**POWER PURCHASE AGREEMENT**

**for**

**NAMIBIA RENEWABLE ENERGY FEED-IN TARIFF (REFIT) PROGRAMME**

**between**

**XYZ IPP**

**and**

**NAMIBIA POWER CORPORATION (PROPRIETARY) LIMITED**

**DRAFT 1**

[1. DEFINITIONS 5](#_Toc365392677)

[2. INTERPRETATION 21](#_Toc365392678)

[3. DURATION OF AGREEMENT 22](#_Toc365392679)

[4. CONDITIONS PRECEDENT 23](#_Toc365392680)

[5. CONSTRUCTION AND DEVELOPMENT OF THE POWER PROJECT 25](#_Toc365392681)

[6. COMMERCIAL OPERATION DATE 27](#_Toc365392682)

[7. SALE AND PURCHASE OF ENERGY 29](#_Toc365392683)

[8. PROVISION OF SUPPLY, METERING EQUIPMENT AND PROCEDURES 30](#_Toc365392684)

[9. PAYMENT FOR ELECTRICITY 31](#_Toc365392685)

[10. INVOICING AND PAYMENT 32](#_Toc365392686)

[11. ENVIRONMENTAL CREDITS 34](#_Toc365392687)

[12. CONTROL AND OPERATION OF THE POWER project 34](#_Toc365392688)

[13. ADDITIONAL OBLIGATIONS 40](#_Toc365392689)

[14. REPRESENTATIONS AND WARRANTIES 41](#_Toc365392690)

[15. APPLICABLE LAW AND JURISDICTION 43](#_Toc365392691)

[16. CHANGE IN COSTS 43](#_Toc365392692)

[17. FORCE MAJEURE 47](#_Toc365392693)

[18. DISPUTE RESOLUTION 52](#_Toc365392694)

[19. TERMINATION 54](#_Toc365392695)

[20. LIABILITY FOR DAMAGE OR LOSS 58](#_Toc365392696)

[21. PROJECT INSURANCE 59](#_Toc365392697)

[22. WAIVER OF SOVEREIGN IMMUNITY 61](#_Toc365392698)

[23. CESSION AND ASSIGNMENT 61](#_Toc365392699)

[24. DIRECT AGREEMENT 62](#_Toc365392700)

[25. SEVERABILITY 62](#_Toc365392701)

[26. ANTI-CORRUPTION MEASURES 62](#_Toc365392702)

[27. CONFIDENTIALITY 62](#_Toc365392703)

[28. SURVIVAL 63](#_Toc365392704)

[29. NOTICES AND DOMICILIUM 63](#_Toc365392705)

[30. SHAREHOLDING IN SELLER 65](#_Toc365392706)

[31. GENERAL AND MISCELLANEOUS 65](#_Toc365392707)

[Annexure A CONSENTS 68](#_Toc365392708)

[Annexure B SINGLE LINE DIAGRAM OF PROJECT SITE 69](#_Toc365392709)

[Annexure C ENERGY PAYMENT 70](#_Toc365392710)

[Annexure D LAYOUT DIAGRAM OF POWER PLANT 72](#_Toc365392711)

[Annexure E SHARING OF ENVIRONMENTAL CREDIT 74](#_Toc365392712)

[Annexure F OPERATING COMMITTEE 75](#_Toc365392713)

[Annexure G CALCULATION OF THE TERMINATION AMOUNT 77](#_Toc365392714)

[Annexure H CONSTRUCTION PROGRAMME 79](#_Toc365392717)

[Annexure I COMMISSIONING SCHEDULE 80](#_Toc365392718)

[Annexure J MONTHLY AND WEEKLY GENERATION FORECASTS 82](#_Toc365392719)

[Annexure K BASE CASE FINANCIAL MODEL 83](#_Toc365392720)

[Annexure L DIRECT AGREEMENT 85](#_Toc365392722)

**PREAMBLE:**

This **Power Purchase Agreement** dated is made by and between:

(1) **………**, a company incorporated in terms of the Laws of Namibia (registered under company registration number: \_\_\_\_\_\_) and having its registered office at \_\_\_\_\_\_\_\_, Namibia (hereinafter referred to as the “**Seller**”); and

(2) **NAMIBIA POWER CORPORATION (PROPRIETARY) LIMITED** a company incorporated in terms of the Laws of Namibia (registered under company registration number: 2051) and having its registered office at NamPower Centre, 15 Luther Street, Windhoek, Namibia (hereinafter referred to as “**NamPower**”),

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

**RECITALS:**

(A) The Seller has been issued with an electricity Generation Licence by the ECB to generate \_\_\_MW through wind generators within the \_\_\_\_\_\_\_\_\_\_ region in Namibia.

(B) The Seller intends to develop a power project of \_\_\_MW capacity on a site located at the Project Site.

(C) NamPower and the Seller acknowledge that this Agreement is entered into pursuant to the REFIT Programme of the Government of the Republic of Namibia;

(D) NamPower is authorised, amongst others, to purchase wholesale electricity from other utilities and/or independent power producers in Southern Africa and owns and controls certain generation facilities and the main transmission lines in Namibia.

(E) The Seller wishes to sell the Net Energy from the Power Plant to NamPower and NamPower is willing to purchase the Net Energy of the Power Plant from the Seller.

(F) The Seller has undertaken to deliver electricity at the Delivery Point and to conclude a Transmission Connection Agreement for transmitting electricity from the Power Plant at the appropriate voltage level as a requirement of the Transmission System.

(G) The Parties intend to stipulate in this Agreement the terms and conditions upon and subject to which NamPower agrees to purchase Net Energy from the Seller.

(H) The Seller acknowledges that the ECB exercises regulatory oversight over this PPA and may make any necessary recommendations and/or comments thereof. The Parties further acknowledge that the ECB’s regulatory oversight extends to amendments to this PPA and that any amendments to this PPA must be submitted to the ECB for regulatory oversight prior to signature thereof.

**THE PARTIES AGREE** as follows:

# 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 17; |
| "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”“AFSA Rules” “Agreed Interest Rate” | means the Arbitration Foundation of Southern AfricaMeans the arbitration rule of AFSA in force from time to time; means the prime rate from time to time charged by Standard Bank Namibia Limited correlated with overdraft facilities;  |
| “Agreement”  | 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 A4 of Annexure C (Energy Payment); |
| “Auxiliary Consumption” | 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; |
| "Availability Declaration" | has the meaning set forth in Clause 12.2.1;  |
| "Base Case Financial Model" | means the financial model as defined under the Finance Documents, which shall be provided at Financial Close and attached to this agreement as **Annexure K** (Base Case Financial Model); |
| "Base Case IRR" | means the IRR as reflected in the Base Case Financial Model; |
| "Base Tariff" | has the meaning set forth in Paragraph A1(1) to Annexure C; |
| "Billing Period" | means the start of the first day of a month to the end of the last day of the said month, provided that:* + - * 1. 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
				2. the final Billing Period shall commence on the first day of the month in which the Termination Date occurs and end on the Termination Date;
 |
| “Business Day”  | means any day except a Saturday, a Sunday or a public holiday in Namibia;  |
| "Change in Costs" | has the meaning set forth in Clause 16.1.2; |
| "Change in Law" | means:* + - * 1. the adoption, promulgation, modification, repeal or reinterpretation after the Signature Date by any Competent Authority of any Law; or
				2. 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: results in any change in respect of Taxes and duties applicable or passed through to the Seller, the Contractors, or its Lenders; 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; orrenders 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 Namibia, any ministry, department, agency, authority or other organisation under the direct or indirect control of the Government of Namibia, 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); |
| "Conditions Precedent"  | means the conditions set out in Clause 4.2; |
| "Confidential Information" | shall have the meaning set forth in Clause 27.1 (Confidential Information); |
| "Connection Date" | means the date of connection of the Power Plant to the Transmission System; |
| "Connection Offer Letter" | has the meaning given to it under the Transmission Connection Agreement; |
| “Connection Works” | has the meaning given to it under the Transmission Connection Agreement; |
| “Connection Facilities” | has the meaning given to it under the Transmission Connection Agreement; |
| “Consents” | 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); |
|  |  |
| “Construction Programme” | 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; |
| "Contractor" | 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; |
| "Contract Year" | means each period of one (1) calendar year which falls within the Term, provided that: * + - * 1. 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
				2. 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;
 |
| "Contracted Capacity" | means the Maximum Export Capacity of the Power Plant which shall be \_\_MW as determined in the Transmission Connection Agreement; |
| "Deemed Commercial Operation Date" | has the meaning given to it in Clause 6.3 (Deemed Commercial Operation Date); |
| "Deemed Commercial Operation Period" | means the period commencing on the Deemed Commercial Operation Date and ending on the Commercial Operation Date; |
| "Deemed Energy Payment" | has the meaning given to it in Clause 6.3.2(iii) and Paragraphs A2 and A3 in Annexure C (Energy Payment), which shall be applicable in all Events of Deemed Availability, mutatis mutandis;  |
| "Delay Liquidated Damages"  | means the liquidated damages payable by the Seller to NamPower for a delay caused by the Seller in achieving the Commercial Operation Date by the Target Commercial Operation Date; |
| “Delivery Point” | means the battery limit between the Seller and NamPower where the Net Energy output is measured and transferred from the Seller to NamPower, as shown in the Single Line Diagram attached as Annexure B (Single Line Diagram of Power Plant);  |
| "Direct Agreement” | means the agreement to be entered into by the Seller and NamPower with the Lenders in relation to this Agreement; |
| "Dispute" | 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; |
| “ECB” | means the Electricity Control Board, the Namibian regulatory authority for electricity established in terms of the Electricity Act, 4 of 2007; |
| "ECB Levy" | means all levies as may be imposed from time to time on the provision of electricity for the benefit of the ECB; |
| "Effective Date" | means the date on which all of the Conditions Precedent have been satisfied or duly waived by both Parties; |
| "Energy Charge" | means the amount in Namibian Dollar payable by NamPower to the Seller for Net Energy in accordance with Annexure C (Energy Payment); |
| “Energy Payment” | means the total amount payable by NamPower to the Seller under this Agreement in any Billing Period, as calculated in accordance with Clause 9.2 and Annexure C (Energy Payment), including any ECB Levy and NEF Levy; |
| "Environmental Credits" | 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.  |
| "EPC Contract" | means the engineering, procurement and construction contract entered into between the Seller and the EPC Contractor; |
| "EPC Contractor" | means the person appointed by the Seller to undertake the engineering, procurement and construction of the Power Plant; |
| "Event of Deemed Availability" | means each of the following events: (a) a NamPower Transmission Default;(b) a NamPower Event of Default; |
| "Finance Documents" | 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; |
| "Financial Close" | means the date on which all of the conditions to the first availability of debt under the Finance Documents have been satisfied or waived; |
| "Force Majeure Event" | has the meaning given to it in Clause 17.1.1; |
| “Generation Licence” | means the generation licence No. \_\_\_\_ issued to the Seller by the ECB and which came into force on (as the same may be amended from time to time thereafter); |
| “Government Action” | means: (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, (b) in the case of NamPower, the reorganisation, restructuring or privatisation of NamPower or the sale of the Government’s controlling interest in NamPower, unless the Lenders' consent was given in accordance with Clause 23.2; |
| "Grid Code" | means, at any time, the most recent version of the grid code published by the ECB in terms of the Electricity Act, 4 of 2007; |
|  |  |
| “Indexed Tariff” | means the Base Tariff indexed as specified in Clauses A1 (Energy Payment) and A3 (Calculation of Deemed Energy Payment) of Annexure C (Energy Payment), as the case may be; |
| "IRR" | 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; |
| "Law" | means any constitution, statute, ordinance, treaty, decree, proclamation, by-law, regulation, notice, circular, code, rule, direction, delegated or subordinated legislation or other legislative measure including 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 Namibia. 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 Namibia; |
| "Lenders" | means the persons from time to time making credit facilities available to the Seller (other than the shareholders of the Seller); |
|  |  |
| "Long Stop Date" | has the meaning set forth in Clause 4.3.2; |
| "Losses" | has the meaning set forth in Clause 20.2.1 (Liability); |
|  |  |
| "Make-up Period" | has the meaning set forth in Clause 3.2.1; |
| “Maximum Export Capacity”  | has the meaning given to it in the Transmission Connection Agreement; |
| "Metering Equipment" | has the meaning given to it in the Transmission Connection Agreement;  |
| “Milestone” | means each key stage during the construction period as identified in the Construction Programme; |
|  |  |
| "Monthly Generation Forecast" | has the meaning set forth in Clause 12.1.1; |
| “Monthly Net Energy” | means the Net Energy for a specific month; |
| “MW” | means Megawatt; |
| “MWh”  | means Megawatt hours; |
| “NAD” or “Namibian Dollar” | means the official currency of the Republic of Namibia; |
| "NamPower Event of Default" | has the meaning set forth in Clause 19.3; |
| "NamPower Transmission Default" | means a breach by NamPower under the Transmission Connection Agreement; |
| "NamPower’s EC Payment" | shall have the meaning set forth in Annexure E (Sharing of Environmental Credit); |
| “National Control Centre”  | means the centre for control and coordination of power flows within Namibia;  |
| “NEF Levy”"Net Energy" | means all levies as may be imposed from time to time under the Petroleum Products and Energy Act, Act No 13 of 1991, on the provision of electricity for the benefit of the National Energy Fund;means for any period the electrical output of the Power Plant measured in kWh at the Delivery Point; |
|  |  |
| "Notice of Intention to Terminate" | means a notice issued pursuant to Clause 19.2, 19.4 or 19.5.1; |
| "Operating Committee" | means the committee described in Clause 12.6 and Annexure F (Operating Committee); |
|  |  |
| “Parties” “Power Plant”“Power Project” | shall mean the Seller and NamPower, or their successors-in-title, and ‘Party’ shall be construed accordingly;means the Wind Generation 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 NamPower pursuant to this Agreement;means the development, construction and operation of the Power Plant, located at the Project Site;  |
| "Project Documents""Project Insurances"“Project Site”“Prudent Industry Practice”  | 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;shall have the meaning set forth in Clause 21.1 (Insurances and Information);means the location of the Power Project as described in Clause 5.1;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 Wind Generation Power 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); |
| “Reasonable and Prudent Operator” | means a person seeking in good faith to perform its obligations and, in so doing and in the general conduct of its undertaking, exercising that degree of skill, diligence, prudence, responsibility and foresight which would reasonably and ordinarily be expected from a skilled and internationally experienced developer, contractor, owner or operator complying with all Laws, engaged in the same or a similar type of undertaking, in the same or similar circumstances and conditions; |
| “REFIT Programme”“Scheduled Connection Date”  | means the Renewable Energy Feed-In Tariff Programme adopted by the Government of the Republic of Namibia through the Ministry of Mines and Energy, and implemented by the ECB and NamPower; twelve (12) months following the Effective Date and has the meaning given to it in the Transmission Connection Agreement; |
|  |  |
| "Scheduled Outage" | means a Scheduled Transmission System Outage and/or a Scheduled Plant Outage; |
| "Scheduled Plant Outage""Scheduled Transmission System Outage" | means a pre-scheduled interruption in the generating capacity of the Power Plant agreed between the Parties (in accordance with Clause 12.7 (Maintenance) and Clause 12.8 (Scheduled Plant Outages), as the case may be);means a pre-scheduled interruption in the transmission capacity of the Transmission System agreed between the Parties (in accordance with Clause 12.10, as the case may be) due to Transmission Maintenance; |
| "Seller Event of Default" | has the meaning set forth in Clause 19.2 (Seller Event of Default); |
| "Seller’s Revised Tariff" | has the meaning set forth in Clause 16.1.4 (Effects of a Change in Costs); |
| "Signature Date" | means the date this Agreement is duly signed and dated by the last Party signing it; |
|  |  |
| "Taxes" | 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; |
| "Target Commercial Operation Date" | means the intended Commercial Operation Date being the date falling two (2) months from the Scheduled Connection Date or as it may be extended in terms of this Agreement; |
|  |  |
| "Term" | has the meaning set forth in Clause 3.1; |
| "Termination Amount" | has the meaning set forth in Annexure G (Calculation of The Termination Amount);  |
| "Termination Date" | means the date of the expiry of the Term or the date of the earlier termination of this Agreement, as the case may be; |
| "Termination Notice" | means a written notice of termination served by the Seller or NamPower to the other Party pursuant to Clause 4.5 (Non-fulfilment of Conditions Precedent) or Clause 19.5 (Consequences of Termination) (as the case may be); |
|  |  |
| “Transmission Connection Agreement”“Transmission Maintenance”“Transmission System Outage”“Transmission System” | means the agreement between the Parties in terms of which the Parties 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;means scheduled maintenance of the Transmission System required to be performed by NamPower;means a disruption or failure of the Transmission System;has the meaning given to it in the Transmission Connection Agreement; |
| “Transmission Unavailability” | means the aggregate number of days 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; |
| "Transmission Unavailability Threshold" | means in excess of 2.5% unavailability of the Transmission System per Contract Year; |
|  |  |
|  |   |
| "Unscheduled Outage" | means an Unscheduled Transmission System Outage and/or an Unscheduled Plant Outage; |
| "Unscheduled Plant Outage" | means any period when the Power Plant is out of service as a result of an unforeseen equipment failure or for any other reason;  |
| "Unscheduled Transmission System Outage"“Week”  | has the meaning given to it in the Transmission Connection Agreement;means the period between 00:00 hours on a Monday and 24:00 hours on the following Sunday. |

# INTERPRETATION

In this Agreement, unless the context clearly indicates a contrary intention:

1. The headings are for convenience only and shall not form part of the interpretation of this Agreement;

### The singular includes the plural and vice versa;

### 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;

### 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;

### 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;

### A gender shall include the other gender;

### A natural person shall include a juristic person, and vice versa;

### 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;

### 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;

### 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;

### 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

### Any reference to a month shall mean a calendar month.

* 1. **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 Namibia, in which case the last day shall be the next successive Business Day.

* 1. **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. **Annexures**

The Annexures to this Agreement shall be deemed to be incorporated herein and to form an indivisible part hereof.

# DURATION OF AGREEMENT

* 1. **Term**

This Agreement shall come into force in accordance with Clause 4 (Conditions Precedent) 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**”).

* 1. **Make-up Term**

### Without limiting the generality of Clause 3.1 (Term), 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 17 (Force Majeure) (the “**Make-up Period**”).

### The occurrence of Force Majeure events during the Make-up Period shall give rise to a further extension of the Make-up Period.

### 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.

# CONDITIONS PRECEDENT

* 1. **On Signature Date**

Clause 2 (Interpretation), Clause 4 (Conditions Precedent), Clause 13 (Additional Obligations), Clause 14 (Representations and Warranties), Clause 15 (Applicable Law), Clause 16 (Change in Costs), Clause 17 (Force Majeure), Clause 18 (Dispute Resolution), Clause 19 (Termination), Clause 20 (Liability for Damage or Loss), Clause 22 (Waiver of Sovereign Immunity), Clause 23 (Cession and Assignment), Clause 24 (Direct Agreement), Clause 25 (Severability), Clause 26 (Anti-Corruption Measures), Clause 27 (Confidentiality), Clause 28 (Survival), Clause 29 (Notices and Domicilium), Clause 30 (Shareholding in Seller), Clause 31 (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 4 (Conditions Precedent) have either been fulfilled or waived by the Parties.

* 1. **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;

### The Seller and NamPower having entered into a Transmission Connection Agreement;

### The Seller obtaining and holding a valid Generation Licence and such Generation Licence is in full force and effect;

### The Seller having achieved Financial Close and providing a certificate to NamPower from the Lenders (or an agent thereof) in this respect;

### NamPower receiving all Consents listed in paragraph A of Annexure A (Consents); and

### Approval by ECB of the Base Tariff and tariff structure as set out in Annexure C (Energy Payment).

* 1. **Responsibilities as regards to conditions precedent**

### 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 4.2 (On Effective Date).

### The Parties shall use their reasonable endeavours to cause the Conditions Precedent enumerated in Clause 4.2 (On Effective Date) 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**”). NamPower shall provide the Seller with such reasonable cooperation as may be necessary to assist the Seller in satisfying the Conditions Precedent listed above.

* 1. **Notice**

### 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 4.2 (On Effective Date) for which it is responsible.

### 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.

### A Party shall promptly inform the other Party in writing when any Condition Precedent for which it is responsible has been satisfied.

### 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.

### 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.

* 1. **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.

# CONSTRUCTION AND DEVELOPMENT OF THE POWER PROJECT

* 1. **Project Site**

### 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.

### 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).

* 1. **Risk and liability**

### The Seller shall be responsible, at its own cost and risk, for:

1. obtaining all Consents including those obtained under Clause 4.2.1 (On Effective Date), except for NamPower's Consents, and maintaining all Seller's Consents in full force and effect during the Term of this Agreement;
2. the commencement of supply of Net Energy to NamPower no later than the Target Commercial Operation Date excluding delays not attributable to the Seller;
3. connecting the Power Plant with the Connection Facilities at the Delivery Point as contemplated in the Connection Offer Letter;
4. 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 23 (Cession and Assignment); and
5. fulfilling all obligations undertaken by the Seller under this Agreement.

### 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.

* 1. **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.

* 1. **NamPower inspection rights**

NamPower 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 NamPower’s representatives 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 NamPower 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 NamPower shall not be unreasonably refused by the Seller.

* 1. **General Construction obligations**

### 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 Transmission Connection Agreement and (v) the standard of a Reasonable and Prudent Operator.

### 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.

### 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 NamPower 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.

### 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 NamPower 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 NamPower arising from NamPower’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.

### For the avoidance of doubt, notwithstanding the above, NamPower 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.

* 1. **Construction Programme**

### The Seller shall achieve the Commercial Operation Date on or before the Target Commercial Operation Date in accordance with Clause 6.1 (Commercial Operation Date).

### The Seller shall comply with the Construction Programme as set out in Annexure H (Construction Programme) and shall without any unreasonable delay notify NamPower in writing of any anticipated failure to achieve the Commercial Operation Date on or before the Target Commercial Operation Date , which notice shall identify:

1. the nature of the reason for the failure;
2. 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
3. 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.

# COMMERCIAL OPERATION DATE

* 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.

* 1. **Delay in Commercial Operation Date**

### 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.

### The Delay Liquidated Damages shall be paid at a rate of 0.25% 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.

### The maximum aggregate payment of the Delay Liquidated Damages under this clause 6.2 (Delay in Commercial Operation Date) shall not exceed 5% of the agreed EPC Contract amount.

### The Parties acknowledge that the Delay Liquidated Damages are a reasonable and genuine pre-estimate of the likely extent of the damages suffered by NamPower 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 6.2.

### In the case of a delay to the Commercial Operation Date as envisioned by this Clause 6.2 (Delay in Commercial Operation Date), the Seller shall keep NamPower informed of the date upon which it anticipates that it will be able to achieve the Commercial Operation Date.

### 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 NamPower 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.

### Following the occurrence of any delay, default or circumstance as contemplated in this Clause 6.2, 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:

(i) the effect which the Power Project reasonably demonstrates is properly attributable to such delay, default or circumstance; and

(ii) 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.

* 1. **Deemed Commercial Operation Date**

### Notwithstanding the extension to the Target Commercial Operation Date contemplated by Clause 6.2.5 (Delay in 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 as set out in this Clause 6.3 (Deemed Commercial Operation Date) 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"**).

### In the case of a delay, default or circumstance as contemplated by Clause 6.3.1 (Deemed Commercial Operation Date):

(i) 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;

(ii) the Parties shall undertake all reasonable measures to ensure that any Power Project Acceptance Tests delayed due to the circumstances contemplated by Clause 6.3.1 (Deemed Commercial Operation Date) shall be undertaken as soon as possible after the circumstances that resulted in such delay, default or circumstance are no longer in place; and

(iii) 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 6.3.1 (Deemed Commercial Operation Date), NamPower 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 12.1.1 (Monthly Generation Forecast) 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).

6.3.3 In the event that the delay, default or circumstance contemplated by Clause 6.3.1 (Deemed Commercial Operation Date) 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 6.3 to NamPower.

# SALE AND PURCHASE OF ENERGY

* 1. **Obligations to Sell and Purchase Electrical Energy**

### 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 NamPower commits to take and purchase at the Delivery Point all Net Energy generated (or deemed to have been 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 NamPower at the Delivery Point.

### 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 NamPower from the Connection Date. The Term shall only commence upon the Commercial Operation Date in accordance with Clause 3.1 (Term). The Energy Payment for Net Energy produced prior to the Commercial Operation Date shall be in accordance with Clause 9.1 (Payment for Energy prior to Commercial Operation Date).

### The Parties acknowledge that the physical connection of the Power Plant to the Transmission System shall be in accordance with the Transmission Connection Agreement.

* 1. **Restrictions on sale of Energy**

### Subject to the express and mandatory requirement of the Grid Code, the Seller shall not sell any Net Energy to any person other than NamPower (save for electrical energy consumed by the Power Plant as Auxiliary Consumption) without NamPower’s prior written consent.

### 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 NamPower as agreed in the Transmission Connection Agreement.

# PROVISION OF SUPPLY, METERING EQUIPMENT AND PROCEDURES

* 1. **Delivery Point**

The supply from the Seller to NamPower shall be delivered at the Delivery Point in accordance with the Transmission Connection Agreement.

* 1. **Metering**

The Net Energy generated by the Power Plant and delivered to NamPower 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 Transmission Connection Agreement.

**8.3 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 NamPower for planning and forecasting purposes. The Seller shall give reasonable notice of such testing to NamPower and shall allow NamPower to be present when these tests are performed.

# PAYMENT FOR ELECTRICITY

* 1. **Payment for Energy prior to Commercial Operation Date**

For each Billing Period prior to the Commercial Operation Date, the Energy Payment shall be in accordance with Annexure C (Energy Payment).

* 1. **Energy Payment**

### NamPower shall pay to the Seller:

### for each Billing Period during the Term (including the Billing Period in which the Commercial Operation Date occurs), the Energy Payment (as per Annexure C (Energy Payment)); and

### for the duration of the Deemed Commercial Operation Period, if it occurs, the Deemed Energy Payment.

* 1. **Payment during Event of Deemed Availability**

9.3.1 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 NamPower or which prevents or hinders NamPower from accepting or receiving such electrical energy in accordance with this Agreement, NamPower shall, subject to the provisions of Clause 12.10.2 pay to the Seller the Deemed Energy Payment in respect of the aggregate amount of Net Energy based on maximum output as defined in the Monthly Generation Forecast (as per Clause 12.1.1 (Monthly Generation Forecast)) in respect of the electrical energy forecast in the Monthly Generation Forecast to be generated for the duration of the occurrence of such Event of Deemed Availability which output shall be forecasted in kWh.

9.3.2 It is hereby clarified that in the event that NamPower shall be required to pay an Energy Payment for part of a certain Billing Period and a Deemed Energy Payment for the rest of such Billing Period, NamPower shall pay to the Seller both the Energy Payment and the Deemed Energy Payment for such Billing Period.

* 1. **Indexation of the Energy Charge**

The Energy Charge shall escalate in accordance with the indexation in Paragraph A4 to Annexure C (Energy Payment).

* 1. **Transmission Use of System Charge**

The Energy Payment to be paid by NamPower 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 Namibian Dollars (N$) per month and is calculated in accordance with applicable ECB Generation and Transmission tariff methodology.This amount will be reviewed annually in accordance with ECB approval, all as specified in Annexure C (Energy Payment).

# INVOICING AND PAYMENT

* 1. **Frequency**

The Energy Payment, as calculated and adjusted in accordance with Clause 9.2 (Energy Payment) shall be invoiced in arrears at the end of each Billing Period and shall be invoiced in Namibian Dollars. The Seller shall charge NamPower value added tax and any other taxes or surcharges, including the ECB Levy and NEF Levy if applicable, in accordance with applicable legislation.

* 1. **Payments Free from Tax**

All sums payable by either Party under this Agreement shall be paid:

* 1. free of any restriction or condition; and
	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 Namibia or by any federation or organisation of which Namibia is a member at the time of payment.
	3. **Deductions Made Whole**

### 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.

### 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.

10.3.3 Clause 10.3.2 does not apply in the event where a Party is compensated or allowed to recoup such Tax via alternative mechanisms.

* 1. **Invoicing and Payment Procedure**

### Invoices for all payments due under this Agreement shall be submitted by the Seller to NamPower 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.

### 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).

### 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.

### Should NamPower dispute an invoice it shall notify the Seller within five (5) Business Days of receipt of such an invoice. NamPower 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. .

### In case of a manifest error on an invoice, NamPower shall immediately notify the Seller, and the Seller shall issue a corrected invoice.

### Should an invoice be in error as a result of a metering or reconciliation error, 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.

### The Seller shall notify NamPower of its Namibian bank account details for payment by NamPower to the Seller.

### In the event that the Seller is required to pay to NamPower any Liquidated Damages or Environmental Credits, NamPower shall issue an invoice to the Seller in accordance with the procedure described above, mutatis mutandis.

### NamPower shall notify the Seller of its bank account details for payment by the Seller to NamPower.

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

# ENVIRONMENTAL CREDITS

* 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.

* 1. **Information Sharing**

NamPower 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 NamPower in relation to the application for and obtaining of Environmental Credits.

* 1. **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 11.4, 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 NamPower 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 11.4 and Annexure E (Sharing of Environmental Credit)

* 1. **Payment of Benefits**

### Notwithstanding Clause 11.3, 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.

# CONTROL AND OPERATION OF THE POWER project

* 1. **Dispatch Procedures**

### Monthly Generation Forecast

1. The Seller shall provide NamPower in writing for each month from the Commercial Operation Date (save during Scheduled Outages), by no later than 09:00 hours on the 25th of the preceding month, the forecast level of generation of the Net Energy for each hour (starting at 00:00 hours on the first day of the month and ending at 24:00 hours on the last day of the month, on the hour every hour) in the month in the format attached hereto as Annexure J (Monthly and Weekly Generation Forecasts) (the "**Monthly Generation Forecast**"). In addition, Monthly Generation Forecasts for the first three (3) months following Target Commercial Operation Date, shall be provided by the Seller to NamPower four (4) months prior to the Target Commercial Operation Date.
2. In the event that the Seller fails to provide the Monthly Generation Forecast for any month, then the last Monthly Generation Forecast provided by the Seller in accordance with Clause 12.1.1(a) above shall be deemed to be the Monthly Generation Forecast for such month.

### Weekly Generation Forecast

1. The Seller shall provide to NamPower 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 forecast level of electrical energy expected to be generated by the Power Plant for each day in the Week in the format attached hereto as Annexure J (Monthly and Weekly Generation Forecasts) (the "**Weekly Generation Forecast**").
2. In the event that the Seller fails to provide the Weekly Generation Forecast for any Week, then the last Weekly Generation Forecast provided by the Seller in accordance with Clause 12.1.2(a) above shall be deemed to be the Weekly Generation Forecast for such Week.

### Daily Generation Forecast

1. The Seller shall provide to NamPower in writing for each day following the Commercial Operation Date, by no later than 10:00 hours on the preceding day, the Seller's estimate made in good faith of the forecast level of electrical energy expected to be generated each hour (the first such hour starting at 00:00 and ending at 00:60 minutes) by the Power Plant in the day (starting at 00:00 hours and ending at 24:00 hours).
2. In the event that the Seller fails to provide the forecast for any day, then the last daily forecast provided by the Seller in accordance with Clause 12.1.3 (a) above shall be deemed to be the daily forecast for the day.

### All generation forecasts are indicative only, and deviations shall not be regarded as a breach of contract. The Monthly Generation Forecast shall however be used as basis for the calculation of Delay Liquidated Damages under Clause 6.2.1 (Delay in Commercial Operation Date), Deemed Energy Payments under Clause 6.3.2 (Deemed Commercial Operation Date), other Deemed Energy Payments under Clauses 9.3 (Payment during Event of Deemed Availability) and 12.10.2 (Scheduled Transmission System Outages and Unscheduled Transmission System Outages), and the quantification of losses in case of termination as a result of Seller Event of Default under Clause 19 (Termination).

* 1. **Availability Declaration**

### The Seller shall provide to NamPower 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 NamPower from time to time (the “**Availability Declaration**”). For the first Contract Year, the Seller shall provide NamPower with an Availability Declaration thirty (30) days prior to the Commercial Operation Date.

### 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 12.2.1 above shall be deemed to be the Availability Declaration for such Contract Year.

### Subject to the terms and conditions of this Agreement, the Seller shall declare the Power Plant available for generation of Net Energy except:

1. for reasons of Scheduled Plant Outages or Unscheduled Plant Outages; or
2. where to do so would not be in accordance with the standards of a Reasonable and Prudent Operator; or
3. in circumstances relating to safety (of either a personnel or the Power Project or apparatus); or
4. to the extent of any illegality, in circumstances where to do so would be unlawful; or
5. for reasons of Force Majeure; or
6. in any other circumstances, with NamPower’s approval.

### The Availability Declaration and all generation forecasts are indicative only, and deviations shall not be regarded as a breach of contract.

### The Seller shall sell, and the Buyer shall purchase, all the Energy generated by the Power Plant.

* 1. **Other relevant data**

So far as possible, by 30 (thirty) days before each anniversary of the Commercial Operation Date, the Seller shall submit to NamPower 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.

* 1. **Further revisions**

### The Seller shall, as soon as is reasonably practicable, make revisions to the Availability Declaration submitted to NamPower should circumstances affecting the operation of the Power Plant or its operating characteristics change at any time.

### 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:

1. make revisions to the data submitted to NamPower under Clause 12.2 (Availability Declaration) and Clause 12.3 (Other relevant data);
2. notify NamPower of any revisions to any previously submitted data; and
3. notify NamPower of any special factors of which it becomes aware.
	1. **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.

* 1. **Coordination**

### The Seller and NamPower shall as far as practically possible coordinate the timing for both Scheduled Plant Outages and Scheduled Transmission System Outages.

### 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.

* 1. **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 Prudent Industry Practice.

* 1. **Scheduled Plant Outages**

### 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 anniversary of the Commercial Operation Date provide to the Operating Committee 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:

1. 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
2. the estimated dates and duration of each Scheduled Plant Outage.

### The Operating Committee shall, upon receipt of the proposals contemplated in clause 12.8.1, 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.

### If there is a requirement to change the dates of any Scheduled Plant Outage, the Seller shall provide NamPower with written notice at least twenty-eight (28) days in advance of the relevant Scheduled Plant Outage. NamPower 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.

### Subject to having complied with the foregoing provisions of this Clause 12.8 (Scheduled Plant Outages), 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.

### 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. NamPower shall not be entitled to any payment and/or indemnification and/or reimbursement from the Seller in connection with any Scheduled Plant Outages.

* 1. **Unscheduled Plant Outages**

### The Seller shall notify NamPower promptly:

* 1. upon the occurrence of any event resulting in the Power Plant being unable to operate; and/or
	2. if the Seller determines that maintenance of the Power Plant is required prior to the next Scheduled Plant Outage scheduled pursuant to Clause 12.8 (Scheduled Plant Outage), and that an Unscheduled Plant Outage is required.

### In each case, the Seller shall:

1. give NamPower 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;
2. notify NamPower of the expected dates and duration of the Unscheduled Plant Outage; and
3. use its best efforts to minimise the duration and effects on the Power Plant of the Unscheduled Plant Outage.

### NamPower shall not be entitled to any payment and/or indemnification and/or reimbursement from the Seller in connection with any Unscheduled Plant Outages.

* 1. **Scheduled Transmission System Outages and Unscheduled Transmission System Outages**

### The Parties agree that the Transmission System may be unavailable not more than the Transmission Unavailability Threshold annually during which NamPower shall perform Transmission Maintenance. NamPower shall, not less than two (2) months prior to the Commercial Operation Date and on an annual basis for the remainder of the Term, at least two (2) months prior to the anniversary of the Commercial Operation Date provide to the Seller its proposals for Scheduled Transmission System Outages, and shall, in as far as is practical, endeavour to coordinate that the timing of the Scheduled Transmission System Outages shall not be during generation hours. Such schedule shall include:

1. the number of expected Scheduled Transmission System Outages; and
2. the estimated dates and duration of each Scheduled Transmission System Outage.

### Subject to having complied with the foregoing provisions of this Clause 12.10 (Scheduled Transmission System Outages and Unscheduled Transmission System Outages), NamPower shall be entitled to shut down the Transmission System from service at the agreed date and time. The total Scheduled Transmission System Outages and Unscheduled Transmission System Outages for the Transmission System (excluding Force Majeure events) for each Contract Year, shall not lead to 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, NamPower shall be liable to pay the Deemed Energy Payment for the period or periods during which such Transmission Unavailability Threshold is exceeded during a Contract Year.

### Without derogating from NamPower's obligation to pay the Deemed Energy Payment as aforesaid, NamPower shall notify the Seller promptly:

1. upon the occurrence of any event resulting in the Transmission System being unable to operate or events affecting system stability; and/or
2. if NamPower determines that maintenance of the Transmission System is required prior to the next Scheduled Transmission System Outage and that an Unscheduled Transmission System Outage is required.

### In each case, NamPower shall:

1. give the Seller 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, NamPower becoming aware of the need for such outage;
2. notify the Seller of the expected duration of the Unscheduled Transmission System Outage; and
3. use its best efforts to minimise the duration and effects on the Transmission System of the Unscheduled Transmission System Outage.

# ADDITIONAL OBLIGATIONS

* 1. **NamPower’s obligations**

NamPower shall, in addition to its other obligations under this Agreement, without cost to the Seller:

### to the extent NamPower 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 NamPower to fulfil its obligations under this Agreement; and

### 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

### 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 pay the Seller for this Net Energy as set out in Annexure C (Energy Payment); and

### 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

### 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.

* 1. **General Obligations of the Seller**

### 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:

1. all relevant Consents required from time to time for the Seller to fulfil its obligations under this Agreement;
2. all applicable Laws (including, without limitation, all health, safety and environmental Laws);
3. Prudent Industry Practice; and
4. the relevant manufacturer's guidelines and instructions.

### 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 Prudent Industry Practice.

### As soon as granted and not later than Financial Close, the Seller shall give notice to NamPower of all Consents and approvals necessary in Namibia to allow the Seller to enter into this Agreement and/or operate the Power Plant and to carry out the transactions contemplated hereby.

# REPRESENTATIONS AND WARRANTIES

* 1. **The Seller’s warranties**

The Seller hereby represents and warrants to NamPower that:

### it is a validly existing legal entity under the Laws of Namibia;

### it is a limited company, incorporated under the Laws of Namibia which has been in continuous existence since incorporation;

### 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;

### 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;

### 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;

### this Agreement does not conflict with any provisions of any Law, any regulations of Namibia or any provision of the articles or memorandum of association of the Seller in effect as at the Signature Date;

### 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;

### 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;

### that it will make use of new equipment supplied by a reputable manufacturer; and

### 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.

* 1. **NamPower Warranties**
1. NamPower hereby represents and warrants to the Seller that:
2. it is a validly existing legal entity under the Laws of Namibia which on the date of this Agreement is wholly-owned by the Government of Namibia;
3. it is a private limited company incorporated under the Laws of Namibia which has been in continuous existence since incorporation;
4. 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 NamPower;
5. all Consents necessary to allow NamPower 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;
6. it has given notice to the Seller of all Consents necessary in Namibia to allow NamPower to enter into this Agreement and to carry out the transactions contemplated therein;
7. there are no applicable Laws in force on the Signature Date or any provisions of any organisational document of NamPower or of any agreement by which NamPower is bound, which restrict or prohibit the ability of NamPower to enter into and perform the terms of this Agreement;
8. execution of this Agreement does not conflict with any provision of any Law or any provision of the articles or memorandum of association of NamPower in effect as at the Signature Date;
9. 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 NamPower’s knowledge are being threatened against NamPower or any of NamPower’s assets, which might materially or adversely affect NamPower’s ability to perform its obligations under this Agreement or result in the dissolution of NamPower; and
10. 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 NamPower is a party or by which NamPower or its property is bound.

# APPLICABLE LAW AND JURISDICTION

This Agreement shall be governed, construed and interpreted in accordance with the Laws of Namibia, and the Parties consent to the non-exclusive jurisdiction of the High Court of Namibia, subject to the provisions of Clause 18 (Dispute Resolution). Subject to the provisions of Clause 18 (Dispute Resolution), the Parties agree that a judgment in any proceedings in connection with this Agreement by the Namibian courts shall be binding upon them and may be enforced against them in any other jurisdiction.

# CHANGE IN COSTS

### The tariff agreed in this Agreement is approved by the ECB, and has an agreed price path, with annual escalations as set out in Annexure C (Energy Payment).

### 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 five million Namibian dollars in aggregate, projected over the life of the Power Plant in accordance with the Base Case Financial Model, NamPower and the Seller shall approach the ECB to adjust the tariff 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.

### The Change in Costs as contemplated in Clause 16.1.2 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.

### In the event of a Change in Law (“Change in Costs”) which falls within the ambit of Clause 16.1.3, the Seller may only claim relief for a Change in Costs in the event:

1. the principle effect of such Change in Costs is directly borne by:
2. the Power Project and other power plants forming part of the REFIT Programme;
3. the Seller and not other persons; and
4. in respect of which the Seller is not entitled to any other relief pursuant to any other provisions of this Agreement; and
5. 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
6. 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.

### 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 under the REFIT Programme shall not be deemed a Change in Costs.

### 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.

### If any one or more Changes in Costs as envisaged in Clause 16.1.2 – 16.1.3 (inclusive) takes place, the Parties agree to meet in accordance with Clause 16.2 (Process for adjustments to the tariff because of Change in Costs) 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 Energy Payment in Annexure C (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.

### Once the then applicable Energy Payment and/or Deemed Energy Payment has been re-calculated in accordance with Clause 16.1.7, the implementation of such revised Energy Payment and/or Deemed Energy Payment ("**Seller's Revised Tariff**") is subject to the official approval of the ECB. In the event that the ECB does not approve the Seller's Revised Tariff or in the event that the ECB determines a revised Energy Payment and/or Deemed Energy Payment which is less beneficial to the Seller than the Seller's Revised Tariff, the Seller shall be entitled to refer the matter to an Expert for a determination.

* 1. **Process for adjustments to the tariff because of Change in Costs**

### After a Change in Costs as contemplated in Clause 16.1.2 and 16.1.3, the Seller shall submit to NamPower within a reasonable time the re-calculation of the Seller's Revised Tariff 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 Energy Payment, Deemed Energy Payment arising from such Change in Costs.

### Within fourteen (14) days after the date of the re-calculation delivered pursuant to Clause 16.2.1 NamPower shall notify the Seller whether it agrees or disagrees with Seller's Revised Tariff. If NamPower notifies the Seller of its disagreement, the Parties agree to meet within seven (7) days and discuss, in good faith, the Seller's Revised Tariff.

###  In the event that NamPower agrees with the re-calculation delivered pursuant to Clause 16.2.1 or as negotiated pursuant to Clause 16.2.2 and subject to the approval of the ECB in accordance with Clause 16.2.4, the calculation of the Energy Payment and/or the Deemed Energy Payment shall be amended accordingly.

### The Seller’s Revised Tariff shall apply as from the date on which the NamPower's annual tariff revision is approved by ECB and takes effect (falling no later than twelve (12) months from the previous NamPower application for tariff review).

### The Parties shall ask the ECB to approve the Seller's Revised Tariff within fourteen (14) days pursuant to Clause 16.1 (Effects of a Change in Costs) or Clause 16.2 (Process for adjustments to the tariff because of Change in Costs).

### The calculation of the revised Energy Payment and/or the Deemed Energy Payment and the Annual Indexation determined pursuant to this Clause 16 (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 Energy Payment and/or the Deemed Energy Payment and the Annual Indexation take effect in accordance with Clause 16.2 . 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.

### In the event, the Parties have met to discuss the re-calculation of the Seller’s Revised Tariff pursuant to clause 16.2.2, and NamPower is in disagreement with the Seller’s calculations, the Parties shall be entitled to refer the matter to the ECB for mediation. If the ECB does not approve the Seller's Revised Tariff or in the event that the ECB determines a revised Energy Payment or a Deemed Energy Payment which is less beneficial to the Seller than the Seller's Revised Tariff, the Parties shall be entitled to refer the matter to an Expert for a determination.

### In the event the Expert rules in favour of the Seller, and the ECB does not implement the re-calculated tariff as determined by the Expert, the Seller may terminate this Agreement and NamPower 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 NamPower having approved the re-calculation of the tariff in accordance with Clause 16.2.7.

# FORCE MAJEURE

* 1. **Definition of Force Majeure Event**

### A “Force Majeure Event” means any event or circumstance which:

1. is beyond the reasonable control of the Party affected by the Force Majeure (the “**Affected Party**”) or its Contractors;
2. 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;
3. 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
4. prevents, hinders or delays the Affected Party in its performance of any of its obligations under this Agreement.

### 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 17.1.1 above, that part of the event or circumstance that could have been mitigated shall not be a Force Majeure Event.

### 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 17.1.1 above:

1. 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
2. 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
3. epidemic, famine or plague; or
4. any event or circumstance constituting a Force Majeure Event under any other Project Document; or
5. 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
6. radioactive contamination or ionising radiation; or
7. 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:

1. a failure or inability to make any payment, any inability to raise finance or any changes in price or market conditions;
2. late delivery or interruption in the delivery of machinery, equipment, materials, spare parts or consumables;
3. 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
4. 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
5. wear and tear, flaws, breakdown in or degradation of, any equipment or machinery.
	1. **Procedure**

### 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.

### 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.

### 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.

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

* 1. **Consequences of a Force Majeure Event**

### 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 17.3 (Consequences of a Force Majeure Event).

### 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 17.2 (Procedure), 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.

### 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 3.2 (Make-up Term).

* 1. **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 Affected Party to perform its obligations under this Agreement, either Party may upon not less than thirty (30) days’ notice, terminate this Agreement.

# DISPUTE RESOLUTION

* 1. **Procedure**

### 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 ECB'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 the ECB.

### Should the Parties fail to resolve such Dispute in accordance with Clause 18.1.1 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.

### Should the chief executives (or equivalent) of the Parties fail to resolve such Dispute in accordance with Clause 18.1.2 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 Namibia shall appoint the arbitrators from a list of approved arbitrators having the requisite experience and expertise in the field of the Dispute.

18.1.4 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.

18.1.5 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.

18.1.6 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 failing within the ambit of this Clause 18.1.

18.1.7 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.

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

18.1.9Should the Independent Expert fail to resolve such dispute in accordance with this Clause 18.1 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 18.2.

* 1. **Arbitration**

### 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 Namibian arbitration laws. In the event, the arbitration laws are deemed to be insufficient, the AFSA Rules shall apply.

### 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 weeks from the date on which the hearing, including argument, was concludedmonth. 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.

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

### Arbitration shall be conducted under the the Namibian arbitration laws and shall be held in Windhoek before three (3) arbitrators. In any event the arbitration shall be conducted in the English language.

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

### 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 18.2 (Arbitration).

* 1. **Obligations during Disputes**

### 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.

### Where a Dispute has been referred for resolution by arbitration in accordance with the Namibian 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.

* 1. **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 27 (Confidentiality).

# TERMINATION

* 1. **Events of Termination**

### 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 4 (On Effective Date); or

### termination by the Seller due to a Change in Costs, in accordance with Clause 19.4 (Termination for Change in Costs); or

### termination by NamPower following a Seller Event of Default, in accordance with Clause 19.2 (Seller Event of Default); or

### (d) termination by the Seller following a NamPower Event of Default, in accordance with Clause 19.3 (NamPower Event of Default); or

### (f) on receipt of a notice from the Seller in accordance with Clause 17.4 (Termination on Account of Force Majeure).

* 1. **Seller Event of Default**

### Each of the following shall constitute a “Seller Event of Default”, save to the extent excused by Clause 17 (Force Majeure) of this Agreement, or a NamPower Event of Default or an Event of Deemed Availability, or a NamPower Transmission Default, and shall entitle NamPower to issue a Notice of Intention to Terminate to the Seller:

### 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 NamPower's prior written consent, which shall not be unreasonably refused or delayed;

### 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 NamPower's prior written consent, which shall not be unreasonably refused or delayed;

### 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;

### 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;

### the transfer of the Seller’s rights or obligations under this Agreement, which are not permitted under Clause 23 (Cession and Assignment) of this Agreement, excluding a transfer to an Affiliate and/or a wholly owned subsidiary;

### 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;

### 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;

### cancellation of the Generation Licence;

### failure of the Seller to pay any sum or sums due and owing to NamPower within thirty (30) days of the due date therefor;

### 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.

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

* 1. **NamPower Event of Default**

Each of the following shall constitute a “NamPower 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 NamPower:

### failure of NamPower to pay any sum or sums due and owing to the Seller within thirty (30) days of the due date therefor;

### NamPower 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 NamPower 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 NamPower is exercising reasonable diligence to remedy such failure, excluding in the event of NamPower'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;

### a NamPower 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

### the liquidation or insolvency of NamPower, except for any frivolous or vexatious petitions for winding up or insolvency or any petition for the winding up or insolvency of NamPower which is discharged, stayed or dismissed within sixty (60) days of commencement thereof or, if earlier, the date on which it is advertised.

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

* 1. **Notice of Intention to Terminate and Termination Notice**

### 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 4 (On Effective Date);

### 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 16.1.4 or 19.4 (Termination for Change in Costs) occurs; or

### in the event of a Seller Event of Default or a NamPower Event of Default (as the case may be).

### Following the issue of a Notice of Intention to Terminate pursuant to Clause 19.4.1 or 19.4.2, except if due to a default in payment by NamPower, 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.

### 19.4.4 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.

* 1. **Consequences of Termination**

### Subject to Clause 19.5.2, 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.

### On termination of this Agreement for a NamPower Event of Default, NamPower 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).

### In the event of a termination by NamPower as a result of a Seller Event of Default, NamPower 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 NamPower, 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).

### The Seller shall, within fourteen (14) days of payment of the Termination Amount as contemplated in Clause 19.5.2 read with Annexure G or in the event where NamPower elects to acquire the Power Plant (inclusive of stock and inventory) under Clause 19.5.3, 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 NamPower. 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 NamPower.

### For avoidance of doubt, NamPower 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.

# LIABILITY FOR DAMAGE OR LOSS

* 1. **Indemnity**

### 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 17 (Force Majeure) of this Agreement, except to the extent that the Party seeking to be indemnified is at fault or is negligent.

### This amount shall be capped to N$ [•] but shall not, for the avoidance of doubt, apply to any Termination Amount payable under Clause 19.6 or Annexure G.

* 1. **Liability**

### 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.

### Neither Party shall be liable to the other Party save as expressly provided for in this Agreement.

* 1. **Damages**

### 20.3.1 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.

### 20.3.2 For avoidance of doubt, the aforesaid limitation on liability does not affect or limit the Termination Amount payable to Seller by NamPower pursuant to Clause 19.5 or payment by the Seller to NamPower in case of termination as a result of Seller Event of Default pursuant to Clause 19.5.3 (Consequences of Termination).

# PROJECT INSURANCE

* 1. **Insurances and information**

### The Seller shall, in accordance with this Clause 21 (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 21.1.2 and 21.1.3 below, the “**Project Insurances**”).

### 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.

### Nothing in this Clause 21 (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 21.1 (Insurance and information).

### The Seller shall provide a copy of all Project Insurances to NamPower, 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 21 (Project Insurance).

### 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 NamPower with such documentation as may be reasonably necessary to evidence that such policy is in force and the amount of the cover thereunder.

### The Seller shall provide NamPower, 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.

* 1. **Endorsements and clauses**

### The Seller shall cause its insurers to waive all rights of subrogation against NamPower 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.

### The Seller shall ensure that the policy for each of its Project Insurances contains a provision:

### naming NamPower 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.

* 1. **Application of insurance proceeds**

### Unless NamPower 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.

### 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.

# WAIVER OF SOVEREIGN IMMUNITY

### The Parties herebyunconditionally 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.

# CESSION AND ASSIGNMENT

* 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 23.2 (Restructuring) hereto. Such consent shall not be unreasonably withheld.

* 1. **Restructuring**

### Notwithstanding the above, NamPower 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 NamPower; (ii) the restructuring, amalgamation, reorganisation or analogous event of NamPower; or (iii) the transfer of all or any material part of NamPower'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 Namibia or any Competent Authority.

### In the event of a restructuring or reorganisation of NamPower resulting in the cession or assignment of this Agreement to another entity in the NamPower group of companies, NamPower shall be jointly and severally liable with the newly created entity for the performance of its obligations in terms of this Agreement.

### In the event that the restructuring or reorganisation of NamPower resulting in the cession or assignment of this Agreement to an entity not forming part of the NamPower 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.

# DIRECT AGREEMENT

24.1 NamPower 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. NamPower 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).

24.2 The Seller may, subject to the prior written approval of NamPower, 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 tariff shall be adjusted, subject to the prior approval of the ECB, in order to ensure that the benefit is passed through to NamPower on a 50/50 basis.

### The Seller shall submit to the Buyer within a reasonable time the re-calculation of the Seller's Revised Tariff derived from the Base Case Financial Model, setting forth in reasonable detail the basis of and the calculations for any necessary adjustments to the Energy Payment, Deemed Energy Payment arising from such Change in Costs.

### Within fourteen (14) days after the date of the re-calculation delivered pursuant to Clause 24.2.1 the Buyer shall notify the Seller whether it agrees or disagrees with Seller's Revised Tariff. 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 Tariff.

###  In the event that the Buyer agrees with the re-calculation delivered pursuant to Clause 24.2.1 or as negotiated pursuant to Clause 24.2.2 and subject to the approval of the ECB in accordance with Clause 24.2, the Energy Payment, the Calculation of the Deemed Energy Payment shall be amended accordingly.

### The Seller Revised Tariff shall apply as from the date on which the Buyer's annual tariff revision is approved by ECB and takes effect (falling no later than twelve (12) months from the previous the Buyer application for tariff review).

### In the event, the Parties have met to discuss the re-calculation of the Seller’s Revised Tariff pursuant to clause 24.2.2, and the Buyer is in disagreement with the Sellers calculations, the Parties shall be entitled to refer the matter to the ECB for mediation. If the ECB does not approve the Seller's Revised Tariff or in the event that the ECB determines a revised Energy Payment or a Deemed Energy Payment which is less beneficial to the Seller than the Seller's Revised Tariff, the Parties shall be entitled to refer the matter to an Expert for a determination.

### In the event the Expert rules in favour of the Buyer, and the ECB or the Seller does not implement the re-calculated tariff 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.

# 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.

# 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.

# CONFIDENTIALITY

* 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.

* 1. **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 27.1 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.

* 1. **Exclusions**

These provisions shall not apply to information which is:

### publicly known or has become publicly known through no unauthorised act of the recipient Party;

### rightfully received by the recipient Party from a third party;

### independently developed by the recipient Party without use of the other Party’s information;

### disclosed by the other Party to a third party without similar restrictions;

### 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

### publicly disclosed with the other Party’s written consent.

* 1. **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.

# SURVIVAL

Termination of this Agreement shall not affect the accrued rights and liabilities of the Parties hereto and the provisions of Clause 15 (Applicable Law and Jurisdiction), Clause 19 (Termination), Clause 18 (Dispute Resolution) and Clause 27 (Confidentiality) shall continue to have effect notwithstanding the termination of this Agreement.

# NOTICES AND DOMICILIUM

* 1. ***Domicilia Citandi et Executandi***

The Parties choose as their *domicilia citandi et executandi* their respective addresses specified in Clause 29.2 (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.

* 1. **Addresses**

For the purposes of Clause 29.1 (*Domicilia Citandi et Executandi*), the Parties’ respective addresses shall be:

In the case of the Seller:

I-THE IPP (Pty) Ltd

\_\_\_\_\_\_\_\_\_ Street,

P.O. Box \_\_\_\_\_\_\_\_\_

Windhoek, Namibia

In the case of NamPower:

Namibia Power Corporation (Pty) Ltd

NamPower Centre

15 Luther Street

PO Box 2864

### Windhoek, Namibia

### Or at such other postal and physical address in Namibia, not being a post office box or poste restante, or which the Party concerned may notify the other in writing.

* 1. **Delivery of Notices**

All notices, notifications, requests, demands or other communications given in terms of this Agreement shall be in writing and shall:

### if delivered by hand be deemed to have been duly received by the addressee on the date of delivery;

### 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;

### if successfully transmitted by facsimile with successful transmission confirmed be deemed to have been received by the addressee one day after dispatch; or

### 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.

* 1. **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.

# SHAREHOLDING IN SELLER

* 1. 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 NamPower in writing prior thereto, such approval not be unreasonably withheld. NamPower'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, NamPower shall be notified with respect to such transfer of shares.
	2. The Seller, shall adhere to the previously disadvantaged Namibian (as designated and defined in section 18 of the Affirmative Action (Employment) Act, Act No 29 of 1998 (hereinafter referred to as “PDN Shareholding”) requirements as stipulated in the Generation Licence.

# GENERAL AND MISCELLANEOUS

* 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.

* 1. **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.

* 1. **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.

* 1. **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 **NamPower** by the signatory who warrants that he is duly authorised:

Signed: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Title: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Witness: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Title: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

This \_\_\_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_

At: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

1. CONSENTS

**A. NamPower’s Consents**

1. Transmission licence amendment (if required) / EIA approvals / Board consent

2. ECB regulatory oversight of the PPA

**B. The Seller’s Consents**

1. Those stipulated in the conditions of the Licence including suspensive conditions, site permit, EIA, Generation licence
2. SINGLE LINE DIAGRAM OF POWER PLANT
3. ENERGY PAYMENT

This Annexure sets out the Energy Payment payable under Clause 9 of this Agreement, for each Billing Period.

The year referred to in this Annexure is the NamPower financial year i.e. 01st of July to 30st of June and not a calendar year i.e. from 1st of January to 31st of December.

**A1. Energy Payment (whether before or after the Commercial Operation Date)**

The Energy Payment shall be composed of the following three (3) components:

Energy Charge – Payment for electricity produced for the Billed Period shall be based on a base tariff of N$ 1.08 per kWh as of (the "**Base Tariff**"). The Base Tariff 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 Net Energy delivered during the Billing Period.

Transmission Use of System Charge – as defined in the Transmission Connection Agreement.

ECB, NEF and any other Levies, if any.

Therefore, the Energy Payment for the Billing Period, from NamPower to the Seller, shall be:

Energy Payment = Base Tariff **x** monthly Net Energy **plus** Transmission Use of System Charge **plus** ECB Levy plus NEF Levy (if any).

**A2. Deemed Energy Payment**

NamPower shall pay the Energy Payment to the Seller in respect of the aggregate amount of Net Energy based on the Monthly Generation Forecast (as per 12.1.1) in respect of the Net Energy that was available deemed to be delivered to NamPower commencing from the Deemed Commercial Operation Date, which output shall be measured in kWh at the end of each month of delay or part thereof thereafter. The Deemed Energy Payment shall be calculated as provided in Paragraph A3 below.

**A3. Calculation of the Deemed Energy Payment**

The Deemed Energy Payment shall be calculated as follows:

Payment for electricity produced for the Billed Period shall be based on the Base Tariff. The Base Tariff shall be indexed on an annual basis, according to the formula in Section A4 below. The tariff shall be multiplied by the Net Energy deemed to be delivered during the Billing Period.

The Deemed Energy Payment for the Billing period, from NamPower to the Seller, shall be:

Deemed Energy Payment = Indexed Tariff **x** Deemed Net Energy for Billing Period.

**A4. Annual Indexation**

The Base Tariff will escalate on an annual basis, from the Commercial Operation Date, 100% in accordance with the Consumer Price Index (CPI) as published by the Namibian Statistic Agency, according to the following formula:

Indexed Tariff = AIT(pM) \* CPI (last published)/CPI (published a year before)

Whereas:

AIT(pm) means: Annual Indexed Tariff of previous year

CPI (last published) = Last CPI published by the Namibian Statistic Agency

CPI (published a year before) = CPI published one year prior to the CPI (last published)

**A5. Transmission Use of System Charge**

The Transmission Use of System Charge shall be calculated as defined in Paragraph E8 to Annexure E to the Connection Offer Letter:

[x] Namibian Dollars (N$) calculated in accordance with the ECB generation and Transmission methodology which is based on the average generation from each generator during the peak load flow in the Transmission system (such amount will be reviewed annually in accordance with the ECB approval).

1. LAYOUT DIAGRAM OF POWER PLANT
2. SHARING OF ENVIRONMENTAL CREDIT

In case that the Power Project will be entitled to receive Environment Credit, the Seller shall pay to NamPower a monthly payment equal to fifty percent (50%) of the net benefit received by the Seller from the sale of Environmental Credits ("**NamPower'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. NamPower's EC Payment shall be made to NamPower only once payment has been received by the Seller for the sale of Environmental Credits.

1. OPERATING COMMITTEE

**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.

**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:

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;

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;

2.3 Coordinate the scheduling of maintenance affecting the operations of the Power Plant;

2.4 Coordination of recommendations for changes in either the Power Plant or the Connection Facilities to effect the operational requirements of NamPower’s control of the Transmission System;

2.5 Develop operating procedures, including plans for operating the Power Plant during anticipated types of emergencies;

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;

2.7 Recommend to the Parties changes regarding the responsibilities of the 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.

**3. Meetings**

The Operating Committee shall only act by unanimous agreement. 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.

**4. Reporting Relationships**

The Operating Committee shall report their activities and recommendations to the Parties or others designated by the Parties.

1. CALCULATION OF THE TERMINATION AMOUNT

In the event of termination as a result of a NamPower Event of Default, NamPower 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 IPP and its Contractors as a result of the termination of this Agreement, including (without limitation):

1. the cost of any materials or goods ordered for the purpose of the Power Project,
2. any expenditure incurred in anticipation of the provision of services or the completion of works in the future;
3. any contracts placed that cannot be cancelled without such Losses being incurred;
4. the cost of demobilization of the Power Project;
5. redundancy payments for employees of the IPP and its Contractors that have been or will be reasonably incurred by The IPP or its Contractors as a result of termination of this Agreement. The foregoing is subject to NamPower not purchasing the Plant as a going concern (as defined in the Labour Act); and

"**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 IPP ;
2. the principal of Shareholder Debt advanced to the IPP ; and
3. all capital contributions made by the Shareholders to the IPP .

"**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
2. 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 [15.1%].

"**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.

"**Regulated Equity IRR**" means [20.1%].

"**Shareholder**" means a holder of any share, or any other security giving the right to subscribe for or convert into a share, in the IPP.

"**Shareholder Debt**" means at any time any loan or other debt provided by the Shareholders to the IPP and which is subordinated to the Outstanding Debt under the Finance Documents.

# Compensation on Termination for NamPower Event of Default

# If this Agreement is terminated for a NamPower Event of Default in accordance with Clause 19.5 (*Notice of Intention to Terminate and Notice to Terminate*) then the amount payable by NamPower pursuant to Clause 19.6.2 shall equal the aggregate of the following, calculated at the date of termination:

1. the Outstanding Debt as at that date;
2. the aggregate Equity Contributions made as at such date;
3. an amount which, on the date of payment by NamPower, gives an internal rate of return on the Equity Contributions as at the Relevant Date equal to the Regulated Equity IRR;
4. any Breakage Costs incurred by the IPP and its Contractors; and
5. 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 NamPower.

Title in the Power Plant shall be transferred to NamPower from the IPP, within fourteen (14) days of payment of the Termination Amount as contemplated in this Annexure.

NamPower 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.

1. CONSTRUCTION PROGRAMME

[To be inserted]

1. COMMISSIONING SCHEDULE

**Acceptance/ Performance Test**

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.

**Synchronisation with and connection to the Transmission System**

### 1.2.1 The Seller shall give NamPower 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.

### 1.2.2 Subject to Clause 1.2.1 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:

1. 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;
2. 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
3. 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.

### 1.2.3 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.

### 1.2.4 The Seller shall immediately after each synchronisation/tripping of the Power Plant, inform the National Control Centre in accordance with the applicable Grid Code.

**Testing and commissioning**

### Following connection and/or synchronisation, as the case may be, of the Power Plant with the Transmission System as described in Clause 1.2 above (Synchronisation with and connection to 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.

### 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).

### The Seller shall give NamPower not less than ten (10) days' prior written notice of each of the Power Project Acceptance Tests, and NamPower or its nominated representative shall be entitled to attend and witness the Power Project Acceptance Tests.

### At all times from the Effective Date to the Commercial Operation Date (including during the conduct of the Power Project Acceptance Tests), NamPower 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 NamPower immediately prior to the Power Project Acceptance Tests.

### Immediately following the Power Project Acceptance Tests, the Seller shall provide NamPower 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.

### 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 NamPower Event of Default, NamPower shall bear the reasonable costs directly incurred by the Seller in the performance of such prevented, hindered or delayed Power Project Acceptance Test.

### The Seller shall notify NamPower 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.

1. MONTHLY AND WEEKLY GENERATION FORECASTS
2. BASE CASE FINANCIAL MODEL
3. PROVISIONS OF DIRECT AGREEMENT