

DRAFT
POWER SUPPLY AGREEMENT UNDER
PILOT SCHEME - II

Name of Procurer, Name of Authorised Person, Address of the
Procurer, Contact Number, Fax, Email etc

25.02.2019

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Instructions for customisation of this document by the Nodal Agency/ Aggregator

The Power Supply Agreement under Pilot scheme-II (PSAP-II) to be customised in accordance with the instructions below:

- a) All specific provisions in the PSAP-II have been enclosed in square parenthesis.
- b) At the time of signing of PSAP-II suitable modifications to be carried out, as necessary, to be removed from Draft PSAP-II. The square parenthesis should be removed after carrying out the required modification. The text in the curly parenthesis within square parenthesis to be retained omitting curly parenthesis wherever applicable.
- c) The asterisks in the Draft PSAP-II should be substituted by specific particulars at the time of signing of PSAP-II.

Part I

Preliminary

POWER SUPPLY AGREEMENT UNDER PILOT SCHEME -II

THIS AGREEMENT is entered into on this the day of....., 20.....

BETWEEN

- 1 The *** Distribution Company having its principal offices at ***** (hereinafter referred to as the “**Utility**” which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns) of One Part;

AND

- 2 [.....]a company incorporated under the provisions of the Companies Act, 1956/2013 and having its registered office at [.....], (hereinafter referred to as the “**Aggregator**” which expression shall, unless repugnant to the context or meaning thereof, include its successors and permitted assigns and substitutes) of the Other Part.

WHEREAS:

- (A) The Utility had resolved to procure electricity from a power generating station through Aggregator that would dedicate a contracted capacity of *** MW for production of electricity and supply thereof to the Utility on finance, own and operate (the “**FOO**”) basis in accordance with the terms and conditions to be set forth in an agreement for procurement of power to be entered into under and in accordance with the provisions of the Electricity Act, 2003.
- (B) PFC Consulting Limited, as Nodal Agency appointed by Ministry of Power, Government of India had invited proposals in accordance with the Guidelines issued by the Central Government under Section 63 of the Act vide Notification No. *** dated *** by its **Bidding Document under Pilot Scheme –II** for selecting the Bidders who offer to supply electricity from power generating station, and had declared certain Bidders including, *inter alia*, the Successful bidder.
- (C) The Nodal agency had prescribed the technical and commercial terms and conditions, and invited bids in accordance with the Guidelines issued by the Central Government under Section 63 of the Act vide Notification No. *** dated *** (the “**Bidding Document under Pilot Scheme –II**”) from the Bidders shortlisted pursuant to the Bidding Document for undertaking the Supply of Electricity.
- (D) After evaluation of the Bids received, the Nodal Agency had accepted the Bid of *** as the Successful bidder and issued the Letter of Award No. dated (hereinafter called the “**LOA**”) to the Successful bidder requiring, *inter alia*, the execution of the Agreement for Procurement of Power under Pilot Scheme -II within 30 (thirty) days of the date of issue thereof.

- (E) The Aggregator has signed Agreement for Procurement of Power under Pilot scheme-II (“**APPP-II**”) with *** (“**Supplier**”) for procurement of *** MW thermal power under the Pilot Scheme @ Rs. ***/ kWh. Copy of the APPP-II shall be submitted to the Utility within seven days of execution of this Agreement and shall become integral part of this Agreement.

The Parties have agreed to enter into this Power Supply Agreement under Pilot scheme-II on the terms and conditions set forth hereinafter.

NOW, THEREFORE, in consideration of the foregoing and the respective covenants and agreements set forth in this Power Supply Agreement under Pilot scheme-II, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound hereby, the Parties agree as follows:

ARTICLE 1
DEFINITIONS AND INTERPRETATION

1.1 Definitions

The words and expressions beginning with capital letters and defined in this Agreement (including those in Article 23) shall, unless the context otherwise requires, have the meaning ascribed thereto herein, and the words and expressions defined in the Schedules and used therein shall have the meaning ascribed thereto in the Schedules.

1.2 Interpretation

1.2.1 In this Agreement, unless the context otherwise requires,

- (a) references to any legislation or any provision thereof shall include amendment or re-enactment or consolidation of such legislation or any provision thereof so far as such amendment or re-enactment or consolidation applies or is capable of applying to any transaction entered into hereunder;
- (b) references to laws of the State, laws of India or Indian law or regulation having the force of law shall include the laws, acts, ordinances, rules, regulations, bye laws or notifications which have the force of law in the territory of India and as from time to time may be amended, modified, supplemented, extended or re-enacted;
- (c) references to a “**person**” and words denoting a natural person shall be construed as a reference to any individual, firm, company, corporation, society, trust, government, state or agency of a state or any association or partnership (whether or not having separate legal personality) of two or more of the above and shall include successors and assigns;
- (d) the table of contents, headings or sub-headings in this Agreement are for convenience of reference only and shall not be used in, and shall not affect, the construction or interpretation of this Agreement;
- (e) the words “**include**” and “**including**” are to be construed without limitation and shall be deemed to be followed by “**without limitation**” or “**but not limited to**” whether or not they are followed by such phrases;
- (f) references to “**construction**” or “**building**” include, unless the context otherwise requires, investigation, design, engineering, procurement, delivery, transportation, installation, processing, fabrication, testing, commissioning and other activities incidental to the construction, and “**construct**” or “**build**” shall be construed accordingly;
- (g) references to “**development**” include, unless the context otherwise requires, construction, renovation, refurbishing, augmentation, upgradation and other activities incidental thereto, and “**develop**” shall be construed accordingly;

- (h) any reference to any period of time shall mean a reference to that according to Indian Standard Time;
- (i) any reference to “hour” shall mean a period of 60 (sixty) minutes commencing either on the hour or on the half hour of the clock, which by way of illustration means 5.00 (five), 6.00 (six), 7.00 (seven) and so on being hours on the hour of the clock and 5.30 (five thirty), 6.30 (six thirty), 7.30 (seven thirty) and so on being hours on the half hour of the clock;
- (j) any reference to day shall mean a reference to a calendar day;
- (k) reference to a “**business day**” shall be construed as reference to a day (other than a Sunday) on which banks in the State where the Power Station is situate are generally open for business;
- (l) any reference to month shall mean a reference to a calendar month as per the Gregorian calendar;
- (m) references to any date, period or Supply of Electricity Milestone shall mean and include such date, period or Supply of Electricity Milestone as may be extended pursuant to this Agreement;
- (n) any reference to any period commencing “**from**” a specified day or date and “**till**” or “**until**” a specified day or date shall include both such days or dates; provided that if the last day of any period computed under this Agreement is not a business day, then the period shall run until the end of the next business day;
- (o) the words importing singular shall include plural and vice versa;
- (p) references to any gender shall include the other and the neutral gender;
- (q) “**kWh**” shall mean kilowatt hour and “**kCal**” shall mean kilo calories;
- (r) “**lakh**” shall mean a hundred thousand (100,000) and “**crore**” shall mean ten million (10,000,000);
- (s) “**indebtedness**” shall be construed so as to include any obligation (whether incurred as principal or surety) for the payment or repayment of money, whether present or future, actual or contingent;
- (t) references to the “**winding-up**”, “**dissolution**”, “**insolvency**”, or “**reorganisation**” of a company or corporation shall be construed so as to include any equivalent or analogous proceedings under the law of the jurisdiction in which such company or corporation is incorporated or any jurisdiction in which such company or corporation carries on business including the seeking of liquidation, winding-up, reorganisation, dissolution, arrangement, protection or relief of debtors;
- (u) save and except as otherwise provided in this Agreement, any reference, at any time, to any agreement, deed, instrument, licence or document of any

description shall be construed as reference to that agreement, deed, instrument, licence or other document as amended, varied, supplemented, modified or suspended at the time of such reference; provided that this Sub-clause (u) shall not operate so as to increase liabilities or obligations of the Utility hereunder or pursuant hereto in any manner whatsoever;

- (v) any agreement, consent, approval, authorisation, notice, communication, information or report required under or pursuant to this Agreement from or by any Party shall be valid and effective only if it is in writing under the hand of a duly authorised representative of such Party, in this behalf and not otherwise;
- (w) the Schedules and Recitals to this Agreement form an integral part of this Agreement and will be in full force and effect as though they were expressly set out in the body of this Agreement;
- (x) references to Recitals, Articles, Clauses, Sub-clauses, Provisos or Schedules in this Agreement shall, except where the context otherwise requires, mean references to Recitals, Articles, Clauses, Sub-clauses, Provisos and Schedules of or to this Agreement; reference to an Annex shall, subject to anything to the contrary specified therein, be construed as a reference to an Annex to the Schedule in which such reference occurs; and reference to a Paragraph shall, subject to anything to the contrary specified therein, be construed as a reference to a Paragraph of the Schedule or Annex, as the case may be, in which such reference appears;
- (y) the damages payable by either Party to the other of them, as set forth in this Agreement, whether on per diem basis or otherwise, are mutually agreed genuine pre-estimated loss and damage likely to be suffered and incurred by the Party entitled to receive the same and are not by way of penalty (the “**Damages**”);
- (z) time shall be of the essence in the performance of the Parties’ respective obligations. If any time period specified herein is extended, such extended time shall also be of the essence; and
- (za) capitalised terms used in the Agreement, but not defined herein, shall have the meaning ascribed to such terms in the Electricity Act, 2003.

1.2.2 Unless expressly provided otherwise in this Agreement, any Documentation required to be provided or furnished by the Aggregator to the Utility shall be provided free of cost and in three copies, and if the Utility is required to return any such Documentation with its comments and/or approval, they shall be entitled to retain two copies thereof.

1.2.3 The rule of construction, if any, that a contract should be interpreted against the parties responsible for the drafting and preparation thereof, shall not apply.

1.2.4 Any word or expression used in this Agreement shall, unless otherwise defined or construed in this Agreement, bear its ordinary English meaning and, for these purposes, the General Clauses Act, 1897 shall not apply.

1.3 Measurements and arithmetic conventions

All measurements and calculations shall be in the metric system and calculations done to 2 (two) decimal places, with the third digit of 5 (five) or above being rounded up and below 5 (five) being rounded down.

1.4 Priority of agreements, clauses and schedules

1.4.1 This Agreement, and all other agreements and documents forming part of or referred to in this Agreement are to be taken as mutually explanatory and, unless otherwise expressly provided elsewhere in this Agreement, the priority of this Agreement and other documents and agreements forming part hereof or referred to herein shall, in the event of any conflict between them, be in the following order:

- (a) this Agreement; and
- (b) all other agreements and documents forming part hereof or referred to herein,

i.e. the Agreement at (a) above shall prevail over the agreements and documents at (b) above.

1.4.2 Subject to the provisions of Clause 1.4.1, in case of ambiguities or discrepancies within this Agreement, the following shall apply:

- (a) between two or more Clauses of this Agreement, the provisions of a specific Clause relevant to the issue under consideration shall prevail over those in other Clauses;
- (b) between the Clauses of this Agreement and the Schedules, the Clauses shall prevail and between Schedules and Annexes, the Schedules shall prevail;
- (c) between any two Schedules, the Schedule relevant to the issue shall prevail;
- (d) between the written description on the drawings and the Specifications and Standards, the latter shall prevail;
- (e) between the dimension scaled from the drawing and its specific written dimension, the latter shall prevail; and
- (f) between any value written in numerals and that in words, the latter shall prevail.

Part II

The Procurement Contract

ARTICLE 2

SCOPE OF THE AGREEMENT

2.1 Scope of the Agreement

The scope of the Agreement (the “**Scope of the Agreement**”) shall mean and include, during the Contract Period:

- (a) supply of electricity to the Utility in accordance with the provisions of this Agreement; and
- (c) performance and fulfilment of all other obligations of the Aggregator and the Utility, as the case may be, in accordance with the provisions of this Agreement and matters incidental thereto or necessary for the performance of any or all of the obligations of the Aggregator under this Agreement.

ARTICLE 3
GRANT OF PROCUREMENT CONTRACT

3.1 The Procurement Contract

- 3.1.1 Subject to and in accordance with the provisions of this Agreement, Applicable Laws and the Applicable Permits, the Utility hereby awards to the Aggregator the procurement contract set forth herein for supply of electricity thereof to the Utility (the “**Procurement Contract**”) for a period of 3 (Three) years commencing from the Appointed Date, and the Aggregator hereby accepts the Procurement Contract and agrees to implement the same subject to and in accordance with the terms and conditions set forth herein.
- 3.1.2 Subject to and in accordance with the provisions of this Agreement, the Procurement Contract hereby awarded shall oblige or entitle (as the case may be) the Aggregator to:
- (a) ensure to procure Availability of the Contracted Capacity for supply of electricity thereof to the Utility under and in accordance with the provisions of this Agreement, save and except as expressly provided in the Agreement;
 - (b) to receive Tariff and Trading Margin in accordance with the provisions of this Agreement;
 - (c) perform and fulfil all of the Aggregator’s obligations under and in accordance with this Agreement;
 - (d) save as otherwise expressly provided in this Agreement, bear and pay all costs, expenses and charges in connection with or incidental to the performance of the obligations of the Aggregator under this Agreement; and
 - (e) neither assign, transfer or sub-let or create any lien or Encumbrance on this Agreement, or the Procurement Contract hereby granted or on the whole or any part of the Power Station nor sell, transfer, exchange, lease or part possession thereof, save and except as expressly permitted by this Agreement”

3.2 Substitution of the Utility

The Parties expressly agree that the Utility may, in pursuance of any re-organisation or restructuring undertaken in pursuance of Applicable Laws, or if it is unable to discharge its liabilities and obligations under this Agreement, substitute itself by another Distribution Licensee(s) and upon such substitution, all the functions, rights and obligations of the Utility under this Agreement shall be deemed to be transferred to the substituted entity in accordance with and subject to Applicable Laws. Provided, however, that prior to any substitution hereunder, the Parties shall, on a best endeavour basis, make such arrangements and enter into such further agreements as may be necessary for performance of their

respective obligations hereunder, including the rights and obligations arising out of the provisions of Article 12. Provided further that the creditworthiness of the substituted entity shall be substantially similar or greater as compared to the Utility and in the event of any shortfall therein, credit enhancement shall be provided by the substituted entity to bridge the gap.

ARTICLE 4

CONDITIONS PRECEDENT

4.1 Conditions Precedent

4.1.1 Save and except as expressly provided in Articles 4, 5, 6, 7, 8, 9, 15, 17, 21 and 23, or unless the context otherwise requires, the respective rights and obligations of the Parties under this Agreement shall be subject to the satisfaction in full of the conditions precedent specified in this Clause 4.1 (the “**Conditions Precedent**”). Provided, however, that a Party may grant waiver from satisfaction of any Condition Precedent by the other Party in accordance with the provisions of Clauses 4.1.2 or 4.1.3, as the case may be, and to the extent of such waiver, that Condition Precedent shall be deemed to be fulfilled for the purposes of this Clause 4.1.1.

4.1.2 The Aggregator may, upon providing the Performance Security to the Utility in accordance with Article 9, at any time after 15 (fifteen) days from the date of this Agreement or on an earlier day acceptable to the Utility, by notice require the Utility to satisfy any or all of the Conditions Precedent set forth in this Clause 4.1.2 within a period of 30 (thirty) days of the notice, and the Conditions Precedent required to be satisfied by the Utility shall be deemed to have been fulfilled when the Utility shall have:

- (a) issued Letter of Credit in accordance with this Agreement; and
- (b) procured approval of the Commission for payment of Tariff by the Utility to the Aggregator in accordance with the provisions of this Agreement & APPP; and

Provided that upon request in writing by the Utility, the Aggregator may, in its discretion, grant extension of time, not exceeding 180 (one hundred and eighty) days, for fulfilment of the Conditions Precedent set forth in this Clause 4.1.2.

4.1.3 The Conditions Precedent required to be satisfied by the Aggregator within a period of 90 (ninety) days from the date of this Agreement shall be deemed to have been fulfilled when the Aggregator shall have:

- (a) provided Performance Security to the Utility;
- (b) delivered to the Utility a legal opinion from the legal counsel of the Aggregator with respect to the authority of the Aggregator to enter into this Agreement and the enforceability of the provisions thereof;
- (c) deposited a certified true copy of this Agreement with the RLDC and SLDC having jurisdiction and obtained a receipt thereof, in accordance with the provisions of Clauses 13.3.3 and 17.4.1;
- (d) ensured Supplier has procured access to the transmission system required for carrying electricity from the Power Station to the Utility’s Drawal Point.

Provided that upon request in writing by the Aggregator, the Utility may, in its discretion, waive any of the Conditions Precedent set forth in this Clause 4.1.3 or grant extension of time, not exceeding 90 (ninety) days, for fulfilment thereof, as the case may be. For the avoidance of doubt, the Utility may, in its sole discretion, grant any waiver hereunder, with such conditions as it may deem fit.

- 4.1.4 Each Party shall make all reasonable endeavours to satisfy the Conditions Precedent within the time stipulated and shall provide the other Party with such reasonable cooperation as may be required to assist that Party in satisfying the Conditions Precedent for which that Party is responsible.
- 4.1.5 The Parties shall notify each other in writing at least once a fortnight on the progress made in satisfying the Conditions Precedent. Each Party shall promptly inform the other Party when any Condition Precedent for which it is responsible has been satisfied.

4.2 Damages for delay by the Utility

In the event that (i) the Utility does not procure fulfilment or waiver of any or all of the Conditions Precedent set forth in Clause 4.1.2 within the period specified in respect thereof, and (ii) the delay has not occurred as a result of breach of this Agreement by the Aggregator or due to Force Majeure, the Utility shall pay to the Aggregator Damages in an amount calculated at the rate of 0.1% (zero point one per cent) of the Performance Security for each day's delay until the fulfilment of such Conditions Precedent, subject to a maximum of 20% (twenty per cent) of the Performance Security.

4.3 Damages for delay by the Aggregator

In the event that (i) the Aggregator does not procure fulfilment or waiver of any or all of the Conditions Precedent set forth in Clause 4.1.3 within the period specified in that Clause and (ii) the delay has not occurred as a result of failure to fulfil the obligations under Clause 4.1.2 or other breach of this Agreement by the Utility or due to Force Majeure, the Aggregator shall pay to the Utility Damages in an amount calculated at the rate of 0.3% (zero point three per cent) of the Performance Security for each day's delay until the fulfilment of such Conditions Precedent, subject to a maximum amount equal to the Bid Security, and upon reaching such maximum, the Utility may, in its sole discretion, terminate the Agreement. Provided that in the event of delay by the Utility in procuring fulfilment of the Conditions Precedent specified in Clause 4.1.2, no Damages shall be due or payable by the Aggregator under this Clause 4.3 until the date on which the Utility shall have procured fulfilment of the Conditions Precedent specified in Clause 4.1.2.

4.4 Deemed Termination upon delay

Without prejudice to the provisions of Clauses 4.2 and 4.3, and subject to the provisions of Clause 9.2, the Parties expressly agree that in the event the Appointed Date does not occur, for any reason whatsoever, 120 (one hundred twenty) days from the date of this Agreement or the extended period provided in accordance with this Agreement, all rights, privileges, claims and entitlements of

the Aggregator under or arising out of this Agreement shall be deemed to have been waived by, and to have ceased with the concurrence of the Aggregator, and the Pilot Agreement for Procurement of Power - II shall be deemed to have been terminated by mutual agreement of the Parties. Provided, however, that in the event the delay in occurrence of the Appointed Date is for reasons attributable to the Aggregator, the Performance Security of the Aggregator shall be encashed and appropriated by the Utility as Damages thereof.

ARTICLE 5
OBLIGATIONS OF THE AGGREGATOR

5.1 Obligations of the Aggregator

- 5.1.1 Subject to and on the terms and conditions of this Agreement, the Aggregator shall observe, fulfil, comply with and perform all its obligations set out in this Agreement or arising hereunder.
- 5.1.2 The Aggregator shall comply with all Applicable Laws and other Applicable Permits (including renewals as required) in the performance of its obligations under this Agreement.
- 5.1.3 Save and except as otherwise provided in this Agreement or Applicable Laws, as the case may be, the Aggregator shall, in discharge of all its obligations under this Agreement, conform with and adhere to Good Industry Practice at all times.
- 5.1.4 The Aggregator shall ensure that the Supplier operates and maintains the Power Station in accordance with the Specifications and Standards and the Maintenance Requirements such that the Availability of the Contracted Capacity of the Power Station is at least 85% (eighty five per cent) thereof during each year of the Contract Period (the “**Normative Availability**”).

Explanation:

Availability of the Power Station to its full capacity shall, in respect of any hour, mean the capacity of the Power Station to the extent it is offered by the Aggregator for producing and supplying electrical energy equal to 1000 kWh per mega watt of Contracted Capacity over a period of one hour, after accounting for auxiliary consumption, and transmission losses upto the Point of Grid Connection, and for any month or year, as the case may be, the hours during that month or year when the Contracted Capacity of the Power Station is fully available for production of electricity shall be expressed as a percentage of total hours in that month or year, as the case may be, (the “**Availability**”). For the avoidance of doubt, the Parties agree that Availability shall, during the months when Appointed Date or the date of Termination occurs, be determined with reference to the number of days when the Power Station was in operation, and shall be determined likewise for any single day of operation. The Parties further agree that if the Contracted Capacity of the Power Station is not Available for production of electricity to its full capacity during any hour, or part thereof, not being less than a quarter of an hour, such hour or part thereof shall, in the computation of Availability, be reduced proportionate to the Non-Availability during that hour. The Parties also agree that the determination of Availability hereunder shall be solely for the purposes of this Agreement and shall not in any manner affect the rights and obligations of the Aggregator for and in respect of scheduling and despatch of electricity under Applicable Laws and the rules and regulations thereunder.

- 5.1.5 The Aggregator shall, at its own cost and expense, in addition to and not in derogation of its obligations elsewhere set out in this Agreement:

- (a) make, or cause to be made, necessary applications to the relevant Government Instrumentalities with such particulars as may be required for obtaining Applicable Permits, and obtain and keep in force and effect such Applicable Permits in conformity with Applicable Laws; Non-grant of medium term open access shall be mutually decided by the Utility and Aggregator;
- (b) procure, or cause to be procured, as required, the appropriate proprietary rights, licences, agreements and permissions for materials, methods, processes, know-how and systems used or incorporated into the Power Station;
- (c) ensure performance and fulfilment of Supplier's obligation in respect of debt service for the Power Station;
- (d) ensure and procure that its Supplier comply with all Applicable Permits and Applicable Laws in the performance by them of any of its obligations under the APPP;
- (e) always act in a manner consistent with the provisions of this Agreement and not cause or fail to do any act, deed or thing, whether intentionally or otherwise, which may in any manner be violative of any of the provisions of this Agreement or Applicable Laws;
- (f) support, cooperate with and facilitate the Utility in the implementation of this Agreement;
- (g) comply with the provisions of Applicable Laws with regard to metering of supply of electricity;
- (h) comply with the directions of the Commission issued from time to time under the Act.

5.2 Not Used

5.3 Obligations relating to transmission charges

- 5.3.1 The Aggregator shall be liable for payment of all charges, due and payable under Applicable Laws, for intra-state transmission of electricity from the Power Station to the Delivery Point.
- 5.3.2 The Utility shall be liable for reimbursement of all charges to the Aggregator, due and payable under Applicable Laws, for inter-state transmission of electricity from the Delivery Point to the Drawal Point.

5.4 Obligations relating to transmission losses

- 5.4.1 The Aggregator shall be liable for the transmission losses in all intra-state transmission of electricity from the Power Station to the Delivery Point.

- 5.4.2 The Utility shall be liable for the transmission losses in all inter-state transmission of electricity from the Delivery Point to the Drawal Point.

5.5 Obligations relating to SLDC and RLDC charges

- 5.5.1 The Aggregator shall be liable for payment of all the charges, due and payable under Applicable Laws by the Aggregator/Supplier to the SLDC up to the Delivery Point for and in respect of all its supplies to the Utility.
- 5.5.2 The Utility shall be liable for reimbursement of all the charges to the Aggregator, due and payable to the RLDC under Applicable Laws, from the Delivery Point to the Drawal Point for and in respect of all its supplies to the Utility.

5.6 Obligations relating to taxes

The Aggregator shall pay, at all times during the subsistence of this Agreement, all taxes, levies, duties, cesses and all other statutory charges payable in respect of the supply of electricity under this Agreement.

5.7 Obligations relating to reporting requirements

All information provided by the Supplier and Aggregator to the SLDC and RLDC as a part of its operating and reporting requirements under Applicable Laws, including the Grid Code, shall also be provided by it to the Utility simultaneously.

ARTICLE 6
OBLIGATIONS OF THE UTILITY

6.1 Obligations of the Utility

- 6.1.1 The Utility shall, at its own cost and expense undertake, comply with and perform all its obligations set out in this Agreement or arising hereunder.
- 6.1.2 The Utility agrees to provide support to the Aggregator and undertakes to observe, comply with and perform, subject to and in accordance with the provisions of this Agreement and Applicable Laws, the following:
- (a) upon written request from the Aggregator, and subject to the Aggregator complying with Applicable Laws, provide reasonable support and assistance to the Aggregator in procuring the Applicable Permits required from any Government Instrumentality for Supply of Electricity; Non-grant of medium term open access shall be mutually decided by the Utility and Aggregator;
 - (b) not do or omit to do any act, deed or thing which may in any manner be violative of any of the provisions of this Agreement;
 - (c) support, cooperate with and facilitate the Aggregator in the implementation and Supply of Electricity in accordance with the provisions of this Agreement and Applicable Laws.

ARTICLE 7
REPRESENTATIONS AND WARRANTIES

7.1 Representations and warranties of the Aggregator

The Aggregator represents and warrants to the Utility that:

- (a) it is duly organised and validly existing under the laws of India, and has full power and authority to execute and perform its obligations under this Agreement and to carry out the transactions contemplated hereby;
- (b) it has taken all necessary corporate and other actions under Applicable Laws to authorise the execution and delivery of this Agreement and to validly exercise its rights and perform its obligations under this Agreement;
- (c) this Agreement constitutes its legal, valid and binding obligation, enforceable against it in accordance with the terms hereof, and its obligations under this Agreement will be legally valid, binding and enforceable obligations against it in accordance with the terms hereof;
- (d) it is subject to the laws of India, and hereby expressly and irrevocably waives any immunity in any jurisdiction in respect of this Agreement or matters arising thereunder including any obligation, liability or responsibility hereunder;
- (e) the execution, delivery and performance of this Agreement will not conflict with, result in the breach of, constitute a default under, or accelerate performance required by any of the terms of its Memorandum and Articles of Association or any Applicable Laws or any covenant, contract, agreement, arrangement, understanding, decree or order to which it is a party or by which it or any of its properties or assets is bound or affected;
- (f) there are no actions, suits, proceedings, or investigations pending or, to its knowledge, threatened against it at law or in equity before any court or before any other judicial, quasi-judicial or other authority, the outcome of which may result in the breach of this Agreement or which individually or in the aggregate may result in any material impairment of its ability to perform any of its obligations under this Agreement;
- (g) it has no knowledge of any violation or default with respect to any order, writ, injunction or decree of any court or Government Instrumentality which may result in any material adverse effect on its ability to perform its obligations under this Agreement and no fact or circumstance exists which may give rise to such proceedings that would adversely affect the performance of its obligations under this Agreement;
- (h) it has complied with Applicable Laws in all material respects and has not been subject to any fines, penalties, injunctive relief or any other civil or criminal liabilities which in the aggregate have or may have a material

adverse effect on its ability to perform its obligations under this Agreement;

- (i) no representation or warranty by it contained herein or in any other document furnished by it to the Utility or to any Government Instrumentality in relation to Applicable Permits contains or will contain any untrue or misleading statement of material fact or omits or will omit to state a material fact necessary to make such representation or warranty not misleading;
- (j) no sums, in cash or kind, have been paid or will be paid, by it or on its behalf, to any person by way of fees, commission or otherwise for securing the Supply Contract or entering into this Agreement or for influencing or attempting to influence any officer or employee of the Utility in connection therewith.

7.2 Representations and warranties of the Utility

The Utility represents and warrants to the Aggregator that:

- (a) it has full power and authority to execute, deliver and perform its obligations under this Agreement and to carry out the transactions contemplated herein and that it has taken all actions necessary to execute this Agreement, exercise its rights and perform its obligations, under this Agreement;
- (b) it has taken all necessary actions under Applicable Laws to authorise the execution, delivery and performance of this Agreement;
- (c) it has the financial standing and capacity to perform its obligations under this Agreement;
- (d) this Agreement constitutes a legal, valid and binding obligation enforceable against it in accordance with the terms hereof;
- (e) it has no knowledge of any violation or default with respect to any order, writ, injunction or any decree of any court or any legally binding order of any Government Instrumentality which may result in any material adverse effect on the Utility's ability to perform its obligations under this Agreement; and
- (f) it has complied with Applicable Laws in all material respects.

7.3 Disclosure

In the event that any occurrence or circumstance comes to the attention of either Party that renders any of its aforesaid representations or warranties untrue or incorrect, such Party shall immediately notify the other Party of the same. Such notification shall not have the effect of remedying any breach of the representation or warranty that has been found to be untrue or incorrect nor shall it adversely affect or waive any right, remedy or obligation of either Party under this Agreement.

ARTICLE 8
DISCLAIMER

8.1 Disclaimer

- 8.1.1 The Aggregator acknowledges that prior to the execution of this Agreement, the Aggregator has, after a complete and careful examination, made an independent evaluation of the Request for Qualification, Request for Proposals, Scope of the Agreement, Specifications and Standards, transmission network, Site, existing structures, local conditions, and any information provided by the Utility or obtained, procured or gathered otherwise, and has determined to its satisfaction the accuracy or otherwise thereof and the nature and extent of difficulties, risks and hazards as are likely to arise or may be faced by it in the course of performance of its obligations hereunder. The Utility makes no representation whatsoever, express, implicit or otherwise, regarding the accuracy, adequacy, correctness, reliability and/or completeness of any assessment, assumption, statement or information provided by it and the Aggregator confirms that it shall have no claim whatsoever against the Utility in this regard.
- 8.1.2 The Aggregator acknowledges and hereby accepts the risk of inadequacy, mistake or error in or relating to any of the matters set forth in Clause 8.1.1 above and hereby acknowledges and agrees that the Utility shall not be liable for the same in any manner whatsoever to the Aggregator or any person claiming through or under any of them.
- 8.1.3 The Parties agree that any mistake or error in or relating to any of the matters set forth in Clause 8.1.1 above shall not vitiate this Agreement, or render it voidable.
- 8.1.4 In the event that either Party becomes aware of any mistake or error relating to any of the matters set forth in Clause 8.1.1 above, that Party shall immediately notify the other Party, specifying the mistake or error; provided, however, that a failure on part of the Utility to give any notice pursuant to this Clause 8.1.4 shall not prejudice the disclaimer of the Utility contained in Clause 8.1.1 and shall not in any manner shift to the Utility any risks assumed by the Aggregator pursuant to this Agreement.
- 8.1.5 Except as otherwise provided in this Agreement, all risks relating to the Supply of Electricity shall be borne by the Aggregator and the Utility shall not be liable in any manner for such risks or the consequences thereof.

Part III

Operations

ARTICLE 9

PERFORMANCE SECURITY

9.1 Performance Security

- 9.1.1 The Aggregator shall, for the performance of its obligations hereunder, provide to the Utility no later than 32 (thirty two) days from the date of this Agreement, an irrevocable and unconditional guarantee from a Schedule Bank for a sum equivalent to Rs. ***** crore (Rupees ***** crore)¹ in the form set forth in Schedule-A (the “**Performance Security**”) for a period of 6 (six) months.
- 9.1.2 Notwithstanding anything to the contrary contained in this Agreement, in the event Performance Security is not provided by the Aggregator within a period of 32 (thirty two) days from the date of this Agreement, the Utility may encash the Bid Security and appropriate the proceeds thereof as Damages, and thereupon all rights, privileges, claims and entitlements of the Aggregator under or arising out of this Agreement shall be deemed to have been waived by, and to have ceased with the concurrence of the Aggregator, and this Agreement, shall be deemed to have been terminated with the consent of the Aggregator.

9.2 Appropriation of Performance Security

Upon occurrence of a Aggregator Default or failure to meet any Condition Precedent, the Utility shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to encash and appropriate from the Performance Security the amounts due to it for and in respect of such Aggregator Default or for failure to meet any Condition Precedent. Upon such encashment and appropriation from the Performance Security, the Aggregator shall, within 15 (fifteen) days thereof, replenish, in case of partial appropriation, to the original level of the Performance Security, and in case of appropriation of the entire Performance Security provide a fresh Performance Security, as the case may be, failing which the Utility shall be entitled to terminate this Agreement in accordance with Article 17. Upon such replenishment or furnishing of a fresh Performance Security, as the case may be, the Aggregator shall be entitled to an additional Cure Period of 120 (one hundred and twenty) days for remedying the Aggregator Default or to meet any Condition Precedent, and in the event of the Aggregator not curing its default or meeting such Condition Precedent within such Cure Period, the Utility shall be entitled to encash and appropriate the Performance Security as Damages, and to terminate this Agreement in accordance with Article 17.

9.3 Release of Performance Security

The Performance Security shall remain in force and effect until expiry of 6 (six) months after the Appointed Date, and shall be released upon the Deemed Performance Security taking effect in accordance with the provisions of Clause 9.4.

¹ To be calculated @ Rs. 10,00,000 (Rs. ten lakh) per MW of Contracted Capacity.

9.4 Deemed Performance Security

The Parties expressly agree that upon release of Performance Security in accordance with the provisions of Clause 9.3, a substitute Performance Security for a like amount shall be deemed to be created under this clause 9.4, as if it is a Performance Security under clause 9.1 for and in respect of the entire Contract Period (the “**Deemed Performance Security**”). The Deemed Performance Security shall be unconditional and irrevocable, and shall constitute the first and exclusive charge on all amounts due and payable by the Utility to the Aggregator, and the Utility shall be entitled to enforce the Deemed Performance Security by making a deduction from the amounts due and payable by it to the Aggregator in accordance with the provisions of Clause 9.5. For the avoidance of doubt, the Parties agree that no amounts shall be earmarked, frozen or withheld in the Escrow Account for securing payment of any potential Damages that may fall due at a subsequent date, and only the amounts which shall have become due and payable by the Aggregator upon occurrence of Aggregator Default shall be liable to appropriation hereunder.

9.5 Appropriation of Deemed Performance Security

Upon occurrence of a Aggregator Default, the Utility shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to appropriate the relevant amounts from the Deemed Performance Security as Damages for such Aggregator Default. For the avoidance of doubt, the Parties expressly agree that upon the Deemed Performance Security being appropriated, in whole or in part, it shall be deemed to be replenished to the extent of such appropriation.

9.6 References to Performance Security

References to Performance Security occurring in this Agreement for and in respect of any period prior to the delivery of the Performance Security by the Aggregator to the Utility , or in respect of any period subsequent to the expiry or release thereof, as the case may be, shall be construed solely for the purposes of calculating the amount of Damages payable by the Aggregator, and the amount so determined shall be appropriated from the Bid Security or Deemed Performance Security, as the case may be.

ARTICLE 10 ALLOCATION OF CAPACITY

10.1 Contracted Capacity

- 10.1.1 Pursuant to the provisions of this Agreement, the Aggregator shall dedicate a generating capacity of *****MW to the Utility at the Delivery Point as the capacity contracted hereunder (the “**Contracted Capacity**”) and the Contracted Capacity shall at all times be operated and utilised in accordance with the provisions of this Agreement.

10.2 Dispatch of unutilised Contracted Capacity

- 10.2.1 In the event that the Utility does not require the supply of the whole or part of the Contracted Capacity for a continuous period of 24 (twenty four) hours or more, it may, by a notice of at least 72 (seventy two) hours prior to such period, specify the reduction in dispatch of the Contracted Capacity and for such reduction in supply, it shall be entitled to a rebate equal to 25% (Twenty Five percent) of the Fixed Charge payable for Availability thereof and the waived Fixed Charge under Clause 10.2.2. Provided, however, that any reduction in supply under Clause 10.2.1 shall be uniform for a block of at least 24 (twenty four) hours and shall not vary between Peak Hours and Off-Peak Hours.
- 10.2.2 In the event that any part of the Contracted Capacity, which is not utilised by the Utility, and is, therefore, utilised for production of electricity and sale thereof to any Buyer, the Fixed Charge due and payable for and in respect of such Contracted Capacity shall be deemed to be waived and accordingly, no Fixed Charge shall be due or payable by the Utility in respect thereof.

10.3 Substitute Supply

In the event the Availability is reduced on account of scheduled maintenance, unscheduled maintenance, or Force Majeure, the Aggregator may, with prior consent of the Utility, which consent the Utility may deny in its sole discretion or convey acceptance with such conditions as it may deem fit, supply electricity from any alternative source, and such supply shall, for payment of Tariff, be deemed to be supply under and in accordance with the provisions of this Agreement. For the avoidance of doubt, the Parties agree that in the event the Utility rejects any supply of electricity offered hereunder from an alternative source, the Supplier shall be deemed to be in compliance with this Agreement for the purpose of determination of Availability and payment of Fixed Charge.

In case the transmission and other incidental charges, including but not limited to application fees for open access, RLDC/SLDC charges, etc., applicable from the alternative source of power supply are higher than the applicable transmission charges, the Aggregator shall be liable to bear such additional charges.

It is hereby clarified that the Utility shall make payment of the Tariff to the Aggregator for supply of electricity from any alternate source in accordance with this Article irrespective of the actual cost of supply of electricity from such alternative source.

Part IV

Financial Covenants

ARTICLE 11

TARIFF

11.1 Tariff

- 11.1.1 The Utility shall pay to the Aggregator tariff comprising the sum of Fixed Charge and Variable Charge payable by the Utility to the Aggregator for Availability and for supply of electricity, as the case may be, in accordance with the provisions of this Agreement (the “**Tariff**”).
- 11.1.2 As a part of the Tariff, the Aggregator shall pay to the Supplier an amount, determined in accordance with the provisions of this Article 11, as the Fixed Charge for Availability of the Power Station to the extent of Normative Availability thereof (the “**Fixed Charge**”).
- 11.1.3 In addition to the Tariff, the Utility shall pay to the Aggregator a trading margin of Rs. ****/ kWh (the “**Trading Margin**”).

11.2 Fixed Charge

The Parties agree that the Fixed Charge payable for Availability shall, in accordance with the offer of the Supplier, be Rs. (Rupees) per kWh, which shall remain constant for the entire contract period.

11.3 Computation of Fixed Charge

- 11.3.1 The obligations of the Utility to pay Fixed Charges in any Accounting Year shall in no case exceed an amount equal to the Fixed Charge due and payable for and in respect of the Normative Availability of 85% (eighty five per cent) computed with reference to the Contracted Capacity (the “**Capacity Charge**”). Provided, however, that in the event of Despatch of the Power Station beyond such 85% (eighty five per cent), Incentive shall be payable in accordance with the provisions of Clause 11.5.1.
- 11.3.2 The Aggregator shall not, for and in respect of any day, be entitled to receive payment of Fixed Charge for Availability exceeding 85% (eighty five per cent) thereof, and in the event it supplies electricity to the Utility in excess of such 85% (eighty five per cent), such excess supply shall be eligible only for payment of Variable Charge, save and except the payment of Incentive due under the provisions of Clause 11.3.1.
- 11.3.3 In the event that any shortfall in supply of electricity to the Utility occurs on account of deficiency in transmission between the Point of Grid Connection and Drawal Point, Availability shall be deemed to be reduced in accordance with the provisions of Clause 11.4.2 and the Utility shall not be liable for payment of any Fixed Charge for the Non-Availability arising as a consequence thereof.

11.4 Declaration of Availability

- 11.4.1 Unless otherwise notified by the Aggregator, the declared Availability shall, be deemed to be 100% (one hundred per cent) thereof at all times.
- 11.4.2 In the event that any shortfall in supply of electricity to the Utility occurs on account of any deficiency in transmission access, the Availability shall be deemed to be reduced to the extent of reduction in transmission of electricity, and the reduction referred to hereinabove shall be deemed as Non-Availability on account of deficiency in transmission. For the avoidance of doubt and by way of illustration, the Parties agree that if such deficiency in transmission is equal to 20% (twenty per cent) of the Contracted Capacity, the Availability shall be deemed to be 80% (eighty per cent) and the Non-Availability hereunder shall be notified by the Aggregator to the Utility forthwith.
- 11.4.3 The Aggregator shall notify, no later than 15 (fifteen) days prior to the commencement of a month, Supplier's maintenance schedule for that month and any reduction in Availability arising as a result thereof. The Aggregator shall, as soon as may be, notify any modifications of Supplier's maintenance schedule and shall confirm, with or without modifications, the reduction in Availability no later than 48 (forty eight) hours prior to its occurrence.
- 11.4.4 In the event that the Availability at any time is determined to be lower than 100% (one hundred per cent) of the Contracted Capacity or the reduced Availability notified hereunder, an event of mis-declaration of Availability (the "**Mis-declaration**") shall be deemed to have occurred. In such an event, the Availability for the relevant month shall, for the purposes of payment of Fixed Charge, be deemed to be reduced by the same proportion that Availability bears to Mis-declaration, as if the Mis-declaration had occurred for a period of one month. For the avoidance of doubt, the Parties agree that deductions on account of Mis-declaration shall be made from the subsequent payments due to the Aggregator under this Agreement.
- 11.4.5 Notwithstanding the provisions of Clause 11.4.4, any reduction in Availability arising out of de-commissioning due to Emergency or a Force Majeure Event shall not be deemed to be Mis-declaration if the Aggregator shall have notified the Utility in accordance with the provisions of Clauses 15.5.

11.5 Incentive and Damages

- 11.5.1 In the event that the Availability in any month exceeds the Normative Availability, the Aggregator shall, in lieu of a Fixed Charge, be entitled to an Incentive which shall be calculated and paid at the rate of 50 % (fifty per cent) of the Fixed Charge for Availability in excess of Normative Availability. Provided, however, that any Incentive hereunder shall be due and payable only to the extent of Despatch of the Power Station. For the avoidance of doubt and by way of illustration, in the event the Availability in any month shall exceed the Normative Availability by 3% (three per cent) of the Contracted Capacity but the Despatch during that month shall exceed 1% (one per cent) of the Contracted Capacity, the Incentive payable hereunder shall be restricted to such 1% (one per cent) only.

11.5.2 In the event that Availability in any month is less than the Normative Availability, the Fixed Charge for such month shall be reduced to the extent of shortfall in Normative Availability and in addition, any reduction below the Normative Availability shall be multiplied by a factor of 0.25 (zero point two five) to determine the Damages payable for such reduction in Availability. For the avoidance of doubt, the Parties agree that the Damages to be deducted for any reduction in Normative Availability shall be 25% (twenty five per cent) of the Fixed Charge which is reduced on account of shortfall in Availability below Normative availability.

However, it is clarified that no Damages shall be payable for reduction in Availability on account of deficiency in transmission access.

11.5.3 The Parties expressly agree that within 30 (thirty) days of the close of every Accounting Year, the cumulative monthly Availability for such year shall be determined and the Incentive or Damages, as the case may be, shall be computed with reference to the Normative Availability for that year. The amount so arrived at shall be adjusted against the Incentives or Damages determined for the respective months of the year and the balance remaining shall be adjusted in the following Monthly Invoice.

11.6 Variable Charge

11.6.1 As part of the Tariff, the Utility shall pay to the Aggregator for and in respect of the Fuel utilised for supply of a kWh of electricity to the Utility, a Variable Charge determined from time to time in accordance with the provisions of this Article 11.6 and expressed in Rupees per kWh (the “**Variable Charge**”).

11.6.2 The Parties agree that the variable charge, in accordance with the offer of the Supplier for the Base Year, shall be Rs. (Rupees)⁵ per kWh as the cost of Fuel/generating cost and cost of transmission charge and transmission losses from the power station to delivery point (the “**Base Variable Charge**”) which shall be revised in accordance with the provisions of Clause 11.6.4 to determine the Variable Charge for the relevant period at the Delivery Point.

11.6.3 The Aggregator represents and warrants that it shall supply electricity to the Utility at the Delivery Point for a lumpsum Tariff that shall comprise: (a) a Base Variable Charge referred to in Clause 11.6.2, which shall include the entire generating cost of electricity, and (b) a Fixed Charge which shall be equal to the generating cost component of Base Variable Charge specified in Clause 11.6.2. For the avoidance of doubt, the Parties agree that the Base Variable Charge shall be revised in accordance with the provisions of Clause 11.6.4.

11.6.4 The Parties agree that the generating cost component of Base Variable Charge specified in Clause 11.6.2 shall be increased for every Accounting Year following the Base Year so as to reflect 50% (fifty per cent) of the variation in WPI occurring between January 31 immediately preceding the Base Year and January 31 immediately preceding the Accounting Year for which such revision is undertaken. For the avoidance of doubt and by way of illustration, if (a) the Base

⁵ The amount shown as blank in clause 11.6.2 shall be specified in the Bid.

Variable Charge specified hereinabove is assumed as 80 paise (eighty paise) and (b) WPI between the two aforesaid dates, the latter being 1 (one) year after the first such date, increases by 5% (five per cent), the Variable Charge in the Accounting Year following the first Accounting Year shall be 82 paise (eighty two paise).

11.7 Taxes and duties

- 11.7.1 The Parties expressly agree that the Tariff shall be inclusive of all taxes and duties, save and except the taxes and duties specified in Clause 11.7.2. It is further agreed that the Aggregator shall pay all taxes and duties, including the taxes and duties specified in Clauses 11.7.2, in accordance with Applicable Laws.
- 11.7.2 The Tariff and Incentives payable by the Utility under this Article 11 shall be exclusive of GST or any replacement thereof, if applicable, and any GST thereon shall be paid by the Aggregator and reimbursed by the Utility upon submission of necessary particulars by the Aggregator.
- 11.7.3 Any payment to be made by the Utility shall be subject to any tax deduction at source, if required to be made by the Utility as per Applicable Laws.

11.8 Billing and Payment

- 11.8.1 Commencing from the month following the month in which the Appointed Date occurs, the Aggregator shall, by the 5th (fifth) day of such and each succeeding month (or, if such day is not a Business Day, the immediately following Business Day), submit in triplicate to the Utility, an invoice in the agreed form (the “**Monthly Invoice**”) signed by the authorised signatory of the Aggregator setting out the computation of the Tariff to be paid by the Utility to the Aggregator in respect of the immediately preceding month in accordance with the provisions of this Agreement.
- 11.8.2 The Aggregator shall, with each Monthly Invoice submit, (a) a certificate that the amounts claimed in the invoice are correct and in accordance with the provisions of the Agreement; (b) proof of Availability for the period billed, comprising evidence of communications regarding the extent of Non-Availability from time to time; (c) detailed calculation of the Fixed Charge for Availability in accordance with this Article 11; (d) detailed calculations of the Variable Charge in respect of electricity dispatched and official documents in support of the variation in WPI, computed in accordance with this Article 11; (e) detailed calculations of the Incentives and/or Damages in accordance with the provisions of Clause 11.5; (f) details in respect of taxes/duties payable/reimbursable in accordance with the provisions of this Agreement; (g) details in respect of Damages or Incentives payable in accordance with the provisions of this Agreement; (h) details of Trading Margin payable and (i) the net amount payable under the Monthly Invoice.
- 11.8.3 The Utility shall, within 30 (thirty) days of receipt of a Monthly Invoice in accordance with Clause 11.8.1 (the “**Payment Due Date**”), make payment of the amount claimed directly, through electronic transfer, to the nominated bank account of the Aggregator, save and except any amounts which it determines as not payable or disputed (the “**Disputed Amounts**”).

- 11.8.4 All Damages and any other amounts due and payable by the Aggregator in accordance with the provisions of this Agreement may be deducted from the Tariff due and payable to the Aggregator and in the event the deductions hereunder exceed the Tariff in that month, the balance remaining shall be deducted from the Tariff due and payable to the Aggregator for the immediately following month.
- 11.8.5 The Aggregator shall raise Supplementary Invoices for reimbursement of charges for inter-state transmission of electricity and RLDC fees/charges as per the actual bills of CTU/RLDC etc. Payment due date, late payment surcharge, rebate for early payment etc. for such Supplementary Invoices shall be as per the actuals bills of CTU/RLDC etc.

11.9 Disputed Amounts

- 11.9.1 The Utility shall, within 10 (ten) days of receiving an invoice, notify the Aggregator of the Disputed Amounts, with particulars thereof. Within 7 (seven) days of receiving such notice, the Aggregator shall present any information or evidence as may reasonably be required for determining that such Disputed Amounts are payable. The Utility may, if necessary, meet a representative of the Aggregator for resolving the dispute and in the event that the dispute is not resolved amicably, the Dispute Resolution Procedure shall apply. For the avoidance of doubt, even if a dispute is resolved amicably, any amount paid after the Payment Due Date shall be deemed as delayed payment for the purposes of payment of interest thereon. For the avoidance of doubt, the Utility shall be entitled to raise a dispute regarding any Disputed Amounts, whether due or already paid in accordance with this Agreement, at any time.
- 11.9.2 If any amount is payable by either Party to the other Party upon determination of a dispute regarding any Disputed Amount under the Dispute Resolution Procedure, such amount shall be deemed to be payable on the date when it first became due under this Agreement, and interest for the period of delay shall be due and payable at the rate specified in Clause 23.4.

11.10 Discount for early payment

The Parties expressly agree that in the event the Utility pays the Tariff within 5 (five) days of the date of submission of the invoice thereof, it shall be entitled to deduct 1% (one per cent) of the amount comprising the Tariff by way of discount for early payment.

ARTICLE 12

PAYMENT SECURITY

12.1 Letter of Credit

- 12.1.1 The Utility shall, no later than 30 (thirty) days prior to the likely date of the Appointed Date, provide to the Aggregator, an unconditional, revolving and irrevocable letter of credit for an amount equivalent to 20% (twenty percent) of the annual Capacity Charge (the “**Letter of Credit**”), which may be drawn upon by the Aggregator for recovery of payment due against the Monthly Invoice in accordance with the provisions of this Agreement. The Letter of Credit shall be substantially in the form specified in Schedule-B and shall come into effect on the Appointed Date, and shall be modified once every year to reflect the revision in 20% (twenty percent) of the annual Capacity Charge in accordance with the provisions of this Agreement.
- 12.1.2 The Letter of Credit shall be procured by the Utility from a bank where at least 30% (thirty per cent) of the Utility’s total monthly Revenues are normally deposited. All costs and expenses relating to opening and maintenance of the Letter of Credit shall be borne by the Utility.
- 12.1.3 In the event of Utility’s failure to pay the Monthly Invoice before the 27th (twenty seventh) day of the month in which the relevant Payment Due Date occurs, the Aggregator may, in its discretion, invoke the Letter of Credit for recovery of the amount due, without any reference to the Utility, pay the amount due upon the Aggregator presenting the following documents, namely:
- (a) a copy of the Monthly Invoice which has remained unpaid; and
 - (b) a certificate from the Aggregator to the effect that the Monthly Invoice is in accordance with this Agreement and that the amount due and payable has remained unpaid.
- 12.1.4 In the event that the amount covered by the Letter of Credit is at any time less than 20% (twenty percent) of the annual Capacity Charge or is insufficient for recovery of payment due against the Monthly Invoice, the Utility shall, within a period of 7 (seven) days from the date on which such shortfall occurred, cause the Letter of Credit to be replenished and reinstated to the extent specified in Clause 12.1.1. For the avoidance of doubt, the Parties agree that the Letter of Credit shall not be revised solely on account of revision in 20% (twenty percent) of the annual Capacity Charge, except to give effect to such revision once every year.
- 12.1.5 The Parties may, by mutual agreement, substitute the Letter of Credit by an unconditional and irrevocable bank guarantee or any equivalent instrument as may be mutually agreed upon.

12.2 Recovery from sale of Contracted Capacity

- 12.2.1 In the event the Aggregator is unable to recover its Tariff through the Letter of Credit, and if the Tariff or part thereof remains unpaid for a period of 1 (one) month from the Payment Due Date, then notwithstanding anything to the contrary contained in this Agreement, the Aggregator shall have the right to sell the whole

or part of the Contracted Capacity to any Buyer for recovery of its payment dues from the Utility. For the avoidance of doubt, the Parties expressly agree that the Aggregator shall be entitled to appropriate the revenues from sale hereunder for recovering the Tariff due and payable to it for sale of such Contracted Capacity to the Utility and the surplus remaining, if any, shall be appropriated for recovery of its dues from the Utility.

12.2.2 The sale of Contracted Capacity pursuant to Clause 12.2.1 shall not extinguish any liability of the Utility or any claim that the Aggregator may have against the Utility, save and except to the extent of amounts recovered under the provisions of Clause 12.2.1.

12.2.3 Supply of electricity to the Utility in accordance with the provisions of this Agreement shall be restored no later than 7 (seven) days from the day on which the Utility pays, or is deemed to have paid, the arrears due to the Aggregator in accordance with the provisions of this Agreement, renews the Letter of Credit.

ARTICLE 13

DESPATCH OF CONTRACTED CAPACITY

13.1 Despatch of Contracted Capacity

- 13.1.1 The Utility shall, in accordance with Applicable Laws, issue instructions to the Aggregator for production of electricity and despatch thereof to the Grid during such period and in such volume as it may specify in its instructions (the “**Despatch**”). Provided that the Utility shall not Despatch in excess of the Contracted Capacity, unless mutually agreed between the Parties. For the avoidance of doubt, the Parties agree that the Utility may, in its discretion, direct the Aggregator to Despatch on its behalf, all or part of the Contracted Capacity, in favour of the third parties designated by it from time to time on the express understanding that the payment therefor shall be made by the Utility to the Aggregator as if the electricity has been Despatched in favour of the Utility.
- 13.1.2 Pursuant to the provisions of Clause 13.1.1, the Aggregator shall cause the Supplier to plan the production and Despatch of electricity and convey its availability for scheduling thereof by the SLDC or RLDC, as the case may be, and shall supply electricity in accordance with the provisions of the Grid Code and the Act.
- 13.1.3 In the event the Aggregator schedules any electricity, produced from Contracted Capacity, for sale to Buyers in breach of this Agreement, the Aggregator shall pay Damages equal to the higher of: (a) twice the Fixed Charge; and (b) the entire sale revenue accrued from Buyers. For the avoidance of doubt, no Fixed Charge or any amount in lieu thereof shall be due or payable to the Aggregator for and in respect of any electricity sold hereunder.

13.2 Settlement of DSM charges

- 13.2.1 All payments due to or from the Aggregator on account of any unscheduled interchange in terms of the DSM Regulations (the “**Deviation Settlement Mechanism**” or “**DSM**”) shall be solely to the account of and borne by the Aggregator/ Supplier.

13.3 Overriding powers of the Utility

- 13.3.1 Upon occurrence of a Aggregator’s Default, the Utility may, in its discretion, direct the Aggregator to stop any or all its sale of electricity to Buyers from and in respect of Contracted Capacity, and to sell all such electricity to the Utility in accordance with the provisions of this Agreement. Upon receipt of any directions hereunder from the Utility, the Aggregator shall comply forthwith and issue despatch and scheduling instruction to the RLDC and SLDC in conformity with the directions of the Utility.
- 13.3.2 In the event the Aggregator does not comply with the directions of the Utility issued in pursuance of Clause 13.3.1, the Utility may issue directions to the RLDC and SLDC to undertake despatch and scheduling in accordance with such instructions as the Utility may issue hereunder from time to time.

- 13.3.3 The Aggregator shall, prior to the Appointed Date, furnish a certified true copy of this Agreement to the RLDC and SLDC and obtain a receipt thereof. By furnishing a copy of this Agreement to the RLDC and SLDC, the Aggregator shall be deemed to have agreed and undertaken to abide by the provisions of this Clause 13.3 and to have given irrevocable instructions to the RLDC and SLDC to carry out all the directions given by the Utility hereunder. For the avoidance of doubt, the Parties expressly agree that the provisions of this Clause 13.3 shall remain in force and effect until the Termination Payment, if any, has been made by the Aggregator to the Utility.
- 13.3.4 The exercise of any overriding powers by the Utility under this Clause 13.3 shall not in any manner affect or diminish the liability and obligation of the Utility to make payments to the Aggregator for the electricity supplied or the Availability of Contracted Capacity and the Utility shall, for this purpose, ensure and procure compliance of the provisions of Article 13. Notwithstanding anything to the contrary contained in this Clause 13.3, the Utility shall not be entitled to issue any directions hereunder nor shall the RLDC and SLDC comply with such directions to the extent and for the period during which Utility is in material breach of the provisions of Article 13 or of its payment obligations to the Aggregator under this Agreement, and in such an event the provisions of Clause 13.3 shall apply.

13.4 Ramp up of Despatch

In the event the Utility Despatches less than 2% (two per cent) of Contracted Capacity at any time and requires ramping up of generation thereafter, it shall allow a period of 4 (four) hours to the Aggregator for reaching Availability equal to the Contracted Capacity. For the avoidance of doubt, the Parties agree that in the event the Aggregator fails to reach such Availability within 4 (four) hours, the shortfall thereof shall be deemed to be Mis-declaration under the provisions of Clause 11.4.4. The Parties further agree that the liability of the Utility hereunder shall at all times be reckoned with reference to the Contracted Capacity.

ARTICLE 14

ACCOUNTS AND AUDIT

14.1 Audited accounts

- 14.1.1 The Aggregator shall maintain books of accounts recording all its receipts (including Tariff, revenues from sale of power to the Utility, other Distribution Licensees and Buyers, and all incomes derived/collected by it from or on account of the Power Station and/or sale of electricity from the Power Station), income, expenditure, payments, assets and liabilities, in accordance with this Agreement, Good Industry Practice, Applicable Laws and Applicable Permits. The Aggregator shall provide 2 (two) copies of its Balance Sheet, Cash Flow Statement and Profit and Loss Account, along with a report thereon by its Statutory Auditors, within 90 (ninety) days of the close of the Accounting Year to which they pertain and such audited accounts, save and except where expressly provided to the contrary, shall form the basis of payments by either Party under this Agreement. The Utility shall have the right to inspect the records of the Aggregator during office hours and require copies of relevant extracts of books of accounts, duly certified by the Statutory Auditors, to be provided to the Utility for verification of basis of payments, and in the event of any discrepancy or error being found, the same shall be rectified and such rectified account shall form the basis of payments by either Party under this Agreement.
- 14.1.2 The Aggregator shall, within 30 (thirty) days of the close of each quarter of an Accounting Year, furnish to the Utility its unaudited financial results in respect of the preceding quarter, in the manner and form prescribed by the Securities and Exchange Board of India for publication of quarterly results by the companies listed on a stock exchange.
- 14.1.3 On or before the thirty-first day of May each Year, the Aggregator shall provide to the Utility, for the preceding Accounting Year, a statement duly audited by its Statutory Auditors giving summarised information on (a) receipts on account of Tariff, (b) revenues from sale of electricity to other Distribution Licensees and Buyers, and (c) such other information as the Utility may reasonably require.

14.2 Appointment of auditors

- 14.2.1 The Aggregator shall appoint, and have during the subsistence of this Agreement as its Statutory Auditors, a firm chosen by it and acceptable to the Utility. All fees and expenses of the Statutory Auditors shall be borne by the Aggregator.
- 14.2.2 The Aggregator may terminate the appointment of its Statutory Auditors after a notice of 45 (forty five) days to the Utility, subject to the replacement Statutory Auditors being appointed in the manner specified in Clause 14.2.1.
- 14.2.3 Notwithstanding anything to the contrary contained in this Agreement, the Utility shall have the right, but not the obligation, to appoint at its cost from time to time and at anytime, another firm (the “**Additional Auditors**”) of Chartered Accountants to audit and verify all those matters, expenses, costs, realisations and

things which the Statutory Auditors are required to do, undertake or certify pursuant to this Agreement.

14.3 Certification of claims by Statutory Auditors

Any claim or document provided by the Aggregator to the Utility in connection with or relating to receipts, income, payments, costs, expenses, accounts or audit, and any matter incidental thereto shall be valid and effective only if certified by its Statutory Auditors. For the avoidance of doubt, such certification shall not be required for exchange of information in the normal course of business.

14.4 Set-off

In the event any amount is due and payable by the Utility to the Aggregator, it may set-off any sums payable to it by the Aggregator and pay the balance remaining. Any exercise by the Utility of its rights under this Clause 14.4 shall be without prejudice to any other rights or remedies available to it under this Agreement or otherwise.

14.5 Dispute resolution

In the event of there being any difference between the findings of the Additional Auditors and the certification provided by the Statutory Auditors, such Auditors shall meet to resolve the differences and if they are unable to resolve the same, such Dispute shall be resolved by the Utility by recourse to the Dispute Resolution Procedure.

Part V
Force Majeure and Termination

ARTICLE 15

FORCE MAJEURE

15.1 Force Majeure

As used in this Agreement, the expression “**Force Majeure**” or “**Force Majeure Event**” shall, mean occurrence in India of any or all of Non-Political Event, Indirect Political Event and Political Event, as defined in Clauses 15.2, 15.3 and 15.4 respectively, if it affects the performance by the Utility (s) or the Aggregator claiming the benefit of Force Majeure (the “**Affected Party**”) of its obligations under this Agreement and which act or event (a) is beyond the reasonable control of the Affected Party, and (b) the Affected Party could not have prevented or overcome by exercise of due diligence and following Good Industry Practice, and (c) has Material Adverse Effect on the Affected Party.

15.2 Non-Political Event

A Non-Political Event shall mean one or more of the following acts or events:

- (a) act of God, epidemic, extremely adverse weather conditions, lightning, earthquake, landslide, cyclone, flood, volcanic eruption, chemical or radioactive contamination or ionising radiation, fire or explosion (to the extent of contamination or radiation or fire or explosion originating from a source external to the Station Premises);
- (b) strikes or boycotts (other than those involving the Aggregator, Contractors or their respective employees/representatives, or attributable to any act or omission of any of them) interrupting supplies and services to the Power Station for a continuous period of 24 (twenty four) hours and an aggregate period exceeding 7 (seven) days in an Accounting Year, and not being an Indirect Political Event set forth in Clause 15.3;
- (c) any failure or delay of a Contractor but only to the extent caused by another Non-Political Event and which does not result in any offsetting compensation being payable to the Aggregator by or on behalf of such Contractor;
- (d) any judgement or order of any court of competent jurisdiction or statutory authority made against the Aggregator in any proceedings for reasons other than (i) failure of the Aggregator to comply with any Applicable Law or Applicable Permit, or (ii) on account of breach of any Applicable Law or Applicable Permit or of any contract, or (iii) enforcement of this Agreement, or (iv) exercise of any of its rights under this Agreement by the Utility;
- (e) the discovery of geological conditions, toxic contamination or archaeological remains on the Station Premises that could not reasonably have been expected to be discovered through an inspection of the Station Premises; or

- (f) Any event of Force Majeure identified under the APPP between Aggregator and the Supplier thereby affecting supply of power from the Aggregator to the Utility shall be considered as Force Majeure event under this Agreement.
- (g) any event or circumstances of a nature analogous to any of the foregoing.

15.3 Indirect Political Event

An Indirect Political Event shall mean one or more of the following acts or events:

- (a) an act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, riot, insurrection, terrorist or military action, civil commotion or politically motivated sabotage;
- (b) any political or economic upheaval, disturbance, movement, struggle or similar occurrence which could not have been anticipated or foreseen by a prudent person and which causes the construction or operation of the Power Station to be financially unviable or otherwise not feasible;
- (c) industry-wide or State-wide strikes or industrial action for a continuous period of 24 (twenty four) hours and exceeding an aggregate period of 7 (seven) days in an Accounting Year;
- (d) any civil commotion, boycott or political agitation which prevents generation or transmission of electricity by the Aggregator for an aggregate period exceeding 7 (seven) days in an Accounting Year;
- (e) any Indirect Political Event that causes a Non-Political Event; or
- (f) any event or circumstances of a nature analogous to any of the foregoing.

15.4 Political Event

A Political Event shall mean one or more of the following acts or events by or on account of any Government Instrumentality:

- (a) Change in Law, only if consequences thereof cannot be dealt with under and in accordance with the provisions of Article 19 and its effect, in financial terms, exceeds the sum specified in Clause 19.1;
- (b) compulsory acquisition in national interest or expropriation of any Power Station Assets or rights of the Aggregator, or of the Contractors;
- (c) unlawful or unauthorised or without jurisdiction revocation of, or refusal to renew or grant without valid cause, any clearance, licence, permit, authorisation, no objection certificate, consent, approval or exemption required by the Aggregator, or any of the Contractors to perform their respective obligations under this Agreement and the Power Stations

Agreements; provided that such delay, modification, denial, refusal or revocation did not result from the Aggregator's, or any Contractor's inability or failure to comply with any condition relating to grant, maintenance or renewal of such clearance, licence, authorisation, no objection certificate, exemption, consent, approval or permit;

- (d) any event or circumstance of a nature analogous to any of the foregoing.

15.5 Duty to report Force Majeure Event

15.5.1 Upon occurrence of a Force Majeure Event, the Affected Party shall by notice report such occurrence to the other Party forthwith. Any notice pursuant hereto shall include full particulars of:

- (a) the nature and extent of each Force Majeure Event which is the subject of any claim for relief under this Article 15 with evidence in support thereof;
- (b) the estimated duration and the effect or probable effect which such Force Majeure Event is having or will have on the Affected Party's performance of its obligations under this Agreement;
- (c) the measures which the Affected Party is taking or proposes to take for alleviating the impact of such Force Majeure Event; and
- (d) any other information relevant to the Affected Party's claim.

15.5.2 The Affected Party shall not be entitled to any relief for or in respect of a Force Majeure Event unless it shall have notified the other Party of the occurrence of the Force Majeure Event as soon as reasonably practicable, and in any event no later than 7 (seven) days after the Affected Party knew, or ought reasonably to have known, of its occurrence, and shall have given particulars of the probable material effect that the Force Majeure Event is likely to have on the performance of its obligations under this Agreement.

15.5.3 For so long as the Affected Party continues to claim to be materially affected by such Force Majeure Event, it shall provide the other Party with regular (and not less than weekly) reports containing information as required by Clause 15.5.1, and such other information as the other Party may reasonably request the Affected Party to provide.

15.6 Effect of Force Majeure Event on the Procurement Contract

15.6.1 Upon the occurrence of any Force Majeure Event prior to the Appointed Date, the period set forth in Clause 4.1 for fulfilment of Conditions Precedent shall be extended by a period equal in length to the duration of the Force Majeure Event.

17.6.2 If any force Majeure Event occurs at any time after the Appointed Date, whereupon the Aggregator is unable to transmit electricity to the Drawal Point despite making best efforts or it is directed by the Utility, RLDC or SLDC or any Government Instrumentality to suspend generation or transmission during the subsistence of such Force Majeure Event, the Contract Period shall be extended by a period equal in length to the period during which the Aggregator

was prevented from generating or transmitting electricity on account thereof; provided that in the event of reduction in generation on account of partial inability or suspension, as the case may be, which cause the Availability on any day is to decline below 80% (eighty per cent) of the Normative Availability, the Utility shall extend the Contract Period in proportion to the loss of Availability due to Force Majeure. For the avoidance of doubt, loss of 25% (twenty five per cent) of Availability for 4 (four) days shall entitle the Aggregator to extension of 1 (one) day in the Contract Period.

15.7 Allocation of costs arising out of Force Majeure

15.7.1 Upon occurrence of a Force Majeure Event after the Appointed Date, the costs incurred and attributable to such event and directly relating to the Contracted Capacity of the Power Station (the “**Force Majeure Costs**”) shall be allocated and paid as follows:

- (a) upon occurrence of a Non-Political Event and Indirect Political Event, the Parties shall bear their respective Force Majeure Costs and neither Party shall be required to pay to the other Party any costs thereof; and
- (b) upon occurrence of a Political Event, all Force Majeure Costs attributable to such Political Event shall be reimbursed by the Utility to the Aggregator.

For the avoidance of doubt, Force Majeure Costs may include interest payments on debt, O&M Expenses and all other costs directly attributable to the Force Majeure Event, but shall not include loss of Tariff, revenues from sale of electricity to other Distribution Licensees and Buyers, or debt repayment obligations.

15.7.2 Notwithstanding anything contained in this Clause 15.7, if during the occurrence of a Force Majeure Event, the Contracted Capacity or part thereof is deemed Available in accordance with the provisions of Clause 5.1.4, the Utility shall not be liable to make any payments towards Force Majeure Costs in respect thereof to the Aggregator under this Clause 15.7.

15.7.3 Save and except as expressly provided in this Article 15, neither Party shall be liable to the other Party in respect of any loss, damage, cost, expense, claims, demands and proceedings relating to or arising out of occurrence or existence of any Force Majeure Event or exercise of any right pursuant hereto.

15.8 Termination Notice for Force Majeure Event

If a Force Majeure Event subsists for a period of 180 (one hundred and eighty) days or more within a continuous period of 365 (three hundred and sixty five) days, either Party may in its discretion terminate this Agreement by issuing a Termination Notice to the other Party without being liable in any manner whatsoever, save as provided in this Article 15, and upon issue of such Termination Notice, this Agreement shall, notwithstanding anything to the contrary contained herein, stand terminated forthwith; provided that before issuing such Termination Notice, the Party intending to issue the Termination

Notice shall inform the other Party of such intention and grant 15 (fifteen) days time to make a representation, and may after the expiry of such 15 (fifteen) days period, whether or not it is in receipt of such representation, in its sole discretion issue the Termination Notice.

15.9 Excuse from performance of obligations

If the Affected Party is rendered wholly or partially unable to perform its obligations under this Agreement because of a Force Majeure Event, it shall be excused from performance of such of its obligations to the extent it is unable to perform on account of such Force Majeure Event; provided that:

- (a) the suspension of performance shall be of no greater scope and of no longer duration than is reasonably required by the Force Majeure Event;
- (b) the Affected Party shall make all reasonable efforts to mitigate or limit damage to the other Party arising out of or as a result of the existence or occurrence of such Force Majeure Event and to cure the same with due diligence; and
- (c) when the Affected Party is able to resume performance of its obligations under this Agreement, it shall give to the other Party notice to that effect and shall promptly resume performance of its obligations hereunder.

15.10 Relief for Unforeseen Events

15.10.1 Upon occurrence of an unforeseen event, situation or similar circumstances not contemplated or referred to in this Agreement, and which could not have been foreseen by a prudent and diligent person (the “**Unforeseen Event**”), any Party may by notice inform the other Party of the occurrence of such Unforeseen Event with the particulars thereof and its effects on the costs, expense and revenues of the Power Station. Within 15 (fifteen) days of such notice, the Parties shall meet and make efforts in good faith to determine if such Unforeseen Event has occurred, and upon reaching agreement on accordance thereof deal with it in accordance with the provisions of this Clause 15.10.

15.10.2 Upon determination of the occurrence of an Unforeseen Event, the Parties shall make a reference to a conciliation tribunal which shall comprise one member each to be nominated by both Parties from among persons who have been Judges of a High Court and the conciliators so nominated shall choose a chairperson who has been a Judge of the Supreme Court or Chief Justice of a High Court.

15.10.3 The conciliation tribunal referred to in Clause 15.10.2 shall conduct its proceedings in accordance with the provisions of Article 21 as if it is an arbitration proceeding under that Article, save and except as provided in this Clause 15.10.

15.10.4 The conciliation tribunal referred to in this Clause 15.10 shall conduct preliminary proceedings to satisfy itself that -

- (a) an Unforeseen Event has occurred;
- (b) the effects of such Unforeseen Event cannot be mitigated without a remedy or relief which is not contemplated in the Agreement; and
- (c) the Unforeseen Event or its effects have not been caused by any Party by any act or omission or its part,

and if the conciliation tribunal is satisfied that each of the conditions specified hereinabove is fulfilled, it shall issue an order to this effect and conduct further proceedings under this Clause 15.10.

15.10.5 Upon completion of the conciliation proceedings referred to in this Clause 15.10, the conciliation tribunal may by a reasoned order make recommendations which shall be:

- (a) based on a fair and transparent justification;
- (b) no greater in scope than is necessary for mitigating the effects of the Unforeseen Event;
- (c) of no greater duration than is necessary for mitigating the effects of the Unforeseen Event; and
- (d) quantified and restricted in terms of relief or remedy.

15.10.6 Within 15 (fifteen) days of receiving the order referred to in Clause 15.10.5, the Parties shall meet and make efforts in good faith to accept, in whole or in part, the relief or remedy recommended by the conciliation tribunal for mitigating the effects of the Unforeseen Event and to procure implementation of the Supply of Electricity in accordance with the provisions of this Agreement. In pursuance hereof, the Parties may, enter into a Memorandum of Understanding (the “**MoU**”) setting forth the agreement reached hereunder, and the terms of such MoU shall have force and effect as if they form part of the Agreement.

ARTICLE 16

COMPENSATION FOR BREACH OF AGREEMENT

16.1 Compensation for default by the Aggregator

In the event of the Aggregator being in material breach or default of this Agreement, it shall, upon receipt of the demand supported by necessary particulars thereof, pay to the Utility by way of compensation, all direct costs suffered or incurred by the Utility as a consequence of such material breach or default; provided that no compensation shall be payable under this Clause 16.1 for any material breach or default in respect of which Damages are expressly specified and payable under this Agreement. For the avoidance of doubt, the Parties agree that the compensation payable under this Article 16 shall be in addition to, and not in substitution for, or derogation of, Termination Payment, if any. The Parties further agree that the non-defaulting Party shall make all reasonable efforts to mitigate or limit the costs and damage arising as a result of breach of Agreement by the other Party or for any consequential losses incurred by the Utility .

16.2 Compensation for default by the Utility

In the event of the Utility being in material breach or default of this Agreement at any time after the Appointed Date, it shall, upon receipt of the demand supported by necessary particulars thereof, pay to the Aggregator by way of compensation, all direct costs suffered or incurred by the Aggregator as a consequence of such material breach or default; provided that no such compensation shall be payable for any material breach or default in respect of which Damages have been expressly specified in this Agreement. For the avoidance of doubt, compensation payable may include interest payments on debt, O&M Expenses and all other costs directly attributable to such material breach or default but shall not include loss on account of Tariff, revenues from sale of electricity to other Distribution Licensees and Buyers, and other revenues, debt repayment obligations, or any consequential losses.

ARTICLE 17
TERMINATION

17.1 Termination for Aggregator Default

17.1.1 Subject to Applicable Laws and save as otherwise provided in this Agreement, in the event that any of the defaults specified below shall have occurred, and the Aggregator fails to cure the default within the Cure Period set forth below, or where no Cure Period is specified, then within a Cure Period of 90 (ninety) days, the Aggregator shall be deemed to be in default of this Agreement (the “**Aggregator Default**”), unless the default has occurred as a result of any breach of this Agreement by the Utility or due to Force Majeure. The defaults referred to herein shall include the following:

- (a) The Performance Security has been encashed and appropriated in accordance with Clause 9.2 and the Aggregator fails to replenish or provide fresh Performance Security within a Cure Period of 15 (fifteen) days;
- (b) subsequent to the replenishment or furnishing of fresh Performance Security in accordance with Clause 9.2, the Aggregator fails to meet any Condition Precedent or cure the Aggregator Default, as the case may be, for which whole or part of the Performance Security was appropriated, within a Cure Period of 120 (one hundred and twenty) days;
- (c) the Aggregator has failed to make any payment to the Utility within the period specified in this Agreement;
- (d) a breach of the Fuel Supply Agreement or any other Power Station Agreements by the Aggregator has caused a Material Adverse Effect;
- (e) the Aggregator creates any Encumbrance in breach of this Agreement;
- (f) the Aggregator repudiates this Agreement or otherwise takes any action or evidences or conveys an intention not to be bound by the Agreement and fails to pay Damages in accordance with the provisions of this Agreement;
- (g) the Aggregator schedules electricity, produced from Contracted Capacity, for sale to Buyers in breach of this Agreement and fails to pay Damages in accordance with the provisions of Clause 13.1.3;
- (h) a Change in Ownership has occurred in breach of the provisions of this Agreement;
- (i) the Aggregator fails to achieve a monthly Availability of 70% (seventy per cent) for a period of 4 (four) consecutive months or for a cumulative period of 4 (four) months within any continuous period of 12 (twelve) months, save and except to the extent of Non-Availability caused by (i) a Force Majeure Event, (ii) an act or omission of the Utility, not occurring due to any default of the Aggregator or (iii) shortage of Fuel occurring for reasons not attributable to the Aggregator;

- (j) there is a transfer, pursuant to law either of (i) the rights and/or obligations of the Aggregator under any of the Power Station Agreements, or of (ii) all or part of the assets or undertaking of the Aggregator, and such transfer causes a Material Adverse Effect;
- (k) an execution levied on any of the assets of the Aggregator has caused a Material Adverse Effect;
- (l) the Aggregator is adjudged bankrupt or insolvent, or if a trustee or receiver is appointed for the Aggregator or for the whole or material part of its assets that has a material bearing on the Power Station;
- (m) the Aggregator has been, or is in the process of being liquidated, dissolved, wound-up, amalgamated or reconstituted in a manner that would cause, in the reasonable opinion of the Utility, a Material Adverse Effect;
- (n) a resolution for winding up of the Aggregator is passed;
- (o) any petition for winding up of the Aggregator is admitted by a court of competent jurisdiction and a provisional liquidator or receiver is appointed and such order has not been set aside within 90 (ninety) days of the date thereof or the Aggregator is ordered to be wound up by a court except for the purpose of amalgamation or reconstruction; provided that, as part of such amalgamation or reconstruction, the entire property, assets and undertaking of the Aggregator are transferred to the amalgamated or reconstructed entity and that the amalgamated or reconstructed entity has unconditionally assumed the obligations of the Aggregator under this Agreement and the Power Station Agreements; and provided that:
 - (i) the amalgamated or reconstructed entity has the capability and operating experience necessary for the performance of its obligations under this Agreement and the Power Station Agreements;
 - (ii) the amalgamated or reconstructed entity has the financial standing to perform its obligations under this Agreement and the Power Station Agreements and has a credit worthiness at least as good as that of the Aggregator as at the Appointed Date;
 - (iii) each of the Power Station Agreements remains in full force and effect; and
 - (iv) such amalgamation or reconstruction is approved by the Commission.
- (p) any representation or warranty of the Aggregator herein contained which is, as of the date hereof, found to be materially false, incorrect or misleading or the Aggregator is at any time hereafter found to be in breach thereof;
- (q) the Aggregator submits to the Utility any statement, notice or other document, in written or electronic form, which has a material effect on the

Utility 's rights, obligations or interests and which is false in material particulars;

- (r) the Aggregator has failed to fulfil any obligation, for which failure Termination has been specified in this Agreement;
- (s) the Aggregator issues a Termination Notice in violation of the provisions of this Agreement; or
- (t) the Aggregator commits a default in complying with any other provision of this Agreement if such default causes or may cause a Material Adverse Effect on the Utility .

17.1.2 Without prejudice to any other rights or remedies which the Utility may have under this Agreement, upon occurrence of a Aggregator Default, the Utility shall be entitled to terminate this Agreement by issuing a Termination Notice to the Aggregator; provided that before issuing the Termination Notice, the Utility shall by a notice inform the Aggregator of its intention to issue such Termination Notice and grant 15 (fifteen) days to the Aggregator to make a representation, and may after the expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice.

17.2 Termination for Utility Default

17.2.1 In the event that any of the defaults specified below shall have occurred, and the Utility fails to cure such default within a Cure Period of 120 (one hundred and twenty) days or such longer period as has been expressly provided in this Agreement, the Utility shall be deemed to be in default of this Agreement (the “**Utility Default**”) unless the default has occurred as a result of any breach of this Agreement by the Aggregator or due to Force Majeure. The defaults referred to herein shall include the following:

- (a) The Utility commits a material default in complying with any of the provisions of this Agreement and such default has a Material Adverse Effect on the Aggregator;
- (b) the Utility has failed to make any payment to the Aggregator, and the Aggregator is unable to recover any unpaid amounts through the Letter of Credit, within the period specified in this Agreement; or
- (c) the Utility repudiates this Agreement or otherwise takes any action that amounts to or manifests an irrevocable intention not to be bound by this Agreement.

17.2.2 Without prejudice to any other right or remedy which the Aggregator may have under this Agreement, upon occurrence of a Utility Default, the Aggregator shall be entitled to terminate this Agreement by issuing a Termination Notice to the Utility ; provided that before issuing the Termination Notice, the Aggregator shall by a notice inform the Utility of its intention to issue the Termination Notice and grant 15 (fifteen) days to the Utility to make a representation, and may after the

expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice.

17.3 Termination Payment

- 17.3.1 Upon Termination on account of a Utility Default, the Utility shall pay to the Aggregator, by way of Termination Payment, an amount equal to the Tariff that would have been due and payable for Normative Availability for a period of 3 (three) months as if the Contracted Capacity was Available for such 3 (three) months from the date of Termination.
- 17.3.2 Upon Termination on account of a Aggregator Default, the Aggregator shall pay to the Utility, by way of Termination Payment, an amount equal to the Tariff that would have been due and payable for Normative Availability for a period of 3 (three) month as if the Contracted Capacity was Available for such 3 (three) months from the date of Termination.
- 17.3.3 Termination Payment shall be due and payable within 15 (fifteen) days of a demand being made with the necessary particulars, and in the event of any delay, the defaulting Party shall pay interest at a rate equal to 3% (three per cent) above the Bank Rate on the amount of Termination Payment remaining unpaid; provided that such delay shall not exceed 90 (ninety) days. For the avoidance of doubt, it is expressly agreed that Termination Payment shall constitute full discharge by the Utility of its payment obligations in respect thereof hereunder.
- 17.3.4 The Aggregator expressly agrees that Termination Payment under this Article 17 shall constitute a full and final settlement of all claims of the Aggregator on account of Termination of this Agreement for any reason whatsoever and that the Aggregator or any shareholder thereof shall not have any further right or claim under any law, treaty, convention, contract or otherwise.

17.4 Instructions to RLDC and SLDC

- 17.4.1 The Aggregator shall, prior to the Appointed Date, furnish a certified true copy of this Agreement to the RLDC and SLDC and obtain a receipt thereof. By furnishing such copy hereunder, the Aggregator shall be deemed to have given irrevocable instructions and authority to the RLDC and SLDC to follow the instructions of the Utility in accordance with the provisions of this Article 17. The Aggregator agrees and undertakes that it shall not in any manner challenge or revoke the provisions of this Article 16 or in any manner prevent the Utility, RLDC or SLDC from giving effect thereto.
- 17.4.2 The Utility agrees and undertakes to exercise its rights hereunder only to the extent of the Contracted Capacity and the Aggregator may supply electricity to Buyers in accordance with the provisions of this Agreement.

17.5 Survival of rights

Notwithstanding anything to the contrary contained in this Agreement, but subject to the provisions of Clause 17.3.4, any Termination pursuant to the provisions of this Agreement shall be without prejudice to the accrued rights of either Party

including its right to claim and recover money damages, insurance proceeds, security deposits, and other rights and remedies, which it may have in law or contract. All rights and obligations of either Party under this Agreement, including Termination Payments, shall survive the Termination to the extent such survival is necessary for giving effect to such rights and obligations.

- 17.6 The expiry of this Agreement on account of efflux of time or earlier Termination thereof shall lead to the automatic termination of Fuel Supply Agreement in accordance with the terms thereof.

Part VI
Other Provisions

ARTICLE 18

ASSIGNMENT AND CHARGES

18.1 Restrictions on assignment and charges

- 18.1.1 Subject to Clauses 18.2 and 18.3, this Agreement shall not be assigned by the Aggregator to any person, save and except with the prior consent in writing of the Utility, which consent the Utility shall be entitled to decline without assigning any reason.
- 18.1.2 Subject to the provisions of Clause 18.2, the Aggregator shall not create nor permit to subsist any Encumbrance, or otherwise transfer or dispose of all or any of its rights and benefits under this Agreement or any Power Station Agreement to which the Aggregator is a party, except with prior consent in writing of the Utility, which consent the Utility shall be entitled to decline without assigning any reason.

18.2 Permitted assignment and charges

The restraints set forth in Clause 18.1 shall not apply to:

- (a) liens arising by operation of law (or by an agreement evidencing the same) in the ordinary course of business of the Power Station;
- (b) mortgages/pledges/hypothecation of Power Station Assets and their related documents of title, arising or created in the ordinary course of business of the Power Station, and as security only for indebtedness to its Lenders and/or for working capital arrangements for the Power Station;
- (c) assignment of rights, interest and obligations of the Aggregator to or in favour of its as security for financing provided by them; and
- (d) liens or encumbrances required by any Applicable Law.

18.3 Assignment by the Utility

Notwithstanding anything to the contrary contained in this Agreement, the Utility may, after giving 60 (sixty) days' notice to the Aggregator, assign and/ or transfer any of its rights and benefits and/or obligations under this Agreement to an assignee who is, in the reasonable opinion of the Utility, capable of fulfilling all of the Utility's then outstanding obligations under this Agreement and has the financial standing necessary for this purpose.

18.4 Approvals for assignment

Any assignment under this Article 18 shall be subject to the approvals and consents required therefor under Applicable Laws, including approval of the Commission. Provided, however, that the grant of any consent or approval under Applicable Laws shall not oblige the Utility to grant its approval to such assignment, save and except as provided herein.

ARTICLE 19
CHANGE IN LAW

19.1 Effect of Change in Law

19.1.1. Change in Law shall mean any change in taxes (excluding taxes on corporate income), duties, cess or introduction of any tax, duty, cess made applicable for supply of power by the Supplier, after the date of submission of bid.

19.1.2 The determination of compensation for any increase or decrease in expenses to the Supplier on account of Change in Law and the date from which such compensation shall become effective shall be decided by the Appropriate Commission, which shall be final and binding on both the Parties, subject to right of appeal provided under applicable Law.

19.1.3 The payment for Change in Law shall be through Supplementary Bills.

19.2 Restriction on cash compensation

The Parties acknowledge and agree that the demand for cash compensation under this Article 19 shall be restricted to the effect of Change in Law during the respective Accounting Year and shall be made at any time after commencement of such year, but no later than one year from the close of such Accounting Year. Any demand for cash compensation payable for and in respect of any subsequent Accounting Year shall be made after the commencement of the Accounting Year to which the demand pertains, but no later than 2 (two) years from the close of such Accounting Year.

19.3 No claim in the event of recovery from Buyers

Notwithstanding anything to the contrary contained in this Agreement, the Utility shall not in any manner be liable to reimburse to the Aggregator any sums on account of a Change in Law if the same are recoverable from the Buyers.

ARTICLE 20
LIABILITY AND INDEMNITY

20.1 General indemnity

20.1.1 The Aggregator shall indemnify, defend, save and hold harmless the Utility and its officers, servants, agents, Government Instrumentalities and Utility owned and/or controlled entities/enterprises, (the “**Utility Indemnified Persons**”) against any and all suits, proceedings, actions, demands and claims from third parties for any loss, damage, cost and expense of whatever kind and nature, whether arising out of any breach by the Aggregator of any of its obligations under this Agreement or any related agreement or on account of any defect or deficiency in the provision of services to the Utility or sale by the Aggregator to any Buyer or from any negligence of the Aggregator under contract or tort or on any other ground whatsoever, except to the extent that any such suits, proceedings, actions, demands and claims have arisen due to any negligent act or omission, or breach or default of this Agreement on the part of the Utility Indemnified Persons.

20.1.2 The Utility shall indemnify, defend, save and hold harmless the Aggregator against any and all suits, proceedings, actions, demands and claims from third parties for any loss, damage, cost and expense of whatever kind and nature arising out of breach by the Utility of any of its obligations under this Agreement or any related agreement, which materially and adversely affect the performance by the Aggregator of its obligations under this Agreement, save and except that where any such claim, suit, proceeding, action, and/or demand has arisen due to a negligent act or omission, or breach of any of its obligations under any provision of this Agreement or any related agreement and/or breach of its statutory duty on the part of the Aggregator, its subsidiaries, affiliates, contractors, servants or agents, the same shall be the liability of the Aggregator.

20.2 Indemnity by the Aggregator

20.2.1 Without limiting the generality of Clause 20.1, the Aggregator shall fully indemnify, hold harmless and defend the Utility and the Utility Indemnified Persons from and against any and all loss and/or damages arising out of or with respect to:

- (a) failure of the Aggregator to comply with Applicable Laws and Applicable Permits;
- (b) payment of taxes required to be made by the Aggregator in respect of the income or other taxes of the Aggregator’s contractors, suppliers and representatives; or
- (c) non-payment of amounts due as a result of materials or services furnished to the Aggregator or any of its contractors which are payable by the Aggregator or any of its contractors.

20.2.2 Without limiting the generality of the provisions of this Article 20, the Aggregator shall fully indemnify, hold harmless and defend the Utility Indemnified Persons from and against any and all suits, proceedings, actions, claims, demands, liabilities and damages which the Utility Indemnified Persons may hereafter suffer, or pay by reason of any demands, claims, suits or proceedings arising out of claims of infringement of any domestic or foreign patent rights, copyrights or other intellectual property, proprietary or confidentiality rights with respect to any materials, information, design or process used by the Aggregator or by the Aggregator's Contractors in performing the Aggregator's obligations or in any way incorporated in or related to the Supply of Electricity. If in any such suit, action, claim or proceedings, a temporary restraint order or preliminary injunction is granted, the Aggregator shall make every reasonable effort, by giving a satisfactory bond or otherwise, to secure the revocation or suspension of the injunction or restraint order. If, in any such suit, action, claim or proceedings, the Power Station, or any part thereof or comprised therein, is held to constitute an infringement and its use is permanently enjoined, the Aggregator shall promptly make every reasonable effort to secure for the Utility a licence, at no cost to the Utility, authorising continued use of the infringing work. If the Aggregator is unable to secure such licence within a reasonable time, the Aggregator shall, at its own expense, and without impairing the Specifications and Standards, either replace the affected work, or part, or process thereof with non-infringing work or part or process, or modify the same so that it becomes non-infringing.

20.3 Notice and contest of claims

In the event that either Party receives a claim or demand from a third party in respect of which it is entitled to the benefit of an indemnity under this Article 20 (the “**Indemnified Party**”) it shall notify the other Party (the “**Indemnifying Party**”) within 15 (fifteen) days of receipt of the claim or demand and shall not settle or pay the claim without the prior approval of the Indemnifying Party, which approval shall not be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or dispute the claim or demand, it may conduct the proceedings in the name of the Indemnified Party, subject to the Indemnified Party being secured against any costs involved, to its reasonable satisfaction.

20.4 Defence of claims

20.4.1 The Indemnified Party shall have the right, but not the obligation, to contest, defend and litigate any claim, action, suit or proceeding by any third party alleged or asserted against such Party in respect of, resulting from, related to or arising out of any matter for which it is entitled to be indemnified hereunder, and reasonable costs and expenses thereof shall be indemnified by the Indemnifying Party. If the Indemnifying Party acknowledges in writing its obligation to indemnify the Indemnified Party in respect of loss to the full extent provided by this Article 20, the Indemnifying Party shall be entitled, at its option, to assume and control the defence of such claim, action, suit or proceeding, liabilities, payments and obligations at its expense and through the counsel of its choice; provided it gives prompt notice of its intention to do so to the Indemnified Party and reimburses the Indemnified Party for the reasonable cost and expenses incurred by the Indemnified Party prior to the assumption by the Indemnifying

Party of such defence. The Indemnifying Party shall not be entitled to settle or compromise any claim, demand, action, suit or proceeding without the prior written consent of the Indemnified Party, unless the Indemnifying Party provides such security to the Indemnified Party as shall be reasonably required by the Indemnified Party to secure the loss to be indemnified hereunder to the extent so compromised or settled.

20.4.2 If the Indemnifying Party has exercised its rights under Clause 20.3, the Indemnified Party shall not be entitled to settle or compromise any claim, action, suit or proceeding without the prior written consent of the Indemnifying Party (which consent shall not be unreasonably withheld or delayed).

20.4.3 If the Indemnifying Party exercises its rights under Clause 20.3, the Indemnified Party shall nevertheless have the right to employ its own counsel, and such counsel may participate in such action, but the fees and expenses of such counsel shall be at the expense of the Indemnified Party, when and as incurred, unless:

- (a) the employment of counsel by such party has been authorised in writing by the Indemnifying Party;
- (b) the Indemnified Party shall have reasonably concluded that there may be a conflict of interest between the Indemnifying Party and the Indemnified Party in the conduct of the defence of such action;
- (c) the Indemnifying Party shall not, in fact, have employed independent counsel reasonably satisfactory to the Indemnified Party, to assume the defence of such action and shall have been so notified by the Indemnified Party; or
- (d) the Indemnified Party shall have reasonably concluded and specifically notified the Indemnifying Party either:
 - (i) that there may be specific defences available to it which are different from or additional to those available to the Indemnifying Party; or
 - (ii) that such claim, action, suit or proceeding involves or could have a material adverse effect upon it beyond the scope of this Agreement:

Provided that if Sub-clauses (b), (c) or (d) of this Clause 20.4.3 shall be applicable, the counsel for the Indemnified Party shall have the right to direct the defence of such claim, demand, action, suit or proceeding on behalf of the Indemnified Party, and the reasonable fees and disbursements of such counsel shall constitute legal or other expenses hereunder.

20.5 No consequential claims

Notwithstanding anything to the contrary contained in this Article 20, the indemnities herein provided shall not include any claim or recovery in respect of any cost, expense, loss or damage of an indirect, incidental or consequential nature, including loss of profit, except as expressly provided in this Agreement.

ARTICLE 21

DISPUTE RESOLUTION

21.1 Dispute resolution

- 21.1.1 Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the “**Dispute**”) shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 21.2.
- 21.1.2 The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.

21.2 Conciliation

In the event of any Dispute between the Parties, either Party may require such Dispute to be referred to the Managing Director of the Utility, Chairman of the Board of Directors of the Aggregator for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 7 (seven) day period or the Dispute is not amicably settled within 15 (fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 21.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 21.3.

21.3 Arbitration

- 21.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 21.2, and is not required under Applicable Laws to be adjudicated or referred to arbitration by the Commission, shall be finally decided by reference to arbitration by an arbitral tribunal constituted in accordance with Clause 21.3.2. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the “**Rules**”), or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration and Conciliation Act, 1996. The place of such arbitration shall be the capital of the State and the language of arbitration proceedings shall be English.
- 21.3.2 There shall be an arbitral tribunal comprising three arbitrators, of whom each Party shall select one, and the third arbitrator shall be appointed by the two arbitrators so selected, and in the event of disagreement between the two arbitrators, the appointment shall be made in accordance with the Rules.
- 21.3.3 The arbitral tribunal shall make a reasoned award (the “**Award**”). Any Award made in any arbitration held pursuant to this Article 21 shall be final and binding

on the Parties as from the date it is made, and the Aggregator and the Utility agree and undertake to carry out such Award without delay.

21.3.4 The Aggregator and the Utility agree that an Award may be enforced against the Aggregator and/or the Utility, as the case may be, and their respective assets wherever situated.

21.3.5 This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder.

21.4 Adjudication by the Commission

21.4.1 In the event a Dispute is required under Applicable Laws to be adjudicated upon by the Commission, such Dispute shall, instead of reference to arbitration under Clause 21.3, be submitted for adjudication by the Commission in accordance with Applicable Laws and all references to Dispute Resolution Procedure shall be construed accordingly. For the avoidance of doubt, the Parties hereto agree that the adjudication hereunder shall not be final and binding until an appeal, if any, against such adjudication has been decided by the appellate tribunal, or no such appeal has been preferred within the time specified in the Applicable Law.

21.4.2 Where any dispute is referred by the Commission to be settled through arbitration, the procedure specified in Clause 21.3 shall be followed to the extent applicable.

21.5 Adjudication by a tribunal

In the event of constitution of a statutory tribunal with powers to adjudicate upon disputes between the Aggregator and the Utility, all Disputes arising after such constitution shall, instead of reference to arbitration or adjudication under Clauses 21.3 and 21.4 respectively, be adjudicated upon by such tribunal in accordance with Applicable Laws and all references to Dispute Resolution Procedure shall be construed accordingly.

ARTICLE 22

DISCLOSURE

22.1 Disclosure of Specified Documents

The Aggregator shall make available for inspection by any person, copies of this Agreement (hereinafter collectively referred to as the “**Specified Documents**”), free of charge, during normal business hours on all working days at the Aggregator’s Registered Office and the Power Station and shall provide copies of the same to any person upon payment of copying charges on a ‘no profit no loss’ basis.

22.2 Disclosure of Documents relating to safety

The Aggregator shall make available for inspection by any person copies of all Documents and data relating to safety of the Power Station, free of charge, during normal business hours on all working days, at the Aggregator’s Registered Office and the Power Station. The Aggregator shall make copies of the same available to any person upon payment of copying charges on a ‘no profit no loss’ basis.

22.3 Withholding disclosure of Protected Documents

Notwithstanding the provisions of Clauses 22.1 and 22.2, but subject to Applicable Laws, the Utility shall be entitled to direct the Aggregator, from time to time, to withhold the disclosure of Protected Documents (as defined herein below) to any person in pursuance of the aforesaid Clauses.

Explanation:

The expression Protected Documents shall mean such of the Specified Documents or documents referred to in Clauses 22.1 and 22.2, or portions thereof, the disclosure of which the Utility is entitled to withhold under the provisions of the Right to Information Act, 2005.

ARTICLE 23
MISCELLANEOUS

23.1 Governing law and jurisdiction

This Agreement shall be construed and interpreted in accordance with and governed by the laws of India, and the courts in the State shall have exclusive jurisdiction over matters arising out of or relating to this Agreement.

23.2 Waiver of immunity

Each Party unconditionally and irrevocably:

- (a) agrees that the execution, delivery and performance by it of this Agreement constitute commercial acts done and performed for commercial purpose;
- (b) agrees that, should any proceedings be brought against it or its assets, property or revenues in any jurisdiction in relation to this Agreement or any transaction contemplated by this Agreement, no immunity (whether by reason of sovereignty or otherwise) from such proceedings shall be claimed by or on behalf of the Party with respect to its assets;
- (c) waives any right of immunity which it or its assets, property or revenues now has, may acquire in the future or which may be attributed to it in any jurisdiction; and
- (d) consents generally in respect of the enforcement of any judgement or award against it in any such proceedings to the giving of any relief or the issue of any process in any jurisdiction in connection with such proceedings (including the making, enforcement or execution against it or in respect of any assets, property or revenues whatsoever irrespective of their use or intended use of any order or judgement that may be made or given in connection therewith).

23.3 Interest

Unless otherwise specified, any interest payable under this Agreement shall accrue on a daily outstanding basis and shall be compounded on the basis of quarterly rests.

23.4 Delayed payments

The Parties hereto agree that payments due from one Party to the other Party under the provisions of this Agreement shall be made within the period set forth therein, and if no such period is specified, within 30 (thirty) days of receiving a demand along with the necessary particulars. Unless otherwise specified in this Agreement, in the event of delay beyond such period, the defaulting Party shall pay interest for the period of delay calculated at a rate equal to 5% (five per cent) above the Bank Rate, and recovery thereof shall be without prejudice to the rights of the Parties under this Agreement including Termination thereof.

23.5 Waiver

23.5.1 Waiver, including partial or conditional waiver, by either Party of any default by the other Party in the observance and performance of any provision of or obligations under this Agreement:

- (a) shall not operate or be construed as a waiver of any other or subsequent default hereof or of other provisions of or obligations under this Agreement;
- (b) shall not be effective unless it is in writing and executed by a duly authorised representative of the Party; and
- (c) shall not affect the validity or enforceability of this Agreement in any manner.

23.5.2 Neither the failure by either Party to insist on any occasion upon the performance of the terms, conditions and provisions of this Agreement or any obligation thereunder nor time or other indulgence granted by a Party to the other Party shall be treated or deemed as waiver of such breach or acceptance of any variation or the relinquishment of any such right hereunder.

23.6 Exclusion of implied warranties etc.

This Agreement expressly excludes any warranty, condition or other undertaking implied at law or by custom or otherwise arising out of any other agreement between the Parties or any representation by either Party not contained in a binding legal agreement executed by both Parties.

23.7 Survival

23.7.1 Termination shall:

- (a) not relieve the Aggregator or the Utility , as the case may be, of any obligations hereunder which expressly or by implication survive Termination hereof, including any rights and obligations under Article 20; and
- (b) except as otherwise provided in any provision of this Agreement expressly limiting the liability of either Party, not relieve either Party of any obligations or liabilities for loss or damage to the other Party arising out of, or caused by, acts or omissions of such Party prior to the effectiveness of such Termination or arising out of such Termination.

23.7.2 All obligations surviving Termination shall only survive for a period of 3 (three) years following the date of such Termination.

23.8 Entire Agreement

This Agreement and the Schedules together constitute a complete and exclusive statement of the terms of the agreement between the Parties on the subject hereof, and no amendment or modification hereto shall be valid and effective unless such

modification or amendment is agreed to in writing by the Parties and duly executed by persons especially empowered in this behalf by the respective Parties. All prior written or oral understandings, offers or other communications of every kind pertaining to this Agreement are abrogated and withdrawn. For the avoidance of doubt, the Parties hereto agree that any obligations of the Aggregator arising from the Request for Qualification or Request for Proposals, as the case may be, shall be deemed to form part of this Agreement and treated as such.

23.9 Severability

If for any reason whatsoever, any provision of this Agreement is or becomes invalid, illegal or unenforceable or is declared by any court of competent jurisdiction or any other instrumentality to be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not be affected in any manner, and the Parties will negotiate in good faith with a view to agreeing to one or more provisions which may be substituted for such invalid, unenforceable or illegal provisions, as nearly as is practicable to such invalid, illegal or unenforceable provision. Failure to agree upon any such provisions shall not be subject to the Dispute Resolution Procedure set forth under this Agreement or otherwise.

23.10 No partnership

This Agreement shall not be interpreted or construed to create an association, joint venture or partnership between the Parties, or to impose any partnership obligation or liability upon either Party, and neither Party shall have any right, power or authority to enter into any agreement or undertaking for, or act on behalf of, or to act as or be an agent or representative of, or to otherwise bind, the other Party.

23.11 Third parties

This Agreement is intended solely for the benefit of the Parties, and their respective successors and permitted assigns, and nothing in this Agreement shall be construed to create any duty to, standard of care with reference to, or any liability to, any person not a Party to this Agreement.

23.12 Successors and assigns

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

23.13 Notices

Any notice or other communication to be given by any Party to the other Party under or in connection with the matters contemplated by this Agreement shall be in writing and shall:

- (a) in the case of the Aggregator, be given by facsimile or e-mail and by letter delivered by hand to the address given and marked for attention of the

person set out below or to such other person as the Aggregator may from time to time designate by notice to the Utility ; provided that notices or other communications to be given to an address outside the city specified in Sub-clause (b) below may, if they are subsequently confirmed by sending a copy thereof by registered acknowledgement due, or by courier, be sent by facsimile or e-mail to the number as the Aggregator may from time to time designate by notice to the Utility .

{ Attention:
Designation:
Address:
Fax No:
Email: }

- (b) in the case of the Utility , be given by facsimile or e-mail and by letter delivered by hand at the address given and marked to the attention of the person set out below with a copy delivered to the Utility Representative or such other person as the Utility may from time to time designate by notice to the Aggregator; provided that if the Aggregator does not have an office in the same city as the Utility , it may send such notice by facsimile or e-mail and by registered acknowledgement due, or by courier.

{ Name:
Designation:
Address:
Fax No:
Email: } ; and

- (c) any notice or communication by a Party to the other Party, given in accordance herewith, shall be deemed to have been delivered when in the normal course of post it ought to have been delivered and in all other cases, it shall be deemed to have been delivered on the actual date of delivery; provided that in the case of facsimile or e-mail, it shall be deemed to have been delivered on the working day following the date of its delivery.

23.14 Language

All notices required to be given by one Party to the other Party and all other communications, Documentation and proceedings which are in any way relevant to this Agreement shall be in writing and in English language.

23.15 Counterparts

This Agreement may be executed in two counterparts, each of which, when executed and delivered, shall constitute an original of this Agreement.

ARTICLE 24

DEFINITIONS

24.1 Definitions

In this Agreement, the following words and expressions shall, unless repugnant to the context or meaning thereof, have the meaning hereinafter respectively assigned to them:

“Accounting Year” means the financial year commencing from the first day of April of any calendar year and ending on the thirty-first day of March of the next calendar year;

“Act” means the Electricity Act, 2003;

“Affected Party” shall have the meaning as set forth in Clause 15.1;

“Agreement” or **“Pilot Power Supply Agreement-II”** or **“PSAP-II”** means this Agreement, its Recitals, the Schedules hereto and any amendments thereto made in accordance with the provisions contained in this Agreement;

“Applicable Laws” means all laws, brought into force and effect by GOI or the State Government including rules, regulations and notifications made thereunder, and judgements, decrees, injunctions, writs and orders of any court of record, applicable to this Agreement and the exercise, performance and discharge of the respective rights and obligations of the Parties hereunder, as may be in force and effect during the subsistence of this Agreement;

“Applicable Permits” means all clearances, licences, permits, authorisations, no objection certificates, consents, approvals and exemptions required to be obtained or maintained under Applicable Laws in connection with the construction, operation and maintenance of the Power Station during the subsistence of this Agreement;

“Appointed Date” means the date on which all the Conditions Precedent are achieved and every Condition Precedent is either satisfied or waived, as the case may be, in accordance with the provisions of this Agreement, and such date shall be the date of commencement of the Contract Period;

“Affiliate” means, in relation to either Party, a person who controls, is controlled by, or is under the common control with such Party (as used in this definition, the expression “control” means, with respect to a person which is a company or corporation, the ownership, directly or indirectly, of more than 50% (fifty per cent) of the voting shares of such person, and with respect to a person which is not a company or corporation, the power to direct the management and policies of such person, whether by operation of law or by contract or otherwise);

“Availability” shall have the meaning as set forth in Clause 5.1.4 and the term **“Available”** shall be construed accordingly;

“Bank Rate” means the rate of interest specified by the Reserve Bank of India from time to time in pursuance of section 49 of the Reserve Bank of India Act, 1934 or any replacement of such Bank Rate for the time being in effect;

“Base Year” means the Accounting Year in which the Bid was received;

“Bid” means the documents in their entirety comprised in the bid submitted by the Supplier in response to the Request for Proposals in accordance with the provisions thereof and **“Bids”** shall mean the bids submitted by any and all pre-qualified bidders;

“Bid Date” means the last date on which the Bid may have been submitted in accordance with the provisions of the Request for Proposals;

“Buyer(s)” shall mean the third parties buying electricity from the Power Station, in accordance with the provisions of this Agreement and Applicable Laws;

“Capacity Certificate” means the certificate issued by an experienced and qualified firm of technical consultants certifying the installed capacity, plant configuration and other principal parameters of the Power Station;

“Change in Law” means the occurrence of any of the following after the Bid Date:

- (a) the enactment of any new Indian law;
- (b) the repeal, modification or re-enactment of any existing Indian law;
- (c) the commencement of any Indian law which has not entered into effect until the Bid Date;
- (d) a change in the interpretation or application of any Indian law by a judgement of a court of record which has become final, conclusive and binding, as compared to such interpretation or application by a court of record prior to the Bid Date; or
- (e) any change in the rates of any of the Taxes that have a direct effect on the Supply of Electricity;

“Change in Ownership” means a transfer of the direct and/or indirect legal or beneficial ownership of any shares, or securities convertible into shares, that causes the aggregate holding of the promoters in the total Equity to decline, at any time prior to the 1st (first) anniversary of the Appointed Date, below 51% (fifty one per cent) thereof, or such lower proportion as may be permitted by the Utility upon substitution of the promoters of the Aggregator by an entity having sufficient financial and technical capacity to discharge the obligations of the Aggregator under this Agreement;

“Commission” means the Appropriate Electricity Regulatory Commission or any successor thereof duly constituted under the Act;

“Conditions Precedent” shall have the meaning as set forth in Clause 4.1.1;

“Contract Period” means the period starting on and from the Appointed Date and ending on the earlier of the 3rd (third) anniversary of the Appointed Date and the date of termination of the Agreement;

“Contracted Capacity” shall have the meaning as set forth in Clause 10.1;

“Cure Period” means the period specified in this Agreement for curing any breach or default of any provision of this Agreement by the Party responsible for such breach or default and shall:

- (a) commence from the date on which a notice is delivered by one Party to the other Party asking the latter to cure the breach or default specified in such notice; and
- (b) not relieve any Party from liability to pay Damages or compensation under the provisions of this Agreement; and

provided that if the cure of any breach by the Aggregator requires any reasonable action by the Aggregator that must be approved by the Utility hereunder, the applicable Cure Period shall be extended by the period taken by the Utility or the to accord their approval;

“Damages” shall have the meaning as set forth in Sub-clause (y) of Clause 1.2.1;

“Delivery Point” means nearest interconnection point of the Power Station with the CTU System i.e. point of grid connection;

“Despatch” shall have the meaning as set forth in Clause 13.1.1;

“Dispute” shall have the meaning as set forth in Clause 21.1.1;

“Disputed Amounts” shall have the meaning as set forth in Clause 11.5.3;

“Dispute Resolution Procedure” means the procedure for resolution of Disputes as set forth in Article 21;

“Distribution Licensee” means a person who has been granted a licence under section 14 of the Electricity Act, 2003 to distribute electricity as a distribution licensee;

“Document” or **“Documentation”** means documentation in printed or written form, or in tapes, discs, drawings, computer programmes, writings, reports, photographs, films, cassettes, or expressed in any other written, electronic, audio or visual form;

“Drawal Point” means interconnection point of the Utility STU transmission system with CTU transmission system;

“Equity” means the sum expressed in Indian Rupees representing the paid up equity share capital of the Aggregator for meeting the equity component of the Power Station Cost, and for the purposes of this Agreement shall include convertible instruments or other similar forms of capital, which shall compulsorily convert into equity share capital of the Aggregator, and any interest-free funds advanced by any shareholder of the Aggregator for meeting such equity component;

“Force Majeure” or **“Force Majeure Event”** shall have the meaning ascribed to it in Clause 15.1;

“GOI” means the Government of India;

“Good Industry Practice” means the practices, methods, techniques, designs, standards, skills, diligence, efficiency, reliability and prudence which are generally and reasonably expected from a reasonably skilled and experienced operator engaged in the same type of undertaking as envisaged under this Agreement and which would be expected to result in the performance of its obligations by the Aggregator in accordance with this Agreement, Applicable Laws and Applicable Permits in reliable, safe, economical and efficient manner, and includes prudent utility practices generally accepted by electricity generating stations for ensuring safe, economic and efficient construction, operation and maintenance of the Power Station and for providing safe, economic, reliable and efficient supply of electricity;

“Government” means the Government of India or the Government of the State, as the case may be;

“Government Instrumentality” means any department, division or sub-division of the Government of India or the State Government and includes any commission, board, authority, agency or municipal and other local authority or statutory body, including Panchayat, under the control of the Government of India or the State Government, as the case may be, and having jurisdiction over all or any part of the Power Station or the performance of all or any of the services or obligations of the Aggregator under or pursuant to this Agreement;

“Grid” means the high voltage backbone system of inter-connected transmission lines and sub-stations;

“Grid Code” means the Indian Electricity Grid Code 2010 or any substitute thereof;

“Incentive” means a payment due to the Aggregator, in accordance with the provisions of this Agreement, for any delivery, performance or outcome, as the case may be, which is better than the standards specified in respect thereof;

“Indemnified Party” means the Party entitled to the benefit of an indemnity pursuant to Article 20;

“Indemnifying Party” means the Party obligated to indemnify the other Party pursuant to Article 20;

“Indirect Political Event” shall have the meaning as set forth in Clause 15.3;

“LOA” or **“Letter of Award”** means the letter of award referred to in Recital (D);

“Letter of Credit” shall have the meaning as set forth in Clause 12.1.1;

“Material Adverse Effect” means a material adverse effect of any act or event on the ability of either Party to perform any of its obligations under and in accordance with the provisions of this Agreement and which act or event causes a material financial burden or loss to either Party;

“Mis-declaration” shall have the meaning as set forth in Clause 11.4.4;

“Monthly Invoice” shall have the meaning as set forth in Clause 11.8.1;

“Non-Availability” means any partial or total lack of Availability for any other reason;

“Non-Political Event” shall have the meaning as set forth in Clause 15.2;

“Normative Availability” shall have the meaning as set forth in Clause 5.1.4;

“Parties” means the parties to this Agreement collectively and **“Party”** shall mean any of the parties to this Agreement individually;

“Payment Due Date” shall have the meaning as set forth in Clause 11.8.3;

“Performance Security” shall have the meaning as set forth in Clause 9.1;

“Point of Grid Connection” means the point of interconnection at which the electricity generated by the Power Station is transferred to the Grid;

“Political Event” shall have the meaning as set forth in Clause 15.4;

“Agreement for Power Purchase under Pilot scheme-II” or **“APPP-II”** shall mean the back to back arrangement for supply of power between the Aggregator and the Supplier from the Power Station;

“Power Station” means the generating station or a Unit thereof, and shall include the Dedicated Transmission System, Power Station Assets, Power Station Facilities; and the construction, operation and maintenance of the Power Station in accordance with the provisions of this Agreement, and includes all works, services and equipment relating to or in respect of the Scope of the Agreement

“Power Station Agreements” means this Agreement, Fuel Supply Agreement, O&M contract and any other material agreements or contracts that may be entered into by the Supplier with any person in connection with matters relating to, arising out of or incidental to the Power Station;

“Power Station Assets” means all physical and other assets relating to and forming part of the Power Station including:

- (a) rights over the Station Premises in the form of licence or otherwise;
- (b) tangible assets such as civil works and equipment including foundations, embankments, pavements, electrical systems, communication systems, relief centres, administrative offices and Sub-stations;
- (c) all rights of the Supplier under the Power Station Agreements;
- (d) financial assets, such as receivables, security deposits etc.;
- (e) insurance proceeds; and
- (f) Applicable Permits and authorisations relating to or in respect of the Power Station;

“Procurement Contract” shall have the meaning as set forth in Clause 3.1.1;

“RLDC” means the Regional load Despatch Centre as specified in the Act;

“Re.”, “Rs.” or “Rupees” or “Indian Rupees” means the lawful currency of the Republic of India;

“Revenues” means all of the present and future funds, payment obligations, monies, claims, bills and any other property whatsoever which may from time to time be derived from or accrue to or be offered or due to the Utility in the form of cash receipts or receivables from any and all sources, save and except any capital receipts of the Utility for and in relation to any capital expenditure for creation of assets;

“SLDC” means the State Load Despatch Centre as specified in the Act;

“Scope of the Agreement” shall have the meaning as set forth in Clause 2.1;

“Secured Obligations” means:

- (a) the amounts due to the Default Escrow Bank from the Utility in relation to the Letter of Credit;
- (b) obligations of the Utility for payment of Tariff and Incentives under and in accordance with this Agreement; and
- (c) obligation of the Utility to make Termination Payment under and in accordance with this Agreement upon termination thereof;

“Specifications and Standards” means the specifications and standards relating to the quality, quantity, capacity and other requirements for the Power Station, as set forth in the rules and regulations made under the Act;

“State” means the State or the Union Territory, as the case may be, in which the headquarters of the Utility is situate and **“State Government”** means the government of that State or Union Territory;

“Station Premises” shall mean and include the site, real estate, assets, equipments, facilities and amenities comprising the Power Station;

“Aggregator” shall have the meaning attributed thereto in the array of Parties as set forth in the Recitals;

“Aggregator Default” shall have the meaning as set forth in Clause 17.1.1;

“Tariff” shall have the meaning as set forth in Clause 11.1.1;

“Taxes” means any Indian taxes (whether Central, State or local) on the goods, materials, equipment and services incorporated in and forming part of the Power Station charged, levied or imposed by any Government Instrumentality, but excluding any interest, penalties and other sums in relation thereto imposed on any account whatsoever. For the avoidance of doubt, Taxes shall not include taxes on corporate income;

“Termination” means the expiry or termination of this Agreement and the Procurement Contract hereunder;

“Termination Notice” means the communication issued in accordance with this Agreement by one Party to the other Party terminating this Agreement;

“Termination Payment” means the amount payable by the defaulting Party to the other Party, under and in accordance with the provisions of this Agreement upon Termination;

“Unit” means a unit of the Power Station which is equipped with a turbine and associated facilities for generation of electricity independently of other units at the Power Station;

“Utility” shall have the meaning attributed thereto in the array of Parties as set forth in the Recitals;

“Utility Default” shall have the meaning as set forth in Clause 17.2.1;

“Utility Representative” means such person or persons as may be authorised in writing by the Utility to act on its behalf under this Agreement and shall include any person or persons having authority to exercise any rights or perform and fulfil any obligations of the Utility under this Agreement;

“WPI” means the Wholesale Price Index for all commodities as published by the Ministry of Industry, GOI and shall include any index which substitutes the WPI, and any reference to WPI shall, unless the context otherwise requires, be construed as a reference to the WPI published for the period ending with the preceding month, save and except that for the purposes of annual revision of the Variable Charge in accordance with the provisions of Clause 11.6, the revision due on April 1 of any year shall be computed with reference to WPI as on January 31 of that year.

IN WITNESS WHEREOF THE PARTIES HAVE EXECUTED AND DELIVERED THIS AGREEMENT AS OF THE DAY, MONTH AND YEAR FIRST ABOVE WRITTEN.

SIGNED, SEALED AND
DELIVERED

For and on behalf of
THE AGGREGATOR by:

SIGNED, SEALED AND
DELIVERED

For and on behalf of
THE UTILITY by:

(Signature)
(Name)
(Designation)
(Address)
(Fax No.)
(e-mail address)

(Signature)
(Name)
(Designation)
(Address)
(Fax No.)
(e-mail address)

In the presence of:

1.

2.

SCHEDULE –A
(See Clause 9.1)

PERFORMANCE SECURITY

The.....,
Distribution Company
State of....

WHEREAS:

- (A) [.....] (the “**Aggregator**”) and [the.... Distribution Company] having its principal offices at.... (“**Utility**”) have entered into an Power Supply Agreement dated(the “**Agreement**”).

- (B) The Agreement requires the Aggregator to furnish a Performance Security to the Utility in a sum of [Rs..... cr. (Rupees.... crore)] (the “**Guarantee Amount**”) as security for due and faithful performance of its obligations, under and in accordance with the Agreement (as defined in the Agreement).
- (C) We,.... through our Branch atthe “**Bank**”) have agreed to furnish this Bank Guarantee by way of Performance Security.

NOW, THEREFORE, the Bank hereby, unconditionally and irrevocably, guarantees and affirms as follows:

1. The Bank hereby unconditionally and irrevocably guarantees and undertakes to pay to the Utility upon occurrence of any failure or default in due and faithful performance of all or any of the Aggregator’s obligations, under and in accordance with the provisions of the Agreement, on its mere first written demand, and without any demur, reservation, recourse, contest or protest, and without any reference to the Aggregator, such sum or sums upto an aggregate sum of the Guarantee Amount as the Utility shall claim, without the Utility being required to prove or to show grounds or reasons for its demand and/or for the sum specified therein.
2. A letter from the Utility, under the hand of an Officer not below the rank of a Superintending Engineer or equivalent, that the Aggregator has committed default in the due and faithful performance of all or any of its obligations under and in accordance with the Agreement shall be conclusive, final and binding on the Bank. The Bank further agrees that the Utility shall be the sole judge as to whether the Aggregator is in default in due and faithful performance of its obligations during the Contract Period under the Agreement and its decision that the Aggregator is in default shall be final, and binding on the Bank, notwithstanding any differences between the Utility and the Aggregator, or any dispute between them pending before any court, tribunal, arbitrators or any other authority or body, or by the discharge of the Aggregator for any reason whatsoever.
3. In order to give effect to this Guarantee, the Utility shall be entitled to act as if the Bank were the principal debtor and any change in the constitution of the Aggregator and/or the Bank, whether by their absorption with any other body or corporation or otherwise, shall not in any way or manner affect the liability or obligation of the Bank under this Guarantee.
4. It shall not be necessary, and the Bank hereby waives any necessity, for the Utility to proceed against the Aggregator before presenting to the Bank its demand under this Guarantee.
5. The Utility shall have the liberty, without affecting in any manner the liability of the Bank under this Guarantee, to vary at any time, the terms and conditions of the Agreement or to extend the time or period for the compliance with, fulfilment and/or performance of all or any of the obligations of the Aggregator contained in the Agreement or to postpone for any time, and from time to time, any of the rights and powers exercisable by the Utility against the Aggregator, and either to enforce or forbear from enforcing any of the terms and conditions contained in the

Agreement and/or the securities available to the Utility, and the Bank shall not be released from its liability and obligation under these presents by any exercise by the Utility of the liberty with reference to the matters aforesaid or by reason of time being given to the Aggregator or any other forbearance, indulgence, act or omission on the part of the Utility or of any other matter or thing whatsoever which under any law relating to sureties and guarantors would but for this provision have the effect of releasing the Bank from its liability and obligation under this Guarantee and the Bank hereby waives all of its rights under any such law.

6. This Guarantee is in addition to and not in substitution of any other guarantee or security now or which may hereafter be held by the Utility in respect of or relating to the Agreement or for the fulfilment, compliance and/or performance of all or any of the obligations of the Aggregator under the Agreement.
7. Notwithstanding anything contained hereinbefore, the liability of the Bank under this Guarantee is restricted to the Guarantee Amount and this Guarantee will remain in force for the period specified in paragraph 8 below and unless a demand or claim in writing is made by the Utility on the Bank under this Guarantee, no later than 6 (six) months from the date of this Guarantee, all rights of the Utility under this Guarantee shall be forfeited and the Bank shall be relieved from its liabilities hereunder.
8. The Performance Security shall cease to be in force and effect before its expiry when the Aggregator shall have provided another Performance Security in substitution of this Performance Security.
9. The Bank undertakes not to revoke this Guarantee during its currency, except with the previous express consent of the Utility in writing, and declares and warrants that it has the power to issue this Guarantee and the undersigned has full powers to do so on behalf of the Bank.
10. Any notice by way of request, demand or otherwise hereunder may be sent by post addressed to the Bank at its above referred Branch, which shall be deemed to have been duly authorised to receive such notice and to effect payment thereof forthwith, and if sent by post it shall be deemed to have been given at the time when it ought to have been delivered in due course of post and in proving such notice, when given by post, it shall be sufficient to prove that the envelope containing the notice was posted and a certificate signed by an officer of the Aggregator that the envelope was so posted shall be conclusive.
11. This Guarantee shall come into force with immediate effect and shall remain in force and effect for a period of 6 months from the date hereof or until it is released earlier by the Utility pursuant to the provisions of the Agreement.

Signed and sealed this.... day of20.... at

SIGNED, SEALED AND DELIVERED

For and on behalf of
the BANK by:

(Signature)
(Name)
(Designation)
(Code Number)
(Address)

NOTES:

- (i) The bank guarantee should contain the name, designation and code number of the officer(s) signing the guarantee.
- (ii) The address, telephone number and other details of the Head Office of the Bank as well as of issuing Branch should be mentioned on the covering letter of issuing Branch.

SCHEDULE –B
(See Clause 12.1.1)

LETTER OF CREDIT

DATE:

TO: Limited (the “**Aggregator**”)

FROM: (Specify the name and address of the bank issuing the Letter of Credit)
(the “**Bank**”)

The Bank hereby issues this unconditional, irrevocable and revolving monthly letter of credit (the “**Letter of Credit**”) No.... in favour of the Aggregator named above, subject to the following terms and conditions:

1. On the instructions of the Utility , we hereby establish this Letter of Credit in favour of the Aggregator in the maximum aggregate amount of Rs.Rupees....)^{\$\$} (the “**Monthly Payment**”), payable not more than once in a month upon notice received from the Aggregator to this effect.
2. The Letter of Credit shall come into force with effect from...., 20.... and shall be valid and effective upto the 31st (thirty first) day of March, 20.... (indicate the year) falling after the year in which the Letter of Credit is issued (the “**Expiry Date**”), and shall be automatically and compulsorily renewed every year by the Bank, 2 (two) months prior to the date of expiry, for the period of the financial year that commences immediately after the Expiry Date, and shall continue to be so renewed until the end of the Contract Period. The date of expiry for the renewed period hereunder shall be deemed to be the Expiry Date for the purposes hereof.
3. This Letter of Credit provides security to the Aggregator for the payment obligations of the Utility under an Agreement for Procurement of Power under Pilot scheme- II datedentered into between the Utility and the Aggregator (the “ **Agreement for Procurement of Power under Pilot scheme-II**”) for supply of MW of electricity by the Aggregator.
4. Any reference to the Agreement for Procurement of Power under Pilot scheme -II or other agreement is for information only and does not in any way incorporate the terms and conditions of such Agreement for Procurement of Power under Pilot scheme – II or agreement into the terms and conditions of this Letter of Credit.
5. The Aggregator may draw upon this Letter of Credit by presenting a written demand for payment (by way of mail, courier or by hand) to the Bank along with the following documents:

^{\$\$} As provided in the Pilot Agreement for Procurement of Power - II, this amount shall be equal to 20% of the annual Capacity Charge payable by the Utility to the Aggregator for Normative Availability of the power station during a period of one month. The Letter of Credit shall be modified and renewed once every year to reflect the revision in 20% (twenty percent) of the annual Capacity Charge in accordance with the provisions of the Agreement

- (i) a copy of the Monthly Invoice (as defined in the Pilot Agreement for Procurement of Power -II) issued by the Aggregator to the Utility , any amounts whereof have remained unpaid; and
 - (ii) a certificate from the Aggregator, under the hand of an Officer not below the rank of a Director of the Aggregator, to the effect that the Monthly Invoice (as defined in the Pilot Agreement for Procurement of Power - II) is in accordance with the Pilot Agreement for Procurement of Power – II and that the amount due has remained unpaid and has not been disputed by the Utility.
- 6. The Bank shall honour such demand for payment, subject to it being compliant with the terms hereof, without inquiring whether the Aggregator has a right as between itself and the Utility to make such demand. Payment hereunder shall be made within 2 (two) business days after receipt of the demand for payment.
- 7. If a demand for payment or the aforesaid accompanying documents do not conform to the provisions of this Letter of Credit, we shall give immediate notice to the Aggregator that the demand for payment or the aforesaid documents, as the case may be, were not effected in accordance with the Letter of Credit, stating the reasons thereof and also specifying what the Aggregator is required to do for making effective its demand for payment in accordance with the Letter of Credit.
- 8. The Expiry Date of this Letter of Credit shall be deemed to be automatically extended, 2 (two) months prior to its Expiry Date, without any act or deed, for an additional period of 1 (one) financial year from the respective Expiry Date, unless at least 180 (one hundred and eighty) days prior to any Expiry Date, the Bank gives notice in writing to the Aggregator and the Utility that the Bank elects not to renew this Letter of Credit for any such additional period, in which case immediately after the Expiry Date of this Letter of Credit, the Bank shall cease to be the Default Escrow Bank.
- 9. Partial drawal shall be permitted hereunder, provided that the maximum drawdown in any month shall not exceed the Monthly Payment.
- 10. The Utility shall cause the Letter of Credit to be replenished to the equivalent of Monthly Payment within 7 (seven) days of a drawdown.
- 11. All payments made under this Letter of Credit will be free and clear of, and without deduction for, any present or future fees, taxes, restrictions or conditions of any nature, and without setoff or counterclaim for any reason, except as required by law.
- 12. All costs and expenses in connection with this Letter of Credit are to be on account of the Utility.
- 13. Save and except as otherwise expressly stated, this Letter of Credit is subject to the International Standby Practice, ISP 98, International Chamber of Commerce Publication No. 590.

14. This Letter of Credit is governed by the Laws of India.
15. All notices, demand for payments and communications in regard to this Letter of Credit are to be given in writing at the addresses below:

To: (Name of Utility representative)
..... (Designation)
..... (Address, telephone and fax numbers)

To: (Name of the Bank representative)
..... (Designation)
..... (Address, telephone and fax numbers)

To: (Name of the Aggregator representative)
..... (Designation)
..... (Address, telephone and fax numbers)

Signed and sealed this.... day of20.... at

SIGNED, SEALED AND DELIVERED
For and on behalf of
the BANK by:

(Signature)
(Name)
(Designation)
(Code Number)
(Address)

NOTES:

- (i) The Letter of Credit should contain the name, designation and code number of the officer(s) signing the Letter of Credit.
- (ii) The address, telephone number and other details of the Head Office of the Bank as well as of issuing Branch should be mentioned on the covering letter of issuing Branch.