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## **Zambia Renewable Feed-in Tariff (REFIT) Program**

# **REFIT Power Purchase Agreement**

**February, 2016**

**Submitted by:  
USAID Southern Africa Trade Hub /  
AECOM International Development**

**Submitted to:  
USAID/Southern Africa**

**and**

**Zambia Energy Regulation Board**

**USAID Contract No. # 857-C15-016**

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# **POWER PURCHASE AGREEMENT**

relating to  
[name of power generation facility]

**ZESCO**

- and -

**[NAME OF SELLER]**

[location of facility]

Dated [●] 20[●]

Revision 4

## ***NOTES:***

1. *This “model” Power Purchase Agreement (the “Agreement”) outlines the provisions commonly found in power purchase agreements in respect of international, private power projects.*
2. *This Agreement is based on a number of key assumptions including:*
  - a) *the project complies with the Zambia REFIT Rules and that it has been identified as an eligible renewable energy supplier via Zambia’s REFIT procurement program.*

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- b) *the developer will finance the project through project finance arrangements;*
  - c) *the generating facility will be commissioned as an integrated whole (and not in stages) on its Commercial Operations Date;*
  - d) *the Seller will also be entering into an implementation agreement (“Implementation Agreement”) with the Government of Zambia (“Government”);*
  - e) *the Seller will obtain a Generation License from the energy regulator in Zambia (the “ERB”)*
  - f) *the Seller will also be entering into an grid connection agreement with ZESCO, and*
  - g) *the facility will be responsible for its own dispatch.*
3. *Section 1 sets forth the definitions of the capitalized terms used in the text of the Agreement.*
4. *Some schedules to the Agreement have not been completed in this draft as these attachments are largely project-specific.*

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**This POWER PURCHASE AGREEMENT (this “Agreement”)**

**is made at**

**[LOCATION] as of [DATE]**

**BETWEEN:**

- (1) ZESCO Limited, a company duly incorporated under the Laws of Zambia and having its registered office at Lusaka Zambia; (the “**Buyer**”) and
- (2) [NAME OF POWER SUPPLIER], a company duly incorporated under the Laws of [COUNTRY OF INCORPORATION] whose registered office is located at [LOCATION], (the “**Seller**”).

The Seller and the Buyer (and their respective permitted successors and assigns) are hereinafter individually referred to as a “**Party**” and collectively as the “**Parties**”.

**WHEREAS:**

- (A) The Seller plans to design, finance, construct, own, operate, insure, maintain and manage a [BRIEFLY DESCRIBE PROJECT AND LOCATION OF PROJECT]; and
- (B) The Seller wishes to sell to the Buyer, and the Buyer wishes to purchase from the Seller, all of the Net Energy Output (as hereinafter defined) pursuant to the terms and conditions set forth herein.

**Now, therefore**, in consideration of the mutual covenants and undertakings hereinafter contained, the Parties hereby agree as follows:



## 1. Definitions

“Affected Party”	has the meaning given to it in Clause 17.2.1;
“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;
“Agreed Interest Rate”	means the Bank of Zambia’s policy rate plus a margin of [●] hundred basis points;
“Agreement”	means this power purchase agreement including its recitals and schedules, amended or modified from time to time in accordance with the terms hereof;
“Authorization”	means any approval, consent, license, permit, authorization or other permission granted or to be granted by a Competent Authority required for the enforcement of rights or performance of obligations under this Agreement by a Party
“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 SCHEDULE I (Base Case Financial Model);
"Base Feed In Tariff"	has the meaning set forth in Clause 34.3;
"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:  a) the first Billing Period shall commence on the Connection Date or the Deemed Commercial Operation Date, if applicable and end on the last day of the month in which the Connection Date or the Deemed Commercial Operation Date, if applicable occurs; and  b) the final Billing Period shall commence on the first day

of the Month in which the Termination Date occurs and end on the Termination Date;

“Business Day” means any day except a Saturday, a Sunday or a public holiday in Zambia;

“Change in Law” means:

- a) the enactment, promulgation, modification, repeal or reinterpretation after the Signature Date by any Competent Authority of any Law; or
- b) the imposition by any Competent Authority of any material condition in connection with the issuance, renewal, or modification of, or the revocation or non-renewal (other than for cause) of, any Consents after the Signature Date,

that in either case:

- i) results in any change in respect of Taxes and duties payable by or otherwise passed through to the Seller, the Contractors, the Lenders or the shareholders of the Seller; or
- ii) establishes, modifies or abolishes requirements for, or materially interferes with, the activities of the Seller in connection with the Power Project or the corporate affairs of the Seller that affect the obligations or rights of the Seller, the Contractors, the Lenders or the shareholders of the Seller, or the financial position of the Seller under this Agreement; or
- iii) renders the performance by the Seller or any other person of its obligations under this Agreement or any other Project Document or Finance 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.

“Change in Tax” means the adoption, promulgation, bringing into effect, repeal, amendment, reinterpretation, change or failure in application against the provisions of the relevant legislation, change in interpretation or modification after the date hereof of any Laws of Zambia, by any Authority, relating to any tax, duty, license fee or other revenue producing measure, including any application of any tax, duty, license fee or other revenue-producing measure which differs from the assumptions in SCHEDULE H (Tax

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	Assumptions)
"Check Measuring System"	means the check metering equipment and recording system and related equipment installed by ZESCO at the Power Plant and owned by ZESCO;
"Claims"	means any and all suits, sanctions, legal proceedings, claims, assessments, judgments, damages, penalties, fines, liabilities, demands and/or losses brought by or on behalf of a Party;
"Commissioned"	means in respect of the Power Plant the successful completion of tests pursuant to SCHEDULE G (Testing and Commissioning);
"Commercial Operation Date"	means the date on which the complete Power Plant is commissioned in terms of the Commissioning Tests and is ready to commence commercial operation on the date notified by the Seller to the Buyer in writing;
"Commissioning Tests"	means one or more tests designed to determine, among other things, whether the Units making up the Power Plant are able to operate at installed capacity and are capable of operating as appropriately required under the Grid Code and in accordance with Prudent Utility Practice
"Competent Authority"	means, with respect to the Republic of Zambia, any ministry, department, agency, authority or other organization under the direct or indirect control of the Government of Zambia, court of competent jurisdiction, or other body exercising legislative, executive, regulatory, administrative or judicial functions or quasi-judicial functions or at any time exercising any form of jurisdiction or <i>de facto</i> control over the Parties, the Contractors, the Lenders or the shareholders of the Seller, any aspect of the Power Project or this Agreement (or any transaction or agreement contemplated herein).
"Conditions Precedent"	means the conditions set out in Clause 4
"Confidential Information"	shall have the meaning set forth in Clause 27.1;
"Connection Date"	means the date of connection of the Power Plant to the Grid System;
"Connection Facilities"	means the facilities on the Seller's side of the Delivery Point for sending and metering the electrical output in accordance with this Agreement and which shall include, without limitation, all other lines and associated equipment, transformers, relay and switching equipment and protective devices, safety equipment, and subject to the Grid Code as well as SCHEDULE E (Metering) , the Metering System required for supply of power as per the terms of this Agreement;

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"Connection Offer Letter"	the connection offer letter provided by ZESCO to the Seller with respect to the connection of the Power Project to the Grid System, attached as an schedule to the Grid Connection Agreement;
"Connection Works"	means the construction of the physical connection by which the Power Plant will be connected to the Grid System and all associated works and activities as provided for in SCHEDULE F (Construction Program);
"Consents"	means the permits, licenses, consents, authorizations, 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 SCHEDULE A (Consents);
"Construct"	means to investigate, survey, design, engineer, procure, construct, erect, expand, refurbish, upgrade, improve, install, test, commission and do any and all other related things in accordance with the standards of a Reasonable and Prudent Operator and the term "Construction" shall be construed accordingly;
"Construction Program"	means the program for Construction of the Power Project as set out SCHEDULE F (Construction Program), which specifies certain Milestones for the Construction of the Power Project and the due dates for such Milestones;
"Construction Start Date"	means the date on which (i) Financial Close has occurred, and (ii) Seller has provided a notice to proceed under the EPC Contract
"Contract Year"	means each period of one (1) calendar year which falls within the Term, provided that: <ol style="list-style-type: none"><li>a) the first Contract Year shall commence on the Commercial Operation Date and end on the last of the calendar year in which the Commercial Operation Date occurs; and</li><li>b) the last Contract Year shall commence on the first day of the calendar year in which the Term is due to end and shall end (unless this Agreement is terminated early in accordance with its terms) on the Termination Date;</li></ol>
"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

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	within this definition;
"Deemed Commercial Operation Date"	has the meaning given to it in Clause 6.3.1, as certified by the Engineer;
"Deemed Commercial Operation Period"	means the period commencing on the Deemed Commercial Operation Date and ending on the Commercial Operation Date;
"Deemed Energy"	means the Net Energy that the Seller would have been able to sell to the Buyer but for an Event of Deemed Energy
"Deemed Energy Amount"	shall have the meaning set forth in Clause 34.3
"Deemed Energy Payment"	has the meaning given to it in Clause 34.3, which shall be applicable in all events of Deemed Energy, mutatis mutandis;
"Delivery Point"	means the point where Net Energy shall be delivered by the Seller to ZESCO as shown in the Line Diagram of the Project Site attached as SCHEDULE B (Line Diagram of Project Site);
"Direct Agreement"	means an agreement to be entered into by the Seller and ZESCO 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;
"Effective Date"	means the date on which all of the Conditions Precedent have been satisfied or duly waived by both Parties;
"Energy Payment"	means the total amount payable by ZESCO to the Seller under this Agreement in any Billing Period, as calculated in accordance with Clause 34.1;
"Engineer"	means an independent consulting engineer or engineering firm or engineering company of international repute appointed by the Lenders (or, in the absence of such appointment, by Seller) and acceptable to ZESCO for the purpose of monitoring the construction, testing and commissioning of the Power Project.
"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. Forms of such benefits shall include, but not be limited to, any and all environmental air quality credits, green credits, renewable energy credits, certificates, carbon or other gas emissions reductions (whether or not they are verified or certified), tags offsets, allowances or similar

products or rights, howsoever named:

- a) resulting from the avoidance of the emission of any gas, chemical or other substance, including but not limited to mercury, nitrogen oxide, Sulphur dioxide, carbon dioxide, carbon monoxide, particulate matter or similar pollutants or contaminants of air, water or soil, gas chemical or other substances; or
- b) attributable to the generation, purchase, sale or use of electricity from or by the Power Plant, or otherwise attributable to the Power Plant during the Term; or
- c) otherwise recognized as valuable by any third party purchaser of environmental credits.

"EPC Contract"	means the Engineering, Procurement and Construction Contract entered into between the Seller and the EPC Contractor;
"EPC Contractor"	means the Contractor appointed by the Seller to undertake the engineering, procurement and construction of the Power Project in terms of the EPC Contract;
"ERB"	means the Energy Regulation Board, the Zambian electricity regulatory authority established in terms of the Energy Regulation Act, Chapter 436 of the laws of Zambia or any other body having regulatory powers over the electricity sector in Zambia which replaces it from time to time;
"Event of Deemed Energy"	has the meaning given to it in Clause 7.1.4;
"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"	means an event set out in Clause 17.1;
"Force Majeure Termination Amount"	means the amount payable to the Seller as set out in the Implementation Agreement for a Force Majeure Event other than a Political Force Majeure Event
"Generation License"	means the generation license issued to the Seller by the ERB and which came into force on [●] (as the same may be amended from time to time thereafter);
"GRZ"	means the Government of the Republic of Zambia;

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"Grid Code"	means, the Grid Code published by the ERB in terms of the Electricity Act, as amended from time to time;;
"Grid Connection Agreement"	means the agreement between the Parties in terms of which the Parties shall Construct the Connection Works to connect the Power Plant with the Grid System, and the terms and conditions that will regulate such connection and establish the technical specifications for the connection;
"Grid Maintenance"	means scheduled maintenance of the Grid System
"Grid Outage"	means a disruption or failure of the Grid System;
"Grid Route"	shall mean the route followed by the transmission or distribution lines forming part of the Connection Works connecting the Power Plant to the Grid System;
"Grid System"	means the electrical transmission and distribution system in Zambia owned by ZESCO;
"Grid Unavailability"	means the aggregate number of hours in a Contract Year during which ZESCO and/or the Grid System is unable or fails to allow the injection and transmission or distribution of the electrical energy generated by the Power Plant into and through the Grid System;
"Grid Unavailability Threshold"	means 176 hours per Contract Year;
"Implementation Agreement"	means the agreement to be executed between the Seller and the Government of the Republic of Zambia in respect to the Power Project, if and to the extent necessary, to facilitate the financing of the Power Project
"Indexed Feed In Tariff"	means the Base Feed In Tariff indexed as specified in Clauses 34.2;
"Installed Capacity"	means the total installed capacity in kilo-Watt electrical (kWe) of the Power Plant as stipulated in the Commissioning Test results;
"Lapse of Consents"	means any Authorization – <ol style="list-style-type: none"><li>a) not being issued (or having lapsed, not being renewed or replaced) within one hundred eighty (180) Days of a properly and timely made and diligently pursued application by Seller for that authorization to be issued, renewed, or replaced, as the case may be, and as a result Sellers ability to perform its obligations under this Agreements is materially and adversely affected;</li><li>b) being made subject, upon renewal or otherwise, to any terms or conditions that materially and adversely affect Seller's ability to perform its obligations under this</li></ol>

Agreement; or

- c) being withdrawn, cancelled, or suspended other than as provided under Laws of Zambia and as a result the Seller's ability to perform its obligations under this Agreement is materially and adversely affected, despite Seller's compliance with the applicable procedural and substantive requirements as applied in a non-discriminatory manner;

"Law"	means the Grid Code, the Consents, any constitution, statute, ordinance, treaty, decree, proclamation, by-law, regulation, notice, circular, code, rule, direction, delegated or subordinated legislation or other legislative measure applicable to the Seller and ZESCO;;
"Lenders"	means the persons from time to time making credit facilities available to the Seller pursuant to the Finance Documents (other than the shareholders of the Seller);
"Licensed Capacity"	means the total maximum capacity in kilo-Watt electrical (kWe) of the Power Plant as stipulated in the Generation License;
"Long Stop Date"	means the [first anniversary] of the execution of this Agreement;
"Losses"	has the meaning set forth in Clause [#] (Liability);
"Main Measuring System"	means the Output Meters, and related equipment, installed at the Power Plant and owned by the Seller;
"Make-up Period"	has the meaning set forth in Clause 20.2.1;
"Material Adverse Effect"	means a material adverse effect on the Seller's ability to exercise its rights and perform its obligations or to enjoy its rights under this Agreement;
"Metering Equipment"	means the Main Measuring System and the Check Measuring System for measuring active power, and measuring devices for measuring reactive power;
"Milestone"	means each key stage during the Construction period as identified in the Construction Program;
"Month"	shall mean the period between 00:00 hours on the first day of the calendar month and 24:00 hours on the last day of that month;
"Monthly Generation Forecast"	has the meaning set forth in Clause 12.1.1.1;
"Monthly Indexation"	means the indexation in accordance with Clause 34.2;
"Monthly Net Energy"	means the Net Energy for a specific Month;



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“MW”	means Megawatt;
“MWh”	means Megawatt hour;
“National Control Center”	means the center for control and coordination of power flows within Zambia;
"Net Energy"	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 by one Party to the other Party specifying the reason which permits such Party to terminate this Agreement;
"Notice of Termination"	means a notice issued upon expiration of the consultation period specified in Clause 19.5.2 (following a Notice of Intention to Terminate) and which, unless the Parties have agreed otherwise, shall terminate this Agreement;
"Output Meters"	means a set of meters used to measure kW, kVAr, kWh and kVArh to an accuracy of 0.2% and situated at the Delivery Point;
“Parties”	means the Seller and ZESCO, or their successors-in-title, and ‘Party’ shall be construed accordingly;
“Political Force Majeure Termination Amount”	means the amount payable to the Seller by the GRZ for a Political Force Majeure Event as set out in the Implementation Agreement;
“Power Plant”	means the solar/hydro/biomass/geothermal/wind plant with the Installed Capacity, to be located at the Project Site, at which energy will be generated by the Seller and sold to ZESCO pursuant to this Agreement;
“Power Project”	means the development, Construction and operation of the Power Plant, located at the Project Site;
"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 SCHEDULE G (Testing and Commissioning);
"Project Documents"	means this Agreement, the EPC Contract, the Grid Connection Agreement, the Generation License, the Consents, the Implementation Agreement (if applicable), the Operations and Maintenance Agreement, and any other agreements or contracts in relation to the Power Project;
"Project Insurances"	shall have the meaning set forth in Clause 21.1;
“Project Site”	means the location of the Power Project as described in Clause 5.1;
“Prudent Industry Practice”	means prudent industry practices followed by 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;
"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 Rules"	means the Renewable Energy Feed-in Tariff Rules developed by the ERB and approved of by the GRZ;
"Scheduled Grid Outage"	means a pre-scheduled interruption in the capacity of the Grid System agreed between the Parties (in accordance with Clause 12.5 and Clause 12.9, as the case may be) due to Grid Maintenance;
"Scheduled Outage"	means a Scheduled Grid Outage and/or a Scheduled Plant Outage;
"Scheduled Plant Outage"	means a pre-scheduled interruption in the generating capacity of the Power Plant agreed between the Parties (in accordance with Clause 12.5 and Clause 12.9 as the case may be);
"Seller Default Termination Amount"	means the amount payable in the event of a Seller Event of Default, as determined in the manner set out in the Implementation Agreement;
"Seller Event of Default"	has the meaning set forth in Clause 19.2;
"Signature Date"	means the date this Agreement is duly signed and dated by the Parties;
"System Operator"	means ZESCO acting as the operator of the Grid System and the National Control Center;
"Target Commercial Operation Date"	means the intended Commercial Operation Date being the date falling [●] weeks from the Target Connection Date or as extended as a result of a Force Majeure Event or extended as a result of a ZESCO Event of Default leading to a delay, other than the failure by ZESCO to achieve the Connection Date by the Target Connection Date;
"Target Connection Date"	means [●] Months following the date on which the Grid Connection Agreement has become effective;
"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 or environmental, energy or fuel tax, but excluding corporation or personal taxes on income;
"Technical Dispute"	means a dispute that relates to a technical, engineering, operational, or accounting issue or matter related to this Agreement that, in any case, is the type of issue or matter that is reasonably susceptible to consideration by an expert in the relevant field or fields and is reasonably susceptible to resolution by such expert.
"Term"	has the meaning set forth in Clause 3.1;
"Termination Amount"	has the meaning set forth in the Implementation Agreement between the Seller and GRZ;
"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 intention to terminate this Agreement served by the Seller or ZESCO to the other Party pursuant to Clause 19.6;
"Total Energy Payment"	has the meaning set forth in Clause 34.1;
"UNCITRAL"	means the United Nations Commission on International Trade Law;
"UNCITRAL Rules"	means the arbitration rules of UNCITRAL in force from time to time;
"Unit"	means any separately identifiable part of the Power Plant that generates electricity and collectively forms the Power Plant;
"Unscheduled Outage"	means any outage other than a Scheduled Outage;
"Week"	means the period between 00:00 hours on a Monday and 24:00 hours on the following Sunday.
"Zambian Kwacha"	is the official legal currency of the Republic of Zambia;
"ZESCO Default Termination Amount"	means the amount payable to the Seller in the event of a ZESCO Event of Default, as set out in the Implementation Agreement;
"ZESCO Event of Default"	has the meaning set forth in Clause 19.3;
"ZESCO Grid Default"	means a breach by ZESCO under the Grid Connection Agreement

## 2. Interpretation

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

- 2.1 The headings are for convenience only and shall not form part of the interpretation of this Agreement;
- 2.2 The singular includes the plural and vice versa;
- 2.3 References to clauses and schedules are, unless the context otherwise requires or states, references to clauses of, and schedules to, this Agreement; and references to clauses are, unless the context otherwise requires or states, references to clauses in the schedules to this Agreement;
- 2.4 References to legislation (including subordinate legislation) and regulations made or licenses issued there under are references to such legislation, regulations and licenses as they may be amended from time to time;
- 2.5 (References to other agreements or documents are, unless the context otherwise requires or states, references to those agreements or documents at the Signature Date and as amended and/or re-enacted and/or consolidated and/or replaced from time to time;
- 2.6 A gender shall include the other gender;
- 2.7 A natural person shall include a juristic person, and vice versa;
- 2.8 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;
- 2.9 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.

### **3. Duration of Agreement**

#### **3.1 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 years] from the Commercial Operation Date (the "Term").

#### **3.2 Make-up Term**

3.2.1 Without limiting the generality of Clause 3.1, the Term shall be extended on a day-for-day basis for all periods during which an Affected Party is unable to perform its obligation pursuant to a

Force Majeure Event, and is relieved of its obligations to so perform in accordance with Clause 17 (the “Make-up Period”).

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

#### **4. Conditions Precedent**

##### **4.1 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), Clause 30 (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 set out in Clause 4 (Conditions Precedent) have either been fulfilled or waived by the Parties.

##### **4.2 On Effective Date**

The remainder of the rights and obligations of the Parties under this Agreement shall come into full force and effect upon the date of fulfilment of all of the following Conditions Precedent (such date being the “Effective Date”):

- 4.2.1 The Seller having obtained all Consents as listed SCHEDULE A (Consents) required for it to perform its obligations under this Agreement and all such Consents being in full force and effect;
- 4.2.2 The Seller and ZESCO having entered into a Grid Connection Agreement;
- 4.2.3 The Seller having achieved Financial Close;
- 4.2.4 ZESCO receiving all Consents listed in SCHEDULE A (Consents); and
- 4.2.5 Approval by ERB of this Agreement and the tariff structure and tariff level as set out in SCHEDULE D (Determination of Payments).

##### **4.3 Responsibilities as regards to conditions precedent**

- 4.3.1 The Parties shall be responsible at their own expense and risk for satisfying and procuring the satisfaction of the Conditions

Precedent relating to such Party referred to in Clause 4.2 (On Effective Date).

- 4.3.2 The Parties shall use their reasonable endeavors to cause the Conditions Precedent enumerated in Clause 4.2 (On Effective Date) to be satisfied within 12 Months from the Signature Date, as the same may be extended by the Parties in writing (the “Long Stop Date”). ZESCO shall provide the Seller with such reasonable cooperation as may be necessary to assist the Seller in satisfying the Conditions Precedent listed above

#### 4.4 **Notice**

4.4.1 The Seller undertakes to disclose promptly to ZESCO in writing anything which will or is likely to materially delay or prevent the fulfillment of any of the Conditions Precedent by the Long Stop Date.

4.4.2 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 inform the other Party of its waiver of any Condition Precedent required to be fulfilled by the other Party in writing.

#### 4.5 **Non-fulfillment of Conditions Precedent**

4.5.1 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.

### 5. **Construction and Development of Power Project**

#### 5.1 **Project Site**

5.1.1 The Seller shall use its best endeavors to obtain and maintain the peaceful use and possession of the Project Site and such associated rights as may be necessary for the purposes of undertaking and implementing the Power Project for the duration of the Term. The Seller shall obtain such other land and/or rights in respect of land as it requires to perform its obligations under this Agreement and all such land and/or rights shall be deemed to form part of the Project Site and shall be at the sole obligation and sole responsibility of the Seller.

5.1.2 The Power Plant shall be located at the area generally described as:

Site: [●]

Town: [●]

Location/ District: [●]

A scale map that identifies the location of the Power Project (the "Project Site"), project lines, Connection Facilities, and significant ancillary facilities at the Delivery Point, is included in SCHEDULE B (Line Diagram of Project Site).

## 5.2 Risk and Liability

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

5.2.1.1. obtaining all Consents including those obtained under Clause 4.2.1 (On Effective Date), except for ZESCO's Consents, and maintaining all Seller's Consents in full force and effect during the Term of this Agreement;

5.2.1.2. the commencement of supply of Net Energy to ZESCO no later than the Target Commercial Operation Date;

5.2.1.3. connecting the Power Plant, as defined in the Connection Offer Letter, via the Connection Facilities at the Delivery Point;

5.2.1.4. 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

5.2.1.5. fulfilling all obligations undertaken by the Seller under this Agreement.

5.2.2 The Seller shall be fully responsible for the suitability of the Project Site and Connection Facilities and shall assume all risk and liabilities associated with the Project Site and the Connection Facilities.

## 5.3 ZESCO inspection rights

ZESCO 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 ZESCO'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 ZESCO 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 ZESCO shall not be unreasonably refused by the Seller.

#### **5.4 General Construction obligations**

- 5.4.1 The Seller shall design, construct, erect, commission, complete and test the Power Plant in accordance with (i) all applicable Laws, including the Seller's Consents; (ii) the Grid Code; (iii) the Grid Connection Agreement and (iv) the standard of a Reasonable and Prudent Operator.
- 5.4.2 The Seller shall provide or procure all plant, equipment, machinery consumables, parts, materials and services whatsoever required for the Construction of the Power Plant as provided for in Clause 5.5 below.
- 5.4.3 No later than thirty (30) days after the expiry of each calendar quarter in the period from the Effective Date to the Commercial Operation Date, the Seller shall deliver to ZESCO a written report setting out the Construction activities undertaken in the preceding period as well as the overall progress in the Construction of the Power Plant with reference to all Milestones.
- 5.4.4 Notwithstanding any review or inspection of, or recommendation in respect of, any preliminary or detailed design, plan or report, the Project Site, the Construction contract(s) or any Construction report (each as may be amended) on the part of ZESCO 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 ZESCO arising from ZESCO'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 Program.
- 5.4.5 ZESCO shall be solely responsible for the availability and condition of the Grid System, including the completion of the construction of the Connection Works by the Target Connection Date, in accordance with the Grid Connection Agreement.

#### **5.5 Construction Program**

- 5.5.1 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).
- 5.5.2 The Seller shall comply with the agreed Construction Program as set out in SCHEDULE F (Construction Program) and shall without



any unreasonable delay notify ZESCO in writing of any anticipated failure to achieve the Commercial Operation Date on or before the Target Commercial Operation Date, which notice shall identify:

- 5.5.2.1. the nature of the reason for the failure;
- 5.5.2.2. 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
- 5.5.2.3. 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.

## **6. Commercial Operation Date**

### **6.1 Commercial Operation Date**

The Seller shall use reasonable endeavors to Construct and commission the Power Plant to achieve the Commercial Operation Date on or before the Target Commercial Operation Date.

### **6.2 Delay in Commercial Operation Date**

- 6.2.1 If the Commercial Operation Date is not achieved on or before the Target Commercial Operation Date, the Seller shall keep ZESCO informed of the date upon which it anticipates that it will be able to achieve the Commercial Operation Date.
- 6.2.2 If due to any delay, default or circumstance caused by an Event of Deemed Energy, the Seller's Construction and commissioning of the Power Project by the Target Commercial Operation Date is prevented, hindered or delayed, then the Seller shall give notice to ZESCO 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 minimize any delay and the effect of any such delay, default or circumstance acting in accordance with Prudent Industry Practice.
- 6.2.3 Following the occurrence of any such delay, default or circumstance, the Parties shall confer as to the effect, if any, of such delay, default or circumstance, and the Target Commercial Operation Date shall be extended by a period agreed by the Parties taking into account:

- 6.2.3.1. the effect which the Power Project reasonably demonstrates is properly attributable to such delay, default or circumstance; and
- 6.2.3.2. the ability of the Parties to reschedule activities to minimize the overall delays to the Commercial Operation Date resulting from such delay, default or circumstance.

### **6.3 Deemed Commercial Operation Date**

- 6.3.1 If an Event of Deemed Energy occurs, and as a consequence the Seller is unable to conduct the Power Project Acceptance Tests on the date(s) on which such Power Project Acceptance Tests would otherwise have occurred, the date on which the Commercial Operation Date would have occurred but for the occurrence of such Event of Deemed Energy shall be the "Deemed Commercial Operation Date".
- 6.3.2 In the case of a delay, default or circumstance as contemplated by Clause 6.3.1 (Deemed Commercial Operation Date):
  - 6.3.2.1. 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;
  - 6.3.2.2. 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
  - 6.3.2.3. The Deemed Energy Payment shall be calculated as provided in Paragraph 34.3.
- 6.3.3 During the period commencing on and from a Deemed Commercial Operations Date until the actual (i.e. non-deemed) Commercial Operations Date (the "Deemed Operation Period"), Deemed Energy shall be calculated on the basis set out in Clause 34.3.
- 6.3.4 Subject to the provisions of Clauses 6.3.1 and 6.3.2, ZESCO shall pay for Deemed Energy Payment arising during any Deemed Operation Period on the basis set out in Clause 34.4 and otherwise in accordance with the provisions of this Agreement.
- 6.3.5 If, upon achievement of the actual (i.e. non-deemed) Commercial Operation Date the Generating Facility has been Commissioned

at less than 100% of Licensed Capacity, then the amount payable by ZESCO in respect of Deemed Energy Amount arising during the Deemed Operation Period shall be adjusted, on a pro-rata basis.

- 6.3.6 The excess (if any) between what ZESCO has paid for Deemed Energy arising during the Deemed Operation Period pursuant to Clause 6.3.4 and the adjusted amount payable by ZESCO pursuant to Clause 6.3.5 shall be credited against future payments to be made by ZESCO to the Seller pursuant to Clause 7.

## **7. Sale and Purchase of Energy**

### **7.1 Obligations to Sell and Purchase Electrical Energy**

- 7.1.1 Subject to and in accordance with the terms and conditions of this Agreement, the Seller commits to sell and supply at the Delivery Point and ZESCO 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 ZESCO at the Delivery Point.
- 7.1.2 Commissioning of the Power Plant and the Connection Facilities shall be in accordance with the commissioning schedule contained in SCHEDULE G (Testing and Commissioning). The Parties agree that Net Energy will be sold to and purchased by ZESCO 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).
- 7.1.3 The Parties acknowledge that the physical connection of the Power Plant to the Grid System shall be in accordance with the Grid Connection Agreement.
- 7.1.4 Subject to Clause 7.1.1, if at any time after the Commercial Operation Date, Seller is prevented from delivering energy to ZESCO as a result of:
- 7.1.4.1. breach by ZESCO pursuant to this Agreement (or a failure of GRZ to fulfill its obligation under the Implementation Agreement);
  - 7.1.4.2. Grid Unavailability in excess of the Grid Unavailability Threshold;

7.1.4.3. receipt of back down instructions from ZESCO, whether or not in the exercise of its statutory obligation as the system operator, save where such instructions are, in accordance with Prudent Utility Practice, intended to ensure the safety and integrity of the Power Plant;

or

7.1.4.4. a deemed commissioning of the Power Plant pursuant to Clause 6.3,

(each an “Event of Deemed Energy”), the energy that otherwise could have been generated at the Generation Facility and sold to ZESCO calculated in accordance with the provisions of Paragraph 34.3 [or, where applicable the provisions of Clauses 6.3.2 to 6.3.6 inclusive] shall constitute “Deemed Energy” and notwithstanding any provisions to the contrary in this Agreement, ZESCO shall make payments to Seller for such Deemed Energy in accordance with the provisions of SCHEDULE D (Determination of Payments).

7.1.5 ZESCO shall be excused from the obligation to pay for Deemed Energy where Seller has been prevented from delivering Energy to ZESCO by any number of Events of Deemed Energy that cumulatively do not exceed 176 hours in the relevant Contract Year.

7.1.6 Deemed Energy shall be measured, and any Events of Deemed Energy Payments shall be calculated, in accordance with SCHEDULE D (Determination of Payments).

## **8. Provision of Supply, Metering Equipment and Procedures**

### **8.1 Delivery Point**

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

### **8.2 Metering**

The Net Energy generated by the Power Plant and delivered to ZESCO pursuant to this Agreement shall be monitored, measured and recorded by the Metering Equipment at the Delivery Point in accordance with the provisions of SCHEDULE E (Metering).

## **9. Payment for Electricity**

### **9.1 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 SCHEDULE D (Determination of Payments).

## 9.2 **Energy Payment**

ZESCO shall pay to the Seller:

9.2.1 for each Billing Period, the Total Energy Payment ( in accordance with SCHEDULE D (Determination of Payments)); and

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

## 9.3 **Payment during Event of Deemed Energy**

Following the Commercial Operation Date, in the event of an Event of Deemed Energy which prevents or hinders the Power Plant from producing Net Energy or from delivering such electrical energy to ZESCO or which prevents or hinders ZESCO from accepting or receiving such electrical energy in accordance with this Agreement, ZESCO shall pay to the Seller the Deemed Energy payment.

## 9.4 **Indexation of the Base Feed In Tariff**

The Base Feed In Tariff Charge shall escalate in accordance with Paragraph 34.2 .

## 9.5 **Grid Connection Charge**

The Energy Payment to be paid by ZESCO to the Seller shall include, among other components, grid connection charges provided for in the Grid Connection Agreement.

## 10. **Invoicing and Payment**

### 10.1 **Frequency**

The Energy Payment, as calculated and adjusted in accordance with this Agreement shall be invoiced in arrears at the end of each Billing Period and shall be invoiced in United States Dollar. In addition to the Energy Payment, the Seller shall charge ZESCO value added tax and any other taxes or surcharges, in accordance with applicable legislation.

### 10.2 **Payments Free from Tax**

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

10.2.1 free of any restriction or condition, and

10.2.2 free and clear of and (except to the extent required by law and as herein below recorded) without any deduction or withholding for or on account of any bank charge or tax imposed, levied, collected, withheld or assessed by or within Zambia or by any federation or organization of which Zambia is a member at the time of payment.

### 10.3 Deductions Made Whole

Each Party shall make any payments payable by it under this Agreement, without withholding or deduction of, or on respect of, any Tax, unless required by Law. If any such withholding or deduction 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.

### 10.4 Invoicing and Payment Procedure

- 10.4.1 Invoices for all payments due under this Agreement shall be submitted by the Seller to ZESCO 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.
- 10.4.2 Each invoice shall be due and payable on or before the thirtieth (30th) day after the invoice is received (or, if such day is not a Business Day, the immediately following Business Day) (the "Due Date").
- 10.4.3 Any amount properly due from one Party to the other Party pursuant to this Agreement and remaining unpaid after the due date shall bear interest from the date when payment was due, such interest to accrue daily and be compounded Monthly at a rate equal to the Agreed Interest Rate from the date when payment was due until the amount due is actually received by the payee. Any overpayments by either Party resulting from an invoicing error or an error in payment shall be refunded by the other Party, together with interest at the Agreed Interest Rate and thereafter a new invoice shall be issued.
- 10.4.4 Should ZESCO dispute an invoice it shall notify the Seller within five (5) Business Days of receipt of such an invoice. It shall nonetheless pay all amounts not in dispute by the applicable Due Date.
- 10.4.5 In case of a manifest error on an invoice, ZESCO immediately notify the Seller, and the Seller shall issue a corrected invoice.
- 10.4.6 Should an invoice be in error as a result of a metering or reconciliation error, as detailed in SCHEDULE E (Metering), the payments shall be recalculated as soon as practicable following the correction of the metering error and any over-payment or under-payment corrected in the invoice for the Month following the receipt of the correct metered data.

- 10.4.7 The Seller shall notify ZESCO of its Zambian bank account details for payment by ZESCO to the Seller.
- 10.4.8 ZESCO shall notify the Seller of its bank account details for payment by the Seller to ZESCO.
- 10.4.9 No Party shall be entitled to offset any amounts payable to the other Party under or in relation to this Agreement

## 10.5 **Disputed Payments**

- 10.5.1 If any sum or part of any sum stated in an Invoice, is in good faith disputed by ZESCO, then:
  - 10.5.1.1. ZESCO shall promptly issue to the Seller a written notice (“Invoice Dispute Notice”) specifying exactly what it is disputing within the Invoice and thereafter pay any undisputed sum in accordance with Clause 10.4.4
  - 10.5.1.2. this shall be treated as a Technical Dispute;
  - 10.5.1.3. ZESCO shall pay such amount as is agreed or determined payable in respect of the disputed sum on the due date, or if the determination is made beyond the due date, within thirty (30) days of:
    - i. the date on which the Parties resolve the disputed sum; or
    - ii. the date of determination by an Expert or Arbitrator (as the case may be), if the Parties fail to reach agreement, and the matter has been referred for expert determination or arbitration.
- 10.5.2 Unless it is so determined that payment should be made in accordance with Clause 18, when making payment of the amount agreed or determined, ZESCO shall pay interest on that amount at the Interest Rate divided by Twelve compounded Monthly, from and including the Due Date of the Invoice or any other Invoice (as the case may be) up to but excluding the date of payment.
- 10.5.3 If ZESCO disputes any amount specified in any Invoice presented by Seller more than three (3) times in any period of nine (9) consecutive Months, and to the extent that the disputes are found to be valid by Seller or by an Arbitrator, then the Parties shall meet at the request of either Party to discuss and resolve the causes of the persistent billing errors.
- 10.5.4 If ZESCO disputes any amount specified in any Invoice presented by Seller more than three (3) times in any period of nine (9) Months and such disputes are found to be invalid by Seller or by

an Arbitrator, then ZESCO shall be liable to pay all the direct costs incurred by the Seller which may accrue as a result of such disputed Invoices. If such number of disputes are made by ZESCO within such period and each one found by Seller or by an Arbitrator to have merit, then the Seller shall be liable to pay all the direct costs, incurred by UETCL which may arise as a result of such disputed Invoices.

## **11. Ownership of Environmental Credits**

The Parties agree that the Developer shall be the sole and exclusive owner of all Environmental Credits (if any) derived or generated as a result of the Power Project and, shall have all rights to trade, sell or otherwise dispose of, in its sole discretion, any and all Environmental Credits associated with the electrical energy generated by the Power Plant.

## **12. Control and Operation**

### **12.1 Monthly Energy Declaration**

#### **12.1.1 Monthly Generation Forecast**

12.1.1.1. The Seller shall provide ZESCO in writing for each Month from the Deemed Commercial Operation Date (save during Scheduled Outages), by no later than 09:00 hours on the 25th of the preceding Month, with 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 SCHEDULE J (Monthly and Weekly Generation Forecast) (the "Monthly Generation Forecast").

12.1.1.2. 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 12.1.1.1 above shall be deemed to be the Monthly Generation Forecast for such Month.

12.1.2 All generation forecasts are indicative only, and deviations shall not be regarded as a breach of contract.

### **12.2 Annual Energy Generation Declaration**

12.2.1 The Seller shall provide to ZESCO in writing for each Contract Year (after taking into consideration Scheduled Plant Outages), by no later than 30 (thirty) days prior to the first day of the next Contract Year, the forecast level of generation of the Contract



Year in such format as may be prescribed by ZESCO from time to time (the "Projected Energy Declaration").

12.2.2 In the event that the Seller fails to provide the Projected Energy Declaration for a Contract Year, then the last Projected Energy Declaration provided by the Seller in accordance with Clause 12.2.1 above shall be deemed to be the Projected Energy Declaration for such Contract Year.

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

12.2.3.1. for reasons of Scheduled Outages or Unscheduled Outages; or

12.2.3.2. where to do so would not be in accordance with the standards of a Reasonable and Prudent Operator; or

12.2.3.3. in circumstances relating to safety (of either a personnel or the Power Project or apparatus); or

12.2.3.4. to the extent of any illegality, in circumstances where to do so would be unlawful; or

12.2.3.5. for reasons of Force Majeure; or

12.2.3.6. in any other circumstances, with ZESCO's approval.

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

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

### 12.3 Further revisions

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

12.3.2 Should circumstances change such that the original or the current Energy Declaration is no longer a reasonable estimate made in good faith, the Seller must, as soon as is reasonably practicable:

12.3.2.1. make revisions to the data submitted to ZESCO under Clause 12.2 and Clause 12.3;

12.3.2.2. notify ZESCO of any revisions to any previously submitted data; and

12.3.2.3. notify ZESCO of any special factors of which it becomes aware.

#### 12.4 **Communication of Declarations**

Each Party hereby authorizes 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.

#### 12.5 **Coordination**

The Seller and ZESCO shall as far as practically possible coordinate the timing for both Scheduled Plant Outages and Scheduled Grid Outages.

#### 12.6 **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.

#### 12.7 **Scheduled Plant Outages**

12.7.1 The Seller shall, not less than one (1) Month prior to the Commercial Operation Date and on an annual basis for the remainder of the Term, at least one (1) Month prior to the anniversary of the Commercial Operation Date provide to ZESCO its proposals for Scheduled Plant Outages, including any planned interruption or reduction of the Power Plant's capacity for the remainder of the Contract Year or the forthcoming Contract Year, as appropriate. Such schedule shall include:

12.7.1.1. the number of expected Scheduled Plant Outages and the extent of expected reductions in the capacity of the Power Plant as a result of such Scheduled Plant Outages; and

12.7.1.2. the estimated dates and duration of each Scheduled Plant Outage.

12.7.2 The Parties shall meet and coordinate the timing of Scheduled Plant Outages for the forthcoming Contract Year, at least one (1) Month prior to the commencement of that Contract Year.

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

12.7.4 Subject to having complied with the foregoing provisions of this Clause 12.7 (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.

12.7.5 The Seller shall be responsible for all costs incurred by it in connection with or arising from any scheduled maintenance carried out by it or on its behalf on the Power Plant. ZESCO shall not be entitled to any payment and/or indemnification and/or reimbursement from the Seller in connection with any Scheduled Plant Outages

## 12.8 **Unscheduled Plant Outages**

12.8.1 The Seller shall notify ZESCO as soon as possible, but not later than the end of the next Business Day:

12.8.1.1. upon the occurrence of any event resulting in the Power Plant being unable to operate; and/or

12.8.1.2. if the Seller determines that maintenance of the Power Plant is required prior to the next Scheduled Plant Outage scheduled pursuant to Clause 12.7 (Scheduled Plant Outage), and that an Unscheduled Plant Outage is required.

12.8.2 In each case, the Seller shall:

12.8.2.1. give ZESCO 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;

12.8.2.2. notify ZESCO of the expected dates and duration of the Unscheduled Plant Outage; and

12.8.2.3. use its best efforts to minimize the duration and effects on the Power Plant of the Unscheduled Plant Outage.

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

## 12.9 **Scheduled Grid Outages and Unscheduled Grid Outages**

12.9.1 ZESCO 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 Grid Outages. Such schedule shall include:

- 12.9.1.1. the number of expected Scheduled Grid Outages; and
- 12.9.1.2. the estimated dates and duration of each Scheduled Grid Outage.
- 12.9.2 Subject to having complied with the foregoing provisions of this Clause 12.9 (Scheduled Grid Outages and Unscheduled Grid Outages), ZESCO shall be entitled to shut down the Grid System from service at the agreed date and time. The total Scheduled Grid Outages and Unscheduled Grid Outages for the Grid System (excluding Force Majeure events) for each Contract Year, shall not lead to Grid Unavailability in excess of the Grid Unavailability Threshold. Should the Grid Unavailability be in excess of the Grid Unavailability Threshold on an annual basis for reasons other than Force Majeure, ZESCO shall be liable to pay the Deemed Energy Payment commencing from the date on which the Event of Deemed Energy occurred.
- 12.9.3 Without derogating from ZESCO's obligation to pay the Deemed Energy Payment as aforesaid, ZESCO shall notify the Seller promptly:
  - 12.9.3.1. upon the occurrence of any event resulting in the Grid System being unable to operate or events affecting system stability; and/or
  - 12.9.3.2. if ZESCO determines that maintenance of the Grid System is required prior to the next Scheduled Grid Outage and that an Unscheduled Grid Outage is required.
- 12.9.4 In each case, ZESCO shall:
  - 12.9.4.1. give the Seller notice of such event as soon as reasonably practicable, but not later than the end of the next Business Day, after the occurrence of such event or, in the case of an Unscheduled Grid Outage, ZESCO becoming aware of the need for such outage;
  - 12.9.4.2. notify the Seller of the expected duration of the Unscheduled Grid Outage; and
  - 12.9.4.3. use its best efforts to minimize the duration and effects on the Grid System of the Unscheduled Grid Outage.

### **13. Additional Obligations**

#### **13.1 ZESCO's obligations**

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

- 13.1.1.1. to the extent ZESCO 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 ZESCO to fulfil its obligations under this Agreement; and
- 13.1.1.2. reasonably assist the Seller in obtaining any Consents which the Seller requires to Construct, commission, operate and maintain the Power Plant under this Agreement; and
- 13.1.1.3. at all times from the Connection Date until the occurrence of the Commercial Operation Date during which the Seller generates Net Energy from the Power Plant, accept the Net Energy so generated and pay the Seller for this Net Energy as set out in SCHEDULE D (Determination of Payments); and
- 13.1.1.4. upon the Seller's reasonable request, discuss details of the Power Project with any potential Lender interested in providing financing or refinancing to the Seller in relation to the Power Plant; and
- 13.1.1.5. upon the Seller's reasonable request, in good faith negotiate and enter into the Direct Agreement with the Seller and the Lenders, on such terms as the Lenders may reasonably require within a reasonable time.

## 13.2 General Obligations of the Seller

- 13.2.1 From the Commercial Operation Date and for the remainder of the Term, the Seller shall, in addition to its other obligations under this Agreement, manage, operate and maintain the Power Plant in accordance with:
  - 13.2.1.1. all relevant Consents required from time to time for the Seller to fulfil its obligations under this Agreement;
  - 13.2.1.2. all applicable Laws; and
  - 13.2.1.3. Prudent Industry Practice.
- 13.2.2 In the event of a conflict among any such standards, the most stringent standard shall prevail, provided that in no circumstances shall the Seller be required to control or operate the Power Plant in violation of any of its Consents or any applicable Law, or in a manner contrary to Prudent Industry Practice.

## 14. Representation And Warranties

### 14.1 The Seller's warranties

The Seller hereby represents and warrants to ZESCO that:

- 14.1.1 it is a validly existing legal entity under the Laws of Zambia;
- 14.1.2 it is a limited company incorporated under the Laws of Zambia which has been in continuous existence since incorporation;
- 14.1.3 it has the full legal capacity and authority to enter into and carry out its obligations under this Agreement and this Agreement constitutes a valid, legally binding and enforceable obligation of the Seller;
- 14.1.4 to the best of the Seller's knowledge and belief, all Consents necessary to allow the Seller to enter into this Agreement and to carry out the transactions contemplated herein, including approval by the board of directors of the Seller, shall be given or received after Signature Date and it shall use its best efforts to keep them remaining in full force and effect for the duration of this Agreement;
- 14.1.5 to the best of the Seller's knowledge and belief there are no applicable Laws in force on the Signature Date or any provisions of any organizational 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;
- 14.1.6 this Agreement does not conflict with any provisions of any Law, any regulations of Zambia or any provision of the articles or memorandum of association of the Seller in effect as at the Signature Date;
- 14.1.7 at the Signature Date no litigation, arbitration or administrative proceedings before any court or arbitrator or authority are presently pending or to the best of the Seller's knowledge are being threatened against the Seller or any of its assets, which might materially or adversely affect the Seller's ability to perform its obligations under this Agreement or result in the dissolution of the Seller;
- 14.1.8 execution of this Agreement will not violate, be in conflict with, result in a breach of or constitute (with due notice or lapse of time or both) a default under any indenture, agreement for borrowed money, bond, note, instrument or other agreement to which the Seller is a party or by which the Seller or its property is bound;

- 14.1.9 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.

#### 14.2 **ZESCO Warranties**

ZESCO hereby represents and warrants to the Seller that:

- 14.2.1 it is a validly existing legal entity under the Laws of Zambia which on the date of this Agreement is wholly-owned by the GRZ;
- 14.2.2 it is a limited liability company incorporated under the Laws of Zambia which has been in continuous existence since incorporation;
- 14.2.3 it has the full legal capacity and authority to enter into and carry out its obligations under this Agreement and this Agreement constitutes a valid, legally binding and enforceable obligation of ZESCO;
- 14.2.4 all Consents necessary to allow ZESCO 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;
- 14.2.5 it has given notice to the Seller of all Consents necessary in Zambia to allow ZESCO to enter into this Agreement and to carry out the transactions contemplated therein;
- 14.2.6 there are no applicable Laws in force on the Signature Date or any provisions of any organizational document of ZESCO or of any agreement by which ZESCO is bound, which restrict or prohibit the ability of ZESCO to enter into and perform the terms of this Agreement;
- 14.2.7 execution of this Agreement does not conflict with any provision of any Law or any provision of the articles or memorandum of association of ZESCO in effect as at the Signature Date;
- 14.2.8 at the Signature Date no litigation, arbitration or administrative proceedings before any court or arbitrator or authority are presently pending or to the best of ZESCO's knowledge are being threatened against ZESCO or any of ZESCO's assets, which might materially or adversely affect ZESCO's ability to perform its obligations under this Agreement or result in the dissolution of ZESCO; and
- 14.2.9 execution of this Agreement will not violate, be in conflict with, result in a breach of or constitute (with due notice or lapse of time or both) a default under any indenture, agreement for borrowed money, bond, note, instrument or other agreement to which ZESCO is a party or by which ZESCO or its property is bound.

**15. Applicable Law**

This Agreement shall be governed, construed and interpreted in accordance with the Laws of Zambia.

**16. Change in Law and Tax**

**16.1 Change in Law**

The provisions of the Implementation Agreement shall apply in the event of a Change in Law.

**16.2 Change in Tax**

The provisions of the Implementation Agreement shall apply in the event of a Change in Tax.

**17. Force Majeure**

**17.1 Definition of Force Majeure Event**

A “Force Majeure Event” shall mean any event or circumstance or combination of events or circumstances beyond the reasonable control of a Party occurring on or after the date hereof that materially and adversely affects the performance by that Party of its obligations under or pursuant to this Agreement; provided, however, that such material and adverse effect could not have been prevented, overcome or remedied in whole by the affected Party through the exercise of diligence and reasonable care and Prudent Utility Practice. The Parties agree that reasonable care includes acts or activities to protect the Project from a casualty event, which are reasonable in light of the likelihood of such event, the effect of such event if it should occur, and the likely efficacy, cost and cost-effectiveness of protective measures. Subject to the exclusions in Clause 17.1.3, shall include the following events and circumstances, but only to the extent that they satisfy the above requirements:

17.1.1 events or circumstances or any combination of events and/or circumstances of the following types that occur inside or directly involve the Republic of Zambia (“Political Force Majeure Events”):

17.1.1.1. any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo or revolution;

17.1.1.2. radioactive contamination or ionizing radiation originating from a source in Zambia or resulting from another Political Force Majeure Event;

17.1.1.3. any riot, insurrection, civil commotion, act or campaign of terrorism that is of a political nature, such as, by way



of example and not limitation, actions associated with or directed against Seller and/or its Contractors as part of a broader pattern of actions against companies or facilities with foreign ownership or management;

- 17.1.1.4. a Lapse of Consent that (A) shall have existed for 26 days or more, (B) together with any and all Lapses of Consent that have occurred in the same calendar year, shall have existed in the aggregate for 45 days or more in such year, or (C) together with any and all Lapses of Consent that have occurred in the same or preceding two calendar years, shall have existed in the aggregate for 60 days or more
- 17.1.1.5. any strike, work-to-rule or go-slow which is not primarily motivated by a desire to influence the actions of Seller so as to preserve or improve conditions of employment, and
  - (i) is part of an industry wide strike, work-to-rule or go-slow, in response to the coming into force, modification, repeal or change in the interpretation of application of or any Law of Zambia after the date of this Agreement; or
  - (ii) is by the employees of any Competent Authority in response to the coming into force, modification, repeal or change in the interpretation of any Law of Zambia after the date of this Agreement; or
  - (iii) is caused by a Political Force Majeure Event;
- 17.1.1.6. any Change in Law or Change in Tax having the effect of preventing or delaying the construction, commissioning or testing of the Power Plant or which prohibit (by rendering unlawful) the operation of the Power Plant or which imposes material limitations on the operation of the Power Plant, unless the GRZ remedies in whole the financial effects on Seller and does so in a way that does not have an adverse effect, whether permanent or temporary, on Seller or the Lenders; or
- 17.1.1.7. either any (i) order or injunction issued by any Competent Authority or (ii) declaration pursuant to a statutory instrument, in either case in respect of archaeological or paleontological remains discovered on or under the Project Site, or the Grid Route that would not have been revealed by a soils investigation

of the Project Site or the Grid Route carried out at the date of such Agreement;

- 17.1.2 events or circumstances or any combination of events and/or circumstances of the following types, except to the extent that they constitute or are caused by Political Force Majeure Event (“Other Force Majeure Events”):
  - 17.1.2.1. earthquake, flood, storm, cyclone or lightning, provided that where such event occurs after the Commercial Operations Date, only where it is on a level that exceeds the design criteria of the Generation Facility, except for the maximum credible seismic design event as specified in the relevant schedules hereto;
  - 17.1.2.2. fire, explosion, mudslide or chemical contamination;
  - 17.1.2.3. epidemic or plague that extend beyond the affected Party’s organization and are widespread or nationwide;
  - 17.1.2.4. a Lapse of Consent (other than a Lapse of Consent that constitutes a Political Force Majeure Event);
  - 17.1.2.5. any strike, work-to-rule or go-slow which is not primarily motivated by a desire to influence the actions of the Seller so as to preserve or improve the conditions of employment.
- 17.1.3 Events or circumstances which shall not constitute Force Majeure include:
  - 17.1.3.1. lack of funds due to any commercial, economic or financial reason such as, but not limited to, a Party’s inability to make a profit or achieve a satisfactory rate of return due to the provisions of this Agreement or changes in market conditions (including due to any Change In Law);
  - 17.1.3.2. Any unexpected changes in the cost and quantities of plant or materials during the construction stage arising out of or relating to lack of proper planning, due diligence or the necessary feasibility studies;
  - 17.1.3.3. late delivery of machinery or other materials or a delay in the performance by any contractor or supplier (except where such late delivery or delay is itself attributable to a Force Majeure Event);
  - 17.1.3.4. normal wear and tear or random flaws in materials and equipment or breakdown in equipment;

- 17.1.3.5. hazards, including but not limited to lightning or the growth of trees, which can be reasonably anticipated in normal utility operations and planned for as part of Prudent Utility Practice; and
- 17.1.3.6. in the case of ZESCO, the inability at any time or from time to time of the Grid System to accept electricity except where caused by a Political Force Majeure Event.

## 17.2 In Case of an Event of Force Majeure

- 17.2.1 If a Party is prevented from or delayed in performing an obligation hereunder by reason of a Force Majeure Event (the "Affected Party"), the Affected Party shall:
  - 17.2.1.1. be relieved from the requirement to perform that obligation during the continuance of the Force Majeure Event;
  - 17.2.1.2. promptly notify the other Party of the occurrences of the event within ninety six (96) hours giving full particulars and satisfactory evidence in support of its claim; and in the event of a breakdown of communication rendering it not reasonably practicable to give notice of Force Majeure within the period specified above, the Affected Party may give such notice as soon as possible, but not later than twenty four (24) hours after reinstatement of communication; and
  - 17.2.1.3. use all reasonable endeavors to overcome the consequences of the event and where the Force Majeure Event has been eliminated or no longer affects a Party, the obligations in this Agreement shall recommence forthwith, and the applicable period for the performance of the obligation shall be extended by a period equal to the duration of the Force Majeure Event.
- 17.2.2 The declaration of Force Majeure shall not relieve any Party from the requirement to make any payment when due.
- 17.2.3 If either Party is prevented, hindered or delayed in the performance of material obligations under this Agreement by reason of Force Majeure occurring after the Commercial Operation Date, then provided the Affected Party has complied with its obligations under this Clause 17, the Term shall be extended by a period in time equal to the period during which the Affected Party was so prevented, hindered or delayed, in accordance with Clause 3.2 (Make Up Term)

### 17.3 Political Force Majeure Events

The provisions of the Implementation Agreement shall govern this Agreement with respect to the consequences of a Political Force Majeure Event.

### 17.4 Extension of Longstop Dates

If:

- 17.4.1 a Force Majeure Event, a breach by ZESCO of its obligations under or pursuant to this Agreement and/or a breach by GRZ of its obligations under or pursuant to the Implementation Agreement (each a “Delaying Event”) occurs; and
- 17.4.2 such Delaying Event materially impedes Seller from achieving (i) the Effective Date prior to the Longstop Date, (ii) the Construction Start Date and/or (iii) the Commercial Operation Date; and
- 17.4.3 in the case of a Force Majeure Event, the Seller has notified ZESCO of the Force Majeure Event in accordance with the provisions of Clause 17.2.1.2 and complied with the provisions of Clause 17.2.1.3, or (ii) in the case of a breach by ZESCO of its obligations under or pursuant to this Agreement and/or a breach by GRZ of its obligations under or pursuant to the Implementation Agreement, the Seller has promptly notified ZESCO of the relevant breach and used all reasonable endeavors to overcome the relevant consequences of the breach;

then such of the Longstop Date, the Construction Start Date and/or the Commercial Operation Date which have not then occurred shall be extended on a day for day basis (for a maximum of one hundred and eighty (180) days) to new dates which reflect the resultant period of delay in achieving the Effective Date, the Construction Start Date and/or or the Commercial Operation Date (as the case may be) caused by the Delaying Event(s).

## 18. Dispute Resolution

### 18.1 Procedure

- 18.1.1 If any Dispute arises relating to this Agreement or any claims for damages or otherwise are made as the result of breach of any obligation hereunder, the Parties shall meet and use their reasonable efforts to resolve such dispute through good faith negotiation.
- 18.1.2 Should the Parties fail to resolve such Dispute in accordance with Clause 18.1.1 above within 7 (seven) 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.

18.1.3 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 under UNCITRAL Rules. The Parties shall agree on the identity of the arbitrators. Should the Parties fail to agree on the arbitrators within 14 (fourteen) days of the referral of the dispute to arbitration, arbitrators shall be appointed in terms of UNCITRAL Rules having the requisite experience and expertise in the field of the Dispute.

## 18.2 Arbitration

18.2.1 Except where otherwise specifically provided for, any Dispute at any time between the Parties or any failure by them to reach agreement in regard to any matter arising out of or in connection with this Agreement or its interpretation or effect, or arising in any way out of the termination or failure of any of them, shall be submitted to arbitration pursuant to the UNCITRAL Rules.

18.2.2 The decision of the arbitrators shall be given in writing as soon as reasonably possible but within 1 (one) Month of the Dispute being referred to the arbitrators. 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 illegal, 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.

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

18.2.4 Arbitration shall be conducted under the UNCITRAL Rules and shall be held in [neutral venue] before three (3) arbitrators. In any event the arbitration shall be conducted in the English language.

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

18.2.6 The aforesaid notwithstanding, any Party shall be entitled to approach any competent court having jurisdiction for urgent relief on an interim basis, pending the finalization of the resolution of the dispute in terms of this Clause 18.2 (Arbitration).

### **18.3 Obligations during Disputes**

- 18.3.1 While a Dispute is continuing, the Parties are required to continue to perform their respective obligations, including the payment of the Energy Payment, under this Agreement until such dispute has been fully and finally resolved.
- 18.3.2 Where a Dispute has been referred for resolution by arbitration in accordance with the UNCITRAL Rules, 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.

### **18.4 Proceedings in Confidence**

- 18.4.1 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
- 18.4.2 of each Party hereto and safeguarded in accordance with the provisions of Clause 27 (Confidentiality).

### **18.5 Technical Disputes**

- 18.5.1 Where this Agreement provides or the Parties otherwise agree that a dispute shall be treated as a Technical Dispute, such Technical Dispute may be referred to an expert agreed upon by the Parties for determination (such person, an "Expert").
- 18.5.2 The Expert shall have demonstrated expertise in the area to which such technical dispute relates and shall not be an agent, employee or contractor of either Party involved in the technical dispute.
- 18.5.3 If the identity of the Expert is not agreed between the Parties within fifteen days (15) days of a request in writing by the Party initiating the Technical Dispute, the Expert shall be appointed by the International Centre of Expertise in accordance with the provisions for appointment of experts under UNCITRAL Rules.
- 18.5.4 Consideration of the Technical Dispute by an Expert shall be initiated by the Party seeking consideration of the Technical Dispute by the Expert submitting within 10 days of the appointment of the Expert to both the Expert and the other Party written materials setting forth:

- 18.5.4.1. a description of the Technical Dispute;
  - 18.5.4.2. a statement of the initiating Party's position; and
  - 18.5.4.3. copies of records supporting the initiating Party's position.
- 18.5.5 Within 10 days of the date upon which a Party has submitted the materials described in Clause 18.5.4, the responding Party may submit to the Expert (and, if such Party does so, shall also submit to the other Party) written materials setting forth:
- 18.5.5.1. a description of the Technical Dispute;
  - 18.5.5.2. a statement of the responding Party's position; and
  - 18.5.5.3. copies of any records supporting the responding Party's position.
- 18.5.6 The Expert shall consider the information submitted by the initiating Party in accordance with the provisions of Clause 18.5.4, the information submitted by the responding Party in accordance with the provisions of Clause 18.5.5 and, in the Expert's discretion, any additional written materials submitted by either Party.
- 18.5.7 Any additional written materials submitted by a Party to the Expert shall be simultaneously submitted by such Party to the other Party.
- 18.5.8 The Expert's final decision should be rendered within thirty (30) days of the date of the Expert's appointment or as soon as practicable thereafter.
- 18.5.9 The Expert shall act as an expert and not as an arbitrator.
- 18.5.10 The costs of the Expert shall be borne as determined by the Expert or, in default of such determination, equally by the Parties.
- 18.5.11 The Expert's determination shall (in the absence of alleged fraud or manifest error) be final and binding on the Parties and not subject to appeal.
- 18.5.12 If any Party wishes to challenge a decision of the Expert, it may do so only (a) by initiating arbitration in accordance with Clause 12.3 within thirty (30) days of its receipt of the decision of the Arbitrator, and (b) on the alleged grounds of fraud and/or manifest error.

- 18.5.13 If no challenge to a decision of the Expert is made in accordance with Clause 18.5.12, the decision shall be final and binding on the Parties.

## **19. Termination**

### **19.1 Events of Termination**

- 19.1.1 This Agreement shall, subject to the provisions of the Direct Agreement with the Lenders, terminate on the earliest to occur of:
- 19.1.1.1. termination due to failure to satisfy the Conditions Precedent, in accordance with Clause 4 (On Effective Date); or
  - 19.1.1.2. termination by the Seller as a result of a Force Majeure Event, in accordance with Clause 19.3.4 (Termination for Force Majeure); or
  - 19.1.1.3. termination by ZESCO following a Seller Event of Default, in accordance with Clause 19.2 (Seller Event of Default); or
  - 19.1.1.4. termination by the Seller following a ZESCO Event of Default, in accordance with Clause 19.3 (ZESCO Event of Default);

### **19.2 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 ZESCO Event of Default or an Event of Deemed Energy, or a ZESCO Grid Default, and shall entitle ZESCO to issue a Notice of Intention to Terminate to the Seller:

- 19.2.1 prior to the Commercial Operation Date, the Seller abandons Construction of the Power Plant for a consecutive period of more than ninety (90) days, without ZESCO's prior written consent, which shall not be unreasonably refused or delayed;
- 19.2.2 following the Commercial Operation Date, the Seller abandons the operation of the Power Plant for a consecutive period of more than thirty (30) days, without ZESCO's prior written consent, which shall not be unreasonably refused or delayed;
- 19.2.3 the Seller fails to cause the Commercial Operation Date to occur by the date falling eighteen (18) 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;



- 19.2.4 the Grid Connection Agreement is terminated in accordance with its terms and conditions as a result of a Seller default under that agreement;
- 19.2.5 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;
- 19.2.6 the liquidation or insolvency of the Seller, except for any frivolous or vexatious petitions for winding up or insolvency or any petition for the winding up or insolvency of the Seller which is discharged, stayed or dismissed within 60 (sixty) days of commencement thereof, or, if earlier, the date on which it is advertised;
- 19.2.7 the Seller is in material breach of its obligations under this Agreement and fails to remedy such breach within sixty (60) days of receipt of the notice of breach, provided that if such failure cannot be remedied by the Seller within such period of sixty (60) days with the exercise of reasonable diligence, then such cure period shall be extended by mutual agreement for an additional reasonable period of time (not to exceed a further sixty (60) days), so long as such failure is capable of being remedied with the exercise of reasonable diligence and the Seller is exercising reasonable diligence to remedy such failure;
- 19.2.8 failure of the Seller to pay any sum or sums due and owing to ZESCO within thirty (30) days of the due date therefor;

### 19.3 ZESCO Event of Default

Each of the following shall constitute a "ZESCO 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 ZESCO:

- 19.3.1 failure of ZESCO to pay any sum or sums due and owing to the Seller within thirty (30) days of the due date therefor;
- 19.3.2 ZESCO 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 ZESCO 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 ZESCO is exercising reasonable diligence to remedy such failure, excluding in the event of ZESCO's failure to pay any sum or sums due and owing

to the Seller under this Agreement, which shall be remedied within 30 (thirty) days of receipt of the notice of breach;

19.3.3 a ZESCO Grid Default occurs and is not remedied within the period, if any, specified for remedy for such breach in the Grid Connection Agreement; or

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

#### 19.4 Termination for Force Majeure

If a circumstance of Force Majeure Event has occurred and continued for a period of one hundred and eighty (180) days from the date of its occurrence, then, the Seller shall be entitled to serve upon ZESCO twenty-eight (28) days' notice to terminate this Agreement. If at expiry of such period of twenty-eight (28) days, such Force Majeure Event shall still continue, then this Agreement shall terminate.

#### 19.5 Notice of Intention to Terminate and Notice of Termination

19.5.1 A Party may serve a Notice of Intention to Terminate on the other Party upon the occurrence of any of the following events:

19.5.1.1. in the event that the Conditions Precedent are not satisfied (or waived by both Parties) in accordance with the provisions of Clause 4.2 (On Effective Date);

19.5.1.2. in the event that a party is unable to perform all or a material part of its obligations under this Agreement;

19.5.1.3. in the event that a Change in Costs entitling it to issue such a Notice of Intention to Terminate as provided for in Clause 19.3.4 (Termination for Change in Costs) occurs;

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

19.5.2 Following the issue of a Notice of Intention to Terminate pursuant to Clause 19.5.1, except if due to a default in payment by ZESCO, 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 Notice of Termination to the defaulting Party.

- 19.5.3 The termination of this Agreement may be subject to a Direct Agreement, and in such event, in the event of a conflict between this Agreement and the Direct Agreement, the terms of the Direct Agreement shall prevail.

## 19.6 Consequences of Termination

- 19.6.1 On termination of this Agreement for a Seller Event of Default and at ZESCO's discretion, Seller shall sell the Power Plant to GRZ, or its assignee, for Seller Default Termination Amount in accordance with the procedures set out in the Implementation Agreement, 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 favor of the Seller as are specified in the Implementation Agreement.
- 19.6.2 On termination of this Agreement for a ZESCO Event of Default, ZESCO shall be liable to pay the Seller, within thirty (30) days, the ZESCO Default Termination Amount set out in the Implementation Agreement 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 favor of the Seller as are specified in the Implementation Agreement.
- 19.6.3 If following a Political Force Majeure Event, or as a result of a Change of Law or Tax, this Agreement is terminated as provided in Clauses 19.3.4 or 19.5 by Seller then GRZ shall be liable to pay the Seller, within thirty (30) days, the Political Force Majeure Termination Amount set out in the Implementation Agreement 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 favor of the Seller as are specified in the Implementation Agreement.
- 19.6.4 If following a Force Majeure Event other than a Political Force Majeure Event, this Agreement is terminated as provided in Clause 19.3.4, then Seller shall, at ZESCO's option, sell the Power Plant to GRZ or its assignee for the Force Majeure 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 favor of the Seller as are specified in the Implementation Agreement.
- 19.6.5 ZESCO must exercise any option it has under this Clause 19.6 to require a sale to, or, as the case may be, a purchase by, GRZ or its designee of the Power Plant by giving notice to the Seller ("Transfer Notice") at any time within 60 days after the day on which this Agreement is terminated (or in where this Agreement expires upon the termination of the Implementation Agreement, the day on which this Agreement expires). If ZESCO does not

exercise the option it has by issuing a Transfer Notice within that 60-day period, then it shall be conclusively presumed to have waived and renounced its rights to require Seller to sell or, as the case may be, purchase the Power Plant from the Seller pursuant to this Clause 19.6. If ZESCO fails to issue a Transfer Notice within that 60-day period, Seller shall continue to own the Generation Facility and shall be free to sell or transfer it to any third party.

- 19.6.6 Except as provided in Clauses 19.6.1 to 19.6.5 above, upon the expiration or earlier termination of this Agreement, the Parties shall have no further obligations or liabilities hereunder except for those obligations or liabilities that arose prior to or arise upon expiration or termination and those obligations or liabilities that expressly survive such expiration or termination pursuant to this Agreement.

## **20. Liability for Damage or Loss**

### **20.1 Indemnity**

- 20.1.1 Each Party shall indemnify, defend and hold harmless the other Party against all losses, damages, claims, liabilities, costs or expenses which the other Party may suffer or incur by reason of any claim for or in respect of: (i) the death or personal injury of any individual or (ii) damage to property or (iii) any third-party liabilities and damages, arising out of the indemnifying Party's default under this Agreement, save where that default is excused in terms of Clause 17 (Force Majeure) of this Agreement, except to the extent that the Party seeking to be indemnified is at fault or is negligent.

- 20.1.2 This amount shall be capped to [•].

### **20.2 Liability**

- 20.2.1 In the event that any losses, Claims or damages ("Losses") in relation to any death or personal injury arises out of or results from the joint or concurrent negligence or the intentional conduct of both Parties, each Party shall be liable in proportion to its degree of negligence or fault. The Parties shall make all reasonable endeavors 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.
- 20.2.2 Neither Party shall be liable to the other Party save as expressly provided for in this Agreement.

### 20.3 Damages

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. For avoidance of doubt, the aforesaid limitation on liability does not affect or limit the Termination Amount payable to Seller by ZESCO pursuant to Clause 19.6 or payment by the Seller to ZESCO in case of termination as a result of Seller Event of Default pursuant to Clause 19.6 (Consequences of Termination).

## 21. Project Insurance

### 21.1 Insurances and information

21.1.1 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:

21.1.1.1. any Laws; and

21.1.1.2. 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").

21.1.2 The Seller shall take reasonable steps to ensure that it and its contractors obtain and maintain in effect at all times such insurance cover as is appropriate in accordance with Prudent Industry Practice.

21.1.3 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).

21.1.4 The Seller shall provide a copy of all Project Insurances to ZESCO, 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).

21.1.5 Not later than thirty (30) days after the date on which the policy for any Project Insurance is issued, amended to any material extent or renewed in accordance with its terms, the Seller shall cause its insurers or agents to provide ZESCO with such documentation as

may be reasonably necessary to evidence that such policy is in force and the amount of the cover thereunder.

- 21.1.6 The Seller shall provide ZESCO, 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.

## 21.2 Endorsements and clauses

- 21.2.1 The Seller shall cause its insurers to waive all rights of subrogation against ZESCO 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.

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

21.2.2.1. naming ZESCO as additional insured thereunder (other than in respect of loss of revenue related to Project Insurances);

21.2.2.2. 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;

21.2.2.3. 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

21.2.2.4. recording that such Project Insurance is primary insurance and shall not be subject to contribution by any other insurance.

## 21.3 Application of insurance proceeds

- 21.3.1 Unless ZESCO 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.

- 21.3.2 Notwithstanding the aforesaid, it is acknowledged and agreed that the Lenders will have security over and rights under the insurance policies, and further, the Lenders shall have the right to apply insurance proceeds in excess of the amount agreed under the Finance Documents to prepayment of the outstanding debt under the Finance Documents.

## **22. Waiver of Sovereign Immunity**

- 22.1 Subject to Clause 22.2, ZESCO unconditionally and irrevocably agrees that the execution, delivery and performance by it of this Agreement constitutes a private and commercial act. In addition to the foregoing, UETCL unconditionally and irrevocably agrees that: (i) should any proceeding (including any arbitration proceeding) be brought against it or its assets in relation to this Agreement or any transaction contemplated by this Agreement, no immunity from such proceedings shall be claimed by or on behalf of itself or with respect to its assets; (ii) it waives any right of immunity that it or any of its assets now has or may acquire in the future in any jurisdiction in connection with any such proceedings; and (iii) it consents generally in respect of the enforcement of any judgment against it in any such proceedings (including any arbitration proceedings) in any jurisdiction to the giving of any relief or the issue of any process in connection with such proceedings (including the making, enforcement or execution against or in respect of any assets whatsoever irrespective of their use or intended use.
- 22.2 Without prejudice to any provision in any jurisdiction which provides immunity (notwithstanding the provisions of Clause 22.1) over any assets, property or other thing (whether physical or intangible) or in each case over any class thereof, Clause 22.1 shall not apply to any assets, property or other thing (whether physical or intangible) which are of strategic importance to the continued operation of the national grid including transmission or distribution lines, substation infrastructure and the National Control Center infrastructure.

## **23. Cession and Assignment**

- 23.1 Subject to the terms of any agreement entered into between the Lenders and ZESCO (including a direct agreement), neither Party may assign or otherwise transfer all or any of its rights, benefits or obligations hereunder without the other Party's prior written consent, provided such consent is not to be unreasonably withheld or delayed, if the Party seeking assignment can satisfy the other Party of such proposed assignee's financial, technical and legal status and ability to observe and perform this Agreement, Provided however that the Party wishing to assign has 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.
- 23.2 No assignment pursuant to this Clause 23.1 shall have effect unless and until the assigning Party has:
- 23.2.1 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



23.2.2 has provided to the other Party a certified copy of the assignment (excluding consideration paid or payable for such assignment).

23.3 Notwithstanding the foregoing provisions, for the purpose of financing the Project, it is expressly acknowledged that Seller intends to obtain such financing for the Project from Lenders, Seller may assign to, or grant a security interest in favor of, the Lenders of all of its rights and interests under or pursuant to this Agreement. Seller shall notify ZESCO of the creation of such security over its rights and interests under this Agreement at least thirty (30) days prior to the execution of any such assignment or security interest.

## **24. Direct Agreement**

ZESCO recognizes that the Seller may wish to finance or refinance the Power Project through limited recourse or other financing and that the entering into of a Direct Agreement may be a precondition to the provision of such finance. ZESCO will co-operate in good faith with the Seller and its Lenders in order that such a Direct Agreement be agreed and entered into.

## **25. 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.

## **26. Anti Corruption**

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 favorable 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

## **27. Confidentiality**

### **27.1 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.

**27.2 Duty to Maintain Confidentiality**

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

**27.3 Exclusions**

These provisions shall not apply to information which is:

- 27.3.1 publicly known or has become publicly known through no unauthorized act of the recipient Party;
- 27.3.2 rightfully received by the recipient Party from a third party;
- 27.3.3 independently developed by the recipient Party without use of the other Party's information;
- 27.3.4 disclosed by the other Party to a third party without similar restrictions;
- 27.3.5 required to be disclosed pursuant to a requirement of a Competent Authority or any applicable Law, so long as the Party required to disclose the information gives the other Party prior notice of such disclosure; or
- 27.3.6 publicly disclosed with the other Party's written consent.

**27.4 Disclosure**

All media releases, public announcements and public disclosures by any Party or their respective employees or agents relating to this Agreement or its subject matter, including without limitation promotional marketing material, shall be coordinated 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

**28. 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), Clause 19 (Termination), Clause 18 (Dispute Resolution) and Clause 27 (Confidentiality) shall continue to have effect notwithstanding the termination of this Agreement.

## 29. Notices

### 29.1 Notices

The Parties choose as their respective addresses the addresses specified in Clause 29.2 (Addresses), 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.

### 29.2 Addresses

For the purposes of Clause 29.1, the Parties' respective addresses shall be:

In the case of the Seller:

[#]

In the case of ZESCO:

[#]

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

### 29.3 Delivery of Notices

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

- 29.3.1 if delivered by hand be deemed to have been duly received by the addressee on the date of delivery;
- 29.3.2 if posted by prepaid registered post be deemed to have been received by the addressee on the 7th (seventh) day following the date of such posting;
- 29.3.3 if successfully transmitted by facsimile with successful transmission confirmed be deemed to have been received by the addressee one day after dispatch; or
- 29.3.4 if successfully transmitted by electronic mail and having received a read receipt from the addressee, be deemed to have been

received by the recipient on the first Business Day on the day of receiving the confirmation receipt.

**29.4 Written Notice**

Notwithstanding anything to the contrary contained in this Agreement, a written notice or communication actually received by one Party from the other, including by way of facsimile or electronic mail transmission, shall be adequate written notice or communication to such Party.

**30. General and Miscellaneous**

**30.1 Sole Record of Agreement**

This Agreement constitutes the sole record of the agreement between the Parties with regard to the subject matter hereof. No Party shall be bound by any express or implied term, representation, warranty, promise or the like not recorded herein.

**30.2 No amendments except in writing**

No addition to, variation of, or agreed cancellation of, this Agreement shall be of any force or effect unless in writing and signed by or on behalf of the Parties.

**30.3 Waivers**

No waiver or failure by a Party to insist on the strict performance of this Agreement or to act in respect of the default or defaults of the other party and no acceptance of payment or performance during the continuance of any such default or defaults shall preclude any right, relief or remedy under or in connection with this Agreement available to the non-defaulting Party and may not be relied on by the defaulting Party as a consent to that default or those defaults or its or their repetition.

**30.4 Successors**

This Agreement shall bind and endure to the benefit of the Parties and their respective successors and permitted assigns.

**30.5 No Partnership**

This Agreement shall not be interpreted or construed to create an association, joint venture, agency relationship or partnership between the Parties or to impose any partnership or agency obligation or liability upon either Party. No Party shall have any right, power or authority to enter into any agreement or undertaking for, or to act on behalf of, or to act as or be an agent or representative of, or to otherwise bind, any other Party.

**30.6 Further Assurance**

Each Party agrees to execute and deliver all such further instruments and do and perform all such further acts and things as shall be necessary for the carrying out of the provisions of this Agreement

**30.7 Counterparts**

This Agreement shall be executed in three counterparts by the Parties hereto and when executed and delivered all the counterparts shall together constitute one and the same instrument.

**30.8 Generation License**

In the event of any inconsistency between this Agreement and the Generation License, the Generation License shall prevail.

**31. SCHEDULE A (Consents)**

**31.1 ZESCO's Consents**

31.1.1 Transmission or Distribution license amendment (if required) / EIA approvals / Board consent

31.1.2 Letter of No Objection from ZESCO's lenders

**31.2 The Seller's Consents**

31.2.1 Those stipulated in conditional License, site permit, EIA, Generation license

31.2.2 Approval as a viable project in terms of the REFIT Rules

**32. SCHEDULE B (Line Diagram of Project Site)**

[To be completed by Seller]

**33. SCHEDULE C (Technical Parameters)**

To be inserted by Seller



### 34. SCHEDULE D (Determination of Payments)

This Schedule sets out the Energy Payment payable under Clause 9 of this Agreement, for each Billing Period in each Contract Year.

#### 34.1 Total Energy Payment

The Energy Payment (whether before or after the Commercial Operation Date) shall be composed of the following components:

- 34.1.1 Payment for electricity produced for the Billed Period shall be the Indexed Feed In Tariff, as specified in section 34.2 below multiplied by the Net Energy delivered during the Billing Period.
- 34.1.2 Grid Connection Charges – as defined in the Grid Connection Agreement during the Billing Period.
- 34.1.3 Other Charges – as contemplated under this Agreement.

Therefore, the Total Payment in Zambian Kwacha (ZMK) for the Billing Period, from the Seller to ZESCO, shall be:

$$TEP_{my} = IFIT_{my} \times NE_{my} + TCC_{my} + OTH_{my}$$

Where

*TP<sub>my</sub>* is the Total Payment in Billing Period *m* of Contract Year *y*

*IFIT<sub>my</sub>* is the Indexed Feed In Tariff, in ZMK, for Billing Period *m* of Contract Year *y*

*NE<sub>my</sub>* is the Net Energy for Billing Period *m* of Contract Year *y*

*TCC<sub>my</sub>* is the Grid Connection charges, in ZMK, for Billing Period *m* of Contract Year *y*

*OTH<sub>my</sub>* is any charge provided for under this Agreement, in ZMK, for Billing Period *m* of Contract Year *y*

#### 34.2 Indexation

The full Base Feed In Tariff shall be adjusted annually from 1 August 2015 to allow for changes in the US inflation rate (CPI) in accordance with the following formulae:

$$IFIT_{my} = BFIT_{bd} \times \frac{USCPI_{y-1}}{USCPI_{by}} \times MAER_{my}$$

Where

*IFIT<sub>my</sub>* is the indexed feed in tariff, in ZMK/kWh, for Billing Period *m* of Contract Year *y*

*BFIT<sub>bd</sub>* is the Base Feed In Tariff, in United State Dollar per kilowatt hour (USD/kWh) as specified in Clause 34.5

**USCPI<sub>y-1</sub>** is the average annual value of the end of month values of the United States Consumer Price Inflation Index<sup>1</sup> over the twelve consecutive months prior to Contract Year *y*.

**USCPI<sub>by</sub>** is the value 236.677 which represents the average annual value of the end of month values of the United States Consumer Price Inflation Index<sup>1</sup> over the twelve consecutive months ending June 2015;

**MAER<sub>my</sub>** is the monthly average exchange rate (ZMK per USD) in Billing Period *m* of Contract Year *y*<sup>2</sup>

### 34.3 Deemed Energy Payment

ZESCO 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 Clause 12.1.1) in respect of the Net Energy that was available deemed to be delivered to ZESCO 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 (Deemed Energy Amount<sup>3</sup>). The Deemed Energy Payment shall be calculated as provided in Clause 34.4 below.

### 34.4 Calculation of the Deemed Energy Payment

The Deemed Energy Payment shall be calculated in the same manner as the Energy Payment in accordance with the following formula:

$$TEP_{my} = IFIT_{my} \times DEA_{my} + TCC_{my} + OTH_{my}$$

Where

**DEA<sub>my</sub>** is the Deemed Energy Amount in Billing Period *m* of Contract Year *y*

### 34.5 Base Feed In Tariff

The tariff for this Agreement shall be [●] USD/kWh with reference date of 1 July 2015 ("Base Feed In Tariff").

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<sup>1</sup> The Consumer Price Index for All Urban Consumers (CPI-U); U.S. City Average; All items, not seasonally adjusted as published by the Bureau of Labor Statistics

<sup>2</sup> As published by <http://www.oanda.com>

**35. SCHEDULE E (Metering)**

**35.1 Installation, Maintenance, Repair and Replacement of Meters**

- 35.1.1 Unless otherwise agreed between the Parties, the Seller shall install the Main Measuring System at or in close proximity to the Delivery Point for the purpose of measuring the Net Energy injected into the Grid System from the Power Plant. The location of the Main Measuring System shall be as shown in Connection Offer Letter.
- 35.1.2 The Main Measuring System shall record for each half-hour in which Net Energy is injected into the Grid System by the Seller, the amount of real electrical energy, measured in kWh.
- 35.1.3 ZESCO shall be entitled, at its sole risk and expense, to install and operate (or procure the installation and operation of) a Check Metering System, which shall be independent of the Main Measuring System, to provide independent comparisons and direct readings. The Check Measuring System shall not interfere with the use or operation of the Main Measuring System or the Power Plant.
- 35.1.4 Each Party shall ensure that once installed, or repaired or replaced (as the case may be), their respective measuring systems are each certified by a qualified meter certifier agreed to by the Parties within a reasonable time.

**35.2 Meter Test**

- 35.2.1 The Metering Equipment shall be tested:
  - 35.2.1.1. upon installation; or
  - 35.2.1.2. when the Seller or ZESCO reasonably requires and, in the absence of evidence of malfunction, annual testing shall be deemed reasonable; or
  - 35.2.1.3. when ZESCO's Check Metering System differs by more than 2.5% (Two and a half percent) from that recorded by the Seller's Main Measuring System; or
  - 35.2.1.4. when newly installed or following any repair; or
  - 35.2.1.5. at least once in every ten years, when the Metering Equipment shall be checked and calibrated against a standard instrument as per the Grid Code.
- 35.2.2 The cost of testing the Main Measuring System shall be borne by the Party requesting such test except when ZESCO requests a test and the test demonstrates that the Main Measuring System

was more than 2.5% (Two and a half percent) inaccurate in which case the Seller shall bear the cost.

### **35.3 Meter Reading**

- 35.3.1 The Seller shall carry out measurements on the last Business Day of each Billing Period using the Main Measuring System, and shall provide the results in writing to ZESCO within seven (7) days of such measurements. Such measurements shall be supplemented by such information as ZESCO may reasonably request including, but not limited to, a report showing all Scheduled Outages and Unscheduled Outages occurring during the relevant Billing Period.
- 35.3.2 A representative of the Seller shall perform a meter reading from the Main Measuring System and a representative of ZESCO shall be entitled to witness such meter reading for verification purposes.
- 35.3.3 If the Main Measuring System is faulty and metered data is available from a Check Metering System, the Parties may agree that the metered data from the Check Metering System shall be used to calculate the Energy Payment during the period of inaccuracy of the Main Measuring System.
- 35.3.4 If the Seller has invoiced ZESCO for payment of any Energy Payment calculated using metered data from a faulty Main Measuring System, the Seller shall recalculate the relevant Energy Payment. Any additional amount payable or refund due to ZESCO as a result of that recalculation shall be included as an adjustment in the Seller's invoice for the Month following the receipt of the correct metered data.

### **35.4 Metering and Reconciliation Agreement**

In the event that a metering and reconciliation agreement is required, the Parties shall meet, discuss and the terms of such an agreement.

**36. SCHEDULE F (Construction Program)**

[To be inserted]

### **37. SCHEDULE G (Testing and Commissioning)**

#### **37.1 Acceptance / Performance Test**

Prior to synchronization 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.

#### **37.2 Synchronization with and connection to the Grid System**

37.2.1 The Seller shall give ZESCO 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 synchronize the Power Plant to the Grid System.

37.2.2 Subject to Clause 37.2.1 above, the Power Plant may only be synchronized and/or connected by the Seller to the Grid System when it meets all the connection conditions prescribed in any Grid Code then in effect and otherwise meets all other legal requirements for synchronization to the Grid System and provided that:

37.2.2.1. 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;

37.2.2.2. the Grid 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

37.2.2.3. the Connection Works referred to in the Grid Connection Agreement have been completed and commissioned in accordance with the terms of the Grid Connection Agreement and the Grid Code.

37.2.3 The synchronization equipment shall be installed by the Seller at its generation facility of the Power Plant at its own cost. The Seller shall synchronize its system with the Grid System only after the approval of synchronization scheme is granted by the National Control Centre.

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

### **37.3 Testing and commissioning**

- 37.3.1 Following connection and/or synchronization, as the case may be, of the Power Plant with the Grid System as described in Clause 37.2 above (Synchronization with and connection to the Grid System) the Seller shall test and commission the Power Plant in accordance with the Grid Code, the Grid Connection Agreement, the standards of a Reasonable and Prudent Operator and the Construction Program, so as to cause the Commercial Operation Date to fall on or before the Target Commercial Operation Date.
- 37.3.2 The Seller shall be required to conduct the Power Project Acceptance Test for the purposes of, inter alia, achieving the Commercial Operation Date and determining the initial capacity of the Power Plant (and in this regard, the Power Project Acceptance Test shall serve as the dependable capacity Test for the Power Plant).
- 37.3.3 The Seller shall give ZESCO not less than ten (10) days' prior written notice of each of the Power Project Acceptance Tests, and ZESCO or its nominated representative shall be entitled to attend and witness the Power Project Acceptance Tests.
- 37.3.4 At all times from the Effective Date to the Commercial Operation Date (including during the conduct of the Power Project Acceptance Tests), ZESCO 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 ZESCO immediately prior to the Power Project Acceptance Tests.
- 37.3.5 Immediately following the Power Project Acceptance Tests, the Seller shall provide ZESCO 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.
- 37.3.6 If a Power Project Acceptance Test has been commenced and the Seller is prevented, hindered or delayed in completing such Power Project Acceptance Test, or any Power Project Acceptance Test is not duly completed, due in either case to a ZESCO Event of Default, ZESCO shall bear the reasonable costs directly incurred by the Seller in the performance of such prevented, hindered or delayed Power Project Acceptance Test.
- 37.3.7** The Seller shall notify ZESCO 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.

**38. SCHEDULE H (Tax Assumptions)**

(To be inserted by Seller)



**39. SCHEDULE I (Base Case Financial Model)**

(To be completed by Seller)

**40. SCHEDULE J (Monthly and Weekly Generation Forecast)**

The Generation Forecast (in KWh per hour) for calendar month: \_\_\_\_\_

Hour Starting	Day 1	Day 2	Day 3	Last Day
00:00				
01:00				
02:00				
03:00				
04:00				
05:00				
06:00				
07:00				
08:00				
09:00				
10:00				
11:00				
12:00				
13:00				
14:00				
15:00				
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