

**Dated** \_\_\_\_\_ / **JXX** \_\_\_\_\_ / **2006**

**ELECTRICITY SUPPLY BOARD**

**-and-**

**THE GVIPP SUPPLIER**

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**GREEN VIPP AUCTION AGREEMENT**

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**THIS AGREEMENT** is made the \_\_\_\_\_ day of \_\_\_ XXX \_\_\_\_\_ 2006

**BETWEEN:**

- (1) **ELECTRICITY SUPPLY BOARD** having its principal offices at 27 Lower Fitzwilliam Street Dublin 2 (“ESB”); and
- (2) **THE PARTY NAMED IN SECTION 1 OF SCHEDULE 2** whose registered office is located at the address set out in Section 1 of Schedule 2 (“GVIPP Supplier”).

**RECITALS:**

- (A) The Commission issued the Invitation to Bid and conducted the Green VIPP Auction for the opportunity to purchase energy from ESB.
- (B) The GVIPP Supplier submitted bids in response to the Invitation to Bid, which have been recommended by the Commission and accepted by ESB.
- (C) Without prejudice to the Invitation to Bid and the Agreement, ESB has agreed to perform in accordance with the Standing Bilateral Record the GVIPP Supplier’s obligations relating to payment to the generators which provide the GVIPP Capacity, and the GVIPP Supplier has agreed to pay ESB the corresponding charges detailed in the Agreement subject to the terms and conditions of the Agreement.

**THE PARTIES AGREE** as follows:

**1. Definitions and Interpretation**

1.1 In the Agreement except where the context otherwise requires the following words and expressions shall have the meanings set opposite them:

- |                                 |                                                                                                                                                                                                                                         |
|---------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>“Act”</b>                    | means the Electricity Regulation Act, 1999 as amended;                                                                                                                                                                                  |
| <b>“Affiliate”</b>              | means in relation to either Party, any holding company or subsidiary or any subsidiary of a holding company of the relevant Party, in each case within the meaning of the Companies Acts 1963 to 2003;                                  |
| <b>“Agreement”</b>              | means this Green VIPP Auction Agreement and its schedules;                                                                                                                                                                              |
| <b>“Approved Credit Rating”</b> | means a credit rating for long term debt of at least A2 given by Moodys and/or A given by Standard & Poors and/or an equivalent rating given by another internationally recognised credit rating agency reasonably satisfactory to ESB; |

<b>“Auction Clearing Price”</b>	means either of the following: <ul style="list-style-type: none"><li>- the lowest bid price where the auction is under-subscribed; or</li><li>- the price of the lowest winning bid as defined in the Invitation to Bid where the auction is over-subscribed or fully subscribed</li></ul> provided that these prices are above or at the Reserve Price;
<b>“Bid Forms”</b>	means the Bid Forms submitted by the GVIPP Supplier in response to the Invitation to Bid;
<b>“BNE”</b>	The best new entrant price as from time to time revised and published by the CER;
<b>“Change in Circumstance”</b>	has the meaning given to it in Clause 20.2;
<b>“Commission” or “CER”</b>	means the Commission for Energy Regulation established pursuant to Section 8 of the Act;
<b>“Confidential Information”</b>	has the meaning given to it in Clause 15;
<b>“Competent Authority”</b>	has the meaning given to it in the Trading and Settlement Code;
<b>“Contracted MW Share”</b>	means, in relation to each GVIPP Supplier, the percentage of the total of the GVIPP Capacity in MWs allocated to such GVIPP Supplier calculated in accordance with Schedule 1, section 1.2 of this Agreement;
<b>“Defaulting Party”</b>	has the meaning given to it in Clause 7.3;
<b>“Distribution Use of System Agreement”</b>	means the agreement of that name entered into pursuant to Section 34 of the Act;
<b>“Dispute”</b>	has the meaning given to it in Clause 10;
<b>“Eligible Customer”</b>	has the meaning given to the term “eligible customer” in Section 27 of the Act;
<b>“Energy Charge”</b>	means in respect of a Trading Period the charge calculated for that Trading Period in accordance with Schedule 1;
<b>“ESB”</b>	means the Electricity Supply Board;
<b>“Escrow Account”</b>	has the meaning given to it in Clause 6.3.2;

<b>“EURIBOR”</b>	means in relation to any sum, the rate per annum for deposits in Euro for the Specified Period applicable thereto which appears on Dow Jones (formerly Telrate) (or any successor service) page 248 (or any relevant successor page). If no such quotation is available, EURIBOR will be the rate per annum for deposits in Euro determined to be equal to the arithmetic mean (rounded upwards to four decimal places) of the six month rates at which at least three banks who generally provided quotes on Dow Jones (formerly Telrate) page 248 when quotations were last available thereon was offering to prime banks in the European Interbank Market deposits in Euro and for the specified period at or about 11:00 am on the relevant rate fixing day. For the purposes of this definition “Specified Period” means the period in respect of which EURIBOR falls to be determined in relation to such sum;
<b>“Euro” or “€”</b>	means the single currency of participating Member States of the European Union;
<b>“Expiry Date”</b>	means the 30 <sup>th</sup> June 2007;
<b>“First Party”</b>	has the meaning given to it in Clause 7.3;
<b>“Force Majeure”</b>	means any one of the events, conditions or happenings set out in Clause 9;
<b>“Framework Agreement”</b>	has the meaning given to it in the Trading and Settlement Code;
<b>“Good Industry Practice”</b>	means the exercise of that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced operator engaged in the same type of undertaking under the same or similar circumstances;
<b>“Grid Code”</b>	means the “grid code” as defined in Section 2(1) of the Act;
<b>“GVIPP Capacity”</b>	means the total capacity expressed in MW that is the object of the GVIPP Auctions and which is determined by the CER in accordance with the subsection 3.2 of the Invitation to Bid
<b>“GVIPP Auctions”</b>	means the auctions for the purchase of energy described in the Invitation to Bid and which are the object of this Agreement;

- “GVIPP Supplier”** means the party to this Agreement identified in Section 1 of Schedule 2;
- “Invitation to Bid”** means the Invitation to Bid in the GVIPP Auction issued by the Commission with Close of Bids on the 1<sup>st</sup> June and the 8<sup>th</sup> of June 2006 for each consecutive auction;
- “Letter of Credit”** means an irrevocable letter of credit in such form as ESB may approve issued for the account of the GVIPP Supplier in favour of ESB, allowing for partial drawings and providing for the payment to ESB forthwith on first written demand, by any bank which meets the following criteria:
- (a) banks with a long-term credit rating of at least AA (Standard and Poor) or AA2 (Moody’s) or equivalent. AA minus will not suffice, or
  - (b) holders of banking licences issued under Section 9 of the Central Bank Act 1971, with total balance sheets assets of not less than €1,269 million equivalent or whose parent bank, where such a holder is a branch or subsidiary, has total balance sheet assets of not less than €12,697 million equivalent and a rating not less than A/A2, or
  - (c) subsidiaries of branches of international banks, operating in Ireland, provided that the parent bank meets the criteria at (a) or has total balance sheet assets of not less than €12,697 million or equivalent and a credit rating of at least A/A2;
- “Material Breach”** means:
- (a) any breach of this Agreement which has a material adverse effect on the ability of a party to enjoy the rights conferred on it by this Agreement having regard to all the circumstances including, without limitation, the nature of the relationship between the parties, the interests of other parties under the Trading and Settlement Code, the obligations of ESB under its statutory and licence obligations, the nature of the breach (and in particular whether it is intentional, negligent or

	otherwise) and the consequences of the breach; and/or
	(b) breach of any of the representations and warranties set out in Clause 2; and/or
	(c) failure on the part of the GVIPP Supplier to hold security cover in accordance with Clause 6 of the Agreement; and/or
	(d) any breach of the Act, the Trading and Settlement Code, the Transmission Use of System Agreement, the Distribution Use of System Agreement or the Grid Code;
<b>“Metering Code”</b>	has the meaning given to it in the Trading and Settlement Code;
<b>“Meter Registration System Operator” or “MRSO”</b>	has the meaning given to it in the Trading and Settlement Code;
<b>“Non-Performing Party”</b>	has the meaning given to it in Clause 9.1;
<b>“Party”</b>	means a party to the Agreement;
<b>“Payment Period”</b>	means a calendar month;
<b>“Qualifying Guarantee”</b>	shall have the meaning given to it in Clause 6.3.3;
<b>“Relevant Supplier”</b>	means a supplier licensed under section 14(1)(b) of the Act;
<b>“Reserve Price”</b>	means, as regards these Auctions, the BNE;
<b>“Security Cover”</b>	has the meaning given to it in Clause 6.3;
<b>“SEM”</b>	means the Single Electricity Market between Northern Ireland and the Republic of Ireland which is expected to be operational in July 2007;
<b>“Settlement Day”</b>	has the meaning given to it in the Trading and Settlement Code;
<b>“Settlement Period”</b>	has the meaning given to it in the Trading and Settlement Code;
<b>“Settlement System Administrator” or “SSA”</b>	means the party authorised to perform the functions detailed in Clause 1.4.(B) of the Trading and Settlement Code;

<b>“Standing Bilateral Contract Report” or “SBCR Report”</b>	means the report of the same name issued pursuant to the Trading and Settlement Code by the Settlement System Administrator;
<b>“Standing Bilateral Record”</b>	means a notification of that name notionally submitted by the GVIPP Supplier to the Settlement System Administrator and stating the volume in percentage terms of electricity which the GVIPP Supplier will purchase in accordance with clause 3.3 and which shall be in a form prescribed by the Settlement System Administrator with the approval of the Commission;
<b>“Supply Period”</b>	means the period commencing at the time determined under Clause 3.2 and ending at the close of the last Settlement Period of the Expiry Date;
<b>“Trading and Settlement Code”</b>	has the meaning given to it in Statutory Instrument No. 49 of 2000 entitled Electricity Regulation Act, 1999 (Trading Arrangements in Electricity) Regulations 2000;
<b>“Trading Day”</b>	has the meaning given to it in the Trading and Settlement Code;
<b>“Trading Period”</b>	has the meaning given to it in the Trading and Settlement Code;
<b>“Transmission System”</b>	has the meaning given to it in the Trading and Settlement Code;
<b>“Transmission Use of System Agreement”</b>	means the agreement of that name entered into pursuant to Section 34 of the Act;
<b>“Volume Unit”</b>	each MWh generated by the GVIPP Capacity and allocated to the GVIPP Supplier under the GVIPP Auctions calculated in accordance with Schedule 1, Section 1.3.
<b>“Weekday hours”</b>	<b>means</b> the hours between 8am and 9pm, each day Monday to Friday, inclusive of bank holidays;
<b>“Weekend/night hours”</b>	<b>means</b> the hours between 9pm and 8am each night Monday to Sunday and between 8am and 9pm Saturday and Sunday.

- 1.2 In the Agreement, unless the context requires otherwise, any reference to:
- 1.2.1 the singular shall include the plural and vice versa;
  - 1.2.2 any gender reference shall be deemed to include references to the masculine, feminine and neuter genders;
  - 1.2.3 the word “including” and its variations shall be construed without limitation;
  - 1.2.4 any reference to “writing” or “written” shall include all methods of reproducing words in a legible and non-transitory form;
  - 1.2.5 any words importing persons or parties shall include individuals, firms and corporations, joint ventures, trusts, unincorporated associations and organisations, partnerships and any other entity, in each case whether or not having a separate legal personality and any references to persons shall include their legal successors and permitted assignees;
  - 1.2.6 any reference to legislation, regulations, directives, orders, instruments, codes or other enactments shall include any amendments, modifications, extensions, replacements or re-enactments thereof then in force;
  - 1.2.7 unless otherwise specified:
    - (a) any reference in the Agreement to a "Clause" is a reference to a Clause contained in the Agreement;
    - (b) any reference to a "Schedule" is a reference to a Schedule to the Agreement;
    - (c) any reference to a “Section” is a reference to a Section to a Schedule to the Agreement; and
    - (d) any reference to an “Appendix” is a reference to an Appendix to the Agreement.
  - 1.2.8 any reference to another agreement or document, or any deed or other instrument (including the Grid Code, the Metering Code, or the Trading and Settlement Code) shall be construed as a reference to that other agreement, or document, deed or other instrument as the same may have been, or may from time to time be, amended, varied, supplemented, substituted or novated;
  - 1.2.9 any capitalised word used in this Agreement which is not defined in the Definition and Interpretation section shall, where defined in the Glossary of the Invitation to Bid, bear the same meaning as in the Invitation to Bid.

- 1.2.10 any terms which are defined in the Act, the Grid Code, the Metering Code or the Trading and Settlement Code and which are not otherwise defined in the Agreement shall have the meanings ascribed to them in the relevant code or the Act;
- 1.2.11 any terms not defined in either the Agreement, the Invitation to Bid, the Grid Code, the Metering Code or the Trading and Settlement Code shall have the meaning commonly used in electric utility practice or the English language, as appropriate;
- 1.2.12 any reference to a month or year shall be construed as reference to a calendar month or year, as the case may be;
- 1.2.13 where reference is made to an amount or sum, it is to an amount or sum denominated in Euro unless specified otherwise;
- 1.2.14 the table of contents and Clause headings are inserted for ease of reference only and shall be ignored for the purpose of the construction of the Agreement;
- 1.2.15 all terms which have been defined in the Agreement shall have their initial letters in capital typescript whenever and wherever they appear in the Agreement;
- 1.2.16 in the event of inconsistency between the provisions of the Agreement and the Grid Code, the Metering Code or the Trading and Settlement Code (as the case may be), the provisions of the Grid Code, the Metering Code or the Trading and Settlement Code (as the case may be) shall prevail to the extent of such inconsistency unless the contrary intention is explicit. In the event of inconsistency between the Agreement and any other agreement between the Parties relating to connection to the Transmission System, the Agreement shall prevail to the extent of such inconsistency unless the contrary intention is explicit;
- 1.2.17 any reference to time shall be construed as local time.

## **2. Representations and Warranties**

- 2.1 The GVIPP Supplier represents and warrants as follows:
  - (a) that it has a licence to supply electricity pursuant to section 14(1)(b) of the Act;
  - (b) that it has signed the Framework Agreement and is a party to the Trading and Settlement Code;
  - (c) that it has signed a Transmission Use of System and a Distribution Use of System Agreement.

## **3. Commencement and Duration**

- 3.1 This Agreement shall commence on the date it is executed by ESB and shall continue in full force and effect until the Expiry Date, unless it is terminated earlier in accordance with its terms.
- 3.2 The Supply Period shall start on the 1<sup>st</sup> July 2006.
- 3.3 The GVIPP Supplier shall purchase electricity generated by the GVIPP Capacity in accordance with the Contracted MW Share awarded to it at the Auctions for every trading period within the Supply Period.

**4. Agreement to Trade**

- 4.1 Subject to Clause 4.2, during the Supply Period ESB agrees to perform in accordance with the Standing Bilateral Record the GVIPP Supplier's obligations relating to payment to the generators which make up the GVIPP Capacity .
- 4.2 The GVIPP Supplier agrees to pay ESB the corresponding charges detailed in the Agreement, subject to the terms and conditions of the Agreement, in each Trading Period the Energy Charge as determined in Schedule 1.
- 4.3 Before performing the obligations referred to under Clause 4.1:
  - 4.3.1 the GVIPP Supplier must have complied with the requirements in the Trading and Settlement Code; and
  - 4.3.2 the GVIPP Supplier agrees to provide ESB as and when required with any data it may require to determine payments under the Agreement.
- 4.4 The Parties agree that the GVIPP Supplier shall create a Standing Bilateral Record in respect of the GVIPP Supplier's purchase of energy under this Agreement with each of the generators which provide the GVIPP Capacity. Such Standing Bilateral Records shall be made in accordance with the Trading and Settlement Code. In the circumstances of this Agreement the SSA will automatically create and apply this percentage on behalf of the GVIPP Supplier.

## 5. Payment

- 5.1 The GVIPP Supplier shall pay ESB for Volume Units generated by the GVIPP Capacity in accordance with the Contracted MW Share awarded to them at the Auctions for every trading period within the GVIPP Supply period as calculated under Schedule 1.
- 5.2 Although the GVIPP Supplier shall in respect of its purchase of energy under this Agreement create a Standing Bilateral Record and not a Bilateral Contract as defined in the Trading and Settlement Code, for convenience the SSA shall provide the GVIPP Supplier with information relating to Energy Charges and other relevant information by way of Standing Bilateral Contract Report. No delay in receiving a Standing Bilateral Contract Report or an invoice shall prejudice the obligation of a Party to make payment of the amount due.
- 5.3 ESB shall invoice the GVIPP Supplier for the Energy Charges for all Trading Periods relating to each Payment Period and any other charges arising under Clauses 4.1 and 4.2, and shall do so as soon as practicable (usually 2 Business Days) following the receipt of the Standing Bilateral Contract Report from the Settlement System Administrator for the last Settlement Day of the relevant Payment Period. This is expected within 15 business days from the end of each Payment Period. In the event of a Standing Bilateral Contract Report from the Settlement System Administrator not being available or delayed, a substitute report as determined in Clause 5.3.1 shall be used for invoicing purposes.
- 5.3.1 In the first instance, the Standing Bilateral Contract Report issued by the Settlement System Administrator shall detail the Standing Bilateral Record for each GVIPP Supplier. If a complete Standing Bilateral Contract Report for each Settlement Day in a Payment Period has not been received by ESB within twenty-one (21) Business Days of the end of the Payment Period then ESB will calculate the Energy Charges as if the Standing Bilateral Contract Report showed a demand in each Trading Period equal to 80% of the GVIPP Supplier's Security Cover. When the Standing Bilateral Contract Report becomes available, revised Energy Charges shall be calculated by ESB and an appropriate adjustment shall be made to the next Energy Charge invoice.
- 5.4 The GVIPP Supplier shall pay all sums due in respect of invoices under Clause 5, free of any charge, set off or counterclaim, in Euro, within ten (10) Business Days of their receipt by making payment by electronic transfer of funds to ESB's bank account notified to the GVIPP Supplier by ESB for the purposes of the Agreement from time to time.
- 5.5 The GVIPP Supplier will also pay any system charges, PSO charges, Capacity Margin charges, industry levies and other charges under the Act and the T&SC and charges for the use of ESB's transmission and distribution network systems and any other charges appropriate to a licensee.
- 5.6 If any amount in relation to an invoice is in Dispute, then the GVIPP Supplier shall pay the total amount of the invoice. Any Dispute in relation to an invoice must be notified by the GVIPP Supplier to ESB as soon as practicable but not

later than five (5) Business Days after receipt of the invoice. In the event that a Dispute arises, ESB shall promptly seek to resolve it with GVIPP Supplier. When a resolution of a disputed payment shows that an overpayment has been made by GVIPP Supplier, then ESB will agree to put the aggrieved party in funds as soon as reasonably practicable together with interest at EURIBOR on the overpayment amount for the period that monies were incorrectly held by ESB.

- 5.7 Charges incurred in any billing period by GVIPP Suppliers shall be due for payment and payable to ESB as set forth in subsection 5.4. Interest will be charged on any overdue amounts (including any amounts that are the subject of a Dispute and subsequently found to be payable) after as well as before judgement on a daily basis at a default rate which is two percentage points per annum above EURIBOR from the date due for payment until the date paid.
- 5.8 Value Added Tax, at the rate and to the extent applicable at the time of supply, will be applied as an additional charge, where applicable, to all charges made under the Agreement.

## **6. Security**

- 6.1 Unless the GVIPP Supplier has an Approved Credit Rating, then it must within 10 Business Days after the execution of this Agreement provide ESB with the security cover referred to in Clause 6.3. If the GVIPP Supplier does not comply with this Clause 6, ESB may at its discretion by notice to the GVIPP Supplier terminate the Agreement with effect from the date specified in the notice.
- 6.2 If the GVIPP Supplier has an Approved Credit Rating, it must immediately notify ESB if its credit rating changes, including giving details of its revised credit rating. If its credit rating ceases to be an Approved Credit Rating, then the GVIPP Supplier must within 10 Business Days of it so ceasing provide the Security Cover referred to in Clause 6.3.
- 6.3 If this Clause 6.3 applies, the GVIPP Supplier must deliver to ESB and subsequently maintain Security Cover in the form of:
- 6.3.1 a Letter of Credit; or
  - 6.3.2 a cash deposit in an interest bearing deposit account at a bank that satisfies the criteria as outlined in the definition of Letter of Credit (an “Escrow Account”); or
  - 6.3.3 a guarantee in the form set out in Schedule 4 issued by an entity with an Approved Credit Rating (a “Qualifying Guarantee”) together with evidence and a legal opinion satisfactory to ESB that the Guarantor has the capacity to give such a guarantee and that the guarantee is validly executed and enforceable;

as security for payment of all monies due to ESB under this Agreement. The amount of Security Cover shall be the amount calculated under Clause 6.4 and notified in writing by ESB to the GVIPP Supplier from time to time.

Notwithstanding the foregoing provisions of this Clause, ESB, at its sole discretion, may accept an alternate form of Security Cover.

- 6.4 The minimum amount of the Security Cover for each Auction is calculated as follows:

$$SC_s = SC_A + SC_B$$

**where:**

$$SC_A = [(1+VR)*((MW_{As} * LF * 1848) * (AP_A + \text{€}4.71) * 0.387)) + (1+VR)*((MW_{As} * LF * 1848) * (AP_A - \text{€}0.29) * 0.613)]$$

$$SC_B = [(1+VR)*((MW_{Bs} * LF * 1848) * (AP_B + \text{€}4.71) * 0.387)) + (1+VR)*((MW_{Bs} * LF * 1848) * (AP_B - \text{€}0.29) * 0.613)]$$

SC is the amount of the Security Cover in €

A refers to Auction 1;

B refers to Auction 2;

MW<sub>s</sub> Means the number of units, or parts thereof, awarded of GVIPP Capacity;

VR is the VAT Rate applicable at that time.

LF is the generic load factor of 37% calculated for the type of plant that makes up the GVIPP Capacity: This in no way should be used as an indicator of actual output that may be attributable to each GVIPP Supplier.

AP Has the meaning given to it for the Auction Clearing Price, that is the BNE + €MWh where the BNE may change from time to time as published by the CER

s The individual GVIPP Supplier

- 6.5 Substitute and replacement Security Cover:

6.5.1 If the bank issuing the GVIPP Supplier's Letter of Credit ceases to have the credit rating set out in the definition of Letter of Credit the GVIPP Supplier shall forthwith procure an alternate Security Cover in compliance with Clause 6.3.

6.5.2 If the entity providing the GVIPP Supplier's Qualifying Guarantee ceases to have an Approved Credit Rating the GVIPP Supplier shall forthwith procure an alternate Security Cover in compliance with Clause 6.3.

- 6.6 Where at the end of any month the then existing amount of Security Cover is less than the amount of Security Cover that would be required by ESB if the amount of Security Cover was recalculated under Clause 6.4, ESB shall notify the GVIPP Supplier of the recalculated amount of Security Cover in writing, whereupon the

GVIPP Supplier shall forthwith procure that ESB receive the necessary additional Security Cover within 10 Business Days.

The Security Cover (and in the case of a cash deposit, any interest accrued in respect of the cash deposit, less any bank and similar charges and any taxes deducted by the bank) will be returned to the GVIPP Supplier within ten (10) Business Days of termination of the Agreement only if the GVIPP Supplier has paid all amounts owing by it in respect of the Agreement. Return of the Security Cover is without prejudice to the rights of ESB under the Agreement and does not relieve the GVIPP Supplier of any of its obligations or any liabilities in respect of the Agreement.

## **7. Default and Termination**

- 7.1 The GVIPP Supplier or ESB may by notice in writing to the other Party terminate the Agreement with effect from the date specified in the notice if ESB ceases to hold any necessary regulatory licence and/or statutory authority to be a counter party to a Standing Bilateral Record made to the SSA by the GVIPP Supplier in accordance with the terms of the Agreement and the Trading and Settlement Code.
- 7.2 ESB may by notice in writing to the GVIPP Supplier terminate this Agreement with effect from the date specified in the notice if the GVIPP Supplier ceases to be a Relevant Supplier.
- 7.3 A party to the Agreement (“First Party”) may by notice in writing to the other party to the Agreement (“Defaulting Party”) terminate the Agreement with effect from the date specified in the notice if:
- 7.3.1 the Defaulting Party fails to pay any amount due for payment to the First Party under the Agreement and such default continues unremedied after the expiry of ten (10) Business Days after the date on which the First Party has notified the Defaulting Party of the default;
  - 7.3.2 the Defaulting Party is in Material Breach and (where the breach is capable of remedy) the First Party has given notice to the Defaulting Party of the breach but the breach has not been remedied within ten (10) Business Days of such notification and (where the breach is not capable of remedy) the First Party has given notice of the breach to the Defaulting Party requiring an undertaking to the reasonable satisfaction of the First Party that the breach will not be repeated and specifying the steps the Defaulting Party will take to ensure compliance with the undertaking and the undertaking has not been given or has been breached within ten (10) Business Days of the notice having been given; or
  - 7.3.3 the Defaulting Party:
    - (a) is unable to pay its debts within the meaning of section 214 of the Companies Act 1963 (and a Party shall not be deemed to be unable to pay its debts if any demand for payment is being contested in good faith by the Party concerned with recourse to all appropriate measures and procedures) or if it enters into any voluntary scheme,

agreement or arrangement (other than for the purpose of solvent reconstruction or amalgamation upon terms and within such period as may previously have been approved in writing by the First Party);

- (b) has a receiver (which expression shall include an examiner within the meaning of the Companies Act 1990) appointed over the whole or any material part of its assets or undertaking;
- (c) passes any resolution for winding-up;
- (d) becomes subject to an order by the High Court for winding-up;
- (e) ceases to be a Relevant Supplier; or
- (f) ceases to be a party to the Trading and Settlement Code, Transmission Use of System Agreement or Distribution Use of System Agreement; or

7.3.4 anything analogous to, or having a substantially similar effect to, any of the events or any circumstances specified in Clause 7.3.3 occurs in any jurisdiction in relation to the Defaulting Party.

7.4 ESB may by notice in writing to the GVIPP Supplier terminate the Agreement with effect from the date specified in the notice if in respect of any aspect of the GVIPP Auctions, including the conduct by the Commission of the auction or its implementation by ESB, any of the following events occur:

- 7.4.1 enforcement action is commenced or threatened by the European Commission under the EC Treaty;
- 7.4.2 any finding by a court of competent jurisdiction in reliance on the EC Treaty and/or the Competition Acts 1991-2002 to the effect that ESB is in breach of its obligations under such provisions or which has the effect of rendering the Agreement less commercially advantageous to ESB;
- 7.4.3 When the SEM comes into effect; or
- 7.4.4 If either party gives written notice following failure to agree to changes following a Change in Circumstance.

## **8. Liability**

- 8.1 Subject to Clause 8.2 each party to the Agreement agrees and acknowledges that neither party (“Party Liable”) nor any of its officers, employees or agents is liable to the other party for loss arising from any breach of the Agreement other than for loss directly resulting from such breach and which at the date of the Agreement was reasonably foreseeable as not unlikely to occur in the ordinary course of events from such breach in respect of:
- 8.1.1 physical damage to the property of either party or their respective officers, employees or agents; and/or
  - 8.1.2 the liability of the other party to any other person for loss in respect of physical damage to the property of any person.
- 8.2 Nothing in the Agreement excludes or limits the liability of the Party Liable for death or personal injury resulting from the negligence of the Party Liable or any of its officers, employees or agents and the Party Liable shall indemnify and keep indemnified the other party, its officers, employees or agents from and against all such loss or liability which the other party may suffer or incur by reason of any claim on account of death or personal injury resulting from the negligence of the Party Liable or any of its officers, employees or agents.
- 8.3 Subject to Clause 8.2, neither the Party Liable nor any of its officers, employees or agents is in any circumstances whatsoever liable to the other party for:
- 8.3.1 any loss of profit, loss of revenue, loss of use, loss of bargain, loss of contract or loss of good will; or
  - 8.3.2 any indirect or consequential loss; or
  - 8.3.3 loss resulting from the liability of the other party to any other person howsoever and whensoever arising save as provided in Clause 8.1 and 8.2.
- 8.4 Each party acknowledges and agrees that the other party holds the benefits of Clause 8.1, 8.2 and 8.3 for itself and as trustee and agent for its officers, employees and agents.
- 8.5 Each of Clause 8.1, 8.2, 8.3, 8.4, and this Clause 8.5 shall survive termination of the Agreement.
- 8.6 Nothing in Clauses 8.1 to 8.5 inclusive shall prevent or restrict either Party enforcing any obligations (including suing for a debt) owed to it under or pursuant to the Agreement.
- 8.7 The rights and remedies provided by the Agreement to the parties are exclusive and not cumulative and exclude and are in place of all substantive (but not procedural) rights or remedies express or implied and provided by common law or statute in respect of the subject matter of the Agreement including without limitation any rights either party may possess in tort which shall include actions brought in negligence and/or nuisance. Accordingly, each party waives to the fullest extent possible all such rights and remedies provided by common law or statute, and releases the other party, its officers, employees and agents to the same

extent from all duties, liabilities, responsibilities or obligations provided by common law or statute in respect in respect of the matters dealt with the Agreement and undertakes not to enforce any of them except to the extent provided for in the Agreement.

- 8.8 Each party acknowledges and agrees that Clause 8.1 to 8.7 inclusive are fair and reasonable having regard to the circumstances as at the date of execution of the Agreement.

## **9. Force Majeure**

- 9.1 Force Majeure means in relation to any event or circumstance or number of events or circumstances or combination thereof which is beyond the reasonable control of such Party (the “Non-Performing Party”) and which could not have been avoided through the use of Good Industry Practice and which results in or causes the failure of that Party to perform any of its obligations under the Agreement, including but not limited to:

- 9.1.1 acts of terrorism;
- 9.1.2 war (whether declared or undeclared), threat of war, act of public enemy, blockade, revolution, riot, insurrection, public demonstration, civil commotion, invasion or armed conflict;
- 9.1.3 sabotage or acts of vandalism, criminal damage or the threat of such acts;
- 9.1.4 extreme weather or environmental conditions including lightening, earthquake, flood, wind, drought, storm, fire, landslide, accumulation of snow or ice, natural disasters and phenomena including 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;
- 9.1.5 any change of legislation, governmental order, restraint or directive having the effect of shutting down or reducing the supply of electricity to the Eligible Customer or which prohibits (by rendering unlawful) the operation of the Eligible Customer and such operation cannot be made lawful by a modification to the Eligible Customer’s installation or a change in operating practice;
- 9.1.6 a strike, walkout, lock-out or any other form of industrial action by persons employed by the Non-Performing Party or by an Affiliate of the Non-Performing Party or by any contractor, subcontractor or agent of the affected Party or any such Affiliate;
- 9.1.7 any strike which is part of a labour dispute of a national character occurring in Ireland or which is part of a national electrical industry strike within Ireland;

- 9.1.8 the inability at any time or from time to time of the Transmission or Distribution System to be capable of lawfully and safely supplying electricity to the Eligible Customer;
- 9.1.9 the act or omission of any contractor or supplier of either Party but only if due to an event which, but for the contractor or supplier not being a party to this Agreement, would have been Force Majeure.

Provided that Force Majeure shall not include:

- (a) lack of funds and/or the inability of a Party to pay;
- (b) mechanical or electrical breakdown or failure of machinery or plant owned or operated by either Party other than as a result of the circumstances identified in Clauses 9.1.1 to 9.1.10 above;
- (c) any of the events referred to in Clause 13 or 20 resulting in modifications in the Agreement; or

9.2 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 the Agreement by reason of Force Majeure, except for an obligation to make payment of money, the Agreement shall remain in effect but the Non-Performing Party's relevant obligations and the corresponding obligations of the other Party owed 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. Further:

- 9.2.1 as soon as reasonably practicable, the Non-Performing Party shall notify the other Party of the circumstances of 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;
- 9.2.2 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;
- 9.2.3 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;
- 9.2.4 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; and

- 9.2.5 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.
  - 9.2.6 insofar as possible the Non-Performing Party shall seek to mitigate the consequences of the Force Majeure.
- 9.3 Clause 9.2 shall not require the settlement of any strike, walkout, lock-out or other labour dispute on terms which, in the sole judgement of the Party involved in the dispute, are contrary to its interests. It is understood and agreed that the settlement of strikes, walkouts, lock-outs or other labour disputes shall be entirely within the discretion of the Non-Performing Party.

## **10. Disputes**

- 10.1 A “Dispute” means any dispute or difference of whatever nature between ESB and the GVIPP Supplier arising from the Agreement except for a dispute or difference in relation to a Change in Circumstances. A dispute or difference of whatever nature in relation to Change in Circumstances will be dealt with as outlined in Clause 20.
- 10.2 Either Party may notify the other Party following the occurrence or discovery of any item or event which the notifying Party acting in good faith considers to be a Dispute under the Agreement.
- 10.3 If considered appropriate the relevant Party may, by notice to the other Party and within fifteen (15) Business Days of a notification under Clause 10.2, appoint a senior company official with expertise or experience in the area in which the Dispute arises and who has no prior direct involvement with the subject matter of the particular Dispute, to represent them and meet with the representative of the other Party within fifteen (15) Business Days of the last date on which a Party receives notification of the Dispute, to attempt in good faith to satisfactorily resolve the Dispute. Such representatives may be accompanied by such other persons which the representatives consider have appropriate expertise to assist in resolving the Dispute.
- 10.4 In the event that the Dispute is not resolved within ten (10) Business Days from the date of the meeting referred to in Clause 10.3 then the Dispute unless it is a Dispute arising under Clause 5 of the Agreement shall be referred to the Commission for determination in such manner as the Commission considers reasonable.
- 10.5 A Dispute arising under Clause 5 of the Agreement which has not been resolved within ten (10) Business Days from the date of the meeting referred to in Clause 10.3 may be referred by either Party to the Commission for determination in such manner as the Commission considers reasonable.
- 10.6 Both Parties shall have the right to bring Court proceedings for any Dispute arising under Clause 5 of the Agreement and any referral under Clause 10.5 shall be without prejudice to this right.
- 10.7 Unless they agree otherwise, the Parties shall bear their own costs and expenses of any referral to the Commission under Clauses 10.4 or 10.5.
- 10.8 Disputes related to the Standing Bilateral Contract Report amounts will be directed to the Settlement System Administrator by complainant. Any determination by the Settlement System Administrator will be adjusted for in a subsequent invoice.

## **11. Entire Agreement**

- 11.1 This Agreement contains and expressly refers to the entire agreement between the parties with respect to its subject matter and expressly excludes any warranty, condition or other undertaking implied at law or by custom or howsoever

otherwise and supersedes all previous agreements and understandings between the Parties (other than as provided for in the Agreement) with respect to its subject matter 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 by the other party not fully reflected in the Agreement.

**12. Waiver**

- 12.1 No delay, omission or forbearance by either party in exercising any right, power, privilege or remedy under the Agreement shall operate to impair or be construed as a waiver of such right, power, privilege or remedy or be construed as a waiver thereof. Any single or partial exercise of any such right, power, privilege or remedy shall not preclude any further exercise thereof or other right, power, privilege or remedy.

**13. Variation**

- 13.1 No variation to this Agreement shall be of any effect unless it is expressly contemplated by this Agreement or is agreed in writing, signed by or on behalf of each party.

**14. Notices**

- 14.1 All notices and other communications to be given under or in connection with the Agreement shall (except where expressly provided otherwise) be in writing and shall either be delivered by hand or sent by ordinary pre-paid post or by facsimile transmission. Delivery by courier is regarded as delivery by hand.
- 14.2 All communications must be sent to the address of the relevant party, the facsimile number set out below, or to such other address or facsimile number of a party as may be notified by that party from time to time. Each communication must be marked for the attention of the relevant person.

**ESB:**

(Excepting Settlement Data, VIPP Notifications, Invoices and related queries which are to be directed as per Schedule 3)

Facsimile: (01)- 7026246

Telephone: (01)- 7026797

For the attention of:

Niall Doherty, Manager,

Power Contracts, ESB Customer Supply

**GVIPP Supplier:**

As set out in Section 1 of Schedule 2.

- 14.3 Subject to Clause 14.4, a communication is deemed to have been received:

14.3.1 if delivered by hand, at the time of delivery;

14.3.2 if sent by ordinary pre-paid post, at the expiration of two (2) Business days after the time of posting; and

14.3.3 if sent by facsimile, at the time of completion of transmission by the sender.

14.3.4 if a communication would otherwise be deemed to have been received outside of normal business hours (being 9.30a.m. to 5.30 p.m. on a Business Day) under this Clause 14, it is deemed to have been received at commencement of normal business hours on the next Business Day.

14.4 A notice of termination under the Agreement other than when delivered by hand will be deemed to have been delivered at the time of receipt by the Defaulting Party.

## **15. Confidentiality**

15.1 Each Party shall treat any and all information and data disclosed to it by the other Party in connection with the Agreement in any form whatsoever, and the Agreement itself, (the “Confidential Information”) as confidential and proprietary, shall preserve the secrecy of the Confidential Information and shall not use the Confidential Information for any purpose other than solely in connection with the Agreement.

15.2 For the purposes of this Clause 15, the term Confidential Information shall not include information which:

15.2.1 at the time of disclosure or at any time thereafter is in, or becomes part of, the public domain other than through a breach of the provisions of this Clause 15; or

15.2.2 the Party receiving the information can prove that 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 15; or

15.2.3 became available to the Party receiving the information from another source in a non-confidential manner otherwise than in breach of an obligation of confidentiality; or

15.2.4 is published by or the publication of which is required by a Competent Authority.

15.3 Notwithstanding the provisions of Clause 15.1, Confidential Information may be disclosed by a party:

15.3.1 to those of the shareholders, owners, directors, officers, employees, agents, consultants, contractors, advisers, investors, insurers or lenders of such party or its Affiliates who need to know the Confidential Information for the Agreement for the purpose of carrying out the Agreement (and for no other purpose) provided that:

(a) the recipient agrees to keep the Confidential Information confidential on terms no less onerous than contained in this Clause 15; and

- (b) the disclosing party shall be responsible for ensuring that the recipient observes and complies with such obligation to keep the Confidential Information confidential and shall accordingly be responsible for any failure of the recipient to do so;
  - 15.3.2 as may be ordered or required by any applicable law or a Competent Authority;
  - 15.3.3 as may be required by the regulations of any recognised stock exchange upon which the share capital of the party (or any parent undertaking of the party) is or is proposed to be from time to time listed or dealt in, and the party making the disclosure shall, if reasonably practicable prior to making the disclosure, and in any event as soon as reasonably practicable thereafter, supply the other party with a copy of such disclosure or statement and details of the persons to whom the Confidential Information is to be, or has been, disclosed. Where a copy of such disclosure or statement has been supplied prior to making the disclosure, the other party may give comments on that disclosure or statement to the party proposing to make it. The party proposing to make the disclosure shall, if reasonably practicable in the time available, consult with the other party as to any such comments and consider whether the disclosure is to be amended to take into account the comments;
  - 15.3.4 as may be required to comply with the requirements of the Grid Code, Metering Code, Trading and Settlement Code or the Agreement;
  - 15.3.5 by either party as may be necessary to comply with any obligation under any licence granted to it under the Act;
  - 15.3.6 by ESB as may be necessary to enable ESB to operate the Transmission or Distribution System or arising from any planning, connection or related information requirements.
  - 15.3.7 by ESB as may be necessary in relation to an application by any person for a connection to ESB Transmission System;
  - 15.3.8 as may be required by a Court, arbitrator or administrative tribunal or an expert in the course of proceedings before it to which the disclosing party is a party; or
  - 15.3.9 as may be agreed in writing by the parties prior to disclosure by the party disclosing such Confidential Information.
- 15.4 All information supplied by or on behalf of a Party to the Agreement shall remain the sole and exclusive property of such Party and the Agreement shall not operate to transfer ownership or any interest whatsoever therein, and the other Party to the Agreement shall, if requested by the Party disclosing the information following termination of the Agreement, promptly return to such Party all documents and any copies, extracts, notes or similar materials containing or based in whole on such information.

- 15.5 The provisions of this Clause 15 shall survive the termination of the Agreement for a period of five (5) years.
- 15.6 The parties to the Agreement shall, insofar as is reasonably practicable, ensure that any copies of the Confidential Information, whether in hard copy or computerised form, will clearly identify the Confidential Information as confidential.
- 15.7 Subject to Clause 15.3, no public announcement or statement regarding the signature, performance or termination of, or otherwise in relation to, the Agreement shall be issued or made by a party to the Agreement unless the other party to the Agreement shall have first been furnished with a written copy of the proposed announcement or statement and shall have approved it (such approval not to be unreasonably withheld or delayed).

## **16. Assignment and sale of Volume Units**

- 16.1 ESB may assign or transfer the benefit or obligations of the Agreement to its legal successors in title or to a subsidiary company wholly owned by ESB or to an Affiliate.
- 16.2 The GVIPP Supplier shall not assign any of its obligations under the Agreement without the prior written agreement of ESB.
- 16.3 Without prejudice to any assignment or sale of Volume Units referred to under the Trading and Settlement Code, the GVIPP Supplier shall not assign its rights under the Agreement nor sell or otherwise dispose of any Volume Units to an energy supplier without the prior written agreement of ESB.

## **17. Severance**

- 17.1 Each of the provisions of this Agreement is severable. If any provision of the Agreement is or becomes illegal, invalid or unenforceable in any respect under the law of any jurisdiction, the legality, validity or enforceability in that jurisdiction of the remaining provisions of this Agreement shall remain in full force and effect and shall continue to bind the parties.

## **18. Survival**

- 18.1 The expiry or termination of the Agreement does not affect any rights or obligations which may have accrued prior to such expiry or termination and does not affect continuing obligations of each of the parties under this Agreement which are expressed to continue after such expiry or termination.

## **19. Governing law and Jurisdiction**

- 19.1 The Agreement shall be governed by and construed in accordance with the law of Ireland and the Courts of Ireland shall have exclusive jurisdiction in relation to any matter arising under or in respect of the Agreement.

**20. Change in Circumstances**

20.1 If there is a Change in Circumstance (or where a Change in Circumstances is imminent) (as defined below), then either Party may notify the other that it wishes to review the Agreement and the Parties shall meet and discuss in good faith the amendments that should be made to the Agreement in order to reflect the original intent of the Parties. If agreement can not be reached in 15 business days from the date of notification then either Party may opt to terminate the Agreement by giving 5 days written notice to the other Party.

20.2 For the purposes of Clause 20.1, a “Change in Circumstance” occurs if after the date of the Agreement any law is passed, made, brought into force, issued, amended or revoked or ceases to have effect that affects this Agreement, or the terms of any of the Trading and Settlement Code, Grid Code, or any licence or document issued pursuant to a condition of any licence are modified and/or which adversely affects ESB (including any change in relevant tax or environmental laws).

**EXECUTED** as an agreement this \_\_\_\_\_ day of \_\_\_\_\_ in the year 2006.

**SIGNED** by (name) \_\_\_\_\_ for and on behalf of the

Electricity Supply Board in the presence of (witness) \_\_\_\_\_

Signatory:

Witness:

Signature \_\_\_\_\_

Signature \_\_\_\_\_

Position \_\_\_\_\_

Position \_\_\_\_\_

**SIGNED** by (name) \_\_\_\_\_ for and on behalf of the GVIPP Supplier

(GVIPP Supplier name) \_\_\_\_\_ in the presence of (witness)

\_\_\_\_\_

Signatory:

Witness:

Signature \_\_\_\_\_

Signature \_\_\_\_\_

Position \_\_\_\_\_

Position \_\_\_\_\_

## Schedule 1

### 1. Calculation of Contracted Capacity.

- 1.1 The GVIPP Supplier shall be allocated a percentage of the GVIPP Capacity at the time of the notification of the Auction results. This percentage will be the sum of the allocations, if any, made in each auction.
- 1.2 Allocation will be on the basis of the highest bid received at or above the reserve submitted as a flat MWh price and will be expressed as a percentage “X%” where:

$$X_s \% = \text{MWh}_s \text{ won} / \text{GVIPP capacity offered}$$

The MWh generated will be determined ex-post and will be allocated to each successful bidder on the basis of the total percentage of GVIPP capacity offered that was won by the bidder in the auction process adjusted for the capacity excluded for the facilitation of this auction and for settlement purposes

For each trading period:

$$\text{MWh}_s \text{ allocated} = \text{MWh produced by the GVIPP capacity} * X_s \%$$

Where:

$X_s \%$  means (MW won / GVIPP capacity offered)

s means the GVIPP Supplier who has been awarded a MW allocation from the auction

### 2. Energy Charging Principles

- 2.1 The Energy Charge payable by the GVIPP Supplier for each Payment Period in the Supply Period is the total of all charges below:
- 2.1.1 The product of the sum of the Volume Units, resulting from the Contracted MW Share, in relation to each of the two Auctions and the relevant Auction Clearing Price;
- 2.1.2 The Auction Clearing Price will be profiled for weekday and weekend/night in the following manner:
- 2.1.2.1 The price that bidders will pay for GVIPP energy will be based on the sum of the prevailing BNE + €/MWh that corresponds with the lowest clearing price in the relevant Auction. This

price will be profiled. The profile of the price will result in a weekday price (8am to 9pm, Monday to Friday, inclusive of bank holidays) and a weekend/night price (9pm to 8am each night Monday to Sunday *and* 8am to 9pm Saturday and Sunday) and will be as follows:

- The price to be paid by successful bidders for GVIPP output secured during the GVIPP 2006/2007 auction process for weekday as defined above will be the prevailing BNE + €MWh price that equates to the lowest clearing price in the relevant auction plus 14.71€MWh; *and*
- The price to be paid by successful bidders for GVIPP output secured during the GVIPP 2006/2007 auction process for weekend/night as defined above will be the prevailing BNE + €MWh price that equates to the lowest clearing price in the relevant auction minus 9.29€MWh.

- 2.2 The above price adjustments will apply for the duration of the Supply Period.
- 2.3 Within 40 days from the start of the Supply Period, a successful bidder may opt to relinquish the Contracted MW Share awarded by notifying ESB in writing at the same time as it complies with the relevant requirements of the Trading and Settlement Code. The relinquished MW Share shall automatically revert to ESB and the relevant Standing Bilateral Record shall be amended accordingly. The GVIPP Supplier shall lose all rights to the output from this relinquished GVIPP Capacity awarded to it at the time of the Auctions.
- 2.4 The successful bidder will also pay any system charges, PSO charges, Capacity Margin charges, industry levies and other charges under the Act and the T&SC and charges for the use of ESB's transmission and distribution network systems and any other charges appropriate to a licensee.
- 2.5 Where applicable, VAT must be paid in accordance with law.
- 2.6 The Energy Charge for a Trading Period is calculated as follows:

For all Trading Periods

$$= \sum_d (X_{As} * (Y_A * MWh_d)) (AP_A + \text{€}14.71) + \sum_n (X_{As} * (Y_A * MWh_n)) (AP_A - \text{€}9.29) + \sum_d (X_{Bs} * (Y_B * MWh_d)) (AP_B + \text{€}14.71) + \sum_n (X_{Bs} * (Y_B * MWh_n)) (AP_B - \text{€}9.29)$$

where:

$$X_s = \frac{MW_s}{GVIPP\_Capacity}$$

$$Y = \frac{GVIPP\_Auction\_ (MW)}{GVIPP\_Capacity + MW_{set}}$$

MWs Means the number of units, or parts thereof, awarded of GVIPP Capacity.

MWh 1000 kWh

MW set The MW retained to allow for the facilitation of the GVIPP Auctions and the settlement of GVIPP Capacity .

S The individual GVIPP Supplier

D Daytime hours which are defined as: 8am to 9pm, Monday to Friday, inclusive of bank holidays for the month being settled

N Night time and weekend hours which are defined as: the hours of 9pm to 8am each night Monday to Sunday and 8am to 9pm Saturday and Sunday for the month being settled

AP Has the meaning given to it for the Auction Clearing Price, that is the BNE + €MWh where the BNE may change from time to time as published by the CER.

A Auction 1

B Auction 2

## **Schedule 2**

This schedule is the Annexure to the Bid Forms of the GVIPP Supplier, as signed by ESB

**Schedule 3**

Addresses

## Schedule 4

THIS DEED OF GUARANTEE, dated as of [ ] (the "Guarantee") is given by the [INSERT] ("**Guarantor**" which expression shall include its legal successors and permitted assigns), in favour of the Electricity Supply Board of Lower Fitzwilliam Street, Dublin 2 of Ireland ("**Seller**" which expression shall include its legal successors and permitted assigns) in connection with an agreement of [insert date] herewith ("the Agreement") between (1) **Seller** and (2) [Insert details] (the "**Principal**") to sell energy capacity and discounted energy.

### 1. **Guarantee**

1.1 In consideration of the agreement of Seller to enter into the Agreement with the Principal, the Guarantor unconditionally and irrevocably:

1.1.2 guarantees to Seller as a primary obligation the due performance of all the obligations and liabilities of the Principal under the Agreement including, without limitation, the due payment and discharge to Seller on first written demand of all monies due and owing by the Principal to Seller, its successors and assigns arising from or under the Agreement; and

1.1.3 agrees as a primary obligation to indemnify Seller from time to time on demand from and against any loss incurred by Seller as a result of any such obligation or liability being or becoming void, voidable, unenforceable or ineffective as against the Principal for any reason whatsoever, whether or not known to Seller, the amount of such loss being the amount which Seller would otherwise have been entitled to recover from the Principal.

1.2 The guarantee and indemnity contained in Clause 1.1 are in respect of all of the obligations and liabilities of the Principal to Seller under or arising out of the Agreement (the "**Obligations**") which have (or, but for any invalidity, voidability, unenforceability or ineffectiveness as contemplated in Clause 1.1.2, would have) accrued due or become payable from or by the Principal to the Seller up to the date of payment under this Guarantee.

### 2. **Nature of Guarantee**

The Guarantor agrees that Seller may resort to the Guarantor for payment of the Obligations as though the Guarantor were the principal obligor whether or not Seller shall have resorted to any collateral security, or whether Seller shall have proceeded against the Principal or any other obligor principally or secondarily liable under the Agreement. Accordingly, the Guarantor waives all and any rights as guarantor that may at any time be inconsistent with this provision.

### 3. **Preservation of Rights**

Neither the obligations of the Guarantor contained in this Guarantee nor the rights, powers and remedies conferred in respect of the Guarantor upon Seller by this Guarantee or by law shall be discharged, impaired or otherwise affected by:

- 3.1.1 the winding-up, dissolution, administration or reorganisation of the Principal or any other person or any change in its status, function, control or ownership;
- 3.1.2 any of the Obligations or any of the other obligations of the Principal or any other person under any security relating to any of the Obligations being or becoming illegal, invalid, unenforceable or ineffective in any respect;
- 3.1.3 any time or other indulgence being granted or agreed to be granted to the Principal or any other person in respect of any of the Obligations or under any other security;
- 3.1.4 any amendment to, or any variation, waiver or release of, any of the Obligations or of any person under any other security;
- 3.1.5 any failure to take, or fully to take, any security agreed to be taken in relation to any of the Obligations;
- 3.1.6 any failure to realise or fully to realise the value of, or any release, discharge, exchange or substitution of, any security taken in respect of any of the Obligations; or
- 3.1.7 any other act, event or omission which, but for this Clause 3.1, might operate to discharge, impair or otherwise affect any of the obligations of the Guarantor contained in this Guarantee or any of the rights, powers or remedies conferred upon Seller by this Guarantee or by law.

3.2 Any settlement or discharge given by Seller to the Guarantor in respect of the Guarantor's obligations under this Guarantee or any other agreement reached between Seller and the Guarantor in relation to it shall be, and be deemed always to have been, void if any act on the faith of which Seller gave the Guarantor that settlement or discharge or entered into that agreement is subsequently avoided by or in pursuance of any provision of law.

3.3 Seller shall not be obliged before exercising any of the rights, powers or remedies conferred upon it in respect of the Guarantor by this Guarantee or by law:

- 3.3.1 to make any demand of the Principal;
- 3.3.2 to take any action or obtain judgment in any court against the Principal;

3.3.3 to make or file any claim or proof in a winding-up or dissolution of the Principal; or

3.3.4 to enforce or seek to enforce any security taken in respect of any of the obligations of the Principal in respect of the Obligations.

3.4 The Guarantor agrees that, so long as the Principal is under any actual or contingent obligations in respect of any of the Obligations, the Guarantor shall not exercise any rights which the Guarantor may at any time have by reason of performance by it of its obligations under this Guarantee:

3.4.1 to be indemnified by the Principal or to receive any collateral from the Principal; and/or

3.4.2 to claim any contribution from any other guarantor of any of the Obligations; and/or

3.4.3 to take the benefit (in whole or in part and whether by way of subrogation or otherwise) of any rights of Seller in respect of any of the Obligations of any other security taken pursuant to, or in connection with, any of the Obligations by Seller.

#### **4 Representations and Warranties**

The Guarantor represents that:

4.1.1 it is a corporation duly organised under the laws of [insert] and has and will have the necessary power to enable it to enter into and perform its obligations under this Guarantee;

4.1.2 this Guarantee constitutes its legal, valid and binding obligations, enforceable against it in accordance with its terms;

4.1.3 all necessary authorisations to enable it to enter into this Guarantee have been obtained and are and will remain in full force and effect;

4.1.4 the execution, delivery and performance of this Guarantee will not conflict with (a) any agreement binding on it or any of its assets; (b) its constitutive documents; or (c) any applicable law.

#### **5 Consents, Waivers and Renewals**

The Guarantor agrees that Seller may at any time and from time to time, either before or after the maturity thereof, without notice to or further consent of the Guarantor, extend the time or payment of, exchange or surrender any collateral for, waive or review any of the terms of the Agreement and may also make any agreement with the Principal under the Agreement for the extension, renewal, payment, compromise, discharge, or release of obligations therein, in whole or in part, or for any modification of the terms thereof without in any way impairing or affecting this Guarantee.

## **6 Agreement**

The Guarantor confirms that it has been provided with a certified copy of the Agreement referred to in this Guarantee and has understood its contents.

## **7 Guarantor Assertions**

Notwithstanding any provision of this Guarantee to the contrary, the Guarantor shall be entitled to assert all defences and circumstances excusing performance which the Principal would be properly entitled to assert under the Agreement against Seller its successors and assigns and in particular the Guarantor shall be entitled to assert as a defence to any claim for payment that such payment obligation has been previously discharged or is not due under the terms of the Agreement provided that nothing in this clause 7 shall allow the Guarantor to assert a defence or excuse performance of the Principal in circumstances where the Principal would by the terms of the Agreement or otherwise by the operation of law be prevented from taking such action.

Notwithstanding anything to the contrary contained or implied herein, the liability of the Guarantor under this Guarantee shall not in any event exceed the obligations of the Principal set forth in the Agreement.

## **8 Partnership**

No changes in the constitution of the Principal and/or change in the ownership or status of the Principal (whether by reason of amalgamation, reconstruction, liquidation or otherwise) shall impair or discharge the liability of the Guarantor under this Guarantee notwithstanding any provisions to the contrary in the Partnership Act 1890 or the Companies Acts 1963 –2003 except insofar as an alternative form of security which is acceptable to Seller is provided to Seller.

## **9 Expenses**

The Guarantor agrees to pay on demand reasonable out-of-pocket expenses (including without limitation reasonable fees and expenses of legal counsel) in any way relating to the enforcement or protection of the rights of Seller under this Guarantee.

## **10 Subrogation**

Upon payment of the Obligations owing to Seller, the Guarantor shall be subrogated to the rights of Seller against the Principal and Seller agrees to take, at the Guarantor's expense, such steps as the Guarantor may reasonably request to implement such subrogation.

**11 Notice**

Any and all notices or demands pursuant to this Guarantee shall be in writing and signed by (or by some person duly authorized by) Seller and may be served by sending it by recorded delivery letter to the Guarantor at the address first given above marked for the attention of [function to be inserted]. Any notice so served shall be effective when received at the recipient party's address.

Any demand made by Seller hereunder shall be in writing and shall specify all relevant details of the Obligations which have arisen and shall be signed by a duly authorised officer of Seller.

**12 Termination**

It is understood and agreed that this Guarantee shall continue in full force and effect with respect to the Obligations until the Obligations have been discharged in full and Seller has given the Guarantor written notice to that effect, such notice not to be unreasonably withheld or delayed.

**13 Miscellaneous**

This Guarantee shall be binding on the Guarantor and its successors or assigns and shall enure for the benefit of and be enforceable by Seller and its successors and assigns but so that the Guarantor may not assign or transfer any of its right or obligations under this Guarantee except with the prior written consent of the Seller.

**14 Governing Law**

This Guarantee shall be governed by and construed in accordance with the laws of Ireland.

IN WITNESS WHEREOF this Guarantee has been executed the day and year first before written above.

Signed, Sealed and Delivered  
under the Common Seal of  
Guarantor

Signed, Sealed and Delivered  
under the Common Seal of  
Seller