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Dated _____

(1) [OPERATOR]

and

(2) [AWARDING AUTHORITY]

**CONTRACT FOR THE
OPERATION AND MAINTENANCE
OF THE WATER AND SEWERAGE SYSTEMS
OF [LOCATION]**

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CONTRACT FOR OPERATION & MAINTENANCE OF WATER & SEWERAGE SYSTEMS

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SAMPLE

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CONTRACT FOR OPERATION & MAINTENANCE OF WATER & SEWERAGE SYSTEMS

THIS CONTRACT is made on the day of []

BY AND BETWEEN

[] a company incorporated under the laws of [] (registered number []) whose registered office is at [] (the "**Operator**", which expression shall include successors and permitted assigns) of the First Part;

AND

[] a company incorporated under the laws of [] (registered number []) whose registered office is at [] (the "**Owner**", which expression shall include successors and permitted assigns) of the Second Part;

In consideration of the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, **THE PARTIES AGREE** as follows:

1. DEFINITIONS AND INTERPRETATION

1.1. Definitions

In the Contract the following words and expressions shall have the meanings assigned to them save in so far as the context otherwise requires:

"**24 Hour Supply**" means water supplied at a minimum pressure of [10m] head without break (i.e. not intermittent);

"**Additional Works**" means such works additional to the Agreed Capital Works Programme as referred to in Clause 9.1.4;

"**Affiliate**" in relation to either Party means:

- (a) any company which is its subsidiary (as defined in [relevant legislation]); or
- (b) its parent undertaking, whether direct or indirect; or
- (c) any other entity owned, managed and/or controlled by it or its parent undertaking whether directly or indirectly through other entities;

"**Agreed Capital Investment Programme**" means the capital investment programme for the Operation Zone and for the installation, renovation and rehabilitation of infrastructure assets within the Operation Zone prepared in accordance with Clause 9 (Agreed Capital Investment Programme);

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"**Applicable Laws**" means any statute, ordinance, regulation or by-law or any rule, code or direction including applicable technical, labour, safety or environmental standards or any licence, consent, permit, authorisation or other approval or interpretation thereof of [] or body or regulatory authority thereof, as they may be issued and in force from time to time, together with any agreement entered into between the Owner or its Affiliates and any State Government pursuant to which the owner, or relevant Affiliate of the Owner, has been given the right to provide for municipal services including but not limited to abstraction of water, provision of municipal services, water supply, drainage and sewerage services;

"**Asset Management Plan**" means the plan developed in accordance with Clause 9.8 (Asset Management Plan);

"**Informal Areas**" means the areas [more specifically indicated on the geographical plan attached at Schedule M];]

"**Base Charge Data**" means the data used to calculate the charges and includes data provided to the Operator by the Owner before signature of the Contract and projections for the first 5 years of the Contract as set out in Schedule [Q], which is to be verified during the Benchmarking Period in accordance with clause 5;

"**Base Performance Data**" means the data which is to be collated during the Benchmarking Period by the Operator in accordance with Clause 5;

"**Benchmarking Period**" means the period of twelve months from the Effective Date;

"**Business Plan**" means the 5 year business plan agreed by the Operator's Board of Directors prior to the Effective Date;

"**Capital Expenditure**" means expenditure under the Agreed Capital Investment Programme;

"**Change**" means any alteration and/or modification to the Outsourced Activities, which is instructed by the Owner or approved as a variation by the Owner in accordance with Clause 20 (Change);

"**Charges**" means the charges to be paid to the Operator for performance of the Outsourced Activities in accordance with Clause 11 (Operator Remuneration);

"**Commencement Certificate**" has the meaning given to it in Clause 2.2 (Effective Date);

"**Conditions of Contract**" means these conditions of contract as amended from time to time, excluding the Schedules and Appendices hereto;

Comment [H R1]: [this is relevant where there are informal connections that the parties wish to formalize]

Comment [H R2]: Appropriate when it is planned to have a Benchmarking Period at the beginning of the contract during which the parties will verify the data, performance standards etc

Comment [H R3]: Appropriate when it is planned to have a Benchmarking Period at the beginning of the contract during which the parties will verify the data, performance standards etc

Comment [H R4]: Appropriate when it is planned to have a Benchmarking Period at the beginning of the contract during which the parties will verify the data, performance standards etc

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"**Conditions Precedent**" means the items listed in Clause 2.1 (Conditions Precedent), the satisfaction of which are necessary for the Contract to come into full force and effect in terms of Clause 2.2 (Effective Date);

Comment [H R5]: Parties need to consider what conditions are necessary before the operator can commence delivery of services

"**Contract Period**" means the period from the Effective Date until the Expiry Date (inclusive);

"**Contract**" means the Conditions of Contract together with all amendments, attachments, appendices, schedules and exhibits thereto;

"**Cost**" means all expenditure incurred (or to be incurred) in connection with the operation, maintenance and management of raw and water and treated water supply and sewerage services by the Operator, whether within or outside the Operation Zone, including overheads and similar charges;

"**Customer**" means a person to whom (before the Effective Date) the Owner or (after the Effective Date) the Operator has agreed to supply water and/or provide wastewater services;

"**Customer Meters**" means the meters or measuring equipment which are/is already in operation at Customer Water Connection Points in the Operation Zone prior to the Effective Date and any additional meters or measuring equipment installed at Customer Water Connection Points after the Effective Date;

"**Customer Water Connection Points**" means the points at which the Customers take delivery of water from the Operator, being for (a) Raw Water Customers and treated water industrial Customers, the Customer Meter and (b) for other Customers, the boundary wall of the Customer's property;

Comment [H R6]: If there are to be connections to customers, it is important to determine where responsibility of the operator ends

"**day**" means a calendar day as used in [country];

"**Deficit**" means total expenditure made by the Owner on the System each year and represents the cost of water used by the Owner for its own purposes;

"**Deficit Incentive Payment**" means the incentive payment made to [Operator] in accordance with Clause 7.2 as detailed in Schedule J, Part 3;

"**Deficit Projection**" means the projected reduction in the Deficit year on year as set out in Schedule R;

"**Dispute**" shall have the meaning given to it in Clause 24.5 (Negotiations)

"**Effective Date**" means the date on which all the provisions of the Contract come into legal force and effect in accordance with Clause 2.2 (Effective Date);

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"**Emergency**" means any situation which causes an immediate threat of injury or danger to the health of any person (whether material or otherwise) or of material damage or material economic loss to the Facilities or to any other property. For the purpose of this definition "**material**" shall mean a loss of [] or more;

Comment [H R7]: Parties should consider circumstances where owner will want to step in for emergency purposes – and implications thereof

"**Employee Transfer Agreement**" means the employee transfer agreement between the Owner and the Operator of even date hereof;

Comment [H R8]: It may help to include a monetary minimum for determining materiality in some circumstances

"**Expert Determination**" means the determination procedures set out in clause 24;

Comment [H R9]: It is important to consider what the relationship between the operator and the existing workforce of the utility is to be – is this to be a secondment of personnel or transfer? What happens on termination/ expiry? What are disciplinary and pay policies? Are employees subject to civil service pay scales?

"**Expiry Date**" means the [fifteenth] anniversary of the Effective Date as extended under Clause 4 or such earlier date on which this Contract is validly terminated;

Comment [VHD10]: Period of the contract will vary depending on the level of risk being accepted by operator and extent of any investments by operator – in these sorts of contracts duration usually between 7 and 15 years

"**Facilities**" means the infrastructure and non-infrastructure assets forming part of the Water System and the Sewerage System as set out in Schedule G (The Facilities) and related storage facilities and administrative buildings provided to the Operator, which shall be updated in accordance with the Contract from time to time to reflect any new infrastructure and non-infrastructure assets installed during the term of the Contract;

"**Financial Institutions**" means the lenders for Capital Expenditure and any other financial institutions and/or banks involved in the financing of the activities being undertaken by the Parties, in accordance with the terms of this Contract;

"**Fiscal Year**" means the [country] fiscal year commencing [1st April] in any one year and ending on [31st March] of the following year;

"**Fixed Charge**" has the meaning given to it in Clause 11.1(a) (Charges);

"**Force Majeure**" has the meaning given to it in Clause 23.1 (Definition of Force Majeure);

"**Gross Negligence**" means (i) in the case of Gross Negligence of the Operator, any reckless disregard of any provision of this Contract by the Operator which either has a materially adverse effect on the Owner and/or the Facilities or which results in a minimum loss of [amount] to the Owner and (ii) in the case of Gross Negligence of the Owner, any reckless disregard of any provision of this Contract by the Owner which either has a materially adverse effect on the Operator and its ability properly to fulfil its obligations under this Contract or which results in a minimum loss of [amount] to the Operator;

Comment [VHD11]: Optional to include a de minimis threshold for loss

Comment [VHD12]: Optional to include a de minimis threshold for loss

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"**Hand Back Procedures**" means those procedures as described in Schedule E (Hand Back Procedures);

Comment [H R13]: It is helpful to include procedures on what is to happen on expiry

"**Incentive Payment**" means the Capex Incentive Payment, the Deficit Incentive Payment and such other incentive payments as shall be agreed between the Parties during the Benchmarking Period and from time to time thereafter;

"**Intellectual Property**" means all intellectual property or other proprietary rights of every kind, including (without limitation) all patents, registered design rights, works subject to the laws of copyright, trade secrets, processes, trade marks and service marks whether registered or not, goodwill and know-how and any associated or similar rights (including in all cases applications and right to apply therefore and documentation thereof);

"**Joint Venture Agreement**" means the agreement to be executed by and between the Owner and the Operator, agreeing to the formation of the Operator and its modalities to be followed which shall include the main purpose and objective of the formation of the Operator;]

Comment [H R14]: Relevant when the utility/public grantor is to be a shareholder in the Operator

"**Liquidated Damages**" means the liquidated damages for failure by the Operator to meet the Performance Standards, as these are to be agreed by the Parties during the Benchmarking Period in accordance with Clause 5;

Comment [VHD15]: Liquidated damages in certain jurisdictions need to be a genuine pre-estimate of the party's loss – if they are found to be more than this then the court might rule that the liquidated damages provision is invalid and damages would then be at large – ie for the court to determine based on actual loss

"**Maintain**" and conjugations thereof shall mean to keep in reasonable and serviceable working order save to the extent that this would require:

Comment [H R16]: It is important to determine what is to be treated as maintenance and what would be regarded as asset replacement as typically the operator will not be responsible for the latter in an O&M Agreement. Parties may want to designate replacement of a particular piece of equipment as maintenance – this should be specified

- (a) an improvement to part of the Facilities concerned; or
- (b) replacement, repair or renewal of any part of the Facilities which is not designed to be replaced, repaired or renewed on a reasonably frequent basis; or
- (c) expenditure exceeding [monetary amount] for a single repair, replacement or renewal;

"**Major Capital Expenditure**" has the meaning set out in Clause 9.5;

"**Major Plant**" means any item of plant or machinery with a new-for-old market replacement value exceeding [monetary amount] without which the Facilities cannot function in accordance with:

Comment [H R17]: See comment HR12

- (a) Applicable Laws; and
- (b) the Standards of a Reasonable and Prudent Operator; and

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(c) Clause 6 (Operator Obligations) of this Contract;

"Manufacturer's Warranties & Recommendations" means the warranties issued by the manufacturer of any plant or equipment forming part of the Facilities and any revisions or updates thereto from time to time issued by the manufacturer, to the extent notified to the Owner or the Operator, any instructions, procedures and recommendations which are issued by the manufacturer of any plant or equipment forming part of the Facilities and any revisions or updates thereto from time to time issued by the manufacturer, to the extent notified to the Owner or Operator;

"Meter" means [raw water meters, customer meters, electricity meters], and any other meters installed to monitor flows and consumption of water and electricity in the System;

"Non-billable Connection" means those connections to the Facilities for which tariffs for the Outsourced Activities are not billed to the relevant Customer, pursuant to Owner instructions.

"Non-revenue Connection" shall mean a connection to the Facilities for which the tariffs for the Outsourced Activities rendered are not or have not been paid to the Owner which:

(a) (prior to the Effective Date) is not authorised by the Owner; or

(b) (following the Effective Date) is not authorised by the Operator;

"Operating Permits" means the Owner Consents and the Operator Consents;

"Operation Zone" means the zone in which the Outsourced Activities are to be provided as more particularly set out in the plan in Schedule G Part 1 (The Facilities);

"Operator Consent" means the list of permits, licences approvals and consents set out in Schedule O;

"Outsourced Activities" means the Operation and Maintenance to be provided by the Operator in relation to the Water System [and the Sewerage System] and any other services or obligations to be performed by the Operator in accordance with this Contract;

"Owner Consents" means all permits, licences, approvals, consents and other forms of authorisation required other than the Operator Consents in connection with the performance of the Operator's obligations under the Contract including, but not limited to, the operation and maintenance of the Facilities, and providing the Outsourced Activities including but not limited to the

Comment [H R18]: This would be relevant where there is a customer that the utility, for whatever reason, wishes to continue supplying but does not wish to bill (and so will be subsidizing). It is important to keep these to a minimum if there is a desire to charge an economic cost of service and cover operations costs. In particular, avoid the temptation of making connections to government entities such as the military non-billable as this is likely to form a large portion of potential revenue.

Comment [H R19]: The parties will need to determine how to define and deal with informal connections and whether to formalize them

Comment [VHD20]: Delete if contract is only for water services

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abstraction licence(s) to abstract water from any river or aquifer [and any licences to dispose of liquid or solid waste] and any permits required for pipe-laying together with any works or apparatus associated with such pipe-laying and any consents to terminate connections and to issue bills on behalf of the Owner and collect monies on behalf of the Owner;

Comment [VHD21]: Delete if contract is only for water services

"Owner Employees" means the employees of the Owner engaged in operating and maintaining the System prior to the date of this Contract as are to be transferred to the Operator pursuant to the Employee Transfer Agreement;

"Owner Officers" means the officers of the Owner as identified and agreed by the Parties to be seconded/transferred to the Operator;

"Party" or **"Parties"** means the Owner, the Operator, the Service Provider or one of them as the context indicates;

"Performance Indicators" means the indicators of performance set out in Schedule H (Performance Indicators);

"Performance Standards" means the standards of performance required of the Operator in carrying out the Outsourced Activities, as determined in accordance with clause 6;

"Planned Maintenance" means those maintenance or construction activities undertaken or to be undertaken by the Operator in accordance with the Operator's planned activities;

"Potable Water Specification" means the specification set out in Schedule A (Potable Water Specification);

"Potable Water Supply Meters" means the meters to be installed by the Operator at the Potable Water Supply Points;

"Potable Water Customers" means the customers to whom the Operator is to supply potable water;

"Potable Water Supply Points" means the points at which the Operator shall supply potable water from the Water Treatment Works into the Potable Water System, as are listed in Schedule B Part 3 (The System) together with any points being agreed by the Parties from time to time;

Comment [VHD22]: Important to determine where operator responsibility stops and where the delivery point is to be – operator will be concerned where contract sets certain water quality standards to be supplying only as far as operator is confident that there is little risk of contamination etc – particular concern in systems which are not providing 24/7 service

"Power Meters" means meters for measuring power consumed at all Facilities consuming power which is chargeable to the Operator under this Contract;

"Procurement Guidelines" means the guidelines establishing the procurement methodology for contracts to be agreed between the Parties;

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["**Raw Sewage Quality Specification**"] means the specification set out in Schedule A Part 5 (Raw Sewage Specification);]

Comment [H R23]: This is important to ensure that raw sewage can be treated and to determine what should happen in the event that the raw sewage is polluted and cannot be treated/ may risk the security of the system

["**Raw Sewage Quantity Specification**"] means the specification set out in Schedule A Part 4 (Raw Sewage Specification);]

"**Raw Water**" means the water drawn from [source];

["**Raw Water Specification**"] means the specification set out in Schedule A Part 3 (Raw Water Specification);

Comment [H R24]: This is important to ensure that raw water can be treated and to determine what should happen in the event that the raw water is polluted and cannot be treated/ may risk the security of the system

["**Raw Water Supply Meters**"] means the meters to be installed by the Operator at the Raw Water Supply Points;]

Comment [VHD25]: Relevant only where supply of raw water is part of operator's obligations

"**Raw Water Supply Points**" means the points at which the Operator shall draw Raw Water, as are listed in Schedule B Part 1 (The System) together with any points being agreed by the Parties from time to time;

"**Reasonable and Prudent Operator**" means an operator conducting itself in accordance with the Standards of a Reasonable and Prudent Operator;

"**Release Event**" means each of the events listed in Clause 20.3 (Release Events);

"**Revenues**" means amounts paid by Customers for water [and wastewater] services provided by the Operator under this Contract;

"**Base Rate**" means [];

"**Schedule of Rates**" means the schedule developed by the Operator in accordance with Clause [];

["**Sewage Collection Point**"] means the entry to the Sewage Collection System which will be considered as the first sewer manhole where the diameter of the exit sewer is equal or greater than [150mm] diameter and at which point the Operator shall collect wastewater from the System, such points being identified by the Parties as being in existence on or before the Effective Date or which are to be established by the Operator under the Contract and are agreed by the Owner;]

Comment [W26]: This may be relevant where there are a number of different sewerage systems in the contract area, some of which may remain the responsibility of the awarding authority

["**Sewage Collection System**"] means the sewerage infrastructure associated with sewers which are greater than [150mm] in diameter. For the avoidance of doubt any infrastructure pertaining to sewers which are less than 150mm in diameter are to be considered outside of the scope of this Contract and at the time of the Effective Date will remain the responsibility of the Public Health Department of [Town Council];]

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["**Sewage Treatment Plants**"] means the plant and works for the treatment of sewage in the Operation Zone as described in Schedule G Part 8 (The Facilities);]

["**Sewerage System**"] means the sewerage system as described in Schedule B Part 2 (The Sewerage System);]

["**Sewerage Asset Management Plan**"] shall have the meaning given to it in Clause [](Sewerage System);]

["**Sludge Delivery Points**"] shall mean the sludge delivery points as described in Schedule B Part 5 (Sludge Delivery Points);]

"**Specification**" means any of the Raw Water Specification, Potable Water Specification, [Raw Sewage Quality Specification and Raw Sewage Quantity Specification];

"**Standards of a Reasonable and Prudent Operator**" means the standards, practices, methods and procedures expected from a person seeking in good faith to perform its contractual obligations and in so doing and in the general conduct of its undertaking exercising that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced operator engaged in the same type of undertaking under the same or similar circumstances and conditions (including the conditions of the Facilities at the Effective Date) as contemplated by this Contract;

"**Successor Operator**" has the meaning given to it in Clause 17.4 (Successor to the Operator);

"**System**" means the Water System[and the Sewerage System];

"**Term**" has the meaning given to it in clause 5;

"**Termination Notice**" has the meaning given to it in Clause 17.2 (Termination);

"**Service Area**" means the geographical area described in Schedule M;

"**Unaccounted for Water**" means:

- (a) leakage and overflows from water pipes and plant used to convey water from the Raw Water Supply Points to the Customer Water Connection Points; and
- (b) unauthorised consumption of water due to Non-revenue Connections to the System;

Comment [H R27]: This is an important definition if the operator is to reduce leakage/informal connections from the system

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- (c) metering inaccuracies including estimates made where meters are not available;

"Variable Charge" means the charge described in Clause 11.1 (Charges) and to be paid to the Operator for the Outsourced Activities;

"Water System" means the water system as described in Schedule [];

"Water Treatment Works" means the treatment works for potable water as described in Schedule G Part 6 (The Facilities);

"Year n" (where "n" is an integer denoting the number of years following the Effective Date, provided that Year 1 shall commence on the Effective Date) shall mean a period of 12 months commencing on the anniversary of the Effective Date.

1.2. Headings and Marginal Notes

The headings and marginal notes are not part of this Contract, and shall not be taken into consideration in its interpretation.

1.3. Interpretation

1.3.1 Words importing persons or parties shall include firms and corporations and any organisation having legal capacity. Words importing the singular also include the plural and vice versa where the context requires. Words importing one gender also include all other genders.

1.3.2 References to a "Clause" or "Schedule" or "Appendix" shall mean a clause or schedule or appendix (as the case may be) of or to this Contract.

1.4. Law and Language

1.4.1 This Contract shall be governed by and interpreted in accordance with the laws of [].

1.4.2 This Contract is prepared in English and the binding and controlling language for all matters relating to the meaning and interpretation of this Contract shall be [].

1.4.3 The language for day-to-day communication between the Operator and the Owner shall be [].

1.5. Priority of Documents

1.5.1 The documents forming the Contract are to be taken as mutually explanatory of each other. If there is an ambiguity or discrepancy in the

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Comment [H R28]: Where there is more than one language spoken, formal language of the contract should be determined

Comment [H R29]: Communication on site can cause a problem where the workforce only speaks a local language that is unfamiliar to the operator's staff

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documents, the Owner shall issue any necessary clarification or instruction to the Operator, and the priority in respect of the interpretation of the documents shall be as follows:

- (a) the Conditions of Contract;
- (b) the Technical Specification; and
- (c) the remaining Schedules.

1.6. Exclusion of Preamble/Recitals

The preamble/recitals in this Contract are included for information only and such preamble/recitals shall not be operative, binding or otherwise relied upon by either Party.

2. CONDITIONS PRECEDENT

2.1. Conditions Precedent

2.1.1 The Parties have agreed that with the exception of Clauses [1, 2, 11.1, 11.2, 11.7, 17, 18, 19, 20, 21 and 22], which shall be immediately enforceable on signature of this Contract and shall survive any termination under **Clause 2.3 (Failure to Meet Conditions Precedent)**, the remaining provisions of this Contract are conditional upon the following occurring or being waived by both Parties:

- (a) [the transfer of the employees pursuant to the Employee Transfer Agreement];
- (b) all Operating Permits being obtained to enable the Operator to provide the Outsourced Activities;
- (c) the Owner providing access to and possession of the Facilities in accordance with Clause 7.1;
- (d) receipt, evidenced in writing, by the Operator of all available:
 - (i) operation and maintenance manuals for the Facilities;
 - (ii) as-built drawings, specifications, diagrams and other information regarding the Facilities, including (without limitation) information in relation to any civil engineering structures;
 - (iii) layout drawings of the Facilities; and

Comment [VHD30]: Important to specify what conditions need to be met before the main obligations under the contract become effective

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- (iv) billing data including (without limitation) access to all hardware, software, operating manuals and procedures associated with the billing system within the Operation Zone together with a complete Customer billing data set giving Customer details and payment histories and list of monthly inputs to billing system;
- (v) Manufacturers' Warranties and Recommendations in relation to the Facilities;
- (e) the Owner delivering to the Operator two photocopies of any contracts, relevant to the performance of the Operator's obligations, which have been, are being or are to be executed by the Owner and each amendment to any such contract which may be entered into by the Owner;
- (f) the Owner providing to the Operator evidence that the insurances described in Clauses 22.1 (Insurance for the Facilities) and 22.4 (Insurance for Workers) have been effected and copies of the policies for the insurance described in Clauses 22.1 (Insurance for the Facilities) and 22.4 (Insurance for Workers);
- (g) the Owner delivering the inventory of works in progress and copies of the terms and conditions of relevant contracts as discussed in Clause 8.8.

2.2. Effective Date

2.2.1 Each Party shall promptly notify the other Party in writing, enclosing evidence in support of the satisfaction of the Conditions Precedent, in the event that it believes a Condition Precedent has been satisfied for the purposes of this Contract. Upon receipt of such notice by the receiving Party, the receiving Party shall confirm its acceptance in writing that the relevant Condition Precedent has been satisfied and/or may request that further evidence in support of satisfaction of the Condition Precedent be provided by the notifying Party.

2.2.2 No later than [two months] after signature of this Contract, or such later date as may be agreed by the Parties in writing, the Parties shall meet to determine whether any Condition Precedent which is not satisfied may either be waived or modified by mutual agreement of the Parties. Provided that the Parties agree that all of the Conditions Precedent are either satisfied or waived, then the Operator shall issue a Commencement Certificate to the Owner, on the date of such agreement, which shall be

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the "**Effective Date**". The Commencement Certificate be in the form set out in Schedule I.

2.3. Failure to satisfy or waive Conditions Precedent

In the event that any of the Conditions Precedent in clause 2.1 have not been satisfied or waived in writing on or before the date set out in clause 2.2, this Contract shall automatically terminate (other than clauses [] which shall survive termination of this Contract). In the event that the failure to satisfy any of the Conditions Precedent is due to the wilful default or negligence of the Owner, the Owner will reimburse the Operator for all reasonable costs incurred by the Operator, during the period from [] to the date of termination of the Contract under this sub-clause 2.3. Otherwise, the Owner shall not, in case of termination of the Contract for failure to satisfy the Conditions Precedent pursuant to this clause 2.3, be liable to indemnify the Operator for any costs incurred by it.

Comment [VHD31]: Appropriate to include a cost recovery provision where there is potential for one party to incur substantial costs before the condition precedents are met

3. APPOINTMENT

The Owner hereby grants to the Operator from the Effective Date the exclusive right to perform the Outsourced Activities within the Operation Zone, subject to the provisions of the Contract.

4. TERM

This Contract shall continue to be in full force and have effect from the Effective Date until the Expiry Date subject to its extension for a further mutually agreed period (hereinafter referred to as the "**Term**"). In the event that a Party wishes to extend the Term then it shall notify the other Party in writing of such wish, not later than twelve months prior to the Expiry Date.

5. BENCHMARKING PERIOD

5.1. Obligations of Operator during the Benchmarking Period

5.1.1 During the Benchmarking Period, the Operator shall use reasonable endeavours to perform the Outsourced Activities from the Effective Date to standards not less than those achieved by the Owner as at the date of the Contract. The Operator will only be liable during this period for loss or damage directly caused by negligence or wilful default of the Operator. The Operator will not be liable for any Liquidated Damages during the Benchmarking Period.

5.1.2 During the Benchmarking Period the Operator will, with the assistance and co-operation of the Owner, perform the following activities:

Comment [VHD32]: Relevant when data on which base case financial model have been based are uncertain/ untested. Disadvantage is that this an opportunity for parties to re-open contract after signature and therefore cause potential uncertainty and lack of transparency for procurement process

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- (a) establishment of initial financial systems and protocols; and
- (b) establishment of the process of initial key Operator staff familiarisation with the System;

5.2. Benchmarking of components of Variable Charge

- 5.2.1 At the beginning of the Benchmarking Period the Operator shall install the Raw Water Supply Meters, the Clarified Water Supply Meters, the Potable Water Supply Meters and the Industrial Consumer Water Supply Meters and all other meters that the parties agree are necessary to calibrate the system as provided within the Agreed Capital Investment Programme and the Parties will calibrate all the Meters jointly. The Parties will then jointly take meter readings from all relevant Meters over a minimum period of six months.
- 5.2.2 At the beginning of the Benchmarking Period the Owner shall recalibrate or install where necessary all Power Meters that the Parties agree are necessary to calibrate the system and the Parties will calibrate all the Meters jointly. The Parties will then jointly take meter readings from all relevant Meters over a minimum period of six months.
- 5.2.3 During the Benchmarking Period all of the parameters of operation such as water quantities pumped, water quantities received, expenditure incurred, electricity consumed, chemicals consumed, maintenance costs etc. will be benchmarked against the Base Charge Data. At the end of the Benchmarking Period, if and to the extent necessary, the variable rates will be adjusted in line with actual expenditure and volumes of water pumped to take into account the Base Charge Data, as has been verified during the Benchmarking Period.

5.3. Performance Standards and Liquidated Damages

- 5.3.1 During the Benchmarking Period the Operator in consultation with the Owner will also take monthly samples and monitor performance in order to collate the Base Performance Data against the criteria set out in Schedule H (Performance Indicators).
- 5.3.2 At the end of the Benchmarking Period the Operator will propose: -
 - (a) a set of Performance Standards to the Owner using the Base Performance Data (as verified during the Benchmarking Period) to be met by the Operator; and
 - (b) the level of Liquidated Damages to be imposed for failure by the Operator to meet the various Performance Standards

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- (c) for approval by the Owner, such approval not to be unreasonably withheld. The Owner shall respond to such proposals within [30] days of receipt thereof. In the event that the Owner does not deliver a written response to the Operator within this period then the Owner shall be deemed to have agreed to the Performance Standards, Liquidated Damages and the Incentive Payments proposed by the Operator.

5.3.3 The Performance Standards will be based on the Performance Indicators. The Performance Standards and the Liquidated Damages will be set at levels which are reasonable in the context of the Base Performance Data, the level of investment contemplated by the Contract and the other terms of the Contract.

5.3.4 If the parties cannot agree these Performance Standards or Liquidated Damages within [30] days of the response then they shall refer the matter to Arbitration.

5.4. Adjustment to Specifications

The Contract Specifications will be adjusted, to the extent appropriate, in accordance with the Base Performance Data.

6. OPERATOR OBLIGATIONS

6.1. Raw Water System

6.1.1 From the Effective Date until the Expiry Date the Operator shall provide the following Outsourced Activities in connection with the Operation and Maintenance of the Raw Water System:

- (a) abstracting raw water from [water source] via the raw water pumps and pumping [via [specified infrastructure]] up to and including the Customer Meters;
- (b) reading and calibrating the Raw Water Consumer meters for verification of demand, supply and system losses, supply of consumption data to the Owner to meet his monthly billing requirements and tracking of meter readings against actual bills raised by the Owner to consumers;
- (c) Maintaining the infrastructure referred to in subparagraph (a) above;
- (d) sampling raw water at the point it enters the suction sump to ensure it meets the Raw Water Specification;

Comment [W33]: Relevant where part of outsourced service is provision of raw water to certain customers

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- (e) detection and monitoring of Non-revenue Connections through flow monitoring or otherwise as the Operator shall deem fit.

6.1.2 The Operator shall maintain a 24 hours per day availability of supply of raw water to the Raw Water Customers except during periods of Planned Maintenance. If the Operator fails to achieve such service level then the Operator shall be liable for Liquidated Damages, save in so far as such failure is attributable to a Release Event in which event the Operator shall use reasonable endeavours to mitigate the effects of the event and operate the Raw Water System in accordance with the Standards of a Reasonable and Prudent Operator.

6.2. Potable Water System

6.2.1 From the Effective Date until the Expiry Date the Operator shall provide the following Outsourced Activities in connection with the operation and Maintenance of the Potable Water System:

- (a) abstracting raw water from [] via [mains] to [] and via the raw water delivery mains and on to the Water Treatment Works;
- (b) transporting water from [] via the delivery mains to [] reservoir and [] reservoir to the Water Treatment Works;
- (c) from the Water Treatment Works through the rising mains via the treated water pumping stations to the water towers and the distribution network to the Potable Water Customers (up to the property boundary of each Potable Water Customer or to the Customer Meter (where installed) for industrial, commercial and domestic customers);
- (d) operating the river intakes, pumping stations and pipe system to [] reservoir, the pipe system from [] reservoir to the Water Treatment Works and the Water Treatment Works;
- (e) Reading and calibrating the Potable Water Consumer meters for verification of demand, supply and system losses, supply of consumption data to the Owner to meet his monthly billing requirements and tracking of meter readings against actual bills raised by the Owner to consumers;
- (f) [management of the [] reservoir by managing water levels and level instrumentation, de-weeding the lake and monitoring spillway condition as detailed in Schedule B, Part 7. All other operation and maintenance works in relation to [] reservoir shall remain the responsibility of the Owner;]

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- (g) Maintaining the infrastructure referred to in subparagraphs (a), (b), (c) and (d) and (e) above;
 - (h) sampling raw water at the point it enters the river basin and at the draw-off from the [] reservoir to determine whether it meets the Raw Water Specification;
 - (i) sampling treated water as it leaves the Water Treatment Works to ensure that it meets the Potable Water Specification;
 - (j) detecting and monitoring Non-revenue Connections.
- 6.2.2 The Operator shall also ensure that the treated water leaving the Water Treatment Works shall meet the Potable Water Specification.
- 6.2.3 To the extent that the raw water required for the supply of potable water fails to meet the Raw Water Specification and such failure prevents the Operator, using the treatment processes used by the Owner at the date of this Agreement, from treating the potable water to meet the Potable Water Specification, then the Operator shall use its best endeavours to meet such Potable Water Specification. In the event any extra cost is required for meeting the Potable Water Specification, then the Operator shall notify the Owner with the details of all such costs, in writing, which shall be borne by the Owner and the Owner shall indemnify the Operator against any and all loss of revenue, cost, penalty, claim, damage, injury, charge, fine, levy or liability (to the extent permitted by law) suffered by the Operator as a result of such failure.
- 6.2.4 From the Effective Date the Operator shall supply potable water to the Customers through the distribution network three times per day (for a minimum duration of 1.5 hours) during the months of [rain season] inclusive and twice per day (for a minimum duration of 1.5 hours) during the rest of the year as per the Benchmark Standards (subject to Planned Maintenance). The Operator shall supply potable water 24 hours per day (subject to Planned Maintenance) to specified Customers, in accordance with the list of specified users set out in Schedule L (Potable Water Customers to Receive a 24 Hours per Day Supply) (as may be amended by the Operator from time to time) to the extent that the Parties consider it appropriate and feasible, as agreed in writing.
- 6.2.5 If the Operator fails to achieve the service defined in this Clause, then the Operator shall incur Liquidated Damages as determined during the Benchmarking Period. The Operator shall not be liable for Liquidated Damages to the extent such failure is attributable to a Release Event in which event the Operator shall use reasonable endeavours to mitigate the

Comment [VHD34]: Important to include provision for what will happen in the event that the raw water supply is contaminated or its specification deviates significantly such that the operator is unable to treat the water with the existing treatment facilities or this will be more costly

Comment [VHD35]: 24/7 water supply may be goal for contract but this may only be able to be achieved in limited areas in the early portion of the contract

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effects of the event and operate the Potable Water System in accordance with the Standards of a Reasonable and Prudent Operator.

- 6.2.6 The Operator shall use its reasonable endeavours to prevent water from entering the Potable Water System that has not been treated to the Potable Water Specification by the existing Water Treatment Works.
- 6.2.7 The Operator has developed the Agreed Capital Investment Programme with the aim of achieving, on the basis of information supplied by the Owner before the date of this Contract, 24-Hour Supply of potable water to the majority of the network within the Contract Period. After six months uninterrupted 24-Hour Supply has been provided to any part of the supply area and has demonstrated security of supply, it is intended that the Operator shall guarantee the Potable Water Specification up to the connection with the Customer (subject to Planned Maintenance and except to the extent that the Operator is prevented or impeded by any Release Event).

Comment [VHD36]: often a concern of operator that it will not guarantee water quality unless and until there is 24/7 supply in a network or distinct portion of a network – due to risk of pollution

6.3. [Sewerage System]

- 6.3.1 From the Effective Date until the Expiry Date the Operator shall provide the following Outsourced Activities in connection with the operation and Maintenance of the Sewerage System, which for the avoidance of doubt shall not include [] that has not been correctly connected to the Sewerage System to the Benchmark Standards:
- (a) collection of sewage from the Sewage Collection Points connected to the Sewerage System and transportation of such sewage through the sewerage network to the Sewage Treatment Plants and then discharging the treated effluent into the river;
 - (b) operating the Sewerage System, sewage pumping stations and the Sewage Treatment Plants in accordance with Performance Standards;
 - (c) carrying out the maintenance on the Sewage Treatment Plants to Maintain operating standards at Performance Standards.
 - (d) making such other improvements to the Sewerage System as may be agreed between the Parties.
- 6.3.2 The Operator shall ensure that the quality of treated effluent leaving the Sewage Treatment Plants meets the Applicable Law in force or any other laws applicable from time to time during the Term of this Contract. However, to the extent that the Operator fails to meet the Treated Sewage Specification, and such failure is due to the sewage influent failing to

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meet the Raw Sewage Specification then the Operator shall use reasonable endeavours to treat the relevant legal requirement PROVIDED that the Operator shall be compensated by the Owner for any extra cost of treatment and shall indemnify the Operator for all and any penalties imposed on the Owner by any authorities or other bodies for such failure.

6.3.3 The Operator shall dispose off the sludge generated from the Sewage Treatment Plants or generated from cleaning of sewer line, manholes or slit pits, without further treatment, in accordance with the Applicable Laws to the disposal facilities used by the Owner at the date of this Agreement. To the extent that the Operator is required (whether by law or otherwise) to use alternative disposal facilities, then the Operator shall not be entitled to any extra Charge, provided that the disposal facilities are within [10 km] of the town boundary of [town] as at the date of this Agreement. To the extent that the alternative disposal plot is outside this area, or an alternative more costly method of disposal is required, then the Owner will indemnify the Operator for an extra Cost resulting from the use of the alternative site or method.

6.4. **Billing**

6.4.1 From the Effective Date until the Expiry Date the Operator shall provide support to the Owner for the Owner's billing and collection of Revenues for water consumption and wastewater discharge. All bills will be collated, distributed and handled by the Owner. All Revenues will be collected by the Owner. All Revenues shall be invoiced in the name of the Owner and paid to the Owner.

6.4.2 The Operator shall have full and unrestricted access to the billing software, all current and historical billing data and the customer contact centre. All reasonable requests for data and analysis from the billing data system shall not be unreasonable refused by the Owner.

6.5. **[Supply of Water Tankers**

The Operator will manage the two water tankers existing at the Effective Date for supply of additional water services for special functions in line with arrangements in place at the date of this Contract and as may be updated from time-to-time as agreed by the Parties.]

6.6. **Standard of Service Provided by the Operator for Water Systems**

6.6.1 The Operator shall perform the Outsourced Activities from the Effective Date until the Expiry Date in accordance with:

Comment [VHD37]: depending on the local laws and on the intention of the parties, operator may not be permitted or may not wish to bill in own name and may carry out billing services as agent for public grantor. If operator is to bill in own name, wording will need to be adapted

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- (a) the Standards of a Reasonable and Prudent Operator;
- (b) all relevant Operating Permits in force from time to time;
- (c) all Applicable Laws, in force from time to time; and
- (d) the Performance Standards.

6.6.2 If the Operator becomes aware of a conflict between the requirements set out in sub-section 6.6.1, it shall inform the Owner accordingly and the Parties shall discuss and agree upon the manner in which the Operator should perform its obligations. Failing agreement the Owner shall direct the manner in which such conflict shall be resolved provided that the manner as directed by the Owner will not cause the Operator, its employees, agents or subcontractors to breach any mandatory or criminal law or to run any risk of criminal, penal or other non-monetary penalties or prosecution and that the Owner shall (save to the extent arising by virtue of any negligent act or omission of the Operator or a breach of this Contract by the Operator) indemnify the Operator against all costs, claims, damages, expenses, fines, losses, liabilities and penalties incurred or sustained by the Operator as a result of the performance of the Outsourced Activities by the Operator in accordance with such direction.

6.7. Facilities Owned or Operated by Third Parties

The Operator shall not be responsible for and shall provide no Outsourced Activities in relation to any facilities owned or operated by third parties, other than water supply to the Customer Water Connection Points.

6.8. Operator's Permits

The Operator shall procure, obtain and maintain all Operator's Consents. The Owner will provide to the Operator's request all reasonable assistance and support to the Operator in procuring the Operator's Consents.

6.9. Spares

The Owner shall transfer to the Operator at no cost the spares, supplies and consumables which exist in the Owner's stores in [] on the Effective Date, and are the property of the Owner, such that they are used for the Outsourced Activities. Any of these spares which remain with the Operator at the end of the Contract Period or on early termination shall be returned to the Owner, unless the Contract is renewed or extended.

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6.10. Metering

- 6.10.1 The Operator shall test and calibrate all Water Meters on a regularly scheduled basis, being at least once every [24] months.
- 6.10.2 The Owner shall test and calibrate all Power Meters on a regularly scheduled basis, being at least once every [24] months.
- 6.10.3 If at any time either Party has reasonable grounds to suspect that any Water Meter is not accurate in any respect, the discrepancy or suspected discrepancy shall be immediately reported to the other Party in writing along with any evidence in support of such claim and the Operator shall arrange for the testing of the relevant Meter.
- 6.10.4 If at any time either Party has reasonable grounds to suspect that any Power Meter is not accurate in any respect, the discrepancy or suspected discrepancy shall be immediately reported to the other Party in writing along with any evidence in support of such claim and the Owner shall arrange for the testing of the relevant Meter.
- 6.10.5 If any of the Meters fails to register or, upon test, is found not to be within the accuracy standards established by the equipment supplier or if not available in the latest revision of the [British Standards Institute] or other relevant standard, then for the purposes of this Contract a reasonable adjustment in accordance with generally accepted engineering practices shall be made correcting all measurements, which adjustments shall reflect, if determinable, the actual period during which any inaccurate measurements were made. If such period cannot be determined it shall be deemed to be such period as shall be equal to one-half of the time from the date of the last previous test of such meter or measuring equipment, provided that the period covered by any such correction shall not exceed six months.
- 6.10.6 The costs of all testing of the Meters other than the Power Meters pursuant to this Sub-Clause 7 shall be borne by the Operator except in the case of testing carried out at the instigation of the Owner which shall only be borne by the Operator, if such testing reveals the relevant meters to be inaccurate by more than [3]% and otherwise by the Owner if within such accuracy standards.
- 6.10.7 The costs of all testing of the Power Meters pursuant to this Sub-Clause 7 shall be borne by the Owner except in the case of testing carried out at the instigation of the Operator which shall only be borne by the Owner, if such testing reveals the relevant meters to be inaccurate by more than [3]% and otherwise by the Operator if within such accuracy standards.

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7. DEFICIT TO THE OWNER

7.1. Reduction in Deficit

The Operator undertakes to ensure that the Deficit will be reduced consistently as per the Deficit Projection set out in Schedule O from [currency and amount] in Year 1 of the Contract to [currency and amount] in year [15] of the Contract on year to year basis, with the aim of reducing the Deficit to zero. The Deficit Projection shall be subject to verification during the Benchmarking Period.

7.2. Incentive for reduction of Deficit

7.2.1 The Operator will be required to develop opportunities to reduce the Deficit. Consequently, as an incentive to bring improvement in operational efficiency, the Owner agrees that if the Deficit is reduced beyond the relevant annual Deficit Projection (as verified during the Benchmarking Period) whether due to improvements in operational efficiency, reductions of unaccounted for water levels or due to an increase in Revenues, the Services Provider will be paid an incentive. Such incentive will be [50]% of the difference, if any, between the relevant Deficit Projection and the actual Deficit achieved.

7.2.2 If the Operator fails to achieve the Deficit Projection due to the Operator failing to operate efficiently in accordance with the Standards of a Reasonable and Prudent Operator (and the failure is not due to the exceptions set out in sub-clause 8.2.3) then the Operator will make good any shortfall between the Deficit Projection and the actual Deficit achieved to the Owner, up to limit of [CURRENCY AND AMOUNT] as determined by the formula set out in Schedule [], which shall be made by the Operator by way of an annual rebate of the Fixed Charge or the Variable Charge. This will be the sole remedy of the Owner in relation to the failure of the Operator to achieve the Deficit Projection (other than the Owner's right to termination for persistent failure in accordance with sub-clause 17.1).

7.2.3 To the extent that the failure to achieve the Deficit Projection is due to one or more of the following then the Operator shall not be required to make good the shortfall pursuant to Sub-Clause 7.2.2: -

- (a) Extra expenditure is required due to additional supply to new Non-Revenue Connections or existing Non-Revenue Connections by the direction of the Owner;
- (b) Any shortfall in Revenues due to failure of the Owner to implement the proposed tariff increases set out in Clause 8.3;

Comment [VHD38]: where the system is running at a loss and it is not going to be practical for it to be running on an economic basis by the end of the contract, it may still be appropriate to incentivize and require the operator to reduce the level of deficit or loss that the operation is running – this may be achieved through paying an incentive payment for reduced losses or an incentive for increase billing and collection levels, or in this case, for reducing the deficit that the utility runs at.

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- (c) Reduced demand by domestic consumers in Year [n] of the Contract that is not in line with projections;
- (d) Non-collection of Revenues against bills which have been raised, by mutual agreement between the Owner and the Operator. During the Benchmarking Period the Owner and the Operator will jointly examine and mutually agree which Non-revenue Connections existing at the date of the Contract should cease to be non-billable and start to be invoiced.

7.3. Reduction in Deficit due to Capital Investment

Where and to the extent that the Deficit is reduced below the Deficit Projections as a direct result of the capital investment made by the Parties, then the benefit shall be shared equally by the Owner and the Operator.

8. OWNER OBLIGATIONS

8.1. Access to Facilities

- 8.1.1 The Owner shall provide to the Operator, at no cost to the Operator, free, continuous and exclusive access to, possession and use of, and rights over, the Facilities, sufficient to enable the Operator to carry out its obligations under this Contract on or before the Effective Date until the Expiry Date. Ownership in the Facilities will remain with the Owner.
- 8.1.2 The Owner shall grant, or procure for the benefit of, the Operator the rights and powers to repair or replace the Facilities, to lay pipes on its behalf (and carry out necessary excavations to achieve this), undertake necessary remedial works at the Water Treatment Works, the Sewage Treatment Plants and pumping stations and new works, where appropriate, and to install connections and any other rights and powers required by the Operator to carry out its obligations under this Contract. The Operator shall give the Owner reasonable notice of any necessary work which is likely to cause a disruption to the public or the Owner, and the Parties shall use best endeavours to agree a mutually acceptable programme for such work.
- 8.1.3 To the extent that the Owner requires access to the Facilities, for example to carry out statutory duties, it shall request such access from the Operator (such consent not to be unreasonably withheld or delayed). The Owner, its subcontractors, employees and consultants (other than the Operator), in exercising their rights of access to the Facilities within the Operation Zone, shall comply at all times with:

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- (a) all Applicable Laws, Operating Permits and all relevant health and safety requirements;
- (b) instructions and directions issued by the Operator which are necessary to ensure compliance by the Operator with any Applicable Laws and any relevant health and safety requirements applicable to their respective activities in the Operation Zone; and
- (c) such health and safety regulations and site regulations as the Operator has in effect at the Facilities from time to time, such regulations having been provided to the Owner.

8.1.4 The Operator shall be relieved from performance of its obligations under this Contract to the extent that the Owner or its subcontractors impede or prevent the performance by the Operator of its obligations under this Contract but shall use reasonable endeavours to perform the Outsourced Activities and mitigate any loss or damage.

8.1.5 The Owner shall be entitled to monitor on a regular basis the Operator's performance of the Outsourced Activities and may request any technical documents and reports reasonably necessary to do so provided that such requests would not hinder the Operator in performing his obligations under the Contract. The Owner may have access to the Facilities to inspect the Facilities during business hours upon reasonable advance notice to the Operator.

The Owner shall be entitled to delegate such inspection rights to a third party provided that the same conditions shall apply.

8.1.6 Where the Owner or its subcontractors, employees, consultants or agents cause damage to the Facilities in the exercise of its rights under this Clause 9.1, the Owner shall be liable to the Operator for the reasonable cost of repairing the damage to the Facilities so caused. Such damage shall be treated as a Release Event.

8.1.7 The Owner shall provide free of charge sufficient office, storage and parking space to enable the Operator to perform its obligations under this Contract.

8.2. Land Rent, and Municipal Charge

The Owner shall be responsible for and pay the Land Rent and the Municipal Charge and the Operator shall not be responsible for these charges. The Owner will also bear the cost of any increase in such charges from time to time.

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8.3. Tariff increases

8.3.1 The Deficit Projection in Schedule R is in real terms and is based on an expectation that the Owner shall increase the tariffs so that:

- (a) the tariff for potable water: -
 - (i) by the end of Year [] of the Contract shall be equal to 1.25 x tariff in force as at [date];
 - (ii) by the end of Year [] of the Contract shall be equal to 1.25 x tariff set pursuant to para (a); and
 - (iii) thereafter shall be increased annually in line with inflation; and
- (b) the tariff for raw water and clarified water will be increased annually in line with inflation.

In the event that such tariff increases are not implemented then Schedule R (Deficit Projections) shall be amended accordingly.

8.4. Non-revenue Connections

The Operator shall monitor the System in order to detect Non-revenue Connections. The Owner shall assist the Operator in identifying Non-revenue Connections and preparing invoices for Non-revenue Connections. For the avoidance of doubt, the Operator shall not be responsible for the quality of water taken at Non-revenue Connections unless and until a formal connection has been installed and a continuous 24-Hour Supply is provided to that connection. If local treatment is required to supply water fit for consumption to a Non-revenue Connection then any related costs shall be met by the Owner (through a permitted shortfall in the Deficit Projection). The Owner shall indemnify the Operator for any cost, penalty, claim, damage, injury, charge, fine, levy or liability arising out of or in connection with any Non-revenue Connections or water abstracted therefrom to the extent that the connections are made into pipes carrying raw or clarified water, unless and until such Non-revenue Connections are connected to the Potable Water System or local treatment processes are put in place.

8.5. Licences and Consents

The Owner shall procure, obtain and maintain all Owner Consents to enable the Operator to perform its duties and its obligations under the Contract for the duration of the Contract. [The Owner shall deal directly with the departments of the [Government] on behalf of the Operator on all matters that require

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consultation and discussion with such department and shall ensure that the Operator is able reasonably to perform his duties under the Contract. The Operator will provide at the Owner's request all reasonable assistance and support to the Owner in procuring the Owner's Consents.

Comment [VHD39]: The extent to which the public grantor is engaged in the process of assisting the operator in obtaining and maintaining permits will depend on the circumstances of the contract

8.6. Electricity

The Owner shall provide the Operator with continuous and unimpeded access to electricity supply facilities. The Operator shall pay the Owner for the provision of electricity at the indexed price per unit as set out in Schedule R (Electricity Supply Prices).

Comment [VHD40]: It may be the case that the operator will be required to obtain electricity itself – in which case there may be an escalation formula for increases in cost of electricity – also possible provisions requiring back-up power supply

8.7. Third Party Contractors

[The Owner shall make an inventory of any works in relation to the Facilities which are in progress (and funded by the Owner) at the Effective Date, deliver to the Operator two copies of any associated contracts as required by the Operator and agree with the Operator on the conditions of commissioning of these works to the Operator for operation and/or management (as applicable) by the Operator upon the commissioning of such works, including any additional costs to be incurred or any increase in the Fixed Charge and the Variable Charge required by the Operator.]

Comment [W41]: Relevant where there are works being carried out by third party contractors at time contract is outsourced to Operator

9. AGREED CAPITAL INVESTMENT PROGRAMME (ACIP)

9.1. Scope of ACIP

9.1.1 The ACIP for the System is set out in Schedule F (Agreed Capital Investment Programme) and totals [CURRENCY AND AMOUNT] in real terms over the initial Term. The Owner agrees to commit the Capital Expenditure in accordance with Schedule F for the first [five] years of the Contract to a value of [CURRENCY AND AMOUNT].

Comment [W42]: Where Operator is undertaking to achieve certain improvements based on capital expenditure by Owner, it is important to have a mechanism to ensure such expenditure is carried out – a fund may be created to cover capex – also possibility that this will be funded by a loan from an IFI or from a grant or perhaps from output based aid.

9.1.2 The ACIP for the System identifies the agreed minimum Capital Expenditure required during the Contract in order to: -

- (a) maintain the System at its current levels;
- (b) refurbish the System;
- (c) improve the current service levels of the System; and
- (d) take into account anticipated demographic increases in the Service Area (up to a population growth rate of one per cent. per annum within the existing official supply areas),

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whilst ensuring that these goals are achieved in an economically and technically sustainable manner.

9.2. Updating of Agreed Capital Expenditure Programme

- 9.2.1 The Operator shall update and revise the ACIP at the end of Year 3 (for Years 6-10), and at the end of Year 9 (for Years 11-15) for review and approval by the Owner, such approval shall not be unreasonably withheld or delayed.
- 9.2.2 The updates to the ACIP shall be made in line with the Asset Management Plan, and submitted to the Owner in a report that includes, as necessary:
- (a) rehabilitation of above-ground assets;
 - (b) rehabilitation of underground assets;
 - (c) replacement of water mains, sewers, manholes and connections;
 - (d) installation of meters, valves and monitoring equipment;
 - (e) installation of water mains (and sewers where appropriate);
 - (f) implementation of appropriate management information systems; and
 - (g) installation of any relevant Customer service infrastructure,
 - (h) any other projects identified by the Operator from time to time;
 - (i) a description for each identified item of Capital Expenditure of the short- and long-term performance improvements as set out in the Technical Specification that should be achieved by the implementation of that Capital Expenditure in order to ensure that the performance specifications are met;
 - (j) a schedule of the anticipated life expectancy of all identifiable installed plant and machinery;
 - (k) and is consistent with the attainment of the Clarified Water Specification, the Potable Water Specification and the proper operation of the Sewerage System.

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9.3. Owner Commitment to Capital Expenditure

The Owner shall be responsible for obtaining the funding for all Capital Expenditure

9.4. Management of the ACIP

9.4.1 In the implementation of the ACIP, the Operator shall, and shall be authorised by the Owner, except to the extent that these are carried out by the Owner, to:

- (a) manage the implementation process including planning, scheme identification, project appraisal, design and specification;
- (b) manage all procurement processes pursuant to the ACIP;
- (c) select and supervise all consultants and contractors and supervise the disbursement of Capital Expenditure and execution of related projects; and
- (d) provide, to the extent relevant, the Outsourced Activities following completion and commissioning of specific projects.

9.4.2 A monthly charge for all obligations related to the management of the ACIP including (without limitation) carrying out the requisite engineering, monitoring construction and testing will be paid in accordance with Clause 12. The Owner will provide adequate support services to the Operator on all ACIP management including engineering, project management and procurement in order to reduce charges paid to the Operator for such services as detailed in Clause 12.1.1(c).

Comment [VHD43]: May be part of the overall remuneration of the operator or may be a separate fee

9.4.3 The Operator shall manage the complete implementation of the ACIP and shall make all associated requests to the Owner for funding for Capital Expenditure in accordance with the ACIP.

9.4.4 The Operator shall have the right to appoint certain contractors on an exclusive basis and to carry out such parts of the Capital Expenditure works itself as it deems appropriate (for which it would be entitled to remuneration in addition to the Charges set out in this Contract). So long as the cost of so doing is demonstrated to be at market rates for quality workmanship.

9.4.5 The Operator shall produce during Year 1 a Schedule of Rates for Capital Expenditure. This will incorporate rates of expenditure for all repetitive works that will be carried out as part of the ACIP and may include without limitation main-laying, service connections and meter

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installation. The rates shall be benchmarked locally and may be executed by a contractor or the Operator himself. The Schedule of Rates shall be presented to the Owner who shall approve it within 14 days or ask for further justification of specific rates where necessary. The Schedule of Rates shall represent rates approved by the Owner and will therefore not require further approval by the Owner when the Operator submits invoices and makes claims for payment for works carried out in accordance with the overall ACIP. The Schedule of Rates shall be updated annually in accordance with market rates.

9.5. Major Capital Expenditure

In the event that, in the opinion of the Operator, from time to time Major Capital Expenditure (being capital expenditure in excess of [amount and currency]) needs to be undertaken (other than as set out in the ACIP and as set out in Schedule []) the Owner and the Operator shall agree between them how to adjust the ACIP to allow for such expenditure, or the Operator shall make recommendations to the Owner for increasing the budget ceiling for the ACIP.

9.6. Capital Expenditure

The Parties acknowledge that the Operator's ability to provide the Outsourced Activities in accordance with the Technical Specification is dependent upon the availability of the Capital Expenditure.

9.7. Lenders' Requirements

9.7.1 The Owner may request the assistance of the Operator to identify cost-effective sources of financing for Capital Expenditure. The Operator will submit to the Owner any proposals for financing arrangements or sources known to the Operator that might satisfy the Owner's requirements. The decision in relation to the method of financing Capital Expenditure shall remain solely with the Owner and the Owner shall be solely responsible for obtaining funding for Capital Expenditure.

9.7.2 If the Operator undertakes, under a separate written agreement with the Owner, to finance part of the Capital Expenditure, the Owner shall use its best endeavours to provide all securities, warranties and authorisations to the Operator, and the Operator shall acknowledge any security over assets as required by lenders provided that in each case the security provided to the lenders by the Owner should not in any manner hinder or hamper the provision of the Outsourced Activities by the Operator or the performance by the Operator of any of its obligations under the Contract.

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9.8. Asset Management Plan

9.8.1 By the end of the period for revising the ACIP at the end of Year 3 (for Years 6-10), and at the end of Year 9 (for Years 11-15) the Operator shall prepare with the assistance of the Owner and issue to the Owner an asset management plan for the Systems (the "**Asset Management Plan**").

9.8.2 The Asset Management Plan will:

- (a) take into account the changing demand for different grades of water and establish ways of meeting these demands (such as providing connections to [Informal Areas], if appropriate), incorporating projections for supply and demand;
- (b) identify the annual expenditure for replacement of any of the above ground and underground plant and other assets that will be operated and maintained by the Operator over the five-year period commencing at the beginning of Year 6 and Year 11;
- (c) contain a schedule of the anticipated life expectancy of all identifiable installed components of the Facilities;
- (d) describe the condition of the Facilities and identify what work is required to maintain the Facilities in their current state or in a fully serviceable state;
- (e) provide proposals for refurbishment of relevant Facilities;
- (f) provide proposals to promote water conservation;
- (g) provide proposals to incorporate any changes in environmental regulations and laws; and
- (h) seek to identify improvements to the quality of the service provided to the customers.

9.8.3 The Asset Management Plan will take into account the ACIP.

9.8.4 The Owner shall review the Asset Management Plan alongside the updates of the ACIP within [30] days of their submission by the Operator with confirmation within [30] days of its acceptance or otherwise thereof.

9.8.5 The Asset Management Plan will form the basis for any changes made to the ACIP.

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10. REVIEW OF AGREED CAPITAL INVESTMENT PROGRAMME

10.1. Annual Review

10.1.1 The Operator shall: -

- (a) submit to the Owner every 12 months a progress report in relation to the Agreed Capital Investment Programme ("ACIP") and any problems with the System;
- (b) recommend to the Owner updates to the ACIP for the following Year if and to the extent that there are to be deviations from the ACIP;

10.1.2 The Owner shall review such recommendations and provide the Operator with confirmation within [30] days of its acceptance or otherwise thereof;

10.1.3 The Owner in the event of any failure of Major Plant brought to its attention by the Operator, shall agree how to remedy the same and allocate resources for the agreed solution;

10.1.4 The Owner shall discuss with the Operator any additional capital works which are not set out in the ACIP and how to allocate/ obtain resources in relation to any such additional works (the "Additional Works") and make recommendations for approval by the Parties, such approval not to be unreasonably withheld or delayed;

10.1.5 The Owner shall discuss with the Operator any requests to bring forward part of the ACIP designated for the following Year's Annual Capital Investment Budget for the purpose of carrying out any identified Capital Expenditure that is necessary in that Year.

10.1.6 The approval of the Owner to such request shall not be unreasonably withheld. The Review shall also contain information for the owner on:

- (a) Total expenditures under the ACIP;
- (b) Performance of Contractors;
- (c) Progress of work carried out when compared to the ACIP;
- (d) Benefits realised for the Owner and consumers from the work executed to date;
- (e) action plans to bring expenditures in line with the ACIP where there is divergence, as necessary.

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11. OPERATOR REMUNERATION

11.1. Charges

11.1.1 The Operator shall be paid the Charges from the Effective Date for the Outsourced Activities. The Charges shall be the Operator's sole compensation for the Outsourced Activities performed including the Operator's activities during the Transition Period but excluding any other costs, fees and amounts to be paid to the Operator under the Contract including, without limitation, the amounts to be paid to the Operator for Capital Expenditure, Changes or Cost increases and the Incentive Payments. The Charges shall include:

- (a) a Fixed Charge as set out in Schedule J (Charges and Escalation) (the "**Fixed Charge**");
- (b) a Variable Charge as set out in Schedule J (Charges and Escalation) for:
 - (i) raw water pumped from the [] to the Owner and to [] Reservoir at a rate of [amount and currency] per m³;
 - (ii) raw water pumped from [] to the other Raw Water Consumers not referred to in paragraph (i) above, including Affiliates of the Owner at a rate of [amount and currency] per m³; and
 - (iii) potable water pumped from the Water Treatment Works into the Potable Water System at a rate of [amount and currency] per m³ (which includes the cost of pumping raw water used for potable water from the Old River Pump House to the Water Treatment Works);

(the "**Variable Charge**"), payable in arrears.

11.1.2 The Operator will also be paid a fee for managing the capital investment programme consisting of a monthly charge for all obligations related to the construction management of the ACIP including (without limitation) carrying out the requisite engineering, monitoring construction and testing.

11.1.3 The Owner will provide direct support and services to the Operator, as described in sub-Clause []. Consequently the Operator will accept a reduction to the proposed monthly charge of [7.5]%, down to [3] per cent of the amount of Capital Expenditure invoiced during that month on the basis that such services are provided by the Owner. If and to the extent,

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that the Owner fails to provide such services then the discount granted by the Operator in relation to this charge shall be reduced accordingly.

11.2. Escalation

11.2.1 Over the Contract Period the Fixed Charge shall be subject to the following escalation made up of two components:

- (a) the aggregate cost of the [x] Owner Employees at the date of the Contract, being equal to [amount and currency] of the Fixed Charge, shall be escalated in line with actual costs of employees, the increases in which shall match the terms laid out within Employee Transfer Agreement;
- (b) the remainder of the Fixed Charge consists of the remaining costs expended by or within the Operator such as maintenance, parts, operating consumables, administration costs and shall be escalated against the average consumer price index as published by [], SAVE THAT in the first five years of the Contract such escalation shall not take into account inflation up to an aggregate limit of [5]% and such amount will be for the account of the Operator and not the Owner. To the extent that and as soon as the compounded inflation exceeds [5]%, escalation will be payable in relation to such remainder of the Fixed Charge for the portion of escalation over [5]% only on a compounded basis.

11.2.2 In the event that the escalation formula as set out in 11.2.1 results in an unforeseen significant increase in costs, the Parties will fully review the costs incurred by the Operator so as to re-base the Fixed Charge.

11.2.3 After five years the above escalation formula will be reviewed in line with the objectives of the Contract, i.e. to meet the key twin objectives being (a) the reduction in the Deficit suffered by the Owner in relation to the Systems and (b) a reasonable return on any investments made and reward for the risks assumed by the Service Provider and its affiliates.

11.3. Payment

11.3.1 The Operator shall submit to the Owner a monthly invoice. The first invoice shall be submitted by the Operator on the first working day (being a day on which banks are open to do business in [location]) of the month after the Effective Date and every monthly anniversary thereafter. The invoice will identify the Fixed Charge, the Variable Charge, the Incentive Payment, where appropriate, and any other amounts to be paid in accordance with this Contract.

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11.3.2 Payments to the Operator of the amounts identified in an invoice shall be made by the Owner within 14 days of receipt of the invoice. The Operator shall be entitled to charge interest at [2]% above the Base Rate for any delayed payment from the date payment was due and payable until the date of full and final satisfaction of the payment. The Owner shall not withhold payment of any part of the invoice which is not in dispute, but shall pay that portion and only withhold, and request the Operator to justify, any portion which is reasonably disputed. If the Operator has not received full and final payment of amounts due within 90 days of receipt by the Owner of the invoice, the Operator shall be entitled to terminate the Contract in accordance with Clause 18.1 (Termination).

11.3.3 The Service Provider shall submit invoices for due Incentive Payments as appropriate to the Operator for verification which shall be given within 30 days. The Operator shall then submit copies of the approved invoices to the Owner with their own next monthly invoice. The Service Provider invoice will identify the Incentive Payment and any other amounts to be paid in accordance with this Contract.

11.3.4 Payments to the Service Provider of the amounts identified in an invoice shall be made by the Owner within 14 days of receipt of the invoice. The Service provider shall be entitled to charge interest at [2]% above the Base Rate for any delayed payment from the date payment was due and payable until the date of full and final satisfaction of the payment. The Owner shall not withhold payment of any part of the invoice which is not in dispute, but shall pay that portion and only withhold, and request the Operator to justify, any portion which is reasonably disputed.

11.4. Taxes

The Operator shall pay such taxes, duties, charges and other impositions as may be levied on the Operator's income under the Applicable Laws. The Owner shall pay all other taxes, duties, charges and other impositions including without limitation, business tax, sales tax, value added tax, service tax if it becomes applicable, import duties or similar charges, duties, taxes or charges imposed on the Operator at any time and from time to time in relation to the performance of the Outsourced Activities or the Capital Expenditure.

11.5. Adjustment of Charges

11.5.1 The Charges set out in this Clause shall be adjusted to reflect:

- (a) Escalation as set out in sub-clause 12.2;
- (b) any Change;

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- (c) any changes in Applicable Laws (including changes in taxation);
- (d) any increase in Costs as a result of Force Majeure; and
- (e) any increase in Costs as a result of a Release Event.

If any of these events described above occur, the Operator shall have the right to submit a revision request to the Owner.

11.5.2 Upon a revision request being submitted in relation to paragraph 11.5.1(a) the Charges shall be revised accordingly. Upon a revision request being submitted in relation to paragraphs 1215.1(a) to (e) inclusive, the Charges shall be revised to reflect any increase in Costs. The Deficit Projections will also be revised to take any such increase into account.

11.5.3 If the Owner disagrees that the Charges should be revised or the Parties are unable to reach agreement on revised Charges within 30 days of receipt of the above revision request by the Owner then the matter shall be resolved by submission to dispute resolution under Clause 24.7 (Arbitration), without recourse to any of the earlier stages of the dispute resolution process under Clause 24 (Disputes and Claims).

11.6. Additional Revenues

11.6.1 The Operator shall be paid the Incentive Payment as set out in Schedule J (Charges and Escalation) for generating additional Revenues by identifying and billing persons responsible for Non-revenue Connections and new Customers and for reducing the level of Unaccounted for Water.

12. HEALTH AND SAFETY

12.1.1 Precautions no less onerous than those already in existence and being maintained by the Owner at the Effective Date shall be taken by the Operator to ensure the health and safety of the Owner Employees and its own employees whilst performing duties required by the Operator under this Contract. The Owner shall, in accordance with the requirements of the local health authorities and Applicable Laws, ensure that at all times medical staff, first aid facilities, and sick bay services and accommodation for the purposes of receiving medical attention are available in the Operation Zone. The Owner shall ensure that suitable arrangements are made for all necessary welfare, sanitation and hygiene requirements and for the prevention of epidemics.

12.1.2 The Operator shall appoint a senior member of staff in the Operation Zone to be responsible for maintaining the safety and protection of its

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personnel and the Owner Employees against accidents in the Operation Zone. Such person shall:

- (a) be qualified for his work and have received appropriate training in health and safety requirements and be familiar with the requirements of the Applicable Laws;
- (b) have the authority to issue instructions and take protective measures to prevent accidents; and
- (c) assist the Operator in maintaining a record of any health and safety incidents which may occur for the purposes of fulfilling the Operator's obligations under this Contract.

12.1.3 The Operator shall send to the Owner details of any accident notified to it, as soon as practicable after its occurrence.

12.1.4 The Operator shall comply with all applicable safety regulations in its access arrangements and operations in the Operation Zone.

13. INFORMATION, REPORTS, RECORDS AND AUDITS

13.1. Reports, Manufacturer's Recommendations and Information

13.1.1 The Operator shall provide to the Owner, such reports as are required for compliance with reporting requirements prescribed by Applicable Laws relevant to the operation and Maintenance of the Facilities or provided for in the Owner's operations and maintenance procedures manuals or any Operating Permit. In addition, upon knowledge of the same, the Operator shall provide the Owner with prompt written notice of:

- (a) any litigation or claims, disputes or actions, threatened or filed, concerning the Facilities or the Outsourced Activities which are material;
- (b) any refusal or threatened refusal to grant, renew or extend, or any action pending or threatened that might affect the granting, renewal or extension of, any Operator's Consent; and
- (c) any dispute with, or notice of violation or penalty issued by, any competent authority which is material.

13.1.2 In respect of any equipment procured directly by the Owner through the ACIP specifically for the Operation Zone the Owner shall deliver a copy of any relevant Manufacturer's Warranties and Recommendations to the

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Operator as soon as reasonably practicable following receipt by the Owner.

13.2. Monitoring

13.2.1 The Owner may designate a suitably technically skilled person to carry out an annual audit of a technical nature in relation to the Outsourced Activities, to visit and inspect the Facilities with the Operator's officers and staff, upon giving the Operator 14 days' notice.

13.2.2 Such audit shall be carried out at reasonable times and so as not to impede or otherwise delay the Operator in the performance of the Outsourced Activities or its obligations under this Contract.

14. PROCUREMENT AND SUB-CONTRACTING

14.1. Sub-Contracting

The Operator may sub-contract any part, but not all, of the Outsourced Activities to be provided by it under this Contract without the prior written consent of the Owner, but without relieving the Operator of its obligations under the Contract. The Operator shall inform the Owner of the identity or any change in the identity of the contractors and subcontractors being used in respect of any part of the Outsourced Activities and the details of the services which are being subcontracted. The Operator shall procure that the sub-contractor engaged by the Operator follows all the statutory provisions applicable in India from time to time in relation to labour and industrial law. The Operator shall procure the sub-contractor to follow the safety procedures in effect at the relevant Facilities from time to time.

14.2. Procurement

The Parties shall establish all Procurement Guidelines prior to the Effective Date.

The Operator shall select the method of procurement to be used for Capital Expenditure which it believes to be appropriate in the circumstances within the Procurement Guidelines and shall enter into such procurement arrangements for and on behalf of the Owner, as the Owner's disclosed agent. Invoices for Capital Expenditure shall be certified by the Operator and submitted to the Owner for payment. In each such procurement package, the Operator (acting in accordance with the Standards of a Reasonable and Prudent Operator) shall act as the Owner's representative and shall manage the procurement process, and the contractor shall be required to comply with the Operator's instructions.

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15. EMERGENCIES

15.1. Emergencies

Notwithstanding any provision to the contrary herein, the Operator may take any action as the Operator deems to be necessary (acting in accordance with the Standards of a Reasonable and Prudent Operator) in the event of an Emergency affecting the Outsourced Activities or Facilities where the Operator considers that immediate action is required to safeguard life, prevent injury or protect property.

15.2. Further Action to be taken in an Emergency

In the event of an Emergency, the Operator shall forthwith notify the Owner of the Emergency, the expenditure made and the actions taken. The Owner shall indemnify the Operator for such expenditure provided that the Operator has complied with its obligations under Clause 15.1 (Emergencies) and has not caused the Emergency through the Operator's Gross Negligence. The Operator shall take all reasonable steps to mitigate the cost to the Owner, having regard to the circumstances and the need to act promptly. Following such notification, at the request of the Owner, the Parties shall discuss without delay the further actions which should be taken as a result of that Emergency and the estimated expenditure associated therewith.

15.3. Owner's Notice

If the Owner considers that an Emergency has arisen in relation to the Facilities, the Owner may give written notice to the Operator specifying the nature of the Emergency which it has identified. The Operator shall, to the extent it is practicable to do so, rectify such Emergency in accordance with the Standards of a Reasonable and Prudent Operator. If the Operator considers that the Emergency is outside its capacity to rectify as the Operator of the Facilities, it shall notify the Owner promptly and the Owner shall take such actions as may be necessary to rectify the Emergency itself.

16. ENVIRONMENT

16.1. Protection of the Environment

Notwithstanding any other provision of this Contract, the Operator shall take all reasonable steps to protect the environment in the Operation Zone and to limit damage and nuisance to people and property resulting from pollution, noise and other results of the fulfilment of its obligations under this Contract and shall take reasonable steps to ensure that air emissions and surface discharges from the Operation Zone shall not exceed the values prescribed by Applicable Laws wherever possible.

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16.2. Indemnification by the Owner

16.2.1 The Owner shall indemnify and hold harmless the Operator, the Operator's contractors and subcontractors, agents and employees against any and all fines, levies or penalties imposed under the Applicable Laws in respect of the Owner's breach of environmental laws, or any claim, losses, damage and expense of whatever kind and nature including (without limitation) all related costs and expense in respect of personal injury or death of third parties, arising from or in connection with environmental damage existing at the Effective Date or arising after the Effective Date and due to any act or event occurring prior to the Effective Date.

16.2.2 This indemnity shall include but not be limited to circumstances arising out of negligent acts or omissions of the Owner, Owner breach of this Contract, breach of the Owner's statutory obligations and duties, breach of a duty of care, imposed by law on the Owner or anyone directly or indirectly employed by the Owner, its contractors and subcontractors (other than the Operator) or their respective officers, agents or employees.

16.3. Indemnification by the Operator

16.3.1 The Operator shall indemnify and hold harmless the Owner, the Owner's contractors and subcontractors, agents and employees against any and all fines, levies or penalties imposed under the Applicable Laws in respect of the Operator's breach of environmental laws, or any claim, losses, damage and expense of whatever kind and nature including (without limitation) all related costs and expense in respect of personal injury or death of third parties, arising from or in connection with environmental damage arising after the Effective Date and not due to any act or event occurring prior to the Effective Date.

16.3.2 This indemnity shall include but not be limited to the circumstances arising out of negligent acts or omissions of the Operator, Operator's breach of this Contract, breach of the Operator's statutory obligations and duties, if any, breach of a duty of care, imposed by law on the Operator or anyone directly or indirectly employed by the Operator, its contractors and subcontractors (other than the Operator) or their respective officers, agents or employees.

16.4. Security of the Operation Zone

The Operator will take reasonable steps to keep unauthorised persons out of the Facilities within the Operation Zone and to alert the Owner of any security

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threats which it believes affect the Operator's ability to fulfil its obligations under this Contract.

17. DEFAULT OF THE OPERATOR

17.1. Notice to Correct

If the Operator fails to carry out any of its material obligations (which shall include the failure by the Operator in 2 successive years to meet the Deficit Projection in accordance with Clause 7.1, if such failure was not due to the exceptions set out in sub-Clause 7.2.3, then the Owner may give notice to the Operator in writing requiring it to make good such failure and remedy the same within a specified reasonable time.

17.2. Termination

If the Operator:

17.2.1 fails to comply with a notice under Clause 17.1 (Notice to Correct);

17.2.2 becomes bankrupt or insolvent, goes into liquidation, has a receivership or administration order made against it, is declared as a sick industrial company under [Applicable Laws], compounds with its creditors, or carries on business under a receiver, trustee or manager for the benefit of its creditors, or if any act is done or any event occurs which (under any Applicable Laws) has a similar effect to any of these acts or events; or

17.2.3 is guilty of Gross Negligence in the performance of its obligations hereunder (including (without limitation) operating the Facilities in violation of any Operating Permits unless required to do so by the Owner under the terms of the Contract),

17.2.4 assigns the Contract other than in accordance with the terms of this Contract

then the Owner may, after having given 90 days' written notice to the Operator in relation to any of the above and, if the default has not been cured by the end of such 90-day period, issue a termination notice ("**Termination Notice**") and terminate the Operator's engagement under the Contract forthwith. If it is found that the Owner was not entitled to terminate under this Clause, the Contract shall be deemed to have been terminated under Clause 18.1 (Termination).

17.3. Valuation at Date of Termination

The Owner shall, as soon as possible after such termination under Clause 17.2 (Termination), determine and advise the Operator of all amounts due to the

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Operator in accordance with the terms of this Contract and Schedule E, after taking into account any loss/damage that the Owner may suffer due to termination pursuant to Sub-Clauses 17.2.1, 17.2.3 and 17.2.4.

17.4. Successor to the Operator

17.4.1 Upon receipt of a Termination Notice from the Owner:

- (a) the Operator shall use reasonable endeavours to facilitate the appointment and commencement of duties of any person to be appointed by the Owner to provide services in connection with the Facilities (the "**Successor Operator**") so as not to disrupt the normal operation and maintenance of the Facilities, and shall co-operate with the Owner in providing the Successor Operator with full access to the Facilities and to all relevant information, data and records relating thereto and comply with all reasonable requests made by the Successor Operator in connection with preparing to take over the Facilities; and
- (b) the Operator shall promptly after termination deliver to the Owner or (if so required by the Owner by written notice) the Successor Operator, all property in its possession or under its control which is owned by the Owner or leased or licensed to the Owner by third parties.

17.4.2 The Operator, to the extent allowed by such contracts and as may be required by the Owner, shall use its reasonable endeavours to transfer to the Successor Operator, as from the date of termination, its rights under all contracts for goods or services (including any sub-contracts) entered into by the Operator in the performance of its obligations under this Contract. Pending such transfer, the Operator shall hold its rights and interests thereunder for the account and to the order of the Owner or (if so required by the Owner by written notice) the Successor Operator. The Owner shall indemnify and hold harmless the Operator from and against any loss of revenue, cost, penalty, claim, damage, injury, charge, fine, levy or liability arising out of or resulting from the continuation and performance of these contracts by the Owner or, as the case may be, the Successor Operator and for the performance by the Operator of its obligations under this Clause 17.4. This provision shall continue notwithstanding termination of the Contract.

17.5. Hand Back Procedures

The Operator and Owner shall comply with the Hand Back Procedures upon termination.

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18. DEFAULT OF THE OWNER

18.1. Termination

If the Owner:

- 18.1.1 fails to pay the Operator any amount due under Clause 7 (Operator Remuneration) within ninety (90) days of receipt by the Owner of the invoice for such amount;
- 18.1.2 becomes bankrupt or insolvent, goes into liquidation, has a receivership or administration order made against it, is declared as a sick industrial company under [Applicable Laws] compounds with its creditors, or carries on business under a receiver, trustee or manager for the benefit of its creditors, or if any act is done or any event occurs which (under any Applicable Laws) has a similar effect to any of these acts or events;
- 18.1.3 persistently fails to meet the Owner's obligations or fails to perform a material obligation of the Owner under the Contract;
- 18.1.4 at any time ceases to have authority to be a party to this Contract or to perform its obligations under this Contract or to be entitled or authorised to delegate or outsource its right or duty to operate any or all of the Facilities or the Outsourced Activities;
- 18.1.5 fails to maintain or renew its Land access to the Operator of the Facilities;
- 18.1.6 assigns the Contract without the Operator's written consent; or
- 18.1.7 if the Facilities within the Operation Zone are expropriated or involuntarily transferred to a governmental entity or if a similar action occurs with respect to all or a substantial part of the Facilities or rights of the Operator or the Owner in respect of the Outsourced Activities,

then the Operator may terminate its employment under this Contract by giving notice to the Owner. Termination of this Contract shall occur 14 days after the giving of the notice.

18.2. Cessation of Work and Removal of Operator's Equipment

After termination under Clause 18.1 (Termination), the Operator shall cease to provide the Outsourced Activities, except for such Outsourced Activities as may be necessary and reasonably instructed by the Owner for the purpose of making the Facilities safe or leaving the Facilities in an operable, clean and safe

Comment [VHD44]: It is important to establish a procedure for handover of facilities on early termination and also expiry of the contract

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condition and provided that there is no continuing dispute in respect to the exercise by the Owner of its right to terminate the Contract:

18.2.1 hand over to the Owner all materials and equipment for which the Operator has received full payment from the Owner; and

18.2.2 remove all Operator's equipment which is in the Operation Zone and (provided that such employees' consent) repatriate all of its expatriate employees from the Operation Zone.

Any such termination shall be without prejudice to any other right of the Operator under this Contract.

18.3. Payment on Termination

After termination under Clause 18.1 (Termination), the Owner shall pay the Operator all reasonable costs for loss or damage suffered (including the cost of compliance with Clause [18.2] (Cessation of Work and Removal of Operator's Equipment) plus an amount calculated and certified in accordance with Schedule E (Payment on Termination).

19. RISKS AND RESPONSIBILITIES

19.1. Operator Indemnity

The Operator shall indemnify and hold harmless the Owner, its contractual agents and employees from and against all claims, damages, losses and expenses attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Facilities) arising out of or resulting from breach by the Operator of its obligation to provide the Outsourced Activities in accordance with the Contract to the extent that such claims, damages, losses or expenses are caused in whole or in part by a breach of a duty of care imposed by law on the Operator or on anyone directly or indirectly employed by the Operator.

19.2. Owner Indemnity

The Operator shall not be liable under the Contract for, and the Owner shall indemnify, defend and hold harmless the Operator, the Operator's contractors, subcontractors, agents and employees from, any and all claims for loss, damage and expense of whatever kind and nature, including all related costs and expenses, in respect of personal injury to or death of third parties and in respect of loss of or damage to any third party property to the extent that the same arises out of any Gross Negligence of the Owner, breach by the Owner of this Contract, breach of the Owner's statutory obligations and duties, breach of a duty of care imposed by law on the Owner or anyone directly or indirectly

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employed by the Owner, its contractors and subcontractors (other than the Operator) or their respective officers, agents or employees.

19.3. Release Events

- (a) The Release Events are the following events, to the extent that they affect the Operator's ability to perform the Outsourced Activities:
- (b) a Force Majeure Event;
- (c) for the purposes of the potable water or the clarified water, the raw water does not conform with the Raw Water Specification and such non-conformity prevents the potable water from meeting the Potable Water Specification;
- (d) [the sewage influent does not comply with the Raw Sewage Quantity Specification or the Raw Sewage Quality Specification (whether or not due to drought or lack of river flow in the rivers) and this prevents or hinders the Operator from treating the raw effluent to meet the Treated Effluent Specification;]
- (e) a failure of Major Plant, unless and to the extent that such failure is due to the failure by the Operator to operate and maintain the particular piece of Major Plant in accordance with the Standards of a Reasonable and Prudent Operator;
- (f) any refusal, default or delay by any body from which an Operating Permit is required in the issue of an Operating Permit or in carrying out works or providing services that it is bound to carry out or provide (as the case may be), or any failure or shortage of power, water, fuel or transport;
- (g) any act or omission of any political or governmental agency or body or judicial authority, any withdrawal of an Operating Permit or the failure by any body, from which an Operating Permit is required, to renew an Operating Permit;
- (h) an Emergency which is not caused by the Gross Negligence of the Operator;
- (i) loss or damage as a result of the use or occupation by the Owner, or by any third parties for which the Owner is responsible, to any section or part of the Facilities, except as may be provided for in this Contract;

Comment [VHD45]: Important to consider what should constitute release events on a case by case basis

Comment [VHD46]: Important to determine what constitutes FM events on a case by case basis

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- (j) failure by the Owner to procure the Owner Consents in accordance with Sub-Clause 8.5 (Licences and Consents);
- (k) any act, omission or default by the Owner or by any third parties for which the Owner is responsible, including employees, agents and contractors (other than the Operator) which impedes or prevents the Operator and/or the Operator's contractors or subcontractors from performing their obligations under this Contract including a failure or omission under Sub-Clause [8.7] and a failure by the Owner to provide access to or possession of or to ensure continued access to or possession of the Facilities in accordance with the Contract;
- (l) latent defects in the Facilities which could not have been reasonably apparent to a Reasonable and Prudent Operator at the date of this Contract;
- (m) any reorganisation, merger, dissolution, privatisation or similar restructuring of the Owner which affects the ability of Operator to perform its obligations under this Contract;
- (n) any delay in respect of obtaining approvals from the Owner which must be granted before the Operator may proceed with undertaking any works in connection with the Outsourced Activities;
- (o) [failure by the Owner to discharge any debts, liabilities or obligations assumed by the Owner in connection with the supply of power to the Facilities from the State Electricity Board which results in the State Electricity Board suspending its supply of power to the Facilities;]
- (p) any undertaking, representation or warranty made by the Owner in the Contract being or becoming incorrect or inaccurate;
- (q) an interruption in the supply of electricity to the System or any part of it;
- (r) damage to assets unless caused by the Gross Negligence of the Operator;
- (s) unauthorised abstraction of water from the System and any associated contamination or loss of capacity, including (without limitation) Non-revenue Connections;

Comment [VHD47]: Applicable where owner is supplying electricity

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- (t) System failures which are beyond the control or responsibility of the Operator under the Contract (including (but not limited to) the failure of Major Plant);
- (u) [material increase in the cost of electricity above [CURRENCY AND AMOUNT] per annum;]
- (v) a Change;
- (w) failure by the Owner to approve or fund in a timely manner any Capital Expenditure necessary to enable the Operator to perform its obligations under this Contract;
- (x) any other event or circumstance specifically provided in this Contract to relieve the Operator of its obligations or provide the Operator with additional compensation.

19.4. Consequences of the Release Events

19.4.1 To the extent that, and for so long as, a Release Event is continuing and is preventing, impeding or delaying the Operator from performing the Outsourced Activities in accordance with the Contract, the Operator shall be relieved of its obligations to provide the Outsourced Services in accordance with the Performance Standards and the other term of this Contract but the Operator will use its reasonable endeavours (without incurring any extra cost or expense) to provide the Outsourced Activities to the extent it is able to do so.

19.4.2 The Operator shall give notice to the Owner of a Release Event upon the Release Event being foreseen by, or becoming known to, the Operator.

19.4.3 If a Release Event results in loss or damage: -

- (a) the Operator shall rectify at the cost of the Owner (unless and to the extent that the Operator receives insurance proceeds for the rectification) such loss or damage to the extent considered necessary by the Operator, following the Standards of a Reasonable and Prudent Operator; and
- (b) the Owner shall also indemnify the Operator for any costs reasonably incurred in an effort to protect the Facilities or the employees from harm, subject to the Operator's duty to mitigate such costs,

19.4.4 If the Owner determines, having received notice under sub-Clause 19.4.2 that the Operator should take further steps to provide the Outsourced

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Activities and such further steps involved extra cost and expense, then this will constitute a Change and the provisions of Clause 20 will apply.

19.4.5 To the extent that the Release Event is due to the action or inaction of the Owner, the Owner shall indemnify (to the extent permitted by law) the Operator against: -

- (a) any penalties, costs, fines, levies or other liabilities imposed on the Operator by authorities or other bodies for the failure to meet relevant statutory or regulatory requirements due to the Release Event; and
- (b) any cost that it may incur resulting from a claim by a third party for damage caused as a result of the Release Event.

19.5. Payment of Fixed Charge and Incentive Payment

19.5.1 To the extent that the Operator is unable to meet its obligations under the Contract due to a Release Event, the Owner shall continue to pay the Fixed Charge and Incentive Payment (to the extent still payable) to the Operator, but shall not be liable to pay the Variable Charge, for those elements of the Outsourced Activities so affected.

19.5.2 Where the Release Event is caused by an Owner breach of its obligations under this Contract, the Owner shall pay to the Operator an additional amount equal to [10] per cent of the Fixed Charge as a margin for profit whilst the Release Event subsists.

19.6. Liquidated Damages

Unless otherwise expressly provided in this Contract, the exclusive remedy available to the Owner for breach by the Operator of its obligations under this Contract shall be the Liquidated Damages.

19.7. Limitation of Liability

The Operator shall in no event be liable to the Owner, whether by way of indemnity or by reason of any breach of this Contract or in tort or otherwise, for the loss of use of any part (or all) of the Facilities or for loss of production, loss of profit or loss of any contract or for any indirect, special or consequential loss or damage which may be suffered by the Owner in connection with this Contract. The total liability of the Operator to the Owner under the Contract shall not exceed:

19.7.1 in respect of liability arising after the Effective Date and before the Expiry Date, [*to be determined*] in any one Year; and

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19.7.2 in aggregate, [*to be determined*].

19.8. Provisions surviving on Termination

The provisions of Clauses 11 (Operator Remuneration), [13.3], [14.5], [24] (Disputes and Claims), [25] (Confidentiality) and [26] (Intellectual Property) [*other?*] shall survive the termination of this Contract.

20. CHANGE

20.1. Right to Vary

20.1.1 A Change may be initiated by the Owner at any time after the Effective Date and before the Expiry Date, either by direct instruction to the Operator or by requesting that the Operator submit a proposal. If the Owner requests the Operator to submit a proposal and subsequently elects not to proceed with the Change, the Operator shall be reimbursed by the Owner for the Cost incurred in preparing and submitting such proposal, including (without limitation) design Outsourced Activities.

20.1.2 The Operator shall not make any alteration and/or modification of the Outsourced Activities, unless and until the Owner instructs or approves a Change.

20.1.3 The following events or circumstances shall be deemed to be a Change instructed and approved by the Owner:

- (a) material reduction of demand volumes (being a reduction of 15% or more of the volumes projected in the model as agreed in the letter appended hereto dated []);
- (b) change of any taxes or duties for which the Operator is liable;
- (c) change in Applicable Laws;
- (d) operation by the Operator of new Facilities;
- (e) material modification of the base costs of operation in excess of the indexation formula;
- (f) material increase in the population in the Service Area or the number of Customers from the statistics current at the date of the Contract;
- (g) the need for the Operator to invest more than [currency and amount] in [specific asset];

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- (h) if the Owner asks the Operator to carry out and finance any Capital Expenditure;
- (i) if the legal or regulatory authority (if any) responsible for the approval of increases in Customer tariffs rejects the proposed tariffs as set out in this Contract or imposes limits on such tariffs;
- (j) change in the number of Owner Employees seconded or transferred to the Operator;
- (k) reduction in the ACIP of 15% or more
- (l) action that the Owner requires the Operator to take pursuant to sub-Clause 20.4.4.

20.1.4 The Operator shall notify the Owner of such event or circumstance and shall provide the Owner with a proposal, as aforementioned.

20.2. Right of Refusal

Where the Owner requests a Change by instruction, the Operator shall have the right to refuse a Change requested by the Owner if the Operator reasonably considers that the Change, if implemented, would:

- (a) have a material adverse effect on the Operator's ability to perform its obligations under or in connection with this Contract; or
- (b) have a material adverse effect on the health and safety of any person and give rise to a breach of any Applicable Laws; or
- (c) cause the Operator to breach the Operating Permits; or
- (d) (in aggregate with all other Changes) exceed or would be likely to exceed the value of []; or
- (e) more appropriately be carried out as an amendment to the ACIP.

20.3. Change Procedure

20.3.1 If the Owner requests a proposal from the Operator, prior to instructing a Change, the Operator shall submit, as soon as reasonably practicable:

- (a) a description of the proposed design, work and/or services to be performed and a programme for its execution; and
- (b) the Operator's proposal for adjustment of the Charges, payment of Costs and/or any necessary modifications to the Contract.

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20.3.2 The Owner shall, as soon as practicable after receipt of such a proposal, respond with his approval or rejection with appropriate comments. If the Parties fail to agree adjustments to the Charges, the Expiry Date and modifications to this Contract (if any), within 14 days of the instruction of a Change or the submission of a proposal requested by the Owner, then this issue shall be referred to dispute resolution under Clause 24 (Disputes and Claims). Adjustment of the charges shall include profit and shall take account of the Operator's submissions.

20.4. Payment of Fixed Charge, Variable Charge, Incentive Payment

If whilst carrying out (in part or full) a Change, the Change affects the ability of the Operator to provide the Outsourced Activities or fulfil its obligations under this Contract, the Operator shall be entitled to be paid the Fixed Charge, Variable Charge and Incentive Payment irrespective of the level of Service performance actually achieved.

21. REQUISITION OF THE OUTSOURCED ACTIVITIES BY THE OWNER OR BY THE PUBLIC AUTHORITIES

In case of requisition of the Outsourced Activities or the Facilities by any public authority (other than the Owner), [the Owner] shall substitute itself for the Operator and take charge of all the expenditure related to the execution of the Outsourced Activities. This shall be treated as a termination by reason of Force Majeure (in the case of a requisition by public authorities) and as a termination due to the default of the Owner (in the case of a requisition by the Owner). In the case of partial requisition of the Outsourced Activities, the Operator shall continue to operate and manage the remaining services provided that the Operator, acting reasonably, determines that this is commercially feasible and shall be compensated in relation to the portion which has been requisitioned as though the Outsourced Activities had been terminated for that portion.

22. INSURANCE

22.1. Insurance for the Facilities

The Owner shall insure the Facilities with the Operator and the Operator's contractors and subcontractors as co-insureds, against all loss or damage from the Effective date until the Expiry Date. This insurance shall cover loss or damage from any cause in so far as such insurance is readily obtainable. Such insurance shall be for a limit of not less than the full replacement cost of the Facilities (including a profit element) and shall also cover the costs of demolition and removal of debris.

[Business All Risks Insurance may be considered in this case.]

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22.2. Insurance for the Operator's Equipment

The Operator shall insure major items of Operator's equipment against loss or damage. This insurance shall cover loss or damage from any cause other than the Release Events listed in Clause 19.3 (Release Events) in so far as such insurance is readily available. Such insurance shall be for a limit of not less than the full replacement value (including delivery to the Operation Zone). Each item of equipment shall be insured for the period during which it is being transported to the Operation Zone and throughout the period it is in or near the Operation Zone, until the Expiry Date.

22.3. Insurance against Injury to Persons and Damage to Property

The Owner shall insure against liability to third parties, with the Operator and the Operator's contractors and subcontractors as co-insureds, for any loss, damage, death or bodily injury which may occur to any physical property except for property insured under Clause 22.1 (Insurance for the Facilities) or to any person (except persons insured under Clause 22.4 (Insurance for Owner Employees)), which may arise out of the performance of the Contract. Such insurance shall be for a limit of not less than [amount and currency].

22.4. Insurance for Owner Employees

The Owner shall effect and maintain insurance against losses and claims arising from the death or injury to any person employed by the Owner, in such a manner that the Operator is indemnified under the policy of insurance. For the employees of a subcontractor of the Owner, such subcontractor may affect such insurance, but the Owner shall be responsible for compliance with this Clause.

22.5. Insurance for Operator Employees

The Operator shall effect and maintain insurance against losses and claims arising from the death or injury to any person employed by the Operator, in such a manner that the Owner is indemnified under the policy of insurance. For the employees of a subcontractor of the Operator, such subcontractor may affect such insurance, but the Operator shall be responsible for compliance with this Clause.

22.6. Submission of Insurance Documentation by the Operator

The Operator shall, within 14 days of the Effective Date, submit to the Owner:

- 22.6.1 evidence that the insurances described in Clauses 22.2 (Insurance for the Operator's Equipment) and 22.5 (Insurance for Operator Employees) have been effected; and

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22.6.2 copies of the policies for the insurances described in Clauses 22.2 (Insurance for the Operator's Equipment) and 22.5 (Insurance for Operator Employees).

[When each premium has been paid, the Operator shall submit copy receipts to the Joint Management Committee.]

22.7. Submission of Insurance Documentation by the Owner

The Owner shall, within 14 days of the Effective Date, submit to the Operator:

22.7.1 evidence that the insurance described in Clauses 22.1 (Insurance for the Facilities), 22.3 (Insurance against Injury to Persons and Damage to Property) and 22.4 (Insurance for Owner Employees) has been effected; and

22.7.2 copies of the policies for the insurance described in Clauses 22.1 (Insurance for the Facilities), 22.3 (Insurance against Injury to Persons and Damage to Property) and 22.4 (Insurance for Owner Employees).

When each premium has been paid, the Owner shall submit copy receipts to the Operator.

22.8. Approval of Insurance

Each Party shall affect all insurances for which it is responsible with insurers and in terms approved by the other Party. Each policy insuring against loss or damage shall provide for payments to be made in the currencies required to rectify such loss or damage. Each policy shall include vitiation cover and a waiver of subrogation rights against the Parties, their employees, contractors and subcontractors.

22.9. Compliance with Conditions of Insurance Policies

The Operator and the Owner shall comply with the conditions stipulated in each of the insurance policies. The Operator and the Owner shall make no material alteration to the terms of their insurance policies without the prior approval of the other Party (such approval not to be unreasonably withheld or delayed). If an insurer makes (or purports to make) any such alteration, each Party shall notify the other Party immediately upon becoming aware thereof.

22.10. Operator's Failure to Maintain

If the Operator fails to effect and keep in force any of the insurances required under this Contract, or fails to provide satisfactory evidence, policies and receipts in accordance with this Clause, the Owner may, without prejudice to

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any other right or remedy, effect insurance for the coverage relevant to such default, and pay the premiums due. Such payments, to the extent they are commercial and reasonable, shall be recoverable from the Operator by the Owner, and may be deducted by the Owner from any monies due, or to become due, to the Operator.

22.11. Owner's Failure to Maintain

If the Owner fails to effect and keep in force any of the insurances required under this Contract, or fails to provide satisfactory evidence, policies and receipts in accordance with this Clause, the Operator may, without prejudice to any other right or remedy, effect insurance for the coverage relevant to such default, and pay the premiums due. Such payments shall be recoverable from the Owner by the Operator, and may be deducted by the Operator from any monies due, or to become due, to the Owner.

22.12. General

Nothing in this Clause shall limit the obligations, liabilities or responsibilities of the Operator or the Owner, under the other terms of this Contract or otherwise. Any amounts not insured or not recovered from the insurers shall be borne by the Operator and/or the Owner in accordance with their other obligations under this Contract.

22.13. Notification

Each Party shall promptly notify the other Party of any claim under any of the insurance policies referred to in this Clause 22, accompanied by full details of the incident or circumstances giving rise to such claim. Each Party shall afford to the other Party all such assistance as may reasonably be required for the preparation and negotiation of insurance claims, save where such claim is against the Party required to give assistance.

23. FORCE MAJEURE

23.1. Definition of Force Majeure

"**Force Majeure**" means an event which is beyond the reasonable control of the Owner and the Operator, and which prevents a Party from complying with its obligations under this Contract, including (but not limited to):

- 23.1.1 acts of God (including, but not limited to, natural disaster, fire, thunder, lightning, explosion, earthquake, storm, typhoon, tornado, drought, tidal wave and flood);

Comment [VHD48]: Parties need to think what is appropriate in this instance

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- 23.1.2 war, hostilities (whether war be declared or not), invasion, act of foreign enemy, mobilisation, requisition, or embargo;
- 23.1.3 rebellion, revolution, insurrection, or military or usurped power, or civil war or terrorist attack or sabotage;
- 23.1.4 contamination by radioactivity from any nuclear fuel, or from any nuclear waste from the combustion of nuclear fuel, radioactive toxic explosive, or other hazardous properties of any explosive nuclear assembly or nuclear component of such assembly;
- 23.1.5 toxic or dangerous pollution;
- 23.1.6 riot, commotion, strikes, go-slows, lock-outs or disorder, unless solely restricted to employees of the Operator (excluding any Owner Employees), engaged in operating and Maintaining the Facilities; or
- 23.1.7 pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds.

23.2. Effect of Force Majeure Event

Neither the Owner nor the Operator shall be considered in default or breach of this Contract to the extent that the performance of their obligations is prevented by a Force Majeure event which arises after the Effective Date, provided, however that Force Majeure shall not excuse either Party's failure to pay, make available monies or discharge any financial obligations, debts or liabilities under this Contract and any guarantees or payment instruments considered under this Contract.

23.3. Operator's Responsibility

Upon the occurrence of any event considered by the Operator to constitute Force Majeure and which may affect performance of its obligations, the Operator shall promptly notify the Owner, and shall endeavour to continue to perform its obligations and to mitigate the losses and damage arising from a Force Majeure event as far as reasonably practicable. The Operator shall also notify the Owner of any proposals to overcome the constraints caused by an event, including any reasonable alternative means for performance, but shall not effect such proposals without the consent of the Owner.

23.4. Owner's Responsibility

Upon occurrence of an event considered by the Owner to constitute Force Majeure and which may affect performance of its obligations, it shall promptly

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notify the Operator, and shall endeavour to continue to perform its obligations as far as reasonably practicable.

23.5. Payment to the Operator

If in consequence of Force Majeure the Facilities suffer loss or damage, the Operator shall be indemnified by the Owner for the loss or damage suffered, the cost of work executed and the increased cost of operation. If the Operator incurs additional cost in complying with Clause 18.3 (Operator's Responsibility), the Operator shall be entitled to recover such cost from the Owner. If the Operator incurs additional cost in providing the Outsourced Activities as a result of Force Majeure, then the Operator shall be entitled to an adjustment in the Charges in accordance with Clause 7.4 (Adjustment of Remuneration).

23.6. Optional Termination

Irrespective of any extension of the term of this Contract, if a Force Majeure event occurs and its effect continues for a period of [182] days, either the Owner or the Operator may give to the other a notice of termination, which shall take effect 28 days after the giving of the notice. If, at the end of the 28-day notice period the effect of the Force Majeure continues, the Contract shall terminate.

23.7. Payment

After termination under this Clause, the Operator shall comply with Clause 17.4 (Successor to the Operator) and the Owner shall pay the Operator all reasonable costs for loss or damage suffered and those sums calculated in accordance with Schedule F (Payment on Termination) (including the cost of compliance with Clause 17.5 (Hand Back Procedures)).

23.8. Release from Performance under the Law

If under the law of the Contract the Owner and the Operator are released from further performance under this Contract, the sum payable by the Owner to the Operator shall be the same as would have been payable under Clause 18.7 (Payment) if the Contract had been terminated under that Clause.

23.9. Hand Back Procedure

If the Contract is terminated under Clause 23.6 (Optional Termination), the Operator and the Owner shall comply with the Hand Back Procedures upon termination.

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24. DISPUTES AND CLAIMS

24.1. Procedure for Claims

The Operator shall advise the Owner of any additional payment or cost which it intends to claim under this Contract or otherwise, as soon as possible, and in any event within 28 days of the start of the event or circumstances giving rise to the claim.

24.2. Records

The Operator shall keep such contemporary records as may be necessary to substantiate any claim either in the Operation Zone or at another location acceptable to the Owner. Without admitting the Owner's liability, the Owner shall, on receipt of such notice, inspect such records and may instruct the Operator to keep further contemporary records. The Operator shall permit the Owner to inspect all such records, and shall (if instructed) submit copies to the Owner provided that such inspection is made during business hours and with reasonable prior notice.

24.3. Accounts

24.3.1 Within 28 days of such notice, or such other time as may be agreed by the Owner, the Operator shall send to the Owner an account, giving detailed particulars of the amount and basis of the claim. Where the event giving rise to the claim has a continuing effect, such account shall be considered as interim. The Operator shall then, at such intervals as the Owner may reasonably require, send further interim accounts giving the accumulated amount of the claim and any further particulars. Where interim accounts are sent to the Owner, the Operator shall send a final account within 28 days of the end of the effects resulting from the event.

24.3.2 The Owner shall pay any amounts and confirm any extension of time or other remedy which it agrees to be due to the Operator, all in accordance with the terms set out in Clause 11.3 (Payment).

24.4. Negotiations

The Parties will attempt in good faith to resolve any dispute, difference, conflict or claim arising out of or in relation to this Contract or the performance of the Outsourced Activities (a "**Dispute**") through negotiations between a senior authorised representative of each of the Parties with authority to settle the relevant Dispute. If the Dispute has not been settled through negotiation within 14 days from the date on which either Party has served written notice on the other of the Dispute (the "**Notice**") then the remaining provisions of this Clause 24 shall apply.

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24.5. Conciliation

If a Dispute arises between the Owner and the Operator, including any Dispute as to any opinion, instruction, determination, certification or valuation of the Owner, the Dispute shall initially be referred in writing to conciliation in accordance with the (LCIA) rules of conciliation. The Parties shall endeavour to agree the identity of the conciliator. If the Parties fail to appoint a conciliator within 28 days of the Notice, then the conciliator shall be appointed by the President of the (LCIA). The conciliator shall make his recommendation in writing and give notice of the same within one month of the referral.

Where either:

24.5.1 one of the Parties is dissatisfied with any recommendation of a conciliator appointed under this Clause 24.5; or

24.5.2 the conciliator fails to give such recommendation by the date arising one (1) month after the date of referral;

then either Party may within one month after receiving notice of the conciliator's recommendation or within one month after the expiry of the one month period referred to in paragraph (b) above (as the case may be) refer the dispute to arbitration in accordance with Clause 24.6 (Arbitration).]

24.6. Arbitration

In the event of a Dispute arising out of or in connection with this Contract, then a Party may by notice in writing (the "Arbitration Notice") to the other Parties refer such Dispute for final resolution by binding arbitration in accordance with the [UNCITRAL Rules of Arbitration]/[London Court of International Arbitration (LCIA) Rules]. The arbitration would be subject to the following conditions: -

24.6.1 all proceedings in any such arbitration shall be conducted in English. The proceedings shall be held in [location];

24.6.2 the Operator/ the Service Provider shall appoint one arbitrator and the Owner shall appoint one arbitrator within 15 days from the receipt of the Arbitration Notice in writing. The two arbitrators so appointed shall appoint a third arbitrator who shall serve as the presiding arbitrator. No person shall be appointed as an arbitrator unless that person has held office as a judge of an appellate level court for a period of not less than 5 years;

24.6.3 the arbitrators shall have the power to award interest on any sums awarded as due and payable up to the date of payment of such sums. In

Comment [VHD49]: Parties will need to agree whether to be international or domestic arbitration – also does the relevant country recognize international arbitral awards – ie signatory to the New York Convention etc

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the event any such award has to be enforced by the courts of [country], the courts of [country] would have the power to grant interest on any sums awarded as due and payable up to the date of payment of such sums.

24.6.4 [notwithstanding the arbitrators power to grant interim reliefs the parties shall have the power to seek appropriate interim relief's from the courts of [country];]

24.6.5 the arbitration award shall be final and binding on all of the Parties, and the Parties agree to be bound thereby and to act accordingly;

24.6.6 the arbitrators may award to a Party that substantially prevails on the merits, its costs and reasonable expenses (including reasonable fees of its counsel);

24.6.7 judgement upon the award rendered may be entered in any court having jurisdiction, or application may be made to such court for a judicial recognition of the award or an order of enforcement thereof, as the case may be and to the extent permissible by law the Parties unconditionally waive their rights to challenge the award rendered by the arbitrators;

24.6.8 the arbitrators shall render its award no later than eight months after the Arbitration Notice, unless otherwise agreed by the Parties; and

24.6.9 the Parties agree that the provisions of Part 1 of [relevant legislation] shall apply to such arbitrations.

24.7. Performance to Continue During Dispute

Performance of this Contract shall continue during arbitration proceedings or any other dispute resolution mechanism pursuant to this Clause 24. No payment due or payable by the Owner or the Operator shall be withheld on account of a pending reference to arbitration or other dispute resolution mechanism except to the extent that such amount of the payment is the subject of such Dispute. All undisputed amounts must continue to be paid in the manner specified.

25. CONFIDENTIALITY

25.1. Confidential Information

Subject to Clause 25.2 (Exceptions), the Parties shall keep confidential all matters relating to the Outsourced Activities, the Facilities and this Contract and shall not make any disclosure, and shall use reasonable endeavours to ensure that their employees, contractors, subcontractors, and agents do not make any

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disclosure, to any person of any information, data, experience and know-how, documents, secrets, dealings, transactions or affairs of or relating to the Parties, the Outsourced Activities, the Facilities or this Contract (the "**Confidential Information**").

25.2. Exceptions

The confidentiality obligation shall not apply to the following:

- 25.2.1 any matter which the Operator or the Owner can demonstrate is already generally available and in the public domain other than through unauthorised disclosure by the Operator;
- 25.2.2 any disclosure which may reasonably be required for the performance of the Operator's obligations under this Contract or the compliance by the Operator with any statutory obligations or for the purposes of legal proceedings;
- 25.2.3 any information which was already in the Operator's possession before it was communicated by the Owner;
- 25.2.4 any disclosure or use required by any law, regulatory body, governmental body, enforcement agency or the rules and regulations of any stock exchange;
- 25.2.5 any disclosure by the Operator to its Affiliates;
- 25.2.6 any disclosure for the purposes of obtaining financial accommodation, including disclosure to prospective shareholders of the Operator;
- 25.2.7 any disclosure wherein the Parties have given their prior written approval to its disclosure or use;
- 25.2.8 any disclosure pursuant to any law, judgement, order, decree, ruling directive by any governmental authority, court, tribunal or arbitral body.

25.3. Announcements

The Parties warrant to and undertake with each other that they shall not, and shall procure that their employees, agents and contractors shall not, issue or make any public announcement or statement regarding the Outsourced Activities, the signature, performance or termination of this Contract or the Operator's employment thereunder unless, prior thereto, the other Party has been furnished with a copy thereof and has approved the same in writing.

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25.4. Survival of Confidentiality Obligations

The provisions and obligations set out in this Clause shall survive and remain in force for three years upon and following the termination of obligations pertaining to this Contract.

26. INTELLECTUAL PROPERTY

26.1. Licence of Intellectual Property

26.1.1 The Operator shall make available to and hereby licenses the Owner to use, free of charge, all Intellectual Property owned by the Operator (or to the extent they are legally able to do so, licensed to the Operator by third parties) which is required in connection with the performance of the Operator's obligations under this Contract (the "**Operator Intellectual Property**"). This licence shall be for the purposes of providing the Outsourced Activities, but for no other purpose. Such licence shall [terminate [] years] after the termination of this Contract (for whatever reason) but shall otherwise be irrevocable, royalty free, non-exclusive and non-transferable and shall not carry the right to grant sub-licences.

Comment [VHD50]: May be appropriate to grant an unlimited license to the grantor to use the IP for the purposes of operating the facilities

26.1.2 The Owner shall, to the extent it is legally able to do so, grant the Operator during the term of this Contract a royalty-free, non-exclusive, irrevocable, personal and non-transferable licence to use Intellectual Property which is owned by the Owner or licensed to the Owner by third parties (the "**Owner Intellectual Property**") only to the extent necessary to enable the Operator to perform its obligations under this Contract. Such licences shall not carry the right to grant sub-licences.

26.1.3 The Operator shall indemnify the Owner in full in respect of all loss, damage and expense of whatever kind and nature arising out of the use by the Owner of the Operator Intellectual Property in accordance with its terms and during the term of the Owner's licence over the Operator's Intellectual Property which infringes the rights of any third party.

26.1.4 The Owner shall indemnify the Operator in full in respect of all loss, damage and expense of whatever kind and nature arising out of the use by the Operator of any Owner Intellectual Property in accordance with its terms which infringes the rights of any third party.

26.2. Third Party Intellectual Property

The Operator shall use reasonable efforts:

26.2.1 to ensure that Intellectual Property owned or developed by third parties and utilised by the Operator in connection with the performance of its

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obligations under this Contract is licensed to the Operator on reasonable terms for the purposes of the operation and maintenance or repair of the Facilities and otherwise for the purposes of this Contract but for no other purpose; and

26.2.2 to ensure that no Intellectual Property of a third party is otherwise used in the performance of the Operator's obligations under this Contract without the prior written approval of the Owner.

27. WARRANTIES

27.1. Owner

The Owner represents, warrants and undertakes to the Operator that, as at the date of this Contract and the Effective Date:

- 27.1.1 it is a company organised and existing under the laws of [];
- 27.1.2 it has full power and authority to enter into this Contract;
- 27.1.3 it has full power, right and authority under Applicable Laws to contractually allow/permit the Operator to provide the Outsourced Activities, use the Facilities and to collect the charges which the Operator is required to collect on behalf of the Owner pursuant to the terms of the Contract;
- 27.1.4 it has obtained all necessary approvals, consents, permits, authorisations that it should obtain to ensure that the Operator can fully discharge its obligations under this Contract and is not in violation of any Applicable Laws;
- 27.1.5 that there is no Material Adverse Effect. Material Adverse Effect means any:
 - (a) event, occurrence, fact, condition, change, development or effect that is or may be materially adverse on the provision of the Outsourced Activities or the use of the Facilities;
 - (b) material impairment of the ability of the Owner or to perform their respective obligations under this Contract;
- 27.1.6 it has riparian or other legal rights to draw water from the [] river for both industrial and domestic usage as necessary to perform the Outsourced Activities in accordance with this Contract;

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- 27.1.7 it has authority under Applicable Laws to carry out the Outsourced Activities and has not been in breach of any Applicable Laws in relation to the rendering of the Outsourced Activities;
- 27.1.8 it has the right and authority to transfer the Owner Employees to the Operator as contemplated under the Contract and all approvals and consents required for this purpose as per Applicable Laws and the respective terms of employment of the Owner Employees have been procured and are in full force and effect as at the Effective Date;
- 27.1.9 it has the full authority, power and right under the Applicable Laws to permit/allow the Operator to collect the charges in accordance with the Contract [at the rates specified in Schedule []];
- 27.1.10 it has full title and ownership of the Facilities and the necessary power to grant rights to the Operator in connection with the Facilities as required in this Contract;
- 27.1.11 it has taken all necessary action for the authorisation of its entry into this Contract and the performance of its obligations under this Contract;
- 27.1.12 it has complied with all applicable procurement rules and restrictions;
- 27.1.13 this Contract is enforceable in accordance with its terms under the Applicable Law without any requirement for further action to be taken by any party;
- 27.1.14 it has the ability to contract out the operation and maintenance of the Facilities at no charge to the Operator; and
- 27.1.15 there are no outstanding loan or finance arrangements which give any third party any rights over the Facilities upon occurrence of events of default under such agreements.

27.2. Operator

The Operator represents, warrants and undertakes to the Owner as at the date of this Contract that:

- 27.2.1 it is a corporation duly established under the laws of India and/or its own country;
- 27.2.2 it has full power and authority to enter into this Contract; and
- 27.2.3 it has taken all necessary action for the authorisation of its entry into this Contract and the performance of its obligations under this Contract.

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The Operator further confirms that the representations, warranties and undertakings made herein are true and shall be deemed to be repeated on the Effective Date.

28. GENERAL

28.1. Assignment

The Owner and the Operator shall not assign or otherwise transfer all or any of their rights or obligations under this Contract without the prior written consent of the other Party, provided that the Operator may (without the consent of the Owner):

- (a) delegate and/or sub-contract all or any of its rights or obligations under this Contract but without relieving the Operator of its obligations under this Contract; or
- (b) assign or transfer all or any of its rights and obligations under this Contract in favour of an Affiliate of the Operator; or
- (c) assign, transfer or create security over all or any benefit of this Contract for the purpose of obtaining financing.

28.2. No Partnership

This Contract shall not constitute, give rise to or evidence any partnership or joint venture between the Parties and the Owner shall not hold itself out as being an agent or partner of or co-venturer with the Operator.

28.3. Waiver

None of the terms, provisions or conditions of this Contract shall be considered waived by any Party to this Contract unless a waiver is given in writing by that Party or its duly authorised representative. No waiver under this Clause above shall be a waiver of any past or future default or breach nor shall it create any amendment or addition to or deletion from any of the terms, provisions or conditions of this Contract unless (and then only to the extent) expressly stipulated in the waiver.

28.4. Whole Agreement

This Contract and the relevant documents referred to in it contain the whole agreement between the Parties relating to the subject matter of this Contract and supersede all previous agreements between the parties relating to that subject matter. In entering into this Contract no Party may rely on any representation, warranty, collateral contract or other assurance (except those set out in this

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Contract and the documents referred to in it) made by or on behalf of any other Party before the signature of this Contract and each of the Parties waives all rights and remedies which, but for this paragraph, might otherwise be available to him in respect of any such representation, warranty, collateral contract or other assurance; provided that nothing in this paragraph shall limit or exclude any liability for fraud.

28.5. Amendment

No modification, amendment, or change of this Contract will be binding on any Party unless consented to in writing by both Parties.

28.6. Further Steps

Each Party agrees, upon the request of the other, to execute any documents and take any further steps as may be reasonably necessary in order to implement and give full effect to this Contract.

28.7. Severability

The invalidity, illegality or unenforceability in whole or in part of any of the provisions of this Contract shall not affect the validity, legality and enforceability of the remaining part or provisions of this Contract.

28.8. Counterparts

This Contract may be executed in any number of counterparts and by different Parties hereto on the same or separate counterparts, each of which shall be deemed to be an original instrument.

28.9. Notices

28.9.1 All notices or other communications under this Contract to any Party to this Contract shall be deemed to be duly given or made when given in writing and:

- (a) when delivered in the case of personal delivery or post; or
- (b) when despatched in the case of telex (provided the relevant answer back is received); or
- (c) when received in the case of facsimile,

in each case to such Party addressed to it at the address given below or at such address as such Party may after the date of this Contract specify in writing for such purpose to the other Parties to this Contract by notice in writing.

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Owner: []

For the attention of: []

Fax Number: []

Operator: []

For the attention of: []

Fax Number: []

28.9.2 A written notice includes a notice by facsimile provided that a copy by way of confirmation is also delivered by personal delivery or post.

28.9.3 For the avoidance of doubt, communication by electronic mail shall not, unless otherwise agreed in writing by the Parties, be an acceptable method for the communication of notices.

28.9.4 A notice or other communication received on a non-working day or after business hours in the place of receipt shall be deemed to be served on the next following working day in such place.

IN WITNESS WHEREOF the Parties have executed this Contract on the date which appears on page 1.

SIGNED by)
for and on behalf of)
Operator)
in the presence of)

SIGNED by)
for and on behalf of)
Owner)
in the presence of)

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SCHEDULE A

Part 1

Potable Water Specification

Part 2

Raw Water Specification

Part 4

Raw Sewage Quantity Specification

Part 5

Raw Sewage Quality Specification

SCHEDULE B

The System

Part 1: Raw Water System

Part 2: Sewerage System

Part 3: Potable Water System

Part 4: Sludge Delivery Points

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SAMPLE

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SCHEDULE C

Escalation Formulae for Capital Expenditure

SCHEDULE D

[Payment on Termination]

1. EARLY TERMINATION

- (a) In the event of early termination of the Contract for Owner default, the Owner shall pay to the Operator amounts due to the Operator under the Contract up to the date of termination plus a pro rata amount for any work partially completed plus an amount equal to $A + B + C$ (as set out below).
- (b) In the event of early termination of the Contract for Operator default, the Owner shall pay to the Operator all amounts due to the Operator under the Contract up to the date of termination plus a pro rata amount for any work partially completed plus an amount equal to $A + B$ (as set out below).
- (c) In the event of early termination of the Contract for extended Force Majeure, [requisition] of the Outsourced Activities [or a change in Applicable Laws which prevents the Operator from continuing performance of the Contract], the Owner shall pay to the Operator all amounts due to the Operator under the Agreement up to the date of termination plus a pro rata amount for any work partially completed plus an amount equal to $A + B$ (as set out below), as well as item C to the extent it relates to [].

A = the non-amortised part of the investments financed by the Operator at the date of termination and any financial charges linked to capital, interests and any commission and penalties which are due to the lenders at the date of the termination.

B = break costs in relation to contractors, subcontractors, suppliers, financiers and consultants plus any costs of repatriation of staff and equipment of the Operator.

C = compensation for loss of anticipated future profits or (in the event that the project consistently operates at a loss from the Effective Date) the payment of the cumulative amount of such losses from the Effective Date.

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2. GENERAL CONDITIONS OF AGREEMENT TERMINATION (EXPIRATION OR EARLY TERMINATION)

- (a) In all cases, at the Expiry Date:
- (i) the personnel of the Operator engaged in providing the Outsourced Activities shall be transferred to the Owner (or the Successor Operator). If the transfer of such personnel is impossible, the Owner shall indemnify the Operator for any loss of revenue, cost, penalty, claim, damage, injury, charge, fine, levy or liability arising out of or in connection with such impossibility and the laying off and redundancy of the personnel;
 - (ii) the Owner (or the Successor Operator) shall purchase from the Operator at a reasonable price all the stocks of consumables, supplies and spares existing for the execution of the Outsourced Activities; and
 - (iii) the Owner (or the Successor Operator) shall take novation of (and replace the Operator as a party to) any ongoing contracts concerning the Outsourced Activities (or pay the expenses of their early termination).
- (b) The Operator shall transfer to the Owner the System subject to normal wear and tear.

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SCHEDULE E

Hand Back Procedures

1. [All movable assets owned by the Operator and associated with the provision of the Outsourced Activities shall be transferred to the Owner, to the extent practicable, within 28 days of termination, against payment by the Owner [of the reasonable market value of those assets].]
2. [All ongoing contracts shall, to the extent feasible, be novated or (to the extent they cannot be novated) assigned to the Owner as soon as reasonably practicable after termination. The Owner shall indemnify the Operator for any loss of revenue, cost, penalty, claim, damage, injury, charge, fine, levy or liability arising from or in connection with such novation or assignment.]

SCHEDULE F

Agreed Capital Investment Programme

SCHEDULE G

The Facilities

[]

SCHEDULE H

Performance Indicators

SCHEDULE I

Certificates

SCHEDULE J

Charges and Escalation

PART 1: FIXED CHARGE

[Insert table showing payment of Fixed Charge over 15 years]

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It is proposed that the indexation formula should be as follows:

[]

PART 2: VARIABLE CHARGE

[Insert table showing payment of Variable Charge against Base Charge Data]

$$\text{Variable Charge, } F_v = (V_r \times Q_r) + (V_t \times Q_t)$$

Where:

V_r = Variable rate charge for raw water delivered to Raw Water Customers

V_t = Variable rate charge for treated water produced at the water treatment plant

Q_r = Quantity of delivered to Raw Water Customers

Q_t = Quantity of treated water produced at the water treatment plant

In Year 1 the values of V_r , V_t & V_f shall be as follows:

$$\text{Fixed Charge, } F_f = [\text{amount and currency}]$$

$$\text{Variable Rate for Raw water, } V_r = [\text{amount and currency}]/\text{m}^3$$

$$\text{Variable Rate for Treated water, } V_t = [\text{amount and currency}]/\text{m}^3$$

Variable Charges : V_r and V_t

It is proposed that the Owner charge the Operator three rates for supplying electricity. The rate depends on the type and location of the supply. The rates will include all taxes and surcharges relating to electricity supply and distribution. The rates will be agreed at the start of the project and are categorised as follows:

[]

Current values used for these rates in the Operator's simulations are:

[amount and currency]/kwHr

$$P_A + P_B + P_C = 1$$

$$V_{r_0} = \text{Variable Rate for raw water at the Effective Date}$$

$$V_{r_1} = \text{Variable Rate for raw water for the quarter under consideration}$$

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- V_{t_0} = Variable Rate for treated water at the Effective Date
- V_{t_i} = Variable Rate for treated water for the quarter under consideration
- EC_0 = Contract rate for electricity at the Effective Date
- EC_i = Contract rate for electricity for the quarter under consideration

The values of PA, PB and PC at the Effective Date are:

[PA = X, PB = Y, PC = Z]

PART 3: INCENTIVE PAYMENT

SCHEDULE K

Potable Water Customers to Receive a 24 Hours per Day Supply

SCHEDULE L

Electricity Supply Prices

SCHEDULE M

Boundary of the Service Area

SCHEDULE N

Maintenance Programme

SCHEDULE O

Operator Consents

SCHEDULE P

Raw and Clarified Water Customers

Part 1

Raw Water Customers

SCHEDULE Q

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Base Charge Data

SCHEDULE R

Deficit Projection

SAMPLE