

Malawi Energy Regulatory Authority

**STANDARD POWER PURCHASE AGREEMENT FOR
ELECTRICITY**

Between

Seller

And

Purchaser

STANDARD POWER PURCHASE AGREEMENT

THIS AGREEMENT is made on..... day 20.....

BETWEEN

[] a company incorporated in [] with its registered office at [] (“**Seller**”);
and

[], a company incorporated in Malawi with its registered office at []
 (“**Purchaser**”).

WHEREAS

- A. Purchaser is entitled to purchase electricity and to transmit and distribute electricity in the Republic of Malawi;
- B. Seller proposes to develop, design, finance, insure, construct and complete, own, operate and maintain a [hydro/geothermal/gas fired] power generation facility with a net capacity of [] located at [];
- C. Seller wishes to sell to Purchaser, and Purchaser wishes to purchase from Seller, the capacity of such power generation facility and all of the Net Electrical Output pursuant to the terms and conditions set forth herein;

IT IS HEREBY AGREED as follows:

CLAUSE 1: Definitions and interpretation

1.1. In this Agreement, unless the context otherwise requires, the following words and expressions shall have the following meanings:

“**Agreement**”: this power purchase agreement together with all schedules hereto as the same may be supplemented or amended from time to time;

“**Agreed Point of Supply**”: the point of common coupling at which Net Electrical Output from the Plant is delivered to the Purchaser’s System being the point specified in Schedule 3;

“**Authorisation**”: any approval, consent, license, permit, authorisation or other permission to be granted by a Governmental Authority required for the enforcement of rights or performance of obligations under this Agreement by a Party;

“**Availability**”: the ability of the Plant, at a particular instant or over a particular period of time, to deliver electricity to the Purchaser’s System and the terms “Available” and “Unavailable” shall be construed accordingly;

“**Available Capacity**”: the Capacity Available (by reference to the Reference Conditions) as ascribed herein in any Settlement Period being the Declared Capacity unless there has been an Availability Failure in respect of the Plant in

that Settlement Period in which event the Available Capacity shall be the volume weight average Availability achieved in response to valid Dispatch Instructions for that Settlement Period;

“Availability Failure”: in respect of the Plant in any Settlement Period, a failure to deliver electricity in accordance with a Dispatch Instruction;

“Back-Up Metering Equipment”: the equipment for check metering to be provided by and installed by Seller and transferred to Purchaser pursuant to Schedule 2;

“Bankruptcy Event”: means the occurrence of any of the following events in respect of a Party herein after referred as (**“affected Party”**), unless such event is capable of being and is set aside within thirty (30) days of the occurrence of the relevant event:

- i. There is entered against the affected Party a decree or order by a court adjudging the affected Party bankrupt or insolvent, or approving, as properly filed by or on behalf of the affected Party, a petition seeking reorganisation, arrangement, or reconstruction, or appointing a receiver, liquidator, trustee (or other similar official) of the affected Party over all or substantial part of its property or assets, or ordering the winding up or liquidation of its affairs;
- ii. The institution by the affected Party of proceedings to be adjudicated bankrupt or insolvent, or the consent by it to the institution of bankruptcy or insolvency proceedings against it, or the filing by it of a petition or consent seeking relief from its creditors generally under any applicable law, or the consent by it to the filing of any such petition or for the appointment of a receiver, liquidator, trustee (or other similar official) of the affected Party or of all or any substantial part of its property; or
- iii. The admission by the affected Party in writing of its inability to pay its debts generally as they become due;

or any other event shall have occurred which under any applicable law would have an effect analogous to any of the events referred to above;

“Black Start Test”: the test specified in Section 3(b)(vi) of Part A of Schedule 5;

“Capable”: means the state of being able to generate electricity in accordance with the Functional Specifications;

“Capacity” means the capacity of the Plant or each Unit as the case may be as set out in the Functional Specifications;

“Capacity Demonstration Test”: a test to demonstrate the Capacity of each Unit conducted in accordance with Section 2 of Part A of Schedule 5;

“Capacity Payments”: the amounts payable by Purchaser to Seller in respect of the Contracted Capacity in accordance with Part B of Schedule 6;

- “Change in Law”**: the adoption, promulgation, or modification, after the date of this Agreement, of any Legal Requirement, or the imposition after the date of this Agreement of any material condition or any restriction in connection with the issuance, renewal, extension, replacement or modification of any Authorisation that in either case establishes requirements for the operation or maintenance of the Plant or of Purchaser’s System that are materially more onerous than the requirements in effect as of the date of this Agreement;
- “Commercial Operation Date”**: in respect of a plant a or Unit (as the case may be), the date notified as such by Seller in accordance with Clause 4.12;
- “Commissioning”**: the conduct of tests and procedures necessary (including those specified in Part A of Schedule 5) to put a Unit or the Plant (as the case may be) into operation;
- “Confidential Information”**: has the meaning ascribed thereto in Clause 15.1;
- “Construction Programme”**: the programme for the construction and installation of the Plant set out in the [Development Agreement] as ascribed herein from time to time adjusted by agreement of the Parties;
- “Construction Security”**: an on demand performance bond in the amount of US Dollars [] (US[]) drawn on an internationally recognised bank acceptable to Purchaser in the form specified by Purchaser;
- “Consumer Price Index” or “CPI”**: the index known as “the Consumer Prices Index as published by National Statistic Office of Malawi or as may be agreed or determined pursuant to Part E of Schedule 6;
- “Contracted Capacity”**: at the date of this Agreement [] net under the Reference Conditions (hereafter referred to as **“Contracted Capacity at the date of this Agreement”**) and from and after the Full Commercial Operation Date such revised amount as may apply following a Contracted Capacity Test or as may otherwise be determined pursuant to Clause 6.8 or Clause 6.11;
- “Contracted Capacity Test”**: the test of the normal full load Capacity of the Plant carried out in accordance with the requirements of Section 3 of Part A of Schedule 5;
- “Daily Liquidated Damages Sum”**: an amount of US Dollars [] (US\$[]);
- “Declared Capacity”**: in respect of a Settlement Period, the Capacity declared in accordance with the Operating and Dispatch Procedures, by Seller to be Available for that Settlement Period;
- “Default”**: any one or more of the events specified in Clauses 13.1 and 13.2;
- “Default Rate”**: two (2) percentage points above LIBOR or any rate above or below LIBOR that the parties agree upon in writing;
- “Dispatch”**: the giving of a Dispatch Instruction;

- “Dispatch Instruction”**: an instruction given by Purchaser to Seller in relation to the operation of the Plant in accordance with Clauses 5.3 and 5.4 and with Part C of Schedule 5;
- “Dispute”**: has the meaning ascribed to it in Clause 16.1;
- “Effective Date”**: has the meaning ascribed thereto in Clause 3.1;
- “Emergency”**: a condition or situation that, in the sole but reasonable opinion of Purchaser, (i) materially and adversely affects, or is likely materially and adversely to affect the ability of Purchaser to maintain a safe, adequate and continuous electrical service to its customers, having regard to the then current standard of electrical service provided to its customers, or (ii) presents or is likely to present a physical threat to persons or property or the security, integrity or reliability of Purchaser’s System;
- “Energy Charges”**: the amounts payable by Purchaser in respect of the Net Electrical Output in accordance with Clause 8.3;
- “Environmental Performance Tests”**: the tests specified in Part A of Schedule 5;
- “Event of Default”**: has the meaning ascribed to it in Clause 13.4;
- “Expert”**: a person appointed in accordance with the provisions of Clause 16.2;
- “Financing Agreements”**: all loan agreements, notes, mortgages, indentures, security agreements, hedging agreements, credit agreements and other such agreements and documents, if any, executed by Seller to finance the construction and/or operation of the Plant;
- “First Commissioning Date”**: has the meaning ascribed to it in Clause 4.6(a);
- “Force Majeure”**: has the meaning ascribed to it in Clause 12.1;
- “Fuel Supply Agreement”**: the agreements for the supply of fuel to the Plant entered into by Seller from time to time, and as amended from time to time;] [in case of Thermal Generation]
- “Full Commercial Operation Date”**: the date notified by Seller in accordance with Clause 4.12;
- “Functional Specification”**: the functional specification for the Plant and each Unit as set out in Schedule 1;
- “Governmental Authority”**: the Government of the Republic of Malawi, any ministry or department or division thereof, any government owned or controlled agency, and any other authority including any regional and local authorities of Malawi;
- “Independent Engineer”**: the Person appointed pursuant to Clause 4.16;
- “Indirect Taxes and Duties”**: all forms of taxation, impost, levy or duty imposed, pursuant to the laws of the Republic of Malawi, after the date of this

Agreement in respect of the sale of electricity or on the purchase, import and use or consumption of any plant, equipment or materials used in connection therewith or in respect of the right or act of producing or delivering electricity, which result, directly or indirectly in an increase or decrease in the costs of Seller in performing its obligations under this Agreement provided that for the avoidance of doubt Indirect Taxes and Duties do not include any value added tax, business rates and payments in respect of the employment of any Person or any form of taxation, impost, levy or duty imposed on the income of Seller upon which income tax is chargeable under the Taxation Act, Cap. 41:01, as the same may be amended or replaced from time to time;

“ISO”: the International Standards Organisation;

“kW”: kilowatts;

“kWh”: kilowatt hours being three million six hundred thousand (3,600,000) Joules as defined in ISO 1000.1992(E);

“Legal Requirement”: any statute, law, regulation or other legislation, or any decree, order or directive of any Governmental Authority having jurisdiction in respect of this Agreement or either Party;

“LIBOR” (London Interbank Offering Rate): means in respect of any day and any amount, the offered rate of interest for US Dollars quoted on Telerate Screen page 3750 (or any replacement page on the Telerate System or such other page on that or another system as may be agreed between the Purchaser and Seller) at 11.00 hours (London time) for a deposit of a principal sum equivalent to the sum in question for a period commencing on such day and ending 30 days later provided that if the said rate is not quoted on any day the rate last quoted shall be used;

“Long Stop Dates”: any of the Long Stop Effective Date and the Long Stop Full Commercial Operation Date;

“Long Stop Effective Date”: the date falling [●] months after the date of this Agreement or any extension thereof agreed between the Parties or applicable pursuant to Clause 12.4;

“Long Stop Full Commercial Operation Date”: the date falling [●] months after the date of this Agreement or any extension thereof agreed between the Parties or applicable pursuant to Clause 12.4;

“Main Metering Equipment”: equipment for metering and monitoring the operation and output of the Plant to be provided by Seller as specified in Section 1 of Schedule 2;

“Malawi Energy Regulatory Authority”: the Authority set up under section 3 of the Energy Regulation Act, Cap. 73:02 of the Laws of Malawi;

“Metering System”: the Main Metering Equipment and the Back-Up Metering Equipment;

“MW”: megawatts being one thousand (1,000) kW;

“MWh”: megawatt hours being one thousand (1,000) kWh;

“Net Electrical Output”: electrical energy measured in kWh generated by the Plant and delivered to Purchaser in accordance with Dispatch Instructions;

“Operating Characteristics”: the performance and operating characteristics of the Plant and each Unit for which values are specified in the Functional Specification;

“Operating and Dispatch Procedures”: the procedures set out in Part C of Schedule 5;

“Operating and Maintenance Agreement”: the agreement for the operation and maintenance of the plant to be entered into by Seller ;

“Operating Period”: the period from the Full Commercial Operation Date until the end of the Term;

“Operating Year”: a period of one (1) year beginning on the first day of the month following the Full Commercial Operation Date or any anniversary thereof;

“Parties”: Purchaser and Seller, and **“Party”** means either of them;

“Person”: individuals, corporations, partnerships, joint ventures, trusts and other commercial entities, whether public or private, and any Governmental Authority;

“Planned Maintenance”: maintenance of the Plant or a Unit which has been planned in accordance with Clause 6.3, or where the context admits, the period allowed or the dates planned for such maintenance;

“Plant”: the plant (comprising the Units and other equipment) described in the Functional Specification, and including Seller’s Connection Facilities and the Metering System;

“Plant Commercial Operations Tests”: the [Reliability Run Test, the Contracted Capacity Test, the Unit Trip Test, Environmental Performance Tests and Black Start Test];

[“Project Agreements”: the Development Agreements Operating and Maintenance Agreement, the Turnkey Construction Agreement, and the Fuel Supply Agreement;]

“Prudent Operating Practice”

In relation to either means the practices, methods and acts engaged by an operator in the electricity industry in [] having regard to operational and engineering considerations, including manufacturers’ recommendations, and to reasonable costs consistent with reliability and

safety or a globally leading [] energy producer who, in the conduct of its undertaking, exercises that degree of diligence, prudence and foresight reasonably and ordinarily exercised by skilled and experienced internationally recognised operators engaged in the same type of undertaking under the same or similar circumstances and conditions, and includes:

- (i) complying with:
 - (a) recognised standards pertaining to that activity;
 - (b) manufacturers' instructions and operating manuals; and
 - (c) the terms of this Agreement;
 - (d) lawful authorizations and legal requirements; 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;

“Purchaser’s Connection Facilities”: has the meaning ascribed to it in Part B of Schedule 1;

“Purchaser’s System”: the high voltage transmission system operated by Purchaser, together with all the distribution system(s) and ancillary electrical plant and equipment connected to such transmission and distribution systems;

“Reference Conditions”: has the meaning ascribed thereto in the Functional Specification;

“Reliability Run Test”: the test carried out in accordance with the requirements of Schedule 5;

“Remedial Programme”: has the meaning ascribed to it in Clause 13.4(a)(ii);

“Required Full Commercial Operation Date”: the date falling [●] months after the date of this Agreement;

“Scheduled Commercial Operation Date”: in respect of a Unit the date specified as such in the Functional Specification or any extension thereof agreed by the Purchaser and the Seller;

“Security Stock”: has the meaning ascribed to it in Clause 7.10;

“Seller’s Connection Facilities”: the connection facilities specified in Part C Schedule 1 as being installed by Seller;

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

“Site”: that area of land [insert description of Power Station site];

“System Characteristics”: the characteristics of the Purchaser’s System specified in Schedule 1; [note: these will need to be added into Schedule 1 in each case]

“Target Effective Date”: the date falling [] month[s] after the date of this Agreement;

“Taxes”: all forms of taxation, duties, excises, imposts, levies and rates whenever imposed and applicable pursuant to the laws of Malawi including Indirect Taxes and Duties;

“Term”: the period from the date of this Agreement until expiry of this Agreement in accordance with Clause 2.2 or earlier termination;

“Turnkey Construction Agreement”: the agreement or agreements for the construction of the Plant to be entered into between Seller and ;

“Unit”: a generating unit and related facilities as described in the Functional Specification;

“Unit Commercial Operations Tests”: the tests to be carried out in accordance with Schedule 5;

“Unit Tests”: the tests to be carried out on each of the Units as specified in Schedule 5 including the Unit Commercial Operations Tests;

“Unit Trip Tests”: the test carried out in accordance with the requirements of Schedule 5;

“US Dollar”: the lawful currency of the United States of America.

1.2 Interpretation: In this Agreement, unless the context otherwise requires;

- a) reference to a business day is a reference to any day which is not a Saturday, Sunday or recognised public holiday in Malawi
- b) reference to a day, month or year is a reference to a calendar day, month or year;
- c) references to Clauses, Schedules, Sections and Figures are references to clauses, schedules, sections and figures of, to or contained in this Agreement;
- d) words in the singular shall be interpreted as including the plural and vice versa, and words denoting natural persons shall be interpreted as referring to corporations and any other legal entities and vice versa;
- e) the term “including” shall be construed without limitation;
- f) in the event of any conflict between the Clauses and the Schedules, the Clauses shall prevail;
- g) headings are for convenience only and shall not affect the construction of this Agreement; and
- h) where an obligation is required to be performed by a specified time and is not so performed, such obligation shall continue (until performed) notwithstanding that the time specified for its performance has elapsed.
- i) References to dollars and to \$ are to United States dollars.

CLAUSE 2: SCOPE AND DURATION

2.1 Scope:

In accordance with and subject to the terms and conditions of this Agreement:

- a) Seller will [enter into the Project Agreements and Financing Agreements including Operating and Maintenance agreement], finance, design, procure, construct, install, test, commission, operate and maintain the Plant in accordance with Prudent Operating Practice, supply and install the Main Metering Equipment and the Back-Up Metering Equipment, supply and install Purchaser Connection Facilities, transfer to Purchaser the Purchaser Connection Facilities and the Back Up Metering Equipment, [purchase fuel for the Plant], [maintain the Security Stock], make the Contracted Capacity Available in compliance with the Operating Characteristics and sell the Net Electrical Output to Purchaser; and
- b) Purchaser will take delivery of Net Electrical Output and pay Energy Charges for such Net Electrical Output and make Capacity Payments for the Contracted

Capacity (adjusted for Availability). Title to, and risk of loss, for the Net Energy shall pass from the Seller to the Purchaser at the Delivery Point.

- c) Subject to and in accordance with the terms of this Agreement and the Grid Code, from and after the Commercial Operation Date and until the expiration or earlier termination of this Agreement, Seller shall sell exclusively to the Purchaser, and the Purchaser shall purchase, all Energy produced by the Seller and the Seller shall provide to Purchaser the Ancillary Services.
- 2.2 Commencement of Agreement: Unless terminated in accordance with its terms, this Agreement shall come into force on the date of this Agreement and shall continue in force until the [●] being the anniversary of the Full Commercial Operation Date.
 - 2.3 **Extension:** The Term may be extended, subject to agreement in writing by the Parties to such extension at the least [●] months prior to the expiry date, and on such terms as the Parties shall agree.
 - 2.4 If the Generation Facility is greater than [MW], upon the expiration of the Term, the Generation Facility shall revert to [] as provided for in the Implementation Agreement [or as agreed by the parties]. If the Generation Facility is less than -----MW, the Seller shall not be required to transfer the Generation Facility to the Purchaser as a result of the expiration of the Term. [as agreed by the parties subject to decommissioning arrangements and as required by the applicable law]

CLAUSE 3 CONDITIONS PRECEDENT

- 3.1 **Effective Date: the parties' obligations hereunder shall commence on the date of signing of the agreement prior to which each of the following conditions precedent shall have been satisfied**
 - (a) this Agreement is approved by the Malawi Energy Regulatory Authority and
 - (b) [the Construction Security is unconditionally provided by Seller to Purchaser;
 - (c) The Seller and Purchaser having entered into a Connection Agreement; and
 - (d) [other conditions as agreed by the parties]
- 3.2 **Responsibilities as regards to conditions precedent:** Each Party shall use reasonable efforts to satisfy or obtain satisfaction of each condition precedent for which such Party is responsible
- 3.3 **Non-Approval:** If the conditions precedent to the Effective Date occurring have not been satisfied or waived by the Long Stop Effective Date then either Party may by notice terminate this Agreement and from the date of such notice this Agreement shall terminate and shall be deemed to be null and void *ab initio* save that the provisions of Clause 14 and 15 shall apply.
- 3.4 **Construction Security:**

- a) On or prior to the Effective Date and with effect therefrom Seller shall provide to Purchaser the Construction Security;
- b) If the Full Commercial Operation Date has not occurred by the Required Full Commercial Operation Date then for each day occurring after the Required Full Commercial Operation Date and until such day as the Full Commercial Operation Date occurs, Purchaser shall be entitled to draw from the Construction Security the Daily Liquidated Damages Sum;
- c) If the Full Commercial Operation Date does not occur by the Long Stop Full Commercial Operation Date, then Purchaser shall be entitled to draw the balance remaining on the Construction Security; and
- d) If the Full Commercial Operation Date occurs before the Long Stop Full Commercial Operation Date, the Construction Security shall be returned by Purchaser to Seller, in full or as partially drawn upon in accordance with this Clause 3.3.

CLAUSE 4: CONSTRUCTION AND COMMISSIONING

[The Requirements for Commissioning provided in the Grid Code and the Connection Agreement shall also apply to this part]

- 4.1 **Co-ordination:** Seller shall keep Purchaser informed of its activities at the Site and shall take all steps necessary to co-ordinate such activities with Purchaser to ensure that any activities at the Site or at any adjacent site being undertaken by or on behalf of Purchaser are not interfered with or disrupted.
- 4.2 **Purchaser's Responsibility:** No later than one (1) month after the Effective Date, Purchaser shall provide to Seller a specification which shall provide details of Purchaser's requirements for the Purchaser's Connection Facilities.
- 4.3 **Information:** Seller shall keep Purchaser informed of the progress of the design, furnishing, supply, construction and installation of the facilities and equipment to be installed by it pursuant to this Agreement, and every month shall provide a progress report in respect thereof which report shall itemise the extent to which each material task in the Construction Programme has been completed and the expected completion date for each outstanding task.
- 4.4 **Monitor Progress:** The Seller shall:
 - a) ensure that Purchaser and any representatives appointed by Purchaser, are afforded reasonable access to the Site upon giving the Seller reasonable notice provided that such access does not materially interfere with the construction works or expose any person on the Site to unsafe conditions;
 - b) make available for inspection at the Site copies of all plans and designs, other than any proprietary information of the Seller or any sub-contractor, in relation to the construction of any part thereof; and

- c) within six (6) months of the Full Commercial Operation Date, supply Purchaser with one (1) set of reproducible copies and five (5) sets of white print copies (or equivalent) of all “as built” plans and designs relating to the operation or maintenance of the Plant as Purchaser may reasonably require.

4.5 **Disclaimer:** The Seller:

- a) accepts that any engineering review or inspection conducted by Purchaser is solely for its own information and accordingly by conducting such review or inspection or electing not to do so Purchaser makes no representation as to the engineering soundness of the Plant nor shall it be treated as having accepted the Plant as fit to meet the terms of this Agreement;
- b) shall in no way represent to any third party that, as a result of any review or inspection by Purchaser, Purchaser is responsible for the engineering soundness of the Plant; and
- c) shall, subject to the other provisions of this Agreement be solely responsible for the economic and technical feasibility, operational capacity and reliability of the Plant.

4.6 **Seller’s obligations:** Seller shall carry out Commissioning in accordance with Prudent Operating Practice and the procedures agreed or determined in writing pursuant to Clause 4.8.

- a) **The First Commissioning Date:** The First Commissioning Date shall be the date specified in the Functional Specification (including any extension thereof) as the target date for the start of Commissioning of the first Unit, or such earlier date as Seller may specify by notice given to Purchaser not less than days before such earlier date subject to Purchaser’s agreement to such earlier date which agreement shall not be unreasonably withheld or delayed.
- b) **Notifications:** seller shall give purchaser not less than days’ notice of the date of commencement of commissioning of each unit provided that seller may postpone any such date by giving purchaser notice of the postponed date in accordance with such detailed procedures agreed in accordance with clause 4.8. in the event that the detailed procedures have not been agreed or determined pursuant to clause 4.8, seller shall give purchaser not less than days’ notice of the date of each test of each unit, and not less than days notice of the postponement of such date.

4.7 **Purchaser attendance:** Purchaser shall have the right to attend the Site on each occasion on which a test is being conducted, and to inspect and witness the test, and to receive, within [] days after the test, a written copy of the test reports.

4.8 **Detailed procedures:** The Parties shall, not later than days before the First Commissioning Date, agree (or failing such agreement an Expert shall determine) detailed procedures consistent with Prudent Operating Practice for Commissioning the Units in accordance with, and consistent with, the terms of the Development Agreement.

- 4.9 **Purchaser Connection Facilities:** Seller shall complete the installation of the Purchaser Connection Facilities and transfer the Purchaser Connection Facilities to Purchaser not less than[-----} months before the First Commissioning Date to enable Purchaser to complete the testing and Commissioning of Purchaser Connection Facilities on or before the First Commissioning Date **in accordance with the Connection Agreement**
- 4.10 **Purchaser Co-operation:** Purchaser shall, subject to any constraints on the Purchaser's System, co-operate with Seller so as to enable Seller to Commission each Unit in accordance with this Clause 4 and in particular will authorise connection to the Purchaser System and Dispatch the Unit or Units to the extent reasonably required by Seller for such purpose and in accordance with the procedures contained in the Development Agreement and agreed or determined under Clause 4.8.
- 4.11 **Re-testing:** Where any test of a Unit is not completed satisfactorily Seller may arrange a further test by giving Purchaser not less than days' notice in accordance with the foregoing provisions of this Clause. The Costs of such re testing shall be [as agreed by the Parties].

Completion of Commissioning and Commercial Operation Date: On the satisfactory completion of the Commissioning of a Unit Seller shall procure the issue of a certificate of the Independent Engineer addressed to Purchaser and Seller, certifying that the Unit's Commissioning has been so completed and the Unit is available for commercial operation and shall, upon issue of the certificate, notify Purchaser of the Commercial Operation Date for that Unit being a date not earlier than days nor later than days after the date of the notice. [**applicable in much larger plants or in areas with very heavy seasonal demand where phased use of open-cycle gas turbines might be appropriate**]

- 4.12 **Plant Commercial Operations Test:** Following satisfactory completion of the Unit Commercial Operations Tests for each Unit, Seller shall conduct the Plant Commercial Operations Tests. Upon satisfactory completion of the Plant Commercial Operations Tests, Seller shall procure the issue of a certificate of the Independent Engineer addressed to Purchaser and Seller, certifying, without any qualification, that Seller has installed all plant and equipment specified in the Functional Specification, that the Plant's Commissioning has been completed, that the Plant is available for full commercial operation and certifying that the Contracted Capacity achieved by the Plant during the Contracted Capacity Test forming part of the Plant Commercial Operations Tests which shall be not less than nine-five per cent (95%) of the Contracted Capacity at the date of this Agreement. Seller shall, upon issue of the certificate, give notice to Purchaser of the date (the "Full Commercial Operation Date") being a date not later than[] days after the date of the notice.
- 4.13 **[Commissioning and testing output:** Purchaser shall pay the fuel component[in case of thermal] of the Energy Charges to Seller for all Net Electrical Output supplied after and prior to the Full Commercial Operation Date.]

- 4.14 **Purchaser failure to take electricity from the First Commissioning Date:** If Seller is unable to achieve the Full Commercial Operation Date by the Required Full Commercial Operation Date solely due to a failure by Purchaser to take electrical energy from Seller, Purchaser shall pay to Seller monthly (and pro-rated for any proportion of the month), in arrears, an amount equal to the interest costs under the Financing Agreements provided that Purchaser shall not be required to pay any interest costs exceeding LIBOR. The Seller shall also be reimbursed all reasonable costs incurred.
- 4.15 **Appointment of Independent Engineer:** For the purposes of Clauses 4.12 and 4.13, Seller shall not less than months prior to the commencement of the tests under Clause 4.12 and Clause 4.13 appoint an independent suitably qualified professional engineer approved by Purchaser who shall among other things witness the Commissioning and testing of the Plant pursuant to this Clause 4 (“Independent Engineer”). If Purchaser fails to approve such appointment, Seller shall have the right to request the[an agreed recognized independent party]to make such appointment and such appointment shall be binding on Seller and Purchaser. All fees and costs payable in respect of the Independent Engineer (including those incurred in making such appointment) shall be borne by Seller.
- 4.16 **Failure to Achieve Full Commercial Operation Date by the Long Stop Full Commercial Operation Date:** If the Full Commercial Operation Date has not occurred by the Long Stop Full Commercial Date for reasons within the control of the seller, the Purchaser may demand payment in full under the Construction Security in accordance with the provisions of Clause 3.3(c) and serve notice of termination of this Agreement, such notice to take immediate effect and such termination shall be subject to the provisions of Clause 13.

CLAUSE 5: OPERATING AND DISPATCH PROCEDURES

- 5.1 **Operation:** Seller shall during the Operating Period operate the Plant in a manner consistent with Prudent Operating Practice and in compliance with Dispatch Instructions with a view to making the Contracted Capacity Available to Purchaser at all times and Seller shall operate the Plant in accordance with the Operating Characteristics. Seller shall ensure that the Net Electrical Output will not fall below the Contracted Capacity by reason of plant and equipment connected to the Units and/or the Plant.
- 5.2 **Notification:** In accordance with the Operating and Dispatch Procedures and any procedures agreed or determined under Clause 5.4, Seller shall keep Purchaser informed by regular daily declarations, together with prompt declarations of any changes, of the Available Capacity and any impairment of the Plant’s Operating Characteristics, provided that if Seller fails to give a declaration in respect of a Unit that Unit shall be deemed to be declared Unavailable unless Seller makes a contrary declaration. *[NB: Consider more detailed notification regime].*
- 5.3 **Dispatch Instructions:** Purchaser shall issue Dispatch Instructions consistent with and within the Functional Specification, the prevailing declaration of Availability and any declared impairment of the Plant’s Operating Characteristics, and any Dispatch constraints and in accordance with the Operating and Dispatch Procedures and any

procedures agreed under Clause 5.4 and shall seek to ensure that Purchaser's System maintains and complies with and does not deviate from the System Characteristics. Purchaser shall not be required to issue Dispatch Instructions (and may require Seller to disconnect or reduce the Net Electrical Output) where:-

- a) an Emergency exists; or
- b) for so long as a disconnection or a reduction in energy deliveries is necessary to enable Purchaser to construct, install, maintain, repair, or test any part of the Purchaser Connection facilities, or any other affected part of the Purchaser's System.

Purchaser shall notify Seller promptly and, insofar as it is practicable, prior to the beginning and end of such reduction or disconnection, and Purchaser shall co-ordinate such reduction or disconnection with Seller. Any action requiring such disconnection or reduction of energy deliveries shall be implemented and completed as soon as reasonably practicable.

5.4 **Further procedures:** The Parties shall, not later than the First Commissioning Date, agree (in accordance with and consistent with the Operating and Dispatch Procedures and all other terms of this Agreement) such further procedures as shall be necessary in accordance with Prudent Operating Practice for the Dispatch of the Plant and operational communications between the Parties. Any procedures not agreed by the Parties by the First Commissioning Date shall be specified by Purchaser in accordance with Prudent Operating Practice. If circumstances arise subsequent to the First Commissioning Date, which either Party deems to require changes in procedures, the Parties shall work together in good faith to establish procedures satisfactory to both Parties, giving due consideration to issues of safety. If the Parties are unable to agree on any such procedures relating to matters of safety, these shall be referred to an Expert. While the Expert is adjudicating the matter, the Parties shall abide by existing agreed procedures, or if there are none applicable, relevant Purchaser procedures existing at the time.

5.5 **Over-generation:** In the event that Seller over a period of two (2) or more Settlement Periods delivers to Purchaser electricity in excess of the Dispatch Instructions, Purchaser may by notice require Seller to comply with Dispatch Instructions and if such excess delivery continues, Seller shall not be entitled to receive the Energy Charges in respect of any excess delivery notwithstanding any other provision in this Agreement to the contrary.

5.6 **Under-generation:** In the event that Seller over a period of two (2) or more Settlement Periods delivers to Purchaser electricity which is less than the quantity required by the Dispatch Instructions ("under-generation"), Seller's Declared Capacity for each settlement period shall be deemed to be equal to the Net Electrical Output for that Settlement Period in which there is an under-generation. **Seller** shall pay to Purchaser liquidated damages calculated in accordance with the relevant formula, provided however that the total amount of Liquidated Damages shall not exceed an amount equivalent to USD [.....]in any one calendar year.

5.7 **Notice:** Any notice given by Purchaser under Clause 5.5 shall be given in writing and delivered by facsimile to Seller at the address and marked for the attention of the person,

specified in Schedule 8 or such other address or person from time to time designated by Seller and such notice shall be deemed to be received upon confirmation of uninterrupted transmission by a transmission report provided that such notice shall be confirmed by letter sent by hand or post, but without prejudice to the original facsimile notice.

- 5.8 **Personnel:** Seller shall only employ personnel, directly or indirectly, who, in its sole reasonable opinion, are adequately qualified and experienced for operating and monitoring the units and the Plant and for co-ordinating operations of the Units and the Plant with the Purchaser System. Seller shall ensure that sufficient personnel are on duty at the Plant at all times, in accordance with Prudent Operating Practice.
- 5.1 **Quality of Supply:** If at any time the supply of electricity to the Agreed Point of Supply does not comply with the applicable requirements of the Purchaser's System Characteristics, the Purchaser's System or any other standards which the Parties may from time to time agree, as a result of the breach by Seller of any such requirements:
- a) Seller shall immediately take the steps necessary pursuant to Prudent Operating Practice to remedy such non-compliance as soon as possible;
 - b) if and to the extent that, as a result of such non-compliance, any Unit is unable to generate supply of electricity, that Unit shall be deemed not to be Available.

In the event of any dispute arising between the Parties as to any such non-compliance, the matter in dispute shall be referred to determination by an Expert in accordance with Clause 16.

CLAUSE 6: MAINTENANCE AND REPAIR

- 6.1 **Seller's obligation:** Seller shall maintain and repair the Plant in accordance with Prudent Operating Practice during the Operating Period.
- 6.2 **Planned Maintenance:** Seller shall be entitled to withdraw each Unit from operation for planned maintenance and inspection in each Operating Year for periods not exceeding those specified in Schedule 4 or as may otherwise be agreed in accordance with Clause 6.3.
- 6.3 **Planned maintenance programme:** The programme of Planned Maintenance for each Operating Year shall be established as follows:
- a) Seller shall not later than days before the start of each Operating Year submit to Purchaser proposed dates for Planned Maintenance in that Operating Year;
 - b) Purchaser may within days after receiving Seller's proposed dates notify Seller of alternative dates which Purchaser prefers, in which case the Parties shall consult and Seller shall use reasonable endeavours to accommodate Purchaser's proposal;
 - c) Not less than days before the start of the relevant Operating Year Seller shall issue a final programme for Planned Maintenance in accordance with the agreement reached by consultation under paragraph (b) provided that where no agreement was reached then Purchaser's last notified alternative dates shall prevail.

- 6.4 **Changes to programme:** The Parties shall cooperate and use their reasonable endeavours to accommodate any reasonable request by either Party to reschedule any Planned Maintenance in any Operating Year.
- 6.5 **Maintenance outages:** Without prejudice to Clause 6.1 and subject to applicable notification requirements under the Operating and Dispatch Procedures, nothing in this Agreement shall oblige Seller to take a Unit out of operation at the start of the relevant period specified in the programme for Planned Maintenance nor prevent Seller from returning a Unit to operation before the end of such period.
- 6.6 **Other outages:** Subject to the terms of this Agreement the Seller may carry out maintenance or repair of the Plant (and taking a Unit out of operation for this purpose) at times other than during Planned Maintenance where such maintenance or repair cannot, in accordance with Prudent Operating Practice, be deferred to the next scheduled Planned Maintenance or upon the occurrence of any outage or emergency.
- 6.7 **Purchaser maintenance:** Purchaser shall, in accordance with Prudent Operating Practice, maintain and repair Purchaser's Connection Facilities and shall use reasonable endeavours to co-ordinate the timing of such maintenance and repair with Seller's Planned Maintenance.
- 6.8 **Revision to Contracted Capacity:** Not less than once in every period of months Seller shall conduct a Contracted Capacity Test. Following a Contracted Capacity Test Seller may revise the Contracted Capacity in accordance with the results of such test provided that the Contracted Capacity may not be less than the Contracted Capacity at the date of this Agreement nor greater than one hundred and five per cent (105%) of the Contracted Capacity at the date of this Agreement. If in any period of months the average Contracted Capacity, demonstrated by Contracted Capacity Tests conducted over that period, is less than ninety-two per cent (92%) of the Contracted Capacity at the date of this Agreement, the Parties shall forthwith meet and agree a programme to be implemented by Seller during the next following month period for restoring the Contracted Capacity to not less than ninety-eight per cent (98%) of the Contracted Capacity in the first years from the Full Commercial Operation Date and thereafter, to ninety-five (95%) of the level which was established by the Contracted Capacity Test conducted as part of the Plant
- Commercial Operations Tests.** If Seller fails to so restore the Contracted Capacity during the said [] months period the Seller shall pay to Purchaser as liquidated damages an amount equal to [] Dollars per kW times the difference between the Contracted Facility Capacity and Initial Dependable Capacity; provided, that such a difference does not exceed an amount equal to ten per cent (10%) of the Contracted Facility Capacity
- 6.9 **Attendance at Contracted Capacity Test:** Seller shall give Purchaser reasonable notice of its intentions to conduct a Contracted Capacity Test and Purchaser shall be entitled to attend or send representatives to witness such test.
- 6.10 **Additional Contracted Capacity Tests:** In addition to the Contracted Capacity Tests provided for in Clause 6.8 either Party may at any time and from time to time call for a

Contracted Capacity Test and the provision of Clauses 6.8 and 6.9 shall apply thereto, mutatis mutandis.

6.11 Availability Failure: If within forty eight (48) hours of an Availability Failure, Purchaser calls for a Contracted Capacity Test pursuant to Clause 6.10 and such Contracted Capacity Test (which shall be carried out immediately after Purchaser calls for such test) demonstrates that the Capacity Available is less than the Contracted Capacity demonstrated by the preceding Contracted Capacity Test then for the period beginning from the Settlement Period within which such Availability Failure occurred and ending when the Available Capacity has been agreed or determined pursuant to the Contracted Capacity Test, the Contracted Capacity for such period shall be equal to the average Availability of the Plant achieved in response to Dispatch Instructions for the Settlement Period immediately after the one in which such Availability Failure occurred. Seller shall also pay to Purchaser liquidated damages calculated in accordance with the relevant formula , provided however that the total amount of Liquidated Damages shall not exceed an amount equivalent to USD [.....]in any one calendar year.

6.12 Disputes: Any dispute as to the results of a Contracted Capacity Test shall be referred to an Expert.

CLAUSE 7: SALE AND PURCHASE OF ELECTRICITY AND FUEL PROCUREMENT

7.1 Payments prior to the Full Commercial Operation Date: Prior to the Full Commercial Operation Date, Purchaser shall pay to Seller such sums as may be payable in accordance with this Agreement.

7.2 Sale and Purchase: Except as provided for in Clause 7.1, Seller shall sell and Purchaser shall purchase in accordance with this Clause 7 all the Net Electrical Output delivered in accordance with Dispatch Instructions.

7.3 Energy Charges: Purchaser shall pay Seller Energy Charges ascertained in accordance with Part A of Schedule 6 in respect of all Net Electrical Output delivered in accordance with Dispatch Instructions.

7.4 Delivery: Electrical energy sold and purchased under this Agreement shall be delivered by Seller at the Agreed Point of Supply.

7.5 Metered Quantities: The quantities of Net Electrical Output delivered by Purchaser shall be metered and determined in accordance with the provisions of Clause 9.

7.6 Capacity Payments: Purchaser shall in respect of the month in which the Full Commercial Operation Date occurs and for each month thereafter during the Term pay Seller for the Contracted Capacity (with adjustments reflecting Availability and subject to evidence of dispatch), in accordance with Part C of Schedule 6 provided if the Full Commercial Operation Date occurs other than on the first (1st) day of the month then in the month in which the Full Commercial Operation Date occurs, the Capacity Payment for that month shall be pro-rated for the number of days from the Full Commercial Operation Date until the last day of that month.

- 7.7 **Further Provisions:** The further provisions of Schedule 6 shall take effect for the purposes of determining the amounts from time to time payable to Purchaser by way of Energy Charges and Capacity Payments.
- 7.8 **Dispatch:** Purchaser intends to Dispatch the Plant according to economic merit order provided that it shall have no liability under this Agreement or otherwise if it fails to do so.
- 7.9 **Taxes and Duties:** if any Taxes and Duties are adjusted or imposed either Party may, within months of the change occurring, by notice to the other, seek an adjustment to the Energy Charges and/or Capacity Payments which will have the effect of placing Seller in the same financial position as it would have been in had the change not occurred. The Parties shall meet and endeavour to agree the adjustment and if the Parties shall fail within days of a notice under this Clause to agree upon such adjustment either Party may refer the matter to an Expert for determination. All other Taxes shall be for Seller's account and shall be borne by and be payable by Seller.
- 7.10 **[Fuel Stock:** Seller shall at all times maintain, in accordance with Prudent Operating Practice, (at the Site) a stock of fuel for the day to day operation of the Plant (such that Seller can perform its obligations under this Agreement) and Seller shall, in accordance with Prudent Operating Practice, also maintain a stock of fuel for the Plant (the "Security Stock") which stock shall not be less than the total amount of fuel required to operate the Plant at full load capacity for a continuous period of [●] days. If, in order to comply with a Dispatch Instruction, Seller has to use any part of the Security Stock it shall replace any such part of the Security Stock as it shall have used as soon as reasonably practicable and in any event not later than [●] days after use. Seller shall provide to Purchaser such evidence of quantities of Security Stock delivered and used as Purchaser may reasonably request.] *[modify to provide for water storage level requirements for hydro and well replacement programmes for geothermal].*

CLAUSE 8: INVOICING AND PAYMENT

- 8.1 **Invoices:** Seller shall prepare and issue to Purchaser an invoice in respect of the charges due from Purchaser after the end of each month of the Term (beginning with the month in which the First Commissioning Date occurs).
- 8.2 **Content of Invoice:** Each invoice prepared by Seller shall contain the information specified in Part C of Schedule 6. If such invoice does not contain the information so specified or is not in the view of Purchaser, accompanied by the supporting documentation required thereby, Purchaser shall be entitled, no later than five (5) days after receipt, to notify Seller that such invoice does not materially conform to Part C of Schedule 6 or it is not accompanied by all the supporting documentation and in such event non-payment by Purchaser of any amount in the invoice shall be deemed to be the subject of a bona fide dispute for the purposes of Clause 8.5 until such time as Seller issues an invoice which contains the information specified in Part C of Schedule 6 and is, in the view of Purchaser, accompanied by the supporting documentation required

thereby. Any dispute under this Clause 8.2 shall be referred to an Expert for determination.

- 8.3 **Payment due date:** Energy Charges, Capacity Payments and any other amounts, payable by Purchaser hereunder shall be due and payable on the thirtieth (30th) day after the date of delivery of the invoice except where such thirtieth (30th) day is not a business day in which event the due date shall be the next following business day.
- 8.4 **Late payment interest:** Any amount properly due, from Purchaser to Seller, or from Seller to Purchaser, under this Agreement and remaining unpaid after the due date for payment shall bear interest at the Default Rate from and including the date when the amount in question was due until but excluding the date when it is received by Seller, or Purchaser (as the case may be) accruing from day to day and compounded quarterly.
- 8.5 **Disputed payments:** If part of any sum shown on an invoice is disputed in good faith by Purchaser then payment of any undisputed part shall not be withheld and shall be paid to Seller when due. Purchaser shall be required to pay of any disputed sums into an escrow account to be managed by the parties and interest at the Non-Default Rate shall be payable on any disputed sum subsequently agreed or determined by an Expert to be due, from and including the date when the sum in question was due until, but excluding, the date when it is received by Seller accruing from day to day and compounded quarterly.
- 8.6 **Taxes, etc:** All payments under this Agreement shall be made free and clear from, and without set-off, deduction or withholding on account of, any form of Taxes save to the extent that Purchaser is duly appointed by the Malawi Revenue Authority Commissioner for Income Tax as agent for Seller under the Taxation Act.
- 8.7 **Seller's account:** Payment of any sum payable under this Clause shall be made to the account of Seller at such bank as may be notified by Seller to Purchaser from time to time provided that if such bank is located outside the Republic of Malawi, Seller shall reimburse Purchaser for all banking charges payable by Purchaser in effecting such payment.
- 8.8 **Currency for payments:** Unless otherwise agreed by the Parties in writing, all amounts falling due under this Agreement shall be payable in state the currency of payment] and Seller shall not be obliged to accept payment in any other currency.

CLAUSE 9: METERING

- 9.1 **Obligations:** Purchaser shall, in accordance with the Prudent Operating Practice, install and maintain the Main Metering Equipment in accordance with Schedule 2 and shall operate the same in accordance with the procedures contained in Part B of Schedule 5. Purchaser shall in accordance with Prudent Operating Practice supply and install the Back-Up Metering Equipment and Purchaser shall test, Commission, maintain and operate the same.
- 9.2 **Defective Metering Equipment:** Where it is agreed or determined that any part of the Metering System is defective (including operating outside the relevant limits of accuracy

in Schedule 2), then such part shall be repaired, adjusted or replaced at the cost of the Party responsible for maintaining the same.

9.3 **Meter Sealing:** Purchaser shall ensure that the Metering System shall comply with the specifications set out in Schedule 2 and shall be jointly sealed. Such seals shall be broken only when both Seller and Purchaser personnel are present. Seller shall be given at least twenty-four (24) hours advance notice of the breaking of seals on any part of the Metering System provided however that no such notice will be necessary when the breaking of a seal is necessitated by the occurrence of an Emergency.

9.4 **Meter Tampering:** Subject to Clause 9.3, Purchaser and Seller undertake not to tamper or otherwise interfere with any part of the Metering System in any way and shall ensure that the Metering System is not tampered with by any other person. Where it is established that the Main Metering Equipment has been tampered or interfered with, or is defective:

- a) the quantity measured or recorded shall be that measured or recorded by the Back-Up Metering Equipment or, failing that, any secondary metering; and
- b) if there is no Back-Up Metering Equipment or secondary metering, or it is also established to have been tampered with, interfered with or is defective, the quantity shall be determined by agreement between the Parties, or failing such agreement, as determined by an Expert.

9.5 **Metering Procedures:** The Parties shall adopt and implement the procedures and arrangements set out in Part B of Schedule 5 for reading, testing, adjusting and recalibrating the Metering System.

9.6 **Disputes:** Any Dispute arising under this Clause 9, Schedule 2 or Part B of Schedule 5 shall be referred to an Expert.

CLAUSE 10: INSURANCE

10.1 Seller shall:

- a) at its sole cost and expense, obtain and maintain, in full force and effect, for the periods specified in Schedule 9 the insurance policies set forth in Schedule 9, in the amounts stipulated, with reputable insurance companies approved by Purchaser (such approval not to be unreasonably withheld) and such other insurance as would be obtained by a prudent owner or operator of an international electricity generating business, [financed on a project – finance basis], of a size and with the characteristics comparable to the Plant, provided that Seller shall not be in breach of its obligations if and to the extent that any particular insurance is unavailable to it on reasonable commercial terms with reference to terms generally offered in the international insurance market for non-utility electricity generators for reasons other than any negligence or default by, or condition (financial or otherwise) of Seller;
- b) provide to Purchaser copies of all policies effected by it and evidence that the premiums payable thereunder have been paid;

- c) upon being provided with reasonable notice by purchaser provide access to Purchaser or its representatives to its offices during office hours to inspect the original policies ;
- d) apply the proceeds of claims under such policies, relating to damage to the Plant, in repairing and restoring the Plant; and
- e) obtain such waivers of rights of subrogation against Purchaser in a form and manner satisfactory to Purchaser.

CLAUSE 11: UNDERTAKINGS AND WARRANTIES OF THE PARTIES

11.1 Undertakings of Seller: Seller undertakes:

- a) to comply with all applicable Legal Requirements;
- b) to apply for and use reasonable endeavours to obtain, in each case prior to the date that such Authorisations as are required by Seller to ensure that Seller is not in breach of any Legal Requirement in performing this Agreement, and to keep in force all Authorisations required to be in Seller's name for the operation of the Plant and any other of its obligations under this Agreement.
- c) to indemnify Purchaser against all reasonable costs incurred by Purchaser in the discharge of its obligations under clause 11.3(b) and this amount shall be capped at[]
- d) to secure that the Plant is constructed in accordance with the Functional Specification and is operated and maintained in accordance with Prudent Operating Practice, all Insurances, all Legal Requirements and the terms of this Agreement (including without limitation the Operating and Dispatch Procedures in Part C of Schedule 5);
- e) to use all reasonable endeavours to avoid financing parties exercising step-in rights ;
- f) to prepare accounts in accordance with the relevant accounting standards ;and
- g) to operate and maintain the individual Units and Plant in such a manner so as not to have an adverse effect on the Purchaser System.

11.2 Representations and Warranties of Seller: Seller represents and warrants that:

- a) Seller is a limited liability company duly organised and validly existing under the laws of Malawi and has all the requisite legal power and authority to execute this Agreement and to carry out the terms and conditions and provisions thereof;
- b) this Agreement constitutes valid, legal and binding obligations of Seller, enforceable in accordance with the terms hereof except as the enforceability may be limited by applicable laws affecting creditors' rights generally;
- c) there are no actions, suits or proceedings pending or, to Seller's knowledge, threatened against or affecting Seller before any court or administrative body or

arbitral tribunal that might materially adversely affect the ability of Seller to meet and carry out its obligations under this Agreement; and

- d) the execution, delivery and performance by Seller of this Agreement have been duly authorised by all requisite corporate action and will not contravene any provision of, or constitute a default under, any other agreement or instrument to which it is a party or by which it or its property may be bound.

11.3 Undertakings of Purchaser: Purchaser undertakes:

- a) to comply with all applicable Legal Requirements and keep in force all its Authorisations;
- b) to assist Seller in obtaining on a timely basis and maintaining in force (as required under Clause 2, and the Construction Programme), and to assist Seller in maintaining until the first anniversary of the Full Commercial Operation Date (to the extent that Purchaser can so do), all Authorisations required by Seller;
- c) to the extent there is a Change in Law affecting Seller, to use reasonable endeavours to assist Seller in obtaining all Authorisations necessary for the construction, continued operation or maintenance of the Plant.
- d) to own, [design, construct] operate and maintain the Purchaser Connection facilities substantially in accordance with the Operating and Dispatch Procedures in Part C of Schedule 5 and with all Legal Requirements;
- e) to operate and maintain the Purchaser's System in such a manner so as not to knowingly have a materially adverse effect on the Plant; and
- f) to exercise its right hereunder to Dispatch the Plant in accordance with the Operating and Dispatch Procedures and the Functional Specification.

11.4 Representations and Warranties of Purchaser: Purchaser represents and warrants that:

- a) Purchaser is a limited liability company duly organised and validly existing under the laws of Malawi and it has all requisite legal power and authority to execute this Agreement and to carry out the terms, conditions and provisions hereof;
- b) all action required to authorise the execution, delivery and performance by Purchaser of this Agreement and the transactions contemplated hereby have been taken and are in full force and effect;
- c) this Agreement constitutes valid, legal and binding obligations of Purchaser, enforceable in accordance with the terms hereof except as the enforceability may be limited by applicable laws affecting creditors' rights generally;
- d) there are no actions, suits or proceedings pending or, to Purchaser's knowledge, threatened, against or affecting Purchaser before any court or administrative body or arbitral tribunal which might materially adversely affect the ability of Purchaser to meet and carry out its obligations under this Agreement;

- e) Purchaser shall prepare accounts in accordance with the relevant accounting standards; and
- f) the execution, delivery and performance by Purchaser of this Agreement have been duly authorised by all requisite corporate action, and will not contravene any provision of, or constitute a default under, any other agreement or instrument to which it is a party or by which it or its property may be bound.

CLAUSE 12: FORCE MAJEURE

12.1 **Events of Force Majeure:** For the purposes of this Agreement “Force Majeure” means subject to Clause 12.2 any event or circumstance which materially and adversely effects the performance of either Party of its obligations or enjoyment of its rights under this Agreement and is not within the reasonable control (directly or indirectly) of the Party affected, and such event or circumstance or its effects cannot be prevented, avoided or removed by such Party acting in accordance with Prudent Operating Practice. “Force Majeure” shall include each of the following events and circumstances to the extent that they satisfy the foregoing requirements:

- a) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, civil commotion, act of terrorism, or sabotage provided that any such event occurs within or directly involves the Republic of Malawi;
- b) an act of God including but not limited to lightning, fire, earthquakes, volcanic activity, floods, storms, cyclones, typhoons, or tornadoes;
- c) epidemics or plagues;
- d) explosions, radioactive or chemical contamination;
- e) labour disputes including strikes, works to rule or go-slows or lockouts that extend beyond the Plant or are widespread or nationwide; and
- f) Change in Law.

12.2 **Exclusions from Force Majeure:** The following events or circumstances shall not constitute Force Majeure:

- a) late delivery to Seller of machinery, equipment, materials, spare parts, labour (other than labour disputes), or consumables;
- b) a delay in the performance of any contractor;
- c) normal wear and tear of, or random flaws in, materials and equipment or breakdowns of equipment;
- d) unavailability of funds; and
- e) unavailability of fuel.

12.3 **Effect of Force Majeure:** If a Party is prevented from or delayed in performing an obligation hereunder by reason of Force Majeure the affected Party shall:

- a) be relieved from the consequences of its failure to perform that obligation;
 - b) promptly notify the other Party of the occurrence of the event and the cessation of the event and, where relevant, the cessation of the effect of such event of Force Majeure on the enjoyment of the affected Party of its rights or the performance by it of its obligations under this Agreement; and
 - c) use all reasonable endeavors to overcome the consequences of the event.
- 12.4 **Extension of Long Stop Dates:** Where Seller is as a result of an event of Force Majeure delayed in or prevented from performing any of its obligations before the Long Stop Dates (or any of them) the Long Stop Dates which have not then occurred shall be revised on a day for day basis to new dates which reflect the period of delay resulting from such Force Majeure provided that no Long Stop Dates may be delayed by more than days in aggregate or such longer period as may be agreed pursuant to Clause 12.5.
- 12.5 **Force Majeure Termination:** If an event of Force Majeure continues beyond a period of [] days, the Parties shall meet in good faith with a view to determining mutually acceptable terms for continuing this Agreement notwithstanding the effects of the event of Force Majeure provided that if at the end of [] days, no solution is found, either Party shall be entitled to terminate this Agreement by giving notice of not less than [] days to the other Party.
- 12.6 **Payments During Force Majeure:** On the occurrence of an event of Force Majeure affecting Seller, then during the event of Force Majeure, Purchaser shall pay to Seller the Energy Charges for the Net Electrical Output Delivered in accordance with Dispatch Instructions.
- 12.7 **Mitigation:** The Party affected by an event or circumstances of Force Majeure shall use its reasonable efforts to mitigate the effects of any event of Force Majeure affecting the enjoyment by such Party of its rights or the performance by it of its obligations under this Agreement, and the Parties shall co-operate to develop and implement a plan to remedy the relevant event or circumstance and/or reasonable alternative measures to remove the event or circumstances of Force Majeure.

CLAUSE 13: TERMINATION AND DEFAULT

- 13.1 **Seller's Default:** For the purposes of this Agreement a Default by Seller shall be:
- a) any breach or default by Seller of its obligations under this Agreement ;
 - b) the failure by Seller to install all the plant and equipment specified in the Functional Specification;
 - c) the failure by Seller to achieve the Full Commercial Operation Date by the Long Stop Full Commercial Operation Date;
 - d) the wilful and unexcused failure by Seller to operate the Plant (including the abandonment of the Plant) in accordance with the provisions of this Agreement;
 - e) the breach by Seller of any of its other material obligations under this Agreement;

- f) the Declared Capacity being less than per cent (%) of the Contracted Capacity at the date of this Agreement for a continuous period of days;
- g) the occurrence of a Bankruptcy Event affecting Seller; and
- h) any statement, representation or warranty made by Seller herein or in any Certificate or other document delivered or made under or pursuant to their Agreement proving to have been incorrect, in any material respect, when made or when deemed to have been made.

13.2 **Purchaser's Default:** For the purposes of this Agreement a Default by Purchaser shall be:

- a) subject to the provisions of Clause 13.4, the breach by Purchaser of any of its material obligations under this Agreement other than the failure to make any payment under this Agreement when due and payable;
- b) the occurrence of a Bankruptcy Event affecting Purchaser;
- c) any failure to pay any sum of money due and owing for thirty (30) business days or more from the date when such sum was first due and demanded where such sum is not subject to a bona fide dispute; and
- d) any statement, representation or warranty made by Purchaser herein or in any Certificate or other document delivered or made under or pursuant to their Agreement proving to have been incorrect, in any material respect, when made or when deemed to have been made.
- e)

13.3 **Defaulting Party, etc:** For the purposes of this Agreement Seller is the defaulting Party in relation to the events of Default specified in Clause 13.1 and Purchaser is the defaulting Party in relation to the events of Default specified in Clause 13.2, and (in each case) the other Party is the non-defaulting Party.

13.4 **Default Notice:** Upon the occurrence of a Default, the non-defaulting Party may give notice to the defaulting Party of the occurrence of such Default. If:

- a) the Default is not capable of remedy; or
- b) the Default is capable of remedy and the defaulting Party does not, where such Default is capable of remedy within a [] day period, remedy the Default; or
- c) the Default is capable of remedy but not within a day period, the defaulting Party does not furnish to the non-defaulting Party a detailed programme ("Remedial Programme") for the remedy as promptly as is practicable of the Default and the defaulting Party fails to remedy the Default in accordance with the Remedial Programme;

then the non-defaulting Party may give notice to the defaulting Party that such Default is an **"Event of Default"**. Any Remedial Programme shall be agreed between the Parties

(such agreement not to be unreasonably withheld or delayed) and in the event of a Dispute (including any Dispute in relation to the Remedial Programme) may be referred to an Expert.

- 13.5 **Termination:** Upon the occurrence of an Event of Default the non-defaulting Party may upon giving not less than days notice to the defaulting Party terminate this Agreement.
- 13.6 **Survival of Rights:** The expiry or termination of this Agreement shall not affect any rights or obligations which may have accrued prior to such expiry or termination and shall not affect obligations of each of the Parties under this Agreement or, any other licence, agreement or document between the parties which are expressed to continue after such expiry or termination.
- 13.7 **Other Remedies:** Notwithstanding the other provisions of this Clause either Party may pursue such other remedies as may be available to it under any applicable law if this Agreement is terminated in accordance with this clause, or clause 13.5.

CLAUSE 14: INDEMNIFICATION AND LIABILITY

- 14.1 **Liability:** Subject to Clauses 14.2, 14.3, 14.4 and 14.5, each Party shall be liable to the other Party for the loss directly and foreseeably resulting from any breach by that Party of its obligations hereunder.
- 14.2 **Own loss:** Notwithstanding Clause 14.1, each Party shall be responsible for, and shall indemnify the other Party against claims in respect of, loss of or damage to persons or property incurred by the first Party (including without limitation reasonable legal fees) and its contractors, employees and agents acts of t. The indemnity provided to each Party under this clause shall not extend to:
- a) any loss of or damage to persons or property to the extent that it was caused by any act or omission of that Party, or the failure of that Party to take reasonable steps in mitigation; or
 - b) any loss of or damage to persons or property to the extent that that Party is compensated under the terms of the Development Agreement or any relevant policy of insurance.
- 14.3 **Consequential Losses:** In no case shall either Party be liable to the other for any indirect or consequential losses or damages.
- 14.4 **Limitation of Liability:** Notwithstanding any other term or provision of this Agreement, the aggregate liability which each Party shall have for all claims made under this Agreement shall not exceed[_____].
- 14.5 **Assertion of Claims:** Neither Party shall be entitled to assert any claim for indemnification until such time as all claims of such Party for indemnification under this Agreement exceed the equivalent of[] US (converted, in each case, as of the

date any would-be claim becomes certain), in the aggregate, at which time all claims of such party for indemnification under this Agreement may be asserted.

- 14.6 **Defence of Claims:** Each Party indemnified herein shall have the right, but not the obligation, to contest, defend and litigate any claim, action, suit or proceeding by any third party alleged or asserted against such person in respect of, resulting from, related to or arising out of any matter for which it is entitled to be indemnified hereunder and the reasonable cost and expenses thereof shall be subject to the indemnification obligation of the Party indemnified hereunder. Provided that if the Party indemnifying acknowledges in writing its obligation to indemnify the Party indemnified in respect of loss to the full extent provided the Party indemnifying shall be entitled, as its option, to assume and control the defence of such claim, action, suit or proceeding liabilities, payments and obligations at its expense and through counsel of its choice if it gives prompt notice of its intention to do so to the Party indemnified and reimburses the Party indemnified for the reasonable cost and expenses incurred by the Party indemnified prior to the assumption by the Party indemnifying of such defense.
- 14.7 The Party indemnified which exercises its rights under Clause 14.6 shall not be entitled to settle or compromise any claim, action, suit or proceeding without the prior written consent of the Party indemnifying (which consent shall not be unreasonably withheld or delayed).
- 14.8 Any Party indemnified which exercises its rights under Clause 14.6 shall have the right to employ its own counsel and such counsel may participate in such action, but the fees and expenses of such counsel shall be at the expense of such Party indemnified, when and as incurred, unless:
- (a) the employment of counsel by such Party indemnified has been authorised in writing by the Party indemnifying;
 - (b) the Party indemnified shall have reasonably concluded that there may be a conflict of interest between the Party indemnifying and the Party indemnified in the conduct of the defense of such action;
 - (c) the Party indemnifying shall not in fact have employed independent counsel reasonably satisfactory to the Party indemnified to assume the defence of such action and shall have been so notified by the Party indemnified; or
 - (d) the Party indemnified shall have reasonably concluded and specifically notified the Party indemnifying either that there maybe specific defences available to it which are different from or additional to those available to the Party indemnifying or that such claim, action, suit or proceeding involves or could have a material adverse effect upon it beyond the scope of this Agreement.

Provided that if paragraphs (a), (b) or (d) shall be applicable, counsel for the Party indemnified shall have the right to direct the defense of such claim, action, suit or proceeding on behalf of the Party indemnified and the reasonable fees and disbursements of such counsel shall constitute legal or other expenses hereunder.

CLAUSE 15: CONFIDENTIALITY

15.1

- a) **Confidential Information:** Each Party agrees that it shall ensure that its employees, officers and directors shall, hold in confidence this Agreement and all information, documentation, data and know-how disclosed to it by the other Party both before and after the date of this Agreement (“Confidential Information”), and shall not disclose to any third party or use Confidential Information other than in connection with the performance of this Agreement or any part thereof without the other Party’s prior written approval, provided that this Clause shall not apply to Confidential Information which is in the public domain other than by reason of a breach of this Clause , or was already in the rightful possession of the recipient Party, or was obtained by the recipient Party in good faith from a third party entitled to disclose it;
- b) a Party may disclose Confidential Information in accordance with any Legal Requirement to do so, or to consultants and contractors (subject to obtaining undertakings of confidentiality except where professional duties already impose an obligation of confidentiality) whose duties reasonably require such disclosure; and
- c) a Party may disclose Confidential Information, subject to obtaining an undertaking to keep the same confidential:-
 - i. any prospective assignee of the Party and its advisers;
 - ii. to any bank or financial institution or investor from whom the Party is seeking finance;
 - iii. to any Expert or Arbitrator under this Agreement.
 - iv. any insurer under a policy of insurance; and
 - v. to any Government Authority for the purpose of acquiring or complying with any necessary Authorisation, provided that such disclosure is in good faith and is necessary to enable such party to perform this Agreement or to protect or enforce its rights under this Agreement or to enable it to comply with any requirement referred to in paragraphs (c)(i) – (v) above or to carry on its business.

15.2 **Survival:** The provisions of this Clause shall survive the termination or expiry of this Agreement up to a period of two years after the termination or expiry of this Agreement

CLAUSE 16: DISPUTE RESOLUTION

16.1 **Arbitration:** Subject to Clauses 16.2 and 16.3, any dispute or difference of any kind between the Parties in connection with or arising out of this Agreement including the interpretation of this Agreement, its validity and any purported breach or termination (a “Dispute”) shall be finally settled by arbitration within the African Region under[_____] Rules which Rules are deemed to be incorporated by reference into this Clause 16.1. It is hereby agreed that:

- a) the seat of the arbitration shall be [; (Parties choose seat of Arbitration
- b) there shall be a arbitrator; (parties to agree on the number of arbitrarators)
- c) the language of the arbitration shall be English;
- d) the award rendered shall apportion the costs of the arbitration;
- e) the award shall be in writing and shall set forth in reasonable detail the facts of the Dispute and the reasons for the tribunal’s decision; and
- f) the award in such arbitration shall be final and binding upon the Parties and judgment thereon may be entered in any Court having jurisdiction for its enforcement; and the Parties renounce any right of appeal from the decision of the tribunal insofar as such renunciation can validly be made.

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

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

- a) The Expert shall be an independent person with relevant experience and willing to act, agreed between the Parties, or if not agreed within[_____] days of a request in writing by either Party, appointed by [_____];
- b) Other than in the case of invoices disputed by Purchaser in accordance with Clause 9.6, for a period of[_____] days after the appointment of the Expert or such other period as the Parties may agree, each Party may make such written submissions as it wishes to the Expert and shall simultaneously provide a copy to the other Party, and at the end of such [_____]day period each Party shall have a period of[_____] days to make counter-submissions to the Expert (with a copy to the other Party) in reply to the other Party’s written submissions made during the aforementioned [_____]day period provided that neither Party shall during such[_____] day period make any written counter-submission which purports to reply to, raise or refer to, any new matters not raised or referred to in any submission made during the aforementioned day period;
- c) At the end of the day period referred to in paragraph (b) above, and no later than [_____] days thereafter, either Party may, with the consent of the Expert

and at a time and place decided by the Expert, make an oral presentation to the Expert in the presence of the other Party commenting on or explaining matters previously submitted to the Expert in writing;

- d) The Expert shall render his determination in writing within [_____] days of the completion of the oral presentation given in accordance with Clause 16.2(c) and give reasonable details of the reasons for his determination;
 - e) The decision of the Expert shall be final and binding on the Parties save in the event of fraud or manifest error or mistake;
 - f) The Expert shall act as an expert and not as an arbitrator;
 - g) The costs of the Expert shall be borne as determined by the Expert or, in default of such determination, equally by the Parties.
- 16.3 The parties may alter the terms of clause 16 by agreement in writing.
- 16.4 **Exclusivity:** Neither Party shall have any right to commence or maintain any legal proceeding concerning a Dispute until the Dispute has been resolved in accordance with Clause 16.1 or 16.2, and then only to enforce or execute the award under such procedure.
- 16.5 **Confidentiality:** The Parties shall each secure that all Experts and arbitrators shall agree to be bound by the provisions of Clause 15 of this Agreement as a condition of appointment.
- 16.6 **Survival:** The provisions of this Clause shall survive the termination or expiry of this Agreement
- 16.7 **Continuance of Obligations:** The Parties shall continue to perform their respective obligations under this Agreement during any Expert or arbitration proceeding, provided that the right to terminate pursuant to Clause 13 on grounds different to those referred to the Expert or arbitrator shall not be restricted by this Clause 16.6.

CLAUSE 17: MAINTENANCE OF OPERATING RECORDS

- (a) Each Party shall keep complete and accurate records and all other data required by each of them for the purposes of proper administration of this Agreement. Among other records and data required hereby or elsewhere in this Agreement, Seller shall maintain an accurate and up-to-date operating log, in a format reasonably acceptable to Purchaser, at the Plant with records of:
 - i. real and reactive power production for each clock hour and bus voltage at all times;
 - ii. changes in operating status, scheduled outages, forced outages and partial forced outages, noting times and causes;
 - iii. any unusual conditions found during inspections; andall such records and data shall be maintained for a minimum of months after the creation of such records or data provided that each Party shall not dispose of or destroy any such records or data after such month period unless the Party

desiring to dispose of or destroy such records or data gives days prior notice to the other Party, generally describing the records or data to be destroyed or disposed of, and the Party receiving such notice does not object thereto in writing within days. If a written objection is received within such day period, the objecting Party shall have a period of days after the date of such written objection within which to inspect and copy the records or data proposed to be disposed of or destroyed, which records and data shall be made available within such day period by Purchaser or Seller as the case may be, at such Party's offices in. After the expiration of such day period, the Party desiring to dispose of or destroy such records or data shall be permitted to do so.

- (b) Either Party shall have the right, upon[_____] days prior notice to the other Party, to examine the records and date of the other Party relating to this Agreement or the operation and Dispatch of the Plant at any time during normal office hours during the period such records and data are required hereunder to be maintained.

CLAUSE 18: OPERATIONAL/MAINTENANCE REQUIREMENTS

18.1 *[Include if applicable]*

CLAUSE 19: MISCELLANEOUS

19.1 Assignment

- (a) Subject to the terms of any agreement entered into between the Lenders and the seller or the purchaser (including a direct agreement), any assignment by a Party of all (but not part only) of its rights and obligations under this Agreement is permitted but only with the prior written consent of the other Party, provided that:
 - i. such consent shall not be unreasonably withheld or delayed if the Party wishing to assign can satisfy the other Party of such proposed assignee's financial, technical and legal status and ability to observe and perform this Agreement; and
 - ii. the Party wishing to assign shall have given notice to that effect to the other Party and such notice shall have given sufficient information to show the status and ability of the proposed assignee to carry out the terms of this Agreement.
- (b) No assignment pursuant to Clause 19.1(a) shall be effective unless and until the assigning Party has
 - i. procured the proposed assignee to covenant directly with the other Party (in a form reasonably satisfactory to such Party) to observe and perform all the terms and conditions of this Agreement and if reasonably required by the other Party arrange for a guarantee or other equivalent security in favour of such other Party in respect of all obligations or liabilities to be assigned;

- ii provided to the other Party a certified copy of the assignment (excluding the consideration paid or payable for such assignment); and obtained written consent from Malawi Energy Regulatory Authority to make the assignment.
- 19.2. **Sub-Contractors:** Seller shall be entitled to engage third parties as contractors for the performance of its obligations hereunder provided that no such engagement shall relieve Seller of its obligations under this Agreement.
- 19.3. **Variation:** This Agreement may not be varied nor any of its provisions waived except by an agreement in writing signed by the Parties.
- 19.4. **Waivers of Rights:** No delay or forbearance by either Party in exercising any right, power, privilege or remedy under this Agreement shall operate to impair or be construed as a waiver of such right, power, privilege or remedy.
- 19.5. **Waiver of Sovereign Immunity:** The Seller and purchaser agree not to claim and irrevocably waives any defence of sovereign immunity to the full extent permitted by law
- 19.6. **Notices:** Except for communications in accordance with the Operating and Dispatch Procedures, any notice or other communication to be given by one Party to the other under or in connection with this Agreement shall be given in writing and may be delivered or sent by prepaid mail or facsimile to the recipient at the address, and marked for the attention of the person, specified in Schedule 8 or such other address or person from time to time designated by notice to the other in accordance with this Clause; and any such notice or communication shall be deemed to be received upon delivery, or five (5) days after posting, or when sent by facsimile upon confirmation of uninterrupted transmission by a transmission report provided that any notice given by facsimile shall be confirmed by letter sent by hand or post, but without prejudice to the original facsimile notice if received in accordance with this Clause 19.5.
- 19.7. **Effect of Illegality, etc:** If for any reason whatsoever any provision of this Agreement is or becomes or is declared by any court of competent jurisdiction to be invalid, illegal or unenforceable, then in any such case the Parties will negotiate in good faith with a view to agreeing one or more provisions to be substituted therefor which are not invalid, illegal or unenforceable and produce as nearly as is practicable in all the circumstances a situation where the commercial position of the parties is as close as possible to the situation provided for under this Agreement prior to the invalidity, illegality or unenforceability occurring.
- 19.7. **Entire Agreement:** This Agreement contains and expressly refers to the entire agreement between the Parties with respect to its subject matter and expressly excludes any warranty, condition or other undertaking implied at law or by custom and supersedes all previous agreements and understandings between the Parties with respect to its subject matter and each of the Party's acknowledges and confirms that it does not enter into this Agreement in reliance on any representation, warranty or other undertaking by the other Party not fully reflected in the terms of this Agreement.

CLAUSE 20: GOVERNING LAW

20.1 This Agreement shall be governed by and construed in all respects in accordance with the Laws of Malawi.

IN WITNESS WHEREOF, the Parties hereto through their duly authorised representatives have executed this Agreement on the date first written above.

Signed and sealed)
for and on behalf of)
[Purchaser])

Director
Secretary

Signed and sealed)
for and on behalf of)
[Seller])

Director
Secretary

