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[NAME OF POWER PURCHASER]

- and -

[NAME OF POWER SUPPLIER]

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**POWER PURCHASE AGREEMENT**

relating to  
the oil fuel fired power generation complex at  
[LOCATION]

DATED AS OF [DATE]

## ***AUTHORS' NOTES:***

1. *This “model” power purchase agreement (the “Agreement”) outlines the basic provisions commonly found in power purchase agreements in respect of international, private power projects. There are, of course, an infinite number of variations that the parties could utilize in drafting an actual agreement. Although we have, in some instances, supplied alternative language suggestions, we do not attempt to catalogue every alternative provision. Instead, this document should be viewed as an example that raises issues for discussion and can be used to assist in the preparation of country-specific agreements.*
2. *The text of the Agreement should be read in conjunction with the attached endnotes, which contain explanatory notes, comments and/or contractual language suggestions to aid the reader. In drafting an actual power purchase agreement, neither endnotes nor footnotes should be included.*
3. *Most privately-owned electric power projects will be financed through a combination of debt and equity, with the debt portion often structured on a project finance basis. Perhaps the most important factor as to whether or not the financial markets will view a given project as “financeable” is the power purchase agreement. Thus, in drafting this Agreement, we have attempted to cover all the key elements that developers, utilities and lenders typically will expect to be included in a well-structured purchase agreement (e.g., force majeure provisions, indemnity provisions, termination provisions, etc.) in some form or another. However, we emphasize that there are no right answers. While all power purchase agreements share certain characteristics, each power purchase agreement is heavily fact- and circumstance-specific and is generally the product of extensive negotiation.*
4. *We note that electric power systems in both emerging markets and developed countries are currently going through great changes. While the use of long-term power sales contracts is and will continue to be significant in many electric power sectors around the world, recently there has been a tremendous push towards the development of spot markets. Spot markets rely on competitive economic forces to set the price of electricity; electric power is dispatched based on daily or hourly bids, and generators with the lowest costs are dispatched first. Such a competitive market does not rely on long-term power purchase agreements to set the price of electric power.*
5. *In this Agreement, we have made a number of assumptions. Specifically, we have assumed that:*
  - a) *the generating facility will not be commissioned in stages (generating unit by generating unit) but, instead, will come on line as an integrated whole on its Commercial Operations Date;*

- b) *the power supplier will also be entering into an implementation agreement (“Implementation Agreement”) with the government of the Host Country (“Government”),<sup>1</sup> that Government will be guaranteeing Utility’s payment obligations, and that Utility is a Government-controlled entity; and*
- c) *the Agreement is in respect of a facility fired by fuel oil (as opposed to natural gas, coal, wood, etc.).*
6. *Nevertheless, we occasionally highlight in the text and endnotes of the Agreement ways in which the Agreement might differ if the conditions differ from our assumptions.*
7. *Schedule 1 sets forth the definitions of the capitalized terms used both in the text of the Agreement and in the endnotes to the Agreement. In an actual power purchase agreement (with no endnotes), fewer definitions will be required.*
8. *The other Schedules to the Agreement have not been included in this draft as these attachments are largely fact- and technology-specific. However, when appropriate in the text and in the endnotes, we do indicate relevant information that will likely be included in the Schedules.*

THIS POWER PURCHASE AGREEMENT (this “Agreement”) is made at [LOCATION] as of [DATE]

BETWEEN:

- (1) [NAME OF POWER PURCHASER] (“Utility”), a company duly incorporated under the Laws of Host Country and having its registered office at [LOCATION]; and
- (2) [NAME OF POWER SUPPLIER] (the “Company”), a company duly incorporated under the Laws of [COUNTRY OF INCORPORATION] whose registered office is located at [LOCATION].

Both Utility and the Company are herein referred to individually as a “Party” and collectively as the “Parties”.

WHEREAS:

- (A) the Company plans to design, finance, construct, own, operate and maintain a [BRIEFLY DESCRIBE PROJECT AND LOCATION OF PROJECT]; and
- (B) the Company wishes to sell to Utility, and Utility wishes to purchase from the Company, the capacity of such power generation facility and 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 benefits to be derived and the representations and warranties, conditions and promises herein contained, and intending to be legally bound hereby, the Company and Utility hereby agree as follows:

## **1. INTERPRETATION**

In this Agreement:

- 1.1 expressions defined in Schedule 1 shall bear the respective meanings set out therein;
- 1.2 the headings and paragraph numbering are for convenience only and shall be ignored in construing this Agreement;
- 1.3 the singular includes the plural and vice versa;
- 1.4 terms not herein defined shall have the meanings ordinarily ascribed thereto in the Oxford English Dictionary;
- 1.5 references to Articles, Sections and Schedules are, unless the context otherwise requires, references to Articles, Sections of, and Schedules to, this Agreement;
- 1.6 references to any agreement, enactment, ordinance or regulation includes any amendment thereof or any replacement in whole or in part;<sup>2</sup>
- 1.7 all references herein to time are to Host Country time;
- 1.8 words importing any gender include the other gender;
- 1.9 the words “include,” “includes” and “including” are not limiting; and
- 1.10 the words “hereof,” “herein,” and “hereunder” and words of similar import when used in this Agreement shall refer to this Agreement as a whole and not to any particular provision of this Agreement.<sup>3</sup>

## **2. SALE AND PURCHASE OF ENERGY AND CAPACITY**

Subject to and in accordance with the terms of this Agreement, the Company shall make available and sell to Utility, and Utility shall purchase from the Company for the consideration described in Article 9, the Dependable Capacity and Net Energy Output of the Complex from and after the Commercial Operations Date.<sup>4</sup>

### 3. **TERM**

#### 3.1 **Initial Term**

The initial term of this Agreement shall commence on the date hereof and shall end [\_\_\_\_\_] years<sup>5</sup> from the Commercial Operations Date unless it is earlier terminated pursuant to the provisions of this Agreement. The termination of this Agreement shall be without prejudice to all rights and obligations of the Parties accrued under this Agreement prior to such termination.<sup>6</sup>

#### 3.2 **Renewal Term**

This Agreement may be extended for an additional period on terms mutually agreeable to the Company and Utility.<sup>7</sup>

### 4. **PRE-OPERATION PERIOD**

#### 4.1 **Permits and Licenses**

The Company, at its sole cost and expense, shall: (a) acquire and maintain in effect all Consents required by all Public Sector Entities with jurisdiction over the Company and/or the Complex in order to enable it to perform its obligations under this Agreement; (b) give all required notices and allow all required inspections under all Consents obtained by it in connection with the Complex; and (c) pay all prescribed fees in connection with such Consents.<sup>8</sup>

#### 4.2 **Submissions by the Company**

The Company shall submit to Utility the documents listed below on or before the dates specified (“PPA Original Documents”) In addition, the Company shall provide to Utility any documents supplementing or otherwise amending a PPA Original Document in a timely manner as such information is amended, modified or superseded (all such supplements and amendments, “PPA Amended Documents”). Prior to executing (a) any PPA Original Document or (b) any PPA Amended Document [that is material to the interests of Utility under this Agreement],<sup>9</sup> the Company shall obtain the written approval of Utility[, which approval shall not be unreasonably withheld or delayed]; provided, however, that any approval requested from Utility for a PPA Amended Document which is to be executed or otherwise created after Financial Closing shall be deemed given unless refused within [\_\_\_\_\_] Days after notice of the request for such approval, or, in the case of Change Orders, within [\_\_\_\_\_] Days after notice of the request for such approval.<sup>10</sup>

- 4.2.1 As soon as available, but no later than Financial Closing, a copy of the Implementation Agreement as executed, with any amendments thereto;
- 4.2.2 On or before Financial Closing, a copy of the Construction Contract as executed, including all schedules, plans and specifications attached thereto, plus all amendments executed as of that date;<sup>11</sup>
- 4.2.3 On or before Financial Closing, copies of all Consents and other governmental authorizations that have been issued to the Company to date for the design, financing, construction, ownership, operation and maintenance of the Complex, and not later than [\_\_\_\_\_] Days prior to the Commercial Operations Date, (a) evidence demonstrating that the Company has obtained all of the [material] Consents then required to be obtained for the ownership, operation and maintenance of, and the supply of power from, the Complex together with (b) a list identifying Consents not yet required to be obtained for the operation and maintenance of, and the supply of power from, the Complex, together with a plan reasonably acceptable to Utility for obtaining such Consents and an estimate of the time within which such Consents will be obtained;
- 4.2.4 On or before Financial Closing, a copy of the Company's proposed plan for the operations and maintenance of the Complex or an O&M Contract entered into by the Company, together with all amendments executed as of that date;<sup>12</sup>
- 4.2.5 On or before Financial Closing, executed copies of all Fuel Supply Agreements, Fuel transportation agreements, backup fuel agreements and other commitments for the supply and transportation of Fuel and backup fuel;<sup>13</sup>
- 4.2.6 As soon as available, copies of any contracts executed with Direct Contractors;
- 4.2.7 As soon as available, but no later than the Financial Closing, the Company shall provide Utility with any environmental assessment or study relating to the Complex that has been provided to the Company or to its Lenders;
- 4.2.8 At least [\_\_\_\_\_] Days prior to Commencement of Construction, evidence demonstrating that the Company has, or the Construction Contractor or other Contractors have, obtained all

material Consents that are necessary for the Commencement of Construction;

- 4.2.9 Beginning within [\_\_\_\_\_] Days after Financial Closing and ending on the Commercial Operations Date, (a) monthly progress reports substantially in the form set forth in Schedule 7 (or such other form as may be agreed to by the Parties), (b) such other reports as are submitted to the Company by the Technical Agent and (c) reports, when and as the Company becomes aware, of any new condition or event which will have a material and adverse effect on the timely completion of the Complex;
- 4.2.10 As soon as available but not later than [\_\_\_\_\_] Days after Financial Closing, general arrangement drawings for the construction of the Complex;
- 4.2.11 Not later than [\_\_\_\_\_] Days prior to the scheduled commencement of testing and Commissioning, a start-up and test schedule for the Complex;
- 4.2.12 Not later than [\_\_\_\_\_] Days prior to the Required Commercial Operations Date, a copy of draft written operating procedures to serve as the basis for the written operating procedures to be jointly developed pursuant to Section 4.3.1;
- 4.2.13 As soon as available but not later than the Commercial Operations Date, final design drawings for the construction of the Complex;
- 4.2.14 As soon as available but not later than [\_\_\_\_\_] Days after the Commercial Operations Date, copies of all test results for tests performed on the Complex;
- 4.2.15 As soon as available but not later than the Commercial Operations Date, a certificate signed by the Technical Agent stating that he has supervised the design and construction of the Complex in accordance with Prudent Utility Practice and that, to the best of his knowledge, such design and construction has been completed consistent with the terms of this Agreement (including the Minimum Functional Specifications), the Implementation Agreement, the Fuel Supply Agreement, the Construction Contract, the final design drawings and Prudent Utility Practice, and that the Complex will have a useful life of at least [\_\_\_\_\_] years;

4.2.16 Not later than [\_\_\_\_\_] Days following the Commercial Operations Date, (a) for the major items of plant incorporated into the Complex, copies as received by the Company under the Construction Contract of all the manufacturers' specifications and manufacturers' operation manuals, and (b) a certificate of the Technical Agent attesting to the fact that all equipment is new and unused; and

4.2.17 As soon as available but not later than [\_\_\_\_\_] months after the Commercial Operations Date, as-built drawings and complete specifications for the Complex.

Neither the receipt nor approval of any PPA Original Document or PPA Amended Document shall (a) relieve the Company of any liability, obligation or responsibility under this Agreement or the Implementation Agreement resulting from a breach by the Company or its Contractors of this Agreement or the Implementation Agreement, or (b) be construed as an endorsement by Utility of the design, financing, construction, ownership, operation or maintenance of the Complex nor as a warranty by Utility of the safety, durability or reliability thereof.<sup>14</sup>

#### 4.3 Operating Procedures

The Company and Utility shall jointly develop written operating procedures for the Complex no later than [\_\_\_\_\_] Days prior to the Required Commercial Operations Date. Such operating procedures shall be based on the designs of the Complex, the Interconnection Facilities and the Utility Grid System and on the draft procedures provided by the Company pursuant to Section 4.2.12; shall be consistent with the Minimum Functional Specifications; and shall deal with all operational interfaces between Utility and the Company, including method of day-to-day communication, key personnel lists, clearances and switching practices, outage scheduling, capacity and energy reporting, operations log and Reactive Power support. The written operating procedures shall be subject to the prior written consent of Utility[, which consent shall not be unreasonably withheld or delayed].

#### 4.4 Energy Before Commissioning<sup>15</sup>

4.4.1 Upon the Company's request, Utility shall provide energy for construction, testing, Commissioning, Start-Ups and Emergencies, subject to availability and Utility's ability to deliver such energy to the Complex. The Company shall pay Utility for such energy in accordance with Utility's then prevailing tariff rate for industrial facilities. Utility is hereby authorized to set-off the charges for such energy delivered by Utility to the Company pursuant to this Section 4.4.1 against any Energy Payments due and owing to the Company.

4.4.2 Prior to the Commercial Operations Date, Utility shall use reasonable efforts to accept all energy produced by the Complex during testing performed pursuant to the Construction Contract and Commissioning, and Utility shall pay the Company for such energy at the rate set forth in Section 9.2.1.<sup>16</sup>

#### 4.5 Inspection

Utility and/or its representatives shall have the right to observe the progress of the construction of the Complex and the testing and Commissioning of the Complex in accordance with Schedule 4. The Company shall comply with all reasonable requests of Utility for, and assist in arranging, any such observation visits to the Complex. Such visits to the Complex shall not be construed as an endorsement by Utility of the design thereof nor as a warranty by Utility of the safety, durability or reliability of the Complex.<sup>17</sup>

#### 4.6 Access to Site

Upon reasonable prior notice from the Company and at reasonable times, Utility shall grant the Company reasonable access to any lands owned by Utility that are necessary for designing, financing, constructing, operating and maintaining the Complex.<sup>18</sup>

#### 4.7 General Covenants of the Company in respect of the Complex

The Company hereby covenants as follows:

4.7.1 during the term of this Agreement, the Company shall design, finance, construct, own, operate and maintain the Complex in accordance with (a) this Agreement, (b) the Minimum Functional Specifications set forth in Schedule 2, (c) sound engineering and construction practices and Prudent Utility Practice, (d) the operating procedures developed pursuant to Section 4.3, (e) the environmental guidelines and occupational health and safety standards of [Host Country],<sup>19</sup> (f) all applicable Consents and Laws and (g) such requirements as Utility may reasonably deem necessary in order for the Interconnection Facilities to be designed and constructed in accordance with sound engineering and construction practices and Prudent Utility Practice;

4.7.2 the Complex will be designed, constructed and completed (a) in a good and workmanlike manner, only with materials and equipment that are new, utility grade and suitable for their intended use; (b) in such a manner as to provide that the useful life of the Complex, with proper operation and maintenance, will be at least equal to

[\_\_\_\_\_] years; and (c) in accordance in all material respects with sound engineering and construction practices and Prudent Utility Practice;

4.7.3 the Company shall Commission the Complex on or before the Required Commercial Operations Date; and

4.7.4 During the term of this Agreement, the Company shall maintain the Site in a clean and presentable manner.<sup>20</sup>

## 5. **REPRESENTATIONS AND WARRANTIES OF THE COMPANY**<sup>21</sup>

The Company represents and warrants to Utility that:

- 5.1 the Company is duly incorporated, validly existing and has complied fully with all requirements of the [LOCAL COMPANIES ACT OR CORPORATE CODE] and all other applicable Laws of Host Country;
- 5.2 the Company has full power to carry on its business and to enter into, legally bind itself by, and perform its obligations under, this Agreement and the other agreements comprising the Security Package;
- 5.3 this Agreement has been duly authorized, executed, and delivered by the Company and constitutes its legal, valid and binding obligation;
- 5.4 the execution, delivery, and performance of this Agreement and each agreement comprising the Security Package does not, and will not, constitute a violation of (a) any statute, judgment, order, decree or regulation or rule of any court, governmental authority or arbitrator of competent jurisdiction applicable or relating to the Company, its assets or its businesses, or (b) the Company's [NAME OF PRIMARY ORGANIC DOCUMENTS, E.G., ARTICLES OF ASSOCIATION] or other organic documents or any indenture, contract or agreement to which it is a party or by which it or its property may be bound;
- 5.5 there are no outstanding judgments against the Company, and, to the best knowledge of the Company, no action, claim, suit or proceeding is pending or threatened against the Company before any court, governmental authority or arbitrator of competent jurisdiction that could reasonably be expected to affect materially and adversely the financial condition or operations of the Company or the ability of the Company to perform its obligations under this Agreement or any other agreement comprising the Security Package or which purports to affect the legality, validity or

enforceability of this Agreement or any other agreement comprising the Security Package;

- 5.6 the Company is not in default under any agreement to which it is a party or by which it or its property may be bound, nor in any default of any technical or financial obligation, which could have a material adverse effect on the ability of the Company to perform its obligations under this Agreement or any other agreement comprising the Security Package; and
- 5.7 no information given by the Company in relation to this Agreement or any agreement in the Security Package or in the proposal submitted by the Company to Utility contains any misstatement of fact or omits to state a fact which would be materially adverse to the enforcement of the rights and remedies of Utility or which would be necessary to make any statement, representation or warranty contained herein or therein true and correct in all material respects.<sup>22</sup>

## **6. OPERATION AND MAINTENANCE OF THE COMPLEX**

### **6.1 Dispatch by Utility**

6.1.1 Subject to the Minimum Functional Specifications and approved Scheduled Outages and Maintenance Outages, Utility shall have the right to Dispatch the Complex in accordance with the provisions of this Section 6.1. From and after the Commercial Operations Date, Utility may Dispatch the Complex up to its Dependable Capacity.

6.1.2 At least [\_\_\_\_\_] Days prior to the [\_\_\_\_\_] Day of each Month commencing with the Month in which the Commercial Operations Date is expected to occur, Utility shall provide to the Company a projected load profile indicating the anticipated operating level for the Complex for each hour of the forthcoming Month. Utility shall use its reasonable endeavors to revise said monthly projected load profile, if necessary, by [TIME] each [DAY OF THE WEEK]. The Parties agree and acknowledge that the actual Dispatch schedule may be substantially different from the projected load profiles provided previously. It is expressly recognized that Utility is not obligated to request any Net Energy Output.<sup>23</sup>

## 6.2 Operation by the Company

- 6.2.1 Provided such Dispatch is in accordance with the terms of this Agreement, from and after the Commercial Operations Date, Company shall control and operate the Complex in accordance with Utility's Dispatch instructions.<sup>24</sup>
- 6.2.2 Commencing with the Commercial Operations Date, the Company shall keep the Control Center informed as to the Declared Available Capacity of the Complex and will immediately advise the Control Center of any change in such Declared Available Capacity.
- 6.2.3 Subject to the Minimum Functional Specifications, the Company shall operate and maintain the Complex in such a manner so as not to have an adverse effect on Utility's voltage level, voltage waveform or transmission and distribution system.
- 6.2.4 The Company shall, in accordance with the Minimum Functional Specifications, install protective relays within the Complex and/or the Interconnection Facilities having ratings and characteristics approved by Utility, and, subject to the Minimum Functional Specifications, shall maintain the settings of all such relays at the levels acceptable to Utility. The Company shall not change the settings of such relays without the prior written consent of Utility[, which consent shall not be unreasonably withheld or delayed].

## 6.3 Scheduled Outages

- 6.3.1 At least [\_\_\_\_\_] Days prior to the Scheduled Commercial Operations Date, the Company shall submit to Utility its desired schedule of Scheduled Outage periods for the remainder of the Year in which the Scheduled Commercial Operations Date occurs. Thereafter, by [DATE] of each Year after the Year in which the Scheduled Commercial Operation Date occurs, the Company shall submit to Utility its desired schedule of Scheduled Outage periods for the following Year.
- 6.3.2 At least [\_\_\_\_\_] Days prior to the Scheduled Commercial Operations Date and [\_\_\_\_\_] Months prior to the commencement of each Year after the Year in which the Scheduled Commercial Operation Date occurs, Utility shall notify the Company in writing whether the requested Scheduled Outage periods are acceptable. If Utility cannot accept any of the

requested Scheduled Outage periods, Utility shall advise the Company of a period when Utility determines such unacceptable Scheduled Outage period can be rescheduled. Such rescheduled period shall be as close as reasonably practicable to the requested period, shall comply with the Minimum Functional Specifications, and shall be of equal duration as the requested period. The Company shall conduct Scheduled Outages only during periods agreed to in writing by Utility as aforesaid.<sup>25</sup>

6.3.3 Commencing with the Commercial Operations Date, the Company may not schedule more than a total of [\_\_\_\_\_] Complex Hours of Scheduled Outages during any Operating Year.<sup>26</sup>

6.3.4 Utility may, upon [\_\_\_\_\_] Days prior written notice, require the Company to reschedule a Scheduled Outage; provided, however, that Utility shall not request that such Scheduled Outage be rescheduled in a manner or time outside the Minimum Functional Specifications.<sup>27</sup>

6.3.5 Utility shall use its reasonable endeavors to coordinate its maintenance program for the Interconnection Facilities with the approved Scheduled Outages so as to minimize any disruption to the operation of the Complex.

#### 6.4 Maintenance Outages

When the circumstances warrant a Maintenance Outage, the Company may advise Utility of such circumstances and of the commencement and estimated duration of the Maintenance Outage. Utility shall grant the Company the right to conduct such Maintenance Outage at a time reasonably acceptable to Utility.

#### 6.5 Emergencies

6.5.1 Utility and the Company shall jointly establish plans for operating the Complex during an Emergency. Such plans shall include recovery from a local or widespread electrical blackout and voltage reduction in order to effect load curtailment. The Company shall, within the Minimum Functional Specifications, comply with such Emergency procedures. Upon Utility's request, the Company shall make technical references available to Utility concerning Start-Up times, black-start capabilities, and minimum load-carrying ability.

6.5.2 During an Emergency and if requested in Dispatch instructions from Utility, the Company shall supply such power as the Complex

thereafter is able to generate within the Minimum Functional Specifications.<sup>28</sup> If the Complex has a Scheduled Outage or a Maintenance Outage and such Scheduled Outage or Maintenance Outage occurs or would occur coincident with an Emergency, the Company shall use its reasonable efforts to reschedule the Scheduled Outage or Maintenance Outage or, if the Scheduled Outage or Maintenance Outage has begun, to expedite the completion of the work to restore power supply as soon as possible.

#### 6.6 Cessation of Operation or Abandonment by the Company

Notwithstanding any other provision of this Agreement, if the Company shall have ceased to operate the Complex for [\_\_\_\_\_] consecutive hours<sup>29</sup> without the prior written consent of Utility, other than because of (a) an event of Force Majeure, (b) a Forced Outage, Scheduled Outage or Maintenance Outage, (c) a breach by Utility of this Agreement, or (d) Dispatch instructions from Utility, then Utility shall be entitled to enter the Site and operate the Complex using the same operating standards which it uses to operate its own generating facilities until the Company demonstrates to the reasonable satisfaction of Utility that it can and will resume normal operations of the Complex. During any period that Utility shall operate the Complex pursuant to this Section, the Company shall be paid only the debt service element of the Capacity Payment and shall not be entitled to any other Capacity Payments or Energy Payments.<sup>30</sup> Notwithstanding the provisions of Section 12.2, Utility shall only indemnify and hold the Company harmless from any loss or damage to the Complex for losses, claims, damages or liabilities incurred, suffered or sustained by the Company by reason of Utility's negligence or willful misconduct in the operation of the Complex during such period, and then only to the extent that such loss or damage is not covered by insurance.<sup>31</sup>

#### 6.7 Fuel Supply

Throughout the term of this Agreement, the Company shall:

- 6.7.1 obtain and maintain a reliable supply of Fuel of quality and in quantity sufficient to generate the Dependable Capacity and Net Energy Output requirements hereunder;<sup>32</sup>
- 6.7.2 on or before the Scheduled Commercial Operation Date and from time to time thereafter, provide to Utility for its prior written approval, [which approval shall not be unreasonably withheld or delayed,] all Fuel Supply Agreements, Fuel transportation agreements, backup fuel agreements and other commitments for the supply and transportation of Fuel and backup fuel, and any [material] amendments to any of these documents; and

6.7.3 obtain and maintain at least a [\_\_\_\_\_] Day supply of Fuel on Site at all times.<sup>33</sup>

#### 6.8 Employment of Qualified Personnel

The Company shall only employ personnel (management, supervisory and otherwise) who are qualified and experienced for operating and monitoring the Complex and for coordinating operations of the Complex with the Utility Grid System. The Company shall ensure that such personnel are on duty at the Complex at all times, twenty-four (24) hours a Day and seven (7) Days a Week commencing with the date on which electrical energy is first generated by the Complex.<sup>34</sup>

#### 6.9 Operating Committee Membership and Duties

6.9.1 On or before [\_\_\_\_\_] Months prior to the Scheduled Commercial Operations Date, the Parties shall establish an Operating Committee comprising [\_\_\_\_\_] members. Each Party shall designate [HALF] members to represent it on the Operating Committee, and either Party may remove or replace any of its Operating Committee members at any time upon notice to the other Party. The Operating Committee shall develop procedures for the holding of meetings, the keeping of minutes of meetings and the appointment and operation of sub-committees. The chairmanship of the Operating Committee shall rotate each six (6) Months between the Parties and the Parties agree that the first chairman shall be nominated by Utility. Decisions of the Operating Committee shall require the approval of a majority of members of the Operating Committee.

6.9.2 The Operating Committee shall be responsible for developing the operating procedures to be developed pursuant to Section 4.3 (and any subsequent revisions thereto); for approving procedures for the Commissioning of the Complex pursuant to Article 10 and Schedule 4; for establishing other procedures relating to the interaction of the Complex, the Metering System, the Interconnection Facilities and the Utility Grid System; and, where appropriate, for proposing solutions to other issues and attempting to resolve Disputes concerning the operation, maintenance and testing of the Complex. These matters shall include:

- (a) the coordination of the respective programs and procedures of the Parties for the construction, commissioning and operation of the Interconnection Facilities, the Metering System

and the Complex, and agreement where necessary upon the respective commissioning procedures;

- (b) the discussion of the steps to be taken on the occurrence of any Force Majeure, or the shutdown or reduction in capacity for any other reason of the Interconnection Facilities or the Complex;
- (c) the coordination of Scheduled Outages;
- (d) safety matters affecting the Complex, the Parties or their Contractors;
- (e) clarification of Emergency plans developed pursuant to Section 6.5.1 for recovery from a local or widespread electrical blackout;
- (f) review and revision, subject to Utility approval, of protection schemes; and
- (g) any other matter mutually agreed to by the Parties.

6.9.3 The Parties shall instruct their representatives on the Operating Committee to act in good faith in dealing with matters considered by the Operating Committee. The Parties shall consider and use reasonable efforts to incorporate decisions of the Operating Committee in the operation and maintenance of the Complex and the Interconnection Facilities. The Operating Committee on its own shall not (a) override or waive any provisions of this Agreement or (b) amend or modify any provisions of this Agreement.

## 6.10 Inspections and Records

6.10.1 Utility shall have the right to visit and observe the Complex and/or the operation thereof upon reasonable advance notice to the Company. Such visits and observation shall not be construed as an endorsement by Utility of the design of the Complex nor as a warranty by Utility of the safety, durability or reliability thereof.

6.10.2 Each Party shall keep complete and accurate records and all other data required by each of them for the purposes of proper

administration of this Agreement. Among other records and data, the Company shall maintain an accurate and up-to-date operating log in a format reasonably acceptable to Utility which log shall include records of:

- (a) real and Reactive Power production for each clock [hour/half-hour], frequency and [ ] kV bus voltage at all times;
- (b) changes in operating status, Scheduled Outages, Maintenance Outages and Forced Outages;
- (c) any unusual conditions found during inspections; and
- (d) other matters agreed to by the Operating Committee.

Either Party shall have the right, upon reasonable prior written notice to the other Party, to examine and/or make copies of the records and data of the other Party relating to this Agreement at any time during normal office hours during the period such records and data are required to be maintained. All such records shall be maintained for a minimum of [ ] Months after the creation of such record or data and for any additional length of time required by regulatory agencies with jurisdiction over the Parties. Upon expiration of such [ ] Month period, neither Party shall dispose of or destroy any such records without [ ] Days prior written notice (generally describing the records or data to be destroyed or disposed of) to the other Party, and the Party receiving such notice may receive such records in lieu of such disposal or destruction by giving the notifying Party notice [ ] Days prior to the expiration of the [ ] Day period.<sup>35</sup>

## 6.11 Periodic Reports

6.11.1 The Company shall, as soon as available but in any event within [ ] Days after the end of each Financial Year, furnish to Utility: (a) [ ] copies of its complete financial statement for such Financial Year (which are in agreement with its books of accounts and prepared in accordance with accounting principles which are generally accepted in Host Country and consistently applied), together with an audited report thereon, all in accordance with the requirements of the [LOCAL COMPANIES ACT OR CORPORATE CODE]; (b) a copy of any management letter or other communication sent by the auditors to the Company or to its management in relation to the Company's financial,

accounting and other systems, management and accounts; (c) a report by the auditors certifying that, based on its said financial statements, the Company was in compliance with its financial obligations under the Loan Documents as of the end of the relevant Financial Year or, as the case may be, detailing any non-compliance. In addition, the Company shall authorize its auditors (whose fees and expenses shall be for the account of the Company) to communicate directly with Utility at any time regarding the Company's accounts and operations and shall furnish to Utility a copy of such authorization.

6.11.2 The Company shall, as soon as available but in any event within [\_\_\_\_\_] Days after the end of each [\_\_\_\_\_] Month period of each Financial Year, furnish to Utility: (a) [\_\_\_\_\_] copies of the Company's complete financial statements for such [\_\_\_\_\_] Month period, all in accordance with accounting principles which are generally accepted in Host Country and consistently applied, and, if requested by Utility, certified by an officer of the Company; and (b) a report on any factors materially and adversely affecting or which might materially and adversely affect the Company's business and operations or its financial condition.

## 7. **INTERCONNECTION**

### 7.1 **Utility Responsibilities**

7.1.1 Utility shall design, construct, install, commission, operate and maintain the Interconnection Facilities (excluding the equipment referred to in Section 8.1.2) in accordance with the terms of this Agreement and Schedule 3, and Utility shall own all such Interconnection Facilities.

7.1.2 Upon completion of the Interconnection Facilities described in Section 7.1.1, Utility shall test such Interconnection Facilities in accordance with the procedures set forth in Schedule 4.

7.1.3 Utility shall complete construction of the Interconnection Facilities [\_\_\_\_\_] Days prior to the Scheduled Commercial Operations Date; provided, however, that such date shall be extended day-for-day in the event that the monthly progress reports of the Company and/or the construction schedule for the Complex,

as revised from time to time, projects a delay in the Scheduled Commercial Operations Date.<sup>36</sup>

7.1.4 If Utility fails to complete the Interconnection Facilities by the date specified in Section 7.1.3, the Required Commercial Operations Date shall be extended day-for-day for each Day that the Interconnection Facilities are delayed beyond that date, and the Company shall be entitled to no other damages or relief therefor except as provided in Section 7.3.

## 7.2 Company Responsibilities

7.2.1 The Company shall permit Utility such access to the Complex as Utility shall require for the design, construction, installation, commissioning, operation and maintenance of the Interconnection Facilities, and the Company shall cooperate with Utility in the design, construction, installation, commissioning, operation and maintenance and testing thereof.<sup>37</sup>

7.2.2 The Company shall be responsible for designing, constructing, installing, commissioning, operating and maintaining all auxiliary and interconnecting equipment on the Company's side of the Interconnection Point, and the Company shall own all such auxiliary and interconnection equipment.

## 7.3 Delay in Completion of Interconnection Facilities

7.3.1 If Utility has not completed the Interconnection Facilities by the date specified in Section 7.1.3 or such later date as may be determined by the Parties in accordance with this Agreement, and (b) the Technical Agent witnesses the [no-load] tests specified in Section [\_\_\_\_\_] of Schedule 4 and, in his reasonable judgment, certifies on the day of the [no-load] tests that the Complex has satisfied the requirements specified in Section [\_\_\_\_\_] of Schedule 4, then Utility shall pay to the Company as liquidated damages [AMOUNT], [as adjusted from time to time in accordance with Schedule 6,] for each Day on which the Interconnection Facilities are not completed after the date specified in Section 7.1.3 or such later date as determined by the Parties in accordance with this Agreement. Notwithstanding any other provision of this Section 7.3.1, the cumulative amount of the liquidated damages payable to the Company under this Section 7.3.1 shall not exceed a cumulative amount equivalent to [AMOUNT].<sup>38</sup>

7.3.2 When Utility completes the Interconnection Facilities, an authorized representative of Utility shall certify in writing to the Company, that the Interconnection Facilities have been completed in accordance with the requirements of this Agreement and are ready to begin receiving electricity. Utility shall promptly provide to the Company copies of the results of all tests and procedures (and supporting data) conducted by or for Utility in connection with the construction, completion and testing of the Interconnection Facilities, which results shall be certified by an authorized representative of Utility as complete and correct. In addition, if Utility has contracted with a third party contractor for the construction, completion or testing of the Interconnection Facilities, Utility shall promptly furnish to the Company copies of any of such contractor's completion certificate(s) and any of Utility's acceptance certificate(s) as may be issued in respect of such construction, completion and testing. Commencing with the date on which Utility provides the Company with the certificates and other documents set forth in this Section 7.3.2, Utility shall bear no further liability for liquidated damages under Section 7.3.1, and the Company shall proceed promptly with testing and Commissioning in accordance with Article 10 and Schedule 4.<sup>39</sup>

#### 7.4 Protective Devices

7.4.1 Each Party shall notify the other Party in advance of any changes to either the Complex or the Utility Grid System that may affect the proper coordination of protective devices between the two systems.

7.4.2 All protective devices to be installed by the Company shall be approved in writing by Utility. Subject to giving the Company reasonable notice, Utility may require the Company to modify or expand the protective devices. Utility shall reimburse the Company for the reasonable costs of such modification or expansion.

#### 7.5 Testing of Interconnection Facilities

The Parties shall cooperate in testing the Interconnection Facilities in accordance with Schedule 3 and the schedule developed by the Operating Committee (but in no event later than the time provided in Section 7.1.3) and at such other times thereafter as either Party may reasonably require. Each Party shall bear its own costs in connection with any such testing.

## 8. METERING AND TELECOMMUNICATIONS

### 8.1 Ownership of Metering Equipment

8.1.1 Utility, at its expense, shall own, procure, operate and maintain the Metering System in accordance with Schedule 5.<sup>40</sup>

8.1.2 The Company, at its expense shall design, finance, construct, install, own, operate and maintain meters and metering devices for backup purposes pursuant to Schedule 5 (“Backup Metering System”) in addition to the Metering System.<sup>41</sup>

### 8.2 Installation of Metering System

The Company shall install the Metering System on the Site, and Utility shall reimburse the Company for all reasonable expenses incurred by the Company for the installation thereof. Utility shall provide the Metering System ready to be installed and such installation instructions from Utility in writing on a timely basis as may be required to allow the Company to install such equipment by the date required for the completion of the Interconnection Facilities under Section 7.3 and for Utility to test the Metering System under Section 8.3. Such installation shall be inspected by, and subject to the approval of, Utility[, which approval may not be unreasonably withheld or delayed].

### 8.3 Testing and Inspection of Metering System

Utility shall inspect and test at its own expense the Metering System and the Backup Metering System for accuracy in accordance with Schedule 5 by the date required for the completion of the Interconnection Facilities under Section 7.1.3, and thereafter at intervals of not less than [\_\_\_\_\_] Days. With respect to each testing of the Metering System or the Backup Metering System, Utility shall give the Company no less than [\_\_\_\_\_] hours advance notice of such testing, and the Company may have a representative present during any such testing, as well as during any inspection of the Metering System or Backup Metering System or adjustment thereof (but the test, inspection or adjustment may be taken if the Company has no representative present).<sup>42</sup>

### 8.4 Measurement of Net Energy Output and Dependable Capacity

8.4.1 Utility shall read the Metering System Monthly on the [\_\_\_\_\_] Business Day of each Month (or such other Day as may be agreed upon by the Operating Committee) for the purpose of measuring the Net Energy Output or Dependable Capacity.<sup>43</sup> Utility shall give the Company not less than [\_\_\_\_\_] hours notice of its intention to read the Metering System. The Company shall have the right to have a representative present during any such

reading (but the reading may be taken if the Company has no representative present). Utility shall take and record such reading together with a photographic record thereof, and Utility shall maintain a log of all such meter readings. In the event that the Metering System is not in service as a result of maintenance, repairs or testing, then the Backup Metering System shall be used during the period that the Metering System is not in service and the foregoing provisions of this Section 8.4.1 shall apply to the reading of the Backup Metering System.

8.4.2 When, as a result of any test pursuant to Section 8.3, the Metering System is found to be inaccurate by more than [\_\_\_\_\_] percent or is otherwise functioning improperly, then the correct amount of Net Energy Output and Dependable Capacity delivered to Utility for the actual period during which inaccurate measurements were made, if any, shall be determined as follows:

- (a) first, the readings of the Backup Metering System, if any, shall be utilized to calculate the correct amount of Net Energy Output and Dependable Capacity, unless a test of such Backup Metering System, as required by either Party, reveals that the Backup Metering System is inaccurate by more than [\_\_\_\_\_] percent or is otherwise functioning improperly;
- (b) if the Backup Metering System is not within the acceptable limits of accuracy or is otherwise functioning improperly, then the Company and Utility shall jointly prepare an estimate of the correct reading on the basis of all available information including deliveries of Net Energy Output during periods of similar operating conditions when the Metering System was registering accurately;
- (c) in the event that the Parties cannot agree on the actual period during which inaccurate measurements were made, the period during which measurements are to be adjusted shall be the shorter of (i) one-half of the period from the last previous test of the Metering System, or (ii) [\_\_\_\_\_] Days immediately preceding the

test which found the Metering System to be inaccurate; and

- (d) the difference between the previous payments by Utility for the period of inaccuracy or improper functioning and the recalculated amount shall be offset against or added to the next payment to the Company under this Agreement, as appropriate.

In the event that Utility and the Company fail to agree upon any estimate pursuant to this Section 8.4.2, then the matter may be referred by either Party for determination by an expert pursuant to Section 16.2.

## 8.5 Sealing, Repair and Replacement of Meters

8.5.1 The Metering System and the Backup Metering System shall comply with Schedule 5 and shall be jointly sealed. Such seals shall be broken only by Utility personnel in the presence of personnel from the Company when the Metering System or the Backup Metering System is to be inspected, tested or adjusted.

8.5.2 When any component of the Metering System is found to be outside acceptable limits of accuracy or otherwise not functioning properly, Utility shall forthwith repair, recalibrate or replace such component of the Metering System. Similarly, when any component of the Backup Metering System is found to be outside acceptable limits of accuracy or otherwise not functioning properly, the Company shall forthwith repair, recalibrate or replace such component of the Backup Metering System. Upon the completion of any examination, maintenance, repair or recalibration of, or replacement of any component in, the Metering System or the Backup Metering System, the relevant metering system shall be jointly sealed.

## 8.6 Telecommunications Equipment

The Company shall provide at its sole cost and expense the telecommunications equipment specified in Schedule 5. The selection and installation of items to be provided by the Company in accordance with this Section 8.6 shall be subject to the prior written approval of Utility.<sup>44</sup>

## 9. COMPENSATION, PAYMENT AND BILLING

### 9.1 Capacity Payment

9.1.1 Beginning on the Commercial Operations Date, Utility shall pay to the Company each Month, in arrears on the [\_\_\_\_\_] Business Day of each Month, an amount equal to the Capacity Payment in accordance with Section 9.6.<sup>45</sup> For each Month, the “Capacity Payment” shall be equal to the product of the Capacity Purchase Price and the Dependable Capacity, as each is in effect for such Month; provided, however, that if the Commercial Operations Date occurs on a date which is not the first Day of a Month, the Capacity Payment, for the period from the Commercial Operations Date through the last Day of the Month in which the Commercial Operations Date occurs, shall be the Capacity Payment for such Month multiplied by a fraction the numerator of which is the number of Days remaining in the Month from and including the Day immediately following the Commercial Operations Date and the denominator of which is the number of Days in such Month; and provided further, that if the last payment period of the term of this Agreement is not a full Month, the Capacity Payment, for such period through the last Day of the term of this Agreement, shall be the Capacity Payment for such Month multiplied by a fraction the numerator of which is the number of Days in such last payment period prior to the last Day of the term of this Agreement and the denominator of which is the number of Days in the Month in which the term of this Agreement ends<sup>46</sup>

9.1.2 The amount of the Capacity Purchase Price shall be as set forth in Schedule 6 and shall be adjusted from time to time in accordance with Schedule 6.<sup>47</sup>

### 9.2 Energy Payment

9.2.1 During the Commissioning of the Complex, in accordance with Section 9.6, Utility shall pay to the Company, in arrears on the [\_\_\_\_\_] Business Day of each Month, for each kWh of Energy Output delivered from the Complex to Utility during the preceding Month, an amount equal to the Company's actual fuel costs for generating such output.<sup>48</sup>

9.2.2 After the Commercial Operations Date, in accordance with Section 9.6, Utility shall pay to the Company, in arrears on the [\_\_\_\_\_] Business Day of each Month, the Energy Purchase Price for each

kWh of Net Energy Output delivered from the Complex to Utility during the preceding Month (each Monthly payment, an “Energy Payment”).

9.2.3 The amount of the Energy Purchase Price shall be as set forth in Schedule 6 and shall be adjusted from time to time in accordance with Schedule 6.<sup>49</sup>

### 9.3 Liquidated Damages<sup>50</sup>

#### 9.3.1 Delays in Commissioning

If the Complex shall not have been Commissioned on or before the Required Commercial Operations Date, then the Company shall pay to Utility [AMOUNT] for each Day by which the Complex is delayed beyond its Required Commercial Operations Date; provided, however, that the cumulative amount of such payments shall not exceed [AMOUNT]. These payments shall be liquidated damages for the detrimental impact of such delay upon Utility's generation planning.

#### 9.3.2 Shortfalls in Commissioned Dependable Capacity

If there is a Commissioned Shortfall, then the Company shall pay to Utility as liquidated damages for the detrimental impact upon Utility's generation planning [AMOUNT] per kW of such Commissioned Shortfall.

#### 9.3.3 On-Going Dependable Capacity Shortfalls

If after the Commercial Operations Date, there is an On-Going Dependable Capacity Shortfall, then the Company shall pay to Utility, as liquidated damages [AMOUNT] for each kW per month of such On-Going Dependable Capacity Shortfall until the next testing of Dependable Capacity which may be requested by the Company pursuant to Article 10 and Schedule 4.<sup>51</sup>

#### 9.3.4 Dispatch Levels<sup>52</sup>

From and after the Commercial Operations Date, in the event that after [\_\_\_\_\_] identical Dispatch requests separated by a sufficient period of time for the Company to have complied with the first request based on ramp time schedules as provided in the Minimum Functional Specifications, the Company does not achieve the operating level requested by Utility pursuant to Section 6.1 within the time allowed by the Minimum Functional Specifications, within a tolerance of plus or minus [\_\_\_\_\_] percent, then the Company shall pay to

Utility, as liquidated damages [AMOUNT] per kWh for each kWh outside the tolerance; provided, however, that Utility shall not be entitled to liquidated damages pursuant to this Section 9.3.4 if the requested operating level cannot be achieved within the Minimum Functional Specifications or is above the Declared Available Capacity of the Complex (as adjusted by Forced Outages declared subsequent to such Dispatch requests).

#### 9.3.5 Adjustment

The amounts of all of the liquidated damages set forth in Section 9.3 shall be adjusted from time to time in accordance with Schedule 6.

#### 9.3.6 Waiver of Defenses

The Parties agree that Utility may be substantially damaged in amounts that may be difficult or impossible to determine in the event that the Complex or any part thereof (a) is not in service by the dates required, (b) is not capable of achieving and maintaining the expected Dependable Capacity, or (c) cannot achieve the designated operating levels. The Parties also agree that the Company may be substantially damaged in amounts that may be difficult or impossible to determine in the event that the Interconnection Facilities are not in service by the date required. Therefore, to the limited extent set out in this Agreement, the Parties have agreed on sums that the Parties agree are reasonable as liquidated damages. It is further understood that the payment of liquidated damages is in lieu of actual damages for the occurrences defined in the first two sentences of this Section 9.3.6, and that the payment of liquidated damages under Sections 7.3 and 9.3.1 through 9.3.4 shall be the exclusive remedy of Utility or the Company, as appropriate, for such occurrences unless and until (a) the Company has committed a Company Event of Default within the meaning of Section 15.1.14 in the case of liquidated damages payable to Utility and (b) Utility has committed a Utility Event of Default within the meaning of Section 15.2.3 in the case of liquidated damages payable to the Company. The Company and Utility hereby waive any defense as to the validity of any liquidated damages in this Agreement on the grounds that such liquidated damages are void as penalties.

### 9.4 Security<sup>53</sup>

#### 9.4.1 Construction Security

On or before Financial Closing, the Company shall provide to Utility security (the “Construction Security”) in the amount of [AMOUNT] to ensure completion of the Complex by the Required Commercial

Operations Date.<sup>54</sup> The Construction Security shall be an unconditional and irrevocable direct pay letter of credit issued by a bank acceptable to Utility in form and substance satisfactory to Utility.<sup>55</sup> The Construction Security and any interest accrued thereon may be applied to the payment of liquidated damages or other Damages and accrued interest thereon as set forth in Section 9.5. There shall be no discontinuity between the expiration of the Construction Security and the effectiveness of the Operations Security, and the Construction Security shall be returned to the Company promptly following delivery to Utility of the Operations Security and the occurrence of the effective date of the Operations Security.

#### 9.4.2 Operations Security

- (a) On the Commercial Operations Date, the Company shall provide to Utility security (the “Operations Security”) in the amount of [AMOUNT] to ensure the completion and proper operation and maintenance of the Complex. The Operations Security shall be an unconditional and irrevocable direct pay letter of credit issued by a bank acceptable to Utility in form and substance satisfactory to Utility. The amount of the Operations Security shall be adjusted from time to time in accordance with Schedule 6.
- (b) The Operations Security may be applied to (i) the payment of liquidated damages and accrued interest thereon in accordance with Section 9.5; (ii) the repayment to Utility of amounts improperly drawn by the Company under the Letter of Credit, together with interest thereon as set forth in Section 9.7.4; and (iii) the payment of other Damages and interest that the Company shall be required to pay to Utility.
- (c) Except as expressly provided in this Agreement, the Company shall maintain the Operations Security at the level designated in subsection (a) at all times; provided, however, that the Company may have [\_\_\_\_\_] Days from the date Utility gives notice to the Company that it has retained or collected funds from the Operations Security pursuant to this Section

9.4.2 to replenish the Operations Security so as to return it to the required level, as escalated.

- (d) Upon termination of this Agreement, Utility shall be entitled to retain or collect, as the case may be, from the Operations Security any damages or moneys then due or reasonably expected to be due to Utility by the Company and shall pay or return to the Company the remainder of the Operations Security and accrued interest, if any. If, upon the termination of this Agreement, there shall be any dispute between the Company and Utility that has been referred to an expert for determination or is being arbitrated pursuant to the Agreement, then Utility shall be entitled to retain or collect, as the case may be, from the Operations Security, an amount equal to the damages or moneys that Utility, in its reasonable judgment, deems sufficient to satisfy any amount that may be due to Utility by reason of such dispute. Upon settlement or resolution of the dispute, Utility shall pay or return to the Company the remaining amount of Operations Security.<sup>56</sup>

#### 9.5 Payment of Liquidated Damages

Within [\_\_\_\_\_] Days after the end of each Month, Utility shall compute and advise the Company by written notice (a “Liquidated Damages Notice”) of the amount of liquidated damages due to Utility pursuant to this Agreement for the preceding Month. The Company shall pay to Utility, or direct Utility to apply the Construction Security or Operation Security (as the case may be) to, the amount of liquidated damages shown on the Liquidated Damages Notice within [\_\_\_\_\_] Days after delivery of the Liquidated Damages Notice (the “Liquidated Damages Due Date”), and interest shall accrue on any unpaid amount from the Liquidated Damages Due Date at the Default Rate. Unless the entire amount of liquidated damages reflected on the Liquidated Damages Notice is paid to Utility by the Company, the amount of such liquidated damages plus accrued interest due to Utility shall be set off against amounts owed the Company by Utility on the next statement(s) submitted to the Company pursuant to Section 9.6.<sup>57</sup>

## 9.6 Payment and Billing

- 9.6.1 Within [\_\_\_\_\_] Days after the end of each Month, Utility shall prepare and deliver to the Company a statement reflecting amounts payable to each Party by the other Party pursuant to this Agreement.<sup>58</sup> Such statement shall include calculations, in reasonable detail, of such amounts owed to the Company for Capacity Payments, Energy Payments, [Supplemental Payments] and liquidated damages and amounts owed to Utility including liquidated damages, in accordance with this Agreement and the procedures determined by the Operating Committee. The statement shall be accompanied by any payment owed to the Company. Any payment which is not paid when due shall bear interest at the Default Rate.
- 9.6.2 If the Company shall dispute any portion of such statement, then the Company shall, within [\_\_\_\_\_] Days of the receipt of such statement, serve a notice on Utility indicating the amount of the dispute and the basis therefor (a “Dispute Notice”). The dispute shall be settled by mutual discussion and, if necessary, referral to an expert pursuant to Sections 16.1 and 16.2. If it is determined that Utility owes an amount of money to the Company, Utility shall, within [\_\_\_\_\_] Days after the receipt of such determination, pay such sum together with interest thereon at the Default Rate from the date Utility should have paid such sum to the Company.
- 9.6.3 At any time prior to [\_\_\_\_\_] Days after the end of a Year, or within such other period as permitted or required by applicable law, either Party may serve a Dispute Notice on the other Party that the amount of any statement submitted by Utility during the preceding Year is in dispute. Each Dispute Notice shall specify the statement concerned, the amount of the dispute and the basis therefor. The dispute shall be settled by mutual discussion and, if necessary, referral to an expert pursuant to Sections 16.1 and 16.2. Upon resolution of the dispute, the Party which is determined to owe money to the other Party shall immediately pay such sum to the other Party together with interest thereon at the Default Rate from the date such payment should have been made.

## 9.7 Letter of Credit<sup>59</sup>

- 9.7.1 Utility shall establish irrevocable, revolving Letters of Credit substantially in the form set forth in Schedule 9 with respect to

amounts payable by Utility to the Company pursuant to Sections 9.1 and 9.2. Each Letter of Credit shall remain in place for twelve (12) months.

- 9.7.2 The first such Letter of Credit shall be established on or before the Commercial Operations Date. Utility shall renew or replace this Letter of Credit and each succeeding Letter of Credit not less than [\_\_\_\_\_] Days prior to its expiration. Each such Letter of Credit shall be established in an amount necessary to meet [\_\_\_\_\_] Months' average projected Capacity Payments and Energy Payments [and Supplemental Payments], which amount shall be determined by Utility based upon (a) the estimated Dispatch requirements for the Complex notified to the Company by Utility pursuant to Section 6.1 and the operating procedures developed in accordance with Section 4.3 and (b) the estimated adjustments to be made to the Capacity Purchase Price and the Energy Purchase Price pursuant to Schedule 6 using index data available for the last preceding twelve Month period. As and when new index data becomes available or Utility's requirements of Net Energy Output [materially] change from its projections, either Party may request that the amount of the outstanding Letter of Credit be adjusted accordingly.
- 9.7.3 The Letter of Credit may be drawn on by the Company upon presentation to the bank of a copy of a statement delivered by Utility to the Company pursuant to Section 9.6 of this Agreement at least [\_\_\_\_\_] Days prior to such presentation to the bank together with a certificate signed by a duly authorized officer of the Company attesting to the fact that Utility has failed to pay all or part of the amount indicated on the statement. If Utility has not delivered a statement to the Company pursuant to Section 9.6 of this Agreement within [\_\_\_\_\_] Days after the end of any Month, then the Company may, in lieu of the statement and certificate referred to in the first sentence of this Section 9.7.3, submit to Utility a statement prepared by the Company in the manner described in Section 9.6 from meter readings taken by the Company. If Utility fails to pay all or part of the amount indicated on the Company's statement within [\_\_\_\_\_] Days after receipt of such statement, the Company may submit to the bank a copy of such statement, together with a certificate signed by a duly authorized officer of the Company attesting to the fact that (a) Utility has failed to prepare a statement for such Month, (b) the statement prepared by the Company is a true and correct statement

of amounts owed to the Company by Utility for Dependable Capacity and Net Energy Output delivered to Utility during the preceding Month, and (c) Utility has failed to pay all or part of the amount indicated on the statement.

- 9.7.4 In the event that the Company shall draw against a Letter of Credit and it shall later be determined that the Company was not entitled to do so, then the Company shall repay such amount to Utility, together with all costs and expenses incurred by Utility in connection with such drawing, plus interest on such amount and expenses from the date of payment at the Default Rate. Utility shall have the right to set-off such amounts owed to Utility by the Company against Capacity Payments and Energy Payments [and Supplemental Payments].

## **10. TESTING AND CAPACITY RATINGS**

### **10.1 Testing**

- 10.1.1 The Company shall carry out Commissioning of the Complex and testing of Dependable Capacity of the Complex thereafter at Utility's request in accordance with Schedule 4.<sup>60</sup> Utility shall be given prior written notice of any testing or Commissioning procedure in accordance with Schedule 4 and shall be entitled to have representatives present for the purpose of observing any such procedure (but such testing or Commissioning may be performed if Utility has no representative present).
- 10.1.2 If Commissioning of the Complex indicates that there will be a Commissioned Shortfall, the Company may request one additional test of Dependable Capacity to be conducted at the Company's expense in accordance with Schedule 4 within [\_\_\_\_\_] Days after the Complex has been Commissioned.<sup>61</sup> If such additional test is requested, then the Commercial Operations Date shall be delayed until such additional test is complete, and the AIDC shall be set in accordance with the additional test.
- 10.1.3 If any test after the Commercial Operations Date indicates that the Dependable Capacity has fallen below the AIDC, the Company may request one additional test of Dependable Capacity to be conducted within [\_\_\_\_\_] Days at the Company's expense in accordance with Schedule 4. Capacity Payments and liquidated damages provided in Section 9.3.3 will be based at all times on the most recent completed test of Dependable Capacity.

## 10.2 Notice of and Compliance with Testing Procedures

The Company shall carry out Commissioning of the Complex, testing the Dependable Capacity of the Complex at the Commercial Operations Date and testing of Dependable Capacity of the Complex thereafter in accordance with this Article 10 and Schedule 4. Utility shall use its reasonable efforts to comply promptly with all reasonable requests by the Company for assistance in carrying out such testing and Commissioning.

## 10.3 Test Results

The Company shall provide Utility with copies of the results of all tests performed pursuant to Schedule 4.

## 10.4 Nomination of Dependable Capacity

Upon completion of testing pursuant to Section 10.1 and Schedule 4, the Company shall notify Utility in writing as to the amount of Dependable Capacity available from the Complex.<sup>62</sup>

## 10.5 Disputes

In the event that a dispute arises between the Company and Utility regarding the testing of Dependable Capacity or the protection tests described in Schedule 4, such dispute shall be resolved by referral to an expert pursuant to Section 16.2.

# 11. INSURANCE

## 11.1 Insurance Coverage<sup>63</sup>

At all times during the term of this Agreement, the Company shall obtain and maintain at its own cost, or cause its Contractors to obtain and maintain, the following types of insurance covering the Complex:<sup>64</sup>

11.1.1 All Risks Marine Cargo insurance in an amount sufficient to cover the replacement cost of all plant and equipment shipped to and intended to become part of the Complex on a warehouse to warehouse basis and subject to deductibles of no more than [AMOUNT];

11.1.2 All Risks (Property Damage)/Operational insurance in an amount sufficient to cover the replacement cost of the Complex, including construction equipment and transit coverage for plant purchased within Host Country and not subject to the insurance described in Section 11.1.1 above and subject to deductibles of no more than [AMOUNT] for all other perils;

- 11.1.3 Employer Liability insurance complying with the Laws of Host Country or any other applicable jurisdiction and Employers' Liability Insurance with limits of at least [AMOUNT] per occurrence and subject to deductibles of no more than [AMOUNT];
- 11.1.4 Comprehensive or Commercial General Liability insurance with bodily injury and property damage limits of at least [AMOUNT] per occurrence and [AMOUNT] in the aggregate and subject to deductibles of no more than [AMOUNT]. Such insurance shall include specific coverage for contractual liability encompassing the indemnification provisions in Article 12, broad form property damage liability, personal injury liability, explosion and collapse hazard coverage, liability for pollution (both gradual and sudden and accidental) products/completed operations liability, and, where applicable, watercraft protection and indemnity liability;
- 11.1.5 Comprehensive Automobile Liability insurance with bodily injury and property damage combined single limits of at least [AMOUNT] per occurrence covering vehicles owned, hired or non-owned and subject to deductibles of no more than [AMOUNT]; and
- 11.1.6 Excess Umbrella Liability Insurance with a single limit of at least [AMOUNT] per occurrence in excess of the limits of insurance provided in Sections 11.1.3, 11.1.4 and 11.1.5 above and subject to deductibles of no more than [AMOUNT].

## 11.2 Endorsements

The Company shall cause its insurers to amend its Comprehensive Commercial General Liability and, if applicable, Umbrella or Excess Liability policies with the endorsement items set forth in Sections 11.2.1 through 11.2.5 below; and to amend the Company's Employer Liability and Auto Liability policies with the endorsement item set forth in Section 11.2.5 below:

- 11.2.1 Utility, its directors, officers, and employees are additional insureds under this policy;
- 11.2.2 This insurance is primary with respect to the interest of Utility, its directors, officers, and employees and any other insurance maintained by them is excess and not contributory with this insurance;

11.2.3 The following Cross Liability section is made a part of the policy:  
“In the event of claims being made by reason of (a) personal and/or bodily injuries suffered by any employee or employees of one insured hereunder for which another insured hereunder is or may be liable, or (b) damage to property belonging to any insured hereunder for which another insured is or may be liable, then this policy shall cover such insured against whom a claim is made or may be made in the same manner as if separate policies have been issued to each insured hereunder, except with respect to the limits of insurance. However, the inclusion of more than one injured will not operate to increase the limit of liability of the insureds hereunder beyond the limit of liability in this policy.”;

11.2.4 Insurer hereby waives all rights of subrogation against Utility, its officers, directors and employees; and

11.2.5 Notwithstanding any provision of the policy, this policy may not be canceled, renewed, or materially changed by the insurer without giving [\_\_\_\_\_] Days prior written notice to Utility. All other terms and conditions of the policy shall remain unchanged.<sup>65</sup>

### 11.3 Use of Proceeds of All Risk/Operational Insurance

The proceeds of any All Risks insurance obtained pursuant to Sections 11.1.1 and 11.1.2 shall, at the option of Utility and subject to the Lenders' rights, be applied to the repair of the Complex.

### 11.4 Certificates of Insurance

The Company shall cause its insurers or agents to provide Utility with certificates of insurance evidencing the policies and endorsements listed above. Failure by the Company to obtain the insurance coverage or certificates required by this Article 11 of insurance shall not in any way relieve or limit the Company's obligations or liabilities under any provision of this Agreement.<sup>66</sup>

### 11.5 Premia and Deductibles

The Company shall be solely responsible for the payment of all premia and deductibles under the policies of insurance maintained pursuant to this Article 11.

## 12. INDEMNIFICATION AND LIABILITY

### 12.1 Indemnity by the Company

In addition to the Company's obligations and Utility's remedies provided elsewhere in this Agreement, the Company will bear responsibility for loss of or damage to property, death or injury to person, and any other liabilities, damages, losses and reasonable costs and expenses (including reasonable legal fees and expert witness fees) (or any claim against Utility in respect thereof) suffered by Utility:

- 12.1.1 during the design, financing, construction, ownership, operation or maintenance of the Complex resulting from any negligent act or omission of, or willful misconduct of, the Company;
- 12.1.2 in connection with, arising out of, or resulting from, any breach of warranty, misrepresentation by the Company, or non-performance of any term, condition, covenant or obligation to be performed by the Company under this Agreement or any other agreement comprising the Security Package; and
- 12.1.3 in connection with any claim, proceeding or action brought against Utility under any applicable national or local environmental laws or regulations resulting from the Company's [lease/ownership] of the Site or the Company's ownership or operation of the Complex, including the discharge, dispersal, release, storage, treatment, generation, disposal or escape of pollutants or other toxic or hazardous substances from the Complex, the contamination of the soil, air, or water around the Site, or any pollution abatement, replacement, removal, or other decontamination or monitoring obligations with respect thereto.<sup>67</sup>

The Company will hold Utility fully indemnified in respect of the foregoing losses, damages, death, injuries, liabilities, costs and expenses; provided, however, that the Company's indemnities shall not extend to any loss, damage, death, injury, liability, costs or expenses (or any claim in respect thereof) to the extent that they were caused by any act or omission of Utility or the failure of Utility to take reasonable steps in mitigation thereof.

### 12.2 Indemnity by Utility

In addition to Utility's obligations and the Company's remedies provided elsewhere in this Agreement, Utility will bear responsibility for loss of or damage to property, death or injury to person, and any other liabilities, damages, losses and reasonable costs and

expenses (including reasonable legal fees and expert witness fees) (or any claim against the Company in respect thereof) suffered by the Company:

- 12.2.1 during the design, financing, construction, ownership, operation or maintenance of the Complex resulting from any negligent act or omission of, or willful misconduct of, Utility;
- 12.2.2 in connection with, arising out of, or resulting from, any misrepresentation by Utility or non-performance of any term, condition, covenant or obligation to be performed by Utility under this Agreement; and
- 12.2.3 in connection with any claim, proceeding or action brought against the Company under any applicable national or local environmental laws or regulations resulting from Utility's ownership or operation of the Interconnection Facilities or the Utility Grid System, including the discharge, dispersal, release, storage, treatment, generation, disposal or escape of pollutants or other toxic or hazardous substances from the Interconnection Facilities or the Utility Grid System, the contamination of the soil, air, or water around the Interconnection Facilities or the Utility Grid System, or any pollution abatement, replacement, removal, or other decontamination or monitoring obligations with respect thereto.

Utility will hold the Company fully indemnified in respect of the foregoing losses, damages, death, injuries, liabilities, costs and expenses; provided, however, that Utility's indemnities shall not extend to any loss, damage, death, injury, liability, cost or expense (or any claim in respect thereof) to the extent that it was caused by any act or omission of the Company or the failure of the Company to take reasonable steps in mitigation thereof.

### 12.3 Joint Negligence

In the event injury or damage results from the joint or concurrent negligent or intentional acts or omissions of the Parties, each Party shall be liable under this indemnification in proportion to its relative degree of fault.

### 12.4 No Indemnification for Fines and Penalties

Any fines or other penalties incurred by a Party for non-compliance with Laws of Host Country shall not be reimbursed by the other Party but shall be the sole responsibility of the non-complying Party. The non-complying party shall have the right, but not the obligation, to contest or appeal any fines it believes have been imposed in violation of the Laws of Host Country.

### 12.5 Notice of Proceedings

Each Party shall promptly notify the other Party of any claim or proceeding in respect of which, but for the provisions of Section 12.6, it is entitled to be indemnified under this Section. Such notice shall be given as soon as reasonably practicable after the relevant Party becomes aware of such claim or proceeding.

### 12.6 Basket Limitation

Neither Party shall be entitled to make any claim under this Article 12 until such time as all such claims by such Party exceed [AMOUNT] in the aggregate or until such claim if not made would be barred by the relevant statute of limitations, at which time all such claims of that Party may be made; provided, however, that, when such claims have been made, the same rule shall apply in respect of future claims. Notwithstanding the foregoing, any claims outstanding at the termination or expiration of this Agreement may be brought at that time.

### 12.7 Conduct of Proceedings

Each Party shall have the right, but not the obligation, to contest, defend and litigate (and to retain legal advisers of its choice in connection therewith) any claim, action, suit or proceeding by any third party alleged or asserted against it arising out of any matter in respect of which it is entitled to be indemnified hereunder, and the reasonable costs and expenses thereof shall be subject to the said indemnity; provided, however, that, the indemnifying Party shall be entitled, at its option, to assume and control the defense of such claim, action, suit or proceeding at its expense and through legal advisers of its choice if it (a) gives notice of its intention to do so to the other Party, (b) acknowledges in writing its obligation to indemnify that Party to the full extent provided by this Article 12, and (c) reimburses that Party for the reasonable costs and expenses previously incurred by it prior to the assumption of such defense by the indemnifying Party. Neither Party shall settle or compromise any claim, action, suit or proceeding in respect of which it is entitled to be indemnified by the other Party without the prior written consent of that Party[, which consent shall not be unreasonably withheld or delayed]; provided, however, that after agreeing in writing to indemnify the indemnified Party, the indemnifying Party may settle or compromise any such claim, action, suit or proceeding without the approval of the indemnified Party.

## 13. **FORCE MAJEURE**

### 13.1 Meaning of Force Majeure

In this Agreement, “Force Majeure” means any event or circumstance or combination of events or circumstances beyond the reasonable control of a Party which materially and adversely affects the performance by that Party of its obligations or the enjoyment by that

Party of its rights under or pursuant to this Agreement. Without limitation to the generality of the foregoing, “Force Majeure” shall include the following events and circumstances to the extent that they satisfy the above requirements:<sup>68</sup>

13.1.1 natural events (“Force Majeure - Natural”) including:

- (a) acts of God; (including lightning, fire, earthquake, flood, storm, hurricane, cyclone, typhoon, tidal wave and tornado);
- (b) epidemic or plague;
- (c) explosion or chemical contamination (other than resulting from an event or circumstance described in Section 13.1.2(a)(i), in which case it shall be a Host Country Political Event); and
- (d) any event or circumstance constituting Force Majeure - Natural under the Implementation Agreement;<sup>69</sup> and

13.1.2 other events of Force Majeure (“Force Majeure - Political”) including:

- (a) Force Majeure - Political which occurs inside or directly involves Host Country (“Host Country Political Events”) including:
  - (i) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, civil commotion, act of terrorism, or sabotage;
  - (ii) nationwide strikes, works to rule or go-slows that extend beyond the Complex or are widespread or nationwide, or that are of a political nature, such as, by way of example and not limitation, labor actions associated with or directed against a Host Country political party, or those that are directed against the Company (or its Contractors) as a part of a broader pattern

of labor actions against companies or facilities with foreign ownership or management;

- (iii) any Change in Law;
  - (iv) radioactive contamination or ionizing radiation originating from a source in Host Country or resulting from another Host Country Political Event;
  - (v) any Lapse of Consent; and
  - (vi) any event or circumstance constituting a Host Country Political Event under the Implementation Agreement;<sup>70</sup> and
- (b) Force Majeure - Political which occurs outside Host Country and does not directly involve Host Country (“Foreign Political Events”) including:
- (i) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, civil commotion, act of terrorism, or sabotage;
  - (ii) strikes, works to rule or go-slows that are widespread or nationwide;
  - (iii) radioactive contamination or ionizing radiation originating from a source outside Host Country and not falling within Section 13.1.2(a)(iv); and
  - (iv) any event or circumstance constituting a Foreign Political Event under the Implementation Agreement.<sup>71</sup>

### 13.2 Notification and Obligation to Remedy.

In the event of the occurrence of a Force Majeure that prevents a Party from performing its obligations hereunder (other than an obligation to pay money), such Party shall: (a) notify as soon as reasonably practicable the other Party in writing of such Force Majeure;

(b) not be entitled to suspend performance under this Agreement for any greater scope or longer duration than is required by the Force Majeure; (c) use all reasonable efforts to remedy its inability to perform and to resume full performance hereunder as soon as practicable; (d) keep such other Party apprised of such efforts on a continuous basis; and (e) provide written notice of the resumption of performance hereunder. Notwithstanding the occurrence of a Force Majeure, the Parties shall perform their obligations under this Agreement to the extent the performance of such obligations is not impeded by the Force Majeure.

### 13.3 Consequences of Force Majeure

13.3.1 Neither Party shall be responsible or liable for, or deemed in breach hereof because of, any failure or delay in complying with its obligations under or pursuant to this Agreement which it cannot perform due solely to one or more Force Majeure or its or their effects or by any combination thereof, and the periods allowed for the performance by the Parties of such obligation(s) shall be extended on a day-for-day basis for so long as one or more Force Majeure continues to affect materially and adversely the performance of such Party of such obligation(s) under or pursuant to this Agreement; provided, however, that no relief shall be granted to the Party claiming Force Majeure pursuant to this Section 13.3 to the extent that such failure or delay would have nevertheless been experienced by that Party had such Force Majeure not occurred; and provided further, that the Party not claiming Force Majeure may immediately terminate this Agreement without further obligation if Force Majeure delays a Party's performance for a period greater than (a) [\_\_\_\_\_] consecutive months prior to the Commercial Operations Date or (b) [\_\_\_\_\_] consecutive months after the Commercial Operations Date.

13.3.2 During the pendency of Force Majeure - Natural or a Foreign Political Event, the Company shall not be entitled to receive Capacity Payments or Energy Payments [or Supplemental Payments] from Utility; provided, however, that if such Force Majeure - affects only part of the Complex, then the Capacity Payments [and Supplemental Payments] during the pendency of such Force Majeure shall be pro-rated to reflect the portion of the Complex not affected thereby, and the Company shall be entitled to receive such pro-rated Capacity Payments [and Supplemental Payments] and Energy Payments for electrical energy actually delivered to Utility.

13.3.3 During the pendency of a Host Country Political Event, the Company shall be entitled to receive Capacity Payments from Utility at the same level as the Capacity Payments paid immediately prior to the Host Country Political Event for a maximum period of [\_\_\_\_\_] months commencing with the date of the occurrence of the Host Country Political Event;<sup>72</sup> provided, however, that if the Host Country Political Event affects only part of the Complex, then the Capacity Payments during the pendency of such Host Country Political Event shall be the sum of (a) the payments previously described in this sentence pro-rated to reflect the portion of the Complex affected by the Host Country Political Event plus (b) Capacity Payments calculated in accordance with Article 9 pro-rated to reflect the portion of the Complex not affected by the Host Country Political Event.

#### **14. TAXES**

All present and future national, local or other lawful taxes, duties, levies, or other impositions applicable to the Company, the Complex, the Project and the Company's other assets shall be paid by the Company in a timely fashion. Nothing herein, however, shall in any way limit or override any provisions of Schedule 6 which allow or provide for certain taxes and charges to be treated as pass-through items. All present and future national, local or other lawful taxes, duties, levies, or other impositions applicable to Utility arising from or in connection with its rights and obligations under this Agreement shall be paid by Utility in a timely fashion.

#### **15. DEFAULTS AND TERMINATION**

##### **15.1 Company Events of Default**

Each of the following events shall be events of default by the Company (each a “Company Event of Default”), which, if not cured within the time permitted (if any) under Section 15.3, shall give rise to the right on the part of Utility to terminate this Agreement pursuant to Section 15.4; provided, however, that no such event shall be a Company Event of Default hereunder if (a) it results from a breach by Utility of this Agreement or (b) if it occurs as a result of a Force Majeure for the period provided pursuant to Section 13.3:<sup>73</sup>

15.1.1 the failure of the Company to post the Construction Security in accordance with Section 9.4.1 on or before Financial Closing;

15.1.2 the failure of the Company to achieve the Commencement of Construction within [\_\_\_\_\_] Days after Financial Closing;

- 15.1.3 the Abandonment by the Company of the construction of the Complex after the Commencement of Construction without the written consent of Utility;
- 15.1.4 the failure of the Company to achieve the Commercial Operations Date within [\_\_\_\_\_] after the Required Commercial Operations Date;
- 15.1.5 the failure of the Company to provide or replenish the Operations Security in accordance with Section 9.4.2 of this Agreement;
- 15.1.6 the Abandonment by the Company of the operation of the Complex without the written consent of Utility;<sup>74</sup>
- 15.1.7 the appointment or replacement by the Company of a Construction Contractor or an O&M Contractor or any [material] amendment to or waiver of any terms of the Construction Contract or the O&M Contract without the prior consent of Utility;
- 15.1.8 the assignment or transfer of this Agreement or an assignment, transfer or acquisition in breach of Section 17.1 or 17.2 of this Agreement;
- 15.1.9 any failure by the Company to make any payment or payments required to be made by it under this Agreement within [\_\_\_\_\_] Days after the Company is given notice that the payment was not made by the due date for payment;<sup>75</sup>
- 15.1.10 except for the purpose of amalgamation, reorganization or reconstruction (provided that such amalgamation, reorganization or reconstruction does not affect the ability of the amalgamated, reorganized or reconstructed entity, as the case may be, to perform its obligations under this Agreement), the occurrence of any of the following events: (a) the passing of a resolution by the owners of the Company for the winding up of the Company; (b) the admission in writing by the Company of its inability generally to pay its debts as they become due; (c) the appointment of a provisional manager, trustee, liquidator or similar person in a winding up proceeding after notice to the Company and due hearing; or (d) the making by a court with competent jurisdiction over the Company of an order winding up the Company;
- 15.1.11 reduction of the Dependable Capacity to less than [\_\_] MW for a period of at least twelve (12) consecutive Months;<sup>76</sup> or

15.1.12 any [material] breach by the Company of this Agreement, which breach has a [material and] adverse impact on Utility.<sup>77</sup>

## 15.2 Utility Events of Default

Each of the following events shall be events of default by Utility (each a “Utility Event of Default”), which, if not cured within the time permitted (if any) under Section 15.3, shall give rise to the right on the part of the Company to terminate this Agreement pursuant to Section 15.4; provided, however, that no such event shall be a Utility Event of Default hereunder if (a) it results from a breach by the Company of this Agreement or (b) if it occurs as a result of a Force Majeure for the period provided pursuant to Section 13.3:

15.2.1 the expropriation, compulsory acquisition or nationalization by Government or any Public Sector Entity of (a) any shares in the Company, or (b) all or any substantial assets or rights of the Company;

15.2.2 except for the purpose of amalgamation, reorganization or reconstruction (provided that such amalgamation, reorganization or reconstruction does not affect the ability of the amalgamated, reorganized or reconstructed entity, as the case may be, to perform its obligations under this Agreement), the occurrence of any of the following events: (a) the passing of a resolution by the shareholders of Utility for the winding up of Utility; (b) the admission in writing by Utility of its inability generally to pay its debts as they become due; (c) the appointment of a provisional manager, trustee, liquidator or similar person in a winding up proceeding after notice to Utility and due hearing; or (d) the making by any court with competent jurisdiction over Utility of an order winding up Utility;

15.2.3 any failure by Utility to make any payment or payments required to be made by it under this Agreement within [\_\_\_\_\_] Days after Utility is given notice that the payment was not made by the due date for payment;<sup>78</sup>

15.2.4 the assignment or transfer of this Agreement or an assignment, transfer or acquisition in breach of Section 17.1 of this Agreement; or

15.2.5 any [material] breach by Utility of this Agreement, which breach has a [material and] adverse impact on the Company.<sup>79</sup>

### 15.3 Notice and Cure

15.3.1 In the case of a Utility Event of Default or a Company Event of Default (each, an “Event of Default”), as the case may be, set forth in Section 15.1 or Section 15.2, the defaulting Party shall have [\_\_\_\_\_] Days to cure the Event of Default. If such Event of Default is incapable of being cured within that period, the defaulting Party may request from the non-defaulting Party an additional period of [\_\_\_\_\_] Days to cure the Event of Default, and approval by the non-defaulting Party of such request shall not be unreasonably withheld or delayed.<sup>80</sup> The defaulting Party shall furnish to the non-defaulting Party during any cure period weekly reports on its progress in curing the Event of Default.

15.3.2 Upon occurrence of an Event of Default that is not cured within the applicable period (if any) for cure, the non-defaulting Party may, at its option, initiate termination of this Agreement by delivering a written notice (“Notice of Default”) of its intent to terminate this Agreement to the defaulting Party.<sup>81</sup> A Notice of Default shall specify in reasonable detail the Event of Default giving rise to the Notice of Default.

### 15.4 Rights and Remedies Upon an Event of Default

15.4.1 If a Company Event of Default has occurred and the Company Event of Default has not been cured within the period specified in Section 15.3, Utility, in its sole discretion, may:

- (a) terminate this Agreement by delivering written notice to the Company; and/or
- (b) proceed in accordance with Article 16 to protect and enforce its rights, to recover any damages to which it may be entitled (including all costs and expenses reasonably incurred in the exercise of its remedy); and/or
- (c) retain all or part of the Construction Security and/or the Operations Security provided by the Company pursuant to Section 9.4 in full or partial satisfaction of the damages to which it may be entitled under subsection (b) above; and/or
- (d) purchase the Complex pursuant to Section 15.5.

These rights and remedies shall not be exclusive but, to the extent permitted by law, shall be cumulative and in addition to all other rights and remedies existing at law, in equity or otherwise; provided, however, that Utility may seek to exercise such rights and remedies only in accordance with the procedures set forth in Article 16. Utility may exercise each right and remedy afforded by this Agreement or by law from time to time and as often as may be deemed expedient by Utility. No delay by, or omission of, Utility to exercise any right or remedy arising upon any Company Event of Default shall impair any such right or remedy or constitute a waiver of such event or an acquiescence thereto.

15.4.2 If a Utility Event of Default has occurred and the Utility Event of Default has not been cured within the period specified in Section 15.3, the Company, in its sole discretion, may:

- (a) terminate this Agreement by delivering written notice to Utility; and/or
- (b) proceed in accordance with Article 16 to protect and enforce its rights and to recover any damages to which it may be entitled (including all costs and expenses reasonably incurred in the exercise of its remedy); and/or
- (c) retain all or part of any Letter of Credit issued pursuant to Section 9.7 or make a demand under the Guarantee, in either case, in full or partial satisfaction of the damages to which it may be entitled under subsection (b) above.<sup>82</sup>

These rights and remedies shall not be exclusive but, to the extent permitted by law, shall be cumulative and in addition to all other rights and remedies existing at law, in equity or otherwise; provided, however, that the Company may seek to exercise such rights and remedies only in accordance with the procedures set forth in Article 16. The Company may exercise each right and remedy afforded by this Agreement or by law from time to time and as often as may be deemed expedient by the Company. No delay by, or omission of, the Company to exercise any right or remedy arising upon any Utility Event of Default shall impair any such right or remedy or constitute a waiver of such event or an acquiescence thereto.

## 15.5 Option to Purchase

15.5.1 If this Agreement terminates because of a Company Event of Default pursuant to Section 15.4.2, then Utility shall have an option

to purchase the Complex (including Fuel, materials, records, drawings and spare parts) at a purchase price equal to the value of the Complex which shall be the greater of (a) the fully depreciated value of the Complex or (b) the remaining debt service under the Loan Documents minus, in either case (a) or (b), any liquidated damages or other Damages and accrued interest thereon to which Utility is entitled (the "Termination Purchase Price"). Said option may be exercised by Utility at any time within [\_\_\_\_\_] Days after the termination of this Agreement by written notice to the Company. If the Company and Utility do not agree on the Termination Purchase Price within [\_\_\_\_\_] Days following Utility's exercise of the above option, then either Party may submit the determination of the Termination Purchase Price for expert determination in accordance with Section 16.2. As soon as practicable following the receipt of said notice by the Company, but in no event later than [\_\_\_\_\_] Days after the Termination Purchase Price has been fixed, the Company shall transfer and assign to Utility all of its right, title and interest in the Complex, free and clear of all liens, charges and encumbrances except the liens, charges and encumbrances created under the Loan Documents, and Utility shall simultaneously pay to the Company the Termination Purchase Price and assume the outstanding debt under the Loan Documents.

15.5.2 Upon the written request of Utility, the Company shall sign, execute and deliver, or cause to be signed, executed and delivered, and do or make, or cause to be done or made, any and all agreements, instruments, papers, deeds, acts or things, supplemental, confirmatory or otherwise, as may be required by Utility for the purpose of or in connection with the option set forth in Section 15.5.1, including transferring to Utility, for the major items of plant incorporated into the Complex, copies of all manufacturers' specifications, manufacturers' operation and maintenance manuals, schedules of protection schemes and protective relay settings, and signed and sealed copies of all as-built drawings for the Complex, including the civil and architectural works.

## 15.6 Obligations Upon Termination

Upon expiration or termination of this Agreement, the Parties shall have no further obligations or liabilities hereunder except for those obligations and liabilities that (a) arose prior to such termination, or (b) expressly survive such termination pursuant to Section 19.13.

## 16. RESOLUTION OF DISPUTES

### 16.1 Mutual Discussions

If any dispute or difference of any kind whatsoever (the “Dispute”) shall arise between Utility and the Company in connection with, or arising out of, this Agreement, the Parties shall attempt in good faith to settle such Dispute in the first instance within [\_\_\_\_\_] Days by mutual discussions between the Company and Utility, which may include referring the Dispute to the Operating Committee for resolution within such [\_\_\_\_\_] Day period.<sup>83</sup>

### 16.2 Referral to an Expert

16.2.1 If the Dispute cannot be settled within the period allowed in Section 16.1 and

- (a) referral to an expert is required by this Agreement;
- or
- (b) the Parties otherwise agree in writing,

in each case, the Dispute shall be referred to an expert for determination.

16.2.2 The Party specified in the relevant provision as having the right (or either Party if no single Party is so specified) may give notice (“Notice of Intention to Refer”) to the other Party of its intention to so refer the Dispute. The Party giving that notice is referred to herein as the “Applicant”, and the Party to whom such notice is given is referred to herein as the “Respondent”.

16.2.3 A Notice of Intention to Refer shall include, inter alia:

- (a) a description of the Dispute;
- (b) the grounds on which the Applicant relies in seeking to have the Dispute determined in its favor; and
- (c) all written material which the Applicant proposes to submit to the expert;

provided however, that this Section 16.2.3 shall not be construed so as to prevent the Applicant from using or producing further written material

which comes into existence or comes to the Applicant's attention after the Notice of Intention to Refer is given, but in such event the Respondent shall be allowed a reasonable time to respond thereto.

16.2.4 The Respondent shall within [\_\_\_\_\_] Days after service of the Notice of Intention to Refer, give to the Applicant a notice (“Notice of Intention to Defend”) of intention to defend which shall include, inter alia:

(a) the grounds upon which the Respondent relies in seeking to have the question determined in its favor; and

(b) all written material that the Respondent proposes to submit to the expert;

provided, however, that this Section 16.2.4 shall not be construed so as to prevent the Respondent from using or producing further written material which comes into existence or comes to the Respondent's attention after the Notice of Intention to Defend is given but in such event the Applicant shall be allowed a reasonable time to respond thereto.

16.2.5 If within [\_\_\_\_\_] Days after service of a Notice of Intention to Defend, the Parties have agreed on an expert and on the terms under which the Dispute shall be referred, the Dispute shall be so referred. In the event that the Parties are unable within [\_\_\_\_\_] Days after service of a Notice of Intention to Defend to agree upon an expert to be appointed hereunder or upon the terms of such expert's reference or both, then either Party may request (a) for all Disputes involving invoices or amounts owed by one Party to the other, the [INSTITUTE OF CHARTERED ACCOUNTANTS OF HOST COUNTRY] and (b) for all Disputes other than Disputes involving invoices or amounts owed by one Party to the other, the then presiding president of the [ASSOCIATION OF ENGINEERS OF HOST COUNTRY], in either case, to appoint an expert, and the terms of reference of such expert's appointment shall be those set out in the Notice of Intention to Refer and the Notice of Intention to Defend;<sup>84</sup> provided, however, that no expert appointed pursuant to this Section 16.2 shall be a national of the jurisdiction of either Party to this Agreement<sup>85</sup> or of the jurisdiction of any of the Initial Shareholders (nor shall such expert be a former employee or agent of any such person).

- 16.2.6 Within [\_\_\_\_\_] Days of the appointment of the expert, the expert shall nominate a time and place in the Host Country for a hearing of the Parties on the Dispute, which time shall not be more than [\_\_\_\_\_] Days after the expert's appointment.
- 16.2.7 The Parties shall not be entitled to apply for discovery of documents but shall be entitled to have access to the other Party's records and data in accordance with Section 6.10.
- 16.2.8 At the time nominated for the hearing, each Party must appear before the expert and present its case.
- 16.2.9 The expert must render his decision on the Dispute as soon as possible after completion of the hearing and must forthwith advise the Parties in writing of his determination and his reasons therefor.
- 16.2.10 The proceedings shall be without prejudice and any evidence given or statements made in the course of the hearing may not be used against a Party in any other proceedings.
- 16.2.11 The proceedings shall not be regarded as an arbitration and the laws relating to commercial arbitrations shall not apply; provided, however, that the expert shall resolve the Dispute in accordance with the Laws of Host Country.
- 16.2.12 Once a Dispute is referred to an expert, the expert may shorten any of the time periods required by this Section 16.2 if, in the expert's best judgment, the Dispute requires expeditious resolution.
- 16.2.13 The decision of the expert shall be final and binding upon both Parties upon the delivery to them of the expert's written determination, save in the event of fraud, serious mistake or miscarriage.
- 16.2.14 If the expert does not render a decision within a period of [\_\_\_\_\_] Days of his appointment or such longer or shorter period as the Parties may agree in writing, either Party may, upon giving notice to the other, terminate such appointment, and a new expert shall be appointed who shall resolve the Dispute in accordance with the provisions of this Section 16.2. If the Dispute is not resolved by one or more experts within [\_\_\_\_\_] months after the receipt by the Respondent of the Notice of Intention to Refer, then either Party may refer the Dispute for arbitration in accordance with this Agreement.

16.2.15 The costs of engaging an expert shall be borne equally by the Parties and each Party shall bear its own costs in preparing materials for, and making presentations to, the expert.

### 16.3 Arbitration

16.3.1 Any Dispute arising out of or in connection with this Agreement that has not been resolved following the procedures set forth in Sections 16.1 and 16.2 shall (regardless of the nature of the Dispute but without prejudice to the provisions of this Agreement requiring any matter to be referred to an expert for final determination) be referred to arbitration and finally settled in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the “Convention”) and the Rules of Procedure for Arbitration Proceedings of the International Centre for Settlement of Investment Disputes (the “Centre”) established by the Convention (the “ICSID Rules”) and the Parties hereby consent to arbitration thereunder.<sup>86</sup> The Parties agree and acknowledge that the Company shall be deemed a foreign controlled company for the purposes of consenting to the jurisdiction of the Convention so long as not less than thirty-five percent (35%) of the shares of the Company are held by Foreign Investors. Arbitration proceedings conducted pursuant to this Section 16.3.1 shall be held at [LOCATION] in Host Country.<sup>87</sup>

16.3.2 As from the date on which the shareholding of the Foreign Investors falls below [\_\_\_\_\_] % of the [shares of the Company], then the dispute shall be finally settled by arbitration under the [ARBITRATION ACT OF HOST COUNTRY]. Arbitration proceedings conducted pursuant to this Section 16.3.2 shall be held at [LOCATION] in Host Country.

16.3.3 No arbitrator appointed pursuant to Section 16.3 shall be a national of the jurisdiction of either Party to this Agreement or of the jurisdiction of any of the Initial Shareholders (nor shall any such arbitrator be an employee or agent or former employee or agent of any such person).

16.3.4 The language of any arbitration under Section 16.3.1 or Section 16.3.2 shall be [\_\_\_\_\_].

16.3.5 Each Party hereby agrees to be bound by any final decision or award of any arbitrator(s) duly appointed under this Agreement.

16.3.6 Except as awarded by the arbitrator(s), each Party shall be responsible for its own costs incurred by it in connection with an arbitration hereunder.

#### 16.4 Waiver of Sovereign Immunity

Utility unconditionally and irrevocably:

16.4.1 agrees that the execution, delivery and performance by it of this Agreement and those agreements included in the Security Package to which it is a Party constitute private and commercial acts rather than public or governmental acts;

16.4.2 agrees that, should any proceedings be brought against it or its assets other than assets protected by the diplomatic and consular privileges under the [RELEVANT SOVEREIGN IMMUNITY ACTS] (“Excepted Assets”) in any jurisdiction 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 (other than Excepted Assets);

16.4.3 consents generally in respect of the enforcement of any judgment against it in any such proceedings in any jurisdiction to the giving of any relief or the issue of any process in connection with such proceedings (including the making, enforcement or execution against or in respect of any property whatsoever irrespective of its use or intended use).

#### 16.5 Service of Process

With respect to any proceedings for enforcement of an award pursuant to this Article 16 against assets of either Party brought in the courts of [\_\_\_\_\_]:

16.5.1 the Company appoints [\_\_\_\_\_], whose address is presently [\_\_\_\_\_], to receive for and on its behalf service of process in such jurisdiction in any such enforcement proceedings;

16.5.2 the Company agrees to maintain in [\_\_\_\_\_] duly appointed process agents, notified to Utility for the purposes of Section 16.5.1 above;

16.5.3 Utility appoints [\_\_\_\_\_], whose address is presently [\_\_\_\_\_], to receive for and on its

behalf service of process in such jurisdiction in any such enforcement proceedings;

16.5.4 Utility agrees to maintain in [\_\_\_\_\_] duly appointed process agents, notified to the Company for the purposes of Section 16.5.3 above; and

16.5.5 each Party agrees that failure by any such process agent to give notice of any process to it shall not impair the validity of such service or of any judgment based thereon.

#### 16.6 Continued Performance

During the pendency of any Dispute being handled in accordance with this Article 16, (a) the Company shall continue to perform its obligations under this Agreement to deliver Dependable Capacity and Net Energy Output, (b) Utility shall continue to pay all amounts due in accordance with Article 9 that are not in dispute, and (c) neither Party shall exercise any other remedies hereunder arising by virtue of the matters in dispute.

### 17. ASSIGNMENT

#### 17.1 Right to Assignment

17.1.1 The Company may not assign or transfer its rights or obligations under, pursuant to or associated with (a) this Agreement, (b) the Complex,<sup>88</sup> (c) the Site, (d) the movable property and intellectual property of the Company, or (e) the revenues or any of the rights or assets of the Company, in each of subsections (a) through (e) without the prior written consent of [Utility/Government].<sup>89</sup> Notwithstanding the foregoing sentence, the Company may assign or transfer (i) assets that, during any Financial Year, do not have an aggregate net book value of an amount equivalent to [AMOUNT]; provided, however, that such assets are sold, transferred or otherwise disposed of on an arm's length basis at full market price and that such sale, transfer or disposal shall not impair the operation of the Project and (ii) obsolete or worn out assets no longer used or useful in its business or assets that are promptly replaced by assets of a similar nature and approximately equal value.<sup>90</sup>

17.1.2 Utility shall not assign its rights or obligations under this Agreement without the prior written consent of the Company[, which consent shall not be unreasonably withheld or delayed]; provided, however, that any such assignee of Utility shall have the

ability to perform all of Utility's obligations and duties under this Agreement.

## 17.2 Creation of Security

17.2.1 Notwithstanding the provisions of Section 17.1.1, for the purpose of financing the construction, operation and maintenance of the Complex, the Company may assign or create security over its rights and interests under, pursuant to or associated with the assets identified in Section 17.1.1(a) through (f); provided, however, that the Company shall not create any such security without the prior written consent of [Utility/Government][, which consent shall not be unreasonably withheld or delayed]. Utility shall execute all such acknowledgments of any security created in accordance with the foregoing sentence as are reasonably requested by the Company to give effect to the foregoing sentence.

17.2.2 Utility shall use all reasonable efforts to execute, acknowledge and deliver any and all further documents and instruments, and to take any other actions, which may be necessary to satisfy the reasonable requests of any Lenders or prospective Lenders in connection with the financing or refinancing of the Project, including executing and delivering to the Lenders a consent to assignment (or other form of direct agreement) concerning the Project between Utility and the Lenders in form and substance satisfactory to the Lenders. The foregoing sentence shall not be construed to require Utility to execute, acknowledge and deliver any further documents and instruments, or to take any other actions, which are inconsistent with its rights under this Agreement or which are expressly subject to its consent or approval under this Agreement.<sup>91</sup>

## 18. NOTICES

### 18.1 Address for Notices

Any notice, communication, request or correspondence (each a "notice") required or permitted under the terms and conditions of this Agreement shall be in writing, in the English language (it being understood that any such communication or paper in a language other than English shall be of no force or effect), and shall be (a) delivered personally, (b) transmitted by telefacsimile and either (i) recipient acknowledges receipt to sender or (ii) sender delivers to recipient a transmission confirmation; or (c) sent by an internationally-recognized overnight mail or courier service, with delivery receipt requested, to the following addresses:

If to Utility:

Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Telefax No.: \_\_\_\_\_  
Attention: \_\_\_\_\_

If to the Company:

Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Telefax No.: \_\_\_\_\_  
Attention: \_\_\_\_\_

or such other address and/or telefacsimile number as either Party may previously have notified to the other Party in accordance with this Section 18.1.

18.2 Effectiveness of Service

Notices shall be effective: (a) in the case of personal delivery, when received by the recipient; (b) in the case of transmission by telefacsimile, if receipt of the transmission occurs before [TIME] recipient's time and recipient receives a transmission confirmation or otherwise acknowledges transmission, upon receipt of transmission, or if receipt of the facsimile transmission occurs after [TIME] recipient's time and recipient receives a transmission confirmation or otherwise acknowledges transmission, the next succeeding Business Day, or (c) in the case of an internationally-recognized and reputable priority courier, [four (4)] days after dispatch.<sup>92</sup>

**19. MISCELLANEOUS PROVISIONS**

19.1 Variations in Writing

All additions, amendments or variations to this Agreement shall be binding only if in writing and signed by duly authorized representatives of both Parties.

19.2 Entire Agreement

This Agreement and all Schedules thereto together represent the entire understanding between the Parties in relation to the subject matter thereof and supersede any or all previous agreements or arrangements between the Parties in respect of the Complex (whether oral or written).

19.3 Severability

In the event that any one or more of the provisions of this Agreement shall be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained herein or of the same provisions in any other jurisdiction shall not in any way be affected or impaired thereby.

#### 19.4 Waivers

19.4.1 No waiver by either Party of any default by the other in the performance of any of the provisions of this Agreement shall (a) operate or be construed as a waiver of any other or further default whether of a like or different character (b) be effective unless in writing duly executed by an authorized representative of such Party.

19.4.2 The failure by either Party to insist on any occasion upon the performance of the terms, conditions or provisions of this Agreement or time or other indulgence granted by one Party to the other shall not thereby act as a waiver of such breach or acceptance of any variation.

#### 19.5 Confidentiality

19.5.1 Each of the Parties shall hold in confidence all documents and other information, whether technical or commercial, relating to the Project or the design, financing, construction, ownership, operation or maintenance of the Complex that is of a confidential nature and that is supplied to it by or on behalf of the other Party. The Party receiving such documents or information shall not publish or otherwise disclose them or use them for its own purposes (otherwise than as may be required by it, its professional advisers, or potential or actual lenders or investors to perform its obligations under this Agreement).

19.5.2 The provisions of Section 19.5.1 above shall not apply to any information: (a) which is or becomes available to the public other than by breach of this Agreement; (b) which is in or comes into the possession of the receiving Party prior to the aforesaid publication or disclosure and which was not or is not obtained under any obligation of confidentiality; (c) which was or is obtained from a third party who is free to divulge the same and which was or is not obtained under any obligation of confidentiality; or (d) which is required by law or appropriate regulatory authorities to be disclosed; provided, however, that the Party supplying the information is notified of the requirement set forth in subclause (d)

at least [\_\_\_\_\_] Business Days prior to such disclosure and the disclosure is limited to the maximum extent possible.

19.5.3 For the avoidance of doubt, nothing herein contained shall preclude the use of provisions similar to those contained in this Agreement and the other agreements referred to herein in any agreements prepared and issued in connection with other projects.

#### 19.6 Successors and Assigns

This Agreement shall inure to the benefit of, and be binding upon, the Parties hereto and their respective successors and permitted assigns.

#### 19.7 No Liability for Review

No review or approval by Utility of any agreement, document, instrument, drawing, specifications or design proposed by the Company shall relieve the Company from any liability that it would otherwise have had for its negligence in the preparation of such agreement, document, instrument, drawing, specifications or design or from failure to comply with the applicable Laws of Host Country with respect thereto, nor shall Utility be liable to the Company or any other person by reason of its review or approval of an agreement, document, instrument, drawing, specification, or design. Furthermore, Utility shall not be liable to the Company or any other person by reason of its observation or inspection of, or any suggestions relating to, the construction, testing, operation or maintenance of the Complex.

#### 19.8 Consequential Damages

Neither Party shall be liable to the other Party in contract, tort, warranty, strict liability or any other legal theory for indirect, consequential, punitive or exemplary damages resulting from the performance of obligations or the exercise of rights under or pursuant to this Agreement.

#### 19.9 No Third Party Beneficiaries

This Agreement is intended solely for the benefit of the Parties hereto and, except for rights expressly granted to the Lenders or other persons, nothing in this Agreement shall be construed to create any duty to, standard of care with reference to, any liability to, or any right of suit or action in, any person not a Party to this Agreement.

#### 19.10 Affirmation

The Company and Utility declare and affirm that neither Party has paid nor has it undertaken to pay and that it shall in the future not pay any bribe, pay-offs, kick-backs or

unlawful commission and that it has not in any other way or manner paid any sums, whether in Local Currency or Foreign Currency and whether in Host Country or abroad, or in any other manner given or offered to give any gifts and presents in Host Country or abroad to any person or company to procure this Agreement, and the Company and Utility undertake not to engage in any of the said or similar acts during the term of and relative to this Agreement.

#### 19.11 Governing Law

This Agreement and the rights and obligations of the Parties under or pursuant to this Agreement shall be governed by and construed according to the laws of Host Country.<sup>93</sup>

#### 19.12 Relationship of the Parties

This Agreement shall not make either of the Parties partners or joint venturers one with the other, nor make either the agent of the other. Neither Party shall have any right, power or authority to enter into any agreement or undertaking for, or act on behalf of, or to act as or be an agent or representative of, or the otherwise bind, the other Party.

#### 19.13 Survival

Cancellation, expiration or earlier termination of this Agreement shall not relieve the Parties of obligations that by their nature should survive such cancellation, expiration or termination, including the rights and obligations, warranties, remedies, promises of indemnity and confidentiality set forth in Sections 9.3.6, 9.4, and 19.5 and Articles 12, 15 and 16.

#### 19.14 Language

The language for the purpose of administering this Agreement, including any expert proceeding or arbitration hereunder, shall be [\_\_\_\_\_].

#### 19.15 Good Faith

In carrying out its obligations and duties under this Agreement, each Party shall have an implied obligation of good faith.

I N W I T N E S S whereof the Parties have entered into this Agreement the date first above written.

[NAME OF POWER PURCHASER]

By: \_\_\_\_\_

Name: \_\_\_\_\_

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

WITNESSED BY:<sup>94</sup>

By: \_\_\_\_\_

Name: \_\_\_\_\_

[NAME OF POWER SUPPLIER]

By: \_\_\_\_\_

Name: \_\_\_\_\_

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

WITNESSED BY:

By: \_\_\_\_\_

Name: \_\_\_\_\_

SAMPLE

## SCHEDULE 1

### DEFINITIONS

Whenever the following terms appear in this Agreement or the Schedules hereto, whether in the singular or in the plural, present, future or past tense, they shall have the meanings stated below unless the context otherwise requires:

**“Abandonment”** - Either (a) the cessation of substantially all activities relating to the construction or operation and maintenance of the Complex, as appropriate (except a cessation that is the direct result of a local strike which occurred and continued despite the reasonable actions or inactions of the Company or its Contractors), or (b) the physical absence of substantially all employees of the Company and its Contractors from the Site after the commencement of excavation for the foundations of the Complex, in either case (a) or (b) for at least [\_\_\_\_\_] consecutive hours.

**“AGC”** - Automatic generation control equipment.

**“Agreement”** - This Power Purchase Agreement, including all Schedules thereto, as amended or supplemented from time to time.

**“AIDC”** - The Dependable Capacity of the Complex as established at the Commercial Operations Date in accordance with Article 10 and Schedule 4.

**“Applicant”** - The Party that served a Notice of Intention to Refer pursuant to Section 16.2.2.

**“Base Rate”** - [DESCRIBE BASE INTEREST RATE]. Whenever the Base Rate is applied, the interest shall be compounded [\_\_\_\_], computed for the actual number of Days elapsed on the basis of a 365-Day year.

**“Backup Metering System”** - The meaning ascribed thereto in Section 8.1.2.

**“Bonus Threshold”** - For each of the Peak Months (or such other Months as may be designated by Utility), the product of (a) the AIDC, and (b) the number of hours in such Month, multiplied by (c) [\_\_\_\_], respectively for each such Month; provided, however, that the factors in subsection (c) hereof may be changed in connection with a redesignation of Peak Months by Utility so long as the average of such factors is not increased.

**“Business Day”** - A day on which business by and between banks may be carried on in [LOCATION] in Host Country.

**“Capacity Payment”** - The meaning ascribed thereto in Section 9.1.1.

**“Capacity Purchase Price”** - The price which Utility will pay to the Company per kWh for Dependable Capacity as determined in accordance with Schedule 6 hereto.

**“Centre”** - The meaning ascribed thereto in Section 16.3.1.

**“Change in Law”** - The (a) the adoption, promulgation, modification or re-interpretation after [DATE] by any Public Sector Entity of any Law of Host Country (including a decision of a Public Sector Entity after [DATE]), which amends or conflicts with the Laws of Host Country established or in effect as of [DATE] or (b) the imposition after [DATE] by a Public Sector Entity of any term or condition in connection with the issuance, renewal, extension, replacement or modification of any Consent, that in either case establishes requirements for the construction, operation or maintenance of the Complex that are more restrictive or more onerous than the most restrictive or most onerous requirements in effect as of [DATE].

**“Change Order”** - Any change order to be given to the Construction Contractor under the Construction Contract which relates to a component of the physical work-in-progress at the Site and which is an PPA Amended Document.

**“Commencement of Construction”** - The initiation of the construction of the Complex as evidenced by the Company's (a) issuance of the Notice to Proceed under the Construction Contract and (b) making of the Initiation Payment.

**“Commercial Operations Date”** - The date on which the entire Complex is Commissioned in accordance with Section [\_\_\_\_] of Schedule 4.

**“Commissioned”** - The state or act of successful completion of Commissioning of the Complex.

**“Commissioned Shortfall”** - The difference between (a) the Dependable Capacity of the Complex on the Commercial Operations Date if less than [\_\_\_\_] MW and (b) [\_\_\_\_] MW.<sup>95</sup>

**“Commissioning”** - Engaging in the operations required for testing of the Complex in accordance with Section [\_\_] of Schedule 4.

**“Company Event of Default”** - An event described in Section 15.1 for which Utility may issue a Notice of Default to the Company.

**“Complex”** - [HERE PROVIDE BRIEF DESCRIPTION OF GENERATING FACILITY, INCLUDING FUEL SOURCE, CAPACITY AND LOCATION]

**“Complex Hour”** - Each hour of partial or complete interruption of the operation of the Complex.

**“Consents”** - All such approvals, consents, authorizations, grants or certificates of registration, notifications, concessions, acknowledgments, agreements, licenses, permits, decisions or similar items required to be obtained from any Public Sector Entity or other relevant governmental entity for the Company or for the construction, financing, ownership, operation and maintenance of the Complex.<sup>96</sup>

**“Construction Contract”** - The agreement to be entered into by the Company for the design, manufacture, construction and Commissioning of the Complex.

**“Construction Contractor”** - The party or parties to the Construction Contract other than the Company.

**“Construction Security”** - The meaning ascribed thereto in Section 9.4.1.

**“Contract Price”** - The price for the design, manufacture, construction and Commissioning of the Complex specified under the Construction Contract.

**“Contractor”** - Any contractor employed by the Company in the design, manufacture, construction, operation or maintenance of the Complex or any part thereof.

**“Control Center”** - Utility's system control center located at [LOCATION] in Host Country, or such other control center designated by Utility from time to time (but not more than one at any time) from which Utility shall Dispatch the Complex.

**“Convention”** - The meaning ascribed thereto in Section 16.3.1.

**“Damages”** - Any actual damages agreed upon by the Parties or established pursuant to any dispute resolution procedure described in Article 16.

**“Day”** - The 24-hour period beginning and ending at 12:00 midnight in [HOST COUNTRY TIME].

**“Declared Available Capacity”** - The estimated net capacity of the Complex announced daily by the Company pursuant to Section 6.2.2 which shall equal the Dependable Capacity adjusted for expected temperature conditions, less any reductions due to Scheduled Outages, Forced Outages and Maintenance Outages.

**“Default Rate”** - The Base Rate plus [\_\_\_\_\_] percent per annum. Whenever the Default Rate is applied, the interest shall be compounded [\_\_\_\_\_] , computed for the actual number of Days elapsed on the basis of a 365-Day year.

**“Dependable Capacity”** - The sustained capacity in MW from the Complex as declared by the Company in writing to Utility according to Section 10.3.

**“Dispatch”** - The instructions issued by Utility from the Control Center in accordance with this Agreement for the Company to schedule and control the generation of the Complex in order to increase or decrease the electricity delivered to the Utility Grid System.

**“Dispute”** - The meaning ascribed thereto in Section 16.1.

**“Dispute Notice”** - The meaning ascribed thereto in Section 9.6.2.

**“Emergency”** - A condition or situation that, in the reasonable opinion of either Party, does materially and adversely, or is likely materially and adversely to (a) affect the ability of Utility to maintain safe electrical service to its customers, having regard to the then-current standard of electrical service provided to its customers, or (b) present a physical threat to persons or property.

**“Energy Payment”** - The meaning ascribed thereto in Section 9.2.2.

**“Energy Purchase Price”** - The price which Utility will pay to the Company per kWh for Net Energy Output in accordance with Article 9 as determined in accordance with Schedule 6 hereto.

**“Excepted Assets”** - The meaning ascribed thereto in Section 16.4.2.

**“Financial Closing”** - The signing of the Loan Documents and the fulfillment of all conditions precedent to the initial availability of funds thereunder.

**“Financial Year”** - The period from January 1st to December 31st or such other period as may be selected by the Company.

**“Forced Outage”** - Any partial or complete interruption of a Unit's generating capability that is not the result of (a) a request by Utility in accordance with this Agreement; (b) a Scheduled Outage or a Maintenance Outage; or (c) an event or occurrence of Force Majeure.

**“Force Majeure”** - An event or occurrence specified in Article 13.

**“Force Majeure - Natural”** - The meaning ascribed thereto in Section 13.1.1.

**“Force Majeure - Political”** - The meaning ascribed thereto in Section 13.1.2.

**“Foreign Currency”** or - The lawful currency of [\_\_\_\_\_].

**“Foreign Investor”** - Any Initial Shareholder of the Company who is a non-resident of Host Country.

**“Foreign Political Events”** - The meaning ascribed thereto in Section 13.1.2(b).

**“Fuel”** - [HERE DESCRIBED TYPE OF FUEL USED BY THE COMPLEX].

**“Fuel Supply Agreement”** - Any agreement entered into by the Company for the purchase and sale of Fuel.

**“Government”** - [NAME OF GOVERNMENT OF HOST COUNTRY].

**“Guarantee”** - The guarantee provided by the Government under the Implementation Agreement, pursuant to which the Government guarantees the payment obligations arising out of the breach, default or non-performance of Utility under this Agreement.<sup>97</sup>

**“Host Country”** - [NAME OF HOST COUNTRY].

**“Host Country Political Events”** - The meaning ascribed thereto in Section 13.1.2(a).

**“ICC Rules”** - The meaning ascribed thereto in Section [\_\_\_\_\_].

**“ICSID Rules”** - The meaning ascribed thereto in Section 16.3.1.

**“Implementation Agreement”** - The [DESCRIBE FULL NAME AND DATE OF IMPLEMENTATION AGREEMENT] entered into between Government and the Company.

**“Improved Loan Conditions”** - The meaning ascribed thereto in Section [\_\_\_\_\_].

**“Initiation Payment”** - The Company's first payment to the Construction Contractor under the Construction Contract which shall be at least [\_\_\_\_\_] percent of the original Contract Price.

**“Initial Shareholders”** - The shareholders of the Company identified as follows: [INSERT NAMES OF INITIAL SHAREHOLDERS OF THE COMPANY].

**“Insurance Event”** - The meaning ascribed thereto in Section [\_\_\_\_\_].

**“Interconnection Facilities”** - All the facilities on the high side of the step-up transformer described in Schedule 3 to be constructed by or for Utility to enable it to receive and deliver capacity and energy in accordance with this Agreement plus the Metering System.

**“Interconnection Point”** - The physical point(s) where the Complex and the Utility Grid System are connected as specified in Schedule 3.

**“kW”** - Kilowatts.

**“kWh”** - Kilowatt-hours.

**“Lapse of Consent”** - Any Consent (a) ceasing to remain in full force and effect, or (b) at any time prior to [DATE], not being issued or renewed upon application having been properly and timely made and diligently pursued, or (c) from and after [DATE], not being issued or renewed within the

period of time prescribed by applicable Laws of Host Country as applied in a non-discriminatory manner and, in any event, within [\_\_\_\_\_] months after the date of proper and complete application therefor, or (d) being made subject, subsequent to its grant, upon renewal or otherwise, to any terms or conditions that materially and adversely affect the Company's and/or the Contractors' ability to perform its or their obligations (including the making available by the Company of Dependable Capacity and Net Energy Output as described in Article 2) under any document included in the Security Package; provided, however, that in no event shall any Lapse of Consent occur as a result of the Government or any Public Sector Entity exercising any power pursuant to the Laws of Host Country to take any of the actions referred to in sub-sections (a) to (d) above as a result of the Company or any other party to whom a Consent is granted failing to abide by any term or condition of any Consent.

**“Law”** - Any law, act, requirement (including license and permit requirements), ordinance, code, order, rule, resolution or regulation of any governmental authority or agency (federal, national, provincial, municipal, local or other) that is at any time applicable to the Company, the Complex, the Project, the Site, or any part thereof, and shall include the Laws of Host Country and all applicable environmental standards and hazardous waste laws, as any such law, act, requirement, ordinance, rule, resolution or regulation or standard may be amended from time to time.

**“Laws of Host Country”** - The national, provincial and local laws of Host Country all orders, rules, regulations, executive orders, decrees, policies, judicial decisions, notifications or other similar directives made pursuant thereto, as such laws, orders, rules, regulations, decrees, policies, judicial decisions and notifications or other similar directives may be amended from time to time.

**“Lenders”** - The lenders party to the Loan Documents and the persons who, from time to time, make other credit facilities available to the Company, together, in each case, with their respective successors and permitted assigns.

**“Letter of Credit”** - A letter of credit provided by Utility pursuant to Section 9.7.

**“Liquidated Damages Due Date”** - The meaning ascribed thereto in Section 9.5.

**“Liquidated Damages Notice”** - The meaning ascribed thereto in Section 9.5.

**“Loan Documents”** - The loan agreements, notes, indentures, security agreements, interest rate hedging agreements, guarantees and other documents entered or to be entered into relating to the construction and permanent financing (including financing of working capital requirements and refinancing and provision of letters of credit for construction and permanent financing) of the Complex or any part thereof.

**“Local Currency”** - The lawful currency of Host Country.

**“Maintenance Outage”** - An interruption or reduction of a Unit's or the Complex's generating capability that (a) is not a Scheduled Outage; (b) has been scheduled and allowed by Utility in accordance with Section 6.4; and (c) is for the purpose of performing work on specific components, which work could be postponed by at least [\_\_\_\_\_] Days but should not be postponed until the next Scheduled Outage.

**“Maintenance Reserve”** - The meaning ascribed thereto in Section [\_\_\_\_\_].

**“Major Overhaul Year”** - The meaning ascribed thereto in Section [\_\_\_\_\_].

**“Major Owner”** - Any Initial Shareholder or any person or other legal entity that (a) owns or otherwise holds or acquires control of, or (b) by virtue of a contemplated purchase or other transfer will own, in either case, [\_\_\_\_\_] percent or more of the shares of, or voting rights in, the Company.

**“Metering System”** - All meters and metering devices owned by Utility and used to measure the delivery and receipt of Net Energy Output and Dependable Capacity.

**“Minimum Functional Specifications”** - The minimum functional specifications (including the technical limits of the Complex) for the construction and operation of the Complex as set forth in Schedule 2 hereof.

**“Month”** - A calendar month according to the Gregorian calendar beginning at 12:00 midnight on the last day of the preceding month and ending at 12:00 midnight on the last day of that month.

**“MVAR”** - Megavars.

**“MW”** - Megawatts.

**“Net Energy Output”** - Net energy delivered by the Company for sale to Utility at the Interconnection Point in accordance with Utility Dispatch as measured in accordance with Section 8.4.

**“Notice of Default”** - The meaning ascribed thereto in Section 15.3.2.

**“Notice of Intention to Defend”** - The meaning ascribed thereto in Section 16.2.4.

**“Notice of Intention to Refer”** - The meaning ascribed thereto in Section 16.2.2.

**“Notice to Proceed”** - The meaning ascribed thereto under the Construction Contract.

**“O&M Contract”** - The agreement between the Company and the O&M Contractor for the operation and maintenance of the Complex.

**“O&M Contractor”** - The company which the Company may from time to time appoint to operate and maintain the Complex.

**“On-Going Dependable Capacity Shortfall”** - The amount, if any, by which the Dependable Capacity is below the AIDC.

**“Operating Committee”** - The committee established pursuant to Section 6.9 for the purpose of determining operating standards and procedures for the Complex.

**“Operations Security”** - The meaning ascribed thereto in Section 9.4.2.

**“Operating Year”**- That period of time (i) with respect to the first Operating Year of the Project, beginning on the Commercial Operations Date and ending at 11:59 p.m. on December 31st of the same Year; (ii) with respect to succeeding Operating Years until the last Operating Year, a full Year; and (iii) with respect to the last Operating Year, that period of time from the end of the preceding Operating Year through the termination date of this Agreement.

**“Parties”** - Both Utility and the Company

**“Party”** - Either Utility or the Company.

**“Peak Months”** - The Months of [\_\_\_\_\_].

**“Premium Date”** - The meaning ascribed thereto in Section [\_\_\_\_\_].

**“Project”** - The development, design, engineering, manufacture, financing, acquisition of the Site, construction, permitting, completion, testing, Commissioning, insurance, ownership, operation and maintenance of the Complex and all activities incidental thereto.

**“Prudent Utility Practice”** - The practices generally followed from time to time by the electric utility industry (including practices generally followed by independent power producers) in Host Country, having regard to engineering and operational considerations, including manufacturers' recommendations. Prudent Utility Practice is not limited to optimum practices, methods or acts to the exclusion of all others, but rather is a spectrum of possible practices, methods and acts which could have been expected to accomplish the desired result at reasonable cost consistent with reliability and safety.<sup>98</sup>

**“Public Sector Entity”** - The Government and any subdivision thereof, any provincial or local governmental authority with jurisdiction or authority over the Company, the Contractors, the Lenders or the Project or any part thereof, any department, authority, instrumentality, agency or

judicial body of the Government or any such provincial or local governmental authority, and any court, tribunal or independent regulatory agency or body in Host Country having jurisdiction over the Company, the Contractors, the Lenders or the Project or any part thereof.

**“Reactive Power”** - The wattless component of the product of voltage and current, which the Complex shall provide to or absorb from the Utility Grid System and which is measured in MVAR.

**“Required Commercial Operations Date”** - The date on which the Complex is required to be Commissioned which shall be [\_\_\_\_\_].

**“Respondent”** - The Party on whom a Notice of Intention to Refer has been served in accordance with Section 16.2.2.

**“Savings”** - The meaning ascribed thereto in Section [\_\_\_\_\_].

**“Scheduled Commercial Operations Date”** - The date which the Company identifies to Utility as the date the Complex will be Commissioned, as such date may be revised from time to time based on the scheduled construction program.

**“Scheduled Outage”** - A planned partial or complete interruption of the Complex's generating capability that (a) is not a Maintenance Outage; (b) has been scheduled and allowed by Utility in accordance with Section 6.3; and (c) is for inspection, testing, preventive maintenance, corrective maintenance or improvement.

**“Security Package”** - All of the agreements identified in Schedule 9 that are entered into in furtherance of the design, financing, construction, ownership, operation and maintenance of the Complex and that form part of the security granted to the Lenders.

**“Site”** - The land, spaces, waterways, roads, water wells and any rights acquired or to be acquired by the Company for the purposes of the Complex on, through, above or below the ground on which all or on any part of the Complex is to be built, (including any working areas required by the Company and the Contractors, villages, townships and camps for the accommodation of the employees of the Company and the Contractors, and all rights of way and access from public highways and, where applicable, railway and seaward access).

**“Start-Up”** - After the Commercial Operations Date, any start up of a Unit or the Complex that is requested by Utility and that results in synchronization with the Utility Grid System. Any such Start-Up shall include one shut-down.

**“Supplemental Payments”** - The amount which Utility will pay to the Company per Month for [\_\_\_\_\_] in accordance with Article 9 as determined in accordance with Schedule 6 hereto.

**“Technical Agent”** -The independent consulting engineer, or engineering company, of international repute acceptable to Utility, the Company and the Lenders for the purposes of monitoring the construction and certifying the results of Commissioning.

**“Termination Purchase Price”** - The meaning ascribed thereto in Section 15.5.1.

**“Unit”** - Each of the generating units that forms a part of the Complex.

**“Utility Event of Default”** - An event described in Section 15.2 for which the Company may issue a Notice of Default to Utility.

**“Utility Grid System”** - The Interconnection Facilities and any other transmission or distribution facilities on Utility's side of the Interconnection Point(s) through which the Net Energy Output of the Complex will be distributed by Utility to users of electricity.

**“Upstream Owner”** - Any person or other legal entity that (a) directly or indirectly holds an interest in, or acquires control of, any Major Owner, or (b) by virtue of a contemplated purchase or other transfer will hold an interest in, or acquire control of, any Major Owner, and, in either case (a) or (b), such person or other legal entity derives or will derive more than [\_\_\_\_\_] percent of its gross revenue from the Project.

**“Week”** - Each period of seven (7) consecutive Days beginning at 12:00 midnight Host Country time falling between a Saturday and a Sunday.

**“World Bank”** - The International Bank for Reconstruction and Development.

**“Year”** - Each twelve (12) Month period commencing on 12:00 midnight on December 31 and ending on 12:00 midnight the following December 31 during the term of this Agreement.

**THE FOLLOWING SCHEDULES NOT PROVIDED:**

Schedule 2 -- Minimum Functional Specifications

Schedule 3 -- Interconnection Facilities

Schedule 4 -- Commissioning and Testing

Schedule 5 -- Metering and Telecommunications

Schedule 6 -- Indexation and Adjustment

Schedule 7 -- Construction Reports

Schedule 8 -- Form of Letter of Credit

Schedule 9 -- Security Package

SAMPLE

## ENDNOTES

<sup>1</sup> Where Utility is a state-owned entity, often the Company will enter into some form of Implementation Agreement and/or Guarantee with the Government. Under an Implementation Agreement, the Government typically agrees to support the Project in a variety of ways, including undertaking generally to assist the Company in obtaining property and services necessary to the implementation of the Project, supporting and expediting applications for Consents and agreeing to not treat the Company or the Company's owners or investors in a discriminatory fashion. Most importantly, the Government in an Implementation Agreement will often agree to provide a Guarantee whereby the Government will guarantee payments due and owing the Company from Utility (and/or from the Fuel supplier, if the Fuel supplier is a state-owned entity). The Government may also ensure the free transferability of funds into and out of the Host Country and offer other foreign exchange protections and provide for certain tax benefits. If the Government of a Host Country does not offer an Implementation Agreement and/or Guarantee, in order for the Project to be financeable, the Company will need to address these issues in a variety of other ways, such as through political risk insurance, legislation, permits and licenses, etc.

<sup>2</sup> Changing requirements may lead to increased costs for the Company. Thus, the Company may object to this provision on the grounds that the Company should not be subject to changing requirements unless it is compensated appropriately.

<sup>3</sup> Another provision sometimes inserted into the interpretation section (or in Article 19) of the Agreement is the following:

(n) unless otherwise provided herein, whenever a consent or approval is required by one Party from the other Party, such consent or approval shall not be unreasonably withheld or delayed.

If such a clause is not included, the Parties typically negotiate which consents and approvals are subject to the absolute discretion of the consenting or approving party and which are subject to a standard of reasonableness. Throughout the text of the Agreement, we note in square brackets instances where one of the Parties (typically the Company) would seek to add a provision stating that the consent or approval of the other Party (typically Utility) will not be unreasonably withheld or delayed.

<sup>4</sup> Utilities may wish to add limitations to this Article 2. Typical changes sought by Utilities include: (a) an express provision that the Company shall not, without the prior written consent of Utility, sell or deliver electric energy from the Complex to any entity other than Utility; (b) a provision regarding the sale and purchase of test energy (which the Company may want as well as Utility); and (c) a provision placing a ceiling on the Dependable Capacity of the Complex which Utility is required to purchase.

<sup>5</sup> Lenders usually require that power purchase agreements have terms at least as long as the debt associated with the Project. An initial term of 15 to 25 years is standard for a power purchase agreement.

<sup>6</sup> The Company may wish to extend the term in the event that the Company is unable to perform its obligations under the Agreement due to a Force Majeure, particularly if the Force Majeure is a Host Country Political Event (including a Change in Law).

Either in this Section or in the Section on Force Majeure, the Company may also request the insertion of a provision stating expressly the extent to which the Company will be compensated during such an extension. The level (full Capacity Payments, partial Capacity Payments, Supplemental Payments, etc.) and duration of any payments made to the Company during such an extension will be the subject of negotiation between the Parties.

<sup>7</sup> The Parties may agree to define in advance certain terms in the event the Agreement is not extended. The following provision (to replace Section 3.2) is illustrative:

Following the end of the [\_\_\_\_\_] Operating Year, the Company and Utility agree to enter into good faith negotiations for a renewal of this Agreement for an additional term of [\_\_\_\_\_] years on terms and conditions mutually agreed to by the Parties. If the Parties cannot agree to terms and conditions for the renewal of this Agreement, the Company will be permitted to contract with any other party for the sale of Dependable Capacity and Net Energy Output from the Complex and Utility shall deliver to the Company any necessary consents for such sale.

The Parties would likely negotiate the extent to which Utility would be obligated to assist in such sales to third parties (*e.g.*, the obligation to wheel electrical energy on the Utility Grid System).

<sup>8</sup> The Lenders will also wish to ensure that the Company has received (or will be able to obtain on a timely basis) all required Consents. To this end, the Company and/or the Lenders will often ask that the Government promise that so long as the required Consents are applied for in accordance with the applicable Laws of the Host Country, such Consents will be granted on a timely basis. If the Government agrees, such a promise will often be included in the Implementation Agreement.

For its part, the Company may require that Utility also agree to maintain all permits, licenses and approvals applicable to Utility or its facilities. The following provision provides an example:

(n) Utility shall, at its own expense, (a) use all reasonable efforts to obtain and maintain in effect all permits, licenses and approvals required by all Public Sector Entities with jurisdiction over Utility, the Utility Grid System, the Interconnection Facilities and the Metering System in order to enable it to perform its obligations under this Agreement; (b) give all required notices and allow all required inspections under all consents, permits, licenses and approvals obtained by it in connection with the Complex; and (c) pay all prescribed fees in connection with such consents, permits, licenses and approvals.

<sup>9</sup> Throughout the text of the Agreement, we note in square brackets instances where the Parties may wish to negotiate whether a right or obligation of a Party is limited by a standard of materiality.

<sup>10</sup> In general, whenever the Company will suffer delays or costs if Utility approval is not timely received, the Company will wish to add a “deemed approval” clause such as this one so that Utility will be deemed to have given its consent or approval if it has not responded to the Company within the allotted time frame.

<sup>11</sup> In some power purchase agreements, the parties state expressly that the Company may appoint a Construction Contractor to design, construct and Commission the Complex, but that Utility has the right to approve the Construction Contractor and any replacement of the Construction Contractor. The following clause is typical:

(n) The Company may appoint a Construction Contractor for the design, construction and Commissioning of the Complex; provided, however, that such appointment shall not relieve the Company of any liability whatsoever resulting from a breach by the Company of any term or condition of this Agreement. The Company shall not appoint or replace the Construction Contractor without the prior written consent of Utility[, which consent shall not be unreasonably withheld or delayed].

<sup>12</sup> As with regards to the Construction Contractor, in some power purchase agreements, the parties state expressly that the Company may appoint an O&M Contractor to operate and maintain the Complex, but that Utility has the right to approve the O&M Contractor and any replacement of the O&M Contractor. The following provision is an example:

(n) The Company may appoint an O&M Contractor to operate and maintain the Complex; provided, however, that such appointment shall not relieve the Company of any liability under this Agreement resulting from a breach by the Company of any term or condition of this Agreement. The Company shall not appoint or replace the O&M Contractor without the prior written consent of Utility[, which consent shall not be unreasonably withheld or delayed].

<sup>13</sup> In any project which has the capability of utilizing a backup fuel source, Utility may request that the Company submit all relevant data regarding its backup fuel arrangements. The following provision is typical:

(n) As available, draft copies of the agreement for the supply of backup fuel for the Complex, and no later than [\_\_\_\_\_] Days prior to Financial Closing, a copy of such backup fuel supply agreement, as will be executed on or before Financial Closing;

Utility may also require that the Company create, and submit to Utility for its approval, an overall plan for providing Fuel to the Complex in accordance with the terms and provisions of this Agreement.

<sup>14</sup> In some power purchase agreements, Utility might require that a percentage of all Capacity Payments be withheld by Utility as retainage to ensure the delivery by the Company of all documents required, by the dates indicated, in Section 4.2.

<sup>15</sup> Often Commissioning of the Complex is done in stages as generating units come on line. This is beneficial to Utility because it is able to get firm capacity from the Company at an earlier date. On the other hand, Utility must also begin making Capacity Payments and Energy Payments prior to the Commercial Operations Date. As stated above, for purposes of this Agreement, we have assumed that the Complex will not be built and Commissioned in successive stages but, instead, will come on line as a single, integrated facility. In the event that the Parties do wish to build and Commission the Complex's generating units in sequential order, this concept would need to be reflected throughout the entire Agreement. For instance, Utility would likely establish a "Required Commissioned Date" for each Unit and the Company would be liable for liquidated damages in the event that each Unit was not Commissioned before its Required Commissioned Date.

<sup>16</sup> Parties to a power purchase agreement will often determine that it is in their respective interests to provide for the sale by the Company, and purchase by Utility, of "test energy" from the Complex prior to the Commercial Operations Date. Otherwise, there would be no payments made to the Company prior to the Commercial Operations Date.

<sup>17</sup> In order to ensure that the Company is able to maintain some degree of control with respect to observation or inspection visits made by Utility, the Company is likely to insist on adding a provision similar to the following to this Section:

All persons visiting the Complex on behalf of Utility shall comply with the reasonable instructions and directions of the Company or its Contractors.

<sup>18</sup> Other provisions sometimes included in Article 4 relate to failure to submit reports and prohibitions against tampering with the Interconnection Facilities. These provision would apply throughout the term of the Agreement, not just during the pre-operation period. The following are examples:

(n) Failure to Submit Reports

Any failure of either Party to timely submit any reports, information or certifications required by this Agreement, including the items required by Section 4.2, shall, in addition to any rights and remedies available to the receiving Party under law, give the receiving Party the right to delay reciprocal action for which such information is provided, or the date or event in connection with which the information is provided, for a period equal to any such delay by the delivering Party.

(n) Tampering

The Company shall not tamper, and shall ensure that its employees, Contractors or subcontractors of any tier do not tamper, with the Interconnection Facilities.

<sup>19</sup> In certain Host Countries, the applicable environmental laws and standards may not be well-developed, and Utility may prefer to use other environmental standards, such as those issued by the World Bank. The Lenders may also impose their own standards on the Company, but these requirements would typically be included in the Loan Documents rather than in this Agreement.

<sup>20</sup> Utility may also require that the Company provide an opinion of counsel affirming the validity of certain of the representations made by the Company in Article 5 and/or certificates of officers, accountants, engineers or agents of the Company in respect of other obligations of the Company under the Agreement. Such covenants would be similar to the following:

(n) at the [Financial Closing/Commercial Operations Date], the Company shall, at no cost to Utility, cause its counsel to issue an opinion to Utility affirming the validity of the representations in Sections 5.1, 5.2, 5.3 and 5.5, affirming, to the best of its knowledge, the validity of the other representations in Article 5 and setting forth such further matters as Utility may reasonably request.

(n) the Company will, upon request of Utility, deliver or cause to be delivered from time to time to Utility certifications of its officers, accountants, engineers or agents as to the performance of its obligations under this Agreement and as to such other matters as Utility may reasonably request; provided, however, that each certificate from such accountants, engineers or agents shall be requested not more than twice in any [\_\_\_\_]-month period;

<sup>21</sup> Utility also may wish the Company to submit a certificate similar to the following:

(n) As of [Financial Closing and as of] the Commercial Operations Date, a certificate, dated as of such date, signed by the Chairman of the Board, President, Chief Executive Officer or a Vice President of the Company and by a principal financial or accounting officer of the Company (a) affirming the validity of the representations of the Company set forth in Article 5 (as of the [Financial Closing Date or the Commercial Operations Date[, as appropriate,]) and (b) stating that no Company Event of Default shall have occurred and be continuing and that the Company has performed all obligations required to be performed by it hereunder on or before [Financial Closing or] the Commercial Operations Date[, as appropriate].

<sup>22</sup> Utility is often asked by the Company to make reciprocal representations and warranties, but Utility, especially if it is Government-owned, often resists. Sometimes the Parties compromise on abbreviated representations and warranties, such as:

(n) Utility hereby represents and warrants that:

(n. 1) it is duly created pursuant to statute, it is validly existing and has, so far as is material to the Company, complied fully with all applicable Laws of Host Country, and that there are no proceedings pending, or to the best of its knowledge, threatened for the dissolution of Utility or that would adversely affect the performance by Utility under this Agreement; and

(n. 2) this Agreement has been duly authorized, executed and delivered by it and constitutes the legal, valid and binding obligation of it.

<sup>23</sup> Sections 6.1.2 and 6.2.2 are relatively simple, straightforward provisions concerning the Dispatch schedule for the Complex. However, in some instances (often relating to the Company's need to schedule Fuel deliveries), the parties to a power purchase agreement will wish to provide much more detail in respect of the scheduling of the Complex. This can be done in the text of the Agreement, in a Schedule or in the operating procedures to be developed pursuant to Section 4.3. The following is an example of a provision with more specificity than that contained in Sections 6.1.2 and 6.2.2:

(n) in order to assist with scheduling of the Complex to meet the requirements of Utility, the Parties agree that the following procedures will be adhered to:

(n.1) Year Ahead Notification.

Not less than [\_\_\_\_\_] Days before the Scheduled Commercial Operations Date, and thereafter not less than [\_\_\_\_\_] Days before the beginning of each Operating Year, Utility shall provide to the Company estimated requirements on a monthly basis for Net Energy Output for the remainder of the Year in which the Commercial Operations Date is scheduled to occur, and thereafter for each subsequent Operating Year, but Utility shall not be bound by these figures.

(n.2) Month Ahead Notification.

Not less than [\_\_\_\_\_] Days before the beginning of the Month prior to the Scheduled Commercial Operations Date and thereafter not less than [\_\_\_\_\_] Days before the beginning of each Month, Utility shall provide to the Company estimated requirements, on a Day-by-Day basis, for Net Energy

Output during that Month and also, provisionally, for the following Month, but Utility shall not be bound by these figures.

(n.3) Week Ahead Notification.

Not less than [\_\_\_\_\_] hours before the beginning of the Week prior to the Scheduled Commercial Operations Date and thereafter not less than forty-eight (48) hours before the beginning of each Week, Utility shall provide to the Company estimated requirements, on an hour-by-hour basis, for Net Energy Output during that Week and also, provisionally, during the following Week, but Utility shall not be bound by these figures.

(n.4) Plant Availability Notification.

To enable Utility to give final schedules of requirements as required by subsection [n.5] below, the Company shall, by [TIME] the Day before the Scheduled Commercial Operations Date and thereafter by [TIME] each Day, inform Utility of the estimated Declared Available Capacity of the Complex available during each hour of that Day commencing [\_\_\_\_\_] hours ahead and, provisionally, for the Day immediately thereafter. Such estimates shall not be binding upon the Company, and the Company shall advise Utility as soon as possible of any changes in its Declared Available Capacity for such Days.

(n.5) Day Ahead Notification.

Not less than [\_\_\_\_\_] hours before the start of the Day before the Scheduled Commercial Operations Date and thereafter not less than [\_\_\_\_\_] hours before the start of each Day, Utility shall provide to the Company its requirements, on an hour by hour basis, for Net Energy Output, Start-Ups, and Reactive Power during that Day and also, provisionally, during the following Day. Such requirements shall be not be binding upon Utility and Utility may subsequently alter its requirements.

The Parties agree and acknowledge that the actual operation level requested by Utility may be substantially different from the information provided in accordance with this Section [n]; provided, however, that actual operation levels requested by Utility shall at all times be subject to compliance with the Minimum Functional Specifications.

(n) In connection with its rights to Dispatch the Complex in accordance with this Agreement, Utility will provide the Company with at least [\_\_\_\_\_] minutes advance notice of changes in operating levels to be achieved by the Complex (or such greater period as may be required by the Minimum Functional Specifications) except that when the Complex is operated with AGC, Utility shall not be required to provide such notice but Utility shall observe the Minimum Functional Specifications in effecting the changes in operating levels.

In the Minimum Functional Specifications, the Company will likely want to limit the ramp rates applicable to the Complex, as well as provide minimum down times and run times. If Utility sometimes places the Complex under the control of AGC equipment, Utility may wish to add a provision to this Section similar to the following:

(n) In the event that Utility from time to time elects to place the Complex under the control of AGC, Utility shall advise the Company of the periodic estimated requirements from the Complex, and the Company shall schedule the operation of the auxiliaries to meet the said estimated requirements.

In addition, Utility may wish to be supplied with Reactive Power from the Complex. If so, a provision similar to the following would be added:

(n) Subject to the Minimum Functional Specifications and approved Scheduled Outages and Maintenance Outages, Utility shall have the right to request, and the Company shall deliver, Reactive Power [free of charge] from the Complex; provided, however, that Utility must distribute requests for Reactive Power among the Complex and other generating facilities on a non-discriminatory basis having due regard for the system-wide voltage profile, Unit location, Unit availability, line outages and system demand.

<sup>24</sup> The Company may wish to clarify here that, in the event that the Company fails to comply with Utility's Dispatch instructions, the payment of liquidated damages will be Utility's only remedy. The following provision is intended to make this point:

In the event that the Company fails or is unable to comply with any such instructions, Utility's sole remedy shall be the collection of liquidated damages, if any, payable in accordance with Section 9.3 and Schedule 6; provided, however, that nothing in this Section 6.2.1 shall preclude Utility from terminating this Agreement pursuant to its rights under Article 15.

<sup>25</sup> Utility may want the Company to plan Scheduled Outages outside of certain Peak Months designated by Utility. If such case, Utility may propose to add a provision similar to the following:

(n) Under no circumstances shall the Company be permitted to schedule Scheduled Outages during the Peak Months specified in Schedule 1. Utility may designate new Peak Months by giving notice to the Company at least [\_\_\_\_\_] Months prior to the next Day by which the Company must submit its proposed schedule of Scheduled Outage periods pursuant to Section 6.3.1; provided, however, that Utility may not designate more than [\_\_\_\_\_] Months each Year as Peak Months; and provided further, that Utility may not designate more than [\_\_\_\_\_] consecutive Months as Peak Months without the prior consent of the Company [(which consent shall not be unreasonably withheld or delayed)].

Furthermore, depending on the number of Units comprising the Complex, Utility may want the Agreement to provide that the Company may only take one Unit off-line at a time for scheduled maintenance. The following provision illustrates the point:

(n) Under no circumstances shall the Company be permitted to schedule Scheduled Outages for more than one Unit at any given time; provided, however, that the Company may schedule a Scheduled Outage for the entire Complex at one time for up to [\_\_\_\_\_] hours per Operating Year subject to the Minimum Functional Specifications and the prior approval of the Operating Committee.

<sup>26</sup> While, as provided in this provision, Utility will wish to limit the number of Scheduled Outages the Company is entitled to take in a given Operating Year, the Company will want to ensure that it is entitled to a sufficient number of Scheduled Outages in order that it may properly maintain the Complex without suffering any liability to Utility. The Company may need additional Scheduled Outages in Operating Years during which extensive maintenance must be performed on the Complex. How frequent major maintenance must occur is dependent on a number of factors, including the type of technology used, the fuel used, the manufacturer and model type, load profile and ambient conditions. The following provision is an example:

(n) Commencing with the Commercial Operations Date, the Company may not schedule more than a total of [\_\_\_\_\_] Complex Hours of Scheduled Outages during the [\_\_\_\_\_] Year after the Commercial Operations Date and each [\_\_\_\_\_] Year thereafter (a “Major Overhaul Year”) or more than a total of [\_\_\_\_\_] Complex Hours of Scheduled Outages in any other Year.

To the extent that the Company may use less than its allotted number of Scheduled Outages, the Company may wish to carry forward the amount of such unused Scheduled Outages to be applied in subsequent Years, although Utility may wish to put certain limitations on the ability of the Company to carry forward Scheduled Outages. For example:

Notwithstanding the preceding sentence, if the Company schedules fewer Complex Hours of Scheduled Outages in any Year after the Commercial Operations Date other than a Major Overhaul Year, the Company may carry up to [\_\_\_\_\_] such unscheduled Complex Hours forward to the next Year and add such unscheduled Complex Hours to the total allowed for that Year; provided, however, that the Company may not carry forward any unscheduled Complex Hours to the Year following a Major Overhaul Year.

Under certain circumstances, the Company may wish to avail itself of a higher number of Scheduled Outages in a given year even if such year is not scheduled to be a Major Overhaul Year. For example, if there are an excessive number of Start-Ups during a given period, the Company may wish perform major maintenance on the Complex prior to the Major Overhaul Year. The following proviso is illustrative:

provided, however, that if at the end of [\_\_\_\_\_] months between such scheduled Major Overhaul Years, the number of combustion turbine Start-Ups exceeds [\_\_\_\_\_] , the Company shall, upon notice given to Utility no later than [\_\_\_\_\_] Days following the end of such [\_\_\_\_\_] month-period, have the right to up to [\_\_\_\_\_] additional Complex Hours of Scheduled Outage in the Year following such [\_\_\_\_\_] months instead of in the Major Overhaul Year.

We also note that instead of viewing Scheduled Outages on a Complex Hour basis, the Parties may wish to do so on a “Unit Hour” by focusing on each hour that an individual Unit (as opposed to the entire Complex) is completely or partially interrupted.

<sup>27</sup> In the event that Utility requests that the Company reschedule a Scheduled Outage, the Company will need a reasonable amount of advance notice. Otherwise, the Company may incur costs because it may have entered into a contract to have the scheduled maintenance performed prior to the rescheduling.

<sup>28</sup> With respect to the supply of power during an Emergency, there is likely to be an issue concerning whether or not the Company shall be obligated to operate outside of the Minimal Functional Specifications of the Complex. Typically, the Company would not be required to operate outside the bounds of the Minimum Functional Specifications unless Utility provided the Company with a very strong indemnity to protect the Company in the event the Complex was damaged in some way. There may also be discussion between the Parties regarding the obligation of the Company to supply power prior to the Commercial Operations Date during an Emergency. If the Company does agree to supply Net Energy Output prior to the Commercial Operations Date during an Emergency, the Company will likely insist on adding a proviso similar to the following to this Section to ensure that it is not unduly harmed by such supply:

provided, however, that, prior to the Commercial Operations Date, the Company shall not be obligated to supply such power if doing so would materially delay the completion of construction, testing or Commissioning for the Complex or adversely affect the Company's

ability to have Commissioned the Complex prior to the Required Commercial Operations Date.

Again, the Company might be willing to increase its obligations during an Emergency if Utility agrees to reimburse the Company for any out-of-pocket costs and other damages it incurs as a result.

<sup>29</sup> This number usually ranges from 24 to 96 hours.

<sup>30</sup> In all likelihood, the amount of compensation to be given to the Company if Utility takes over operation of the Complex following a cessation of operations by the Company will be subject to negotiation. In the following clause, Utility would be required to make payments for fixed operation and maintenance costs in addition to debt service payments:

During any period that Utility shall operate the Complex pursuant to this Section, Utility shall bear all costs of such operation (including fixed costs and variable Fuel costs), and Utility shall only be obligated to pay the Company an amount sufficient to cover the equivalent of the debt service component and fixed operation and maintenance component of the Capacity Payment as calculated under Section 9.1 and Schedule 6. At its option, Utility shall also either (i) pay for the cost of any Fuel and lubricating oil in the Company's storage facilities which the Company has paid for and which Utility has used to operate the Complex, or (ii) replace such Fuel and lubricating oil supplies upon resumption of operation by the Company.

Whether or not Utility in such a situation would reimburse the Company for Fuel and lubricating oils which have already been charged to the Company's account would also differ from project to project.

<sup>31</sup> In the event Utility wants the right to assume the control and operation of the Complex after an abandonment of the Complex by the Company, the standard of care and the scope of Utility's indemnity will be subject to negotiation. In addition, the Company and the Lenders may request that, before Utility commences the operation of the Complex pursuant to Section 6.6, there be adequate insurance coverage in place to cover any damage that might occur during such operation. Alternatively, Utility might be required to defend, indemnify and hold the Company harmless from and against any loss or damage sustained as a result of an event that occurred during the period of Utility's operation of the Complex.

<sup>32</sup> For purposes of this Agreement, as mentioned above, we are assuming that the Complex is fired by diesel fuel oil. In a gas-fired plant, there would typically be a provision in the Agreement requiring the Company to maintain a given level of fuel oil as backup fuel in addition to the general requirement to obtain and maintain a reliable supply of natural gas.

<sup>33</sup> If both the Fuel supplier and Utility are owned or controlled by the Government, the Company may wish to be excused from this obligation if the Fuel supplier defaults in its obligations under the Fuel Supply Agreement. In this case, provisos similar to the following might be added:

provided, however, that the Company will not be required to maintain such [ ] Day supply for so long as, and to the extent that, a default by the fuel supplier under any Fuel Supply Agreement causes the Company to reduce such [ ] Day supply; and provided further, that the Company shall use its reasonable efforts to replenish such [ ] Day supply as soon as practicable with Fuel from any source.

<sup>34</sup> The Laws of Host Country may require, or political considerations may dictate, that the Company utilize and/or train certain levels of local labor in the operation and maintenance of the Complex. If so, a provision such as the following should be added to Section 6.8:

The Company shall use its reasonable endeavors to employ local labor in both skilled and unskilled capacities. The Company shall also develop and maintain training programs in conjunction with Utility to train qualified local persons for positions requiring special labor skills. At a minimum, upon the request of Utility, the Company shall train up to [ ] qualified local persons in the operation of the Complex and up to [ ] qualified local persons in the maintenance of the Complex.

<sup>35</sup> The Parties may agree that it is in their mutual interests to record certain telephone communications relating to the Dispatch of the Complex. If so, a provision similar to the following would be inserted in this Article 6:

(n) Each Party hereby authorizes the other Party to tape record all telephoned voice communications relating to Declared Available Capacity control and Dispatch of the Complex received from the other Party pursuant to this Agreement and shall supply, at the request of the other Party, a copy or transcript of any such recording.

<sup>36</sup> The Company may wish that Utility provide to the Company status reports in respect of the construction, installation and testing of the Interconnection Facilities. If Utility agrees to this demand, a provision similar to the following would be inserted in Section 7.1:

(n) Utility shall give the Company reports on the progress of the design and construction of the Interconnection Facilities (including a good faith, non-binding estimate of the date by which Utility then expects to complete the construction and installation of the Interconnection Facilities as required by Section 7.1.3) until the construction and installation of the same are fully completed. Such reports shall be given by Utility on a [quarterly] basis, or more frequently when reasonably requested by the Company.

<sup>37</sup> The Company is likely to insist that, while on the Site pursuant to this Section 7.2.1, Utility comply with the reasonable instructions of the Company and indemnify the Company against any harm that Utility causes while on the Site. The following provision would be added to the end of Section 7.2.1:

When on the Site, Utility shall comply with all reasonable instructions of the Company and its Contractors relating to the carrying out of any work on the Site and, notwithstanding any other provision in this Agreement to the contrary, shall defend, indemnify and hold the Company and the Contractors harmless from any loss or damage sustained by virtue of Utility's [gross] negligence or willful misconduct in the exercise of rights pursuant to this Section 7.2.1, but only to the extent that such loss or damage is not covered by the Company's insurance.

<sup>38</sup> In the event that Utility has not completed the Interconnection Facilities on time, in addition to (or in lieu of) liquidated damages, the Company may wish to have the option to construct alternative interconnection facilities. Generally, this would only be a viable option for the Company if such alternative interconnection facilities could be built at a relatively low capital cost. The following provision is illustrative:

(n) In the event that Utility has not completed the Interconnection Facilities by the date on which the cumulative amount of liquidated damages payable by Utility under Section 7.3.1 exceeds [AMOUNT], the Company may notify Utility that it intends to construct alternative interconnection facilities (which are sufficient to enable the Company to complete the testing and Commissioning specified in Sections [\_\_\_\_\_] of Schedule 4) [at its own expense], and the Company shall then proceed to construct such alternative interconnection facilities in accordance with the specifications set forth in Schedule 3. Upon completion of such alternative interconnection facilities, the Company shall test such facilities in accordance with the procedures set forth in Schedule 3. Utility shall cooperate with the Company in, and have the right to observe, the design, construction, installation, commissioning, operation, maintenance and testing of the alternative interconnection facilities. Such cooperation and observation shall not be construed as an endorsement by Utility of the design thereof nor as a warranty by Utility of the safety, durability or reliability of such facilities.

Depending on the levels of liquidated damages paid pursuant to Section 7.3.1, the Company will likely seek reimbursement from Utility of the costs it incurs in constructing any alternative interconnection facilities pursuant to the foregoing provision.

<sup>39</sup> In connection with the Interconnection Facilities, the Company or its Lenders may wish to have the right to require Utility to accelerate its construction of the Interconnection Facilities. If so, a provision similar to the following might be added:

(n) At any time after the Company has given Utility notice of the anticipated Scheduled Commercial Operations Date, the Company may request Utility in writing to accelerate the design, construction and installation of the Interconnection Facilities, or both, at the Company's sole expense, and Utility shall use all reasonable efforts to comply with such request. Within [\_\_\_\_\_] Days after Utility's receipt of such a request, the Parties shall meet and Utility shall advise the Company of whether such acceleration is possible and, if so, the number of Days to be gained, the incremental cost of such acceleration, any options that may be available, and Utility's estimated payment schedule therefor. Upon Utility's receipt of [\_\_\_\_\_] percent of estimated costs for a program of acceleration identified at the meeting and the Company's commitment in writing to pay for the balance of such program of acceleration, Utility shall promptly undertake such program.

<sup>40</sup> The commercial terms regarding the Metering System often vary from power purchase agreement to power purchase agreement. For instance, in some power purchase agreements, the Company rather than Utility may have the responsibility for procuring, owning and operating the Metering System. Similarly, in regards to Section 8.2, Utility not the Company may be responsible for installing the Metering System (especially if Utility owns and operates the Metering System).

<sup>41</sup> In the event that a Backup Metering System is not required, a provision such as the following can be added:

(n) Nothing in this Agreement shall prevent the Company from installing, owning, and maintaining meters and metering devices for backup purposes (“Backup Metering System”).

<sup>42</sup> In some power purchase agreements, the Company might have the primary responsibility for testing the Metering System or the Backup Metering System. Whichever Party has this responsibility, the other Party would customarily be entitled to advance notice of any testing and allowed to have one of its representatives present during any such testing.

<sup>43</sup> As with the testing of the Metering System, the Company rather than Utility might have the primary responsibility for reading the Metering System.

<sup>44</sup> The telecommunications equipment to be provided by the Company is typically set forth in a Schedule to the Agreement (in this Agreement, Schedule 5). Such equipment normally would include telemetering and data interface equipment, a PBX or similar system to permit voice communications between the Complex and the Control Center and telecopying equipment.

<sup>45</sup> Alternatively, the Parties may agree that Capacity Payments will begin being made on the Day after the Commercial Operations Date. The Parties may also agree that Capacity Payments will be made in

advance of the Commercial Operations Date in exchange for a reduction in the aggregate amount of Capacity Payments.

<sup>46</sup> In some cases, Utility may wish to insert a provision into the Agreement stating it shall not have to make any Capacity Payments until it has reviewed and approved the test results for the Complex. In such case, a clause similar to the following would be added:

Notwithstanding the preceding sentence, Utility may withhold all such payments until Utility receives and approves all of the test results specified in Section 4.2.14; provided, however, that Utility may not withhold such payments more than [\_\_\_\_\_] Days after it receives all of the test results specified in Section 4.2.14 unless Utility indicates within the [\_\_\_\_\_] Day period that it does not approve such test results in accordance with Section 4.2.

<sup>47</sup> In this Agreement, from and after the Commercial Operations Date, Utility will purchase the Dependable Capacity of the Complex. As set forth in Section 9.2, Utility will also purchase the Net Energy Output of the Complex when dispatched. Accordingly, the tariff consists of two parts: (a) the Capacity Purchase Price, which is payable to the Company by Utility and is not dependent upon actual dispatch and (b) the Energy Purchase Price, which is payable to the Company based on the actual amount of Net Energy Output taken, or dispatched, by Utility from the Complex. Typically, for a power purchase agreement like this one, for each Operating Year, the Capacity Purchase Price and the Energy Purchase Price would be based on a “reference tariff” set forth in a separate schedule to the agreement (in this case, Schedule 6). The reference tariff is based on certain pricing assumptions in effect on the date the power purchase agreement is signed.

In this Agreement, Schedule 6 would provide for the adjustment and indexation of the Capacity Purchase Price. Such adjustment primarily relates to providing the Company with protection against exchange rate risk, inflation risk and interest rate risk. The Capacity Purchase Price is generally comprised of components which cover the Company’s debt service, its other fixed costs (including administrative, maintenance and insurance costs) and a return on equity. The Parties will often negotiate as to whether Capacity Payments are paid in Foreign Currency or Local Currency or a combination of both. If payments are to be made in Local Currency, the Company may ask that payments be indexed to account for the devaluations in Local Currency *vis-a-vis* the relevant Foreign Currency and/or restrictions on conversion of Local Currency into Foreign Currency and transfer of such Foreign Currency out of the Host Country. The Parties may also negotiate changes to the Capacity Purchase Price based on changes in foreign inflation rates (and/or in local inflation rates if the Capacity Purchase Price consists of any component covering local fixed costs) and in changes relating to the interest rate increases or decreases in respect of the Company’s debt under the Loan Documents.

<sup>48</sup> This provision would only be applicable in the event that the Parties agree that the Company will sell, and Utility will purchase, test energy from the Complex.

<sup>49</sup> Schedule 6 to the Agreement would also provide for the adjustment and indexation of the Energy Purchase Price. While the Energy Purchase Price can be structured in a variety of ways, often the Energy

Purchase Price will be comprised of fixed and variable fuel charge elements and a variable operations and maintenance cost element. Typically, the fuel charge elements are adjusted based on changes in the price of Fuel for the Complex and the variable O&M element is adjusted based on changes in foreign or local inflation (as appropriate). If the Energy Purchase Price is denominated in Local Currency, the Energy Purchase Price would also be indexed to account for exchange rate fluctuations.

Some power purchase agreements also provide for Supplemental Payments to be made by Utility to the Company. For example, Supplemental Payments are sometimes made for certain Force Majeure events, for Start-Ups of the Complex and for certain pass-through costs, such as insurance premia, payments under a lease, changes in the cost of regulatory compliance, certain taxes, initial training expenses and certain adjustments with respect to previous payments.

Utility, on the other hand, will seek to reduce its payments to the Company. For instance, Utility may wish to capture some of the benefits to the Company of refinancing a Project. The following provision illustrates the point:

(n) If the Company refinances the Complex or any portion thereof during the term of this Agreement upon terms and conditions, including interest rate, security, repayment provisions and fees, which, on the whole, are more favorable to the Company than the terms and conditions provided for in the Loan Documents executed at Financial Closing (the “Improved Loan Conditions”), then the Company shall pay to Utility [\_\_\_\_\_] percent of the reasonable value of the Improved Loan Conditions (the “Savings”) through a reduction in the payments to the Company over the remaining term of this Agreement which is equivalent to the Savings as set forth in Section [\_\_\_\_] of Schedule 6.

<sup>50</sup> There are many different ways of structuring liquidated damages in connection with a power purchase agreement. Section 9.3 is only one example.

<sup>51</sup> Section 9.3.3 could also be structured to provide for differing levels of liquidated damages depending on the AIDC and the latest tested Dependable Capacity. The following provisions is illustrative:

(n) If, after the Commercial Operations Date, the Dependable Capacity of the Complex shall be less than [\_\_\_\_\_] percent of the AIDC, then the Company shall pay to Utility the following amounts until the next testing of Dependable Capacity as liquidated damages for the detrimental impact of such lower Dependable Capacity on Utility's generation planning:

(n.1) if the AIDC is less than [\_] MW, [AMOUNT] per kW per Month of the On-Going Dependable Capacity Shortfall;

(n.2) if the AIDC is greater than [\_\_\_] MW and the Dependable Capacity is greater than [\_\_\_] MW, [AMOUNT] per kW per Month of the On-Going Dependable Capacity Shortfall; or

(n.3) if the AIDC is greater than [\_\_\_] MW and the Dependable Capacity is less than [\_\_\_] MW, [AMOUNT] per kW per Month for the difference between the AIDC and [\_\_\_] MW plus [AMOUNT] per kW per Month for the difference between [\_\_\_] MW and the Dependable Capacity.

<sup>52</sup> Again, there are various ways to structure a provision providing for the payment of liquidated damages in the event that the Company fails to reach the operating level requested by Utility. Section 9.3.4 is one available option. The Parties could also agree that the Company is entitled each Operating Year to a certain number (or “bank”) of “free” kWh to offset any Forced Outages. A bank of free kWh for Forced Outages will be especially important to the Company in the early years of operation (as the kinks in the Complex are worked out) and in Major Overhaul Years. If a bank concept is utilized in the power purchase agreement, in any Operating Year when the entire bank of free kWh are not used, the Company will likely want the ability to carry forward such unused free kWh to be applied in subsequent Operating Years.

The Parties could also agree to cap the amount of liquidated damages payable under Section 9.3.4. One example of a cap would be that liquidated damages under Section 9.3.4 in any Month shall not exceed the Capacity Payments owed to the Company for such Month.

Another variation would be for the Parties to weight the liquidated damages payable under Section 9.3.4 based on when the Forced Outages occur. The liquidated damages would be higher if the Forced Outages occur during peak hours than if they occur during non-peak hours.

<sup>53</sup> In addition to liquidated damages, the Parties to the Agreement may determine that it is their mutual interests to provide for certain bonuses which would be payable to the Company upon the achievement of specified milestones. For instance, the Company might be entitled to earn bonus payments in the event that the Commercial Operation Date occurs prior to a specified date or if, in any given year, the Net Energy Output of the Complex during the Peak Months (or any Months) exceeds Utility’s targets. The following clauses are examples of such bonus arrangements:

(n) Energy Purchase Price Premium

(n.1) In the event that the Commercial Operations Date occurs on or before [DATE], as such date may be extended as provided in Section [n.2] (the “Premium Date”), in addition to the Energy Purchase Price, Utility shall pay to the Company a premium of to [AMOUNT] per kWh of Net Energy Output delivered to Utility from the Commercial Operations Date and continuing through the [\_\_\_\_\_] Operating Year. Except as set forth in Section [n.2], in no event shall the Premium Date or

the period, if any, during which the premium shall be paid be extended by reason of a Force Majeure or for any other reason whatsoever.

(n.2) The Premium Date shall be extended on a Day-for-Day basis for (a) Utility's failure to complete the construction and installation of the Interconnection Facilities in accordance with Article 7, and/or (b) a delay or deferral caused by Utility of the Commissioning tests of the Complex by the Company pursuant to Article 10 and Schedule 4.

(n) Net Energy Output Bonus

(n.1) In the event that the Net Energy Output during any of the Peak Months in any Operating Year is in excess of the Bonus Threshold for the applicable Peak Month, then Utility shall pay to the Company within [\_\_\_\_\_] Days of the end of such Peak Month, in addition to any other payments due to the Company pursuant to Section 9.2, an amount equal to [AMOUNT] for each kWh by which the Net Energy Output of the Complex during such Peak Month in the Operating Year is greater than the Bonus Threshold for such Peak Month.

(n.2) The amount of the bonus payable pursuant to this Section [n] shall be adjusted from time to time in accordance with Schedule 6.

<sup>54</sup> Utility may also wish to have additional security provided to ensure that the Company performs certain other obligations under the Agreement, *e.g.*, achieving Financial Closing on or before a specified date. Utility may also wish to use such additional security or the Construction Security to secure the Company's obligation to reimburse Utility for the costs it incurs in designing and constructing the Interconnection Facilities in the event the Agreement terminates prior to the Commercial Operations Date.

<sup>55</sup> In some power purchase agreements, in lieu of providing a letter of credit, the Company would have the option of making cash payments to Utility (which Utility would typically hold in a segregated, interest-bearing account) or establishing a performance bond, or a combination of cash collateral account, performance bond and/or letter of credit.

<sup>56</sup> Utility may require the Company, in addition to providing the letters of credit set forth in Section 9.4, to establish and maintain a maintenance reserve account to be used to pay for the maintenance costs of the Complex. This will not be a tremendous burden to the Company because typically its Lenders will have even more stringent requirements regarding maintenance reserves. A representative provision follows:

(n) Maintenance Reserve

(n.1) The Company shall establish and maintain a Maintenance Reserve (the “Maintenance Reserve”), with a financial institution and under depository arrangements satisfactory to Utility, to be used exclusively to pay for maintenance expenses for the Complex, including any repairs or replacements that are necessary or appropriate to assure that the Complex will continue to be operated and maintained in accordance with Prudent Utility Practice. On or before the Commercial Operations Date, the Company shall deposit [AMOUNT] in the Maintenance Reserve.

Thereafter, the Company shall maintain a funding level equal to [AMOUNT] in the Maintenance Reserve at all times; provided, however, that the Company may have [\_\_\_\_\_] Days to replenish the Maintenance Reserve so as to return it to the original level in the event that funds are withdrawn from the Maintenance Reserve to pay for maintenance costs.

(n.2) The Maintenance Reserve shall not be subject to a lien or any other claim by any person other than Utility; provided, however, that the Maintenance Reserve may be subject to a lien by the Lenders as long as it is specified that such funds may be used for maintenance only and cannot be used for debt service or any other purpose unless: (a) the Company has defaulted under the Loan Documents, and (b) the Lenders have accelerated payments under the Loan Documents so that the full outstanding balance is due and payable.

<sup>57</sup> Utility will likely wish to insert a provision in Section 9.5 providing that if the amount of the liquidated damages plus accrued interest due to Utility is greater than the amount which can be set off against a specified number of statements, Utility may immediately deduct the sum due from the Construction Security or the Operation Security, as appropriate.

<sup>58</sup> In many cases, the Company will prepare, and deliver to Utility for payment, invoices each Month detailing the amount of Capacity Payments, Energy Payments, Supplemental Payments (if any), liquidated damages (if any) and bonus payment (if any) payable to the Company. If the Company does prepare such invoices, it would then be up to Utility to pay the amounts indicated on the invoices within the allotted time or to dispute all or part of the invoice. Typically, if the Company is given the responsibility for preparing the initial invoices, it is also given the primary responsibility for reading the meters. See n. 43 *supra*.

<sup>59</sup> Section 9.7 is not always included in power purchase agreements, especially if Utility is viewed as creditworthy and/or if the Government has provided a Guarantee to the Company guaranteeing Utility's payments to the Company.

<sup>60</sup> Schedule 4 will establish a detailed schedule and protocol in respect of the testing and Commissioning of the Complex before and after the Commercial Operations Date, including procedures for the various tests to be performed concerning the first synchronization of the Complex, initial operational testing, reliability tests and Dependable Capacity tests after the Commercial Operations Date.

<sup>61</sup> The number of additional Dependable Capacity tests permitted may be subject to negotiation.

<sup>62</sup> Utility may wish to have the right to approve the results of the testing under Article 10 or, as a compromise, to have the Technical Agent approve such results. Utility may also wish to set a limit on the amount of Dependable Capacity which the Company can nominate. Accordingly, a provision similar to the following might be added:

The Company shall set the amount of Dependable Capacity at the least of (a) [\_\_\_\_\_] MW, or (b) the amount of sustained capacity at the Utility-owned meters as determined by testing from time to time in accordance with Schedule 4.

<sup>63</sup> The types of insurance coverage set forth in Section 11.1 are fairly standard. Of course, given the particulars of the actual project, the Parties may determine that additional or alternative coverages are needed. In certain projects, Utility will also be obligated to obtain and maintain insurance coverage, including coverage for the Interconnection Facilities and/or its other facilities.

<sup>64</sup> The Company may request that provisos similar to the following be added to limit its general obligation to obtain the insurance coverage set forth in Section 11.1:

provided, however, that, if the specified policies and/or deductibles are not available on commercially reasonable terms for reasons other than any negligence or default by, or condition (financial or otherwise) of, the Company, the Company may, subject to the approval of Utility, [which approval shall not be unreasonably withheld or delayed,] obtain, and/or cause its Contractors to obtain, alternative coverage on terms that are reasonable and customary for similar electric generating facilities; and provided further, that the coverage and deductible amounts set forth in Section 11.1 may be changed from time to time with the prior written consent of Utility[, such consent not to be unreasonably withheld or delayed].

In addition, the Company may wish to include a provision concerning the respective rights and obligations of the Parties in the event that the insurance set forth in Section 11.1 becomes more costly or unavailable due to a Host Country Political Event. The following provision is illustrative:

(n) If, following a Host Country Political Event or an event or occurrence that, had it affected the Company directly, would have been a Host Country Political Event (collectively, an “Insurance Event”), any of the insurance required by this Section 11.1 is not available to the Company at commercially reasonable rates and on commercially reasonable terms (including reasonable deductibles) due to the occurrence of the Insurance Event, then, so long as such insurance continues (on an uninterrupted basis) to be available to the Company by reputable insurers acceptable to the Lenders, upon notice to Utility by the Company, the actual additional cost necessary to maintain the required level of insurance in the required amounts that is attributable to the occurrence of the Insurance Event shall be recoverable by the Company from Utility and treated as a pass-through item pursuant to Schedule 6. In such an event, in lieu of making such payment to the Company, Utility in its sole discretion may elect to procure from internationally reputable insurer(s) the insurance required by Section 11.1 (which in all material respects, including without limitation deductibles, endorsements, terms of reinsurance and security in favor of the Lenders, conforms to the terms of insurance that were prevailing and in effect immediately prior to the Insurance Event) on behalf of the Company and secured in favor of the Lenders. In the event that, at any time, Utility obtains insurance pursuant to this Section [n], the Company and the Lenders (so long as they shall have an insurable interest in the Complex) shall be named as joint insureds. Any Dispute as to the amount or the extent to which such additional cost was in fact, or at any time continues to be, attributable to the occurrence of an Insurance Event, shall be determined by an expert in accordance with the provisions of Section 16.2.

<sup>65</sup> In connection with Utility’s right to operate the Complex under the Section 6.6, Utility may request that the Company add the following provision to this Section 11.2:

(n) With respect to the initial policies of insurance required to be obtained pursuant to Section 11.1, the Company shall procure endorsements or written acknowledgments pre-qualifying Utility as an operator of the Complex pursuant to Section 6.6 under such policies of insurance (and will use all reasonable efforts to maintain such endorsements or written acknowledgments) so that such insurance will, subject to the terms and conditions of such policies of insurance, continue in effect without interruption in the event that Utility operates the Complex pursuant to Section 6.6. With respect to subsequent policies of insurance required to be procured pursuant to Section 11.1, the Company shall use all reasonable efforts to procure endorsements or written acknowledgments pre-qualifying Utility (and to maintain such pre-qualification, if obtained) as an operator of the Complex pursuant to

Section 6.6 under such policies of insurance, so that such insurance will, subject to the terms and conditions of such policies of insurance, continue in effect without interruption in the event that Utility operates the Complex pursuant to Section 6.6.

<sup>66</sup> If the Complex is project-financed, the Lenders in the Loan Documents will likely ensure that the required insurance policies are established and remain in place throughout the term of the debt. Nevertheless, Utility may wish to have the option to purchase insurance for the Complex in the event that the Company fails to do so or allows any of its policies to lapse. If so, a provisions similar to the following would be added:

(n) If the Company and/or its Contractors fail to obtain or maintain the policies of insurance as required in Section 11.1, Utility may obtain equivalent policies of insurance. The Company shall reimburse Utility for the cost of such policies within [\_\_\_\_\_] Days after notification by Utility, and interest shall accrue at the Default Rate if the Company fails to make payment within such [\_\_\_\_\_] Days. Alternatively, Utility may set off the cost of such policies plus any accrued interest against any payments otherwise owed to the Company. The Company and the Lenders (so long as they shall have an insurable interest in the Complex) shall be named as additional insureds for their respective rights and interests on any insurance procured by Utility pursuant to this Section 11.4. Failure of Utility to obtain the insurance coverage required by this Article 11 shall in no way relieve or limit the Company's obligations and liabilities under other provisions of this Agreement.

The Company, in turn, may insist that the following proviso be added to the foregoing provision in the event that Utility proceeds to purchase insurance coverage on behalf of the Company:

; provided, however, that the Company's failure to purchase insurance shall not constitute a default under this Agreement if Utility purchases insurance pursuant to this Section [n].

<sup>67</sup> In the event that the Company leases the Site from Utility (or from another Public Sector Entity), it is likely that the Company will insist that there be a specific exclusion in Section 12.1 for any claim, proceeding or action related to hazardous materials for which Utility (or such other Public Sector Entity) is responsible pursuant to such lease.

<sup>68</sup> Force Majeure is often divided into the categories described in Section 13.1 if Utility is state-owned and Utility (or the Government) takes some responsibility for the events or circumstances described as Force Majeure -- Political herein. If Utility is not state-owned, there would not be a need to draw a distinction between Force Majeure-- Natural and Force Majeure -- Political.

<sup>69</sup> If the Fuel supplier is Government-owned or -controlled, the Company may request that any event or circumstance constituting a Force Majeure -- Natural under the Fuel Supply Agreement be added here.

<sup>70</sup> If the Fuel supplier is Government-owned or -controlled, the Company may request that any event or circumstance constituting a Host Country Political Event under the Fuel Supply Agreement be added here.

<sup>71</sup> If the Fuel supplier is government-owned or -controlled, the Company may request that any event or circumstance constituting a Foreign Political Event under the Fuel Supply Agreement be added here.

In addition, the Parties may negotiate certain express exclusions from Force Majeure, such as: (a) the unavailability, late delivery or changes in cost of plant, machinery, equipment, materials, spare parts, Fuel or consumables for the Project; (b) a delay in the performance of any Contractor; (c) non-performance or breakdown in equipment resulting from normal wear and tear typically experienced in power generation materials and equipment; and (d) non-performance caused by, or connected with, the non-performing Party's (i) negligent or intentional acts, errors or omissions, (ii) failure to comply with any of the Laws of Host Country, or (iii) breach of, or default under, this Agreement.

<sup>72</sup> The Government, rather than Utility, may agree in the Implementation Agreement to compensate the Company for Host Country Political Events. If so, Utility would be relieved of its obligation to pay Capacity Payments (or Supplemental Payments) in the event of a Host Country Political Event.

<sup>73</sup> If Utility is a governmental entity, the Company may propose that none of the events listed in Section 15.1 shall be a Company Event of Default under the Agreement if such event results from a breach by Government of the Implementation Agreement or the Guarantee (if any) or , if the Fuel supplier is a government entity, if such event results in a breach by the Fuel supplier under the Fuel Supply Agreement.

<sup>74</sup> The Company may wish to limit the applicability of Section 15.1.6 by inserting a provision stating that it shall not be a Company Event of Default if the Abandonment by the Company resulted from a situation which presented a physical threat to persons or property or the security, integrity or reliability of the Complex.

<sup>75</sup> The Company may wish to add a materiality standard similar to the following to the end of this Section:

(which payment or payments exceed in the aggregate at any one time the [AMOUNT]).

<sup>76</sup> Utility may also request that a Company Event of Default occur in the event that the Company fails to achieve the operating levels requested by Utility in its Dispatch notices over a sustained period of time or if the Complex otherwise has a low availability for a given period of time.

<sup>77</sup> The Company may request that a proviso similar to the following is added so that Utility cannot take advantage of this catch-all provision when a more-specific Company Event of Default would also be applicable:

provided, however, that a breach which, with the passing of time or the fulfillment of any other condition specified in Sections 15.1.1 to 15.1.11 above, would constitute an event or circumstance falling within any such Section shall not be a Company Event of Default under this Section 15.1.12.

<sup>78</sup> Utility may wish to add a materiality standard similar to the following to the end of this Section:

(which payment or payments exceed in the aggregate at any one time the equivalent of [AMOUNT]).

In the event that the Government has posted a Guarantee of the payment obligations of Utility under the Agreement, Utility would likely insist that this Section 15.2.3 not become a Utility Event of Default until the Company has first given notice of such payment default to the Government in accordance with the terms of the Guarantee, and that Government also fails to make payment to the Company in breach of the Guarantee.

<sup>79</sup> Utility may request that a proviso similar to the following is added so that the Company cannot take advantage of this catch-all provision when a more-specific Utility Event of Default would also be applicable:

provided, however, that a breach which, with the passing of time or the fulfillment of any other condition specified in Sections 15.2.1 to 15.2.4 above, would constitute an event or circumstance falling within any such Section shall not be a Utility Event of Default under this Section 15.2.5.

The Company may propose to track the Company Events of Default listed in Section 15.1. The Company may also seek to add the following Utility Event of Default relating to the failure of Utility to construct the Interconnection Facilities:

(n) failure of Utility to complete the construction and installation of the Interconnection Facilities by the date that is [\_\_\_\_\_] months after the Scheduled Commercial Operations Date (as extended pursuant to Section 7.1.3), or delay or deferral by Utility of any Commissioning test or tests for more than [\_\_\_\_\_] months after the date on which such test or tests were originally scheduled in accordance with Schedule 4;

If Utility is a governmental entity and there is an Implementation Agreement and/or Guarantee in place, the Company is also likely to argue that the following additional Utility Events of Default be added to this Section 15.2:

(n) the privatization or public sale of Utility, unless the obligations of the Government under the Implementation Agreement and the Guarantee remain in full force and effect after such privatization or public sale (or replacement credit support is provided to the Company by an entity acceptable to the Company in a form and substance satisfactory to the Company);

(n) any material breach by Government of the Implementation Agreement or the Guarantee;

<sup>80</sup> The Parties may negotiate the length of the cure periods in respect of Events of Defaults. Certain Events of Defaults may have longer cure periods than other Events of Defaults.

<sup>81</sup> The Lenders to the Project will require that they be given notice of any Company Event of Default and an additional opportunity to cure such Company Event of Default. The terms and conditions of the Lenders notice and cure rights will ordinarily be set forth in a direct agreement or consent to assignment between the Lenders, Utility and the Company. However, Lenders may propose that a provision similar to the following be added directly to the Agreement:

(n) Notice to the Lenders of the Company's Default.

(n.1) Notwithstanding any other provision of this Agreement notwithstanding, from and after the occurrence of Financial Closing, Utility shall not seek to terminate this Agreement as the result of any default of the Company without first giving a copy of any notice required to be given to the Company under Section 15.3 to the Lenders, such notice to be coupled with a request to the Lenders to cure any such default within the period provided in the [CONSENT TO ASSIGNMENT], which period shall commence upon delivery of each such notice to the Lenders. Each such notice shall be in writing.

(n.2) No rescission or termination of this Agreement by Utility shall be valid or binding upon the Lenders without such notice, and the expiration of the cure periods specified in the [CONSENT TO ASSIGNMENT]. The Lenders may make, but shall be under no obligation to make, any payment or perform or procure the performance of any act required to be made or performed by the Company, with the same effect as if made or performed by the Company. If the Lenders fail to cure or procure the cure of, or are unable or unwilling to cure or procure the cure of, any Company Event of Default prior to the expiration of the cure periods specified in the [CONSENT TO ASSIGNMENT], then Utility

shall have all its rights and remedies with respect to such default as set forth in this Agreement.

<sup>82</sup> In addition to the remedies set forth in Section 15.4.2, the Company may want to ensure that it will be able to readily sell the Complex under favorable commercial terms if the Company is forced to terminate the Agreement as a result of a Utility Event of Default. Thus, the Company may request that Utility grant the Company a “put option” in respect of the sale of the Complex. In other words, if the Company elects to terminate the Agreement after the occurrence and during the continuation of an Utility Event of Default (after expiration of all available cure periods), the Company may wish to have the option to obligate Utility to purchase the Complex (under commercial terms similar to those set forth in Section 15.5). The Company may also want to have such a “put option” upon the occurrence of certain Host Country Political Events which last for extended durations.

<sup>83</sup> The Parties may wish to refer a Dispute which has not been resolved by mutual discussions pursuant to this Section 16.1 to the Parties’ respective presidents or chief executive officers for resolution, prior to referring the matter to an expert or arbitrator. In such case, a provision similar to the following would be added to Section 16.1:

(n) In the event that a Dispute is not resolved by discussion in accordance with Section 16.1 within the time periods set forth therein, either Party may (but shall not be compelled to) refer the Dispute to the chief executive officer or chief operating officer of the Company (or another authorized director or officer of the Company designated by notice to Utility in writing) and the [TITLE] of Utility (or another authorized official of Utility designated by notice to the Company in writing) for further consideration and attempted resolution within [\_\_\_\_\_] Days after the Dispute has been referred to such individuals (or such longer period as the Parties may agree).

<sup>84</sup> There are numerous alternative methods available to the Parties for selecting an expert. For instance, the Parties could agree in advance of the Commercial Operations Date on the selection of a professional engineer or accountant to serve as the expert for the purposes of this Section 16.2. The Parties could also agree that each Party will select an expert, and those two experts shall select a third individual to serve as the expert. In addition, the expert could be selected by a national or international alternative dispute resolution agency or organization, such as the International Chamber of Commerce's International Center for Expertise.

<sup>85</sup> There are obvious practical advantages to having the expert be a resident of the Host Country. Thus, the Parties may agree to eliminate or waive the requirement that the expert not be a national of the jurisdiction of either Party to this Agreement.

<sup>86</sup> The ICSID Rules are only available to the Parties if Utility is a Government-owned or -controlled entity. If Utility is not owned or controlled by the Government, the Parties typically would provide that disputes will be arbitrated in accordance with the arbitration rules of the International Chamber of Commerce, the arbitration rules of the United Nations Commission on International Trade Law or the applicable arbitration laws of the Host Country (if any).

<sup>87</sup> For certain Disputes, such as Disputes involving large sums or serious matters such as the enforceability or termination of the Agreement, the Company may wish the Agreement to provide that such arbitration take place in a neutral forum. The Company may also want the ability to arbitrate any Dispute in a neutral forum especially if the arbitration is not being conducted under ICSID Rules and Utility is Government-owned or -controlled. The Parties may then negotiate who bears the incremental costs of such arbitration. The following provision provides an example:

(n) The arbitration shall be conducted at [LOCATION] in Host Country; provided, however, that if the amount in Dispute is greater than [AMOUNT] or the amount of such Dispute together with the amount of all previous Disputes submitted for arbitration pursuant to this Section 16.3 exceed [AMOUNT] or an issue in Dispute is (a) the legality, validity or enforceability of this Agreement or any material provision hereof, or (b) the termination of this Agreement, then either Party may require that the arbitration be conducted in [ALTERNATIVE NEUTRAL LOCATION], in which case the arbitration shall be conducted in [ALTERNATIVE NEUTRAL LOCATION]. Except as awarded by the arbitrator and except as hereinafter provided, each Party shall be responsible for its own costs incurred by it in connection with an arbitration hereunder. Notwithstanding the foregoing, either Party may require that arbitration of any Dispute be required by a Party to be arbitrated in [ALTERNATIVE NEUTRAL LOCATION], in which case the arbitration shall be conducted in [ALTERNATIVE NEUTRAL LOCATION]; provided, however, that if the Dispute is not of a type that could have been conducted in [ALTERNATIVE NEUTRAL LOCATION] in accordance with the provisions of the foregoing sentence, the Party requiring that arbitration be conducted in [ALTERNATIVE NEUTRAL LOCATION] shall pay all costs of arbitration as and when incurred by the other Party (including out of pocket costs but excluding any award made by the arbitrator) in excess of the costs that would have been otherwise incurred by such other Party had the arbitration been conducted in Host Country.

<sup>88</sup> In the event that any Major Owner or Upstream Owner of the Company wishes to sell, transfer or otherwise dispose of any of its ownership interests in the Company, or if the Company wishes to sell or otherwise dispose of the Complex (other than by the sale and leaseback of the Complex or by the mortgage of the Complex), Utility may request that it have a right of first refusal or right of first offer in respect of such proposed transfer.

<sup>89</sup> The Parties may agree that the Government is the appropriate entity to grant consent to the Company in respect of an assignment pursuant to Sections 17.1 and 17.2 if Utility is owned or controlled by Government.

<sup>90</sup> Because the Company is typically a special purpose corporation, Utility may wish to ensure that the Major Owners and Upstream Owners of the Company stay actively involved in the Project and the

ownership of the Company. Thus, Utility may propose that such entities not assign or otherwise transfer its ownership interest in the Company below a certain level without the prior written consent of Utility or the Government. The Company's sponsors, on the other hand, will resist any attempts by Utility to restrict their ability to transfer their interests in the Company or the Complex.

<sup>91</sup> The Lenders to the Project may insist that a provision similar to the following be added to ensure that Utility and the Company expressly recognize the rights of the Lenders contained in the Agreement:

(n) The Lenders shall have all rights expressly granted in their favor in this Agreement or in any or consent to assignment (or other form of direct agreement) concerning the Project between Utility and the Lenders. Save in respect of such rights, the Lenders shall not exercise any of the rights of the Company hereunder assigned to them under the Loan Documents unless and until such time as the Lenders elect that the Lenders or their designees shall succeed to the Company's interest under this Agreement, whether by exercise of the rights or remedies of the Lenders under the Loan Documents or otherwise, in which case the Lenders shall give notice to Utility of the occurrence and continuance of an event of default under the Loan Documents and of such succession by the Lenders or their designees.

<sup>92</sup> The Project's Lenders may require that a notice provision similar to the following be added to Article 18:

(n) A copy of any material notice sent hereunder by Utility to the Company shall be concurrently sent to the Lenders. Material notices shall include a notice of a Force Majeure experienced by Utility and a Notice of Default. Each material notice shall be delivered to the Agent at the address indicated at Financial Closing (or such other address Lenders or the Agent may have specified by written notice delivered in accordance herewith).

<sup>93</sup> The Company may request that the Agreement be governed by English law or laws of the State of New York, especially if Utility is Government-owned or -controlled, because English law and New York law are well-developed and will help to ensure neutrality.

<sup>94</sup> Whether or not the Laws of Host Country govern the Agreement, such laws may require that in order for the Agreement to be binding a specified number of signatories must sign the Agreement for each Party. In addition, some Host Countries require that each signature to an agreement be sealed or witnessed (or notarized) by at least one person in order for that agreement to be effective or admissible in court. Local counsel should be consulted to determine the particular signing, sealing and witnessing requirements for the relevant Host Country.

<sup>95</sup> This definition provides that Commissioned Shortfall will not be deemed to occur unless the Dependable Capacity of the Complex falls below a given threshold level (which would be less than the nameplate rating of the Complex). Alternatively, the deadband could be eliminated by writing the definition as follows:

**“Commissioned Shortfall”**- The difference between (a) the Dependable Capacity of the Complex on the Commercial Operations Date and (b) [\_\_\_] MW.

<sup>96</sup> If there is to be an Implementation Agreement, the Company may seek assistance from the Government in expediting its applications for Consents and/or assurances that the Government will grant all Consents for which the Company has properly applied. If such protection is included in the Implementation Agreement, the Company may wish to limit the definition of Consents in this Agreement to the Consents covered by the Implementation Agreement.

<sup>97</sup> In addition to guaranteeing payments owed by Utility to the Company, the Guarantee might also be a guarantee of the performance by Utility of its other obligations under the Agreement (*e.g.*, the obligation to construct the Interconnection Facilities).

<sup>98</sup> Depending on the level of development of the utility industry in Host Country, in defining “Prudent Utility Practice,” the Parties may wish to refer to the practices generally followed in the United States, the European Community or in some other part of the world, rather than referring to the practices commonly used in Host Country.