Commission for Energy Regulation

Implementation Agreement

(Incorporating ESB Capacity and Differences Agreement)

Confidential Draft: 22 May 2003

22nd May 2003
THIS AGREEMENT is made the day of 200[ ]

BETWEEN:

(1) COMMISSION FOR ENERGY REGULATION of Plaza House, Belcard Road, Tallaght, Dublin 24 (hereinafter called “CER”); and

(2) [____], a incorporated under the laws of [___] whose registered office is situated at [____] (the “Generator”).

WHEREAS:

1. By Invitation to Tender (herein referred to as the “ITT”) dated [_____ 2003] the CER invited tenders from prospective generators to facilitate new generation capacity.

2. A number of tenders were submitted, one of which was that of the Generator. After evaluation of all tenders, the tender of the Generator was selected.

3. In accordance with the requirements of the Tender,

   3.1 the Generator has executed the Connection Agreement (as hereafter defined) simultaneously with this Agreement;
   3.2 the Generator has received the Authorisation to Construct (as hereafter defined);
   3.3 the Generator has obtained and confirmed funding for the Project (as hereafter defined) to the satisfaction of the CER:
   3.4 the Generator has obtained full grant of planning permission and such other Relevant Consents (as hereafter defined) as are required to commence and complete the Project;
   3.5 the Generator has submitted the Programme (as hereafter defined) in Approved Form (as hereafter defined);
   3.6 the Construction Agreement (as hereafter defined) has simultaneously come into full force and effect.
   3.7 the Generator has shown Good Marketable Title (as hereafter defined) to the Site (as hereafter defined).

4. A further requirement of the ITT was that the successful tenderer would, inter alia, enter into an Implementation Agreement being this Agreement and which the Parties hereto have agreed to do subject to and upon the terms and conditions hereafter set forth.

NOW IT IS HEREBY AGREED as follows:-

In this Agreement and the Appendices hereto, save where the context otherwise admits or requires, the following definitions shall have the following meanings:-

1. DEFINITIONS AND INTERPRETATION

1.1 “Act” means the Electricity Regulation Act, 1999;
“Apparatus” means an item of equipment in which electrical conductors are used, supported or of which they may form part and include meters, lines and appliances used or intended to be used for carrying electricity for the purpose of supplying or using electricity;

“Appendix” means an appendix to this Agreement;

“Approved Form” shall mean in relation to any deed or documents that form which shall be approved by or on behalf of the CER.

“Authorisation to Construct” means the authorization which has issued from the CER to the Generator to construct the Facility;

“Auxiliary Load” means the electrical demand of the Generation Unit’s auxiliary plant required for the operation of the Generation Unit and the supply of fuel to the Generation Unit.


“Business Day” means any day other than a Saturday, a Sunday or a public holiday in Ireland;

“CADA Agreement” means the capacity and differences agreement between ESB of the one part and the Generator of the other part as set out in Appendix [1];

“CER” means the Commission for Energy Regulation and shall include, where the context so admits or requires, its officers, employees, agents, consultants, the Representative or its advisors and its legal successors and permitted assigns;

“Commercial Operation” means the operation of the Facility in full compliance with all of the provisions of this Agreement and as further defined in the Connection Agreement, and, in the event of any conflict or ambiguity, the provisions of the Connection Agreement shall apply;

“Commercial Operation Date” means the achievement of the date set out in the Milestones and compliance with the provisions of this Agreement and ESBNG permitting the Generator to energise the Connection to the ESB Transmission System being not more than two Business Days after ESB’s receipt of a notification from the CER that the Generation Unit complies with the Specifications, the Facility has achieved Practical Completion and that it has satisfactorily passed the Commissioning Tests and the Completion and Performance Tests;

“Commissioning” means activities involved subsequent to Practical Completion in undertaking the commissioning of the Facility including the Commissioning Tests or implementing the Commissioning Instructions as defined in and pursuant to the terms
of the [Connection Agreement] or as the context requires the testing of any item of users equipment required pursuant to the Grid Code prior to connection or reconnection in order to determine that it meets all requirements and standards for connection to the ESB Transmission System and also to determine the new values of parameters to apply to it following a material alteration or modification and in addition those activities involved in undertaking the Commissioning Tests or implementing the Commissioning Instructions as the context requires;

“Commissioning Instructions” means those instructions set out in the Connection Agreement and/or as may be laid down by ESBNG from time to time for the commissioning of the Project and which shall form part of the Commissioning Tests;

“Commissioning Tests” means those tests which are required to be undertaken and be successful to permit the Facility to proceed to the Completion and Performance Tests and then to come into Commercial Operation and more particularly set out in this Agreement and the Connection Agreement or as may be required by the Representative (acting reasonably) or ESBNG from time to time;

“Companies Acts” means the Companies Act 1963 - 2001;

“Competent Authority” means any local or national or supra-national agency, Commission authority, department, inspectorate, ministry, official, or public or statutory person (whether autonomous or not) of the Republic of Ireland or of the European Union and where the context so admits or requires shall include the CER but shall not include a court or tribunal of competent jurisdiction.

“Completion and Performance Tests” means the tests set in [Parts 2 and 3 of Appendix 2] of this Agreement [and such further tests as the Representative (acting reasonably) or ESBNG might require from time to time] [and, if applicable, such tests required under the Grid Code or the Connection Agreement];

“Completion Tests” means the tests set out in [Appendix 2 Part 2] of this Agreement;

“Confidential Information” means the information defined in [Clause 10.1] of this Agreement;

“Connection” means connection of the Facility to the ESB Transmission System;

“Connection Agreement” means the agreement of even date herewith between [ESBNG] and the Generator which contains the details specific to the Generator’s connection to the ESB Transmission System;

“Connection Point” means the physical point or points at which the Facility is joined to ESB’s Connection Equipment and notified to the Generator in accordance with the Connection Agreement;

“Connection Works” means ESB’s Connection Works and the Generator’s Connection Works;

“Construction Contract” means the agreement or agreements entered (or to be
entered into between the Generator and the EPC Contractor relating to any or all of
the design, construction, completion and commissioning and bringing into Commercial
Operation of the Project;

“Contract Capacity” means the Capacity of the Generation Unit at the Connection
Point, when operating on the Primary Fuel and, if necessary to maintain the
combustion process, any supplementary fuel which the Generator has provided as part
of the Tender [for the purposes of the CADA Agreement] and “Contracted Capacity”
shall be construed accordingly;

“Contracted Operating Characteristics” means those Plant characteristics agreed to be
provided by Generator in the Tender and set out in Appendix [3] of this Agreement;

“Construction Costs” means the costs incurred by the Generator in the design,
construction, completion and Commissioning of the Facility, shallow connection
works [the Generator’s Connection Works, the Completion and Performance Tests
and bringing the Facility into Commercial Operation;

“Deep Operational Date” means the Deep Operational Date as defined in the
Connection Agreement” or Supplementary Letter provided by ESB National Grid for
the purposes of a generator submitting a Tender;

“Direct Agreement” means the direct agreement between CER, the Generator and the
Lenders which includes (inter alia) provisions relating to the termination of the
Relevant Agreements, the form of which is set out in Appendix [4] to this Agreement:

“Directive” means any present or future legislation, statutory instrument, regulation,
directive, requirement, instruction, direction or rule of any Competent Authority
binding on either or both of CER and the Generator (including any directive,
requirement, instruction, direction or rule amending any license required by either of
the parties in connection with the performance of a [Relevant Agreement]) and
includes any modification, extension or replacement thereof then in force;

“Dispute” means a difference or dispute or difference of whatsoever nature arising
between CER and the Generator arising out of or in connection with this Agreement;

“Energy” means the electrical energy produced, flowing or supplied by an electrical
circuit during a time interval and being the integral with respect to time of the
instantaneous active energy, measured in units of Watthours or standard multiples
thereof;

“Engineer” means the engineer of the Generator or such other professional person
appointed by the Generator to administer and manage the Project;

“EPC Contractor” means the party or parties with which the Generator enters into a
contract or contracts for any one or more of the design, construction, completion and
commissioning and bringing into Commercial Operation of the Facility;

“ESB” means the Electricity Supply Board and where the context so admits or
requires its successors;

“ESBNG” means the same term as defined in the Connection Agreement;

“ESB Connection Equipment” means a transmission station which is solely or mainly for the use of a specific user and any tail-fed lines or cables, where appropriate, which similarly are used solely or mainly by a single user. Switching bays at each end of the lines are included as part of the line (cable) as appropriate;

“ESB Transmission System” means the ESB Transmission System as defined in the Grid Codes and the Connection Agreement;

“Facility” means the Generation Unit to be constructed at the Site together with its auxiliary equipment, stocks, buildings and property at the Site, including equipment, to be installed at the Generator’s side of the Connection Point necessary to effect Connection and more particularly described in the Specifications, the Tender and this Agreement;

“Financial Close” means the date on which to first draw down of funds under the Lending Agreements for the financing of the Facility are made;

“Force Majeure” means any event (which for the purposes of a Relevant Agreement shall mean any event or circumstance, or number of events or circumstances, or combination thereof) in Ireland not within the reasonable control of a Party to a Relevant Agreement and which could not have been reasonably prevented or the consequences of which could not have been prevented by Prudent Electric Utility Practice and which is not due to the act, error, omission, breach, default or negligence of the affected Party, its employees, agents or contractors and which has the effect of preventing a Party to a Relevant Agreement from complying with its obligations under a Relevant Agreement including;

(a) acts of terrorists;

(b) war declared or undeclared, blockade, revolution, riot, insurrection, civil commotion, invasion, or armed conflict;

(c) sabotage or acts of vandalism, criminal damage or the threat of such acts

(d) natural disasters and phenomena including extreme weather or environmental conditions, meteorites, the occurrence of pressure waves caused by aircraft or other aerial devices travelling at supersonic speeds, impact by aircraft, volcanic eruption, explosion including nuclear explosion, radioactive or chemical contamination or ionising radiation;

(e) any change of legislation governmental order, restraint or Directive having the effect of preventing or delaying the construction, completion, commissioning or testing of the Facility or which prohibits (by rendering unlawful) the operation of the Facility and such
operation cannot be made lawful by a modification to the Facility or a change in operating practice;

(f) the act or omission of any contractor or supplier of the Generator but only if due to an event which, but for the contractor or supplier not being a party to the Relevant Agreements, would have been Force Majeure;

Provided That Force Majeure shall not include:

(i) lack of funds and/or the inability of a party to a Relevant Agreement to pay,

(j) mechanical or electrical breakdown or failure of machinery or Plant owned or operated by the Generator other than as a result of the circumstances identified in (a) to (f) above;

“Fuel Supply Agreement” means the agreement [of even date] between the Generator and [the nominated fuel Supplier of the Generator] for the sale and purchase of fuel for the Facility and where the context so admits or requires any substitute agreement;

“Generating Unit” or “Unit” means the generating unit shown in Appendix [5] which is to be installed at the Site and which is the subject of the [Relevant Agreements];

“Generator’s Connection Works” means that part of the Works to be undertaken and building services and equipment to be provided by the Generator under the [Connection Agreement and this Agreement], including (without limitation) installation of the equipment in accordance with the provisions of the Connection Agreement, Transmission line, Station Compound Works and where the context so admits or requires any part or parts thereof;

“Good Marketable Title” means a title of quality commensurate with prudent standards of current conveyancing practice in Ireland in accordance with current Law Society of Ireland recommended practice;

‘Grid Code” means the conditions, procedures, provisions and codes governing the planning and operation of the ESB Transmission System and the scheduling and dispatch of generation prepared by [ESBNG] in accordance with Section 33 of the Act, and to which the Generator is required to adhere and where the context so admits or requires any amendment, modification variation or extension thereof from time to time;

“Insured Risks” means the risks detailed in the Construction Contract and without taking away or without prejudice to the generality of the foregoing include,

(a) the risks of fire, lightning, explosion, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, earthquake, aircraft and other aerial devices or articles dropped therefrom, riot and civil commotion, impact
from vehicles, aircraft, malicious damage, collapse, subsidence, heave, vibration, weakening or removal of support or lowering of ground water; and,
(b) such other risks or perils as Prudent Electric Utility Practice would require or the CER or its advisors shall from time to time reasonably require.

“Legal Requirement(s)” means, in relation to the Party in question, any of the following:
(a) any Relevant Consent;
(b) any Directive;
(c) any requirement imposed by the Grid Code;
(d) any interpretation of law, or finding, contained in any judgement given by a court or tribunal of competent jurisdiction in respect of which the period for making an appeal has expired which requires any Legal Requirement falling within paragraphs (a) or (b) above to have effect in a way different to that in which it previously had effect, other than in relation to the health or safety or persons at work;

“Lenders” means the parties who, following Financial Close, will make loans, credit facilities or funding arrangements available to the Generator for the purpose of or in connection with the Project, including any agent bank and any security agent [and who will enter into the Direct Agreement with CER;

“Lending Agreements” means the agreement(s) entered into between Generator and the Lenders for the financing of the Project;

“Maximum Export Capacity” means the maximum value (MW) to be provided by the Facility in accordance with the Connection Agreement and also this Agreement;

“MW” means Megawatt(s);

“Milestones” mean those specific dates set out in the Programme in respect of which the Generator must achieve full compliance;

“Non-Performing Party” means a Party which is unable to perform all or any of its obligations under a [Relevant Agreement] by reason of Force Majeure;

“Operating Characteristics” means the technical capabilities, flexibilities and limitations for the operation of a Generation Unit as registered or declared in accordance with the provisions of the Grid Code;

“Operation” means a scheduled or planned action relating to the operation of a power system;

“Party” means a party to this Agreement and their respective successors or permitted assigns;
“Performance Bond” means the indemnity performance bond to be provided by Generator to CER in accordance with Clause [3] of this Agreement and in the form set out at Appendix [6] or any replacement or substitute thereof in Approved Form:

“Performance Tests” means those tests set out at Part 3 of Appendix [1] of this Agreement:

“Planning and Environmental Consents” means the planning and environmental consents and any licence (including IPC Licence) required in connection with the Project and to be obtained by the Generator on, before or subsequent to the date hereof, as required, in order to construct and operate the Facility pursuant to the terms of this Agreement;

“Plant” means fixed and movable items used in the generation and/or supply and/or transmission of electricity, other than Apparatus;

“Programme” means the agreed programme for undertaking and completing the Works and more particularly set out in Appendix [7];

“Practical Completion “ means that Milestone when practical completion of the Works in accordance with the provisions of this Agreement occurs and which will include the fitting out and testing of the Facility with all equipment and other matters to permit Commissioning Tests to commence and be undertaken immediately thereafter and reference to the “Date of Practical Completion” are to the date on which the Certificate of Practical Completion and/or the Quality Control Certificate is issued in accordance with Clause [8] of this Agreement;

“Primary Fuel” means the fuel registered in accordance with the Grid Code as the principal fuel utilized for Energy production by the Generation Unit and which in the case of the Facility shall be [ ] [or in the event of insufficient quantities of [ ] being unavailable then [ ];

“Project’ means the design, construction, financing, completion and Commissioning of the Facility and the Completion and Performance Tests in accordance with this Agreement, the connection of the Facility pursuant to the [Connection Agreement] the bringing thereof into Commercial Operation and all other associated works and the subsequent operation and maintenance of the Facility;

“Project Agreements” means the Relevant Agreements, the Construction Contract, and the Fuel Supply Agreement and, if applicable, the Direct Agreement, and, where the context so admits or requires, any one or more of them;

“Prudent Electric Utility Practice” means those standards, practices, methods and procedures conforming to safety and Legal Requirements which are attained by exercising that degree of skill, care, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced operator in Europe engaged in the same type of undertaking under the same or similar circumstances;

“Relevant Agreements” means this Agreement and Connection Agreement and
where the context so admits or requires any one or both of them;

“Relevant Authority” means the CER”

“Relevant Consent(s)” means all consents, permissions, approvals, authorizations, certificates licences, permits, exemptions, filings, registrations, notarisations and other matters, official or otherwise, which are required (or which would, in accordance with Prudent Electric Utility Practice, normally be obtained) in connection with the right to commence, carry out, test, maintain, complete and bring into Commercial Operation the Project and to use and enjoy the Facility and the exercise of rights or discharge of obligations under this Agreement (including advice that there is no objection to a particular proposal or that a particular proposal is not inconsistent with policy or guidelines), of or from a Competent Authority and, where a Competent Authority is authorized to prohibit a proposal the passing of the time limit for such prohibition without the proposal being prohibited. Without limiting the foregoing, Relevant Consents shall include Planning and Environmental Consents, Building Regulations (and approvals), Environmental Impact Reports, Building Control Regulations, compliance with Legal Requirements, consents under the Safety Regulations and consents of all parties having interests or rights in or over the Site, those parties required to give rights of access from the public roadway to the Site over adjoining lands and who in the case of such parties by the lawful exercise of their power in the absence of such consent could prevent or impede the carrying out or progress of the Project or its use and enjoyment;

“Quality Control Certificate” means the Quality Control Certificate or similar certificates which may be required under any Legal Requirements;

“Representative” shall mean the representative or representatives appointed from time to time by the CER in connection with the Agreement;

“Safety Authority” means the National Authority for Occupational Safety and Health.

“Safety Regulations” means all requirements, consents and measures including those required by statute to include the Safety Health and Welfare at Work Act 1989, regulations issued thereunder and pursuant to the provision of the Safety, Health and Welfare at Work (Construction) Regulations 2001 and by the insurers of the Project.

“Shallow Operational Date” means the Shallow Operational Date as defined in the Connection Agreement;

“Site” means the site at which the Facility is to be constructed including the lands, spaces, roads and any surface, wayleaves and easements relating to the Project shown or identified as such on the plan set out in Appendix [8] to this Agreement:

“Site Conditions” means all ecological, geological, hydrological, geophysical, archaeological or environmental conditions affecting the Site;

[“Site [Lease][Acquisition Agreement]” means the agreement of that name to be entered into by the Generator and [     ] in respect of the acquisition by the Generator of property rights in respect of the Site;
“Specifications” means
(a) the plans, architectural drawings or design drawings, structural drawings, the process drawings, the mechanical and electrical building services drawings, the specifications in connection with process, mechanical and electrical building services, civil and building works and engineering calculations relating to the Project and shall include any material variations, additions to and revisions of the Specifications relating to the Project,
(b) the specifications of the Facility
(c) the applicable codes and standards
(d) the levels of Maximum Export Capacity and Operating Characteristics and other performance parameters which the Generation Unit is required to achieve or exceed as a requirement of the achievement of the Commercial Operation Date pursuant to this Agreement and where the context so admits or requires any part or parts thereof.
Without taking away from the generality of the foregoing, the Specifications illustrate the general arrangements of the Facility and surrounding areas of the Site, the standards to be achieved, and the quality of materials to be used. The Specifications are set out in Part 1 of Appendix [3];

“Synchronisation” means the condition where the Generation Unit is connected to the ESB Transmission System so that the frequency and those relationships of the Generation Unit and the ESB Transmission System to which it is connected are identical;

“Tender” shall mean the Invitation to Tender dated [2003] of the CER for the supply of the Facility and the Response dated [2003] of the Generator thereto and all subsequent clarifications provided by the Generator in relation thereto and where the context so admits or requires any part or parts thereof;

“Testing” means where the context so admits or requires testing carried under the Grid Code, Commissioning Tests and the Completion and Performance Tests and “Test” shall be construed accordingly;

“Transmission Station Compound Works” mean that part of the Works to be undertaken by the Generator as required by ESBNG in accordance with the Connection Agreement;

“Works” mean the permanent and temporary works required for the design, construction, completion, Commissioning Testing and bringing into Commercial Operation of the Facility and the Project and where the context so admits or requires any part or parts thereof.

1.2 INTERPRETATION

1.2.1 Any reference to any statute or any provision of any legislation shall include any modification, amendment, re-enactment or extension thereof for the time being in force or any statutory instruments or orders made thereunder.
1.2.2 The masculine gender shall include the feminine and neuter and the singular number shall include the plural and vice versa and words importing persons shall include firms or companies.

1.2.3 Word such as hereunder, hereof and herein and other words commencing with "here" shall, unless the context clearly indicates the contrary, refer to the whole of this Agreement and not to any particular section or clause thereof.

1.2.4 Save as otherwise provided herein, any reference to a clause, paragraph, sub-paragraph or schedule shall be a reference to a clause, paragraph, sub-paragraph or schedule (as the case may be) of this Agreement and any reference in a clause to a paragraph or sub-paragraph shall be a reference to a paragraph or sub-paragraph of the clause or paragraph in which the reference is contained, unless it appears from the context that a reference to some other provision is intended.

1.2.5 The section headings to the clauses in this Agreement are inserted for convenience of reference only and shall not be considered as part of or affect the construction or interpretation of this Agreement.

1.2.6 This Agreement may be executed in any number of counterparts and by the different Parties hereto on separate counterparts, each of which when executed and delivered shall constitute an original all such counterparts together constituting but one and the same instrument.

1.2.7 Amendments to or modifications of this Agreement may be made only by mutual agreement of the Parties in writing and shall be subject to whatever approvals of appropriate authorities as may be required by law.

1.2.8 A waiver by either Party of any breach by any other Party of any of the terms, provisions or conditions of this Agreement or the acquiescence of such Party and any act (whether of commission or omission) which but for such acquiescence would be a breach as aforesaid shall not constitute a general waiver of such term, provision or condition or of any subsequent act contrary thereto.

1.2.9 This Agreement shall not constitute any Party, the legal representative, partner or agent of the other Party nor (save as expressly provided in this Agreement) shall any Party or any successor of any Party have the right or authority to assume, create or incur any liability or obligation of any kind expressed or implied against or in the name of or on behalf of any other Party.

1.2.10 This Agreement or the benefit thereof may not be assigned by any of the Parties hereto in whole or in part without the prior and mutual written consent of the Parties hereto.

1.2.11 Save as provided herein, this Agreement and all rights and obligations hereunder shall for all purposes be treated and construed as being separate and apart from any other agreement or agreements or any rights and obligations thereunder save only insofar as the express provision requires the contrary.

1.2.12 Where the Generator consists of two or more persons the covenants and agreements by the Generator shall be deemed to be by such persons jointly and severally.
1.2.13 The Parties hereto enter this Agreement as principals for and on their own behalf.

1.2.14 The Tender shall form part of this Agreement and this Agreement and the Tender shall be read and construed as one. In the event of any conflict between this Agreement and the Tender, the provisions of this Agreement shall prevail.

1.2.15 This Agreement the Tender and the Project Agreements represent the entire of the understanding of the Parties concerning the subject matter hereof and override and supersede all prior promises, representations, understandings, arrangements, or agreements concerning the same which are hereby revoked by mutual consent of the Parties.

1.2.16 This Agreement shall become effective only upon the same being executed by or on behalf of the Parties hereto.

1.2.17 Words denoting an obligation on a Party to do any act, matter or thing include an obligation to procure that it be done and words placing a Party under a restriction include an obligation not to permit or allow infringement of the restriction.

1.2.18 References to "liability", unless the context otherwise requires includes claims, demands, proceedings, damages, losses, costs and expenses.

2. AGREEMENT

2.1 The Generator agrees with the CER to construct, complete and bring into Commercial Operation the Project in accordance with the provisions of this Agreement and, where applicable, any Relevant Agreement. The Generator shall not amend, deviate or depart from the Project except with the written consent of the CER.

3. PERFORMANCE BOND

3.1 The Generator shall deliver to the CER the Performance Bond on the execution of this Agreement (or such later date as may be permitted by the CER).

3.2 Nothing herein or in the Performance Bond shall in any way affect or diminish the obligations of the Generator herein which shall be required to be complied with in full.

4. CONFIRMATIONS

4.1 The Generator hereby warrants, represents and confirms to the CER as follows:

4.1.1 that the representations and warranties contained in the Generator’s Response to the ITT, which forms part of the Tender are true, valid and correct, complete and accurate as of the date hereof and will continue to be so;

4.1.2 the Generator is a company duly organised, validly existing and in a good standing under the laws of the country in which it is established and has full power and authority to carry on its business as intended by the Relevant Agreements and as provided for in this Agreement;
4.1.3 the Generator has the corporate power and authority to enter into this Agreement and the transactions provided for and contemplated in it or any of the Project Agreements;
4.1.4 the execution and performance of this Agreement or any Project Agreement does not conflict with or constitute a breach or default under any contract or agreement of any kind to which the Generator is a party or any judgment, order, statute or regulation which is applicable to the Generator or its assets;
4.1.5 all Governmental consents and authorisations and all other Relevant Consents that are required to enable the Generator fulfill any of its obligations under this Agreement or any of the Project Agreements have been obtained and are in full force and effect and all conditions of these Governmental consents and authorisations and all other Relevant Consents have been complied with;
4.1.6 the Generator has acquired Good Marketable Title to the Site in accordance with the [Site [Lease] Acquisition Agreement], the Site is not affected by any of the Site Conditions and, consequently, it can perform its obligations in full under this Agreement and all of the Project Agreements and shall not give grounds for any delay in achieving Commercial Operation by the Commercial Operation Date;
4.1.7 that it has obtained a full Grant of Planning Permission for the Project on the Site;
4.1.8 the Authorisation to Construct has issued to the Generator;
4.1.9 the matters set out in Recital 3 above are true and correct in all respects and;
4.1.10 the Generator is entering into this Agreement and each of the other Project Agreements with a full understanding of its material terms and risks and is capable of assuming those risks.

5. THE CONTRACTOR

5.1 The Generator shall be and is responsible for the appointment and employment of the EPC Contractor.

5.2 The EPC Contractor shall be reputable, competent and suitable with respect to the Works and the Project.

5.3 This Clause 5 shall apply to the appointment of a contractor by way of replacement of the EPC Contractor and the appointment of sub-contractors.

5.4 The Generator shall require as a condition of employment of the EPC Contractor that it maintains indemnity insurance cover throughout the period that it retains liability for breach of the terms of the Construction Agreement with a reputable insurance company of at least [€ ] for each claim that may be made.

5.5 The Generator shall ensure that the Construction Agreement executed by the Generator and the EPC Contractor is executed under seal and that it is sufficiently detailed and comprehensive to ensure compliance with the Generator’s obligations under this Agreement or any other Project Agreement.

5.6 The Generator shall:
5.6.1 diligently take all steps necessary effectually to procure the due performance and observation of the obligations and duties of the EPC Contractor and ensure all necessary certificates are obtained to verify hand over and take over of the Works is properly achieved, the requirements of the Grid Code and the Connection Agreement are complied with insofar as they relate to the EPC Contractor;

5.6.2 not waive, release, vary nor estop itself from enforcing or seeking redress from any such obligation or duty without the consent in writing of the CER;

5.6.3 not do or omit to do any act or thing which would entitle the EPC Contractor to treat as terminated by breach the Construction Contract;

5.6.4 comply with its obligations under the Construction Contract;

5.6.5 enforce all warranties received in connection with the Works whether or not received from the EPC Contractor, its agents, sub-contractors or any other person.

5.7 The Generator shall indemnify and keep indemnified the CER from and against all actions, proceedings, costs, claims, liability, loss, damages, expenses and demands which may arise by reason of breach, default, neglect or omission of the Generator of its obligations under this Clause 5.

5.8 For the avoidance of doubt, the appointment by the Generator of the EPC Contractor shall not in any way diminish the responsibilities and obligations of the Generator herein which shall continue to have full force, application and effect.

6. DESIGN AND CONSTRUCTION OF FACILITY

6.1 Duty to Implement

6.1.1 The Generator shall be responsible for the design, financing, construction, completion and commissioning of the Facility, the Project and its associated Plant and Apparatus in accordance with the Specifications, the Tender and this Agreement.

6.1.2 The Generator shall ensure that the Facility is completed by the date of Practical Completion and that the Commissioning Tests and the Completion and Performance Tests are completed and successful by each of the Milestones provided therefor and the Project is completed and comes into Commercial Operation by the Commercial Operation Date.

6.2 The Works and The Project

6.2.1 The Generator will procure that the Works and the Project are carried out:

6.2.1.1 in a good and workmanlike manner and in accordance with good building practice and current codes of practice;
6.2.1.2 with good and suitable materials which comply with relevant Irish, European and equivalent International standards;

6.2.1.3 in accordance with the Specifications, the Relevant Consents, Legal Requirements and the Programme;

6.2.1.4 in accordance with the Planning and Environment Consents;

6.2.1.5 in compliance with the Safety Regulations;

6.2.1.6 in compliance with all statutory orders and regulations made under or deriving validity from them and any requirements and codes of practice of Local Authorities and Competent Authorities affecting the Facility, the Project and/or the Site;

6.2.1.7 in accordance with the terms and conditions of the Authorisation to Construct;

6.2.1.8 in accordance with the Milestones;

6.2.1.9 without infringement of any rights, reservations, covenants, restrictions, stipulations or other encumbrances binding on or affecting the Site;

6.2.1.10 without infringement of any of the Project Agreements; and,

6.2.1.11 with due diligence.

6.2.2 The Generator agrees with the CER to provide (or procure the provisions of) anything necessary for the proper provision of the Works according to the true intent and meaning of the Specifications, whether the same may or may not be particularly shown or described provided the same is reasonably inferred therefrom and if there shall be found any discrepancy therein, the Generator shall immediately and in writing refer same to the Engineer and the Representative who shall decide the course to be followed and the Generator shall not be entitled to make any claim or seek any extension to the Milestones.

6.2.3 The Generator shall ensure that there shall not be used on or in connection with the Project, any materials or substances which at the time of specification are not approved or not recommended by the current relevant Irish, European, or equivalent International standards and codes of practice (so far as they may be applicable to the Project) as being:-

6.2.3.1 of deleterious, unsatisfactory or unsuitable quality;

6.2.3.2 deleterious by themselves or when used in conjunction with other materials or any particular situation or location;

6.2.3.3 deleterious with the passage of time;
6.2.3.4 likely to cause damage to the Works;

6.2.3.5. potentially hazardous to health and safety;

6.2.3.6 capable of posing a threat to the stability, integrity or performance of the Works;

6.2.3.7 capable of reducing the normal life expectancy of the Works.

6.2.4 The Generator shall comply with all the obligations under the Safety Regulations and ensure that the execution of the Works complies with the Safety Regulation and shall give all necessary notices and declarations to the Safety Authority, appoint competent Project Supervisor(s), ensure that the Health and Safety File is prepared, maintained and completed as required by the Safety Regulations and ensure that all persons connected to or related to the design of the Project comply with the duties imposed in the Safety Regulations.

6.2.5 The Generator shall comply with all the obligations under the Connection Agreement and the other Project Agreements and on the part of the Generator to observe and comply.

6.2.6 The Generator shall comply with the provisions of the Grid Code and all directions and requirements of EBSNG, insofar as it relates to the Project Agreements and the Facility.

6.2.7 The Generator shall enter into a proper Fuel Supply Agreement which shall meet the needs and requirements of the Facility and in accordance with Prudent Electric Utility Practice.

6.2.8 The Generator will:

6.2.8.1 keep the CER, through the Representative, informed of material measures taken and stages reached by the Generator in performing its obligations;

6.2.8.2 keep the CER, through the Representative, informed of the progress of the Works and how it equates with the Programme and the Milestones;

6.2.8.3 keep the CER, through the Representative, informed of material problems or delays affecting the Works;

6.2.8.4 at four weekly intervals furnish to the Representative a progress report outlining progress by reference to the Programme and the Milestones and any proposed significant alteration to the Specifications or deviation from the milestones. In particular, the Generator will, within six months of the Commercial Operation Date keep the Representative and ESB fully adequately and timely informed of progress and the achievement of the Commercial Operation Date, the Generator
acknowledging the importance of achieving the CommercialOperation Date, the need for ESB to enter into hedge contracts and the consequences for both CER and ESB, should such not be achieved;

6.2.8.5 keep the CER, through the Representative, fully informed of the progress of the Works;

6.2.8.6 furnish the Representative, if requested, with copies of the minutes of site meetings, together with copies of all relevant documents, including test certificates, test reports and any specialist reports;

6.2.8.7 promptly report to the Representative any problem or delays which may become apparent to the Generator and provide the Representative with such papers and explanations that the Representative may reasonably require to satisfy himself that the Generator is complying fully with its obligations under this Agreement;

6.2.8.8 comply or procure compliance with all conditions applying to the Consents, all Acts of the Oireachtas and any enforceable codes of practice of the Local Authority or requirement of any Competent Authority affecting the Site or the Project;

6.2.8.9 execute and do all works and things required by all Acts of the Oireachtas, the lawful requirements of all authorities affecting the Site or the Works, including, without limiting the generality of the foregoing, all requirements of any Competent Authority including water, gas, electricity and telecommunications authorities;

6.2.8.10 keep CER indemnified from and against all fees, costs, charges, penalties, loss, damages, liability whatsoever and expenses made or incurred under this Clause 6 which may at any time become payable or in respect of any claim, breach, action or proceedings taken by any third party as a result of any default by the Generator pursuant to the provisions of this Agreement or by the breach, default, neglect, act or omission of the Generator.

6.2.9. The Representative may enter upon the Site (including any buildings in the course of construction thereon) at all reasonable times, giving reasonable prior notice to the Generator or the Contractor in order to:

6.2.9.1 inspect and view the state and progress of the Works;

6.2.9.2 inspect the materials and workmanship;

6.2.9.3 ascertain generally that the covenants, agreements, conditions and stipulations contained in this Agreement or any relevant Agreements have been and are being duly performed and observed.

6.2.10 The Generator shall give to the Representative at least five (5) working days prior notice of Site and other formal meetings of the Engineer or other
professional advisors of the Generator and/or the Contractor in connection with the Works and the Representative shall and is entitled to attend and speak at such meetings.

7. INSURANCE

7.1 The Generator will at all times during the Project keep insured the Project in its full reinstatement cost for the time being against the Insured Risks, together with a sum to cover professional fees and other incidentals costs and expenses and the costs of shoring-up demolition and site clearance and similar expenses with an insurer of repute.

7.2 The Generator shall insure or cause the Project to be insured against public liability insurance on the part of CER, any Lender, the Generator and Contractor, and against Employers Liability Insurance both in a sum acceptable to and in accordance with good insurance industry practice.

7.3 The Generator shall ensure that the Contractor arranges and maintains All Risks Insurance for the entire full value of the Works in accordance with the provisions of the Construction Contract such insurance shall be taken out as required by Clause 7.4 hereof and shall be subject in all respects to the provisions of this Clause 7.

7.4 The Generator shall note the interest of the CER as indemnified party on such insurances.

7.5 The Generator shall supply the Representative with a copy of the insurance policy or policies and endorsements made to it and produce documentary evidence of its renewal including receipts for payments of premium as reasonably requested by the Representative.

7.6 The Generator shall not do or suffer to be done anything which may render the said policy or policies of insurance void or voidable.

7.7 The Generator will cause all works damaged or destroyed to be reinstated with due diligence and replace and repair any unfixed materials or goods destroyed or damaged and remove and dispose of any debris and proceed as soon as may be practicable in the carrying out and completion of the Works and will cause the proceeds of the insurance to be applied towards the reinstatement. If the proceeds of insurance are insufficient to cover the cost of reinstatement, replacement or repair, the Generator will make good any deficiency out of its own monies.

7.8 During any period in which the Contractor is responsible for insuring the Project pursuant to the terms of the Construction Contract, the insurances effected by the Contractor shall constitute sufficient compliance with the obligations of the Generator under this Clause 7 so long as the insurance cover is not less than the amount or extent hereinbefore specified and the insurances are taken out as required by Clause 7.4 hereof.
7.9 The Generator shall subsequent to Commercial Operation keep the Project fully and adequately insured in accordance with Prudent Electric Utility and shall, on request, furnish copies of such insurance policy or policies and the receipt for the update premium payable thereon.

7.10 All insurance taken out pursuant to this Agreement shall include an Irish jurisdiction clause.

8. PRACTICAL COMPLETION

8.1 The date of Practical Completion of the Facility shall be as set out in the Milestones which the Generator shall achieve and, for the avoidance of doubt, shall be deemed to be the date that the Facility is ready to commence Commissioning Tests.

8.2 The Engineer shall give the Representative five Business Days notice of his intention to issue the Certificate of Practical Completion of the Facility.

8.3 The Generator, through the EPC Contractor, will be responsible for carrying out all tests to prove that the Facility has been constructed in accordance with the design to the Facility and the Specifications. The Generator shall procure that the EPC Contractor engaged for the construction of the Transmission Station Compound Works will carry out tests to ensure that the same is constructed in accordance with its design and Specifications. The Representative, shall accompany the Engineer on his inspection of the Project prior to the issue of the Certificate of Practical Completion. The Engineer shall make available for inspection all test results that confirm that the Facility has been constructed in accordance with the design and Specifications. If the Representative shall determine that the Certificate of Practical Completion should not issue, he shall inform the Engineer and set out his reasons therefor in writing and the works required to be undertaken to permit the Certificate of Practical Completion to issue. The Generator shall immediately undertake the outstanding work required to comply with the requirements of the Representative. Upon their completion, the provisions of this clause 8.3 shall be repeated.

8.4 Until Practical Completion occurs, no Commissioning shall take place.

8.5 The Generator shall furnish to CER, and ESBNG on Practical Completion:

8.5.1 a copy of all construction and test certificates that confirm that the Facility has been constructed in accordance with the design and the Specifications;

8.5.2 a certified copy of the Certificate of Practical Completion and any Quality Control Certificates required by any of the Relevant Agreements;

8.5.3 certified copy of Commencement Notices and any other notices required to be served on any Competent Authority, where required.

8.5.4 if not already furnished all licences (including the Planning and Environmental Consents) required by any Competent Authority for the construction and operation of the Facility; and,
8.5.5 such further documentation and certificates as may be required by the Grid Code, the Connection Agreement or Legal Requirements.

9. COMMISSIONING AND TESTING

9.1 Upon the issue of the Certificate of Practical Completion and compliance with Clause 8.5 Commissioning by reference to the Commissioning Instructions and the Commissioning Tests and, thereafter, if successful, the Completion and Performance Tests shall be undertaken and completed in accordance with the Milestones therefor.

9.2 Mechanical Completion and Commissioning

9.2.1 The Generator shall give the Representative at least five (5) days’ notice in accordance with the Programme of the undertaking of the Commissioning Tests. Major mechanical and electrical tests shall require to be agreed. The Representative will have the option to witness the tests. Failure of the Representative to attend will not delay the tests but shall not in any way diminish the responsibility and obligations of the Generator nor in any way prejudice the CER, it being the responsibility of the Generator at all times to ensure the Facility passes the said tests. The Programme shall set out the carrying out of any Commissioning Tests, of any mechanical testing of any part of the Facility, the timing of the Commissioning Tests, the mechanical tests, the electrical tests and the Completion and Performance Tests. The Generator shall promptly notify the Representative of any changes to that Programme.

9.2.2 The Generator shall diligently commission the Generation Unit after Practical Completion and proceed, upon the successful completion of the Commissioning Tests, to undertake and complete the Completion and Performance Tests with a view to achieving the Commercial Operation Date.

9.2.3 Without taking away from the generality of the Commissioning Tests and Completion and Performance Tests, Commissioning Tests and the Completion and Performance Tests shall be such tests as are suitable to test the Project complies with the design of the Facility, the Specifications, achieves Synchronization, the Facility operates in a proper and efficient manner and at the required performance levels, the Facility adapts to a live running environment and operates under normal business conditions having regard to the needs, nature, volume, requirements and safeguards of the Facility and the Facility is capable of handling in a proper and efficient manner the required needs, achieves the Contracted Capacity and the Maximum Export Capacity, complies with all Legal Requirements and permits the Facility to come into Commercial Operation by the Commercial Operation Date.

9.2.4 The Generator shall furnish to (and, where necessary, procure same for) the CER (and to any other relevant Party or Competent Authority) such certificates as may be necessary to permit the Facility to come into Commercial Operation.
9.2.5 The Generator shall, in addition to its obligations herein, comply with any provision of, give all notices and furnish all certificates required by the Grid Code or any Relevant Agreement which relates to Commissioning, Commissioning Tests, Completion and Performance Tests and Connection as if the same were set forth ad longum herein so that Commercial Operation will be achieved by the Commercial Operation Date.

9.3 Notice of Testing and the Test Results

9.3.1 The Generator shall give the Representative, and ESBNG not less than five (5) Business days prior written notice of its intention to conduct, Commissioning Tests nominated mechanical tests, the electrical tests or the Completion and Performance Tests and shall permit the Representative, if requested and representatives of ESBNG to attend those tests. The Generator shall, after the conduct of such tests, promptly provide the Representative and ESBNG with copies of the relevant test results.

9.3.2 Any failure by the Generator to comply with its obligations under Clause 9.3.1 shall render the relevant test invalid for the purposes of this Agreement and the Generator shall be obliged to repeat the test.

9.3.3 Notwithstanding the involvement of the Representative, the CER shall be deemed, for the avoidance of doubt, to have fully relied upon the Generator as an expert in all matters relating to the Works, Practical Completion, Commissioning and the Completion and Performance Tests.

9.4 Performance of the Generation Unit

Without prejudice to the rights and remedies of the CER, if the result of any test performed pursuant to Clause 9.3 demonstrates that the Generation Unit does not meet the design of the Facility or the Specifications and that it is incapable of providing the Contracted Capacity, the Contracted Operating Characteristics or the Maximum Export Capacity, the Generator shall take such measures as may be required to bring the performance of the Generation Unit up to the design of the Facility and the Specifications the Contracted Capacity, the Contracted Operating Characteristics and the Maximum Export Capacity at the earliest opportunity, and in any event within [twenty (20) Business Days].

9.5 Commencement of Commercial Operation

The Generator shall procure the confirmation from ESBNG pursuant to the provisions of the Connection Agreement in respect of the Shallow Operational Date and Deep Operational Date of the occurrence of the Commercial Operation Date after the Generation Unit has met the Specifications and that it has satisfactorily completed and passed the Commissioning Tests and the Completion and Performance Tests and furnish certified copies thereof to the CER.

10. CONFIDENTIALITY

10.1 Confidential Information
CER and the Generator shall each treat any and all information and data disclosed to it in connection with this Agreement in any form whatsoever (the “Confidential Information”) as confidential and proprietary and shall preserve the secrecy of the Confidential Information and accordingly not disclose it to any other person and shall not use Confidential Information for any purpose other than solely in connection with the performance of their respective rights and obligations under this Agreement or any other Relevant Agreement.

10.2 Permitted Disclosure

Notwithstanding the provisions of Clause [10.1] Confidential Information may be disclosed:

10.2.1 by either Party to those of the directors, officers, employees, agents, consultants, the Representative, advisers or investors of such Party who need to know the Confidential Information for the purpose of carrying out feasibility studies, the negotiation of any of the Project Agreements and the implementing of this Agreement and who agree in writing to keep the Confidential Information confidential on identical terms to this Clause [10]; and/or,

10.2.2 by either Party as may be ordered or required by any applicable law or a Competent Authority; and/or,

10.2.3 by either Party as may be required by any recognised stock exchange, in which event the Party making the disclosure shall first supply the other Party with a copy of such disclosure or statement and agree to incorporate any amendments or additions reasonably required by the other Party; and/or,

10.2.4 by either Party to any bank or financial institution (or its professional consultants) from which such Party is seeking to obtain finance or advice, upon obtaining a strict confidentiality undertaking from such bank or financial institution or professional consultants; and/or,

10.2.5 by either Party as may be required to comply with the requirements of any of the Project Agreements; and/or,

10.2.6 by CER as may be necessary to comply with any statutory obligation (including the Freedom of Information Act, 1997); and/or,

10.2.7 by either Party as may be agreed in writing by the Parties prior to disclosure by the Party disclosing any of the Confidential Information; and/or,

10.2.8 by either Party to the insurers of either Party.

10.3 For the purposes of this Clause [10], the term Confidential Information shall not include information which:
10.3.1 at the time of disclosure or any time thereafter is in or becomes part of the public domain other than through a breach of any provisions of this Clause [10]; or,

10.3.2 the Party receiving the information can prove the information was already known to it or was independently acquired or developed by it without being in breach of its obligations under this Clause [10]; or

10.3.3 became available to the Party receiving the information from another source in a non confidential manner, otherwise than in breach of any obligation of confidentiality.

10.4 All information supplied by or on behalf of a Party shall remain the sole and exclusive property of such Party and this Agreement shall not operate to transfer ownership or any interest whatsoever therein. On termination, the other Party shall, if requested by the Party disclosing the information promptly return to such Party all documents and any copies, extracts, notes or similar material containing or based in whole on such information.

10.5 The Generator shall not, without the prior written consent of the CER, make any public announcement or statement regarding this Agreement or any of the Project Agreements (including any dispute under the Project Agreements) or the status of any discussions relating thereto.

10.6 The provisions of this Clause [10] shall survive the expiry or termination of this Agreement.

11 DATA PROTECTION

11.1 The Generator shall be responsible for compliance with the provisions of the Data Protection Act, 1988 and as amended and extended and shall:

11.1.1 ensure all necessary registration applications are made and provide the CER with a copy of each such registration and any amendments or alterations made thereto;

11.1.2 ensure that any personal data is up to date;

11.1.3 notify CER of the names of staff who are authorised to permit any disclosures of such data on behalf of the Generator.

11.2 The CER may from time to time serve on the Generator an information notice requiring the Generator, within such time and in such form as is specified in the information notice, to furnish to the CER such information as the CER may reasonably require relating to:

11.3.1 compliance by the Generator or by its sub-contractors with the Generator obligations to the CER under this Agreement in connection with the processing of personal data; and/or

11.3.2 the rights of data subjects, including but not limited to subject access rights.
12 FORCE MAJEURO

12.1 Consequence of Force Majeure

Subject to this Clause [12] and except as otherwise provided in the Agreement, where a Non-Performing Party is rendered wholly or partially unable to perform all or any of its obligations under this Agreement by reason of Force Majeure, the Agreement shall remain in effect but the Non-Performing Party’s relevant obligations and the corresponding obligations of the other Party owned to the Non-Performing Party under the Agreement which are obligations affected by Force majeure shall be suspended provided that such suspension shall be of no greater scope and no longer duration than is required by the Force Majeure.

12.2 Effect of Force Majeure

In the event of the Non-Performing Party is unable to perform all or any of its obligations under the Agreement by reason of Force Majeure:

12.2.1 as soon as reasonably practicable, the Non-Performing Party shall notify the other party of the circumstance for Force Majeure, identifying the nature of the event, its expected duration, and the particular obligations thereby affected and furnish reports at such intervals as the other party may reasonably request, with respect thereto during the period of Force Majeure;

12.2.2 the Non-Performing Party shall use all reasonable efforts to remedy this inability to perform and to resume full performance of its obligations under the Agreement;

12.2.3 no obligations of either Party that arose before the Force Majeure and which can reasonably be expected to be performed are excused as a result of Force Majeure;

12.2.4 forthwith after the occurrence of the Force Majeure, each Party shall use all reasonable endeavours to consult with the other as to how best to give effect to their obligations under the Agreement so far as is reasonably practicable during the period of Force Majeure;

12.2.5 insofar as is possible the Non Performing Party shall seek to mitigate the consequences of the Force Majeure occurrence; and

12.2.6 the non-Performing Party on being able to resume full performance of its obligations under the Agreement, shall provide the other Party with written notice to that effect, without delay.

12.3 If the event of Force Majeure shall continue for more than twelve months, then either Party may terminate this Agreement by notice to the other Party
13. **DIRECT AGREEMENT**

The Generator may encumber (by way of charge or assignment with a provision for re-assignment on redemption) the Facility and this Agreement and any other assets required for the performance of this Agreement by way of security to the Lenders on foot of the Lending Agreements. The Generator shall notify the CER in writing within ten [10] Business Days of the creation of any such encumbrance and the execution of and date of coming into force of the Lending Agreements. The CER is willing to enter into the Direct Agreement, if requested to by the Lenders and upon proof that Financial Close has occurred or will occur subject to entry into the Direct Agreement.

14. **TAX CLEARANCE**

14.1 The Generator shall at all times during the operation of this Agreement be:

14.1.1 if Irish resident, in possession of a valid Tax Clearance Certificate;

14.1.2 if non-Irish resident, in possession of a Statement of Suitability issued by the Irish Revenue Commissioners

and furnish same to the CER on an annual basis and at such other times as may be required;

14.2 The Generator shall ensure in a similar manner that each sub-contractor possesses a Tax Clearance Certificate or, as the case may be, a Statement of Suitability.

14.3 The Generator shall inform the CER immediately of any change in the provisions of Clause 14.1 or 14.2

15 **TERM OF AGREEMENT**

15.1 This Agreement shall commence on the date of signing hereof.

15.2 In the event that;-:

15.2.1 the Generator at any time goes into liquidation, (whether voluntary or compulsory) or receivership or has an Examiner appointed to it, or being an individual or partnership is declared bankrupt;

15.2.2 the Generator, (or any Party for whom the Generator is responsible) commits a material breach of any term or condition of this Agreement or any Relevant Agreement;

15.2.3 the CER becomes aware the Generator provided information or made representations to the CER or its agent which is incorrect or inaccurate to a material degree;
15.2.4 there is a material change in identity or control of the Generator without the consent of the CER, which in the opinion of the CER, materially affects the Project;

THEN the CER shall be entitled to invoke the provisions of Clause [16] hereof.

15.3 For the purpose of this Clause a “material breach” shall include;

15.3.1 failure to complete the Project in accordance with the Milestones;

15.3.2 failure to comply with any of the provisions of Clause [6];

15.3.3 the termination of any of the Project Agreements without the approval of the CER;

15.3.4 any of the Project Agreements not coming into full force and effect with this Agreement or, if later, at the time required to come into full force and effect;

15.3.5 any breach of any warranties, representations or confirmations contained in Clause 4 hereof;

15.3.6 any other act, default or omission which is in breach of this Agreement and in respect of which the CER has given notice (a “breach notice”) to the Generator requiring the breach to be rectified and the Generator has failed to rectify within ten (10) Business Days of the breach notice or such longer period as the CER may in its own discretion shall specify in the breach notice.

16. CONSEQUENCES OF BREACH

16.1 In the event of any circumstances in Clause [15] above arising, the CER shall be entitled to;

16.1.1 require completion of the Project by the Generator in accordance with the provisions of this Agreement; and/or

16.1.2 call in the Performance Bond and/or.

16.1.3 terminate this Agreement and/or.

16.1.4 recover all loss and damage sustained by the CER by reason of the breach, neglect, default or omission of the Generator under this Agreement.

16.2 The right of the CER herein shall be subject to the provisions of Clause [13], if the Direct Agreement has been entered into by the CER Provided Always that nothing in Clause [13] or the Direct Agreement shall prevent the CER from calling in the Performance Bond in accordance with Clause 16.1.3 or the provisions of the Performance Bond.
16.3 The right to terminate this Agreement shall be without prejudice to any right or remedy of either Party.

17. NON LIABILITY

Notwithstanding anything else contained in this Agreement, no Party shall be responsible to the other Party for any consequential loss or damage which such Party may suffer and which, without limitation, shall include loss of profits, loss of business, loss of revenue, loss of contracts, loss of investment opportunity, loss of reputation, loss of goodwill, economic loss, cost of procurement of substitute goods, services, technology or rights or any indirect, incidental or consequential loss of damage. For the avoidance of doubt, the Performance Bond shall not be affected directly or indirectly in any way by the provisions of this Clause 17.

18. CORRUPT GIFTS AND PAYMENTS OF COMMISSION

18.1 The Generator shall neither:

18.1.1 offer or give or agree to any person employed or engaged by the CER any gift or consideration of any kind as an inducement or reward for doing or forbearing to do or for having done or forborne to do any act in relation to the obtaining or performance of this Agreement or any other agreement with the CER or for showing or forbearing to show favour or disfavour to any person in relation to this Agreement; nor

18.1.2 enter into this Agreement if, in connection with it, commission has been paid or agreed to be paid to any person employed or engaged by the CER by the Generator or on the Generator’s behalf or to the Generator’s knowledge.

18.2 In the event of any breach of this Clause [18] by the Generator or by anyone employed by the Generator or acting on the Generator’s behalf (whether with or without the knowledge of the Generator) or the commission of any offences by the Generator or by anyone employed by the Generator or acting on behalf of the Generator under the Prevention of Corruption Acts, 1889 to 1916 in relation to this or any other contract or agreement for the CER, the CER may summarily terminate this Agreement by notice in writing to the Generator Provided Always that such termination shall not prejudice or affect any right of action or remedy which shall have accrued or shall accrue thereafter to the CER and provided further that the CER may recover from the Generator the amount or value of any such gift, consideration or commission. For the avoidance of doubt, the CER shall be entitled, without prejudice to its other rights and remedies to call in the Performance Bond.

19. SEVERANCE

19.1 If any provision of this Agreement shall be found by any court or administrative body of competent jurisdiction or upon arbitration or by any other Competent Authority to be invalid or unenforceable, such invalidity or unenforceability shall not affect the other provisions of this Agreement which shall remain in full force and effect.
19.2 If any provision of this Agreement is so found to be invalid or unenforceable but would be valid or enforceable if some part of the provision were deleted, the provision in question shall apply with such modification(s) as may be necessary to make it valid.

19.3 The Parties agree, in the circumstances referred to in sub-clause [19.1] and if Clause [19.2] does not apply, to attempt to substitute for any invalid or unenforceable provision a valid or enforceable provision which achieves to the greatest extent possible the same effect as would have been achieved by the invalid or unenforceable provision. The obligations of the Parties under any invalid or unenforceable provision of this Agreement shall be suspended while an attempt at such substitution is made.

20. NOTICES

20.1 Mode of Service

Subject to Clause [20.3] notices and other communications to the other Party to this Agreement required or permitted hereunder or any proceedings relating hereto shall be in writing and will be sufficiently served:

20.1.1 if delivered by hand; or
20.1.2 if sent by fax; or
20.1.3 if sent by prepaid registered post; or
20.1.4 if sent by electronic mail

...to the address specified below in this Clause or to such other address as is from time to time notified to the other Party in accordance with the provisions of this Clause:

the Commission for Energy Regulation
Plaza House,
Belgard Road,
Tallaght,
Dublin 24.

And copied to:

the Generator

And copied to:

20.2 Time of Service
Subject to Clause [20].3 any such notice or communication shall be deemed to have been served,

20.2.1 if delivered by hand, upon such delivery;
20.2.2 if sent by fax, upon the sender obtaining a valid fax transmission receipt or when the recipient confirms receipt of the fax;
20.2.3 if sent by pre-paid registered post, on the third Business Day after the date of posting;
20.2.4 if sent by electronic mail, when the recipient has (by electronic mail or otherwise) acknowledged receipt of the communication,

provided that, if in accordance with the above provisions, any such notice or communication is delivered or received outside working hours on any day, such notice or communications shall be deemed to have been served at the start of the working hour on the next Business Day thereafter.

20.3 Fax and e-mail notices

Each person giving a notice or making a communication hereunder by facsimile or electronic mail shall promptly confirm such notice or communication by post to the person to whom such notice or communication was addressed but the absence of any such confirmation shall not affect the validity of any such notice or communication or time upon which it is deemed to have been served.

21. ANNOUNCEMENTS

The Generator shall not (without the consent of the CER) publish any press release, advertisement, document or statement concerning this Agreement or any of the Project Agreements and in any application for consent shall provide such information and comment on such press release, advertisement, document or statement as the CER may from time to time reasonably request.

22. CONCILIATION

If any Dispute arises between the Parties with respect to or any matter arising out of or relating to this Agreement and is unable to be resolved between them, then either Party may request that the conciliation procedures set out in Appendix [9] hereto be invoked and which he may do so by notice in writing to the other Party. If a settlement of the Dispute is not reached under the conciliation procedure set out in Appendix [9], either Party may refer the dispute to arbitration in accordance with clause [23] hereof.

23. ARBITRATION

23.1 Subject to clause [22], any and all Disputes between the Parties with respect to any matter arising out of or relating to this Agreement shall be determined by reference to Arbitration in accordance with Clause 23.2.

23.2 Subject to Clauses 23.3 and 23.4, all Disputes to be dealt with under this Clause 23.2 shall be finally settled by arbitration under the Rules of Arbitration of the International
Chamber of Commerce (ICC Rules) as in force at the time such arbitration is commenced.

23.3 The Parties shall seek to agree in writing the identity of a sole arbitrator and by written notice jointly request the International Chamber of Commerce (ICC), acting in accordance with the procedures adopted by the ICC for this purpose, to appoint the agreed arbitrator. If the Parties have not submitted a joint written notice to the ICC within five (5) Business Days of receipt of a Party requesting to refer the Dispute to arbitration, then either or both Parties may apply to the ICC, acting in accordance with the procedures adopted by the ICC for this purpose, to appoint a sole arbitrator.

23.4 Where a Dispute is referred to arbitration, the procedures to be followed shall be as determined by the arbitrator in accordance with the ICC Rules, subject to the following:-
23.4.1 the seat of the arbitration shall be in Dublin, Ireland and the language of the arbitration shall be English;
23.4.2 the Governing Law shall be as provided in Clause 24.

23.5 Any Arbitration Award shall be final and binding and may, if necessary, be enforced by any Court or authority having jurisdiction which shall be a Court or authority having its forum within the Irish jurisdiction.

23.6 Notwithstanding a Dispute has been referred to conciliation in accordance with Clause [22] or to arbitration in accordance with this Clause [23], each Party shall be obliged to perform and observe its obligations under this Agreement and any of the Project Agreements as if the Dispute had not occurred or the provisions of Clause [22] or [23] invoked but without prejudice to the Dispute being resolved at a later date, it being at all times and of the essence that the provisions of this Agreement and each of the Project Agreements operate without impediment or hindrance in a spirit of good faith and that the performance and observance of this Agreement and each of the Project Agreements are not in any way jeopardized or prejudiced.

24. GOVERNING LAW

24.1 Governing Law

24.1.1 All Disputes between the Parties arising out of or in any way relating to this Agreement or any other Disputes between the Parties or in any way connected with the subject matter of this Agreement shall be governed by the laws of Ireland. Subject to Clauses [22 and 23] any dispute shall be subject to the exclusive jurisdiction of the Courts of Ireland.

24.1.2 Each Party further agrees that a finding or conclusion of an arbitrator or determined by an arbitrator in accordance with Clause [23] or any judgment in any proceedings brought under or pertaining to this Agreement in the Courts of Ireland shall be conclusive and binding upon such Party and may be enforced in the Courts of any other jurisdiction.

24.1.3 Nothing contained in this Clause 24 or Clauses 22 and 23 shall limit the right of the Parties to seek provisional or protective relief from any Court having
competent jurisdiction pending the outcome of conciliation or arbitration in accordance with this Agreement.

IN WITNESS whereof the Parties hereto have executed this Agreement the day and year first herein WRITTEN.
APPENDIX 1
CAPACITY AND DIFFERENCES AGREEMENT
APPENDIX 2

MECHANICAL TESTS AND COMPLETION AND PERFORMANCE TESTS

Part 1

Mechanical Tests

The following tests will be carried out including but not limited to:
- Tests to confirm that installations have been constructed in compliance with the Specifications
- Type tests
- Third party tests
- Gas and steam turbine overspeed Tests
- Safety System Tests

Part 2

Completion Tests

After First Synchronisation, the following Tests will be carried out including but not limited to:
- Load rejection test
- Generators Plant Functional Checks
- Environmental Tests
- Grid Code Compliance Tests
- Consistency of Plant settings and Equipment
- Operation of Auto Changeover Systems Tests
- Control Systems Performance Tests
- Performance Testing of Sub Systems
- Generator Load Run Tests

The Generator will make available for inspection procedures for testing of the Generators equipment. The Representative will decide the tests that he wishes to witness.

Part 3

Performance Tests

[To be developed from Generator’s Tender]
To confirm the Facility’s performance the following tests will be required as a minimum
- Reliability Run
- Capacity Guarantee Tests
- Performance Guarantee Tests
- Other tests necessary to confirm compliance with Grid Code requirements
APPENDIX 3

SPECIFICATIONS

Part 1 Specifications

The specification should include the following:

- Plant configuration
- Operating capabilities
- Plant capacity
- Project schedule
- Site details
- Requirements for design, quality of materials and workmanship
- Standards codes and statutory requirements
- Safety standards
- Fuels specifications
- Environmental requirements
- Grid code compliance requirement
- Redundancy levels
- Site layout
- Operating requirements
- Detailed gas Turbine/generator specification
- Detailed Heat Recovery Steam Generator specification
- Detailed Steam Turbine/Generator specification
- Detailed Mechanical and Electrical BOP specification
- Grid connection requirements
- Civil and structural works
- Building requirements
- Quality assurance, inspection and testing requirements

The Generator shall include a list of standards and regulations with which he intends to comply. The Generator will comply with the following codes, standards and regulations as a minimum:

- Grid Codes
- Irish standards and regulations
- Relevant BS, DIN, ASME, ASTM, ANSI, TEMA, French and API standards
- All buildings and supporting structures shall comply with Irish standards. Where unspecified ASTM and ANSI shall apply
- ASHRAE standards shall apply to all HVAC equipment and installation
- International Organisation for Standardisation (ISO)
- European Committee for Standardisation (CEN)
- IEC standards shall be used for all electrical equipment and systems

If the Generator proposes use of standards other than those mentioned he must demonstrate that they are equivalent or superior to those mentioned.

The Generator must comply with all Irish and EU acts and regulations applicable to this type of development including but not limited to:

- Planning requirements
• Irish Building regulations
• Safety, Health and Welfare
• Environmental Protection
• ETCI – Electro Technical Council of Ireland “National Rules for Electrical Installations
• Regulations relating to gas installations
• Regulations relating to electricity installations

[To be further developed from the Generator’s Tender]

Part 2
Contracted Operating Characteristics
[To be further developed from the Generator’s Tender]

• To comply with the Connection Agreement
• Net Capacity to be declared by the generator
APPENDIX 4
FORM OF DIRECT AGREEMENT

[CER]
and

[AGENT BANK]
and

[GENERATOR]

DIRECT AGREEMENT
RECITALS

1. Definitions and Interpretation
2. Acknowledgement and Consent
3. Notices of Termination and Enforcement
4. Step-In and Step-Out
5. Novation or Share Sale
6. Absence of Step-In or Novation
7. Revocation of Generator’s Licence
8. Acknowledgement and Revocation of Notices
9. Notices
10. Assignment
11. Counterparts
12. Payment
13. Default Interest
14. Remedies and Waivers
15. Partial Invalidity
16. Confidentiality
17. Entire Agreement
18. Law, Jurisdiction and Expiry

Execution
THIS DIRECT AGREEMENT is dated 200[ ]

BETWEEN:

(1) COMMISSION FOR ENERGY REGULATION of Plaza House, Belgard Road, Tallaght, Dublin 24 (“CER”) (“Purchaser”);

(2) [ ] BANK of [ ], as agent [and trustee] for and on behalf of the Banks (“Agent”); and

(3) [ ] a company registered and incorporated under the laws of [ ] whose registered office is situate at [ ] (“Generator”).

WHEREAS:

(A) By the Credit Agreement the Banks have agreed to make available certain credit facilities to Generator.

(B) By virtue of the Implementation Agreement the Generator agreed with the CER to design, construct, commission, bring into Commercial Operation the Facility.

(C) By Clause [14] of the Implementation Agreement, the CER agreed to enter into this Agreement.

NOW IT IS AGREED as follows:

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In the Agreement, unless the context otherwise requires:

“Agreement”

means this direct agreement including the recitals;

“Banks”

means the [banks] as defined in the Credit Agreement [certain financial institutions/other investors];

“Business Day”

means Monday through to Friday (inclusive), but excluding public holidays in Ireland;

“CADA Agreement”
means the capacity and differences agreement between ESB of the one part and the Generator of the other part;

“Competent Authority”

has the meaning given to it in the Implementation Agreement;

“Connection Agreement”

means the agreement of that title dated [ ] between [EirGrid] (1) and Generator (2);

“Counter Notice”

has the meaning given to it in Clause 3.3;

“Credit Agreement”

means the [credit agreement] dated [ ] between [ ] and any other related documentation;

“CPI”

means the consumer price index published by the Government Information Centre;

“[Debenture”

means the [ ] of [ ] granted by Generator to Agent dated [ ];

“Enforcement Notice”

has the meaning given to it in Clause 3.2;

“ESB”

means the Electricity Supply Board and where the context so admits or requires its successors;

“Event of Default”

means an [Event of Default] as defined in the Credit Agreement;

“EURIBOR”

has the meaning given to it in the CADA Agreement;

“Facility”
has the meaning given to it in the Implementation Agreement;

“Implementation Agreement”

means the agreement of that title dated [          ] between CER (1) and Generator (2);

“Insolvency Related Event”

means in relation to Generator:

(a) an order of the High Court being made or an effective resolution being passed for its insolvent winding up or dissolution; or

(b) a receiver of the whole or any material part of its assets or undertaking being appointed or an examiner (within the meaning of the Companies (Amendment) Act 1990) being appointed; or

(c) it enters into any scheme of arrangement (other than for the purpose of a solvent reconstruction or amalgamation upon terms and within such period as may previously have been approved in writing between the Parties); or

(d) it is unable to pay its debts within the meaning of Section 214 of the Companies Act 1963 (save where any demand for payment is being contested in good faith by the Party with recourse to all appropriate measures and procedures);

and any similar or analogous process to any of the above in relation to Generator or its assets in any jurisdiction.

“Liability Amount”

has the meaning given to it in Clause 4.5;

“Novation Effective Date”

has the meaning given to it in Clause 5.1;

“Principal Agreements”

means the Implementation Agreement, the CADA Agreement and the Connection Agreement;

“Proposed Novation Notice”

has the meaning given to it in Clause 5.1;

“Proposed Shareholder”

has the meaning given to it in Clause 5.1;
“Proposed Share Sale Notice”

has the meaning given to it in Clause 5.1;

“Proposed Substitute”

has the meaning given to it in Clause 5.1;

“Prudent Electric Utility Practice”

has the meaning given to it in the Implementation Agreement;

“Security Documents”

means [the Debenture], [the Shares Pledge,] [ ] and any other security taken by Agent in connection with the Credit Agreement;

“Share Sale Effective Date”

has the meaning given to it in Clause 5.1;

“Shares Pledge”

means the pledge on its shares in Generator granted by [ ] to agent dated [ ];

“Step-in Date”

means the date of issue of the Step-in Undertaking;

“Step-in Notice”

has the meaning given to it in Clause 4.1;

“Step-in Period”

means the period commencing on the Step-in Date and ending on the earlier of:

(a) the date of the [second] anniversary of the Step-in Date (subject only to Clause 5.8);

(b) the Step-out Date;

(c) the Novation Effective Date; and

(d) the Share Sale Effective Date;

“Step-in Undertaking”

has the meaning given to it in Clause 4.2(b);
“Step-out Date”

has the meaning given to it in Clause 4.4;

“Termination Notice”

has the meaning given to it in Clause 3.1;

“Wilful Default”

means any intentional or reckless breach or disregard by a party of its obligations but not, for the avoidance of doubt, a breach or disregard of an obligation resulting from an error of judgement or inadvertent mistake arising in good faith.

1.2 Interpretation

In the Agreement, unless the context otherwise requires;

(a) words importing persons or parties shall include firms and corporations and all references to persons shall include their successors and permitted assigns;

(b) words importing the singular only also include the plural and vice versa where the context requires;

(c) words importing the masculine shall include the feminine and neuter and vice versa where the context requires;

(d) the headings in the Agreement shall not be deemed part of or to be taken into consideration in the interpretation or construction hereof and are included for ease of reference only;

(e) all references to Clauses shall be construed as references to clauses of the Agreement unless the context otherwise requires;

(f) all references to agreements or documents include all references to such agreements or documents as the same may have been or may from time to time be, varied, amended, supplemented, substituted, novated or assigned;

(g) all references to legislation include all replacements and amendments thereof;

(h) if any of the source documents or indices referred to in the Agreement are unavailable or cease publication or if any of the reference data used to compile any such indices shall change, the parties shall negotiate in good faith to agree alternative source documents or indices which as nearly as practicable achieve the same result as the source documents or indices; and

(i) all references to notices given by one party to the other shall be taken to mean notices in writing given in accordance with Clause 10.
2. Acknowledgement and Consent

2.1 Generator hereby gives notice to the CER of the security interests granted by Generator to Agent under the Security Documents over all of the right, title, benefit and interest of Generator in and to the Principal Agreements.

2.2 CER hereby consents to the granting of the security interest referred to in Clause 2.1 created by the Security Documents, as contemplated by Clause [14] (Encumbrance) of the Implementation Agreement.

2.3 CER hereby confirms to Agent that it has not received notice of any other security interests granted by Generator to any third party of any right, title, benefit or interest in and to any of the Principal Agreements.

2.4 Save in respect of any obligations of Agent or any of the Banks assumed in connection with the Agreement, CER acknowledges that Agent and the Banks do not assume any liabilities or obligations under the Principal Agreements as a result of the security interest referred to in Clause 2.1.

2.5 Agent and the Banks hereby acknowledge that nothing in the Credit Agreement, the Security Documents, the Agreement or any other agreement between any of them and Generator (including in particular but without limitation the service by Agent of a Step-in Notice) shall affect in any way the rights of the CER under Clause [Termination] (Termination) of the Implementation Agreement or (but an exercise by CER of those rights shall not preclude an exercise by Agent and the Banks of their rights under the Agreement).

2.6 CER warrants to Agent that, as at the date of the Agreement, so far as it is aware and save as disclosed in writing to Agent:

(a) Generator is not materially in breach of the Implementation Agreement;

(b) no material action, arbitration or administrative proceedings of or before any court or agency has been started or threatened by CER in relation to the Implementation Agreement.

[2.7 Agent and the Banks hereby acknowledge that nothing in the Credit Agreement, the Security Documents or the Agreement shall prevent the CER from invoking its rights to call in the Performance Bond.]

3. NOTICES OF TERMINATION AND ENFORCEMENT

3.1 CER undertakes to Agent not to give notice to terminate the Implementation Agreement without first giving Agent at least [30] days’ prior written notice (a “Termination Notice”) specifying the grounds for that termination or exercise.
3.2 Agent undertakes to give notice as soon as reasonably practicable (but within 10 Business Days) to the CER (an “Enforcement Notice”) of:

(a) any acceleration of amounts due and owing under the Credit Agreement; and/or

(b) any enforcement procedure commenced under any of the Security Documents;

when any such acceleration and/or enforcement procedure is commenced, specifying the grounds for that acceleration or enforcement.

3.3 CER undertakes to Agent that upon receipt of an Enforcement Notice it shall not give notice to terminate the Implementation Agreement without first giving Agent at least [30] days’ prior written notice (a “Counter Notice”) specifying the grounds for that termination or exercise.

4. STEP-IN AND STEP-OUT

4.1 If Agent shall take any steps to enforce the whole or any part of the security granted pursuant to the Security Documents, Agent may, at any time prior to the expiry of a termination Notice or Counter Notice or, if a Termination Notice or Counter Notice has not been given, at any time after service of an Enforcement Notice, give at least thirty (30) days but no more than sixty [60] days’ prior written notice to CER (a “Step-in Notice”) of the intention of Agent to issue a Step-in Undertaking on a specified date. Subject to Clause 8.2, CER shall not be entitled to terminate the Implementation Agreement during the notice period specified in a Step-in Notice.

4.2 (a) Within thirty [30] days of receipt of the Step-in Notice CER shall give written notice to Agent of any sums which are or shall become due and payable and of any obligations which are or shall become outstanding by Generator to CER under the Implementation Agreement up to the date specified in the Step-in Notice as being the proposed date of issue of a Step-in Undertaking.

(b) Upon receipt of the information referred to in Clause 4.2(a), Agent, not later than thirty [60] days after the date of issue of the Step-in Notice, may give notice to the CER stating that it wishes any receiver or manager appointed pursuant to the Security Documents or a company the whole of whose issued share capital is held by the Banks (A “Bank Entity”) to become a joint and several obligor with the Generator in respect of the Generator’s obligations under the Implementation Agreement and the Bank Entity shall execute a written undertaking (in form and substance reasonably satisfactory to CER) (the “Step-in Undertaking”) (accompanied by such financial support for the Bank Entity from the Banks or otherwise so that the CER (acting reasonably) is satisfied that the Bank Entity is capable of meeting its obligations under the Step-in Undertaking), incorporating a clause in terms similar to Clause 13:

(i) pay to CER within forty-five [45] days of demand by CER any sum due and payable but unpaid by Generator to CER under the
Implementation Agreement prior to the date of issue of the Step-in Undertaking, as notified by CER pursuant to Clause 4.2(a);

(ii) perform any outstanding obligations of Generator under the Implementation Agreement which shall have arisen prior to the date of issue of the Step-in Undertaking, as notified by CER pursuant to Clause 4.2(a);

(iii) pay any sum due and payable under the Implementation Agreement which shall arise from any act or omission occurring after the Step-in Date (but subject to Clauses 4.4, 5.4(a)(iv) and 5.4(b); and

(iv) perform any obligations under the Implementation Agreement which shall arise after the Step-in Date (but subject to Clauses 4.4, 5.4(a)(iv) and 5.4(b).

4.3 During the Step-in Period CER shall be entitled to exercise its right of termination under the Implementation Agreement:

(a) in respect of any event arising during the Step-in Period (and “event” shall include the expiry of any period allowed for the remedy of a default which occurred prior to the Step-in Date and in respect of which the CER has given the Agent written notice prior to the Step-in Period) provided that such event is not:-

(i) an Insolvency Related Event; or

(ii) any event arising as a direct consequence of Agent exercising its right to enforce the security constituted by any of the Security Documents; or

(iii) in the case of a Step-in Notice relating to a Termination Notice given by CER, a breach of the Implementation Agreement which is capable of remedy and is remedied within any relevant remedy time period set out in the Implementation Agreement. For the purposes only of this Clause 4.3(a)(iii) such time period shall be deemed to commence seven days after the Step-in Date; or

(b) if Bank Entity fails to pay when due any amount owed to CER or to perform any obligation under the Step-in Undertaking and such failure is not remedied within fourteen [14] days of notice thereof by CER to Agent.

4.4 Agent may at any time give CER at least thirty [30] days’ prior written notice:

(a) to terminate the Step-in Period on a date specified in the notice (the “Step-out Date”); or

(b) that the Step-in Period will end due only to the occurrence (subject to Clause 5.8) of the [second] anniversary specified in paragraph (a) of the definition of the Step-in Period,
and provided that all liability under the Step-in Undertaking pursuant to any claims made during the period of such notice shall have been fully and unconditionally discharged, the Bank Entity, the Agent and the Banks, shall be released from the Step-in Undertaking on the Step-out Date or the occurrence (subject to Clause 5.8) of such [second] anniversary, (as the case may be). Such release shall not affect the continuation of Generator’s obligations towards CER under the Implementation Agreement.

4.5 Notwithstanding any other provision of the Agreement or the Implementation Agreement, the aggregate amount (the “Liability Amount”) for which the Bank Entity shall be liable to CER under or pursuant to the Step-in Undertaking shall not, save as may be otherwise agreed by Agent, exceed the aggregate sum of €[ ] (escalated from the date of execution of the Implementation Agreement to the date on which the final payment shall have been made under the Step-in Undertaking, in accordance with the corresponding percentage increase in the CPI during such period) as the same may be reduced pursuant to Clause 4.6, provided that the limitation contained in this Clause 4.5 shall not apply to any claim by Purchaser in respect of Wilful Default under the Implementation Agreement occurring after the Step-in Date by any of Agent, Generator, the Bank Entity and the Banks or any person acting thereunder on behalf of any one or more to them.

4.6 If, at any time after the Step-in Date any of Agent, Generator, the Bank Entity and the Banks pay:

   (a) any amount to Generator in order to able it to make a payment falling due under the Implementation Agreement; or

   (b) any amount in or toward discharge of any obligations of Generator under the Implementation Agreement;

the aggregate amount set out in Clause 4.5 shall be reduced pro tanto by such amount from and after the date of such payment.

4.7 Agent shall notify CER as soon as reasonably practicable after it becomes aware of any decease in the Liability Amount pursuant to Clauses 4.5 and 4.6 by more than €[ ] in aggregate.

5. NOVATION OR SHARE SALE

5.1 At any time:

   (a) prior to the expiry of a Termination Notice or Counter Notice, or if a Termination Notice or Counter Notice has not been given, at any time after service of an Enforcement Notice; or

   (b) during the Step-in Period.

Agent may either:
(i) give notice (a “Proposed Novation Notice”) to CER that it wishes another person (a “Proposed Substitute”) to assume by way of sale, transfer or other disposal the rights and obligations of Generator under the Implementation Agreement and specifying a date, falling not later than thirty [30] days after the date of the Proposed Novation Notice, on which such assumption is to be effective (which date, if such assumption shall become effective in accordance with this Clause 5, shall be known as the “Novation Effective Date”); or

(ii) give notice (a “Proposed Share Sale Notice”) to CER that it wishes another person or persons (together a “Proposed Shareholder”) to acquire the shares of Generator, which are subject to the Shares Pledge and specifying a date, falling not later than thirty [30] days after the date of the Proposed Share Sale Notice, on which such acquisition is to be effective (which date, if such acquisition shall become effective in accordance with this Clause 5, shall be known as the “Share Sale Effective Date”).

5.2 A novation in accordance with a Proposed Novation Notice (a “Novation”), or a share sale in accordance with a Proposed Share Sale Notice (a “Share Sale”), shall only be effective if CER consents to that Novation, or Share Sale, in writing in accordance with Clause 5.3. Agent shall (as soon as practicable) supply CER with such information as CER reasonably requires to enable it to decide whether to grant such consent.

5.3 CER may only withhold or delay consent to either a Novation, or a Share Sale, by reference to the following criteria:

(a) the legal capacity, power and authorisation of either the Proposed Substitute to become a party to and perform the obligations of Generator under the Implementation Agreement, or the proposed Shareholder to become a shareholder of Generator, including any necessary authorisations and consents; and

(b) the technical competence and financial standing of, and the technical and financial resources available to, either the Proposed Substitute for the purpose of running and operating the Facility in accordance with Prudent Electric Utility Practice, or the Proposed Shareholder for the purpose of ensuring that Generator shall be able to run and operate the Facility in accordance with Prudent Electric Utility Practice.

If any consent is refused under Clause 5.2, the CER shall simultaneously give written reasons for such refusal to the Agent.

CER shall notify Agent in writing within fifteen [15] days of the later of receipt of a Proposed Novation Notice, or Proposed Share Sale Notice, and all information required under Clause 5.2, as to whether or not it has decided to grant such consent. If no written notice is given by CER within such fifteen [15] day period, CER shall be deemed to have consented. If CER exercises its right hereunder to withhold its consent to a Proposed Novation Notice or
proposed Share Sale Notice, this shall not prejudice the ability of Agent to give one or more subsequent Proposed novation Notices, or Proposed Share Sale Notices, pursuant to the provisions of Clause 5.1 containing changed particulars relating to the same Proposed Substitute, or Proposed Shareholder, or particulars relating to another Proposed Substitute or Proposed Shareholder, which Agent has good cause to believe would fulfil the requirements of Clauses 5.3(a) and 5.3(b).

5.4 If CER consents to:

(a) a Novation pursuant to a Proposed Novation Notice, on the Novation Effective Date:

(i) the Proposed Substitute shall become a party to the Implementation Agreement in place of Generator and thereafter shall be treated as if it is named as a party thereto in place of Generator;

(ii) CER and the Proposed Substitute shall enter into a novation agreement and any other requisite agreements in form and substance satisfactory to CER acting reasonably pursuant to which the Proposed Substitute shall be granted all of the rights and assume all of the obligations of Generator under the Implementation Agreement, provided that CER will not be in breach of any of its obligations hereunder if the Proposed Substitute does not agree to enter into such agreements;

(iii) CER shall owe its obligations under the Implementation Agreement arising on and after the Novation Effective Date to the Proposed Substitute and the receipt, acknowledgement or acquiescence of the Proposed Substitute shall be a good discharge; and

(iv) if Agent shall have entered into a Step-in Undertaking, the Bank of Entity and, if applicable, Agent and the Banks shall be released from the Step-in Undertaking, provided that all obligations of Agent and the Banks under the Step-in Undertaking which have accrued up to the Novation Effective Date and are identifiable as at such date shall have been discharged in full on such date; or

(b) a share sale pursuant to a Proposed Share Sale Notice, if Agent shall have entered into a Step-in Undertaking, Agent and the Banks shall be released from the Step-in Undertaking on the Share Sale Effective Date, provided that all obligations of Agent and the Banks under the Step-in Undertaking which have accrued up to the Share Sale Effective Date and are identifiable as at such date shall have been discharged in full on such date.

5.5 CER hereby expressly consents to either any transfer of the benefit of Generator’s interest in the Implementation Agreement to a Proposed Substitute, or any sale of shares in Generator to a Proposed Shareholder, which has been approved by CER in accordance with the provisions of this Clause 5.
5.6 After the Novation Effective Date, or the Share Sale Effective Date, CER shall only be entitled to exercise its rights of termination under the Implementation Agreement in respect for any event arising after such date (and “event” shall include the expiry of any period allowed for the remedy of a default which occurred and in respect of which the CER has given the Agent written notice prior to the Novation Effective Date or the Share Sale Effective Date, as the case may be) provided that such event is not a breach of the Implementation Agreement which is capable of remedy and is remedied within any applicable remedy time period. For the purposes only of this Clause 5.6, any such remedy time period shall be deemed to commence seven (7) days after the Novation Effective Date or Share Sale Effective Date (as the case may be).

5.7 For the avoidance of doubt, if a Proposed Novation Notice, or Proposed Share Sale Notice, is served during the Step-in Period and CER does not consent to that Proposed Novation Notice, or Proposed Share Sale Notice, the Step-in Period shall continue (subject to the terms of this Agreement).

5.8 If as at the expiry of the Step-in Period Agent is in the course of conducting discussions in good faith with a Proposed Substitute, or Proposed Shareholder, (which has been approved by CER in accordance with Clause 5.3) then the Step-in Period shall not expire but shall continue until a date agreed by CER or if contracts have been exchanged with a Proposed Substitute, or Proposed Shareholder, (which has been approved by CER in accordance with Clause 5.3) as at the expiry of the Step-In Period then the Step-in Period shall not expire but shall continue until the date such contacts are completed provided that such date shall not be later than sixty (60) days after such exchange.

6. **ABSENCE OF STEP-IN OR NOVATION**

If a Termination Notice or a Counter Notice expires and either:

(a) no Step-in Notice has been given; or

(b) no Proposed Novation Notice, or Proposed Share sale Notice, has been given or, if it has been given, CER does not consent to that novation, or share sale, in accordance with its rights hereunder;

then CER shall be entitled to:

(i) terminate and act upon any and all grounds for termination available to it in relation to the Implementation Agreement; and

(ii) pursue any and all claims and exercise any and all rights and remedies against Generator.

7. **REVOCATION OF GENERATOR’S LICENCE**

If any licence issued by a Competent Authority is revoked which Generator is required to maintain by virtue of the Implementation Agreement at any time after the
commencement of the Step-in Period and undertakings satisfactory to a Competent Authority have been given by Generator or Agent to a Competent Authority that:

(a) steps will be taken to remedy the event or circumstance in question which gave rise to such revocation and such steps have been or are being taken; and/or

(b) continuity of supplies of electricity from the Facility shall be restored and maintained within ninety (90) days,

then, without prejudice to any other right, relief or remedy of CER under the Implementation Agreement, CER shall refrain from any right it may have under the Implementation Agreement to terminate same for a period commencing on the date of revocation of the licence and ending on the earlier of the date falling sixty (60) days after the date of such revocation and the date (if any) that a new licence is granted by the Competent Authority on the same terms as were contained in the revoked licence or such other terms as shall be acceptable to Agent.

8. ACKNOWLEDGEMENT AND REVOCATION OF NOTICES

8.1 CER acknowledges in favour of Agent, each of its employees, agents and directors and advisers that it shall be reasonable for Generator in exercising any discretion under the Implementation Agreement or in making any determination to consult with Agent or its advisers.

8.2 A Counter Notice, an Enforcement Notice, a Step-in Notice and a Termination Notice can each be revoked (in writing to the recipient) by the party giving them prior to the expiry of their respective notice periods. Upon any such revocation, the rights and obligations of the parties to the agreement shall be construed as if the relevant notice had not been given.

9. NOTICES

9.1 Any notice authorised by the Agreement to be given by either party to the other shall be in writing.

9.2 All written communications shall either be personally delivered or sent by pre-paid registered post (by airmail if overseas) or by telefax. Communication by telefax shall be confirmed by forwarding a copy of same by pre-paid registered post.

9.3 Any notice so delivered, posted or transferred shall be deemed to have been given:

(a) in the case of pre-paid registered post on the second Business Day following the date of posting (or, if airmailed from overseas, on the fifth Business Day following the date of posting)); and

(b) in the case of facsimile transfer where there is confirmation of uninterrupted transmission by a transmission report and where there has been no telephonic communication by the recipient to the senders (to be confirmed in writing) that the telefax has not been received in legible form:
9.4 Any such notice authorised by the Agreement to be given by either party to the other shall be sent or delivered to the address, and marked for the attention of the representative of the receiving party:

if to CER:

Commission for Energy Regulation,
Plaza House,
Belgard Road,
Tallaght,
Dublin 24.

Telefax: 353-1-

Attention: [ ]

if to Agent:

[ ]

Telefax: [ ]

Attention: [ ]

if to Generator

[ ]

Telefax: [ ]

Attention: [ ]

9.5 Either Party may, by written notice to the other, change its nominated address or telefax number.
10. ASSIGNMENT

10.1 Neither CER nor Agent shall assign or transfer any part of its respective rights or obligations under the Agreement without the prior consent of the other, provided that Agent may assign or transfer its rights and obligations to a successor agent under the Credit Agreement without the consent of CER and this Clause 10.1 shall not prevent any Bank assigning or transferring its rights under the terms of the Credit Agreement.

11 COUNTERPARTS

The Agreement may be executed in any number of counterparts, all of which when taken together shall constitute one and the same instrument.

12 PAYMENT

12.1 The Euro is the currency of account and of payment for each and every sum (if any) at any time due from any party pursuant to the Agreement.

12.2 On each date on which the Agreement requires an amount to be paid by any party, such party shall make the same available to the payee in Euros in immediately available, freely transferable, cleared funds to such account with such bank as the payee may have specified for this purpose.

12.3 All payments required to be made by any party pursuant to the Agreement shall be deemed to be exclusive of value added tax.

13. DEFAULT INTEREST

Each party shall be entitled, without prejudice to any other right or remedy, to receive interest on any payment not made on the due date calculated at the rate of two (2) percentage points above EURIBOR, compounded on an annual basis, from the due date up to but excluding the date of payment.

14. REMEDIES AND WAIVERS

No failure to exercise, nor any delay in exercising, on the party of any party hereto any right or remedy hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right or remedy prevent any further or other exercise thereof or the exercise of any other right or remedy. The rights and remedies herein provided are cumulative and not exclusive of any rights or remedies provided by law.

15. PARTIAL INVALIDITY

If at any time any provision of these presents is or become illegal, invalid or unenforceable in any respect under the law of any jurisdiction neither the legality, validity or enforceability of the remaining provisions of these presents nor the legality, validity or enforceability of such provision under the law of any other jurisdiction shall in any way be affected or impaired thereby.
16. CONFIDENTIALITY

16.1 Subject to Clause 16.2, the parties hereto shall at all times during the continuance of the Agreement and for a period of three (3) years following its expiry (howsoever occasioned):

(a) use their reasonable endeavours to keep all information regarding the terms and conditions hereof and any data or information acquired under or pursuant to the Agreement or the Implementation Agreement confidential and accordingly not disclose the same to any other person; and

(b) not use any document or other information (whether technical or commercial) obtained by them respectively by virtue of the Agreement or the Implementation Agreement concerning the undertaking of any of the other party for any purpose other than performance of the relevant party’s obligations and exercise of its rights under the Agreement, provided that the provisions of this Clause 16.1 shall not apply to information which at the time of disclosure was in the public domain other than by breach of the foregoing obligations of confidentiality.

16.2 Each party shall be entitled to disclose the terms and conditions of the Agreement and any data or information acquired by it under or pursuant to the Agreement or the Implementation Agreement without the prior written consent of the other party if such disclosure is made in good faith:

(a) to any outside professional consultants or advisers engaged by or on behalf of such party and acting in that capacity upon obtaining from such consultants or advisers an undertaking of confidentiality equivalent to that contained in Clause 16.1;

(b) to the extent required by the licence to operate the Facility, applicable law or binding requirement of a Competent Authority or the rules of a recognised stock exchange;

(c) to the extent required by law or any directive or pursuant to an order of any court of competent jurisdiction;

(d) to directors, employees and officers of such party; or

(e) by the Agent to the Banks, to a Proposed Substitute or to a Proposed Shareholder, and is necessary to enable such party to perform its obligations under the Agreement or to protect or enforce its rights under the Agreement.

17. ENTIRE AGREEMENT

The Agreement (when read together with the Implementation Agreement) contains or expressly refers to the entire agreement between the parties with respect to the specific subject matter hereof and expressly excludes any warranty, condition or other understandings implied at law or by custom and supersedes all previous agreements.
and undertakings between the parties with respect thereto and each of the parties acknowledges and confirms that it does not enter into the Agreement in reliance on any representation, warranty or other undertaking not fully reflected in the terms of the Agreement.

18. LAW, JURISDICTION AND EXPIRY

18.1 The Agreement shall be interpreted and enforced in accordance with the laws of Ireland.

18.2 Agent and the Banks acknowledge that the Implementation Agreement is governed by the laws of Ireland and that, to the extent that terms defined therein are incorporated herein, the meaning of those terms shall be determined by such laws.

18.3 (a) The parties irrevocably agree that the courts of Ireland shall have exclusive jurisdiction to hear and determine any suit, action or proceeding, and to settle any disputes, which may arise out of or in connection with the Agreement and, for such purposes, irrevocably submit to the exclusive jurisdiction of such courts.

(b) The parties irrevocably waive any objection which they might now or hereafter have to the courts referred to in Clause 18.3(a) being nominated as the forum to hear and determine any suit, action or proceeding, and to settle any disputes, which may arise out of or in connection with the Agreement and agree not to claim that any such court is not a convenient or appropriate forum.

18.4 The rights of Agent under the Agreement shall be extinguished upon the repayment by Generator of all sums due and owing to the Banks by Generator under the Credit Agreement or upon a failure to serve a Step-in Notice, a Proposed Novation Notice or a Proposed Share Sale Notice by the time that a Termination Notice or a Counter Notice expires.
Signed by
For an on behalf of
CER

Signed by
for an on behalf of
[AGENT]

Signed by
for an on behalf of
[GENERATOR]
APPENDIX 5

GENERATING UNIT

[To be completed from the Generator’s Tender]
APPENDIX 6

PERFORMANCE BOND

BOND NO

This Indemnity Bond is made the day of 200[ ]

BETWEEN

[Name of Generator] with its registered address at [Insert Address] (hereinafter called “the Generator”) of the first part;

[ ] having its registered office situate at [address] (hereinafter called “the Surety” which expression shall include its successors and assigns) of the second part and

The Commission for Energy Regulation, of Plaza House, Belgard Road, Tallaght, Dublin 24 (hereinafter called “the Commission”) of the third part.

WHEREAS

1. By Agreement dated day of 200[ ] and made between the Commission of the one part and the Generator of the other part (hereinafter called “the Agreement”) the Generator has agreed to provide the Project as defined and described in the Agreement as a result of the Tender (as defined in the Agreement) and subject to the terms and conditions set out in the Agreement.

2. It was a term of the Tender and the Agreement that the Generator provide a Performance Bond in the form hereinafter appearing.

NOW THIS BOND WITNESSETH AS FOLLOWS :

1. The terms, definitions and expressions contain in the Agreement shall have the same meanings ascribed thereto in this Performance Bond.

2. (1) The Generator and the Surety are hereby jointly and severally held and firmly bound to indemnify the Commission on demand as follows:

   (a) in the full and just daily sum of €800 per MW of the Maximum Export Capacity of the Facility for each day by which the Commercial Operation Date is delayed up to a maximum of ninety days; and,
   (b) in the full and just sum of twenty eight million eight hundred thousand euro ( € 28,800,000 ).

Provided That if the Generator shall duly perform and observe all the terms, conditions, stipulations and provisions contained or referred to in the Agreement which are to be performed or observed by the Generator or, if on default by the Generator, the Surety shall satisfy and discharge, subject to Clause 2(3) hereof, the amounts contained and computed herein, then this Bond shall be of no effect but otherwise shall remain in full force and effect.
(2) For the avoidance of doubt and save subject to Clause 2(3) hereof, the indemnity contained in Clauses 2(1) (a) and 2(1) (b) are separate and mutually exclusive.

(3) If the Commission exercises its rights to call in the Bond contained in Clause 2(1) (b) hereof, and, if at such time, the Commission has previously exercised its right to call in the Bond contained in Clause 2(1) (a) hereof, then any amounts paid to the Commission in accordance with Clause 2(1) (a) shall be set off against the amount payable to the Commission in accordance with Clause 2(1) (b) but not further or otherwise.

3. The Surety shall not in any way be released or discharged from the Surety’s liability under this Bond by the giving by the Commission of any extension of time or allowance for the performance and observance of the Agreement or anything therein mentioned or contained and on the part of the Generator to be performed or observed or any other forgiveness neglect compromise or arrangement waiver or forbearance on the part of the Commission to the Generator or any alteration of time or any variation or amendment of the Agreement.

4. This Bond shall remain in force and the Generator and the Surety shall not be released therefrom until the expiration of twelve months from the Commercial Operation Date.

5. This Bond is executed by the Surety upon the following express condition which shall be a condition precedent to the right of the Commission to recover hereunder.

   The Surety shall be notified in writing by registered or hand delivered letter to its registered office of any serious breach of or default in any of the terms and conditions contained in the Agreement and on the part of the Generator to be performed and observed and for which the Surety is being called upon to satisfy and discharge as soon as possible but in any event within three months after such breach or such default shall have come to the knowledge of the Commission or his representative or representatives having supervision of the Agreement.

6. All monies which became payable by the Surety under this Bond shall be paid in Dublin Ireland and in Euro.

7. This Indemnity Bond or any matter related to this Indemnity Bond shall be governed by the laws of Ireland. The Generator the Surety and the Commission hereby submit to the exclusive jurisdiction of the Courts of Ireland.

IN WITNESS whereof the parties hereto have caused their common seals to be affixed to this Bond the day and year first herein WRITTEN.
The Common Seal was hereunto affixed of [Generator]
in the presence of:

Witness: _________________________
Name: ____________________________ Director
Address: ____________________________
__________________________ Director/Secretary
Occupation: _______________________

The Common Seal was hereunto affixed of [name of Surety]
in the presence of:

Witness: _________________________
Name: ____________________________ Director
Address: ____________________________
__________________________ Director/Secretary
Occupation: _______________________

PRESENT when the Official Seal of the Commission was affixed hereto.

Witness: _________________________
Name: ____________________________
Address: ____________________________
________________________________ Authorised
Signatory
Occupation: _______________________


APPENDIX 7

PROGRAMME
[To be completed from the Generator’s Tender]
APPENDIX 8
THE SITE

[To be completed from the Generator’s Tender]
APPENDIX 9
CONCILIATION PROCEDURE

1. A Party to this Agreement seeking conciliation shall notify the other Party to that effect and shall at the same time specify the matter in dispute, or difference or the question to be resolved (herein “the dispute”).

2. The Parties to the conciliation shall agree on a conciliator, and failing agreement within 5 Business Days, any of the Parties to it can request the President for the time being of The Law Society of Ireland to appoint a conciliator.

3. The conciliator shall require the Parties to submit, in advance of the hearing, a brief written opening statement and appending the necessary documentation not later than 5 Business Days after his appointment. The Parties should at the same time notify the conciliator of the names of the persons appearing at the conciliation.

4. The conciliator shall within 5 Business Days after receipt of the statements and documentation establish the order of the proceedings and shall arrange a convenient time, date and place for hearing.

5. The conciliator may consider and discuss such solutions to the dispute as he thinks appropriate or as may be suggested by either Party. All information given to the conciliator is confidential and shall remain so unless authorised by the Party who supplied the information.

6. The conciliator may, having informed the Parties, consult independent third party experts.

7. The conciliator shall endeavour to commit the Parties to reach a mutual settlement failing which he shall within 5 Business Days of the hearing, issue his recommendation. He shall not be required to give reasons. It shall remain confidential if rejected by either Party in accordance paragraph 8 hereof.

8. If the Parties do not reject the recommendation within 5 Business Days after the date of its issue, it shall be final and binding on them. If a Party rejects the recommendation within the aforesaid period, then the provision of Clause [23] shall apply.

9. Each Party to the conciliation shall pay its own costs. The Parties shall be jointly and severally liable for the conciliator’s costs in equal shares, unless the conciliator decides otherwise.

10. Conciliations are settlement negotiations and are, without prejudice to the rights of the disputants. All statements, information and material, made, given or exchanged, orally or in writing either during the conciliation or prior thereto or thereafter upon the request of the conciliator shall be inadmissible in any legal proceedings, in court or arbitration, to the maximum extent permitted by law. Evidence which is otherwise admissible in legal proceedings shall not be rendered inadmissible as a result of its use in the conciliation. The disputants agree not to summon or otherwise require the conciliator to appear or testify or produce records, notes, or any other information or material in any legal proceedings, in court or arbitration, and no recordings or stenographic records will be made of the conciliation.

11. Any agreement reached by the disputants through the conciliation shall be set down in writing and duly executed by the Parties or their authorised representatives, as the case may be. For the avoidance of doubt, nothing in this paragraph 11 shall affect or prejudice a conciliator’s recommendation which has become binding pursuant to the provisions of paragraph 8 hereof.
SIGNED by
for and on behalf of the
CER
in the presence of:

SIGNED by
for and on behalf of
[Generator]
in the presence of: