to "Spillage Situation", SMO can instruct the Seller to reduce the

generation of the Daily Nominations. This reduction will not be considered a reduction in the Available Capacity.

In the event that the SMO fails to provide the Weekly Ahead Schedule for any Week, then the Seller shall define the Weekly Generation Forecast, which will be valid until SMO provides a new Weekly Ahead Schedule for such Week.

#### **11.1.3 Daily Generation Forecast**

The Seller will inform the SMO every day, before 9:00 Malawi's time, or the time requested in the Market Rules or Market Procedures, the power it Nominates for each hour of the next day, as well as any other information necessary for the SMO to prepare the Day Ahead and Real Time dispatch. This Daily Nominations should coincide with the Generation Schedule agreed between Seller and SB, according with the procedure described in the previous section on Weekly Generation Forecast. The Seller may introduce changes to the Generation Schedule for verifiable security reasons, or because orders of the SMO. Any reduction not based on security reasons or SMO orders will be considered and reduction in the plants Available Capacity.

In case the capacity to be injected is lower than the established in the Generation Schedule, the Seller will inform the SB with no less than two hours prior to submitting the information to the SMO.

The Seller will be responsible for any reduction in the power to be injected as ordered by the SMO whether it occurs because the information provided to SMO is incomplete or inexact.

In accordance with the Market Rules, Grid Code and Market Procedures and any procedures agreed by the parties, the Seller shall keep the SB informed by regular Daily Nominations, together with prompt declarations of any changes, of the Available Capacity and any impairment of the Plant's Operating Characteristics, provided that if the Seller fails to give a declaration in respect of a Unit that Unit shall be deemed to be declared Unavailable unless Seller makes a contrary declaration.

SMO, in accordance with the results of the Day Ahead Economic Dispatch shall issue Dispatch Instructions to Seller consistent with and within the Market Rules, Grid Code, Functional Specification and the prevailing Daily Nomination. As part of the Dispatch Instructions, SMO will instruct on the Net Electrical Output to inject each hour, the reserve margins for Frequency Regulation Reserves and the reactive power production. If for some reason the Dispatch Instruction request a Net Electrical Output different than the Nomination, the Seller will immediately inform the SB who will advise on modification of the Nomination. SMO may require Seller to modify the Nomination or disconnection when:

- i. an Emergency exists, which may require to increase or decrease generation in respect to the Nomination;
- ii. for so long as a disconnection or a reduction in energy deliveries is necessary to enable to construct, install, maintain, repair, or test any part of the Transmission or Distribution Connection facilities, or any other affected part of the Electricity System;
- iii. During necessary short term maintenance outputs agreed between SMO and Seller, and the SB shall be informed;
- iv. A water spillage condition in the hydro plants of the system;
- v. To keep the system balance during real time operation.

The SMO shall notify the Seller prior to the beginning and end of such reduction or disconnection. The SMO shall co-ordinate such reduction or disconnection with Seller. Any action requiring such disconnection or reduction of energy deliveries shall be implemented and completed as soon as reasonably practicable.

Changes in the Daily Nominations because these orders of the SMO will not be considered as deviations subject to settlement, nor as reductions in the available capacity.

The Parties and the SMO shall, not later than the First Implementation Date, agree further procedures as shall be necessary for the Dispatch of the Plant and operational communications between the Parties. Any procedures not agreed by the Parties by the First Implementation Date shall be specified by the SMO in accordance with Grid Code, Market Rules or Procedures or Prudent Operating Practice. If circumstances arise subsequent to the First Implementation Date, which either Party deems to require changes in procedures, the Parties shall work together in good faith to establish procedures satisfactory to both Parties, giving due consideration to issues of safety and that fulfils requirements of Grid Code Market Rules and Market Procedures. If the Parties are unable to agree on any such procedures relating to matters of safety, these shall be referred to an Expert. While the Expert is adjudicating the matter, the Parties shall abide by existing agreed procedures, or if there are none applicable, relevant SB procedures existing at the time.

The SB will calculate the hourly differences between the energy actually delivered by the Transmission System, according to the readings of the metering system and the Daily Nomination communicated as part of the Dispatch instructions to Seller for the day ahead Dispatch. Metering information will be collected by the SMO and informed to SB and Seller

This difference (positive or negative) will be valued at the System Marginal Price of the corresponding hour, as indicated in the Market Rules, at the delivery point into the Transmission System at which the Seller is connected.

The SB will calculate the corresponding accumulated differences that Seller should pay or receive, corresponding to the previous month. SMO will produce a verification of the communicated values (taking into account the registered contracts).

Any notice given by the SMO shall be given in writing and delivered by e-mail, or any electronic means agreed by the Parties, to Seller at the e-mail address and marked for the attention of the persons or such other address or person from time to time as designated by Seller and such notice shall be deemed to be received upon confirmation of uninterrupted transmission by a transmission report provided that such notice shall be confirmed by letter sent by hand or post.

If at any time the supply of electricity to the Agreed Point of Supply does not comply with the applicable requirements of the Grid Code, as a result of the breach by Seller of any such requirements:

- i. Seller shall immediately take the steps necessary pursuant to Grid Code and Prudent Operating Practice to remedy such non-compliance as soon as possible;
- ii. if and to the extent that, as a result of such non-compliance, any Unit is unable to generate supply of electricity, that Unit shall be deemed not to be Available or with reduce Available Capacity.

The requirements in (i) and (ii) above shall not be applicable where such deviations from the Grid Code or Day-ahead Dispatch have arisen due to the operating conditions of the Transmission and Distribution Systems, following orders of the SMO.

In the event of any dispute arising between the Parties as to any such non-compliance, the matter in dispute shall be referred to determination by an Expert in accordance with Clause 22.2. The expert shall take into consideration the written opinion of the SMO.

- 11.1.4 All generation forecasts are indicative only, and deviations shall not be regarded as a breach of contract, with the exception of the Daily Nominations, that will be considered mandatory for the Seller, unless it is modified by instructions of the SMO. In all the other cases the deviations will be settled according with the Market Rules and Market Procedures.
- 11.1.5 Any non-justified deviations that results in a Net Electrical Output of less than 5% of the Daily Nomination will be considered a reduction in the Available Capacity, and will lead to a reduction in the Capacity Payment, which be calculated according with clause C.3 of Annexure C.

## **11.2 Availability Declaration**

- 11.2.1 The Seller shall provide to ESCOM SB in writing for each Contract Year (after taking into consideration Scheduled Plant Outages), by no later [than 30 (thirty) days prior to the 1 January] of the ensuing



Contract Year to which the forecast relates, the forecast level of generation of the Net Energy for each Contract Year in such format as may be prescribed by ESCOM SB from time to time (the "Availability Declaration"). For the first Contract Year, the Seller shall provide ESCOM SB with an Availability Declaration [thirty (30) days] prior to the Commercial Operation Date.

11.2.2 In the event that the Seller fails to provide the Availability Declaration for a Contract Year, then the last Availability Declaration provided by the Seller above shall be deemed to be the Availability Declaration for such Contract Year.

11.2.3 Subject to the terms and conditions of this Agreement, the Seller shall declare the Power Plant available for generation of Net Energy except:

for reasons of Scheduled Plant Outages or Unscheduled Plant Outages; or

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

in circumstances relating to safety (of either a personnel or the Power Project or apparatus); or

to the extent of any illegality, in circumstances where to do so would be unlawful; or

for reasons of Force Majeure; or

in any other circumstances, with ESCOM SB's approval.

11.2.4 The Availability Declaration and all generation forecasts, with exception of the Daily Nominations are indicative only, and deviations shall not be regarded as a breach of contract.

11.2.5 ESCOM SB shall purchase, all the Energy generated by the Power Plant.

### **11.3 Other relevant data**

So far as possible, by [30 (thirty) days] before each anniversary of the Commercial Operation Date, the Seller shall submit to ESCOM SB in written form details of any material factors which in the reasonable opinion of the Seller may have a material effect on the ability of the Power Plant to produce Net Energy.

### **11.4 Further revisions**

11.4.1 The Seller shall, as soon as is reasonably practicable, make revisions to the Availability Declaration submitted to ESCOM SB should circumstances affecting the operation of the Power Plant or its operating characteristics change at any time. Any change in the Available Capacity should be informed also in the Monthly Generation Forecast or Weekly Generation Forecast.

11.4.2 Should circumstances change such that the original or the current Availability Declaration is no longer a reasonable estimate made in good faith, the Seller must, as soon as is reasonably practicable:

make revisions to the data submitted to ESCOM SB;

notify ESCOM SB of any revisions to any previously submitted data; and

notify ESCOM SB of any special factors of which it becomes aware.

## **11.5 Communication of Declarations**

Each Party hereby authorises the other Party to record all telephone voice communications relating to Net Energy of the Power Plant received from the other Party and, where recording equipment of a Party has failed, the other Party shall supply, at the request of the first Party, a copy or transcript of any such recording. [Note: or provide any other method which is agreeable to by the Parties.]

## **11.6 Coordination**

11.6.1 The Seller and ESCOM [SB] shall as far as practically possible coordinate the timing for both Scheduled Plant Outages and Scheduled Transmission System Outages.

11.6.2 The Parties shall establish an [Operating Committee] composed of [four (4) members]. The obligations and responsibilities of the [Operating Committee] shall be as set out in [Annexure F (Operating Committee)], however it is hereby agreed that the Operating Committee and/or its members will not have any liability towards the Power Project and/or the Parties. [Note: Parties to agree whether there will be a need for an Operating Committee.]

## **11.7 Maintenance**

The Seller shall, during the Term, carry out such maintenance as shall be commensurate with the proper running of the Power Plant and in accordance with Grid Code and Prudent Industry Practice.

## **11.8 Scheduled Plant Outages**

11.8.1 The Seller shall, not less than [one (1) month] prior to the Commercial Operation Date and on an annual basis for the remainder of the Term, at least [one (1) month] prior to the timeline established in the Market Rules and Market Procedures] its proposals for Scheduled Plant Outages, including any planned interruption or reduction of the Power Plant's Contract Capacity for the remainder of the Contract Year and the forthcoming Contract Year, as appropriate. Such schedule shall include:

the number of expected Scheduled Plant Outages and the extent of expected reductions in the Contract Capacity of the Power Plant as a result of such Scheduled Plant Outages; and

the estimated dates and duration of each Scheduled Plant Outage.

- 11.8.2 The [Operating Committee] shall, upon receipt of the proposals meet and coordinate the timing of Scheduled Plant Outages for the forthcoming Contract Year, at least as close to [one (1) month] prior to the commencement of that Contract Year as possible.

The Scheduled Plant Outage will be informed to the SMO in the timeline established in the Market Rules or market Procedures. The SMO, based on its Year Ahead Operational planning will may propose changes to this schedule.

The [Operating Committee] will analyse the SMO's request, and can propose an alternative to the SMO, according with the Market Procedures

- 11.8.3 If there is a requirement to change the dates of any Scheduled Plant Outage, the Seller shall provide ESCOM SB with written notice at least [twenty-eight (28) days] in advance of the relevant Scheduled Plant Outage. ESCOM SB will require the SMO's opinion, and if it agrees, may approve such a request for a change of date within [five (5)] days of such request. Such an approval shall not be unreasonably withheld or delayed.
- 11.8.4 Subject to having complied with the foregoing provisions, the Seller shall be entitled to remove any Unit and/or the Power Plant from service at the agreed date and time for the Scheduled Plant Outage.
- 11.8.5 The Seller shall be responsible for all costs incurred by it in connection with or arising from any scheduled maintenance carried out by it or on its behalf on the Power Plant. ESCOM SB shall not be entitled to any payment and/or indemnification and/or reimbursement from the Seller in connection with any Scheduled Plant Outages.

## **11.9 Unscheduled Plant Outages**

- 11.9.1 The Seller shall notify SMO and ESCOM SB promptly:

upon the occurrence of any event resulting in the Power Plant being unable to operate; and/or

if the Seller determines that maintenance of the Power Plant is required prior to the next Scheduled Plant Outage scheduled and that an Unscheduled Plant Outage is required.

- 11.9.2 In each case, the Seller shall:

give SMO and ESCOM SB notice of such event as soon as reasonably practicable after the occurrence of such event or, in the case of an Unscheduled Plant Outage, the Seller becoming aware of the need for such outage;

notify SMO and ESCOM SB of the expected dates and duration of the Unscheduled Plant Outage;

SMO can deny the outage for security reasons, and if delay do not lead to damages to the Seller's equipment.

use its best efforts to minimise the duration and effects on the Power Plant of the Unscheduled Plant Outage.

11.9.3 ESCOM SB shall not be entitled to any payment and/or indemnification and/or reimbursement from the Seller in connection with any Unscheduled Plant Outages.

11.10 Scheduled and Unscheduled Transmission System Outages

11.11 The Parties agree that if because planned or unplanned outages the Transmission System the Seller cannot deliver its Net Electrical Output, at the effects of the capacity Payment the Sellers plant will be considered as available, with the last Available Capacity informed.

## **12. Additional Obligations**

### **12.1 ESCOM SB's obligations**

ESCOM SB shall, in addition to its other obligations under this Agreement, without cost to the Seller:

12.1.1 to the extent ESCOM SB has not done so at the Signature Date, apply in a timely fashion for, obtain, maintain and comply with all Consents required from time to time for ESCOM SB to fulfil its obligations under this Agreement; and

12.1.2 reasonably assist the Seller in obtaining any Consents which the Seller requires to construct, commission, operate and maintain the Power Plant under this Agreement; and

12.1.3 at all times from the Connection Date until the occurrence of the Commercial Operation Date during which the Seller generates Net Energy from the Power Plant, accept the Net Energy so generated.; and

12.1.4 upon the Seller's reasonable request, discuss details of the Power Project with any potential Lender interested in providing financing or refinancing to the Seller in relation to the Power Plant; and

12.1.5 upon the Seller's reasonable request, in good faith negotiate and enter into the Direct Agreement with the Seller and the Lenders, on such terms as the Lenders may reasonably require within a reasonable time.

### **12.2 General Obligations of the Seller**

12.2.1 From the Commercial Operation Date and for the remainder of the Term, the Seller shall, in addition to its other obligations under this Agreement, manage, operate and maintain the Power Plant in accordance with:

all relevant Consents required from time to time for the Seller to fulfil its obligations under this Agreement;

all applicable Laws (including, without limitation, all health, safety and environmental Laws);

Malawi's Grid Code;

In coordination with the SMO maintenance schedule<.

Prudent Industry Practice; and

the relevant manufacturer's guidelines and instructions.

12.2.2 In the event of a conflict among any such standards, the most stringent standard shall prevail, provided that in no circumstances shall the Seller be required to control or operate the Power Plant in violation of any of its Consents or any applicable Law, or in a manner contrary to Grid Code, Market Rules and Prudent Industry Practice.

12.2.3 As soon as granted and not later than Financial Close, the Seller shall give notice to ESCOM SB of all Consents and approvals necessary in Malawi to allow the Seller to enter into this Agreement and/or operate the Power Plant and to carry out the transactions contemplated hereby.

### **13. Representations and Warranties**

#### **13.1 The Seller's warranties**

The Seller hereby represents and warrants to ESCOM SB that:

13.1.1 it is a validly existing legal entity under the Laws of Malawi;

13.1.2 it is a limited company, incorporated under the Laws of Malawi which has been in continuous existence since incorporation;

13.1.3 it has the full legal capacity and authority to enter into and carry out its obligations under this Agreement and this Agreement constitutes a valid, legally binding and enforceable obligation of the Seller;

13.1.4 to the best of the Seller's knowledge and belief, all Consents necessary to allow the Seller to enter into this Agreement and to carry out the transactions contemplated herein, including approval by the board of directors of the Seller, shall be given or received after Signature Date and it shall use its best efforts to keep them remaining in full force and effect for the duration of this Agreement;

13.1.5 to the best of the Seller's knowledge and belief there are no applicable Laws in force on the Signature Date or any provisions of any organisational document of the Seller or of any agreement by which the Seller is bound, which restrict or prohibit the ability of the Seller to enter into and perform the terms of this Agreement;

13.1.6 this Agreement does not conflict with any provisions of any Law, any regulations of Malawi or any provision of the articles or memorandum of association of the Seller in effect as at the Signature Date;

13.1.7 at the Signature Date no litigation, arbitration or administrative proceedings before any court or arbitrator or authority are presently

pending or to the best of the Seller's knowledge are being threatened against the Seller or any of its assets, which might materially or adversely affect the Seller's ability to perform its obligations under this Agreement or result in the dissolution of the Seller;

- 13.1.8 execution of this Agreement will not violate, be in conflict with, result in a breach of or constitute (with due notice or lapse of time or both) a default under any indenture, agreement for borrowed money, bond, note, instrument or other agreement to which the Seller is a party or by which the Seller or its property is bound;
- 13.1.9 that it will make use of new equipment supplied by a reputable manufacturer; and
- 13.1.10 it has fully investigated the Project Site and has satisfied itself as to the Project Site's adequacy and fitness for the purposes of the Power Project and this Agreement.

## **13.2 ESCOM SB Warranties**

ESCOM SB hereby represents and warrants to the Seller that:

- 13.2.1 it is a validly existing legal entity under the Laws of Malawi which on the date of this Agreement is [wholly-owned by the Government of Malawi];
- 13.2.2 it is a private limited company incorporated under the Laws of Malawi which has been in continuous existence since incorporation;
- 13.2.3 it has the full legal capacity and authority to enter into and carry out its obligations under this Agreement and this Agreement constitutes a valid, legally binding and enforceable obligation of ESCOM SB;
- 13.2.4 all Consents necessary to allow ESCOM SB to enter into this Agreement and to carry out the transactions contemplated herein have been given or received and remain in full force and effect;
- 13.2.5 it has given notice to the Seller of all Consents necessary in Malawi to allow ESCOM SB to enter into this Agreement and to carry out the transactions contemplated therein;
- 13.2.6 there are no applicable Laws in force on the Signature Date or any provisions of any organisational document of ESCOM SB or of any agreement by which ESCOM SB is bound, which restrict or prohibit the ability of ESCOM SB to enter into and perform the terms of this Agreement;
- 13.2.7 execution of this Agreement does not conflict with any provision of any Law or any provision of the articles or memorandum of association of ESCOM SB in effect as at the Signature Date;
- 13.2.8 at the Signature Date no litigation, arbitration or administrative proceedings before any court or arbitrator or authority are presently pending or to the best of ESCOM SB's knowledge are being

threatened against ESCOM SB or any of ESCOM SB's assets, which might materially or adversely affect ESCOM SB's ability to perform its obligations under this Agreement or result in the dissolution of ESCOM SB; and

- 13.2.9 execution of this Agreement will not violate, be in conflict with, result in a breach of or constitute (with due notice or lapse of time or both) a default under any indenture, agreement for borrowed money, bond, note, instrument or other agreement to which ESCOM SB is a party or by which ESCOM SB or its property is bound.

#### **14. Applicable Law and Jurisdiction**

This Agreement shall be governed, construed and interpreted in accordance with the Laws of Malawi, and the Parties consent to the non-exclusive jurisdiction of the High Court of Malawi, subject to the provisions Dispute Resolution. Subject to see provisions of Dispute Resolution, the Parties agree that a judgment in any proceedings in connection with this Agreement by the Malawian courts shall be binding upon them and may be enforced against them in any other jurisdiction.

#### **15. Change in Costs**

- 15.1. The tariff agreed in this Agreement is approved by MERA, and has an agreed price path, with annual escalations as set out in Annexure C (Capacity and Energy Payment).
- 15.2. In the event of any Change in Law resulting in a Change in Costs that materially changes the economic position of the Seller, and more specifically has the effect of an increase in cost or decrease in revenue to the Seller of more than [ ] aggregate, projected over the life of the Power Plant in accordance with the Base Case Financial Model, ESCOM SB and the Seller shall approach MERA to adjust the Capacity and Energy Payment in terms of the then applicable tariff methodology to ensure that the Seller's Regulated Equity Return as set out in the Base Case Financial Model is maintained.
- 15.3. The Change in Costs must have the effect of (a) impacting one or more of the inputs in the Base Case Financial Model and / or (b) results in one or more changes to the [Grid Code].
- 15.4. In the event of a Change in Law ("Change in Costs") the Seller may only claim relief for a Change in Costs in the event:
- 15.4.1 the principle effect of such Change in Costs is directly borne by:
- the Power Project;
  - the Seller and not other persons; and
- 15.4.2 in respect of which the Seller is not entitled to any other relief pursuant to any other provisions of this Agreement; and

- 15.4.3 which was not foreseen by the Seller on or before the Signature Date or if it was foreseen, the impact on the Power Project was not foreseen; and
- 15.4.4 which could not reasonably have been foreseen by any person in the position of the Seller on or before the Signature Date or if it could have reasonably have been foreseen, the impact on the Power Project could not reasonably have been foreseen.
- 15.5 An increase in taxes of general application which does not discriminate against the Seller or against the Seller and other parties undertaking projects similar to the Power Project shall not be deemed a Change in Costs.
- 15.6 A Change in Costs shall not include any Law that was enacted or made but not yet in force as at the Signature Date, or any bill that was promulgated for comment at any time before the Signature Date if and to the extent that such bill is materially unchanged when enacted and brought in effect.
- 15.7 If any one or more Changes in Costs (inclusive) takes place, the Parties agree to meet to quantify the financial implications of the Changes in Costs by reference to the Base Case Financial Model so as to calculate the changes required to the Capacity Payment in Annexure C (Capacity and Energy Payment) such that the Seller's Regulated Equity Return, assuming the Change in Costs, is equal to the equity return in the Base Case Financial Model.
- 15.8 Once the then applicable Capacity Payment has been re-calculated the implementation of such revised Capacity Payment ("Seller's Revised Capacity Payment") is subject to the official approval of MERA. In the event that MERA does not approve the Seller's Revised Capacity Payment or in the event that MERA determines a revised Capacity Payment which is less beneficial to the Seller than the Seller's Revised Capacity Payment, the Seller shall be entitled to refer the matter to an Expert for a determination.
- 15.9 Process for adjustments to the Capacity Payment because of Change in Costs
  - 15.9.1 After a Change in Costs the Seller shall submit to ESCOM SB within a reasonable time the re-calculation of the Seller's Revised Capacity Payment derived from the Base Case Financial Model, setting forth in reasonable detail the basis of, and the calculations in the claim for, any necessary adjustments to the Capacity Payment, arising from such Change in Costs.
  - 15.9.2 Within [fourteen (14) days] after the date of the re-calculation delivered ESCOM SB shall notify the Seller whether it agrees or disagrees with Seller's Revised Capacity Payment. If ESCOM SB notifies the Seller of its disagreement, the Parties agree to meet within [seven (7) days] and discuss, in good faith, the Seller's Revised Capacity Payment.
  - 15.9.3 In the event that ESCOM SB agrees with the re-calculation delivered or as negotiated and subject to the approval of MERA the calculation of the Capacity Payment shall be amended accordingly.



- 15.9.4 The Seller's Revised Capacity Payment shall apply as from the date on which ESCOM SB's annual tariff revision is approved by MERA and takes effect (falling no later than [twelve (12) months] from the previous ESCOM SB application for tariff review).
- 15.9.5 The Parties shall ask MERA to approve the Seller's Revised Capacity Payment within [fourteen (14) days].
- 15.9.6 The calculation of the revised Capacity Payment and the Annual Indexation determined pursuant in the Change in Costs clause shall take into consideration the period from the date of the relevant Change in Costs until the date on which the revised Capacity Payment and the Annual Indexation take effect. In calculating the adjustment, the effect of the Change in Costs from the effective date of such Change in Costs until the date of the final adjustment becomes effective shall be taken into consideration.
- 15.9.7 In the event, the Parties have met to discuss the re-calculation of the Seller's Revised Capacity Payment and ESCOM SB is in disagreement with the Seller's calculations, the Parties shall be entitled to refer the matter to MERA for mediation. If MERA does not approve the Seller's Revised Capacity Payment or in the event that MERA determines a revised Capacity Payment which is less beneficial to the Seller than the Seller's Revised Capacity Payment, the Parties shall be entitled to refer the matter to an Expert for a determination.
- 15.9.8 In the event the Expert rules in favour of the Seller, and MERA does not implement the re-calculated Capacity Payment as determined by the Expert, the Seller may terminate this Agreement and ESCOM SB shall not have any claim and/or demand and shall not be entitled to any indemnification and/or reimbursement in connection with such termination. The aforementioned right to termination is subject to ESCOM SB having approved the re-calculation of the tariff.

## **16 Force Majeure**

### **16.1 Definition of Force Majeure Event**

16.1.1 A "Force Majeure Event" means any event or circumstance which:

is beyond the reasonable control of the Party affected by the Force Majeure (the "Affected Party") or its Contractors;

is without fault or negligence on the part of the Affected Party or its Contractors and is not the result of a breach by the Affected Party or its Contractors of any of their obligations under any Project Document (including, in respect of the Affected Party, this Agreement), Consents or applicable Law;

was not foreseeable, or if foreseeable, could not have been (including by reasonable anticipation) avoided or the effects of which could not have been overcome by the Affected Party or its

Contractors, acting in accordance with Prudent Industry Practice;  
and

prevents, hinders or delays the Affected Party in its performance  
of any of its obligations under this Agreement.

16.1.2 If an Affected Party or its Contractors could, by acting in accordance with Prudent Industry Practice, have mitigated an event or circumstance that otherwise satisfies the requirements set out in paragraphs (a) to (d) above, that part of the event or circumstance that could have been mitigated shall not be a Force Majeure Event.

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

any material effect of the natural elements, including lightning, drought, wind, fire, earthquake, solar flares, volcanic eruption, landslide, flood, storm, tsunami, cyclone, typhoon, tornado, or meteorites; or

air crash, shipwreck, train wreck or major failure or stoppage of transportation, objects falling from aircraft or other aerial devices, sonic boom, explosions or chemical contamination; or

epidemic, famine or plague; or

any event or circumstance constituting a Force Majeure Event under any other Project Document; or

act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, civil commotion, sabotage, act of terrorism or exercise of military or usurped power; or

radioactive contamination or ionising radiation; or

labour unrest, strike, go-slow or other labour action but not those affecting only the personnel of a Party;

provided that the following shall not constitute a Force Majeure Event unless caused by or resulting from a Force Majeure Event:

a failure or inability to make any payment, any inability to raise finance or any changes in price or market conditions;

late delivery or interruption in the delivery of machinery, equipment, materials, spare parts or consumables;

a delay or failure by a third party which prevents, hinders or delays the Affected Party in the performance of its obligations under this Agreement, save where the cause of such delay or failure by the third party would constitute a Force Majeure Event pursuant to this Agreement; or

any technical or operational problems with the Power Plant arising from a fault in the construction, operation and/ or maintenance of the Power Plant which is attributed to any failure by the Affected Party to obtain and/ or maintain a Consent; or

wear and tear, flaws, breakdown in or degradation of, any equipment or machinery.

## **16.2 Procedure**

16.2.1 If an Affected Party wishes to cite a Force Majeure Event as being the cause of it being unable to meet any or some of its obligations hereunder, the Affected Party shall, as soon as reasonably practicable of it becoming aware of the Force Majeure Event, but not later than [two (2) days] of the occurrence of the event, advise the other Party of the nature, cause and/or likely duration of the Force Majeure Event (to the extent the same can be reasonably determinable at the time of such notice) and, when appropriate or when reasonably requested to do so by the other Party, update such information.

16.2.2 Both Parties shall take such steps as are reasonably available to it to overcome such Force Majeure Event and each Party shall mitigate its effect on the ability of the Affected Party to meet its obligations under this Agreement, and shall consult to develop and implement a remedial plan to minimise each Party's losses.

16.2.3 The Affected Party shall promptly provide notice to the other Party of:  
the cessation of the Force Majeure Event; and  
its ability to immediately recommence performance of its obligations under this Agreement by reason of the cessation of the Force Majeure Event.

16.2.4 During the occurrence of a Force Majeure Event, each Party shall bear its own costs resulting from the occurrence of the Force Majeure Event.

## **16.3 Consequences of a Force Majeure Event**

16.3.1 Notwithstanding any other provisions of this Agreement, to the extent the Affected Party hereto is unable to perform any of its obligations under this Agreement due to a Force Majeure Event then the Affected Party shall be relieved from liability in respect of such obligations and shall be entitled to suspend performance of such obligations.

16.3.2 If it is agreed or determined that a Force Majeure Event has occurred, the Affected Party shall, provided that it has complied with the requirements not be liable for any failure to perform an obligation under this Agreement as a consequence of such Force Majeure Event, to the extent only that:

such performance is prevented, hindered or delayed by the Force Majeure Event; and

such failure could not have been mitigated by the Affected Party acting in accordance with Prudent Industry Practice.

- 16.3.3 Any time period specified in this Agreement for the performance of any obligation, including but not limited to the Long Stop Date, the Target Commercial Operation Date and the Commercial Operation Date, shall be extended on a day-for-day basis for each day that the relevant Force Majeure Event prevents, hinders or delays the Affected Party from performing that obligation within the time period, and the Term shall be extended.

#### **16.4 Termination on Account of Force Majeure**

If the Force Majeure Event or its direct effect or consequences on the operations of either Party is of such magnitude or will be (or it is more probable than not that it will be) of such duration that after a period of [twelve (12) months] it is unreasonable in all the circumstances for the Seller to perform its obligations under this Agreement, the Seller may upon not less than [thirty (30) days"] notice, terminate this Agreement.

### **17.1 Dispute Resolution**

#### **17.1 Procedure**

- 17.1.1 If any Dispute arises relating to this Agreement or any claims for damages or otherwise are made as the result of breach of any obligation hereunder, the Parties shall meet and use their reasonable efforts to resolve such dispute through good faith negotiation. The Parties acknowledge MERA's rules and entitlement to mediate the settlement of certain disputes between the Parties as provided for in the Generation Licence. The Parties shall follow the applicable dispute resolution as set by MERA.
- 17.1.2 Should the Parties fail to resolve such Dispute within [seven (7) days] of their meeting or such longer period as the Parties may agree, the matter shall be elevated to Chief Executive (or equivalent) level for resolution.
- 17.1.3 Should the Chief Executives (or equivalent) of the Parties fail to resolve such Dispute within [fourteen (14) days] of their meeting or such longer period as the Parties may agree, any Party may refer such dispute or difference to arbitration to be undertaken by three (3) arbitrators. The Parties shall agree on the identity of the arbitrators. Should the Parties fail to agree on the arbitrators within [fourteen (14) days] of the referral of the dispute to arbitration, the President of the Law Society of Malawi shall appoint the arbitrators from a list of approved arbitrators having the requisite experience and expertise in the field of the Dispute.
- 17.1.4 In the event of a technical dispute between the Parties during the Construction Period, the Parties shall refer the matter to the Chief Executive officers for resolution. In the event of a failure to resolve the

Dispute, the matter shall be referred to a technical expert ("Independent Expert") appointed by the Parties.

- 17.1.5 The Parties agree that the Independent Expert shall act as an expert and not as an arbitrator and shall decide those matters referred or reserved to the Independent Expert under this Agreement by reference to Prudent Industry Practice using the Independent Expert's skills, experience and knowledge with regard to such matters as the Independent Expert in his or her sole discretion considers appropriate.
- 17.1.6 The Parties agree they will make every reasonable effort to supply whatever information, documents and materials the Independent Expert considers necessary to address the matters referred and will act in good faith.
- 17.1.7 The Independent Expert will endeavour to provide the Independent Expert's decision within the shortest time possible. In most cases, it is expected that the Independent Expert should be able to supply a decision to the Parties within [fourteen (14)] Business Days. If for any reason, the Independent Expert requires longer than [fourteen (14)] Business Days, the Independent Expert will provide the Parties a written explanation for the required extension of time with an estimate of the likely timetable for a decision on the matter referred.
- 17.1.8 The Parties shall share equally the fees and expenses of the Independent Expert.
- 17.1.9 Should the Independent Expert fail to resolve such dispute within [fourteen (14)] Business Days or such longer period as the Parties may agree, any Party may refer such dispute or difference to arbitration.

## **17.2 Arbitration**

- 17.2.1 Except where otherwise specifically provided for, any Dispute at any time between the Parties or any failure by them to reach agreement in regard to any matter arising out of or in connection with this Agreement or its interpretation or effect, or arising in any way out of the termination or failure of any of them, shall be submitted to arbitration pursuant to the applicable Malawian arbitration laws. In the event, the arbitration laws are deemed to be found to be insufficient, the [AFSA/ UNCITRAL] Rules shall apply.
- 17.2.2 The decision of the arbitrators shall be given in writing as soon as reasonably possible after the dispute has been referred to the arbitrators but not longer than [six (6) weeks] from the date on which the hearing, including argument, was concluded. The decision shall be final and binding upon the Parties and shall not be subject to appeal to any court or tribunal of any kind unless manifestly unlawful or unjust, provided however that any Party may take action in any court of competent jurisdiction to enforce the arbitrators' decision, including its award in respect of the costs of arbitration.

- 17.2.3 Each Party shall bear its own costs and the costs of arbitration shall be borne equally by the Parties, unless the arbitrators decide otherwise.
- 17.2.4 Arbitration shall be conducted under the Malawian arbitration laws and shall be held in Malawi before three (3) arbitrators. In any event the arbitration shall be conducted in the English language.
- 17.2.5 The Parties may be legally represented and may present evidence by independent experts or as otherwise permitted by the arbitrators.
- 17.2.6 The aforesaid notwithstanding, any Party shall be entitled to approach any competent court having jurisdiction for urgent relief on an interim basis, pending the finalisation of the resolution.

### **17.3 Obligations during Disputes**

- 17.3.1 While a Dispute is continuing, the Parties are required to continue to perform their respective obligations, including the payment of the Energy Payment and/or Deemed Energy Payment, under this Agreement until such dispute has been fully and finally resolved.
- 17.3.2 Where a Dispute has been referred for resolution by arbitration in accordance with the Malawian arbitration laws, then neither of the Parties shall be entitled to exercise any rights or election arising in consequence of any alleged default by the other arising out of the subject matter of the Dispute until the Dispute has been resolved by the decision of the arbitrators.

### **17.4 Proceedings in Confidence**

All proceedings held by the Parties for the purpose of resolving Disputes shall be held in private and except as permitted or required by any other provision of this Agreement, shall not be open to third parties, it being agreed that for the purposes of this Agreement the record and outcome of any proceedings shall also constitute Confidential Information of each Party hereto.

## **18. Termination**

### **18.1 Events of Termination**

- 18.1.1 This Agreement shall, subject to the provisions of the Direct Agreement with the Lenders, terminate on the earliest to occur of:
- termination due to failure to satisfy the Conditions Precedent, On Effective Date; or
  - termination by the Seller due to a Change in Costs, (Termination for Change in Costs); or
  - termination by ESCOM SB following a Seller Event of Default, or
  - termination by the Seller following on ESCOM SB Event of Default, or
  - on receipt of a notice from the Seller.

## 18.2 Seller Event of Default

Each of the following shall constitute a “**Seller Event of Default**”, save to the extent excused by Force Majeure of this Agreement, or an ESCOM SB Event of Default or an Event of Deemed Availability, or an ESCOM SB Transmission Default, and shall entitle ESCOM SB to issue a Notice of Intention to Terminate to the Seller:

- 18.2.1 prior to the Commercial Operation Date, the Seller abandons construction of the Power Plant for a consecutive period of more than [ninety (90) days], without ESCOM SB's prior written consent, which shall not be unreasonably refused or delayed;
- 18.2.2 following the Commercial Operation Date, the Seller abandons the operation of the Power Plant for a consecutive period of more than [thirty (30) days], without ESCOM SB's prior written consent, which shall not be unreasonably refused or delayed;
- 18.2.3 the Seller fails to cause the Commercial Operation Date to occur by the date falling [six (6) months] after the Target Commercial Operation Date excluding in the event that the Commercial Operation Date did not occur due to any reason not attributable to the Seller;
- 18.2.4 a default is caused by the Seller under the Transmission Connection Agreement and is not remedied within the period, if any, specified for remedy for such breach in the Transmission Connection Agreement and the Transmission Connection Agreement is terminated;
- 18.2.5 the transfer of the Seller's rights or obligations under this Agreement, which are not permitted (Cession and Assignment) of this Agreement, excluding a transfer to an Affiliate and/or a wholly owned subsidiary;
- 18.2.6 the liquidation or insolvency of the Seller, except for any frivolous or vexatious petitions for winding up or insolvency or any petition for the winding up or insolvency of the Seller which is discharged, stayed or dismissed within [60 (sixty) days] of commencement thereof, or, if earlier, the date on which it is advertised;
- 18.2.7 the Seller is in material breach of its obligations under this Agreement and fails to remedy such breach within [sixty (60) days] of receipt of the notice of breach, provided that if such failure cannot be remedied by the Seller within such period of [sixty (60) days] with the exercise of reasonable diligence, then such cure period shall be extended by mutual agreement for an additional reasonable period of time (not to exceed a further [sixty (60) days]), so long as such failure is capable of being remedied with the exercise of reasonable diligence and the Seller is exercising reasonable diligence to remedy such failure;
- 18.2.8 cancellation of the Generation Licence;
- 18.2.9 failure of the Seller to pay any sum or sums due and owing to ESCOM SB within [thirty (30) days] of the due date therefor;
- 18.2.10 any environmental failure as follows:

where, as a result of an environmental failure on the part of or attributable to the Seller, a Seller Consent is withdrawn by the Competent Authority rendering it unlawful for the Seller to carry on any activity for which such permission is required; or

where, as a result of an environmental failure on the part of or attributable to the Seller, a directive or order is made by any Competent Authority or any court for the cessation of any of the Seller's activities, in either case rendering it unlawful for the Seller to perform any material obligations under this Agreement; or

in the event of any persistent or recurring material environmental failures over a period of at least [six (6) consecutive months], in respect of which the Seller has received a final warning to desist, from a Competent Authority, with which the Seller has not complied.

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

#### **18.4 ESCOM SB Event of Default**

Each of the following shall constitute an "ESCOM SB Event of Default" to the extent that it is not caused by a Force Majeure Event or Seller Event of Default and shall entitle the Seller to issue a Notice of Intention to Terminate to ESCOM SB:

- 18.4.1 failure of ESCOM SB to pay any sum or sums due and owing to the Seller within [thirty (30) days] of the due date therefor;
- 18.4.2 ESCOM SB is in material breach of its obligations under this Agreement and fails to remedy such breach within [60 (sixty) days] of receipt of the notice of breach, provided that if such failure cannot be remedied by ESCOM SB within such period of [sixty (60) days] with the exercise of reasonable diligence, then such cure period shall be extended by mutual agreement for an additional reasonable period of time (not to exceed a further [thirty (30) days]), so long as such failure is capable of being remedied with the exercise of reasonable diligence and ESCOM SB is exercising reasonable diligence to remedy such failure, excluding in the event of ESCOM SB's failure to pay any sum or sums due and owing to the Seller under this Agreement, which shall be remedied within [thirty (30) days] of receipt of the notice of breach;
- 18.4.3 a ESCOM [SB] Transmission Default occurs and is not remedied within the period, if any, specified for remedy for such breach in the Transmission Connection Agreement and the Transmission Connection Agreement is terminated; or
- 18.4.4 the liquidation or insolvency of ESCOM SB, except for any frivolous or vexatious petitions for winding up or insolvency or any petition for the winding up or insolvency of ESCOM SB which is discharged, stayed



or dismissed within [sixty (60) days] of commencement thereof or, if earlier, the date on which it is advertised.

- 18.5 ESCOM SB shall, to the extent that it has knowledge of the same, promptly notify the Seller in writing of the occurrence of any ESCOM SB Event of Default.

#### **18.6 Notice of Intention to Terminate and Termination Notice**

- 18.6.1 A Party may serve a Notice of Intention to Terminate on the other Party upon the occurrence of any of the following events:

in the event that the Conditions Precedent are not satisfied (or waived by both Parties);

in the event that either Party is unable to perform all or a material part of its obligations under this Agreement for reasons for a Force Majeure Event (or the effects thereof) continuing for a consecutive period of more than [twelve (12) months];

in the event that a Change in Costs entitling it to issue such a Notice of Intention to Terminate (Termination for Change in Costs) occurs; or

in the event of a Seller Event of Default or an ESCOM SB Event of Default (as the case may be).

- 18.6.2 Following the issue of a Notice of Intention to Terminate except if due to a default in payment by ESCOM SB, the Parties shall consult for [thirty (30) days], or such longer period as the Parties may agree, to determine what steps need to be taken to prevent termination of this Agreement. Failing agreement within such time, the Party having given the Notice of Intention to Terminate may terminate this Agreement forthwith by delivering a Termination Notice to the defaulting Party.

- 18.6.3 The termination of this Agreement shall be subject to the Direct Agreement, and in the event of a conflict, the terms of the Direct Agreement shall prevail.

#### **18.7 Consequences of Termination**

- 18.7.1 Upon termination of this Agreement, both Parties shall be excused and relieved of all obligations and liabilities under this Agreement, except for payment of all amounts due, and liabilities resulting from any action, inaction or event occurring before the Termination Date or as a result of the termination.

- 18.7.2 On termination of this Agreement for a ESCOM SB Event of Default, ESCOM SB shall be liable to pay the Seller, within [sixty (60) days], the relevant Termination Amount set out in Annexure G (the Termination Amount), to the account specified by the Seller, which amount shall be payable gross of any applicable withholding or other Taxes, and undertake such other actions in favour of the Seller as are specified in Annexure G (The Termination Amount).

- 18.7.3 In the event of a termination by ESCOM SB as a result of a Seller Event of Default, ESCOM SB shall be entitled to claim its direct losses and costs arising from such termination. These losses and costs shall be capped at [10%] of the EPC Contract Amount, and calculation thereof shall be based on Monthly Generation Forecasts and the rates as set out in Annexure C (Energy Payment). In such event ESCOM SB, at its sole discretion, shall have the option to acquire the Power Plant (inclusive of stock and inventory) at a price equivalent to outstanding debt for the Power Project owing, at the date of termination, by the Seller to the Lender(s).
- 18.8 The Seller shall, within [fourteen (14) days] of payment of the Termination Amount or in the event where ESCOM SB elects to acquire the Power Plant (inclusive of stock and inventory) sign the necessary agreements, including title documents especially also as regards immovable and movable property and land rights and the like in order to ensure the transfer of the title in the Power Plant and the Connection Facilities to ESCOM SB. The Seller shall ensure that all warranties, guaranties, intellectual property and other rights necessary for the operation of the plant and equipment shall be transferred free of charge to ESCOM SB.
- 18.9 For avoidance of doubt, ESCOM SB shall not assume any liability for termination of this Agreement as a result of a Force Majeure Event, Change in Law, Government Action, or a Seller Event of Default.

## **19 Liability for Damage or Loss**

### **19.1 Indemnity**

- 19.1.1 Each Party shall indemnify, defend and hold harmless the other Party against all losses, damages, claims, liabilities, costs or expenses which the other Party may suffer or incur by reason of any claim for or in respect of: (i) the death or personal injury of any individual or (ii) damage to property or (iii) any third-party liabilities and damages, arising out of the indemnifying Party's default under this Agreement, save where that default is excused in terms of Force Majeure of this Agreement, except to the extent that the Party seeking to be indemnified is at fault or is negligent.
- 19.1.2 This amount shall be capped to [ ] but shall not, for the avoidance of doubt, apply to any Termination Amount payable.

### **19.2 Liability**

- 19.2.1 In the event that any losses, claims or damages ("Losses") in relation to any death or personal injury arises out of or results from the joint or concurrent negligence or the intentional conduct of both Parties, each Party shall be liable in proportion to its degree of negligence or fault. The Parties shall make all reasonable endeavours to mitigate any Losses they may suffer as a result of the breach of any of the other Party's material obligations under this Agreement.

19.2.2 Neither Party shall be liable to the other Party save as expressly provided for in this Agreement.

### **19.3 Damages**

19.3.1 Other than as provided in this Agreement, in no event shall either Party be liable to the other Party, at law or in equity and whether based on contract, tort or otherwise, for any indirect, incidental, special or consequential damages incurred by such Party or any third party as a result of the performance or non-performance of the obligations imposed pursuant to this Agreement, irrespective of the causes thereof, including fault or negligence. To the extent that any damages required to be paid hereunder are liquidated, the Parties acknowledge that such damages are difficult or impossible to determine, or otherwise obtaining an adequate remedy is inconvenient, and the liquidated damages constitute a reasonable approximation of the harm or loss that may be suffered by the Party affected thereby.

19.3.2 For avoidance of doubt, the aforesaid limitation on liability does not affect or limit the Termination Amount payable to the Seller by ESCOM SB or payment by the Seller to ESCOM SB in case of termination as a result of Seller Event of Default.

## **20 Project Insurances**

### **20.1 Insurances and information**

20.1.1 The Seller shall, obtain and maintain in effect, at its own cost and expense, such insurance coverage as is required by:

any Laws; and

the standards of a Reasonable and Prudent Operator,

(together with insurances procured and below, the "Project Insurances").

20.1.2 The Seller shall take reasonable steps to ensure that it and its contractors obtain and maintain in effect at all times such insurance cover as is appropriate for a contractor acting as a Reasonable and Prudent Operator.

20.1.3 Nothing out of the Project Insurance shall prevent the Seller from procuring additional insurance cover, over and above such insurance coverage as it is required to procure.

20.1.4 The Seller shall provide a copy of all Project Insurances to ESCOM SB, along with such documentation as may be necessary to evidence that the Project Insurances are in full force and effect and otherwise in compliance with the other requirements of the Project Insurance.

20.1.5 Not later than [thirty (30) days] after the date on which the policy for any Project Insurance is issued, amended to any material extent or renewed in accordance with its terms, the Seller shall cause its insurers or agents to provide ESCOM SB with such documentation as

may be reasonably necessary to evidence that such policy is in force and the amount of the cover thereunder.

- 20.1.6 The Seller shall provide ESCOM SB, from time to time, with copies of receipts or statements from the Seller's insurers or agents evidencing payment by the Seller of the premiums in respect of each Project Insurance and the amount of cover.

## **20.2 Endorsements and clauses**

- 20.2.1 The Seller shall cause its insurers to waive all rights of subrogation against ESCOM SB in respect of a claim arising under any of its Project Insurances (except, in so far as the waiver of such rights against the Seller) is concerned in circumstances where the Seller has by its act or omission vitiated the Project Insurances.

- 20.2.2 The Seller shall ensure that the policy for each of its Project Insurances contains a provision:

naming ESCOM SB as additional insured thereunder (other than in respect of loss of revenue related to Project Insurances);

that each additional insured shall be separately indemnified in respect of claims by them under the Project Insurances, provided that the liability of the insurer concerned shall not be increased beyond the amount for which the insurer would have been liable for in the absence of such separate indemnity provision;

for automatic reinstatement of the sum insured on the basis that the sum insured shall not be reduced by the amount of any claim whether paid or due and payable; and

recording that such Project Insurance is primary insurance and shall not be subject to contribution by any other insurance.

## **20.3 Application of insurance proceeds**

- 20.3.1 Unless ESCOM SB otherwise agrees in writing, the Seller shall apply proceeds of any insurance claim made due to loss or damage to the Power Plant or any part of the Power Plant (other than claims under business interruption insurance, delay in start-up, any other loss of revenue policies or third party liability policies) towards reinstatement, reconstruction, replacement, repair or renewal of such loss or damage in the first instance.

- 20.3.2 Notwithstanding the aforesaid, it is acknowledged and agreed that the Lenders will have security over and rights under the insurance policies, and further, the Lenders shall have the right to apply insurance proceeds in excess of the amount agreed under the Finance Documents to prepayment of the outstanding debt under the Finance Documents.

## **21 Waiver of Sovereign Immunity**

The Parties hereby unconditionally and irrevocably agree that the entry into and performance of this Agreement by the Parties constitute private and commercial acts

and neither of the Parties nor any of their assets is entitled to immunity from arbitration or legal process or jurisdiction on grounds of sovereignty or otherwise.

## **22. Cession and Assignment**

### **22.1 Prior Consent**

The Parties shall not be entitled to cede or assign this Agreement or any of its rights and obligations without the prior written consent of the other Party except to the Lenders for the purpose of providing security under the Finance Documents. Such consent shall not be unreasonably withheld.

### **22.2 Restructuring**

22.2.1 Notwithstanding the above, ESCOM SB shall be entitled to cede, assign or transfer its rights and obligations under this Agreement to a third party but only in the context of: (i) the dissolution of ESCOM SB; (ii) the restructuring, amalgamation, reorganisation or analogous event of ESCOM SB; or (iii) the transfer of all or any material part of ESCOM [SB's] property, assets and undertaking to a third party or successor, provided that, in each case such dissolution, restructuring, amalgamation, reorganisation, analogous event or transfer is at the instruction of or sanctioned by the Government of the Republic of Malawi or any Competent Authority.

22.2.2 In the event of a restructuring or reorganisation of ESCOM SB resulting in the cession or assignment of this Agreement to another entity in the ESCOM [SB] group of companies, ESCOM [SB] shall be jointly and severally liable with the newly created entity for the performance of its obligations in terms of this Agreement.

22.2.3 In the event that the restructuring or reorganisation of ESCOM [SB] resulting in the cession or assignment of this Agreement to an entity not forming part of the ESCOM [SB] group of companies, such restructuring or reorganisation shall not take place without the prior written consent of the Seller's Lenders, provided that such consent shall not be unreasonably withheld.

## **23 Direct Agreement**

23.1 ESCOM SB recognises that the Seller may wish to finance or refinance the Power Project through limited recourse or other financing and that the entering into of the Direct Agreement shall be a precondition to the provision of such finance. ESCOM SB will co-operate in good faith with the Seller and its Lenders to agree and enter into such a Direct Agreement incorporating as a minimum those matters set out in n Annexure L (Provisions of Direct Agreement).

23.2 The Seller may, subject to the prior written approval of ESCOM SB, and subject to prior regularly oversight, refinance or change its financiers in order to obtain financing at better terms. The Parties agree that in such an event the Capacity Payment shall be adjusted, subject to the prior approval of the

NERA, in order to ensure that the benefit is passed through to ESCOM SB on a 50/50 basis.

- 23.3 The Seller shall submit to the Buyer within a reasonable time the re-calculation of the Seller's Revised Capacity Payment derived from the Base Case Financial Model, setting forth in reasonable detail the basis of and the calculations for any necessary adjustments to the Capacity Payment arising from such Change in Costs.
- 23.4 Within [fourteen (14) days] after the date of the re-calculation delivered the Buyer shall notify the Seller whether it agrees or disagrees with Seller's Revised Capacity Payment. If the Buyer notifies the Seller of its disagreement, the Parties agree to meet within [7 (seven) days] and discuss, in good faith, the Seller's Revised Capacity Payment.
- 23.5 In the event that the Buyer agrees with the re-calculation delivered or as negotiated and subject to the approval of MERA the Energy Payment, the Calculation of the Deemed Energy Payment shall be amended accordingly.
- 23.6 The Seller Revised Capacity Payment shall apply as from the date on which the Buyer's annual tariff revision is approved by MERA and takes effect (falling no later than [twelve (12) months] from the previous the Buyer application for tariff review).
- 23.7 In the event, the Parties have met to discuss the re-calculation of the Seller's Revised Capacity Payment and the Buyer is in disagreement with the Sellers calculations, the Parties shall be entitled to refer the matter to MERA for mediation. If MERA does not approve the Seller's Revised Capacity Payment or in the event that MERA determines a revised Capacity Payment which is less beneficial to the Seller than the Seller's Revised Capacity Payment, the Parties shall be entitled to refer the matter to an Expert for a determination.
- 23.8 In the event the Expert rules in favour of the Buyer, and MERA or the Seller does not implement the re-calculated Capacity Payment as determined by the Expert, the Buyer may terminate this Agreement and the Seller shall not have any claim and/or demand and shall not be entitled to any indemnification and/or reimbursement in connection with such termination.

## **24 Severability**

Each Party agrees that it will perform its obligations under the terms of this Agreement in accordance with all applicable Laws, rules and regulations now or hereafter in effect. If any Clause or Clauses of this Agreement is found to be illegal or unenforceable, then the Parties shall take all possible steps to re-negotiate and to re-structure this Agreement in such a manner that it will comply with provisions of such laws. If this cannot be done, the offending Clause or Clauses will be removed and regarded as pro non scrip to, and the remaining Clauses of this Agreement shall remain binding on the Parties.

## **25 Anti-corruption Measures**

Each Party to this Agreement undertakes not to offer, directly or indirectly, an advantage to third parties and not to request, promise or accept for its own benefit or

for the benefit of a third party, illicit gifts with the purpose of obtaining favourable judgement in the performance of this Agreement or any associated projects or any other negotiations between the Parties not directly related to this Agreement. The Parties undertake to impose and enforce these anti-corruption measures on their employees, Affiliates and agents.

## **26 Confidentiality**

### **26.1 Confidential Information**

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

### **26.2 Duty to Maintain Confidentiality**

Each Party will use the same means as it uses to protect its own confidential information, but in no event less than reasonable means, to prevent the disclosure and to protect the confidentiality of such information. No Confidential Information will be disclosed by the recipient Party, other than to its agents, representatives or employees, the Lenders and their advisors and to Contractors, without the prior written consent of the other Party.

### **26.3 Exclusions**

These provisions shall not apply to information which is:

- 26.3.1 publicly known or has become publicly known through no unauthorised act of the recipient Party;
- 26.3.2 rightfully received by the recipient Party from a third party;
- 26.3.3 independently developed by the recipient Party without use of the other Party's information;
- 26.3.4 disclosed by the other Party to a third party without similar restrictions;
- 26.3.5 required to be disclosed pursuant to a requirement of a Competent Authority or any applicable Law, so long as the Party required to disclose the information gives the other Party prior notice of such disclosure; or
- 26.3.6 publicly disclosed with the other Party's written consent.

### **26.4 Disclosure**

All media releases, public announcements and public disclosures by any Party or their respective employees or agents relating to this Agreement or its subject matter, including without limitation promotional marketing material, shall be co-ordinated with and approved by each Party prior to the release thereof. The foregoing will not apply to any announcement intended solely for internal distribution by any Party or to any disclosure required by legal,

accounting or regulatory requirements beyond the reasonable control of the Party in question.

## **27 Survival on Termination**

Termination of this Agreement shall not affect the accrued rights and liabilities of the Parties hereto and the provisions of Applicable Law and Jurisdiction Confidentiality shall continue to have effect notwithstanding the termination of this Agreement.

## **28 Notices**

### **28.1 Domicilia Citandi et Executandi**

The Parties choose as their domicilia citandi et executandi their respective addresses specified hereof, for all purposes arising out of or in connection with this Agreement, at which addresses all process and notices arising out of or in connection with this Agreement, its breach or termination may be served upon or delivered to the Parties.

### **28.2 Address for Notices**

The Parties' respective addresses shall be:

	In the case of the Seller	In the case of ESCOM SB
Addresses:		
Fax:		
Email:		
Attention:		

Or at such other postal and physical address in Malawi, not being a post office box or poste restante, or which the Party concerned may notify the other in writing.

### **28.3 Delivery of Notices**

All notices, notifications, requests, demands or other communications given in terms of this Agreement shall be in writing and shall:

- 28.3.1 if delivered by hand be deemed to have been duly received by the addressee on the date of delivery;
- 28.3.2 if posted by prepaid registered post be deemed to have been received by the addressee on the 7th (seventh) day following the date of such posting;
- 28.3.3 if successfully transmitted by facsimile with successful transmission confirmed be deemed to have been received by the addressee one day after dispatch; or
- 28.3.4 if successfully transmitted by electronic mail and having received a read receipt from the addressee, be deemed to have been received by the recipient on the first Business Day on the day of receiving the confirmation receipt.



## **28.4 Written Notice**

Notwithstanding anything to the contrary contained in this Agreement, a written notice or communication actually received by one Party from the other, including by way of facsimile or electronic mail transmission, shall be adequate written notice or communication to such Party.

## **29 Shareholding in Seller**

The controlling shareholder (holder of not less than fifty-one percent (51%)) of the shares in the Seller at the Signature Date shall not transfer control in the Seller during the period of [three (3) years] after Commercial Operation Date, unless such transfer of control has been approved by ESCOM SB in writing prior thereto, such approval not be unreasonably withheld. ESCOM SB's consent shall not be required in connection with a transfer of shares in the Seller resulting from the enforcement of security provided to the Lenders. However, ESCOM SB shall be notified with respect to such transfer of shares.

## **30 General and Miscellaneous**

### **30.1 Sole Record of Agreement**

This Agreement constitutes the sole record of the agreement between the Parties with regard to the subject matter hereof. No Party shall be bound by any express or implied term, representation, warranty, promise or the like not recorded herein.

### **30.2 No amendments except in writing**

No addition to, variation of, or agreed cancellation of, this Agreement shall be of any force or effect unless in writing and signed by or on behalf of the Parties.

### **30.3 Waivers**

Any relaxation or indulgence which any Party may grant to any other shall not constitute a waiver of the rights of that Party and shall not preclude that Party from exercising any rights which may have arisen in the past or which might arise in future.

### **30.4 Approvals and Consents**

An approval or consent given by a Party under this Agreement shall only be valid if in writing and shall not relieve the other Party from responsibility for complying with the requirements of this Agreement nor shall it be construed as a waiver of any rights under this Agreement except as and to the extent otherwise expressly provided in such approval or consent, or elsewhere in this Agreement.

IN WITNESS, whereof the said Parties have signed this Agreement on the dates and at the places specified hereunder.

On behalf of the Seller by the signatory who warrants that he is duly authorised:

Signed: \_\_\_\_\_ Title: \_\_\_\_\_

Witness: \_\_\_\_\_ Title: \_\_\_\_\_

This \_\_\_\_\_ day of \_\_\_\_\_

At: \_\_\_\_\_

On behalf of ESCOM SB by the signatory who warrants that he is duly authorised:

Signed: \_\_\_\_\_ Title: \_\_\_\_\_

Witness: \_\_\_\_\_ Title: \_\_\_\_\_

This \_\_\_\_\_ day of \_\_\_\_\_

At: \_\_\_\_\_

## **Annexure A Consents**

### **A.1 ESCOM SB's Consents**

- A.1.1 [Transmission licence amendment (if required)] / EIA approvals / Board consent
- A.1.2 Letter of No Objection from ESCOM SB's lenders
- A.1.3 Approval by MERA of the Base Tariff and tariff structure

### **A.2 The Seller's Consents**

- A.2.1 Those stipulated in the conditions of the Licence including suspensive conditions, site permit, EIA, Generation licence

## **Annexure B Single Line Diagram of Power Plant**

## **Annexure C - Capacity and Energy Payment**

This Annexure sets out the Capacity and Energy Payment payable under Clause Error! Reference source not found. of this Agreement, for each Billing Period.

The year referred to in this Annexure is the ESCOM SB financial year i.e. [ ] and not a calendar year i.e. from 1st of January to 31st of December.

### **C.1 Capacity (whether before or after the Commercial Operation Date)**

The Capacity Payment shall be composed of the following three (3) components:

C.1.1 Base Capacity Payment: is the Payment for Capacity Available during the Billed Period shall be based on a base Capacity Payment of [ ] (the "Base Capacity Payment ") as of [ ]. The Base Capacity Payment shall be indexed on an annual basis, according to the formula in Section A4 below. The then applicable Indexed Tariff shall be multiplied by the Available Capacity calculated as in clause C.6 of this annexure during the Billing Period.

*Note: the Base Capacity Payment would arise either from the result of a competitive tender in which Seller was awarded and it offered its value in its economical offer, or of a direct negotiation between the SB and the Seller. It is assumed that this Base Capacity Payment will cover or the fixed costs of the Seller, including CAPEX, OPEX, return on investment (IRR), taxes and any other cost related with the project.*

C.1.2 Transmission Use of System Charge – as defined in the Transmission Connection Agreement.

C.1.3 MERA and any other Levies, if any.

Therefore, the Capacity Payment for the Billing Period, from ESCOM SB to the Seller, shall be as calculated in clause C.3 of this Annexure.

to the CPI (last published)

### **C.2 Transmission Use of System Charge**

The Transmission Use of System Charge shall be calculated based on the Connection Agreement between the Seller and ESCOM's TL and the transmission charges are calculated in accordance with MERA Transmission Tariff methodology.

### **C.3 Calculation of the Capacity Payment**

Seller shall be entitled to Capacity Payments in respect of Capacity in each month calculated as follows:

$$CP_p = CCR_p \times CC \times MA$$

Where

$CP_p$  = the Capacity Payment for month p (expressed in MKW);

$CCR_p$  = the Capacity Charge Rate for month p (expressed in MKW/kW);

CC = the Contracted Capacity (expressed in kW).

MA= Monthly Availability

The value of  $CCR_a$  will be adjusted each year according with the formula:

$$CCR_{pa} = CCR_0 \frac{CPI_a}{CPI_0}$$

Where:

$CCR_0$  = [initial value of CCR as agreed by Seller and SB]

$CPI_0$  = [value of CPI at the date of Commencement of the Agreement]

$CPI_a$  = value of CPI on year “a”

The Unit Capacity Payment Rate for the term of the Agreement shall be US Dollars [] per MW/yr, before the Output Payments finishes, and [...] after that date.

#### **C.4 Monthly Availabilities**

For each month in each Operating Year, starting with the month in which the Full Implementation Date occurs, there shall be calculated a Monthly Target Availability and an Actual Monthly Availability as follows:

##### **Monthly Target Availability:**

$$MA = AC_{tp} / MTAp$$

$AC_{tp}$  =  $\sum$  Actual Available Capacity each hour of the month p in kW

$H_p$  = Hours in month p.

$$MTA_p = (CC \times H_p) - \sum SMA_p - \sum USMA_{pt}$$

where

$MTA_p$  = Monthly Target Availability (expressed in kW);

CC = Contracted Capacity (expressed in kW);

$SMA_p$  = Scheduled Maintenance Allowance in month p (expressed in kW) representing the total capacity not available for delivery due to scheduled maintenance outages computed assuming the Plant would otherwise have been Dispatched at its Contracted Capacity.

Hsma= Number of hours of the month p

USMA<sub>p</sub> = Unscheduled Maintenance allowance in month p  
(expressed in kW)

## C.5 Energy Payments

For each month in each Operating Year, starting with the month in which the Full Implementation Date occurs, the Energy Payment shall be calculated as follows:

$$EP_m = EDL_m * EPRICE_m$$

Where

EP<sub>m</sub>: energy payment in month “m”

EDL<sub>m</sub> : energy delivered to the Transmission System in month “m”, as established in the Daily Nominations, corrected by changes ordered by the SMO.

EPRICE<sub>m</sub>: current energy price in month “m” agreed by the Parties

Note: the difference between the metered energy as informed by the SMO and the Daily Nominated energy will be settle by the SB based on the criteria established in the Market Rules and Market Procedures.

The value of EPRICE will be adjusted each year or when the fuel price change more than 10%, according with the formula:

$$EPRICE_m = a \frac{CPI_m}{CPI_0} b \frac{FP_m}{FP_0} EPRICE_0$$

Where

EPRICE<sub>0</sub> = initial value of CCR as agreed by Seller and SB

CPI<sub>0</sub> = value of CPI at the date of Commencement of the Agreement

CPI<sub>m</sub> = value of CPI at the date of recalculation of the energy price

FP<sub>m</sub>: fuel price at the date m of recalculation of the energy price

FP<sub>0</sub>: fuel price at the date Commencement of the Agreement

a = [value agreed at the Commencement of the Agreement]

b = [value agreed at the Commencement of the Agreement]

a + b = 1

## **C.6 Start Up cost (optional clause)**

The Parties agree that every time that one Unit of the Seller's plant is started up because the requirements of the Daily Nomination, or because instructions of the SMO, the Seller will receive a payment of [] [].

## **C.7 Minimum Power Generation (optional clause)**

The Parties agree that the Seller's plant has the right of a minimum energy generation of [] MWh. In case the energy produced is lower than this value, the Seller shall have the right to receive a payment of [] for each MWh non-generated below the agreed minimum generation.

Each month, at the effects of the compensation for low generation, the minimum energy generation used to calculate the compensation will be reduced applying to the agreed value the coefficient MA as defined in clause C.3 of this Annexure.

## **Annexure D Layout Diagram of Power Plant**

## **Annexure E Sharing of Environmental Credits**

In case that the Power Project will be entitled to receive Environment Credit, the Seller shall pay to ESCOM SB a monthly payment equal to [fifty percent (50%)] of the net benefit received by the Seller from the sale of Environmental Credits ("**ESCOM SB's EC Payment**") in accordance with the Net Energy produced during the Billing Period. The net benefit shall equal the total income from the sale of Environmental Credits minus all the costs and expenses related to such Credits. ESCOM SB's EC Payment shall be made to ESCOM SB only once payment has been received by the Seller for the sale of Environmental Credits.

## **Annexure F Operating Committee**

### **F.1 Appointment of Committee**

Within [five (5) days] of the Signature Date, the Parties shall form an Operating Committee for day-to-day management of this Agreement. Each Party shall appoint [two (2)] representatives and an alternate for the Operating Committee. Within [fourteen (14) days] of the date of this Agreement, each Party shall provide to the other Party notice of the appointment of its Operating Committee representatives and their particulars. The first meeting of the Operating Committee shall be convened no later than [two (2) weeks] after the final appointment. The committee shall maintain and adopt an

appropriate record of its deliberations, which record shall in the event of a dispute constitute conclusive evidence of the decisions taken in respect of the subject matter therein.

## **F.2 Responsibilities**

The Operating Committee shall be responsible for (a) coordinating the Construction schedules of each Party's portion of the Power Plant, the Connection Facilities [and any required modifications to the Transmission System], and (b) ongoing coordination of areas of mutual interest and concern involving the Power Plant and the Connection Facilities. Without limiting the generality of the foregoing duties, the Operating Committee shall:

- F.2.1 Coordinate the respective programs of the Parties for the construction, commissioning and testing of facilities and equipment, and the respective commissioning procedures provided that the Operating Committee is not authorized to make any changes to any of such programs, but only to provide its recommendations;
- F.2.2 Without derogating from the Seller's rights to compensation and/or any other remedy under this Agreement, to develop steps to be taken on the occurrence of any event of Force Majeure, or the shutdown or reduction in capacity for any other reason of the Power Plant or the Connection Facilities;
- F.2.3 Coordinate the scheduling of maintenance affecting the operations of the Power Plant;
- F.2.4 Coordination of recommendations for changes in either the Power Plant or the Connection Facilities to affect the operational requirements of ESCOM SMO's control of the Transmission System;
- F.2.5 Discuss the proposal of SB on the Monthly and Weekly generation forecasts. Agree on the Daily Nominations to be informed to SMO, and analyse and approve changes to the Daily Nominations proposed by the SMO;
- F.2.6 Address safety matters affecting the Parties, their Contractors and their respective employees as related to the Power Project and the interconnection between the Power Plant [and Transmission System];
- F.2.7 Recommend to the Parties changes regarding the responsibilities of the Operating Committee.
- F.2.8 However, it is hereby agreed that the Operating Committee and/or its members will not have any liability towards the Power Project and/or the Parties.

## **F.3 Meetings**

The Operating Committee shall only act by unanimous agreement, with the exception of the Monthly and Weekly Generation Forecasts and Daily Nominations, where in case of non-agreement, the opinion of the SB will

prevail. The Operating Committee shall develop and implement written policies regarding the frequency of meetings and minutes of meetings. The Operating Committee shall not have authority to modify or alter the rights and obligations of the Parties under this Agreement.

#### **F.4 Reporting Relationships**

The Operating Committee shall report their activities and recommendations to the Parties or others designated by the Parties.

#### **Annexure G Calculation of the Termination Amount**

In the event of termination as a result of an ESCOM SB Event of Default, ESCOM SB will pay an amount (a "**Termination Amount**") calculated as follows:

- "Breakage Costs"** means all Losses that have been or will be reasonably and properly incurred by the Seller and its Contractors as a result of the termination of this Agreement, including (without limitation):
- the cost of any materials or goods ordered for the purpose of the Power Project,
  - (a) any expenditure incurred in anticipation of the provision of services or the completion of works in the future;
  - (b) any contracts placed that cannot be cancelled without such Losses being incurred;
  - (c) the cost of demobilization of the Power Project;
- redundancy payments for employees of the Seller and its Contractors that have been or will be reasonably incurred by the Seller or its Contractors as a result of termination of this Agreement.
- "Equity Contributions"** means at the relevant time, an amount equal to the aggregate value of each of:
- 1 the paid-in share capital of the Seller;
  - (d) the principal of Shareholder Debt advanced to the Seller; and
  - (e) all capital contributions made by the Shareholders to the Seller.
- "Losses"** means all damages, losses, liabilities, costs, expenses (including legal and other professional charges and expenses), and charges whether arising under statute, contract or at law or in connection with judgments, proceeding, internal costs or demands.



<b>"Outstanding Debt"</b>	means the aggregate of: 1 all principal, accrued interest (including without limitation default interest), fees costs, expenses and other liabilities payable under the Finance Documents; and (f) any amount equal to the amount evidenced by the Lenders as being the cost to it of breaking any funding arrangements or hedging arrangements entered into under the Finance Documents (including, for avoidance of doubt, any costs associated with breaking any fixed rate loan).
<b>"Reduced Equity IRR"</b>	means [ %]
<b>"Relevant Date"</b>	means, if the date of termination of this Agreement is (i) prior to the Commercial Operations Date, the date of such termination, or (ii) on or after the Commercial Operations Date, the Commercial Operations Date.
<b>"Regulated Equity IRR"</b>	means[%].
<b>"Shareholder"</b>	means a holder of any share, or any other security giving the right to subscribe for or convert into a share, in the Seller.
<b>"Shareholder Debt"</b>	means at any time any loan or other debt provided by the Shareholders to the Seller and which is subordinated to the Outstanding Debt under the Finance Documents.

## **G.1 Compensation on Termination for ESCOM SB Event of Default**

If this Agreement is terminated for an ESCOM SB Event of Default then the amount payable by ESCOM SB shall equal the aggregate of the following, calculated at the date of termination:

G.1.1 the Outstanding Debt as at that date;

the aggregate Equity Contributions made as at such date;

an amount which, on the date of payment by ESCOM SB, gives an internal rate of return on the Equity Contributions as at the Relevant Date equal to the Regulated Equity IRR;

any Breakage Costs incurred by the Seller and its Contractors; and

any documented costs and expenses of enforcement or protection or preservation of security properly and reasonably incurred by the Lenders from the date of termination to the date of payment by ESCOM SB.

G.1.2 Title in the Power Plant shall be transferred to ESCOM [SB] from the Seller, within [fourteen (14) days] of payment of the Termination Amount as contemplated in this Annexure.

- G.1.3 ESCOM SB shall not assume any liability for termination of this Agreement as a result of a Force Majeure event, Change in Law, Government Action, or a Seller Event of Default.

## **Annexure H Construction Programme**

## **Annexure I Commissioning Schedule**

### **I.1 Acceptance/Performance Test**

- I.1.1 Prior to synchronisation of the Power Plant, the Seller shall be required to get the Power Plant certified for the requisite acceptance/performance test with respect to the entire Power Plant as may be laid down by an agency identified by both Parties to carry out testing and certification for the Power Plant.

### **I.2 Synchronisation with and connection to the Transmission System**

- I.2.1 The Seller shall give ESCOM SB at least [60 (sixty) days"] advanced preliminary written notice and at least [30 (thirty) days] advanced final written notice, of the date on which it intends to synchronise the Power Plant to the Transmission System.
- I.2.2 The Power Plant may only be synchronised and/or connected by the Seller to the Transmission System when it meets all the connection conditions prescribed in any [Grid Code] then in effect and otherwise meets all other legal requirements for synchronisation to the Transmission System and provided that:
- the Metering Equipment has been installed, tested and successfully commissioned in accordance with the minimum testing standards referred to in the [Grid Code] and any additional testing standards as may apply in relation thereto;
- the Transmission Connection Agreement is in full force and effect and any conditions precedent to its effectiveness have either been fulfilled or duly waived in accordance with its terms; and
- the Connection Works referred to in the Transmission Connection Agreement have been completed and commissioned in accordance with the terms of the Transmission Connection Agreement and the [Grid Code].
- I.2.3 The synchronisation equipment shall be installed by the Seller at its generation facility of the Power Plant at its own cost. The Seller shall synchronise its system with the Transmission System only after the approval of synchronisation scheme is granted by the [National Control Centre].
- I.2.4. The Seller shall immediately after each synchronisation/tripping of the Power Plant, inform the [National Control Centre] in accordance with the applicable [Grid Code].

### **I.3 Testing and commissioning**

- I.3.1 Following connection and/or synchronisation, as the case maybe, of the Power Plant with the Transmission System the Seller shall test and commission the Power Plant in accordance with the [Grid Code], the Transmission Connection Agreement, the standards of a Reasonable and Prudent Operator and the Construction Programme, so as to cause the Commercial Operation Date to fall on or before the Target Commercial Operation Date.
- I.3.2 The Seller shall be required to conduct the Power Project Acceptance Test for the purposes of, inter alia, achieving the Commercial Operation Date and determining the initial capacity of the Power Plant (and in this regard, the Power Project Acceptance Test shall serve as the dependable capacity Test for the Power Plant).
- I.3.3 The Seller shall give ESCOM SB not less than [ten (10) days'] prior written notice of each of the Power Project Acceptance Tests, and ESCOM SB or its nominated representative shall be entitled to attend and witness the Power Project Acceptance Tests.
- I.3.4 At all times from the Effective Date to the Commercial Operation Date (including during the conduct of the Power Project Acceptance Tests), ESCOM SB shall co-operate with the Seller, provide load for such testing and, subject to the terms of this Agreement, at the request of the Seller, dispatch the Power Plant up to its full available capacity as notified by the Seller to ESCOM SB immediately prior to the Power Project Acceptance Tests.
- I.3.5 Immediately following the Power Project Acceptance Tests, the Seller shall provide ESCOM SB with a copy of all relevant data and reports from the relevant Power Project Acceptance Test, including, in respect of the Power Project Acceptance Test, the determination of the dependable capacity of the Power Plant.
- I.3.6 If a Power Project Acceptance Test has been commenced and the Seller is prevented, hindered or delayed in completing such Power Project Acceptance Test, or any Power Project Acceptance Test is not duly completed, due in either case to a ESCOM SB Event of Default, ESCOM SB shall bear the reasonable costs directly incurred by the Seller in the performance of such prevented, hindered or delayed Power Project Acceptance Test.
- I.3.7 The Seller shall notify ESCOM SB once the Power Project Acceptance Test has been completed and the Seller has issued the completion certificate to the EPC Contractor pursuant to the terms of the EPC Contract.

### **Annexure J. Monthly and Weekly Generation Forecasts**

### **Annexure K Base Case Financial Model**

### **Annexure L Provisions of the Direct Agreement**

## **Annexure J: Implementation Agreement**

*Note: This document may be amended to reflect such changes that GOM may deem necessary, including on account of internal and external governance and approval processes.*

IMPLEMENTATION AGREEMENT

BETWEEN

THE GOVERNMENT OF MALAWI

AND

[IPP]

## CONTENTS

<b>Contents.....</b>	<b>294</b>
<b>Preamble:.....</b>	<b>296</b>
<b>Recitals: .....</b>	<b>296</b>
<b>1. DEFINITIONS and Interpretation.....</b>	<b>297</b>
1.1 Definitions.....	297
1.2 Interpretation .....	307
<b>2. Duration of Agreement .....</b>	<b>308</b>
<b>3. Implementation of the Project .....</b>	<b>308</b>
<b>4. acquisition of Site, Transportation and Company Consents .....</b>	<b>309</b>
4.1 Acquisition by the Company of Site and Transportation .....	309
4.2 Applications by the Company for Consents.....	309
<b>5. Support of the GOM.....</b>	<b>309</b>
5.1 Grant of Rights .....	309
5.2 Support to Obtain Company Consents .....	310
5.3 Conditions to Company Consents .....	310
5.4 Support for Obligations.....	311
5.5 Immigration Controls .....	311
5.6 Procedure.....	312
<b>6. Construction, Operation, Maintenance and Staffing .....</b>	<b>312</b>
6.1 Construction, Operation, and Maintenance of the PS .....	312
6.2 [Amendments to the PPA] .....	312
6.3 Delivery of PPA and Amendments .....	312
6.4 Operation of the PS by the Company.....	312
<b>7. Liability .....</b>	<b>313</b>
7.1 Limitation of Liability .....	313
7.2 Indemnification for Fines and Penalties.....	313
7.3 Double Jeopardy under Power Purchase Agreement .....	313
<b>8. Insurance.....</b>	<b>314</b>
<b>9. Taxation and Import Controls .....</b>	<b>314</b>
9.1 Taxation of Investors .....	314
9.2 Right to Import Material, Equipment and Supplies: Customs Duties ...	314
9.3 Export and Re-import .....	315
<b>10. Foreign Currency Exchange and Transfer of Funds .....</b>	<b>316</b>
10.1 Foreign Exchange Regulation .....	316
10.2 Free Transfer and Repatriation of Necessary Funds .....	316
10.3 Tariff Increased in line with Exchange Risks .....	316

<b>11. Restrictions on acquisitions and Transfers of Shares and Assets .....</b>	<b>316</b>
11.1 Assurance against Discriminatory Action .....	316
11.2 Acquisition of Shares or Assets .....	316
11.3 Non-Discriminatory .....	317
<b>12. Compensation Events .....</b>	<b>317</b>
<b>13. GOM Guarantee .....</b>	<b>319</b>
13.1 Guarantee .....	319
13.2 Waiver of Defences .....	319
13.3 Continuing Guarantee .....	320
13.4 Additional Security .....	320
13.5 Preliminary Demand .....	320
13.6 Certification .....	320
13.7 Subordination .....	321
13.8 No Set-Off .....	321
<b>14. Assignment and Security .....</b>	<b>321</b>
14.1 Assignment .....	321
14.2 Creation of Security .....	321
14.3 Delivery of Financing Documents .....	322
<b>15. Force Majeure .....</b>	<b>322</b>
15.1 Definition .....	322
15.2 Notification Obligations .....	324
15.3 Duty to Mitigate .....	325
15.4 Delay Caused by Force Majeure .....	325
15.5 Termination for Extended Force Majeure .....	325
<b>16. Termination .....</b>	<b>325</b>
16.1 Termination for Default .....	325
16.2 Termination Notices .....	329
16.3 Notice to the GoM of the Power Purchaser's Default .....	329
16.4 [Notice to the Lenders of the Company's Default] .....	330
16.5 Other Termination Rights .....	332
16.6 Other Remedies .....	332
<b>17. Rights and Obligations of the Parties upon Termination .....</b>	<b>332</b>
17.9 Obligations upon Termination .....	334
<b>18. Resolution of Disputes .....</b>	<b>335</b>
18.1 Resolution by Parties .....	335
18.2 Determination by Expert .....	335
18.3 Negotiation .....	338
18.4 Arbitration .....	338
18.5 Commercial Acts .....	338
18.6 Sovereign Immunity: Jurisdiction .....	339

<b>19. Confidentiality .....</b>	<b>339</b>
<b>20. Survival on Termination .....</b>	<b>340</b>
<b>21. Notices .....</b>	<b>340</b>
<b>22. Miscellaneous Provisions .....</b>	<b>341</b>
22.1 Governing Law .....	341
22.2 Amendment .....	341
22.3 Third Parties .....	341
22.4 No Waiver .....	341
22.5 Relationship of the Parties .....	342
22.6 Language .....	342
22.7 Entirety .....	342
22.8 Successors and Assigns .....	342
22.9 No Liability for Review .....	342
22.10 Affirmation .....	342
22.11 Counterparts .....	344
22.12 [Accounts and Reports] .....	344
<b>Annexure A Company Consents.....</b>	<b>346</b>

**Preamble:**

**THIS IMPLEMENTATION AGREEMENT** dated [ ] is made by and between:

BETWEEN:

- (1) THE GOVERNMENT OF THE REPUBLIC OF MALAWI ("**GoM**"); and
  - (2) IPP, a company incorporated in Malawi (the "**Company**"), which expression shall include its successors in title and permitted transferees and assigns
- (together, the "**Parties**" and "**Party**" shall mean either of them)

**RECITALS:**

- (A) The Company has proposed to the Power Purchaser (as hereinafter defined) that the Company will design, engineer, construct, insure, commission, operate and maintain a [ ] MW solar PV electric generation facility (the "**PS**", as hereinafter defined);
- (B) The Company proposes to enter into a Power Purchase Agreement with the Power Purchaser; and
- (C) The GoM is entering into this Agreement to encourage private investment in the electric power sector in Malawi and to provide assurances of support for the Company's efforts to develop the Project in an efficient and timely manner.

**IT IS HEREBY AGREED** as follows:

## 31. DEFINITIONS AND INTERPRETATION

### 31.1 Definitions

Whenever the following capitalised terms appear in this Agreement, the recitals or in the schedules, whether in the singular or in the plural, present, future or past tense, they shall have the respective meanings stated below:

<b>"Abandonment"</b>	means the voluntary cessation of operations of the PS, and the withdrawal of all, or substantially all, personnel by the Company from the Site for reasons other than a breach or default by the Power Purchaser under the Power Purchase Agreement or the GoM under this Agreement or a Force Majeure Event;
<b>"Agent"</b>	shall have the meaning ascribed thereto in clause 46.4;
<b>"Agreement"</b>	means this Implementation Agreement, together with all schedules attached hereto, dated as at the date first written above, by and between the GoM and the Company, as may be amended by the Parties from time to time;
<b>"Available Capacity"</b>	shall have the meaning ascribed thereto in the Power Purchase Agreement;
<b>"Base Case Financial Model"</b>	means the Company's financial model, satisfactory to the Lenders setting out the base case assumptions of the Project, as annexed to the Power Purchase Agreement;
<b>"Business Day"</b>	means any day, other than a Saturday, Sunday or public holiday, that banks in Lilongwe, Malawi [and <input type="checkbox"/> ] are legally permitted to be open for business;
<b>"Bilateral Tax Treaties"</b>	means one or more conventions or treaties executed or to be executed between certain other countries and the Republic of Malawi for the avoidance of double taxation;
<b>"Change in Law"</b>	means: <ul style="list-style-type: none"><li>(a) the adoption, promulgation, repeal, modification or reinterpretation after the date of this Agreement by any Government Agency of any Law of Malawi (including a final, binding and non-appealable decision of any Government Agency);</li><li>(b) the imposition by a Relevant Authority of any material term or condition in connection with the issuance, renewal, extension, replacement or modification of any Company Consent after the date of this Agreement; or</li><li>(c) the imposition by a Relevant Authority of any additional Company Consent,</li></ul>



including, without limitation, any change in Tax, that in the case of any of the events described in clauses (a), (b) or (c) above establishes a material increase in costs or a material decrease in revenue as a consequence of any requirement for the design, construction, operation or maintenance of the PS that is materially more restrictive than the most restrictive requirements (i) under the Laws of Malawi as in effect as at the date of this Agreement, (ii) specified in any applications, or other documents filed in connection with such applications, for any Company Consent filed by the Company on or before the Commercial Operations Date, and (iii) agreed to by the Company in any agreement in the Project Agreements;

**"Claims"**

means any claims, penalties, losses, damages, expenses, liabilities and demands (whether accrued, actual, contingent, latent or otherwise) of whatever nature or kind including all documented legal fees and costs associated therewith;

**"Commercial Operations Date"**

shall have the meaning ascribed thereto in the Power Purchase Agreement;

**"Company Consents"**

means all such approvals, consents, authorisations, notifications, concessions, acknowledgements, agreements, licences [(including the Generation Licence)], permits, decisions or similar items which is or are issued by a Relevant Authority and which the Company or its EPC Contractor is required to obtain from any Relevant Authority (other than the Power Purchaser) and thereafter to maintain to fulfil its obligations under this Agreement, including the Specified Consents; provided, however, that in no event shall the Company Consents include any concessions or exemptions from the Laws of Malawi unless they are expressly granted pursuant to the terms of this Agreement;

**"Company Event of Default"**

shall have the meaning ascribed thereto in clause 46.1.1;

**"Compensation Event"**

means any of the following events:

- (a) a Change in Law;
- (b) a Malawi Political Event;
- (c) a GoM Event of Default;

**"Construction Start Date"**

means the date on which the Company issues the "notice to proceed" authorising the EPC Contractors to commence the EPC Works in accordance with the EPC Contract;

<b>"Contract Price"</b>	<p>Means:</p> <ul style="list-style-type: none"> <li>(a) the Project Debt;</li> <li>(b) an amount that, when taken together with the amount calculated in sub-clause (a), provides the Company with its Equity Rate of Return as projected in the Base Case Financial Model;</li> <li>(c) an amount equal to the redundancy payments for employees of the Company that have been or will be reasonably incurred by the Company as a direct result of the termination of this Agreement; and</li> <li>(d) amounts payable as Contractor's Costs; less (to the extent that it is a positive amount):</li> <li>(e) the value of stocks of consumables and spare parts held by the Company relating to the Project.</li> </ul>
<b>"Contractors"</b>	means the contractors and suppliers engaged by either Party to carry out and perform the activities required by this Agreement and the Power Purchase Agreement, including the EPC Contractor, and the O&M Contractor, and any other direct contractors and any of their direct sub-contractors integrally involved in the Project;
<b>"Customs"</b>	means the agency or agencies of the GoM responsible for collection of Custom Duties and the release of plant, equipment and machinery following import into or before export from Malawi;
<b>"Customs Duties"</b>	means all Taxes (other than VAT) levied by any Relevant Authority on or relating to the import into or export from Malawi of plant, machinery and equipment;
<b>"Delayed Payment Rate"</b>	means JIBAR plus [two] per cent ([2]%) per annum compounded semi-annually, and calculated for the actual number of days which the relevant amount remains unpaid on the basis of a three hundred and sixty five (365) days year;
<b>"Dispute"</b>	means any dispute or disagreement or difference arising under, out of, or in connection with this Agreement, including, without limitation, any dispute or difference concerning the existence, legality, validity or enforceability of this Agreement or any provision hereof or the obligations or performance of a Party under any provision hereof;
<b>"Dollars" and "\$"</b>	means the lawful currency of the United States of America;
<b>"Effective Date"</b>	shall have the meaning ascribed thereto in clause 32 (Effectiveness of Agreement: Term);

<b>"Election Notice"</b>	shall have the meaning ascribed thereto in clause 46.4.2;
<b>"Environmental Liabilities"</b>	means all Losses (including, without limitation, reasonable costs of investigation, testing, containment, removal, clean up, abatement or remediation, and reasonable attorney's fees and costs), whether or not quantified in amounts relating to the presence in the environment of Hazardous Materials attributable to the PS or any liabilities or obligations arising from any violation by the Company, its Contractors or their employees or agents of any environmental Laws of Malawi;
<b>"Environmental Standards"</b>	means collectively, the environmental guidelines and occupational health and safety standards established by the Ministry of Natural Resources Energy and Mining for the GoM, or in the absence of such guidelines, the most updated versions of the World Bank Group Environmental, Health, and Safety Guidelines (known as the "EHS Guidelines");
<b>"EPC Contract"</b>	means the agreement entered into or to be entered into between the Company and the EPC Contractor for the design, engineering, procurement, construction, completion, start up, testing, and commissioning by the EPC Contractor of the PS, as may be amended by the Parties thereto from time to time;
<b>"EPC Contractor"</b>	means [ ], and any successor thereto appointed by the Company;
<b>"Equity Rate of Return"</b>	means the equity rate of return for the Investors as specified in the Base Case Financial Model, being a return of [ ];
<b>"Evaluation Period"</b>	shall have the meaning ascribed thereto in clause 46.4.2;
<b>"Expert"</b>	shall have the meaning ascribed thereto in clause 48.2.1;
<b>"Extended Cure Period"</b>	shall have the meaning ascribed thereto in clause 46.4.2;
<b>"Financial Closing"</b>	means the date when the Financing Documents are effective and the conditions to the first disbursement of funds under the Financing Documents have been satisfied or waived (as the case may be);
<b>"Financing Documents"</b>	means: <ul style="list-style-type: none"> <li>(a) the agreements pursuant to which any loans, credit facilities, commercial paper, bonds, letters of credit or other financial indebtedness will be made available to the Company to finance or refinance the</li> </ul>

	Project (except any equity or equity-related funds including loan funds made available by the shareholders of the Company to fund their investment in the Project); and
	(b) any security agreement and hedging agreements in respect of any indebtedness incurred or to be incurred by the Company under any of the agreements in paragraph (a) above;
<b>"Force Majeure Event"</b>	shall have the meaning ascribed thereto in clause 45.1;
<b>"Foreign Investors"</b>	means the shareholders of the Company who are foreigners or non-resident Malawian nationals holding dual nationalities;
<b>"Generation Licence"</b>	means the licence No. [ ] dated [ ] issued by the Malawi Energy Regulatory Authority permitting the generation and supply of electricity by the Company from the PS in accordance with the terms and conditions of such licence;
<b>"Government Agency"</b>	means: <ul style="list-style-type: none"> <li>(a) the GoM, any subdivision of the GoM, or any local governmental authority with jurisdiction over the Company, the Project or any part thereof; or</li> <li>(b) any department, authority, instrumentality, agency, or judicial body of the GoM or any local governmental authority; or</li> <li>(c) courts and tribunals in Malawi; and</li> <li>(d) any commission or independent regulatory agency or body having jurisdiction over the Company, the Project or any part thereof;</li> </ul>
<b>"GoM Event of Default"</b>	shall have the meaning ascribed thereto in clause 46.1.2;
<b>"Guarantee"</b>	means the guarantee granted in favour of the Company by the GoM pursuant to clause 43.1;
<b>"Hazardous Material"</b>	means any pollutant, contaminant, solid waste, hydrocarbon product, toxic or hazardous substance or waste, any flammable, explosive or radioactive materials regulated under, or subject to any Laws of Malawi;
<b>"Hazardous Substance Activity"</b>	means any actual, proposed or threatened use, storage, holding, existence, release, emission, discharge, generation, processing, abatement, removal, disposition, handling or transportation of any Hazardous Material from, under or on the Site;

<b>"Investor"</b>	means the holder, from time to time of Ordinary Share Capital, as well as the holders of any securities that are convertible at the option of the holder into Ordinary Share Capital;
<b>"JIBAR"</b>	means the Johannesburg Interbank Agreed Rate for Dollar deposits for a period equal to three (3) months which appears on the appropriate page at or about 11:00 a.m. in Johannesburg on the last available day that banks in Johannesburg are legally permitted to be open for business;
<b>"Lapse of Consent"</b>	means any Company Consent: <ul style="list-style-type: none"> <li>(a) ceasing to remain in full force and effect and not being renewed or replaced within the time period prescribed by the applicable Laws of Malawi; or</li> <li>(b) (other than a Specified Consent) not being issued upon application having been properly and timely made and diligently pursued; or</li> <li>(c) being made subject, upon renewal or otherwise, to any terms or conditions that materially and adversely affect the Party's ability to perform its obligations under any document included within the Project Agreements, in each of the above instances despite such Party's compliance with the applicable procedural and substantive requirements as applied in a "non-discriminatory" (as explained in clause 41.3 of this Agreement) manner;</li> </ul>
<b>"Laws of Malawi"</b>	means any constitution or provision, treaty, decree, convention, statute, act, regulation, rule, ordinance, proclamation, subordinate legislation, delegated legislation, by-law, judgment rule of common law or equity, rule, ruling or guideline applicable in Malawi, and all orders, rules, regulations, statutory regulatory orders, executive orders, decrees, judicial decisions, notifications, or other similar directives issued by any Relevant Authority pursuant thereto, including the Environmental Standards, as any of them may be amended from time to time;
<b>"Lenders"</b>	means the financial institutions party to the Financing Documents, or subsequent financial institutions that become parties to the Financing Documents not objected to by the GoM in accordance with the terms of this Agreement, together with their respective successors and assigns;
<b>"Local Investor"</b>	means any Investor who is not a Foreign Investor;

<b>"Loss"</b>	means any loss, damage, liability, payment and obligation (excluding any indirect or consequential loss, damage, liability, payment or obligation), and all expenses (including, without limitation, reasonable legal fees);
<b>"MW"</b>	means Megawatt or 1,000,000 Watts;
<b>"Month"</b>	means a calendar month according to the Gregorian calendar, beginning at 12:00 midnight on the last day of the preceding month and ending at 12:00 midnight on the last day of that month;
<b>"Kwacha"</b>	means Malawian Kwacha, the official currency of the Republic of Malawi;
<b>"Malawi"</b>	means the Republic of Malawi;
<b>"Malawi Political Event"</b>	shall have the meaning ascribed thereto in clause 45.1.1;
<b>"Malawian Grid"</b>	means the system for the transmission of electricity, which shall include all transmission lines and associated equipment, transformers and associated equipment, relay and switching equipment, and protective devices and safety equipment, in Malawi to which the PS is connected. For the avoidance of doubt, all modifications and additions required to be undertaken to the Malawian Grid for transmission and distribution of Electricity generated by the PS starting from the high side of the generation step-up transformers at the Site [and including the Transmission Facilities] shall form part of the Malawian Grid;
<b>"Net Cash Flow"</b>	means the net cash profits of the Company with respect to the PS less all principal repayment amounts but without regard to depreciation, all as shown in the audited financial statements of the Company for the last completed financial year prior to the date of termination of this Agreement;
<b>"Notice of Intent to Terminate"</b>	shall have the meaning ascribed thereto in clause 46.2.1;
<b>"O&amp;M Agreement"</b>	means the operation and maintenance agreement to be entered into between the Company and the O&M Contractor for the operation and maintenance of the PS, as may be amended by the parties thereto from time to time;
<b>"O&amp;M Contractor"</b>	means any operation and maintenance contractor or contractors, and any successors thereto, appointed by the Company;
<b>"Other Force Majeure Event"</b>	shall have the meaning ascribed thereto in clause 45.1.1;

<b>"Ordinary Share Capital"</b>	means any shares of the Company with voting or other rights of management and control, and any securities of the Company that are convertible into such shares at the option of the holder;
<b>"Person"</b>	means any person, firm, company, corporation, society, government, state or agency of a state, or any association or partnership (whether or not having separate legal personality) of two or more of the foregoing;
<b>"Power Purchase Agreement"</b>	means the Power Purchase Agreement, dated [ ], by and between the Power Purchaser and the Company for the purchase and sale of electric generation capacity and electric power generated by the PS, as may be amended by the parties thereto from time to time;
<b>"Power Purchaser"</b>	means ESCOM SB, a company incorporated in Malawi having its registered office at [ ], Malawi;
<b>"Prescribed Fee"</b>	means with respect to any Company Consent, the charge or fee, if any, prescribed by the Laws of Malawi;
<b>"Prescribed Form"</b>	means with respect to any Company Consent, the form, if any, (including all information and details) prescribed by the Laws of Malawi for the application for or renewal of such Company Consent;
<b>"Prior Environmental Losses"</b>	means any and all losses, damages, Claims and expenses suffered or incurred by the Company and its Contractors arising as a result of: (a) the occurrence, prior to the Construction Start Date, of any Hazardous Substance Activity conducted negligently by any party other than the Company on the Site; (b) any violation, prior to the Commencement Date, of Environmental Laws relating to the Site or relating to the ownership, use, occupancy or operation in relation thereof by any party other than the Company; or (c) any environmental liability (including without limitation, liability relating to Environmental Contaminants on the Site) not associated with activities of any party on the Site or to the ownership, use, occupancy or operation thereof;
<b>"Project"</b>	means the development of an independent electricity generation project, comprising: <ul style="list-style-type: none"> <li>(a) the development of the infrastructure to supply fuel to the PS;</li> <li>(a) the design, engineering, financing, [refinancing (provided that the benefits of such refinancing are shared by the Parties in accordance with the requirements of this Agreement)], construction,</li> </ul>

procurement, permitting, testing and commissioning of the PS;

- (b) the procurement, importation, exportation (for repair, maintenance or refurbishing) and contracting for goods, equipment and services for the PS;
- (c) the insuring, operation, maintenance and repair of the PS, including any Restoration; and
- (d) the development of the infrastructure to connect the PS to the Malawian Grid;
- (e) the sale of Available Capacity and the generation and sale of net output from the PS under the Power Purchase Agreement;
- (f) the recruitment, employment and training of staff for the PS;

**"Project Agreements"**

means:

- (a) this Implementation Agreement;
- (b) the Power Purchase Agreement;
- (c) any O&M Agreement;
- (d) the EPC Contract; and
- (g) Financing Documents;

**"Project Assets"**

means all assets required for the purposes of, or in connection with, the Project (including land, plant, machinery, buildings and intellectual property rights) wherever they are situated and whether or not they are owned by the Company;

**"Project Debt"**

means the aggregate of:

- (a) all amounts outstanding at the Termination Date, including (but not limited to) principal and interest (whether unpaid, compounded or accrued) as at that date including, without limitation, all amounts representing capitalised interest and all amounts that have been advanced to meet any cost overruns or otherwise, from the Company to the Lenders under the Financing Documents, as well as any fees, charges and expenses payable by the Company to the Lenders;
- (b) all amounts, including amounts arising pursuant to closing out, settling early or unwinding any position under any hedging agreement, and other breakage costs, payable by the Company to the Lenders or the hedging counterparty as a result of a prepayment under the Financing Documents,



subject to the Company and the Lenders mitigating all such costs to the extent reasonably possible,

less

(c) all credit balances held on any bank accounts held by or on behalf of the Company on the Termination Date which are available for application in or towards discharge of the amounts referred to in (a) and (b) above on the Termination Date; and

(d) all amounts payable by the Lender or the hedging counterparty to the Company as a result of a prepayment of amounts outstanding under the Finance Agreements;

**"Proposed Material Amendment"**

shall have the meaning ascribed thereto in clause 36.2;

**"Protected Assets"**

shall have the meaning ascribed thereto in clause 48.6.2;

**"Prudent Industry Practice"**

shall have the meaning ascribed thereto in the Power Purchase Agreement;

**"PS"**

means the solar PV power station to be established by the Company to generate Electricity, including any facilities ancillary thereto, located on the Site having a design capacity of approximately [ ] MW to be designed, engineered, constructed, commissioned, owned, operated and maintained by the Company during the Term, whether completed or at any stage in its construction;

**"Relevant Authority"**

means the department, authority, instrumentality, agency or other relevant entity from which a Company Consent is to be obtained and any authority, body or other Person having jurisdiction under the Laws of Malawi with respect to the Project, the Power Purchaser and this Agreement, as the case may be;

**"Required Commercial Operations Date"**

means the date that is [ ] ( ) days following the date on which Financial Closing occurs, as such date may be extended pursuant to clause [ ] of the Power Purchase Agreement or by reason of a Force Majeure Event affecting the Company thereunder;

**"Restoration"**

shall have the meaning ascribed thereto in clause [ ] of the Power Purchase Agreement;

**"Site"**

means area located in Malawi (coordinates [ ]), on which the PS is to be located, as described and shown in the location map attached at [ ] to the Power Purchase Agreement;

<b>"Specified Consents"</b>	means the Company Consents identified in schedule 1;
<b>"Tariff"</b>	means the meaning ascribed thereto in the Power Purchase Agreement;
<b>"Tariff Approval"</b>	means [ ];
<b>"Tax" or "Taxes"</b>	means any tax, charge, cess, impost, tariff, duty, basis for assessing taxes (including the rates of or periods for depreciation of assets for tax assessment purposes), fiscal concession or allowance imposed by or payable to a Relevant Authority, including any VAT, environmental or energy tax, import or Customs Duty, withholding tax, excise tax, tax on foreign exchange transactions or property tax. The term "Tax" shall not include any fee or charge payable to a Relevant Authority as consideration for goods or services provided by such Relevant Authority in relation to a commercial activity carried out by such Relevant Authority;
<b>"Term"</b>	shall have the meaning ascribed thereto in clause 32.1 (Effectiveness of Agreement: Term);
<b>"Termination Date"</b>	shall have the meaning ascribed thereto in clause 46.2.3;
<b>"Termination Notice"</b>	means a written notice of termination of this Agreement issued by the GoM or the Company, as the case may be, pursuant to clause 46.2.3;
<b>"Termination Payment"</b>	shall have the meaning ascribed thereto in the Power Purchase Agreement;
<b>"Transfer Date"</b>	means the date falling [ ] Days after the Termination Date;
<b>"Transmission Facilities"</b>	shall have the meaning ascribed thereto in the Connection Agreement;
<b>"VAT"</b>	means value added tax under the Malawian Value Add Tax Act, as may be amended or superseded from time to time;
<b>"Year"</b>	means each twelve (12) Month period commencing on 12:00 midnight on 31 December and ending on 12:00 midnight the following 31 December during the Term.

## 31.2 Interpretation

In this Agreement:

31.2.1 headings are only for convenience and shall be ignored in construing this Agreement;

31.2.2 the singular includes the plural and vice versa;

- 31.2.3 references to clauses, clauses, Recitals and schedules are, unless the context otherwise requires, references to clauses, clauses and schedules to this Agreement;
- 31.2.4 except as expressly provided to the contrary herein, references to times and dates are, and shall be construed to be, references to Malawi standard time;
- 31.2.5 except as expressly provided to the contrary herein, whenever a consent or approval is required by one (1) Party from the other Party, such consent or approval shall not be unreasonably withheld or delayed;
- 31.2.6 in carrying out its obligations and duties under this Agreement, each Party shall have an implied obligation of good faith;
- 31.2.7 a reference to any legislation or legislative provision includes any statutory modification or re-enactment of or legislative provision substituted for, and any subordinate legislation under, that legislation or legislative provision; and
- 31.2.8 except as expressly provided to the contrary herein, nothing herein shall be construed or interpreted as limiting, diminishing or prejudicing in any way the rights of the Company, to claim any benefit provided under the Laws of Malawi (whether in effect now or in the future).

## **32. Duration of Agreement**

- 32.1 Except for the provisions of this clause 32 (Effectiveness of Agreement: Term) and clauses A.2.135 (Grant of Rights), 4 (Acquisition of Site, Transportation and Company Consents), 5.3 (Conditions to Company Consents), clause 35.4 (Support for Obligations), clause 36 (Construction, Operation, and Maintenance of PS: Appointment of Contractors), clause 0 (Assignment and Security) and clause 51.3 (Miscellaneous Provisions), which shall become effective immediately upon execution and delivery of this Agreement, this Agreement shall commence and be effective on the date of Financial Closing (the "Effective Date"),
- 32.2 This Agreement shall, unless terminated earlier in accordance with the terms of this Agreement, continue in full force and effect until the [ ] anniversary of the Commercial Operations Date (the "Term"), as such date may be extended pursuant to clause [ ] of the Power Purchase Agreement.

## **33. Implementation of the Project**

The Company shall design, insure, finance, acquire, construct, complete, and commission the PS, and shall own, operate and maintain and transfer the PS, in each case, in accordance with all applicable Laws of Malawi, the Company Consents, this Agreement and the other Project Documents.

## **34. Acquisition of Site, Transportation and Company Consents**

### **34.1 Acquisition by the Company of Site and Transportation**

34.1.1 The Company has identified and purchased [or leased] the Site. The Company shall (or procure that the EPC Contractor shall) obtain supplies for the PS, make arrangements for delivery and receipt at port facilities in Malawi of equipment and materials necessary to construct the PS, and make arrangements for transport to the Site of all such equipment and materials from the port facilities. The Company shall carry out and complete these activities in accordance with the terms of this Agreement and the Power Purchase Agreement.

34.1.2 In the event that a Force Majeure Event prevents the Company obtaining access to the Site for more than [ ] Days during the Construction period, either the GoM or the Company shall be entitled to terminate this Agreement and following payment of the termination payment in accordance with clause 47.3, there shall be no further liability or obligation on either Party toward the other in case the Agreement is terminated pursuant to his clause (save for liability for antecedent breaches).

### **34.2 Applications by the Company for Consents**

The Company shall make or cause to be made, in a timely fashion, all applications (whether initial or renewal applications) for the Company Consents in the Prescribed Form and with the Prescribed Fee to the appropriate Relevant Authority and shall diligently pursue all such applications. The information supplied in the applications shall be complete and accurate and shall satisfy the substantive and procedural requirements of the applicable Laws of Malawi applied in a "non-discriminatory" manner.

## **35. Support of the GOM**

### **35.1 Grant of Rights**

35.1.1 The GoM hereby grants to the Company the exclusive right to design, finance, insure, construct, commission, complete, own, operate and maintain the PS in accordance with the terms and conditions contained in this Agreement and the Laws of Malawi until the expiration or earlier termination of this Agreement, pursuant to its terms.

35.1.2 Without limiting the generality of clause 35.1.1, the GoM grants, [or shall procure the grant] to the Company for the Term and for use solely in connection with the Project:

any other lease, easement or right of use or possession (or other appropriate rights as the case may require) in respect of the Site and access routes reasonably required by the Company to fulfil its obligation under this Agreement, free and clear of any encumbrances; the exclusive right to undertake the Project which includes (without limitation) the right to:

- (i) construct the PS; and
- (ii) own operate and maintain the same until the Transfer Date;
- (iii) possess, use and procure benefits from, including the right to deliver, electricity generated by the PS to the Power Purchaser;
- (iv) employ such persons on such terms and the Company or such Contractor of the Company considers necessary or appropriate, subject to the Laws of Malawi;
- (v) grant valid, effective and enforceable security interests over the Project Assets and to assign and/or transfer by way of security its rights and/or obligations under this Agreement to any Lenders (or their nominated security agent, if applicable) in order to obtain financing in connection with the Project; and
- (vi) all other rights granted under or pursuant to this Agreement.

35.1.3 The GoM hereby represents and warrants that no other person has any rights which conflict, or are incompatible with, the rights of the Company in respect of the Project.

35.1.4 The GoM shall indemnify and hold harmless the Company in respect of any losses arising from Claims suffered or incurred by the Company as a result of or in connection with any and all Prior Environmental Losses and/or any relocation of persons or property from the Site for the purposes of undertaking the Project.

35.1.5 The GoM shall take all actions as are required under this Agreement in a timely manner so as not to cause material delay to the implementation of the Project.

## **35.2 Support to Obtain Company Consents**

Upon request of the Company, the GoM shall support and use all reasonable efforts to expedite consideration of the Company's applications for the Company Consents or reissuances thereof filed pursuant to clause 34.2, and the timely issuance thereof or reissuance of a Company Consent subject to a Lapse of Consent by any Relevant Authority. Any request for support under this clause 35 shall be made by the Company and shall be accompanied with copies of the application for the Company Consent, any notice that the issuance or reissuance of the Company Consent was denied or deferred, and a statement of the Company's efforts in obtaining the issuance or reissuance of the Company Consent to date.

## **35.3 Conditions to Company Consents**

35.3.1 The GoM or any Relevant Authority may attach such "non-discriminatory" terms and conditions (as explained in clause 41.3 to the issuance or renewal of any of the Company Consents as are in accordance with the Laws of Malawi, and the attachment of such terms and conditions shall not in and of itself constitute a breach of

this Agreement by the GoM, a Force Majeure Event under clause 44.3.2 (Force Majeure) (unless it constitutes a Change in Law), or a GoM Event of Default under clause 46.1.2.

35.3.2 The Company shall abide by all and shall ensure that its Contractors abide by all such terms and conditions.

35.3.3 If the Company fails to abide by (or failure by the Company to ensure that its Contractors abide by) any term or condition of any Company Consent, the GoM or any Relevant Authority may exercise any power pursuant to the Laws of Malawi in respect of such failure and such exercise shall not of itself constitute a breach of this Agreement by the GoM, a Force Majeure Event under clause 44.3.2 (Force Majeure), or a GoM Event of Default under clause 46.1.2; provided, however, that, with respect to all such Company Consents issued by the GoM or any Relevant Authority, the GoM shall not, and the GoM shall ensure that no such Relevant Authority shall, terminate prior to its expiration date or revoke any such Company Consent earlier than the later of:

[thirty (30)] days after delivery to the Company of written notice by the GoM or such Relevant Authority of such failure; and

the period of time, if any, that must expire under the Laws of Malawi or the relevant Company Consent prior to early termination or revocation of any such Company Consent;

provided, further, that nothing in this clause 0 (Support of the GOM) shall limit the GoM or any Relevant Authority from taking any action in relation to a breach of, or non-compliance with, a Company Consent (other than termination or revocation) which it is entitled to take under the Laws of Malawi or to require the Company to cease operating the PS.

#### **35.4 Support for Obligations**

Upon reasonable request by the Company, the GoM shall use reasonable efforts to support the Company's performance of its obligations to design, finance, insure, acquire, construct, own, operate, maintain and transfer the PS. If the GoM reasonably determines that the Company has failed to comply with its obligations under this Agreement and that such failure is the principal cause of the Company's difficulties in performing such activities, the GoM may advise the Company of such determination, and the GoM shall not be obligated to take any action to assist the Company pursuant to this clause 0 (Support of the GOM) until such time as the Company has fully complied with its obligations under this Agreement. By agreeing to use reasonable efforts to support the Company's efforts, the GoM has not relieved, and does not relieve in any way, the Company of its obligations or potential liability under this Agreement, the Power Purchase Agreement, and the other documents comprising the Project Agreements.

#### **35.5 Immigration Controls**

Provided the Company and the Contractors comply with all applicable Laws of Malawi, the GoM will expeditiously grant applications of the Company and the

Contractors for work permits, employment passes, visas, and other permits, as necessary for individuals involved in the Project. Notwithstanding the foregoing, however, the GoM may, in any individual case, decline to grant an application, or expel a person previously admitted, to protect the national security interests and public health and safety of Malawi, as determined by the GoM.

### **35.6 Procedure**

To the extent permitted under the applicable Laws of Malawi, all applications and any other necessary requisites for Company Consents, whether for the Company, its employees, its Contractors or employees of its Contractors, are to be routed through the Company.

## **36 Construction, Operation, Maintenance and Staffing**

### **36.1 Construction, Operation, and Maintenance of the PS**

The Company shall design, construct, install, commission, operate and maintain the PS; provided, however, that the Company may contract with the EPC Contractors to design, construct, install, and commission the PS and the O&M Contractor to operate and maintain the PS; provided, further, that the appointment of the EPC Contractor and the O&M Contractor by the Company shall not relieve the Company of any of its obligations or potential liability regarding the design, financing, insuring, acquisition, construction, completion, operation, or maintenance of the PS.

### **36.2 [Amendments to the PPA]**

[The Company shall provide the GoM with a certificate of a duly authorized officer of the Company setting out any proposed amendment (a "**Proposed Material Amendment**") to the PPA that would result in a change in the EPC Contractor. If the GoM does not object to such certificate on or before the end of the fifteen (15) Business Days period provided for herein, as the case may be, the GoM shall be deemed not to have objected to the Proposed Material Amendment.]

### **36.3 Delivery of PPA and Amendments**

Within [thirty (30)] days after execution of the PPA and any Proposed Material Amendment, the Company shall (i) deliver to the GoM a copy of the PPA and each such Proposed Material Amendment. The confidentiality provisions contained in this Agreement shall apply to GoM and its representative with respect to the PPA and any Proposed Material Amendment thereto.

### **36.4 Operation of the PS by the Company**

Notwithstanding anything contained in this clause 0 (Construction, Operation, Maintenance and Staffing) to the contrary, the Company shall be entitled to engage its own personnel and operate the PS or, if the O&M Agreement then in effect has been terminated by the Company in accordance with its terms,

engage some or all of the personnel of the former O&M Contractor and operate the PS, in either case with prior notice to the GoM.

## **37. Liability**

### **37.1 Limitation of Liability**

Neither Party shall be liable to the other Party in contract, tort, warranty, strict liability, or any other legal theory for any indirect, consequential, incidental, punitive, or exemplary damages. Neither Party shall have any liability to the other Party except pursuant to, or for breach of, this Agreement; provided, however, that this provision is not intended to constitute a waiver of any rights of one (1) Party against the other with regard to matters unrelated to this Agreement or to any activity not contemplated by this Agreement.

### **37.2 Indemnification for Fines and Penalties**

Subject to the provisions of this Agreement, any fines or other penalties incurred by the Company for non-compliance with applicable Laws of Malawi or other governmental directions issued pursuant thereto and in accordance therewith or the Company Consents shall not be reimbursed by any Relevant Authority but shall be the sole responsibility of the Company.

### **37.3 Double Jeopardy under Power Purchase Agreement**

37.3.1 Except Disputes or breaches related to clause [ ] (Licences), and clause [ ] (Insurances), clause [ ] (Taxes and Levies), and clause [ ] (Termination) of the Power Purchase Agreement,

any settlement or waiver in writing by the Power Purchaser of any dispute or breach under the Power Purchase Agreement; or

any final, non-appealable order or award issued or given in any such proceedings;

shall be binding on the GoM with respect to any issue or claim, as the case may be, based on the same facts or acts or omissions by the Company. Settlement or waiver of any dispute or breach related to clause(s) [ ] of the Power Purchase Agreement shall be effective only if agreed to, in writing, by both the Power Purchaser and the GoM.

37.3.2 Notwithstanding any other provision in this Agreement to the contrary, the Power Purchaser shall be responsible in the first instance for pursuing any claim against the Company based upon a failure of the Company to satisfy its obligations under the Power Purchase Agreement. The GoM shall not bring or (other than through the Power Purchaser) cause any proceedings to be brought against the Company for any breach of its obligations under clause 3 (Implementation of the Project) and clause 34.1 and clause 34.2 (to the extent such clauses relate to substantially similar obligations of the Company under the Power Purchase Agreement) or clause 0 (Assignment and Security) of this Agreement, if the Power Purchaser has fully pursued, or is then pursuing, a claim or claims against the Company based upon an alleged breach of the Power Purchase



Agreement. A final, non-appealable order issued in a proceeding initiated by the Power Purchaser and based upon a claim of a breach of the Power Purchase Agreement, shall be without prejudice to any proceedings against the Company that the GoM could otherwise bring for breach by the Company of substantially the same obligations under this Agreement. Nothing in this clause 37.3 shall prevent the GoM and the Power Purchaser from separately initiating proceedings to terminate this Agreement and the Power Purchase Agreement, respectively, pursuant to clause 46.1 and clause 46.2 of this Agreement and clause [ ] of the Power Purchase Agreement.

### **38 Insurance**

The Company shall obtain and maintain insurance from financially strong and internationally reputable insurance companies in accordance with clause [ ] of the Power Purchase Agreement. If and to the extent that the GoM can be named as an additional insured on any fire, perils, casualty, and liability insurance policies covering the PS without any consequential increase in the premia payable by the Company, the GoM shall be so named by the Company; provided however, that the GoM shall agree to subordinate its interest in all such policies (except general liability coverage) to the interests of the Lenders therein. Subject to the provisions of clause [ ] of the Power Purchase Agreement [and any prepayment requirement under the Financing Documents], the proceeds of all such insurance (except general liability coverage) shall be used to repair or restore the PS to the condition existing immediately prior to the event giving rise to such insurance claim and proceeds. Copies of any filed claims or the receipt of any insurance proceeds shall be notified to GoM within [ ] Business Days of such filing or receipt of proceeds by the Company. Notwithstanding the provisions of this clause 0, the insurance reinstatement obligations shall be subjected to a general economic viability test to be determined by the Expert and where it is found to be uneconomically viable to reinstate the PS, the Parties shall agree as to how the proceeds of any such policy shall be used, subject to any overriding requirements in the Financing Documents.

### **39. Taxation and Import Controls**

#### **39.1 Taxation of Investors**

Local Investors will be taxed according to the applicable Laws of Malawi while Foreign Investors will be governed by the Bilateral Tax Treaties (if any) with the respective countries. Foreign Investors, where no Bilateral Tax Treaties exist with the respective countries shall be taxed in accordance with the applicable Laws of Malawi.

#### **39.2 Right to Import Material, Equipment and Supplies: Customs Duties**

39.2.1 The GoM requests that the Company incorporate (and requests that the Company require its Contractors to incorporate) as much locally produced material, equipment, and supplies as possible for the design, construction, completion, operation and maintenance of the

PS. Nonetheless, prior to the Commercial Operations Date the Company and its Contractors shall be entitled to import without restriction and exempt from VAT, but subject to the payment of the applicable Customs Duty, determined under the Laws of Malawi, of imported plant, machinery and equipment not manufactured locally, and required for the design, construction, completion, operation and maintenance of the PS; provided, that such imported plant, machinery and equipment shall be used at the Site, in relation to the Project and will not be sold or otherwise transferred to or used by another Person other than the Company or its Contractors.

39.2.2 Provided that applicable Customs Duties are timely paid by the Company, all plant, machinery and equipment imported for incorporation into the PS, or use in the Project will be cleared for release from Customs and available for removal by the Company or its agents within [ ] Business Days following delivery by the Company of written notice to the GoM of a delay in the release by Customs of such plant, machinery and equipment. Such notice may be given at any time after a delay in the release of such plant, machinery or equipment of [ ] days following the delivery to the proper authorities of all documents (including all information and details) required by the Laws of Malawi for importation of plant, machinery and equipment into Malawi. In the event that there is a claim for Customs Duties in excess of applicable Customs Duty, as determined under the Laws of Malawi, of plant, machinery or equipment not manufactured locally, imported prior to the Commercial Operations Date for incorporation into the PS, or use in the Project, and the Company chooses to pay such duties under protest, upon notice to the GoM by the Company, such dispute shall be resolved consistent with the terms of this Agreement and the Laws of Malawi within [ ] days after the Company files its refund claim.

39.2.3 All items not consumed during the construction of the PS or incorporated into the PS may be freely re-exported by the Company, within [twelve (12) months] following the Commercial Operations Date, without incurring further liability for Customs Duties in Malawi. The GoM may, as provided by the Laws of Malawi, require the Company to re-export any items of plant, equipment or machinery used in the construction of the PS that are not reasonably required for the Company to operate and maintain the PS, unless the Company agrees promptly to pay the applicable import taxes and Customs Duties for those items of the plant, equipment or machinery.

### **39.3 Export and Re-import**

The Company (or its Contractors) shall be entitled to export all items of plant and machinery imported by it under this clause 0 (Taxation and Import Controls) for permanent installation in the PS for the purpose of repair or refurbishment outside Malawi and to re-import the same upon payment of the applicable Customs Duties and the GoM shall, at the request of the Company,

use its reasonable endeavours to expedite the issuance of any Company Consent required for the export and re-import of such machinery and equipment.

#### **40. Foreign Currency Exchange and Transfer of Funds**

##### **40.1 Foreign Exchange Regulation**

The exchange and transfer abroad of all Dollars related to the Project shall be governed by the Laws of Malawi as amended from time to time, provided that the GoM shall permit the Company to make or receive any payments in relation to the Project in Dollars.

##### **40.2 Free Transfer and Repatriation of Necessary Funds**

The GoM shall permit the free transfer of all funds and financial settlements in Dollars necessary to implement and carry out the Project or as contemplated by this Agreement.

##### **40.3 Tariff Increased in line with Exchange Risks**

[The GoM shall approve any increase to the Tariff that is necessary to address exchange risks between Kwacha and US Dollar.]

#### **41. Restrictions on acquisitions and Transfers of Shares and Assets**

##### **41.1 Assurance against Discriminatory Action**

Neither the GoM nor any Government Agency shall take any discriminatory action (as described in clause 41.3 which materially and adversely affects the Project or the performance of the Company's obligations, or the enjoyment of its rights or the interests of the Investors or Lenders under the Project Agreements. Nothing in the foregoing or in clause 41.2 shall apply to any actions taken by the GoM or the Power Purchaser pursuant to their respective rights and obligations arising under this Agreement and the Power Purchase Agreement.

##### **41.2 Acquisition of Shares or Assets**

The GoM undertakes to the Company that neither it nor the Power Purchaser nor any Government Agency will expropriate, compulsorily acquire, nationalize, or otherwise compulsorily procure (except as provided in clause 0) any Ordinary Share Capital or material assets of the Company. Notwithstanding the foregoing, nothing in this Agreement shall be construed as a waiver by the GoM or the Power Purchaser of the Power Purchaser's exercise of its power of eminent domain, so long as it is exercised in accordance with the Laws of Malawi and the effect of such exercise does not materially and adversely affect the Company's ability to perform its obligations under and enjoy the benefits of the Power Purchase Agreement or, without just and adequate compensation, adversely affects its use and enjoyment of the Site.

### **41.3 Non-Discriminatory**

The use of the term "non-discriminatory" or "discriminatory" in this Agreement is not intended to prohibit or limit in any way the GoM or any Relevant Authority from making rational distinctions between parties or from using measures, establishing conditions, or enforcing requirements that are, in each case, intended or designed to advance the purposes of the program being implemented by the GoM or Relevant Authority or of a Company Consent. It is intended, however, to prohibit the use of governmental authority, over Company Consents, for example, to deprive the Company of the benefits of this Agreement or the Power Purchase Agreement by the application of a higher standard to the Company (alone, or together with others in a small class) than to others similarly situated because of, for example, its foreign ownership, or to gain commercial or political advantage.

## **42. Compensation Events**

### **42.1 If, as a result of the occurrence of a Compensation Event:**

42.1.1 the Company, acting reasonably, considers it is unable to achieve the Required Commercial Operations Date; and/or

42.1.2 the Company is unable to comply with its obligations under any of the Project Documents.

then the Company is entitled to relief from its obligations and/or to claim compensation for the additional costs incurred and/or the lost revenue suffered under this clause 42.1.

### **42.2 To obtain relief and/or claim compensation:**

42.2.1 As soon as practicable and in any event within [ ] Business Days after becoming aware that the Compensation Event has caused, or is likely to cause any of the consequences listed in clause 42.1, the Company shall give to the GoM a notice of its claim for:

an extension of time for the Required Commercial Operations Date;

relief from its obligations under this Agreement; and/or

payment of compensation.

42.2.2 The notice referred to in clause 42.2.1 must set out full details of the Compensation Event and the extension of time claimed, and include an invoice for any estimated or actual additional costs incurred and/or loss of revenue claimed in the relevant Month and reasonable evidence supporting such claim in accordance with clause 42.2.3; and

42.2.3 The Company shall demonstrate to the reasonable satisfaction of the GoM that:

the Compensation Event was the direct cause of one of the consequences listed in clause 42.1; and

the actual or estimated time lost, the obligations under the Agreement, and/or the estimated additional costs incurred or loss of revenue in such Month, could not reasonably be expected to be mitigated or recovered by the Company.

**42.3 In the event that the Company has complied with its obligations under clause 42.2, then:**

- 42.3.1 in the case that, as a result of the Compensation Event, the Company is unable to achieve the Required Commercial Operations Date, the Required Commercial Operations Date shall be extended by such time as shall be reasonable for such a Compensation Event taking into account the likely effect of the delay; or
- 42.3.2 in the case that, as a result of the Compensation Event, the Company is unable to comply with its obligation under any of the Project Documents, the Company shall be relieved of such obligations for the duration of the Compensation Event or its effects; and
- 42.3.3 in the case of any additional costs incurred and/or loss of revenue suffered by the Company in any Month, the GoM shall pay the Company such actual or estimated additional costs and/or actual or estimated revenue lost by the Company, as specified in the invoice pursuant to clause 42.2.
- 42.3.4 an invoice issued to the GoM pursuant to clause 42.2 shall be due and payable within ten (10) Business Days after the date of the invoice.
- 42.3.5 any amount properly due from the GoM and remaining unpaid after the due date shall bear interest at the Delayed Payment Rate from the date when payment was due until the amount due is actually received by the Company.
- 42.3.6 should the GoM dispute an invoice or any of the documentary evidence supporting such invoice as provided by the Company pursuant to clause 42.2, the GoM shall notify the Company within [ ] Business Days of receipt of such invoice and/or documentary evidence and the Parties shall meet and seek to resolve the dispute. Following resolution, the invoice shall become payable within [ ] Business Days. If the Parties are unable to resolve the dispute, it shall be referred to arbitration pursuant to clause 0.
- 42.3.7 if any Compensation Event continues for longer than [twelve (12)] Months from the date of the notice referred to in clause 42.2 and the Parties agree that, as a result of the Compensation Event, the Project is no longer economically viable, then the Parties shall meet and negotiate in good faith adjustments to this Agreement and the Project to mitigate the effects of the Compensation Event of the Project. If the Parties cannot agree on any such adjustments after [ ] days of good faith negotiations, either Party may terminate this Agreement. If this Agreement is terminated pursuant to this clause 42.3.6, the GoM shall pay the Company an amount calculated in accordance with clause 0.

## **43 GoM Guarantee**

### **43.1 Guarantee**

In consideration of the Company entering into the Power Purchase Agreement with the Power Purchaser, the GoM hereby irrevocably and unconditionally guarantees and promises to pay the Company the amount of [ ] when due in accordance with the terms of the Power Purchase Agreement, which obligation of the GoM shall include monetary damages arising out of any failure by the Power Purchaser to perform its obligations under the Power Purchase Agreement to the extent that any failure to perform such obligations gives rise to monetary damages.

### **43.2 Waiver of Defences**

The Guarantee shall be absolute and unconditional and shall remain in full force and effect until all the covenants, terms, and agreements set forth in the Power Purchase Agreement shall have been completely discharged and performed, unless waived by the Company in writing. The obligations of the GoM shall not be modified or impaired upon (and the GoM waives any defence to the performance of such obligations based upon) the happening from time to time of any event, including the following:

- 43.2.1 the extension of time for payment of any amounts due or of time for performance of any of the covenants, terms, or agreements of the Power Purchaser set forth in the Power Purchase Agreement;
- 43.2.2 subject to clause 52.2, amendments to the Power Purchase Agreement;
- 43.2.3 the failure, omission, or delay by the Company to enforce, ascertain, or exercise any right, power, or remedy under or pursuant to the terms of the Power Purchase Agreement or this clause 42.3.7;
- 43.2.4 the bankruptcy, insolvency, or other failure or financial disability of the Power Purchaser or the Company;
- 43.2.5 the addition, or partial or entire release of any guarantor, maker, or other party (including the Power Purchaser) primarily or secondarily responsible for the performance of any of the covenants, terms, or agreements set forth in the Power Purchase Agreement or by any extension, waiver, amendment, or thing or circumstance whatsoever in law or in equity that may release or create a defence or discharge for a guarantor (other than complete performance in accordance with the terms of the Power Purchase Agreement);
- 43.2.6 any failure of the Power Purchaser to comply with the requirements of any law, regulation or order;
- 43.2.7 the dissolution, privatisation, reorganization or any other legal alteration of the legal structure of the Power Purchaser;
- 43.2.8 any assignment as security, pursuant to clause 44.2.1, of the Power Purchase Agreement, by the Company; and

43.2.9 the invalidity or unenforceability of the Power Purchase Agreement or any of its terms, conditions or provisions, caused solely by the GoM or the Power Purchaser.

### **43.3 Continuing Guarantee**

The Guarantee shall be a continuing security and, accordingly, shall extend to cover the balance due to the Company at any time from the Power Purchaser under the Power Purchase Agreement. No demand made by the Company hereunder shall prejudice or restrict the right of the Company to make further or other demands.

### **43.4 Additional Security**

43.4.1 The Guarantee shall be in addition to, and not in substitution for or derogation of, any other security that the Company may at any time hold in respect of the obligations of the Power Purchaser under the Power Purchase Agreement.

43.4.2 The Company may enforce the Guarantee notwithstanding that it may hold any other guarantee, lien, or security of or for the obligations of the Power Purchaser under the Power Purchase Agreement or have available to it any other remedy at law or equity.

### **43.5 Preliminary Demand**

43.5.1 Notwithstanding that the Guarantee is the unconditional obligation of the GoM, before taking steps to enforce the Guarantee and demand payment from the GoM, the Company agrees to notify the GoM of the non-payment by the Power Purchaser and make demand in writing for payment from the Power Purchaser. After [thirty (30)] days from the date notice of such non-payment was delivered to the GoM, the Company may notify the GoM in writing that payment from the Power Purchaser, continues to be past due, and make a demand for payment from the GoM under the Guarantee, and the GoM shall make payment within [ten (10)] Business days following such demand for payment. Late payments hereunder shall bear mark-up at an annual rate equal to the Delayed Payment Rate.

43.5.2 Except as provided in clause 43.2.1, the Company shall not be obliged before taking steps to enforce the Guarantee, to exercise any other remedies that may be available to it under or in respect of the Power Purchase Agreement, or to initiate any proceedings or obtain judgment against the Power Purchaser thereon.

### **43.6 Certification**

Any demand for payment made pursuant to the Guarantee shall be made in person by a duly authorized officer of the Company at the GOM's offices at [ ], and shall be accompanied by a certificate signed by a duly authorized officer of the Company, stating that:

"We hereby certify that (A) [ ] (the "Company") is making this demand on the Government of the Republic of Malawi (the "Guarantor") in the amount of Kwacha [insert amount] in accordance with clause 42.3.7 of the

Implementation Agreement dated [ ], by and between the Guarantor and the Company; (B) the amount specified hereinabove is due and payable by the "Power Purchaser" under the Power Purchase Agreement between the Company and the Power Purchaser; (C) demand in writing for payment from the Power Purchaser was delivered to the Power Purchaser on or after the date payment was due and notice of such non-payment was delivered to the GoM not less than [thirty (30)] days prior to the date hereof; and (D) such amount, on the date hereof, remains unpaid by the Power Purchaser."

#### **43.7 Subordination**

Any right that the GoM may at any time have to be indemnified by the Power Purchaser in respect of sums paid out by the GoM in performance of the Guarantee, shall be subordinated to the rights of the Company to recover from the Power Purchaser in full all sums that are then due from the Power Purchaser under the Power Purchase Agreement.

#### **43.8 No Set-Off**

No set-off, counterclaim, reduction, or diminution of any obligation that the GoM has or may have against the Company, nor any right of subrogation that the GoM has or may have against the Company, shall be available to the GoM against the Company in connection with any obligation of the GoM to the Company under the Guarantee.

### **44. Assignment and Security**

#### **44.1 Assignment**

No assignment or transfer by a Party of this Agreement or such Party's rights or obligations hereunder shall be effective without the prior written consent of the other Party, except as provided in clause 44.2.1

#### **44.2 Creation of Security**

44.2.1 Notwithstanding the provisions of clause 44.1, for the purpose of financing the Project, in connection with the Financial Closing the Company may assign pursuant to the Financing Documents to, or create a security interest in favour of, the Lenders in the Company's rights and interests under or pursuant to (i) this Agreement, (ii) any agreement or document included within or contemplated by the Project Agreements, (iii) the PS, (iv) the Site, the present and future movable, immovable, and intellectual property of the Company, (v) the present and future revenues or any of the rights or assets or actionable claims of or debts owed to, the Company and (vii) any other present or future interest, right, property or asset of the Company of any kind and wherever situated.

44.2.2 The GoM recognises that Lenders may require a direct agreement with the GoM to obtain customary insurances for step-in, step-out and substitution rights and other appropriate support. The GoM agrees to cooperate in good faith with the Company's efforts to obtain limited recourse financing for the Project, and undertakes to enter into a



direct agreement with the Lenders containing terms and condition as may be required in international limited recourse project financing.

#### **44.3 Delivery of Financing Documents**

- 44.3.1 Prior to Financial Closing, the Company shall deliver to GoM a schedule or a copy of the term sheet reflecting the proposed material terms of the Financing Documents and setting forth a principal repayment schedule that provides for debt repayment, together with the interest rate or rates (or mark up or other term denoting the return paid to the Financiers on debt) and any schedules or formulae that will be included in the Financing Document for the computation of fees and charges payable to the Lenders upon the winding up for early termination of the loans under the Financing Documents, and shall also identify the equity commitments, individually and in total, of the Initial Shareholders. Each loan agreement constituting part of the Financing Documents will provide that any liquidated damages received by the Company from its EPC Contractor for capacity or other testing shortfalls shall be used either to reduce the outstanding principal amount of debt under such loan agreement or in an effort to remedy such shortfalls. The Company shall provide GoM with a copy of the loan agreements executed on the date of Financial Closing no later than [fifteen (15)] Business Days after Financial Closing.
- 44.3.2 Following Financial Closing, the Company shall deliver to GoM, copies of all amendments to the executed Financing Documents within [ten (10)] days after the execution of each such document. At the request of GoM, prior to the execution of such amendments or modifications to the Financing Documents or new Financing Documents, the Company shall deliver to the GoM, in a form satisfactory to the GoM, assurances, undertakings or agreements that no alteration or enhancement as a result of such amendments or modifications shall increase in any respect the financial obligations of the GoM hereunder.

### **45 Force Majeure**

#### **45.1 Definition**

- 45.1.1 A "Force Majeure Event" means any event or circumstance or combination of events or circumstances, including but not limited to those events and circumstances described in clause 45.1.2 (and the resulting effects thereof) which:
- is not excluded in clause 45.1.3;
  - is beyond the reasonable control directly or indirectly of the affected Party;
  - is not reasonably foreseeable, or if reasonably foreseeable cannot be or caused to be prevented or avoided in whole in part by the

affected Party, despite employing Prudent Industry Practices or the exercise of reasonable care and diligence;

adversely affects (in cost and/or time) the ability of the affected Party to perform its obligations under this Agreement.

45.1.2 In this Agreement a Force Majeure Event includes, but is not limited to, any of the following events or circumstances or combinations of events or circumstances, provided they satisfy the requirements in clause 45.1.1 above:

the following political events that occur inside or directly involve Malawi (each a "Malawi Political Event"):

- (i) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, civil commotion, or act or campaign of terrorism or political sabotage; or
- (ii) any Lapse of Consent that shall have existed for [thirty (30)] consecutive days or more; or
- (iii) any strike, work-to-rule, go-slow, or analogous labour action that is politically motivated and is widespread or nationwide; or
- (iv) radioactive contamination or ionizing radiation resulting from another Malawi Political Event;
- (v) any Change in Law; or

Other events beyond the reasonable control of the affected Party (each an "Other Force Majeure Event"), including, but not limited to:

- (i) lightning, fire, earthquake, tsunami, flood, storm, cyclone, typhoon, or tornado; or
- (ii) any Lapse of Consent that shall have existed for less than [thirty (30)] consecutive days; or
- (iii) any strike, work-to-rule, go-slow, or analogous labour action that is not politically motivated and is not widespread or nationwide; or
- (iv) fire, explosion, chemical contamination, radioactive contamination, or ionizing radiation; or
- (v) epidemic or plague.

**45.1.3 Force Majeure Events shall expressly not include the following conditions:**

late delivery or interruption in the delivery of machinery, equipment materials, spare parts or consumables;  
a delay in the performance of any Contractor; or  
breakdown in machinery or equipment; or

normal wear and tear or random flaws in materials and equipment,  
provided, that each of the events described in clauses 45.1.30, 45.1.30 and 45.1.30 shall constitute a Force Majeure Event to the extent that such events or circumstances are caused by an event or circumstance that is itself a Force Majeure Event, whether experienced directly by the Company or by one of its Contractors.

## **45.2 Notification Obligations**

- 45.2.1 If, by reason of a Force Majeure Event, a Party is wholly or partially unable to carry out its obligations under this Agreement, the affected Party shall (i) give the other Party notice of the Force Majeure Event as soon as practicable, but in any event, no later than the later of [forty-eight (48)] hours after the affected Party becomes aware of the occurrence of the Force Majeure Event or [six (6)] hours after the resumption of any means of providing notice between the Company and the GoM, and (ii) give the other Party a second notice, describing the Force Majeure Event in reasonable detail and, to the extent which can reasonably be determined at the time of such notice, providing a preliminary evaluation of the obligations affected, a preliminary estimate of the period of time that the affected Party shall be unable to perform such obligations and other relevant matters as soon as practicable, but in any event, no later than [seven (7)] days after the initial notice of the occurrence of the Force Majeure Event is given by the affected Party. When appropriate, or when reasonably requested so to do by the other Party, the affected Party shall provide further notices to the other Party, more fully describing the Force Majeure Event and its cause(s) and providing or updating information relating to the efforts of the affected Party to avoid and/or to mitigate the effect(s) thereof and estimates, to the extent practicable, of the time that the affected Party reasonably expects it shall be unable to carry out any of its affected obligations due to the Force Majeure Event.
- 45.2.2 The affected Party shall provide notice to the other Party of (i) with respect to an ongoing Force Majeure Event, the cessation of the Force Majeure Event, and (ii) its ability to recommence performance of its obligations under this Agreement as soon as possible and in any event no later than [seven (7)] days after the occurrence of each of the clauses 45.2.1 and 45.2.2 here above.
- 45.2.3 Failure by the affected Party to give written notice of a Force Majeure Event to the other Party within the [forty eight (48)] hour period or [six (6)] hour period required under clause 45.2.1 shall not prevent the affected Party from giving such notice at a later time; provided, however, that in such case, the affected Party shall not be excused pursuant to clause 45.4 for any failure or delay in complying with its obligations under or pursuant to this Agreement until such notice has been given. If such notice is given within the [forty-eight (48)] hour period or [six (6)] hour period required by clause 45.2.1, the affected Party shall be excused for such failure or delay pursuant to clause

45.4 from the date of commencement of the relevant Force Majeure Event.

#### **45.3 Duty to Mitigate**

The affected Party shall use all reasonable efforts (or shall ensure that its Contractors use all reasonable efforts) to mitigate the effects of a Force Majeure Event, including, but not limited to, the payment of reasonable sums of money by or on behalf of the affected Party (or such Contractor), which sums are reasonable in light of the likely efficacy of the mitigation measures.

#### **45.4 Delay Caused by Force Majeure**

So long as the affected Party has, at all times since the occurrence of the Force Majeure Event, complied with the obligations of clause 45.3 and continues to so comply, then (i) the affected Party shall not be liable for any failure or delay in performing its obligations (other than an obligation to make a payment or provide security) under or pursuant to this Agreement during the existence of a Force Majeure Event, and (ii) any performance deadline that the affected Party is obligated to meet under this Agreement shall be extended; provided, however, that no relief, including extension of performance deadlines, shall be granted to the affected Party pursuant to this clause 45.4 to the extent that such failure or delay would nevertheless have been experienced by the affected Party had the Force Majeure Event not occurred. Other than for breaches of this Agreement by the other Party, the other Party (that is not affected by the Force Majeure Event) shall not bear any liability for any loss or expense suffered by the affected Party as a result of a Force Majeure Event. Notwithstanding the foregoing, the GoM shall not be entitled to claim for itself, and shall not be relieved of its obligations under this Agreement by the occurrence of a Malawi Political Event.

#### **45.5 Termination for Extended Force Majeure**

If any Force Majeure Event continues for longer than [twelve (12) Months] from the date of the notice referred to in clause 45.2, either Party may terminate this Agreement. If this Agreement is terminated pursuant to this clause, the GoM shall pay the Company an amount calculated in accordance with clause 0.

### **46. Termination**

#### **46.1 Termination for Default**

##### **46.1.1 Company Event of Default; Termination by the GoM**

Each of the following events shall be an event of default by the Company (each a "**Company Event of Default**"), which, if not cured within the time period permitted (if any) to cure, shall give rise to the right on the part of the GoM to terminate this Agreement pursuant to clause 46.2; provided, however, that no such event shall be a Company Event of Default (i) if it results from the GoM's breach of this Agreement, (ii) if it results from a breach by the Power Purchaser of

the Power Purchase Agreement or (iii) if it occurs as a result of a Force Majeure Event (except in the case of clause 46.1.10) or a Compensation Event:

failure of the Company to have achieved the Construction Start Date within [ ] days after Financial Closing;

failure of the Company to achieve the Commercial Operations Date within [ ] days after the Required Commercial Operations Date;

after the Construction Start Date but prior to the achievement of the Commercial Operations Date, the failure of the Company to prosecute the Project in a diligent manner for a period of [ ] consecutive days without prior notice to, and the prior written consent of, the GoM;

after the Commercial Operations Date, an Abandonment by the Company without prior notice to, and the prior written consent of, the GoM that continues for a period of [ ] consecutive days;

other than the assignments to and by the Lenders contemplated under clause 44.2, the assignment or transfer of the Company's rights or obligations in the assets identified in clause 44.2.1 without obtaining the prior written consent of the GoM or the transfer, conveyance, loss, or relinquishment of the Company's right to own and/or operate the PS or any material part thereof or to occupy the Site, to any Person (other than the Power Purchaser pursuant to the Power Purchase Agreement) without the prior written approval of the GoM;

except for the purpose of amalgamation or reconstruction (provided, that such amalgamation or reconstruction does not affect the ability of the amalgamated or reconstructed entity, as the case may be, to perform its obligations under this Agreement and further provided that such amalgamation has been agreed to by the GoM), the occurrence of any of the following events: (a) the passing of a resolution by the shareholders of the Company for the winding up of the Company; (b) the voluntary filing by the Company of a petition of bankruptcy, moratorium, or other similar relief; (c) the appointment of a provisional liquidator in a proceeding for the winding up of the Company after notice to the Company and due hearing, which appointment has not been set aside or stayed within [ninety (90)] days of such appointment; (d) the making by a court with jurisdiction over the Company of an order winding up the Company that is not stayed or reversed by a court of competent authority within [ninety (90)] days;

any statement, representation, or warranty by the Company in this Agreement proving to have been incorrect, in any material respect, when made or when deemed to have been made, and such failure or incorrect statement, representation, or warranty

having a material and adverse effect on the Company's ability to perform its obligations under this Agreement or on the obligations or liabilities of the GoM under this Agreement;

exercise by the Lenders of their remedies under the Financing Documents with respect to either the PS, its assets or the pledged Ordinary Share Capital, such that either the Company or its management are removed by the Lenders from control of the PS or the Company and the failure by the Lenders to deliver an Election Notice (as defined in clause 46.4) or to transfer the PS and the rights and obligations of the Company under the Agreement and the Power Purchase Agreement to a transferee within [two hundred and forty (240)] days thereafter;

any material breach or default by the Company of or under this Agreement or the Power Purchase Agreement that is not remedied within [thirty (30)] days after notice from the GoM, Power Purchaser, respectively, stating that a material breach of such agreement has occurred that could result in the termination of the agreement and identifying the material breach in question in reasonable detail; or

any default by the Company in the making of any undisputed payment or payments required to be made by it under this Agreement or the Power Purchase Agreement, as the case may be, on the due date specified in such agreement that continues unpaid for [ ] days.

#### **46.1.2 GoM Event of Default; Termination by the Company**

Each of the following events shall be an event of default by the GoM (each a "**GoM Event of Default**"), which, if not cured within the time period permitted (if any) to cure, shall give rise to the right on the part of the Company to terminate this Agreement pursuant to clause 46.2; provided, however, that no such event shall be a GoM Event of Default (i) if it results from a breach by the Company of the Power Purchase Agreement or this Agreement, or (ii) if it occurs as a result of an Other Force Majeure Event (except in the case of clause 46.1.10):

the dissolution, pursuant to law of the Power Purchaser, except for an amalgamation, reorganization, reconstruction, or further privatization of the Power Purchaser, where the GoM without interruption guarantees the performance of the succeeding entity or entities on terms acceptable to the Company (acting reasonably) or such other commercial security is provided for the obligation of the succeeding entity or entities that in the reasonable business judgment of the Company provides an adequate alternative to the Guarantee and all of the Power Purchaser's obligations under the Power Purchase Agreement are assigned pursuant to law or contractually assumed, through novation or otherwise, by one (1) or more entities, each with the

lead capacity and appropriate commercial function to perform its obligations thereunder;

any default or defaults by the GoM in the making of any undisputed payment or payments required to be made by it hereunder on the due date for payment specified herein that continues unpaid for [ ] days;

any material breach or default by the GoM of or under this Agreement that is not remedied within [ ] days after notice from the Company to the GoM stating that a material breach of the Agreement has occurred that could result in the termination of this Agreement, identifying the material breach in reasonable detail and demanding remedy thereof;

any material breach or default by the Power Purchaser of or under the Power Purchase Agreement that is not remedied within [ ] days after receipt of a notice from the Company to the Power Purchaser, with a copy of the notice to the GoM that states that a material breach of the Power Purchase Agreement has occurred that could result in the termination of the Power Purchase Agreement, identifies the breach in reasonable detail and demands remedy thereof;

any change in any applicable Laws of Malawi (A) making unenforceable, invalid, or void any material undertaking of the GoM or the Power Purchaser under this Agreement or the Power Purchase Agreement; or (B) (other than a Change in Law for which compensation is provided under this Agreement) making (1) it unlawful for the Company, the Lenders or the Investors to make or receive any payment, to perform any obligation or to enjoy or enforce any material right under this Agreement or any other document or agreement in the Project Agreements, or (2) any such payment, the performance of any such material obligation or the enjoyment or enforcement of any such material right unenforceable, invalid or void as a result of any such change in law;

any change in any of the Laws of Malawi (other than a Change in Law for which compensation is provided under this Agreement) placing any material restrictions or limitations (beyond those restrictions or limitations that are in existence on the date of the execution of this Agreement) on the ability of the Company to exchange Kwacha for Dollars, or for Foreign Investors to repatriate, any capital, dividends, distributions or other proceeds from the Company (provided that such distributions do not arise in connection with a breach of this Agreement), which restrictions or limitations remain in place for more than one hundred and eighty (180) days without an arrangement being provided to exempt the Company or its Foreign Investors from all such restrictions and limitations;

the expropriation, compulsory acquisition, or nationalization by the GoM or any Government Agency of (i) any Ordinary Share Capital, or (ii) any material asset or right of the Company (except as contemplated by the Project Agreements).

## **46.2 Termination Notices**

- 46.2.1 Upon the occurrence of a GoM Event of Default or a Company Event of Default, as the case may be, that is not cured within the applicable cure period, if any, the non-defaulting Party may, at its option, initiate termination of this Agreement by delivering a notice (a "Notice of Intent to Terminate") of its intent to terminate this Agreement to the defaulting Party. The Notice of Intent to Terminate shall specify in reasonable detail the Company Event of Default or the GoM Event of Default, as the case may be, giving rise to such notice.
- 46.2.2 Following delivery of the Notice of Intent to Terminate, the Party in default may continue to undertake efforts to cure the Company Event of Default or the GoM Event of Default, as the case may be, for a period of [forty five (45)] days commencing on the delivery date of such notice in the case of a failure by either Party to make payments, or for a period of [ninety (90)] days commencing on the delivery of such notice in the case of any other Company Event of Default or GoM Event of Default, as the case may be, (or such longer period as the Parties may mutually agree) and if the default is cured at any time prior to the delivery of a Termination Notice in accordance with clause 46.2.1, then the non-defaulting Party shall have no right to terminate this Agreement in respect of such cured Company Event of Default or GoM Event of Default, as the case may be.
- 46.2.3 Subject to the provisions of clause 46.3 or clause 46.4, as the case may be, upon expiration of the cure period described in clause 46.2.1 and unless the Parties shall have otherwise agreed or unless the Company Event of Default or GoM Event of Default, as the case may be, giving rise to the Notice of Intent to Terminate shall have been remedied, the Party having given the Notice of Intent to Terminate may terminate this Agreement by delivering a Termination Notice to the other Party whereupon, this Agreement shall terminate on the date (the "Termination Date") specified in the Termination Notice, which date shall not be earlier than the date that is [ten (10)] Business Days following the date on which the Termination Notice is delivered to the other Party or later than [thirty (30)] days following the date of such delivery of the Termination Notice to the other Party, and the provisions of clause 0 ( Rights and Obligations of the Parties upon Termination) shall apply.

## **46.3 Notice to the GoM of the Power Purchaser's Default**

- 46.3.1 Notwithstanding anything in this Agreement, the Company shall not seek to terminate this Agreement pursuant to clause [ ] of the Power Purchase Agreement due to any default by the Power Purchaser thereunder without first giving, with respect to any such default, a



copy of any notice required to be given to the Power Purchaser under clause [ ] of the Power Purchase Agreement to the GoM, such notice to include a reasonable description of such default and shall provide to the GoM the opportunity to cure any such default within the same cure period as provided to the Power Purchaser under the Power Purchase Agreement and such cure period to commence upon delivery of each such notice to the GoM. Each such notice shall be deemed to have been delivered (a) when presented personally to the GoM, (b) when transmitted by facsimile, or (c) [five (5)] days after being deposited in a regularly maintained receptacle for the postal service in Malawi, postage prepaid, registered or certified, return receipt requested, addressed to the GoM, at the address indicated in clause 51.1 (or such other address as the GoM may have specified by written notice delivered in accordance therewith).

- 46.3.2 No such rescission or termination of this Agreement pursuant to clause [ ] of the Power Purchase Agreement by the Company shall be effective without notice and expiration of the cure period as provided in clause 46.3.1. The GoM may make or perform, but shall be under no obligation to make any payment (other than is required under the Guarantee) or to perform any act required of the Power Purchaser under the Power Purchase Agreement with the same effect as if the payment or act had been made or performed by the Power Purchaser. If the GoM fails to cure or is unable or unwilling to cure a default of the Power Purchaser within the cure periods provided to the Power Purchaser under the Power Purchase Agreement, the Company shall have all of its rights and remedies with respect to such default as set forth in this Agreement and the Power Purchase Agreement; provided, however, that if the GoM is diligently attempting to cure any default other than a payment default of the Power Purchaser and demonstrable progress toward affecting such cure is being made, the GoM shall be granted an additional period not exceeding [ninety (90)] days to affect such cure before the Company may exercise its rights and remedies with respect to such default set forth in this Agreement and the Power Purchase Agreement.

#### **46.4 [Notice to the Lenders of the Company's Default]**

- 46.4.1 [Notwithstanding anything in this Agreement, from and after the occurrence of Financial Closing, the GoM shall not seek to terminate this Agreement as the result of any default of the Company without first giving a copy of any notices required to be given to the Company under clause 46.2 to the Lenders. The Lenders shall be entitled to cure any such default within the cure period specified in clause 46.2.2, such cure period shall commence upon delivery of each such notice to the Lenders. If there is more than one (1) Lender, the Lenders will designate in writing to the GoM an agent (the "Agent"), and any notice required hereunder shall be delivered to such Agent, such notice to be effective upon delivery to the Agent as if delivered to each of the Lenders. Each such notice shall be in writing and shall be deemed to

have been delivered (a) when presented personally to the Lender or the Agent, (b) when transmitted by facsimile to the number specified in accordance with the procedure set forth below, or (c) [five (5)] days after being deposited in a regularly maintained receptacle for the postal service in Malawi, postage prepaid, registered or certified, return receipt requested, addressed to the Lender or to the Agent at such address as the Lenders may have specified by written notice delivered in accordance herewith. Any notice given by facsimile under this clause 46.4 shall be confirmed in writing delivered personally or sent by prepaid post, but failure to so confirm shall not void or invalidate the original notice if it is in fact received by the Lender or the Agent. Notwithstanding the foregoing, if the address of the Lender or Agent is outside Malawi, any notice delivered to the Lender or Agent pursuant to this clause 46.4 shall be sent by international courier or facsimile, and if sent by facsimile, confirmed by international courier. The address and facsimile number for Lender or Agent shall be provided to the GoM by the Company and thereafter may be changed by the Lender or the Agent by subsequent delivery of a notice to the GoM at the address or facsimile number for the GoM provided in clause 51.1 (or at such other address or facsimile number subsequently delivered to the Lender or the Agent in accordance with this clause 46.4 and otherwise in accordance with the requirements of clause 51.1.

- 46.4.2 No rescission or termination of this Agreement by the GoM shall be valid or binding upon the Lenders without such notice, the expiration of such cure period, and the expiration of the Extended Cure Period (as defined below) provided in this clause 46.4([Notice to the Lenders of the Company's Default). The Lenders may make or procure, but shall be under no obligation to make, any payment or perform any act required to be made or performed by the Company, with the same effect as if made or performed by the Company. If the Lenders fail or are unable or unwilling to cure or to procure the cure of any Company Event of Default within the cure period under clause 46.2.1 as provided to the Company in this Agreement, the GoM shall have all its rights and remedies with respect to such default as set forth in this Agreement; provided, however, that if the cure by the Lenders of the Company Event of Default requires the Lenders to take control of and occupy the PS, then before termination of the cure period provided to the Company pursuant to clause 46.2.2, such cure period commencing on the delivery of such notice to the Lenders, the Lenders shall have a further period (the "Evaluation Period") during which the Lenders shall evaluate such default, the condition of the PS and other matters relevant to the actions to be taken by the Lenders concerning such default, and which Evaluation Period shall end on the sooner to occur of (i) the Lenders' delivery to the GoM of a notice ("Election Notice") that the Lenders have elected to pursue their remedies under the Financing Documents and assume the rights and obligations of the Company under the Agreement as provided in

clause 46.2, or (ii) thirty (30) days following the end of the cure period under clause 46.2. Upon delivery of the Election Notice, the Lenders shall be granted, to the extent that they diligently attempt to cure or to procure the cure of such Company Event of Default, an additional period of one hundred and eighty (180) days to cure any Company Event of Default (the "Extended Cure Period"). In the event that the Lenders fail to cure or procure the cure of any Company Event of Default required to be cured pursuant to clause 46.2 on or before the expiration of the Extended Cure Period, the GoM may exercise its rights and remedies with respect to such default set forth in this Agreement, the GoM may immediately terminate this Agreement, and such termination shall be effective on delivery to the Lenders or the Agent of a notice of such termination.]

#### **46.5 Other Termination Rights**

This Agreement may be terminated:

- 46.5.1 by the GoM for a Company Event of Default, in accordance with clause 46.1.1;
- 46.5.2 by the Company for a GoM Event of Default, in accordance with clause 46.1.2;
- 46.5.3 by the Company for a prolonged Force Majeure Event affecting the Company's access to the Site, in accordance with clause 34.1.2;
- 46.5.4 by either Party for a prolonged Force Majeure Event affecting such Party or the other Party, in accordance with clause 44.3.2;
- 46.5.5 by either Party for a prolonged Compensation Event, in accordance with clause 42.3.6; or
- 46.5.6 by the mutual agreement of the Parties.

#### **46.6 Other Remedies**

Subject to clause 37.1, the exercise of the right of a Party to terminate this Agreement, as provided herein, does not preclude the Party from exercising other remedies that are provided herein or are available at law. Remedies are cumulative, and the exercise of, or failure to exercise, one or more remedy by a Party shall not limit or preclude the exercise of, or constitute a waiver of, other remedies by that Party; provided, that the remedies and termination payments provided in clause 0 ( Rights and Obligations of the Parties upon Termination) are the exclusive remedies available to each Party with respect to any termination of this Agreement as a consequence of the events described therein.

### **47 Rights and Obligations of the Parties upon Termination**

#### **47.1 Where this Agreement is terminated pursuant to clause 46.5.1:**

- 47.1.1 within [ ] Business Days of the Termination Date, the Company shall deliver to the GoM a notice specifying the Project Debt outstanding in relation to the Project;

- 47.1.2 within [ ] Business Days of the Termination Date, the GoM shall pay to the Company, the Project Debt; and
- 47.1.3 within [ ] Business Days of the Transfer Date, the Company shall transfer the Project to the GoM in accordance with clause 47.7.
- 47.2 Where this Agreement is terminated pursuant to clause 46.5.2 or clause 46.5.6:**
  - 47.2.1 within [ ] Business Days of the Termination Date, the Company shall deliver to the GoM a notice specifying the Contract Price;
  - 47.2.2 within [ ] Business days of the Termination Date, the GoM shall pay to the Company, an amount equal to the Contract Price; and
  - 47.2.3 within [ ] Business Days of the Transfer Date, the Company shall transfer the Project to the GoM in accordance with clause 47.7.
- 47.3 Where this Agreement is terminated pursuant to clause 46.5.3 or clause 46.5.4:**
  - 47.3.1 within [ ] Business Days of the Termination Date, the Company shall deliver to the GoM a notice specifying the Project Debt outstanding in relation to the Project;
  - 47.3.2 within [ ] Business Days of the Termination Date, the GoM shall pay to the Company, an amount equal to the Project Debt; and
  - 47.3.3 within [ ] Business Days of the Transfer Date, the Company shall transfer the Project to the GoM in accordance with clause 47.7.
- 47.4 Where this Agreement is terminated pursuant to clause 46.5.5:**
  - 47.4.1 within [ ] Business Days of the Termination Date, the Company shall deliver to the GoM a notice specifying the Project Debt outstanding in relation to the Contract Price;
  - 47.4.2 within [ ] Business Days of the Termination Date, the GoM shall pay to the Company, an amount equal to the Contract Price; and
  - 47.4.3 within [ ] Business Days of the Transfer Date, the Company shall transfer the Project to the GoM in accordance with clause 47.7.
- 47.5 Any termination payment payable by the GoM under clauses 47.1 to clause 47.4 (inclusive) shall only be payable if the company has not been paid, when due, a termination payment by the Power Purchaser under the Power Purchase Agreement, in respect of the termination of the Power Purchase Agreement in accordance with its terms. For the avoidance of doubt, the Company shall only be entitled to receive a termination payment from either the Power Purchaser under the Power Purchase Agreement, or the GoM under this Agreement and not both.
- 47.6 Any termination payment payable by the GoM under clauses 47.1 to clause 47.4 (inclusive) shall, to the extent such calculation has not already been made, be made free and clear of any withholding or set-off on account of any Taxes or otherwise but shall be calculated net of any insurance proceeds

actually received by the Company in respect of any event or events which gave rise to or contributed to the termination of this Agreement. To the extent that the Company has a claim under an insurance policy which has not been paid at the date of any termination payment by the GoM, the GoM shall pay the amount in full and thereafter be entitled to an assignment of the benefit of such claim by the Company.

47.7 Immediately following the payment of the termination amount by the GoM pursuant to any of clauses 47.1 to clause 47.4 (inclusive), and in any event within [one (1)] Month of the Transfer Date, the Company shall provide the GoM with copies of all data and information of the Company's activities in respect of the Project, including but not limited to documents, maps, plans, worksheets and other technical data and information and shall execute such documents as the Company may reasonably consider necessary to effect the transfer, free and clear from any lien or encumbrance created by the Company, of:

47.7.1 all of its right, title and interest in and to the Site and the Project Assets;

47.7.2 all Permits which are in each case held by the Company and capable of being transferred;

47.7.3 all intellectual property rights relevant to the Project Assets and capable of being transferred. For the avoidance of doubt, such intellectual property rights shall be transferred free of any royalty and in perpetuity for the remaining life of the Project Assets, either, where the Company itself owns such intellectual property rights, by means of the cession or transfer to the GoM of such intellectual property rights or where the Company itself holds one or more licence(s) to use such intellectual property, by way of the cession or transfer of such licences to the GoM; and

47.7.4 all operating and maintenance manuals, operational summaries, transfer notes, design drawings, as built drawings and other information, including all test records and information on the actual condition of the major components and equipment,

which are in each case reasonably required by the GoM to enable it to take over the operation and maintenance of the PS and to implement any modifications to the PS reasonably required to allow the PS to continue to operate and be maintained in accordance with Prudent Utility Practice.

**47.8 The provision of this clause shall survive the expiration or termination of this Agreement.**

**47.9 Obligations upon Termination**

Upon expiration or earlier termination of this Agreement, the Parties shall have no further obligations hereunder except for obligations that arose prior to or arise upon such expiration or termination and obligations that expressly survive such expiration or termination pursuant to this Agreement, provided, however, that notwithstanding anything to the contrary in this Agreement, the rights and obligations set out in clause 0 (Taxation and Import Controls),

clause 0 (Foreign Currency Exchange and Transfer of Funds), clause 0 (Resolution of Disputes), and this clause 0 (Rights and Obligations of the Parties on Termination) shall survive any termination or expiration of this Agreement until all provisions are fulfilled and all funds payable hereunder by the GoM are received by the Company or the Lenders upon the sale or other disposal of the assets related to the Project, including, without limitation, proceeds from the enforcement by the Lenders of the security created by the Company under or pursuant to the Project Agreements have been repatriated and, if the Company or the Foreign Investors so desire in the case of Kwacha funds, converted by the Company or the Foreign Investors into Dollars in accordance with the terms of this Agreement and repatriated.

## **48. Resolution of Disputes**

### **48.1 Resolution by Parties**

In the event that a Dispute arises, the Parties shall attempt in good faith to settle such Dispute by mutual discussions within [thirty (30)] days after the date that the disputing Party gives written notice of the Dispute to the other Party. During such mutual discussions and any resolution procedure instituted pursuant to this clause 0 the Parties shall faithfully continue to perform their respective obligations under this Agreement.

### **48.2 Determination by Expert**

48.2.1 In the event that the Parties are unable to resolve a Dispute in accordance with clause 48.1 within the time periods set forth therein, then either Party, in accordance with this clause 48.2, may refer the Dispute to an expert (the "Expert") for consideration of the Dispute and to obtain a recommendation from the Expert as to the resolution thereof. Notwithstanding the foregoing, either Party may require that any Dispute be referred for resolution to arbitration pursuant to clause 0 without first referring it to an Expert.

48.2.2 The Party initiating submission of the Dispute to the Expert shall provide the other Party with a notice stating that it is submitting the Dispute to an Expert and nominating the Person it proposes to be the Expert. Within [fifteen (15)] days of receiving such notice, the other Party shall notify the initiating Party whether such Person is acceptable, and if such nominated expert is not acceptable to the responding Party, the responding Party shall propose a Person to be the Expert. If the Party receiving such notice fails to respond or notifies the initiating Party that the Person is not acceptable or nominates an expert that is not acceptable to the initiating Party, the Parties shall meet within [five (5)] Business days and discuss in good faith for a period of [five (5)] days to agree upon a Person to be the Expert. Failing nomination by the responding Party of an expert within the period provided or failing such agreement by the Parties of the expert, at the end of the meeting, the [ ] (for financial and billing matters), [ ] (for technical matters) shall

be requested to select the Expert, and the selection of the Expert by the relevant selecting entity shall be binding on the Parties; provided, however, that the selecting entity shall be directed that, unless the Parties otherwise agree in writing, the Expert shall not be a national of the jurisdiction of either Party or of the jurisdiction of any Investor or group of Investors holding directly or beneficially more than [five per cent (5%)] of the Company nor shall any such Expert be an employee or agent or former employee or agent or have a material interest in the business of any such Person.

- 48.2.3 Consideration of the Dispute by an Expert shall be initiated by the Party who is seeking consideration of the Dispute by concurrently submitting to both the Expert and the other Party, written materials setting forth:

- a description of the Dispute;
- a statement of the initiating Party's position, and whether a hearing is requested by such Party; and
- copies of records supporting the initiating Party's position.

- 48.2.4 Within [ten (10)] days of the date that a Party has submitted the materials described in clause 48.2.3, the other Party may submit to the Expert, with copies to the other Party:

- a description of the Dispute;
- a statement of such Party's position and, if not already requested, whether a hearing is requested by such Party; and
- copies of any records supporting the Party's position.

The Expert shall consider any such information submitted by the responding Party and may consider any additional information submitted by either Party at a later date but, in such event, the other Party shall be concurrently provided with such information and shall be allowed reasonable opportunity to respond thereto.

- 48.2.5 Each Party shall have access to the other Party's relevant records and be entitled to receive copies of the records submitted by the other Party.

- 48.2.6 Each Party shall designate one person knowledgeable about the issues in Dispute who shall be available to the Expert to answer questions and provide any additional information requested by the Expert. Except for such person, a Party shall not be required to, but may, provide oral statements or presentations to the Expert or make any particular individuals available to the Expert. If a hearing is requested by either Party pursuant to clause 48.2.4, the Expert shall nominate a time and place for a hearing of the Parties on the Dispute.

- 48.2.7 The Expert shall provide a recommendation within [fifteen (15)] days after the [ten (10)] day response period provided in clause 48.2.4, has expired, or within such further time as is agreed in writing by the Parties. If the Expert's recommendation is given within such [fifteen

(15)] days period, as may be extended by the Parties, the Parties may review and discuss the recommendation with each other in good faith for a period of [ten (10)] days following delivery of the recommendation before proceeding with any other actions.

- 48.2.8 The proceedings shall be without prejudice to any Party, and any evidence given or statements made in the course of this process may not be used against a Party in any other proceedings. The process shall not be regarded as an arbitration and the laws relating to commercial arbitration shall not apply.
- 48.2.9 Unless the Parties agree in writing at the time the Expert is selected, stating that the recommendation of the Expert shall be binding, the recommendation of the Expert shall not be binding; provided, however, that if arbitration proceedings in accordance with clause 0 have not been commenced within [seventy-five (75)] days from the date the Expert's recommendation was received by the Parties in accordance with clause 48.2.7, the Expert's recommendation shall be final and binding on the Parties, and any right of such Parties to resort to arbitral, judicial or other proceedings in relation to the subject matter of the recommendation shall stand waived to the fullest extent permitted by law.
- 48.2.10 Subject to clause 48.2.9, if a Party does not accept the recommendation of the Expert with respect to the Dispute or if the Expert has not provided a recommendation within the time period specified in clause 48.2.7, either Party may initiate arbitration proceedings in accordance with clause 0.
- 48.2.11 The costs of engaging an Expert shall be borne equally by the Parties and each Party shall bear its costs in preparing materials for, and making presentations to, the Expert.
- 48.2.12 The failure of any Party to comply with the provisions and time periods set out in this clause 48.2 shall not prevent (i) the Expert from proceeding; and/or (ii) any Party from requesting that the Expert proceedings be terminated and the matter referred immediately to arbitration in accordance with clause 0.
- 48.2.13 Either Party may serve a written notice on the other Party within [thirty (30)] days of the Expert's decision having been notified to it, stating its intention to refer the matter in Dispute to arbitration, provided that the notifying Party implements fully the decision of the Expert before commencing the procedure to refer the Dispute to arbitration and commences the procedure to refer the Dispute to arbitration within a further [forty-five (45)] day period after serving such notice. Notwithstanding anything to the contrary expressed in this clause 0, either Party may require arbitration of a Dispute pursuant to clause 0 without reference to an Expert under this clause 48.2.



### **48.3 Negotiation**

Save where this Agreement provides that a Dispute or other matter shall be referred to an Expert for resolution, should any Dispute arise between the Parties, then the Parties shall first try to resolve the Dispute through amicable negotiation. When a Party considers a matter constitutes a Dispute, a Party shall invite the other Party in writing to a meeting to attempt to resolve the Dispute within [ ] from the date of the written invitation.

### **48.4 Arbitration**

48.4.1 Failing a resolution through negotiation pursuant to clause 48.3, the Dispute, if arbitral in law, shall be finally resolved in accordance with the Rules of the International Chamber of Commerce ("ICC").

48.4.2 The arbitration shall be confidential and shall be conducted in [Johannesburg, South Africa], in English. The seat of the arbitration shall be [Johannesburg, South Africa].

48.4.3 The arbitration shall be conducted by three (3) arbitrators, with the Company appointing one (1) arbitrator, the GoM appointing one (1) arbitrator, and the two (2) arbitrators so selected appointing the presiding arbitrator within ten (10) days after the latter of the two (2) arbitrators was appointed. If either of the Company or the GoM fails to appoint an arbitrator, or if the two (2) Party-appointed arbitrators cannot reach an agreement on the presiding arbitrator within such [ten (10)] day period, then the ICC shall appoint the remainder of the three (3) arbitrators not yet appointed.

48.4.4 The award rendered by the arbitration panel shall be final and binding upon all the Parties and any judgment may be entered in accordance with applicable law in any court having jurisdiction thereof.

48.4.5 If any Dispute arises and that Dispute is substantially the same as or connected to issues raised in a related difference, dispute, claim or controversy that has already been referred to arbitration (including in respect of or under any other Project Document) then, upon the written request of either Party, such Dispute shall be dealt with jointly with the matter already under arbitration, and the Parties shall be bound in a like manner by any decision of the arbitrator already appointed.

48.4.6 The Parties shall use reasonable endeavours to resolve any Dispute that involves a third party in conjunction with that party, including but not limited to permitting the third party to be present during arbitration, and the use of multiparty arbitration procedures.

### **48.5 Commercial Acts**

The GoM unconditionally and irrevocably agrees that the execution, delivery and performance by it of this Agreement constitutes its private and commercial acts.

## 48.6 Sovereign Immunity: Jurisdiction

48.6.2 The GoM hereby irrevocably and unconditionally agrees that:

should any proceedings be brought against the GoM or its assets, other than its aircraft, naval vessels and other defence related assets or assets protected by the diplomatic and consular privileges provisions of any legislation (the "**Protected Assets**") in any jurisdiction in connection with this Agreement or any of the transactions contemplated by this Agreement, no claim of immunity from such proceedings will be claimed by or on behalf of the GoM on behalf of itself or any of its assets (other than the Protected Assets);

it waives any right of immunity which it or any of its assets (other than the Protected Assets) now has or may in the future have in any jurisdiction in connection with any such proceedings; and

consents generally in respect of the enforcement of any judgment against it in any such proceedings in any jurisdiction to the giving of any relief or the issue of any process in connection with such proceedings (including without limitation, the making, enforcement or execution against or in respect of any of its assets whatsoever (other than the Protected Assets)) regardless of its use or intended use.

48.6.3 The Company hereby unconditionally and irrevocably consents generally to the jurisdiction, with respect to itself and any and all of its assets and property that it now has or may thereafter acquire, of any court of competent jurisdiction for any action filed by the GoM to enforce any award or decision of any arbitrator who was duly appointed under this Agreement to resolve any Dispute between the Parties. The Company waives any objection that it may now or hereafter have to the venue of any action or proceeding brought as consented to in this clause 48.6.2 and specifically waives any objection that any such action or proceeding has been brought in an inconvenient forum and agrees not to plead or claim the same. The Company agrees that service of process in any such action or proceeding may be effected in any manner permitted by the law applicable to the aforementioned court. The Company irrevocably waives any and all rights it may have to enforce any judgment or claim against the Protected Assets in the courts of any jurisdiction.

48.6.4 For the avoidance of doubt, any Dispute or difference between the Parties as to whether either Party has complied with the affirmation set out in this clause 48.6 shall be referred for determination under clause 0 and shall fall within the definition of Dispute.

## 49 Confidentiality

49.1 Each of the Parties and their Contractors, subcontractors, consultants and agents and each of their respective successors and permitted assigns shall hold in confidence all documents and other information, whether technical or

commercial, supplied to it by or on behalf of the other Party, relating to the design, construction, insurance, operation, maintenance, transfer, management and financing of the PS, and all information and documents obtained by it in the course of any inspection performed in accordance with the terms of this Agreement, and shall not, without the consent of the other Party, save as required by law or appropriate regulatory authorities, prospective lenders to, or investors in the Company and their professional advisers, publish or otherwise disclose or use the same for its own purposes otherwise than as may be required to perform its obligations under this Agreement. Notwithstanding the above, nothing herein contained shall preclude the use of provisions similar to those contained in this Agreement and the other Agreements referred to herein and in agreements prepared and issued or to be prepared and issued in connection with other projects by the GoM.

49.2 The provisions of paragraph (a) here above shall not apply to:

49.2.1 any information in the public domain otherwise than by breach of this Agreement;

49.2.2 information in the possession of the receiving Party thereof before divulgence as aforesaid, and which was not obtained under any obligation of confidentiality.

## **50 Survival on Termination**

Cancellation, expiration or earlier termination of this Agreement shall not relieve the Parties of obligations that, by their nature, should survive such cancellation, expiration or termination, including, without limitation, warranties, remedies, promises of indemnity and confidentiality.

## **51. Notices**

51.1 Except as otherwise expressly provided in this Agreement, all notices or other communications to be given or made hereunder shall be in writing, shall be addressed for the attention of the persons indicated herein below, and shall either be delivered personally or sent by courier, registered or certified mail or facsimile. The addresses for service of the Parties and their respective facsimile numbers shall be:

In the case of the GoM	In the case of the Company
Addresses:	

Fax:

Email:

Attention:

51.2 All notices shall be deemed delivered (i) when presented personally, (ii) if received on a business day for the receiving Party, when transmitted by facsimile to the receiving Party's facsimile number specified here above and, if received on a day that this is not a business day for the receiving Party, on the first business day of the receiving Party following the date transmitted by facsimile to the receiving Party's facsimile number specified here above, (iii) two (2) days after being delivered to a courier for overnight delivery, addressed to the receiving Party, at the address indicated here above or, (iv) five (5) days after being deposited in a regularly maintained receptacle for the postal service in Malawi, postage prepaid, registered or certified, return receipt requested, addressed to the receiving Party, at the address specified here above (or such other address as the receiving Party may have specified by written notice delivered to the delivering Party at its address or facsimile number specified above). Any notice given by facsimile shall be confirmed in writing delivered personally or sent by registered or certified mail, but the failure to so confirm shall not void or invalidate the original notice if it is in fact received by the Party to which it is addressed.

51.3 Any Party may by notice change the addressee and/or address to which such notices and communications to it are to be delivered or mailed.

## **52. Miscellaneous Provisions**

### **52.1 Governing Law**

This Agreement and the rights and obligations of the Parties hereunder shall be governed by and construed in accordance with the laws of Malawi.

### **52.2 Amendment**

This Agreement can be amended only by agreement between the Parties in writing, executed by a duly authorized representative of each of the Parties. [No amendment of the Power Purchase Agreement shall increase the liability of the GoM under this Agreement, unless such amendment is approved in writing by the GoM or has not been objected to by GoM in accordance with clause 48.1.]

### **52.3 Third Parties**

This Agreement is intended solely for the benefit of the Parties, and nothing in this Agreement shall be construed to create any rights in, duty to, standard of care to, or any liability to, any Person not a Party.

### **52.4 No Waiver**

52.4.1 No waiver by either Party of any default or defaults 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 different character; or
- (b) shall be effective unless in writing duly executed by a duly authorized representative of such Party.

52.4.2 Neither the failure by either Party to insist on any occasion upon the performance of the terms, conditions and provisions of this Agreement, nor time or other indulgence granted by one (1) Party to the other, shall act as a waiver of such breach or acceptance of any variation or the relinquishment of any such right or any other right hereunder, which shall remain in full force and effect.

## **52.5 Relationship of the Parties**

This Agreement shall not be interpreted or construed to create an association, joint venture, or partnership between the Parties or to impose any partnership obligation or liability upon either Party. Neither Party shall have any right, power or authority to enter into any agreement or undertaking for, or act on behalf of, or to act as or be an agent or representative of, or to otherwise bind the other Party.

## **52.6 Language**

The language for the purpose of administering this Agreement shall be English.

## **52.7 Entirety**

Upon the occurrence of Financial Closing and the full effectiveness of this Agreement, this Agreement shall be the full and final expression of the agreement between the Parties on the matters contained herein. All written or oral representations, understandings, offers or other communications of every kind between the Parties in relation to the Project prior to this Agreement are hereby abrogated and withdrawn.

## **52.8 Successors and Assigns**

This Agreement shall be binding upon, and inure to the benefit of, the Parties and their respective successors and permitted assigns.

## **52.9 No Liability for Review**

No review, non-objection or approval by the GoM or any Relevant Authority of any agreement, document, instrument, drawing, specifications or design proposed by the Company shall relieve the Company from any liability that it would otherwise have had for its negligence in the preparation of such agreement, document, instrument, drawing, specification or design or failure to comply with the applicable Laws of Malawi with respect thereto, or to satisfy the Company's obligations under this Agreement, nor shall the GoM be liable to the Company or any other Person by reason of its review and approval of an agreement, document, instrument, drawing, specification, or design.

## **52.10 Affirmation**

52.10.1 The Company hereby declares that it has not obtained or induced the procurement of this Agreement or the Power Purchase Agreement or any contract, consent, approval, right, interest, privilege or other obligation or benefit related to this Agreement or the Project from the

GoM or any Government Agency through any corrupt or illegal business practice.

52.10.2 Without limiting the generality of the foregoing, the Company represents and warrants that it has fully disclosed in writing all commissions, brokerage and other fees, and other compensation (other than compensation paid to employees of the Company for services provided) paid or payable to any Person within or outside Malawi in relation to the Project and has not given or agreed to give and shall not give, or agree to give to any Person within or outside Malawi either directly or indirectly through any natural or juridical Person, including its affiliates, employees, agents, associates, brokers, consultants, officers, directors, promoters, shareholders, sponsors or subsidiaries (and any of their employees, agents, associates, brokers, consultants, officers, directors, promoters, shareholders or sponsors), any commission, gratification, bribe, finder's fee or kickback, whether described as consultation fee or otherwise, with the object of obtaining or inducing the procurement of this Agreement or the Power Purchase Agreement or any contract, right, interest, privilege or other obligation or benefit related to this Agreement or the Project from the GoM or any Government Agency, except that which has been expressly declared pursuant hereto.

52.10.3 The Company accepts full responsibility and strict liability for making any false declaration, not making full disclosure, misrepresenting facts or taking any action likely to defeat the purpose of the representations and warranties contained herein and the declarations required hereby. It agrees that any contract, consent, approval, right, interest, privilege or other obligation or benefit obtained or procured as aforesaid shall, without prejudice to any other right and remedies available to the GoM, shall be voidable and without legal effect at the option of the GoM.

52.10.4 Notwithstanding any rights and remedies that are available to and may be exercised by the GoM in this regard, the Company agrees to indemnify the GoM for any loss or damage incurred by it on account of its corrupt business practices and further pay compensation to the GoM in an amount equivalent to ten (10) times the amount of any commission, gratification, bribe, finder's fee or kickback paid or given by the Company (either directly or indirectly through any natural or juridical Person, including its affiliates, employees, agents, associates, brokers, consultants, officers, directors, promoters, shareholders, sponsors or subsidiaries (and any of their employees, agents, associates, brokers, consultants, officers, directors, promoters, shareholders or sponsors), as aforesaid for the purpose of obtaining or inducing the procurement of this Agreement or the Power Purchase Agreement or any contract, consent, approval, right, interest, privilege or other obligation or benefit related to this Agreement or the Project from the GoM or any Government Agency.

## **52.11 Counterparts**

This Agreement may be executed in two (2) or more original copies and each such copy may be executed by each of the Parties in separate counterparts, each of which copies when executed and delivered by the Parties, shall constitute an original, but all of which shall together constitute one (1) and the same instrument.

## **52.12 [Accounts and Reports]**

### **52.12.1 Appointment of Auditors**

The Company shall make arrangements with respect to the installation and operation of an accounting and cost control system and for the appointment, as auditors, of a reputed firm of independent chartered accountants reasonably acceptable to the GoM.

### **52.12.2 Right of Inspection**

The Company shall permit representatives of the GoM, on reasonable notice, to enter upon and inspect the PS and the design, construction, operation, and maintenance thereof. The Company shall maintain complete and accurate records accounting for all transactions relating to any Restoration of the PS, which records shall be subject to inspection and audit by the GoM.

### **52.12.3 Periodic Reports**

- (c) The Company shall, as soon as available but in any event within [sixty (60)] days of filing, furnish to the GoM two (2) copies of all documents filed in compliance with the requirements of [ ] as amended or superseded from time to time.
- (d) The Company shall, as soon as available, furnish to the GoM: (A) a report on any factors materially and adversely affecting, or that might materially and adversely affect, the Project or the Company's business and operations; and (B) copies of the Monthly progress reports and any other construction related reports given to the Power Purchaser.

### **52.12.4 Reporting of Changes**

The Company shall, at least [ ] days prior to its becoming effective, report any contemplated (i) material change in its memorandum and articles of association; (ii) change in its fiscal year; (iii) change in the constitution of its Board of Directors; (iv) change in its Chief Executive Officer, (v) registration of a transfer of Ordinary Share Capital to any Person who thereby becomes a registered holder of greater than [five (5) per] cent of the issued Ordinary Share Capital, or of a transfer of Ordinary Share Capital to or from a Person or

entity who, immediately prior to such transfer, held greater than [ ] per cent of the issued Ordinary Share Capital.

#### **52.12.5 Lists of Lenders and Creditors**

Together with the periodic reports required by clause 52.12.3, the Company shall also furnish to GoM a list of the Lenders and each of its creditors to which the Company has an outstanding obligation of [ ] or more, along with statements or schedules of repayment of local and foreign loans/debts to such Lenders and creditors duly certified by its auditors on a [six (6)] Monthly basis in each Year. The report shall also indicate any changes, as compared to the report submitted the previous Year that might have occurred.

#### **52.12.6 Information Regarding Statutory Notice/Winding Up Proceedings**

The Company shall, within [seven (7)] days of receipt thereof, provide a copy of any notice that the Company may be served under [ ] by any of the Lenders or its creditors.

The Company shall provide to the GoM all information in respect of any further actions taken by the Lenders or its creditors following any notice under [ ].

#### **52.12.7 Failure by the Company to submit Reports, Documents and Information**

In addition to the rights the GoM may have under this Agreement or under the Laws of Malawi, in the event that the Company fails to submit any of the documents, reports or information as and when required under this Agreement, the GoM shall be entitled to assess against and recover from the Company fines and costs established from time to time by the GoM for such non-compliance. Such fines and costs shall be paid to the GoM within [ ] Business Days of notice of such non-compliance and assessment by the GoM.]

IN WITNESS WHEREOF, this Agreement has been executed by the Parties [and delivered as a Deed] on the date first here above written.  
For and on behalf of

THE GOVERNMENT OF THE REPUBLIC OF MALAWI

By: \_\_\_\_\_

Title: \_\_\_\_\_

Witness: \_\_\_\_\_

Name: \_\_\_\_\_



Witness: \_\_\_\_\_

Name: \_\_\_\_\_

SOLAR PV COMPANY (PROPRIETARY) LIMITED

By: \_\_\_\_\_

Title: \_\_\_\_\_

Witness: \_\_\_\_\_

Name: \_\_\_\_\_

Witness: \_\_\_\_\_

Name: \_\_\_\_\_

## **Annexure M    Company Consents**

Particulars of Consent

Relevant Authority

## **Annexure K: Land Lease Agreement**

*Note: This document may be amended to reflect such changes that GOM may deem necessary, including on account of internal and external governance and approval processes.*

### LAND LEASE AGREEMENT

BETWEEN

THE GOVERNMENT OF MALAWI

AND

[LESSEE]

## CONTENTS

Contents.....	349
Preamble:.....	350
Recitals: .....	349
1. Duration of Agreement .....	349
2. Description of Site .....	349
3. Purpose and Use .....	350
4. Renewal Period .....	350
5. Rental Payments .....	350
6. Sub-Letting.....	350
7. Delivery of Exclusive Possession .....	350
8. Conditions Precedent.....	350
9. Lessor's Warranties and Representations .....	350
10. Authorisation to Build .....	351
11. Signs .....	351
12. Compliance with the Laws of Malawi .....	351
13. Undertakings by the Lessee .....	352
14. Taxes.....	352
15. The Lessor's Access to the Site .....	352
16. Assignment .....	352
17. Termination by the Lessee.....	353
18. Registration of the Lease Agreement .....	353
19. Partial Invalidity .....	353
20. Governing Law and Jurisdiction .....	353
21. Entire Agreement and Variation .....	353
22. Heirs and Assignees.....	354
23. Notices .....	354
Annexure A Title Deed .....	355

## **PREAMBLE:**

**THIS LAND LEASE AGREEMENT** dated [ ] is made by and between:

- (1) The Government of the Republic of Malawi (GoM); with its principal place of business at [location], ("**Lessor**"); and
  - (2) [Lessee]; a limited liability company incorporated under the laws of [Malawi] and having its principal place of business at [location], ("**Lessee**").
- (together, the "**Parties**" and "**Party**" shall mean either of them)

## **RECITALS:**

- (A) The Lessee has been issued with an electricity Generation Licence by the Malawi Energy Regulatory Authority to generate [ ] MW through [ ] power plant in Malawi;
- (B) The Lessee has been granted rights to build and operate a power plant and has entered into a Power Purchase Agreement ("**PPA**") with [ ].
- (C) The Title Deed for the land covered by this Lease Agreement is attached as 0 (the particular plot of land and production office is referred to in this Agreement as the "**Site**"); and
- (D) The Lessor and Lessee wish to enter into this Lease Agreement for the lease of the Site for use by the Lessee to build and operate a [ ] power plant and related activities pursuant to the PPA.

**IT IS HEREBY AGREED** as follows:

### **1. Duration of Agreement**

- 1.1 This Lease Agreement shall be for a period of [ ] years and shall become binding upon the Lessor when signed by both the Lessor and the Lessee. Until such time, the Lessee shall have no right of occupation whatsoever and no claim to the existence of a lease, verbal or written.
- 1.2 This Lease Agreement shall terminate on [ ].

### **2. Description of Site**

The Lessor hereby agrees to lease to the Lessee the Site upon the terms and conditions set forth in this Lease Agreement. The Site description is as follows:

Site: [ ]

Town: [ ]

Location/ District: [ ]

GPS Coordinates: [ ]

### **3. Purpose and Use**

- 3.1 The Site may be occupied and used by the Lessee exclusively for (i) the [ ] power plant which shall be used for generating electricity, (ii) supply thereto of required utilities (including, inter alia, potable water, power, sewage systems and telecommunications towers) and (iii) for the national grid connection.
- 3.2 The Lessee is not permitted to utilise the Site for any other purpose.

### **4. Renewal Period**

Any extension of this Lease Agreement will be negotiated by the Parties one (1) year before the expiry of the original term of [ ] years. Such extension will be in writing and signed by both Parties.

### **5. Rental Payments**

The Lessee agrees to pay to the Lessor, at the Lessor's address set out above or at such other place as the Lessor may designate in writing, an amount of [ ] per month, payable monthly in advance on the [ ] of the month.

### **6. Sub-Letting**

The Lessee shall not sub-let the Site without the knowledge and written consent of the Lessor.

### **7. Delivery of Exclusive Possession**

The Lessor shall deliver exclusive and lawful possession of the entire Site to the Lessee on or before [ ] ("**Delivery Date**").

### **8. Conditions Precedent**

The Lessor shall, prior to the Delivery Date, satisfy the following conditions:

- 8.1 The Lessor has registered the Lease Agreement with the relevant land office as required under applicable Malawian law.
- 8.2 The Lessor has confirmed in writing to the Lessee that the Site has been cleared of any occupants.
- 8.3 [Note: Include any other relevant conditions precedent.]

### **9. Lessor's Warranties and Representations**

- 9.1 The Lessor undertakes that the Lessee shall lawfully, peacefully and freely hold, occupy, use, operate and enjoy the Site in order to fulfil its obligations and exercise its rights in respect of the [ ] power plant without disturbance, nuisance or interference by the Lessor, successors, assigns, agents or creditors.

- 9.2 The Lessor undertakes that no third party shall have a right or claim to the Site during the term of the Lease Agreement.
- 9.3 The Lessor warrants and represents that it has obtained and will maintain all approvals from the [government], the provincial/ municipal authorities and all other applicable government agencies or bodies, needed for the Lessee to lawfully enter into this Lease Agreement and to use the Site for the purpose described in Clause 2 at all times during the term of the Lease Agreement.
- 9.4 The Lessor warrants and represents that it is the lawful and sole owner during the term of the Lease Agreement and that there are no encumbrances, mortgages, liens or security interests on the Site other than those created pursuant to this Lease Agreement.
- 9.5 The Lessor warrants and represents that the Site will be free from any occupants as at the Delivery Date.
- 9.6 The Lessor warrants and represents that the Site is free from pollution, unexploded ordinances and environmental damage.

## **10. Authorisation to Build**

The Lessee is hereby authorised by the Lessor to carry out all construction works on the Site, including such modifications to the Site as the erection of fences, creation of bunding and burial of piping as are required to carry out the permitted purposes (set out in clause 2.1) or as required in accordance with the laws of Malawi.

[Include if relevant: The Lessee may renovate the leased structures, demolish the buildings on the Site and reconstruct others in order to carry out its obligations and exercise its rights under the PPA.]

## **11. Signs**

The Lessee shall have the right to erect any sign related to its business on the condition that such signs comply with the laws of Malawi.

## **12. Compliance with the Laws of Malawi**

12.1 Without limiting the general requirements under the laws of Malawi, the Lessee while using the Site shall ensure, the following during the term of the Lease Agreement:

12.1.1 Compliance with the laws and regulations on hygiene.

12.1.2 Compliance with the laws and regulations on environmental protection and security.

12.1.3 Compliance with the laws and regulations on safety, fire, explosion prevention and fire extinguishment.

### **13. Undertakings by the Lessee**

- 13.1 The Lessee undertakes to maintain the Site in good condition at the Lessee's own risks and expense and to keep all the Lessee's belongings inside the Site at all time during the term of this Lease Agreement.
- 13.2 The Lessee undertakes to procure and maintain insurance covering any damages occurring within the Site to third parties and its personal property from fire and other risks, or as required under the applicable laws.
- 13.3 The Lessee undertakes that there will be no illegal or prohibited matters, objects, substances, materials, products and/ or the like allowed to operate, manufactured or held inside the Site.
- 13.4 The Lessee undertakes that the rights under this Lease Agreement shall not be transferred to any third party by any means without written approval from the Lessor.
- 13.5 The Lessee shall return the Site to the Lessor upon termination of this Lease Agreement in good condition.
- 13.6 In the event of termination of the Lease under Clauses 16 and 17 hereof, the Lessee shall within [thirty (30) business days] following the termination date with which to remove all property and fixtures belonging to the Lessee from the Site. [For the avoidance of doubt, the Lessee may leave in situ any improvements to the land, including paths, roading, bunding, water pipelines and electricity supply lines.]

### **14 Taxes**

- 14.1 The Lessor agrees to be responsible for payment of any and all taxes or fees levied by applicable laws, or any organ or agency arising from the lease of the Site. Should the Lessor fail to pay any such taxes and the Lessee is held responsible by any organ or agency for paying such tax, the Lessee shall have the right to deduct the amount of the tax from the next lease payment or payments.
- 14.2 The Lessee shall provide written notice to the Lessor prior to making such deduction. The Lessee agrees to be responsible for payment of any and all taxes arising from the Lessee's operation of the [ ] power plant on the Site, such as sales or tax.

### **15 The Lessor's Access to the Site**

The Lessor, the Lessor's agents and employees shall have no right of entry onto the Site, except as provided by applicable laws without the prior written consent of the Lessee.

### **16. Assignment**

The Lessor may assign or conditionally assign its interest in this Lease Agreement provided that the assignee assumes in writing all of the Lessor's obligations and liabilities under this Lease Agreement. The Lessee may inform the Lessor of any

assignment or transfer of the Site it enters into and may request from the Lessor an acknowledgement of such assignment or transfer.

## **17. Termination by the Lessee**

The Lessee has the right to terminate this Lease Agreement, upon written notice to the Lessor, without penalty, under the following circumstances:

- 17.1 [If the PPA is terminated or does not become effective.]
- 17.2 Any breach by the Lessor of any its material obligations, representations under this Lease Agreement and where the Lessee has failed to take appropriate measures to rectify this breach within [sixty (60) days] after receiving written notices of the breaches from the Lessee.
- 17.3 Failure of the Lessee to use or take possession of the Site for [ninety (90) consecutive days].

## **18. Registration of the Lease Agreement**

The Parties shall, to the extend required by law and practice, properly register this Lease Agreement with the relevant [Land Registry Office] and any other government office that may serve as a place for registering or recording leases, within [forty-five (45) days] from the date this Lease Agreement is executed.

## **19. Partial Invalidity**

If any term of this Lease Agreement shall be invalid or unenforceable, the remainder shall be valid as written to the fullest extent permitted by the laws of Malawi.

## **20. Governing Law and Jurisdiction**

This Agreement shall be governed, construed and interpreted in accordance with the Laws of Malawi, and the Parties consent to the non-exclusive jurisdiction of the High Court of Malawi. The Parties agree that a judgment in any proceedings in connection with this Agreement by the Courts of Malawi shall be binding upon them and may be enforced against them in any other jurisdiction.

## **21. Entire Agreement and Variation**

- 21.1 This agreement contains the entire agreement of the Parties and supersedes all previous communications, representations and agreements, whether oral or written, with respect to the Site.
- 21.2 This Lease Agreement may not be amended except in writing, signed and acknowledged by both Parties.



## **22. Heirs and Assignees**

This Lease Agreement shall be binding on the heirs, assignees and the successors in interest of the Lessor and the Lessee.

## **23. Notices**

- 23.1 The Parties choose as their domicilia citandi et executandi their respective addresses specified in Clause 23.2 (Addresses) hereof, for all purposes arising out of or in connection with this Lease Agreement, at which addresses all process and notices arising out of or in connection with this Lease Agreement, its breach or termination may be served upon or delivered to the Parties.
- 23.2 For the purposes of Clause 23.1 (Domicilia Citandi et Executandi), the Parties' respective addresses shall be:

In the case of the Lessee

Addresses:

Fax:

Email:

Attention:

Or at such other postal and physical address in Malawi, not being a post office box or poste restante, or which the Party concerned may notify the other in writing.

- 23.3 All notices, notifications, requests, demands or other communications given in terms of this Lease Agreement shall be in writing and shall:
- 23.3.1 if delivered by hand be deemed to have been duly received by the addressee on the date of delivery;
  - 23.3.2 if posted by prepaid registered post be deemed to have been received by the addressee on the 7th (seventh) day following the date of such posting;
  - 23.3.3 if successfully transmitted by facsimile with successful transmission confirmed be deemed to have been received by the addressee one day after dispatch; or
  - 23.3.4 if successfully transmitted by electronic mail and having received a read receipt from the addressee, be deemed to have been received by the recipient on the first business day on the day of receiving the confirmation receipt.

23.4 Notwithstanding anything to the contrary contained in this Agreement, a written notice or communication actually received by one Party from the other, including by way of facsimile or electronic mail transmission, shall be adequate written notice or communication to such Party.

IN WITNESS whereof the said Parties have signed this Lease Agreement on the dates and at the places specified hereunder.

On behalf of the Lessor by the signatory who warrants that (s)he is duly authorised:

Signed: \_\_\_\_\_ Title: \_\_\_\_\_

Witness: \_\_\_\_\_ Title: \_\_\_\_\_

This \_\_\_\_\_ day of \_\_\_\_\_

At: \_\_\_\_\_

On behalf of the Lessee by the signatory who warrants that he is duly authorised:

Signed: \_\_\_\_\_ Title: \_\_\_\_\_

Witness: \_\_\_\_\_ Title: \_\_\_\_\_

This \_\_\_\_\_ day of \_\_\_\_\_

At: \_\_\_\_\_

**Annexure AA Title Deed**

## Annexure L: Generation licence Application



ELECTRICITY ACT  
(Cap.73:01)

ELECTRICITY BY-LAWS 2008 (by-laws 5 &7)

### SECOND SCHEDULE

### APPLICATION FOR LICENCE TO GENERATE ELECTRICITY FOR SALE

SECTION A

FORM EA 1

#### PARTICULARS OF APPLICANT

A.1 Full Name of applicant

.....

A.2 Address of applicant, or in the case of a body corporate, the registered office

.....

.....

A.3 Telephone Number of applicant ..... Fax no: .....

A.4 E-mail Address .....

A.5 Contact person Name .....

Telephone no .....

Fax no .....

E-mail .....

A.6 Legal form of applicant .....  
.....

A.7 If the applicant is a company provide the following:-

- Full names of shareholders (holding more than 5% of shares) and percentage holding
- Full names and occupation of Directors
- Certificate of Incorporation
- Memorandum and Articles of Association

## SECTION B

### **COMMENCEMENT DATE, PURPOSE AND DURATION OF LICENCE**

B.1 Desired date from which the licence (if granted) is to take effect  
.....

B.2 Duration of the licence from commencement date  
.....

B.3 Purpose for which electricity is to be generated  
.....

B.4 Type of application (issue, transfer, amendment or renewal)  
.....

## SECTION C

### **PARTICULARS OF GENERATING STATION**

(To be provide for each generating station separately)

C.1 Name of generating station

.....

C.2 Location of generating station

.....

.....

C.3 Address of generating station

.....

.....

C.4 Contact Person Name

.....

.....

Telephone Number .....

Fax Number .....

E-mail .....

C.5 Type and age of generating station (thermal, nuclear, hydro, pumped storage, gas turbine, diesel generator, solar, wind or other including equipment description)

.....

C.6 Date on which the generating station was commissioned for an existing station or the expected commissioning date for a proposed station

.....

C.7 The installed capacity of each unit within the generating station (MW)

.....

## C.8 Life span of each generation station

.....

## C.9 Maximum generating capacity (MW) expected to be available from the generating station and energy to be produced (kWh).

	Max kWh	Total kWh	Own Use kWh	For sale kWh
YEAR 1				
YEAR 2				
YEAR 3				
YEAR 4				
YEAR 5				
YEAR 6				
YEAR 7				

## C.9 Estimate of the energy conversion efficiency of:

- a. Turbine.....
- b. Generator.....
- c. Estimated overall station.....

## SECTION D

### PARTICULARS OF ANY LONG TERM ARRANGEMENTS WITH ENERGY

SUPPLIERS (To be provided for each generating station separately)

#### D.1 Name of Transmission company

.....  
.....

#### D.2 Particulars of the contractual arrangements (attach draft contract if in place)

.....

.....

## SECTION E

### GENERATION BUSINESS

(To be provided for each generating station separately)

E.1 Details of proposed major maintenance programmes, including the expected cost and duration thereof, covering the next five years.

.....

.....

.....

E.2 Details of major generating station rehabilitation and modifications dates, cost and description for the next five years.

.....

.....

E.3 Details of generating station expansion, dates, cost and description

.....

.....

E.4 Particulars of power sales agreements and tariffs therein

.....

.....

E.5 Particulars of anticipated outages and duration thereof as a result of E1 and E2 above.

.....

.....

## SECTION F

### FINANCIAL INFORMATION

F.1 Income Statement

Provide statements and annual forecasts of sales, revenues and costs.  
Attach copies of the current and/or budgeted balance sheet, rate of return,

profit and loss account and source and application of funds for current and next two years. Indicate major cost items such as staff costs, maintenance.

**F.2 Investment Programme**

Investment Programme for current and the next five years. Attach copies of the detailed scheme or schemes prepared by a competent engineer and mode and cost of financing such a scheme.

**F.3 Fixed Assets**

Summary of total assets of all generating plant.

**F.4 Audited Accounts**

Provide copies of the latest audited accounts of the applicant.

**F.5 Letters of Reference from Banks**

Provide one letter of recommendation as to creditworthiness from a local commercial bank and one from a reputable international bank.

## SECTION G

### INFORMATION ON HUMAN RESOURCES

**G.1 Personnel**

- 1** submit details of the number of staff and employees and their categories and grades in the service of or to be recruited by the applicant, showing their qualifications and number of years of experience in similar jobs.
- 2** Provide *curriculum vitae* of top management personnel of the applicant.

## SECTION H

### ENVIRONMENTAL CONSIDERATION

- H.1** Provide a brief description of the likely negative impact of the generation facility on natural resources and environmental and mitigation measures proposed.



Provide a copy of the approved environmental mitigation plan (if any) by the relevant authority

## SECTION I

### **PERMITS FROM OTHER GOVERNMENT DEPARTMENTS OR REGULATORY AUTHORITIES**

#### Permits

Submit copies of permits or approvals issued by public or local authority or other regulatory agencies necessary for the operation of the generating plant.

## SECTION J

### **ADVERTISING NOTICE**

J.1 Attach draft copy of the notice of advertisement as to representations or objections.

## SECTION K

### **TARRIFS**

Provide a schedule of the proposed tariffs

## SECTION L

### **ADDITIONAL INFORMATION**

Provide any other relevant information which the applicant wishes to include with this application.

.....

SIGNED-----

DATE-----

RECEIPT ACKNOWLEDGED-----DATE-----

MERA STAMP