

# Keadby 3 Carbon Capture Power Station (EN010114 / IP Ref: 20029046)

Deadline 5 submission

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## **Post-hearing submission in respect of the Issue Specific Hearings**

### **Summary**

1. Following the Applicant's representations, ClientEarth remains concerned that under the current draft DCO there is a clear risk of the project being operated in a fundamentally different way to that assessed in this Examination.
2. In particular, as the Applicant confirmed at the hearings, current draft Requirement 33 allows the generating station to operate without carbon capture, or with a capture rate below the 90% rate assumed in the Environmental Statement.
3. Equally, current draft Requirement 33 allows any captured carbon dioxide to be used commercially and subsequently emitted into the atmosphere, rather than permanently stored as assumed in the Environmental Statement.
4. ClientEarth's proposed conditions are intended to avoid this risk and to secure these aspects of the proposal that go to the core of its planning merits. They are therefore necessary, relevant to planning and relevant to the proposed development, as well as meeting the other tests set out in EN-1.

5. From the information provided, there does not appear to be any duplication of the content of ClientEarth's proposed conditions in the commercial contracts, subsidy regimes or regulatory mechanisms that the Applicant has cited.
6. The Applicant has also not explained why the enforcement or pipeline safety concerns that it has now raised cannot be accommodated within the terms of the respective conditions. ClientEarth has suggested updated illustrative drafting that would address these concerns at **Annex 1**.
7. Finally, ClientEarth rejects any suggestion that it misrepresented the Applicant's position. The Applicant has now clarified that it is opposed in principle to conditions requiring it to operate with CCS in the way assumed in the Environmental Statement, but that is not what it said in its REP1 submission.

### **ClientEarth's proposed conditions remain necessary in light of the Applicant's representations**

8. As summarised above, ClientEarth remains of the view that its proposed conditions are necessary to secure core aspects of the Applicant's proposal relating to the capture and storage of carbon dioxide produced by the proposed generating capacity, and meet the tests set out in 4.1.7 EN-1 (i.e. "*necessary, relevant to planning, relevant to the development to be consented, enforceable, precise, and reasonable in all other respects*").<sup>1</sup>
9. It is important to note at the outset that in its Deadline 3 comments the Applicant stated that paragraph 3 of draft Requirement 33 will "*ensure the generating station will only be operated in conjunction with the carbon capture plant*" (REP3-021, p. 62). However, as the Applicant confirmed at Issue Specific Hearing 2, this is not correct: paragraph 3 allows the generating station to be operated without carbon capture, provided only that the carbon capture plant had previously – at some point in time – been brought into commercial use.
10. The other argument made in the Applicant's Deadline 3 response to ClientEarth was that ClientEarth's proposed conditions would duplicate non-planning mechanisms, stating that these mechanisms would "*together ensure the generating station will only be operated in conjunction with the carbon capture plant*" (see REP3-021, p. 62).
11. However, from the information cited by the Applicant, it is not clear how any of these non-planning mechanisms will ensure the carbon capture and storage aspect of the proposal – whether taken "*together*" or on their own. Indeed, the Applicant has stated that the "*range of government regimes and commercial mechanisms outside of planning*" that it relies on in this context, are "*all ... still in development and evolving in parallel with the examination and after its close*" (REP3-021, p. 58). Moreover, it is also not clear how the Applicant's approach is needed to avoid duplication with a "*commercial regime*" that it describes as being "*still under development*" (REP3-021, pp 62-63).

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<sup>1</sup> In this context, ClientEarth does not accept the Applicant's suggestion that ClientEarth's position "*on the achievement of the planning tests by R33 is contrary to that of relevant statutory consultees*" (REP3-021, p. 61). The extracts from statutory consultees cited by the Applicant address whether the current draft provisions of Requirement 33 meet the planning tests – clearly, it is not ClientEarth's position that the current draft provisions of Requirement 33 fail the planning tests, rather that ClientEarth's proposed conditions meet the planning tests.

12. In respect of the provisional Dispatchable Power Agreement (DPA) Heads of Terms<sup>2</sup> and 'Cluster Sequencing for Carbon Capture Usage and Storage Deployment: Phase-2 Guidance' (annexed to REP3-021) relied on by the Applicant in this context, ClientEarth observes that:
- a. The provisional DPA Heads of Terms are expressly subject to the disclaimer that the draft heads of terms "*are indicative only and do not constitute an offer by government and do not create a basis for any form of expectation or reliance*", while government "*reserve[s] the right to review and amend all provisions within the document and its Annexes, for any reason and in particular to ensure that proposals are consistent with any new subsidy control regime*".<sup>3</sup>
  - b. It is inherently uncertain that any DPA will be entered into with the Applicant, on the current provisional terms or otherwise – or that such contracts will remain in place over the life of the development.<sup>4</sup>
  - c. The provisional DPA Heads of Terms only require an average capture rate of 70%, with significant grace periods for lower capture rates (see the definition of "*minimum CO2 capture rate*" at p. 24 and the consequences of failure to comply with minimum CO2 capture rate set out at p. 57 for example). Higher rates may indeed be "*incentivised*" by the DPA as the Applicant suggests – to the extent that a DPA is entered into in the current form or at all – but clearly they are not required or ensured.
  - d. The Cluster Sequencing Phase 2 Guidance states (with emphasis added) that:
    - i. "*Projects must be designed to achieve a minimum of a 90% capture rate when the plant is operating at full load.*" (p. 32);
    - ii. "*Each Project is required to have a projected capture rate of at least 90% to be eligible for the Phase-2 evaluation process ...*" (p. 39)
  - e. Clearly, these requirements in the Phase 2 Guidance relate to the design of the projects concerned and not their actual operation.

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<sup>2</sup> See **Annex 2** (also available at:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1023072/dpa-provisional-heads-terms-october-2021-annex-a.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1023072/dpa-provisional-heads-terms-october-2021-annex-a.pdf)).

<sup>3</sup> See p. 5 of **Annex 3**: "*This update sets out further details on the government's current proposals on the potential business model for power plants with Carbon Capture Usage and Storage (CCUS). The proposals, as set out in this document, and the updated provisional Dispatchable Power Agreement Heads of Terms (DPA HoTs) published simultaneously as Annex A, in whatever form they are expressed, are indicative only and do not constitute an offer by government and do not create a basis for any form of expectation or reliance. The proposed terms, in this document and the DPA HoTs, are not final and are subject to further development by the government, and approval by Ministers, in consultation with relevant regulators and the devolved administrations, as well as the development and Parliamentary approval of any necessary legislative amendments, and completion of necessary contractual documentation. We reserve the right to review and amend all provisions within the document and its Annexes, for any reason and in particular to ensure that proposals are consistent with any new subsidy control regime.*" (also available

at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1023071/dpa-business-model-october-2021.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1023071/dpa-business-model-october-2021.pdf)).

<sup>4</sup> As explained by the Applicant at p. 14 of REP2-006: "*This multi part requirement is drafted by reference to a range of defined terms avoiding reference to future commercial/fiscal regimes that are unknown, or which could change over the lifetime of the Proposed Development.*" (emphasis added).

13. Equally, as previously explained – and not disputed by the Applicant – there is currently no indication, much less assurance, that the project’s environmental permit will require that the project’s generating capacity is operated only when the project’s carbon capture infrastructure is also in operation (at a particular capture rate or otherwise). Rather the environmental permit will regulate the operation of the capture and related infrastructure when such infrastructure is in operation. As the Applicant explained at Issue Specific Hearing 1, the environmental permit issued by the Environment Agency will require the use of ‘best available techniques’ (BAT), but the Applicant has not suggested that this will include a requirement to use carbon capture when operating the generating station (at a minimum capture rate of 90% or otherwise).
14. The Applicant has also suggested that the UK Emissions Trading System (ETS) and the associated Greenhouse Gas Emissions Trading Scheme Order 2020 would duplicate the conditions proposed by ClientEarth (REP3-021, p. 62). However, it is not explained how the ETS or the related regulations could serve to require the Applicant to operate the project with carbon capture (at a particular rate or otherwise) and that captured carbon dioxide be supplied to the National Grid pipeline network for onward permanent storage. In terms of emissions, the ETS simply requires operators to record their emissions and surrender the required amount of emissions allowances – it does not compel the use of any particular technology or fix the level of an installation’s emissions.<sup>5</sup>
15. Rather than risking duplication, ClientEarth’s proposed conditions seek to secure aspects of the Applicant’s proposal that are not secured by the commercial and regulatory regimes cited by the Applicant, and that are fundamental to the proposal’s planning merits.

### **The Applicant’s practical concerns can be accommodated**

16. ClientEarth welcomes the Applicant’s confirmation that “*the conveyance of the captured carbon dioxide to NGCL’s carbon transport pipeline*” is within its control (REP3-021, p. 61). This is all that would be required of the Applicant under ClientEarth’s proposed condition, as previously set out in ClientEarth’s illustrative drafting of its proposed conditions at REP2.
17. However, it is not clear that the further practical concerns now raised by the Applicant – regarding (i) the local authority’s ability to enforce capture rates, and (ii) possible pipeline safety restrictions – cannot be accommodated in conditions:
  - a. As the Applicant has explained, it will need to monitor capture rates, including for the purpose of ensuring compliance with the environmental permit (see e.g. REP2-006, p. 8). If it is the case that the local authority is not capable of assessing compliance against operating exceptions, then it is not clear why the Applicant cannot be required to report any instances of non-compliance to the local authority. ClientEarth would be happy for a relevant reporting obligation to be added to Requirement if this would provide clarity as to how this obligation would be enforced.
  - b. Equally, an exception for pipeline safety restrictions could also be incorporated in any condition if necessary, as is the case in other conditions included in the draft DCO (see e.g. draft Requirement 27 (REP4-004)).

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<sup>5</sup> See, e.g., <https://www.gov.uk/government/publications/participating-in-the-uk-ets/participating-in-the-uk-ets>: “Each year, installation operators and aircraft operators covered by the scheme must surrender allowances to cover their reportable emissions.”

18. In **Annex 1**, ClientEarth has suggested updated drafting for its proposed conditions (with additional text in bold underline) to illustrate how the Applicant's concerns might be accommodated.
19. The Applicant has also made the separate point that "*it is not possible for the reader of the DCO to know what the operating exceptions are, where to read these, and how to interpret and apply these*" (REP3-021, p. 62). However, this point is not understood, given that the environmental permit is a defined term in the DCO and already referred to in other provisions of the DCO (as is the case with other licences and consents, such as any licence under section 6 of the Electricity Act 1989 and any pipeline works authorisation required by section 14 of the Petroleum Act 1998).

### **The Applicant's suggestion that ClientEarth misrepresented its position is baseless**

20. Finally, in its Deadline 3 comments the Applicant stated that ClientEarth's representation REP2-020 "*misrepresented or misunderstood*" the Applicant's position in a way that could serve to "*bypass*" analysis of how CCS technologies "*are being developed and how they will be controlled and incentivised in a range of government regimes and commercial mechanisms outside of planning*" (REP3-021, pp 56-58). It is not clear on what possible basis the Applicant could seek to make these claims:
  - a. First, ClientEarth's representation simply pointed out that the Applicant's response to RR-001 appeared to object to ClientEarth's proposed conditions only on the basis that their precise scope made them practically unworkable – specifically because (i) the capture rate "*may be lower outside of normal operating conditions (e.g. at start-up) or in response to events outside of the Applicant's control*", and (ii) "*[t]he storage site is not operated by the Applicant*" (REP1-021, p. 25). Indeed, this is further demonstrated by the Applicant's conclusion that "*as such*" it "*cannot*" amend the wording of draft Requirement 33 in the way proposed. Equally, no argument was made by the Applicant at REP1 that ClientEarth's proposed conditions would be unreasonable or unnecessary due to duplication with regulatory and commercial regimes, as it has since argued at Deadlines 2 and 3. The Applicant's position may be that it objects in principle to conditions of the kind proposed by ClientEarth (as it has since clarified), but that is not what it stated in its response to ClientEarth's RR-001. It is therefore hard to understand the possible complaint flowing from the Applicant having to clarify and justify its position with information and arguments that on any view were not included in its REP1 submission.
  - b. Secondly, the Applicant's suggestion that ClientEarth's REP2 representation somehow served to "*bypass*" consideration of how non-planning mechanisms will control the technologies used in the proposed development is clearly wrong. ClientEarth engaged directly with these issues in its REP2 representation in the context of the project's environmental permit – i.e. before the Applicant made arguments regarding duplication with non-planning mechanisms at Deadlines 2 and 3.

### **Conclusion**

21. ClientEarth remains of the view that its proposed conditions remain necessary and meet the planning tests under EN-1.
22. In particular, the Applicant has not pointed to any non-planning mechanism that can be relied on to ensure that the following assumptions from the Environmental Statement will be fulfilled (subject to reasonable operating exceptions):

- a. the generating station will only be operated commercially with carbon capture;
  - b. a minimum carbon dioxide capture rate of 90% will be achieved during commercial operation of the generating station; and
  - c. all captured carbon dioxide will be supplied to the National Grid gathering network for onward permanent storage.
23. Under the current draft DCO terms, there is therefore a clear risk of the generating station being used in unabated mode or with a capture rate below 90%, or for the captured carbon dioxide to be used commercially and subsequently emitted into the atmosphere, rather than permanently stored. This would result in a fundamentally different project to that assessed in this Examination.
24. Finally, the Applicant has cited concerns regarding enforcement and pipeline safety, but it has not explained why these issues cannot be addressed in the drafting of the conditions.
25. ClientEarth would be happy to provide further comment or clarification in relation to these matters should it assist the Examining Authority.

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**ANNEX 1 – PROPOSED CONDITIONS****“Carbon capture plant**

33.—(1) *No part of the authorised development may commence, save for the permitted preliminary works, until details of the following have been submitted to and approved by the relevant planning authority-*

*(a) evidence that development consent is in place for the construction of the National Grid Carbon Gathering Network;*

*(b) evidence that a carbon dioxide storage licence for the intended storage site for the National Grid Carbon Gathering Network is in place; and*

*(c) evidence that an environmental permit is in place for the authorised development.*

*(2) Prior to the start of commissioning of the authorised development, the undertaker must not (save where the benefit of the Order has been transferred pursuant to article 66) without the consent of the Secretary of State—*

*(a) dispose of any interest in the land required for Work No. 1C or Work No. 7; or*

*(b) do anything, or allow anything to be done or to occur, which may reasonably be expected to diminish the undertaker’s ability, within two years of such action or occurrence, to prepare Work No. 1C and Work No. 7 for construction.*

*(3) Work No. 1A may not be brought into commercial use without Work No. 1C and Work No. 7A also being brought into commercial use.*

***(4) The undertaker must ensure a minimum carbon dioxide capture rate of at least 90% at all times during commercial use of Work No. 1A, as assumed in the environmental statement, subject to any specified operating exceptions or lower capture rates in the Environmental Permit in place for the authorised development. The undertaker must report any failure to meet this condition to the relevant planning authority as soon as is reasonably practicable.***

***(5) The undertaker must supply all of the carbon dioxide captured during commercial use of the authorised development to the National Grid Carbon Gathering Network for the purpose of onwards permanent geological storage, except to the extent that in the undertaker’s reasonable opinion it would be unsafe to do so.”***

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ClientEarth is an environmental law charity, a company limited by guarantee, registered in England and Wales, company number 02863827, registered charity number 1053988, registered office 10 Queen Street Place, London EC4R 1BE, a registered international non-profit organisation in Belgium, ClientEarth AISBL, enterprise number 0714.925.038, a registered company in Germany, ClientEarth gGmbH, HRB 202487 B, a registered non-profit organisation in Luxembourg, ClientEarth ASBL, registered number F11366, a registered foundation in Poland, Fundacja ClientEarth Poland, KRS 0000364218, NIP 701025 4208, a registered 501(c)(3) organisation in the US, ClientEarth US, EIN 81-0722756, a registered subsidiary in China, ClientEarth Beijing Representative Office, Registration No. G1110000MA0095H836. ClientEarth is registered on the EU Transparency register number: 96645517357-19. Our goal is to use the power of the law to develop legal strategies and tools to address environmental issues.

## ANNEX 2



# Annex A:

## Dispatchable Power Agreement: Heads of Terms

**Note: This Annex is subject to the "Disclaimer" at the front of the update document to which it is annexed.**

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## INTRODUCTORY NOTES

These Heads of Terms are preliminary and indicative draft terms for the Dispatchable Power Agreement ("**Agreement**"). They provide a framework of the principal terms and conditions that will or are expected to be included in the Agreement. These Heads of Terms do not constitute definitive drafting of the Agreement's terms.

These Heads of Terms should be read in conjunction with the following documents: (i) '**An update on the assessment of potential business models for Carbon Capture, Usage and Storage, December 2020 ("December 2020 Update")**'; (ii) '**Carbon Capture, Usage and Storage: An Update on the Dispatchable Power Agreement Business Model, May 2021 ("May 2021 Update")**'; and (iii) '**Carbon Capture, Usage and Storage: An Update on the Dispatchable Power Agreement Business Model, October 2021 ("October 2021 Update")**'.

These Heads of Terms do not indicate any willingness or agreement on the part of the Department for Business, Energy & Industrial Strategy ("**BEIS**") to enter into, or procure entry into, the Agreement. These Heads of Terms do not constitute an offer and are not capable of acceptance.

In connection with the above, given the Heads of Terms are preliminary and indicative only, the provisions set out therein are subject to further consideration and development by BEIS. Those provisions and terms which require particular consideration and development (including where BEIS is yet to make decisions relating to policy matters, commercial issues, risk allocation, and the allocation of the Agreement) have been square bracketed (with footnotes) in the Heads of Terms. BEIS reserves the right to review and amend these square bracketed provisions, and all other provisions set out in the Heads of Terms.

## PARTIES

The Dispatchable Power Agreement (Agreement) will be executed and delivered by the **Generator** and the **DPA Counterparty**<sup>1</sup>.

## BACKGROUND

- (A) The Agreement will be entered into following the applicable contract allocation or negotiation process established pursuant to Chapter 2 of the Energy Act 2013.
- (B) Prior to execution of the Agreement, the Generator will have satisfied [the eligibility criteria]<sup>2</sup>.
- (C) The Agreement is a private law, commercial contract made between the Parties and will be subject to private law remedies.

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<sup>1</sup> Note to Reader: The contractual framework relating the decision making of the DPA Counterparty is subject to further review by BEIS.

<sup>2</sup> Note to Reader: To be confirmed how the DPA will be awarded (Direct Award or Competitive Allocation Process).

## PART 1 DEFINITIONS AND INTERPRETATION

### 1. DEFINITIONS AND INTERPRETATION

#### 1.1 Definitions

In the Agreement:

**"Achieved and Declared Capture Rate Average"** means the monthly average of: i) the Achieved CO<sub>2</sub> Capture Rate; and ii) Declared CO<sub>2</sub> Capture Rate, during the relevant AP Billing Period, calculated by the DPA Counterparty for each AP Billing Period in accordance with the following formula:

$$ADLCR = \frac{(ACR \times ACR_{Settlement\ Units}) + (DLCR \times DLCR_{Settlement\ Units})}{Total_{Settlement\ Units}}$$

where:

ADLCR	=	Achieved and Declared Capture Rate Average (%)
ACR	=	Achieved CO <sub>2</sub> Capture Rate in the AP Billing Period (%)
ACR <sub>Settlement Units</sub>	=	Total number of AP Settlement Units where the ACR is applicable in the AP Billing Period
DLCR	=	Declared CO <sub>2</sub> Capture Rate in the AP Billing Period (%)
DCR <sub>Settlement Units</sub>	=	Total number of AP Settlement Units where the Deemed CO <sub>2</sub> Capture Rate is applicable in the AP Billing Period
Total <sub>Settlement Units</sub>	=	Total number of AP Settlement Units in the AP Billing Period

**"Achieved CO<sub>2</sub> Capture Rate"** has the meaning given to that term in schedule 3 (Availability Payment Calculations);

**"Adjusted Capture Period"** means a period during the Term in which the Achieved CO<sub>2</sub> Capture Rate is reduced or increased as a direct result of a Qualifying Change in Law;

**"Adjusted Output Period"** means a period of reduced or increased capture [or generation] by the Facility occurring during the Term as a direct result of a Qualifying Change in Law;

**"Annual NDC Notice"** has the meaning given to that term in clause 8.4 (Annual NDC Test);

**"Annual NDC Response Notice"** has the meaning given to that term in clause 8.4 (Annual NDC Test);

**"Annual NDC Test"** means the test, carried out in accordance with the Commissioning Tests, to be completed by the Generator in order to determine the Net Dependable Capacity on each NDC Anniversary;

**"AP Billing Period"** means a Month, except that the first AP Billing Period shall commence on the Start Date and end on the last day of the Month in which the Start Date occurs and the last AP Billing Period shall commence on the first day of the last Month of the Term and end on the last day of the Term;

**"AP Calculated CO<sub>2</sub> Generated"** has the meaning given to that term in schedule 3 (Availability Payment Calculations);

**"AP Calculated CO<sub>2</sub> Generated with T&S Outage"** has the meaning given to that term in schedule 3 (Availability Payment Calculations);

**"AP Fuel Composition"** has the meaning given to that term in schedule 3 (Availability Payment Calculations);

**"AP Metered CO<sub>2</sub> Output"** has the meaning given to that term in schedule 3 (Availability Payment Calculations);

**"AP Settlement Unit"** means each half hour period in a day divided into half hour-long periods occurring during the Term after the Start Date and starting at 00:00 on such day;

**"AP Total Metered Fuel Consumption"** has the meaning given to that term in schedule 3 (Availability Payment Calculations);

**"Applicable Discount Rate"** means [*definition to be developed by BEIS*];

**"Arbitral Award"** has the meaning given to that term in clause 27.4 (Arbitration);

**"Arbitral Tribunal"** has the meaning given to that term in the LCIA Arbitration Rules;

**"Arbitrator"** means any person to whom a Dispute is referred for resolution by arbitration in accordance with the Dispute Resolution Procedure;

**"Assumed Load Factor"** means [*definition to be developed by BEIS*];

**"Assumed Net Dependable Capacity"** means [*definition to be developed by BEIS*];

**"Assumed Net Efficiency"** means [*definition to be developed by BEIS*];

**"Audit"** has the meaning given to that term in clause 6.4 (Right to Audit);

**"Authority"** means the Gas and Electricity Markets Authority that is established under Section 1 of the Utilities Act 2000;

**"Availability Payment Due Date"** has the meaning given to that term in clause 14.1 (Due Date for Payment);

**"Availability of Capture"** has the meaning given to that term in schedule 3 (Availability Payment Calculations)

**"Availability of Generation"** has the meaning given to that term in schedule 3 (Availability Payment Calculations);

**"Availability Payment"** means the payment calculated in accordance with schedule 3 (Availability Payment Calculations) to be made by the DPA Counterparty to the Generator in the circumstances set out in clause 10 (Availability Payment);

**"Availability Payment Billing Statement"** has the meaning given to that term in clause 13.1 (Availability Payment Billing Statement);

**"Availability Payment Rate"** has the meaning given to that term in schedule 3 (Availability Payment Calculations);

**"Balancing and Settlement Code"** means the Balancing and Settlement Code that is provided for in standard condition C3 (Balancing and Settlement Code (BSC)) of the Electricity Transmission Licence;

**"Base Performance Assumptions"** means:

- (a) the Reference Plant CO<sub>2</sub> Emissions; and
- (b) the Reference Plant Gas Consumption,

with each of these terms representing a component of the Variable Payment as calculated in accordance with schedule 4 (Variable Payment Calculation);

**"Billing Period"** means the AP Billing Period or the VP Billing Period (as applicable);

**"Billing Statements"** means the Availability Payment Billing Statement or the Variable Payment Billing Statement (as applicable);

**"BM Unit"** has the meaning given to that term in the Balancing and Settlement Code;

**"BM Unit Metered Volume"** has the meaning given to that term in the Balancing and Settlement Code;

**"BSC Agent"** has the meaning given to that term in the Balancing and Settlement Code;

**"BSC Company"** has the meaning given to that term in the Balancing and Settlement Code;

**"Business Day"** means a day (other than a Saturday or a Sunday) on which banks are open for general business in London;

**"Calculated CO<sub>2</sub> Generated"** means the mass quantity of CO<sub>2</sub> (*expressed in tCO<sub>2</sub>*) generated by the Facility during the relevant Test, based upon the Total Metered Fuel Consumption and Fuel Composition, converted to an equivalent mass quantity of CO<sub>2</sub> based upon an oxidation factor of 1.0 as per the guidelines set out in "Joint Environmental Programme, Guidance for the Monitoring and Reporting of CO<sub>2</sub> Emissions from Power Stations, EUETS Phase 2";

**"Calculated CO<sub>2</sub> Generated with T&S Outage"** means the mass quantity of CO<sub>2</sub> (*expressed in tCO<sub>2</sub>*) generated by the Facility where a T&S Outage Event occurs during a Test, based upon the Total Metered Fuel Consumption and Fuel Composition converted to an equivalent mass quantity of CO<sub>2</sub> based upon an oxidation factor of 1.0 as per the guidelines in "Joint Environmental Programme, Guidance for the Monitoring and Reporting of CO<sub>2</sub> Emissions from Power Stations, EUETS Phase 2";

**"Capture Plant"**<sup>3</sup> means the part of the Facility described in schedule 1 (The Facility), which:

- (a) is capable of capturing, monitoring, metering and exporting CO<sub>2</sub> produced by the Power Plant which complies with the Captured Carbon Dioxide Quality Standards; and
- (b) includes all associated infrastructure required to integrate such facility within the Project;

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<sup>3</sup> Note to Reader: We note that the definitions of "Capture Plant" and "Power Plant" may need to be adjusted if the Capture Plant is inherent to the cycle design of the Power Plant.

**"Capture Plant Outage Event"** means an event where the Capture Plant is declared to be unavailable, curtailed or derated in accordance with [*the declaration method to be determined*];

**"Capture Plant Outage Relief Events"** has the meaning given to that term in clause 10.6(b) (Capture Plant Outage Relief Events);

**"Capture Rate Breach Notice"** has the meaning given to that term in clause 3.6 (Termination for a Prolonged Minimum CO<sub>2</sub> Capture Rate Breach);

**"Capture Rate Rectification"** has the meaning given to that term in clause 3.6 (Termination for a Prolonged Minimum CO<sub>2</sub> Capture Rate Breach);

**"Capture Rate Rectification Plan"** has the meaning given to that term in clause 3.6 (Termination for a Prolonged Minimum CO<sub>2</sub> Capture Rate Breach);

**"Capture Rate Termination Date"** has the meaning given to that term in clause 3.6 (Termination for a Prolonged Minimum CO<sub>2</sub> Capture Rate Breach);

**"Capture Rate Termination Notice"** has the meaning given to that term in clause 3.6 (Termination for a Prolonged Minimum CO<sub>2</sub> Capture Rate Breach);

**"Captured Carbon Dioxide Quality Standards"** means [the compositional limits (minimum percentage of CO<sub>2</sub> and maximum levels of a range of contaminants) that are permissible for entry to the T&S Network, together with maximum and minimum entry pressure and maximum and minimum entry temperature, specified by the T&S Operator];

**"Carbon Price"** has the meaning given to that term in clause 11.4 (Carbon Price);

**"Carbon Reference Price"** means:

- (a) the sum of the prevailing: i) carbon price support rate (*expressed in £/tCO<sub>2</sub>*) as published by HM Treasury; and ii) the effective carbon price in the UK (pursuant to articles 4 and 46 of the Greenhouse Gas Emissions Trading Scheme Order 2020) equal to the 'December Futures Contract Price' within the secondary markets as reported by [ICE Futures Europe] (*expressed in £/tCO<sub>2</sub>*); or
- (b) an alternative carbon reference price determined by the DPA Counterparty pursuant to the Carbon Reference Price Review;

**"Carbon Reference Price Review"** means a review of the Carbon Reference Price conducted by the DPA Counterparty in accordance with schedule 9 (Review Procedures);

**"CCUS Programme"** means a programme to deploy a system comprising the following:

- (a) capturing CO<sub>2</sub> that has been produced by, or in connection with:
  - (i) commercial electricity generation;
  - (ii) commercial industrial processes; or
  - (iii) commercial hydrogen production;
- (b) transporting such CO<sub>2</sub> that has been captured; and
- (c) disposing of such CO<sub>2</sub> that has been captured, by way of permanent storage;

**"Change in Applicable Law"** means:

- (a) the coming into effect, amendment, supplement, termination, repeal, replacement or withdrawal of or to: (i) any Law or Directive; or (ii) any Industry Document; or
- (b) a change in the interpretation or application of any Law, Directive or Industry Document by any Competent Authority;

**"Change in Law"** means:

- (a) the coming into effect, amendment, supplement, termination, repeal, replacement or withdrawal of or to: (i) any Law or Directive; (ii) any Industry Document; or (iii) any Required Authorisation; or
- (b) a change in the interpretation or application of any Law, Directive, Industry Document or Required Authorisation by any Competent Authority,

in each case after the date of the Agreement and save (in each case) to the extent that the Change in Law:

- (c) arises out of, or in connection with, a breach of or default under or with respect to, that Law, Directive, Industry Document or Required Authorisation by the Generator or any of its Representatives;
- (d) arises out of, or in connection with, a failure by the Generator or any of its Representatives to act in accordance with the Reasonable and Prudent Standard; or
- (e) represents no more than a continuous improvement or development of good practice which would be complied with in respect of a generating facility deploying the CO<sub>2</sub> Capture Technology by a generator acting in accordance with the Reasonable and Prudent Standard;

**"CiAL Dispute"** has the meaning given to that term in clause 21.3 (CiAL Dispute);

**"CiAL Request Criterion"** means *[the definition and procedure will be detailed in the full form DPA]*;<sup>4</sup>

**"CiAL Request Notice"** has the meaning given to that term in clause 21.1(b) (CiAL Review);

**"CiAL Review"** means a review conducted by the DPA Counterparty pursuant to clause 21.1 (CiAL Review) as to whether:

- (a) a Change in Applicable Law: (i) has been implemented, has occurred or has become effective; or (ii) is expected to be implemented, to occur or to become effective and, in each case as a direct result of such Change in Applicable Law being implemented, occurring or becoming effective, one (1) or more of the Required CiL Amendment Objectives will cease to be met; and
- (b) as a consequence of one (1) or more of the Required CiL Amendment Objectives ceasing to be met, Required CiL Amendments are necessary;

**"CiAL Review Outcome Notice"** has the meaning given to that term in clause 21.2 (Notification of outcome of CiAL Review);

**"CiAL Review Trigger"** has the meaning given to that term in clause 21.1 (CiAL Review);

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<sup>4</sup> Note to Reader: A specified threshold will trigger the requirement for the DPA Counterparty to carry out a CiAL Review as was the case under AR3. This will be detailed in the full DPA contract.



**"Claimant"** has the meaning given to that term in clause 27.3(b) (Expert Determination);

**"CO<sub>2</sub>"** means carbon dioxide;

**"CO<sub>2</sub> Capacity Test"** means a test, as requested by the DPA Counterparty at any time, to verify a Deemed CO<sub>2</sub> Capture Rate;

**"CO<sub>2</sub> Capture Rate Estimate"** means [*the Generator's estimate of the Test Achieved CO<sub>2</sub> Capture Rate to be agreed between the Generator and the DPA Counterparty*] (expressed as a percentage);

**"CO<sub>2</sub> Capture Rate Metered Cut-Off Time"** means, in relation to each Billing Period, [*a time to be determined*] on [*a Business Day to be determined*] following such Billing Period;

**"CO<sub>2</sub> Capture Rate Metering Data"** means the Metering Data used in the calculation of the Achieved CO<sub>2</sub> Capture Rate in accordance with schedule 3 (Availability Payment Calculations);

**"CO<sub>2</sub> Capture Rate Recalculation Amount"** has the meaning given to that term in clause 9.3 (Recalculations of Estimated CO<sub>2</sub> Capture Rate);

**"CO<sub>2</sub> Capture Technology"** means technology which:

- (a) captures [some or all of the] CO<sub>2</sub> [or any substance consisting primarily of CO<sub>2</sub>]; and
- (b) temporarily stores, processes and exports CO<sub>2</sub> [(or any substance consisting primarily of CO<sub>2</sub>)] [for permanent storage]; or
- (c) carries out any other process which is preparatory or ancillary to limbs (a) and (b) of this definition;

**"CO<sub>2</sub> Cost Differential"** has the meaning given to that term in schedule 4 (Variable Payment Calculation);

**"CO<sub>2</sub> Delivery Points"** means the point(s) of connection of the Facility to the T&S Network [*or where CO<sub>2</sub> is transported from the Facility to the T&S Network other than by pipeline, the point(s) of connection where such CO<sub>2</sub> first enters the T&S Network*]<sup>5</sup>, in each case as identified on a plan which is annexed to the DPA;

**"CO<sub>2</sub> Flow Rate Estimate"** means [*the total instantaneous mass flow rate of CO<sub>2</sub> that the Generator estimates will be delivered to the CO<sub>2</sub> Delivery Points by the Capture Plant (expressed in tonnes per day (tpd))*];

**"CO<sub>2</sub> Metering Dispute"** means a Dispute which relates to the calculation of the Metered CO<sub>2</sub> Output in respect of a Settlement Unit;

**"CO<sub>2</sub> Metering Equipment"** means the metering equipment which is required pursuant to the CO<sub>2</sub> Metering Specification to meter the Metered CO<sub>2</sub> Output and may include flow meters, composition analysers, associated communications equipment, and any other necessary ancillary equipment and infrastructure;

**"CO<sub>2</sub> Metering Obligation"** means the obligation of the Generator under clause 18 (Generator's Undertaking: Metering);

**"CO<sub>2</sub> Metering Specification"** has the meaning given to that term in schedule 7 (CO<sub>2</sub> Metering Specification);

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<sup>5</sup> Note to Reader: Definition to be kept under review as transport and storage business model develops.

**"Commissioned"** means that all of the Commissioning Tests have been successfully completed, followed or passed (as appropriate) in relation to the Facility (or a part of the Facility), and grammatical variations thereof shall be construed accordingly;

**"Commissioning Tests"** means all of the procedures and tests (including performance tests) satisfactory to the DPA Counterparty which, in accordance with the Reasonable and Prudent Standard, and in compliance with industry guidelines, practices and standards, are:

- (a) relevant to generating and carbon capture facilities which are the same as, or of a similar type to, the Facility (including those which are relevant to the Facility Generation Technology and the Facility Capture Technology);
- (b) required to be completed, followed or passed (as appropriate): (i) in order for a generating facility to generate and export electricity; or (ii) to demonstrate that a generating facility is fit for commercial operation; and
- (c) required to be completed, followed or passed (as appropriate): (i) in order for a capturing facility to capture and export CO<sub>2</sub> emissions; or (ii) to demonstrate that a capturing facility is fit for commercial operation;

**"Competent Authority"** means:

- (a) any national, federal, regional, state, local, or other court, arbitral tribunal, administrative agency or commission or other governmental, administrative or regulatory body, authority, agency or instrumentality;
- (b) any private body to the extent it carries out one (1) or more public functions; or
- (c) any other body with jurisdiction in respect of the Facility, the Project and/or the Dispatchable Power Agreement,

and includes the Authority, the Economic Regulator, the Environment Agencies and the Secretary of State but excludes the DPA Counterparty;

**"Conditions Precedent"** means the Initial Conditions Precedent and the Operational Conditions Precedent and **"Condition Precedent"** shall be construed accordingly;

**"Confidential Information"** means DPA Counterparty Confidential Information and Generator Confidential Information;

**"Connected Disputes"** has the meaning given to that term in clause 27.5 (Consolidation of Connected Disputes);

**["Cost Data"** means in respect of the Project:

- (a) all out-of-pocket costs which have been incurred by the Generator relating to:
  - (i) pre-development;
  - (ii) regulatory and licensing;
  - (iii) engineering, procurement and construction (including mechanical, electrical and civil);
  - (iv) infrastructure; and

(b) the Generator's total capital expenditure.]<sup>6</sup>

**"CP Fulfilment Notice"** has the meaning given to that term in clause 6.2(b) (Fulfilment of Conditions Precedent);

**"CPI"** means:

- (a) the all items index of consumer price inflation published each month by the Office for National Statistics;
- (b) if that index is no longer being published, such index as the DPA Counterparty may reasonably determine to be appropriate in the circumstances; or
- (c) if there is a material change to the basis of that index, such other index as the DPA Counterparty may from time to time reasonably determine to be appropriate in the circumstances;

**"CUSC"** means the Connection and Use of System Code that is provided for in standard condition C10 (Connection and Use of System Code (CUSC)) of the Electricity Transmission Licence;

**"Date of Referral"** has the meaning given to that term in clause 27.3(e) (Expert Determination);

**"Date of Response"** has the meaning given to that term in clause 27.3(f) (Expert Determination);

**"Declared CO<sub>2</sub> Capture Rate"** " has the meaning given to that term in clause 10.5 (Determination of Deemed CO<sub>2</sub> Capture Rate);

**"Deemed CO<sub>2</sub> Capture Rate"** has the meaning given to that term in schedule 3 (Availability Payment Calculations);

**"Deemed Rate"** has the meaning given to that term in clause 10.5 (Determination of Deemed CO<sub>2</sub> Capture Rate);

**"Default"** means a Termination Event or any event or circumstances specified in clause 4 (Termination Events) which would (with the passage of time, the giving of notice, the making of any determination under the Agreement or any combination of any of the foregoing) be a Termination Event;

**"Default Interest"** means for any period calculated as follows [*to be determined*];

**"Default Termination Date"** has the meaning given to that term in clause 3.4(a) (Default termination);

**"Default Termination Payment"** has the meaning given to that term in schedule 5 (Calculation of Termination Amounts);

**"Delivery Body"** means the person from time to time responsible under and by virtue of Section 10 of the Energy Act 2013 for directing the DPA Counterparty to offer to enter into the Agreement and/or Dispatchable Power Agreements;

**"Devolved Legislation"** means (i) an Act of Scottish Parliament; (ii) an Act or Measure of Senedd Cymru; (iii) a Scottish statutory instrument within the meaning of section 27 of the

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<sup>6</sup> Note to Reader: Definition to be kept under review by BEIS.

Interpretation and Legislative Reform (Scotland) Act 2010; or (iv) Welsh subordinate legislation within the meaning of s.3(2) of the Legislation (Wales) Act 2019;

**"Directive"** means any ordinance, code, decision, directive, order, decree, regulation, determination, award, standard or rule of any Competent Authority which is legally binding upon the relevant Party or with which that Party would ordinarily comply acting (in the case of the Generator) in accordance with the Reasonable and Prudent Standard and, in circumstances in which the Generator is seeking to invoke the provisions of clause 20 (Change in Law), with which the Generator does in fact comply;

**"Directors' Certificate"** means a certificate signed by two directors (or equivalent) of the Generator;

**"Discriminatory Change in Law"** means a Change in Law the terms of which specifically (and not merely indirectly or consequentially or by virtue of the disproportionate effect of any Change in Law that is of general application) apply to:

- (a) the Project and not to the design, development, construction, conversion, installation, completion, testing, commissioning, operation, maintenance and decommissioning of any other project;
- (b) the Facility and not to any other generating facility; or
- (c) the Generator and not to any other person;

**"Dispatchable Power Agreement" or "DPA"** means a dispatchable power agreement between the DPA Counterparty and an eligible generator entered into following the applicable contract allocation or negotiation process established under or by virtue of the Energy Act 2013;

**"Dispute"** means any dispute or claim whatsoever relating to, in connection with or arising out of the Agreement;

**"Dispute Notice"** means a notice in writing that initiates the Dispute Resolution Procedure and which contains the information required by clause 27.1(c) (Outline of the Dispute Resolution Procedure);

**"Dispute Resolution Procedure"** means the rules, obligations and procedures set out in clause 27 (Dispute Resolution Procedure);

**"Distribution Connection and Use of System Agreement"** means the agreement of that name that an Electricity Licensed Distributor is required to prepare or maintain in force in a form approved by the Authority under standard condition 22 (Distribution Connection and Use of System Agreement) of an Electricity Distribution Licence;

**"DPA Counterparty Confidential Information"** means:

- (a) all Information which is confidential or proprietary in nature and which relates (directly or indirectly) to the DPA Counterparty or a Government Entity (including any such Information relating to United Kingdom government policy with respect to matters pertinent to Dispatchable Power Agreements or the Agreement) which the Generator (or its Representatives) receives or has received from the DPA Counterparty (or its Representatives) or any third party who receives or has received such Information from the DPA Counterparty (or its Representatives) in respect of the Agreement (including any Information which the Generator prepares which contains or makes explicit reference to such information or from which such Information is readily ascertainable); and

- (b) all Information relating to or arising from negotiations, discussions and correspondence in connection with the Agreement,

but excluding in each case any Excluded Information;

**"DPA Counterparty Permitted Purposes"** means:

- (a) complying with the DPA Counterparty's responsibilities and obligations, and exercising the DPA Counterparty's rights, powers and discretions, under or in connection with the Agreement or any other Dispatchable Power Agreement;
- (b) complying with the DPA Counterparty's responsibilities and obligations under or by virtue of the Energy Act 2013, any other Law, or any Directive, policy or guidance;
- (c) reporting on the establishment, performance or operation of, or compliance with, the arrangements contemplated by the Agreement and/or Dispatchable Power Agreements; and
- (d) reporting to the Secretary of State on the performance, operation, and DPA Settlement Activities of the Project to enable or assist the Secretary of State to fulfil its functions in connection with the Dispatchable Power Agreement and/or CCUS Programme. The Secretary of State's functions include:
  - (i) the development of the Dispatchable Power Agreement;
  - (ii) the development of the CCUS Programme; and
  - (iii) any examination of the performance, efficiency, and effectiveness of the Project;

**"DPA Settlement Activities"** means the calculation, invoicing, recalculation and settlement of payments to be made pursuant to the Agreement;

**"DPA Settlement Services Provider"** means any person appointed for the time being and from time to time by the DPA Counterparty to carry out any of the DPA Settlement Activities, or who is designated by the Secretary of State to carry out the DPA Settlement Activities, acting in that capacity;

**"Due Date"** means the Availability Payment Due Date or the Variable Payment Due Date (as applicable);

**"Economic Regulator"** means the independent economic regulator of the economic regulatory regime for the T&S Network;

**"EIR"** means the Environmental Information Regulations 2004;

**"Electricity Act"** means the Electricity Act 1989;

**"Electricity Delivery Point"** means the point of connection of the Facility to the Electricity Transmission System or the Electricity Distribution System, as applicable (being the Boundary Point as defined in the Balancing and Settlement Code);

**"Electricity Distribution Code"** means the distribution code that an Electricity Licensed Distributor is required to prepare or maintain in force in a form approved by the Authority under standard condition 21 (Distribution Code) of an Electricity Distribution Licence;

**"Electricity Distribution Licence"** means a licence granted or treated as granted under Section 6(1)(c) of the Electricity Act;

**"Electricity Distribution System"** means all or part of a distribution system in Great Britain operated by an Electricity Licensed Distributor;

**"Electricity Licensed Distributor"** means a person who is authorised by an Electricity Distribution Licence to distribute electricity;

**"Electricity Metering Dispute"** means a Dispute which relates to the calculation of the Metered Electricity Output in respect of a Settlement Unit;

**"Electricity Metering Equipment"** means the "Metering Equipment" as defined in, and registered pursuant to, the Balancing and Settlement Code to measure the flows at the Electricity Delivery Points of electricity with the Facility, its Metering System, and its associated BM Unit(s);

**"Electricity Metering Obligation"** means the obligation of the Generator under clause 18 (Generator's Undertaking: Metering);

**"Electricity Supplier"** has the meaning given to that term in section 9(1) of the Energy Act 2013;

**"Electricity Transmission Licence"** means an electricity transmission licence granted or treated as granted under Section 6(1)(b) of the Electricity Act that authorises a person to participate in the transmission of electricity;

**"Electricity Transmission Licensee"** means any person who is authorised by an Electricity Transmission Licence to participate in the transmission of electricity;

**"Electricity Transmission System"** means those parts of the GB Transmission System that are owned or operated by an Electricity Transmission Licensee within the transmission area specified in its Electricity Transmission Licence;

**"Electricity Transmission System Operator"** means the holder of an Electricity Transmission Licence in relation to which licence the Authority or the Secretary of State, where appropriate, has issued a Section C (system operator standard conditions) Direction in accordance with such licence and where that direction remains in effect;

**"Eligible Capture Technology"** means CO<sub>2</sub> Capture Technology which is eligible for a Dispatchable Power Agreement, as specified in the EA 2013 Regulations (as in effect as at the date of the Agreement);

**"Environment Agencies"** means: (i) the Environment Agency in England; (ii) Natural Resources Wales; and (iii) the Scottish Environment Protection Agency;

**"Estimated CO<sub>2</sub> Capture Rate"** has the meaning given to that term in clause 9.2 (Estimates of CO<sub>2</sub> Capture Rate Metering Data);

**"Estimated CO<sub>2</sub> Capture Rate Billing Period"** has the meaning given to that term in clause 9.2 (Estimates of CO<sub>2</sub> Capture Rate Metering Data);

**"Estimated CO<sub>2</sub> Capture Rate Billing Statement"** has the meaning given to that term in clause 9.2 (Estimates of CO<sub>2</sub> Capture Rate Metering Data);

**"Estimated Data Settlement Unit"** has the meaning given to that term in clause 9.2 (Estimates of CO<sub>2</sub> Capture Rate Metering Data);

**"Estimated Metered Electricity Output"** has the meaning given to that term in clause 11.6 (Estimates of Loss Adjusted Metered Electricity Output);

**"Estimated Output Billing Period"** has the meaning given to that term in clause 11.6 (Estimates of Loss Adjusted Metered Electricity Output);

**"Estimated Output Billing Statement"** has the meaning given to that term in clause 11.6 (Estimates of Loss Adjusted Metered Electricity Output);

**"Estimated Output Settlement Unit"** has the meaning given to that term in clause 11.6 (Estimates of Loss Adjusted Metered Electricity Output);

**"EUR 2011/1227"** means the retained version of Commission Regulation (EU) No. 1227/2011 (which can be found online at <http://legislation.gov.uk/eur/2011/1227/contents>) as amended in Law from time to time, including by S.I. 2019/534;

**"Excluded Information"** means Information:

- (a) in, or which enters, the public domain otherwise than as a consequence of a breach of any provision of the Agreement; or
- (b) properly in the possession of the recipient on a non-confidential basis and not, to the knowledge of the recipient, as a result of a breach by it, its Representatives or any third party of any duty of confidentiality attaching thereto prior to such Information being acquired by or provide to it;

**"Expert"** means any person appointed to determine a Dispute in accordance with clause 27.3 (Expert Determination);

**"Expert Determination Dispute"** means the following Disputes to be determined by an Expert in accordance with clause 27.3 (Expert Determination):

- (a) whether there has been a breach of the Metering Obligations;
- (b) a CiAL Dispute;
- (c) [a CO<sub>2</sub> Metering Dispute]; or
- (d) [*any other matters subject to expert determination to be determined*];

**"Expert Determination Notice"** has the meaning given to that term in clause 27.3(a) (Expert Determination);

**"Expert Determination Procedure"** means the rules, obligations and procedures set out in clause 27.3 (Expert Determination);

**"Facility"** means the [Power Plant] and [Capture Plant]<sup>7</sup> and all necessary interfaces and any other facilities or equipment required up to the Electricity Delivery Point(s) and CO<sub>2</sub> Delivery Point(s) as set out in schedule 1 (The Facility), for the safe, efficient, timely and economical operation of the [Power Plant] and [Capture Plant] in a manner to satisfy fully the requirements under the Agreement;

**"Facility Capture Technology"** means, in respect of the Facility, the Eligible Capture Technology deployed by the Facility, as specified in schedule 1 (The Facility);

**"Facility Generation Technology"** means, in respect of the Facility, the generation technology deployed by the Facility, as specified in schedule 1 (The Facility);

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<sup>7</sup> Note to Reader: We note that the definitions of "Capture Plant" and "Power Plant" may need to be adjusted if the Capture Plant is inherent to the cycle design of the Power Plant.

**"Facility Metering Equipment"** means the Electricity Metering Equipment, the CO<sub>2</sub> Metering Equipment and the Gas Supply Metering Equipment;

**"FM Affected Party"** has the meaning given to that term in clause 22.1 (Relief due to Force Majeure);

**"FoIA"** means the Freedom of Information Act 2000 and any subordinate legislation made under that Act, together with (where the context requires) any guidance and codes of practice issued by the Information Commissioner in relation to such legislation;

**"Force Majeure"** means any event or circumstance including:

- (a) any Change in Law (excluding any Foreseeable Change in Law but including any change in the policy or guidance of any Competent Authority between the date of the Agreement and Start Date); and
- (b) any event or circumstance resulting from any action or omission by or of any DPA Settlement Services Provider, any BSC Agent or a BSC Company,

provided that such event or circumstance:

- (i) is beyond the reasonable control of the FM Affected Party or, if relevant, its Representatives (in the case of the Generator and its Representatives, acting and having acted in accordance with the Reasonable and Prudent Standard);
- (ii) could not reasonably have been avoided or overcome by the FM Affected Party or its Representatives (as appropriate); and
- (iii) is not due to the FM Affected Party's fault or negligence (or that of its Representatives),

provided always that:

- (A) neither non-availability of funds nor the lack of funds shall constitute Force Majeure; and
- (B) no event or circumstance which has occurred before the date on which the Generator applied for the Agreement of which, the Generator or any of its Representatives either was aware, or (if it or they had made all due and careful enquiries and acted to a Reasonable and Prudent Standard) could be expected to have been aware, shall constitute a Force Majeure;

**"Foreseeable Change in Law"** means a Change in Law which is reasonably foreseeable on the date of the Agreement and which falls within one of a number of categories of foreseeable Changes in Law which will be set out in the Agreement [*and which will reflect the definition of "Foreseeable Change in Law" in the AR3 CfD Standard Terms and Conditions*];

**"Fuel Composition"** means the composition of the fuel used by the Facility, as measured at the Gas Supply Point(s);

**"Full Capture Plant Outage Event"** means an event where the Capture Plant is declared to be fully unavailable in accordance with [*the declaration method to be determined*];

**"Full T&S Outage Event"** means an event or circumstance that prevents the Facility from accessing and exporting any CO<sub>2</sub> to the T&S Network by the Facility;



**"Further Milestone Assessment Response Notice"** has the meaning given to that term in clause 7.2 (Response to Milestone Requirement Notice);

**"Gas"** or **"Natural Gas"** shall have the same meaning as in the Uniform Network Code;

**"Gas Act"** means the Gas Act 1986 as such act is amended or subsequent gas acts and any regulation made thereunder as amended or re-enacted from time to time;

**"Gas Cost Differential"** has the meaning given to that term in schedule 4 (Variable Payment Calculation);

**"Gas Distribution System"** means all or part of a distribution system in Great Britain operated by a Gas Licensed Transporter;

**"Gas Licensed Shipper"** means a person who is authorised by a Gas Shipper Licence to ship Natural Gas;

**"Gas Licensed Transporter"** means a person who is authorised by a Gas Transporter Licence to distribute Natural Gas;

**"Gas Price"** has the meaning given to that term in clause 11.3 (Gas Price);

**"Gas Reference Price"** means:

- (a) the settlement price for a day-ahead natural gas contract for delivery through the National Balancing Point (NBP) Virtual Trading Point [as published on ICE Futures Europe]; or
- (b) an alternative gas reference price determined by the DPA Counterparty pursuant to the Gas Reference Price Review;

**"Gas Reference Price Review"** means a review of the Gas Reference Price conducted by the DPA Counterparty in accordance with schedule 9 (Review Procedures);

**"Gas Shipper Licence"** means a licence granted under Section 7A of the Gas Act;

**"Gas Supply Metering Dispute"** means a Dispute which relates to the metering of the gas supply to the Facility;

**"Gas Supply Metering Equipment"** means the metering equipment which is required pursuant to the Gas Supply Metering Obligation to meter the gas supply to the Facility and may include flow meters, composition analysers, associated communications equipment, and any other necessary ancillary equipment and infrastructure;

**"Gas Supply Metering Obligation"** means the obligation of the Generator under clause 18 (Generator's Undertaking: Metering);

**"Gas Supply Points"** means the point(s) of connection of the Facility to the gas supply to be identified on a plan which is annexed to the DPA;

**"Gas Transmission System"** means all or part of a transmission system in Great Britain operated by a Gas Licensed Transporter;

**"Gas Transporter Licence"** means a licence granted under Section 7 of the Gas Act;

**"GB System Operator"** means the operator of the GB Transmission System;

**"GB Transmission System"** means the system consisting (wholly or mainly) of high voltage electric lines owned or operated by Electricity Transmission Licensees within Great

Britain that is used for the transmission of electricity from one generating station to a substation or to another generating station or between substations or to or from any interconnector;

**"Generation Technology"** means a generation technology deployed by a generating facility;

**"Generator Confidential Information"** means:

- (a) all Information which is confidential or proprietary in nature and which relates (directly or indirectly) to the Generator, the Facility or the Project which the DPA Counterparty (or its Representatives) receives or has received from the Generator (or its Representatives) or any third party who receives or has received such Information from the Generator (or its Representatives) in connection with the Agreement (including any Information which the DPA Counterparty prepares which contains or makes explicit reference to such Information or from which such Information is readily ascertainable); and
- (b) all Information relating to or arising from negotiations, discussions and correspondence in connection with the Agreement between or on behalf of the Parties,

but excluding in each case any Excluded Information;

**"Generator Permitted Purpose"** means:

- (a) complying with the Generator's responsibilities and obligations, and exercising the Generator's rights, powers and discretions, under or in connection with the Agreement; and
- (b) complying with the Generator's responsibilities and obligations under or by virtue of the Energy Act 2013, any other Law, or any Directive, policy or guidance;

**"Generator QCiL Notice"** has the meaning given to that term in clause 20.1 (Qualifying Change in Law: Procedure);

**"Generator Repeating Representations"** means each of the representations set out in clause 15.1 (Generator's Representations and Warranties) other than clauses 15.1(g) (No litigation), and 15.1(h) (No requirement to deduct or withhold);

**"Generator Termination Date"** means the Default Termination Date or Capture Rate Termination Date (as applicable);

**"Government Entity"** means:

- (a) any department, non-departmental public body, authority or agency of [Her Majesty's Government of the United Kingdom]<sup>8</sup> or the Crown;
- (b) any of Her Majesty's Secretaries of State and any other Minister of the Crown;
- (c) any body corporate established by statute, some or all of the members of which are appointed by a Secretary of State or Minister of the Crown; and
- (d) any other entity or person directly or indirectly wholly-owned by, or held on trust for, any of the foregoing;

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<sup>8</sup> Note to Reader: This definition is subject to further review by BEIS including to ensure consistency, insofar as appropriate, with AR4 CfD drafting as it develops.

**"Grid Code"** means the Grid Code that is required to be drawn up by the GB System Operator and approved by the Authority under standard condition C14 (Grid Code) of the Electricity Transmission Licence;

**"Group"** means, in respect of any Party, its subsidiaries, subsidiary undertakings, associated undertakings and any holding company of the Party and all other subsidiaries, subsidiary undertakings and associated undertakings of any such holding company from time to time;

**"Identified Costs"** has the meaning given to that term in clause 20.1(a)(iv)(A) (Qualifying Change in Law);

**"Industry Documents"** means any and all agreements, codes and instruments regulating:

- (a) the generation, transmission, distribution, supply and trading of electricity in Great Britain, including the Grid Code, the SOTO Code, the Balancing and Settlement Code, the CUSC, the Master Registration Agreement, any Electricity Distribution Code, any Distribution Connection and Use of System Agreement and/or any other connection or use of system agreement with an Electricity Transmission Licensee or Electricity Licensed Distributor;
- (b) [the transmission, distribution, supply and trading of Gas in Great Britain, including the Uniform Network Code; the Independent Gas Transporter Network Codes; and the Supply Point Administration Agreement and/or any other connection or use of system agreement with a Gas Licensed Transporter or Gas Licensed Shipper]<sup>9</sup>; and
- (c) [*any applicable CO<sub>2</sub> industry codes*],

and **"Industry Document"** shall be construed accordingly;

**"Information"** means all information of whatever nature and in whatever form, including in writing, orally, electronically and in a visual or machine-readable medium (including CD-ROM, magnetic and digital form) and, in relation to any obligation of any person to provide information pursuant to the Agreement, shall be limited to such information that is within the control of that person, and for these purposes information shall be deemed to be within the Generator's control if:

- (a) it is within the possession of the Generator;
- (b) the Generator has a right to possession of it; or
- (c) the Generator has a right to inspect or take copies of it;

**"Information Commissioner"** has the meaning given to that term in the FoIA;

**"Initial Conditions Precedent"** means the conditions precedent set out in Part A of schedule 2 (Conditions Precedent) and **"Initial Condition Precedent"** shall be construed accordingly;

**"Initial Milestone Delivery Date"** means the date which falls eighteen (18) months after the date of the Agreement;

**"Initial Net Dependable Capacity Estimate"** means [*an estimate of the net dependable capacity of the Facility (expressed in MW) provided by the Generator*];

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<sup>9</sup> Note to Reader: The definition of "Industry Documents" is subject to further review.

**"Initial Target Commissioning Window"** means [twelve (12)] months, with such period commencing on [*the target commissioning window start date notified by the Generator to the Delivery Body in its application for the Dispatchable Power Agreement*].

**"Intellectual Property Rights"** means:

- (a) all intellectual property rights, including patents, trade marks, rights in designs, know-how, copyrights (including the rights to access, make copies, update, develop, enhance, alter, modify or otherwise amend the source code of any software) and database rights and topography rights (whether or not any of these is registered and including applications for registration of any such thing) and all rights or forms of protection of a similar nature or having equivalent or similar effect to any of these which may subsist anywhere in the world; and
- (b) all data and Information (whether or not Confidential Information);

**"Law"** means:

- (a) any Act of Parliament, or subordinate legislation within the meaning of Section 21(1) of the Interpretation Act 1978;
- (b) any exercise of the Royal Prerogative;
- (c) [any provision of Devolved Legislation whose subject matter falls within what was, immediately before IP Completion Day (as defined in s.39 European Union (Withdrawal Agreement) Act 2020), an area of exclusive or shared competence within the meaning of Articles 2, 3, 4 and 6 of the Treaty on the Functioning of the European Union; or]
- (d) [any retained EU law,]

in each case in the United Kingdom [(or part thereof, including Scotland and Wales)]; and

- (e) to the extent directly binding on and/or enforceable by or against private persons within the United Kingdom any obligations arising from or provided for in a Treaty or other international agreement to which the United Kingdom is a signatory;<sup>10</sup>

**"LCIA"** means the London Court of International Arbitration;

**"LCIA Arbitration Rules"** means the arbitration rules published under that name by the LCIA;

**"Longstop Date"** means the last day of the Longstop Period following the final day of the Target Commissioning Window, as such date may be extended day for day for each day of delay to the Project by reason of:

- (a) a Force Majeure in respect of which the Generator is the FM Affected Party but only to the extent that the Generator has satisfied the requirements of clause 22 (Force Majeure) and this definition in order to be entitled to such extension; or
- (b) the failure of the Electricity Transmission System Operator, Electricity Transmission Licensee or Electricity Licensed Distributor to carry out in a timely manner any required system reinforcement or connection works specified in the construction agreement attributable to the Facility and to which any Electricity Transmission System Operator, Electricity Transmission Licensee or Electricity Licensed Distributor

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<sup>10</sup> Note to Reader: This definition is subject to further review by BEIS including to ensure consistency, insofar as appropriate, with AR4 CfD drafting as it develops.

is a party (except to the extent that such failure is due to the fault or negligence of the Generator or its Representatives); or

- (c) the failure of the Gas Licensed Transporter to carry out in a timely manner any required system reinforcement or connection works specified in the construction agreement attributable to the Facility and to which any Gas Licensed Transporter is a party (except to the extent that such failure is due to the fault or negligence of the Generator or its Representatives); or
- (d) the failure of the T&S Operator to carry out in a timely manner: (A) any connection works specified in the T&S Construction Agreement; or (B) any required works to the T&S Network in order for the Facility to export captured CO<sub>2</sub> to the T&S Network (except to the extent that such failure is due to the fault or negligence of the Generator or its Representatives),

and provided that in the case of delays caused by the reasons set out in (b), (c) and/or (d) above:

- (i) the Generator gives notice to the DPA Counterparty as soon as reasonably practicable of the nature and extent of the failure; and
- (ii) there shall be no extension for any day of delay to the Project that could have been avoided by the Generator and its Representatives using reasonable endeavours:
  - (A) to mitigate the effects of such failure (including delay to the Project);
  - (B) to carry out its obligations under the Agreement in any way that is reasonably practicable; and
  - (C) to resume the performance of its obligations under the Agreement as soon as reasonably practicable;

**"Longstop Date Acceptance Tests"** means the tests, carried out simultaneously and in accordance with the Commissioning Tests, to be completed by the Generator in order to determine the: (i) Net Dependable Capacity; (ii) Test Achieved CO<sub>2</sub> Capture Rate; (iii) Plant Net Efficiency; and (iv) Start Up Times;

**"Longstop Date Capacity Notice"** has the meaning given to that term in clause 8.3 (Longstop Date Capacity Notice);

**"Longstop Date Capacity Response Notice"** has the meaning given to that term in clause 8.3 (Longstop Date Capacity Notice);

**"Longstop Period"** means a period of twelve (12) months following the last day of the Target Commissioning Window or such longer period that results from an extension in accordance with the definition of **"Longstop Date"**;

**"Loss Adjusted Metered Electricity Output"** means the BM Unit Metered Volume for the Facility in respect of a Settlement Unit as measured by the Electricity Metering Equipment, adjusted for: (i) the transmission loss multiplier allocated in accordance with the BSC; or (ii) any new or substituted multiplier or factor which is in the nature of, or similar to, a transmission loss multiplier;

**"Master Registration Agreement"** means the agreement of that name that an Electricity Licensed Distributor is required to maintain in force in a form approved by the Authority under standard condition 23 (Master Registration Agreement) of an Electricity Distribution Licence;

**"Material Change"** means:

- (a) in relation to the Electricity Metering Equipment a "Material Change" as defined in the Balancing and Settlement Code save that references to "Metering Equipment" within the definition of "Material Change" in the BSC shall be replaced by references to Electricity Metering Equipment;
- (b) in relation to the CO<sub>2</sub> Metering Equipment, a change to the systems and/or processes relating to such equipment which is of such a type or magnitude as to raise the reasonable expectation that the Generator's ability to meet its obligations under this Agreement relating to the CO<sub>2</sub> Metering Equipment will be affected; or
- (c) in relation to the Gas Supply Metering Equipment, a change to the systems and/or processes relating to such equipment which is of such a type or magnitude as to raise the reasonable expectation that the Generator's ability to meet its obligations under this Agreement relating to the Gas Supply Metering Equipment will be affected;

**"Material Generation Technologies"** means a Generation Technology that accounts from time to time for at least one per cent. (1%) of all installed generation capacity (expressed in MW) in the United Kingdom;

**"Metered CO<sub>2</sub> Output"**<sup>11</sup> means the mass quantity of CO<sub>2</sub> (*expressed in tCO<sub>2</sub>*) entering the T&S Network as measured at the CO<sub>2</sub> Delivery Point(s);

**"Metered Day Electricity Output"** has the meaning given to that term in schedule 4 (Variable Payment Calculation);

**"Metered Electricity Output"** means for each Settlement Unit, the Loss Adjusted Metered Electricity Output for such Settlement Unit as reported by a BSC Company or BSC Agent to the DPA Counterparty;

**"Metered Electricity Output Cut-Off Time"** means, in relation to each VP Billing Period, [*a time to be determined*] on [*a Business Day to be determined*] following such VP Billing Period;

**"Metered Electricity Output Recalculation Amount"** has the meaning given to that term in clause 11.7 (Recalculations of Estimated Metered Electricity Output);

**"Metering"** means the functions of metering, measuring, Sampling, Sample analysis and/or calculating and includes check metering. **"Metered"** shall be construed accordingly;

**"Metering Access Rights"** has the meaning given to that term in clause 18.6 (Access and testing of meters);

**"Metering Access Termination Event"** means an event as set out in clause 18.8 (Failure to provide Metering Access Rights);

**"Metering Data"** means all data (including Supporting Information) relating, directly or indirectly, to the quantity of CO<sub>2</sub>, electricity, carbon, fuel and other consumables that is required for the DPA Settlement Activities, including the calculation by the DPA Counterparty of the Availability Payment in accordance with schedule 3 (Availability Payment Calculations), and the Variable Payment in accordance with schedule 4 (Variable Payment Calculation), such data to:

- (a) be Metered by the Facility Metering Equipment where applicable; and

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<sup>11</sup> Note to Reader: BEIS' expectation is that captured CO<sub>2</sub> which fails to comply with the Captured Carbon Dioxide Quality Standards will not be exported to the T&S Network through the valve equipment at the CO<sub>2</sub> Delivery Point(s), and will therefore not be considered to be "Metered CO<sub>2</sub> Output".

- (b) include the Metered value relevant to each Settlement Unit at each Metering Point by both the main Facility Metering Equipment and any check Facility Metering Equipment;

**"Metering Dispute"** means a CO<sub>2</sub> Metering Dispute, Electricity Metering Dispute or Gas Supply Metering Dispute;

**"Metering Obligations"** means the Electricity Metering Obligation, the CO<sub>2</sub> Metering Obligation and the Gas Supply Metering Obligation;

**"Metering Points"** means the Electricity Delivery Point, CO<sub>2</sub> Delivery Points, and the Gas Supply Points;

**"Metering Schematic Obligation"** has the meaning given to that term in clause 18.6 (Metering Schematic Obligation);

**"Metering System"** has the meaning given to that term in the Balancing and Settlement Code;

**"Milestone Assessment Response Notice"** has the meaning given to that term in clause 7.2 (Response to Milestone Requirement Notice);

**"Milestone Delivery Date"** means the Initial Milestone Delivery Date, as such date may be extended day for day for each day of delay to the Project by reason of:

- (a) a Force Majeure in respect of which the Generator is the FM Affected Party but only to the extent that the Generator has satisfied the requirements of clause 22 (Force Majeure) and this definition in order to be entitled to such extension;
- (b) the failure of the Electricity Transmission System Operator, Electricity Transmission Licensee or Electricity Licensed Distributor to carry out in a timely manner any required system reinforcement or connection works specified in the construction agreement attributable to the Facility and to which any Electricity Transmission System Operator, Electricity Transmission Licensee or Electricity Licensed Distributor is a party (except to the extent that such failure is due to the fault or negligence of the Generator or its Representatives);
- (c) the failure of the Gas Licensed Transporter to carry out in a timely manner any required system reinforcement or connection works specified in the construction agreement attributable to the Facility and to which any Gas Licensed Transporter is a party (except to the extent that such failure is due to the fault or negligence of the Generator or its Representatives); or
- (d) the failure of the T&S Operator to carry out in a timely manner: (A) any connection works specified in the T&S Construction Agreement; or (B) any required works to the T&S Network in order for the Facility to export captured CO<sub>2</sub> to the T&S Network (except to the extent that such failure is due to the fault or negligence of the Generator or its Representatives),

and provided that in the case of delays caused by reasons in (b), (c), and/or (d) above:

- (i) the Generator gives notice as soon as reasonably practicable to the DPA Counterparty of the nature and extent of the failure; and
- (ii) there shall be no extension for any day of delay to the Project that could have been avoided by the Generator and its Representatives using reasonable endeavours:
  - (A) to mitigate the effects of such failure (including delay to the Project);

- (B) to carry out its obligations under the Agreement in any way that is reasonably practicable; and
- (C) to resume the performance of its obligations under the Agreement as soon as reasonably practicable;

**"Milestone Requirement"** has the meaning given to that term in clause 7.1 (Milestone satisfaction);

**"Milestone Requirement Notice"** has the meaning given to that term in clause 7.1 (Milestone satisfaction);

**"Milestone Satisfaction Date"** means the date of the Milestone Assessment Response Notice from the DPA Counterparty to the Generator specifying that the Generator has complied with and fulfilled a Milestone Requirement;

**"Minimum CO<sub>2</sub> Capture Rate"** means [seventy per cent. (70%)];

**"Minimum CO<sub>2</sub> Capture Rate Breach"** has the meaning given to that term in clause 3.6 (Termination for a Prolonged Minimum CO<sub>2</sub> Capture Rate Breach);

**"Minimum CO<sub>2</sub> Capture Rate Obligation"** has the meaning given to that term in clause 3.6 (Termination for a Prolonged Minimum CO<sub>2</sub> Capture Rate Breach);

**"Minimum CO<sub>2</sub> Capture Rate Suspension Period"** has the meaning given to that term in clause 10.8 (Failure to comply with Minimum CO<sub>2</sub> Capture Rate Obligation: Suspension);

**["Minimum Reporting Content Requirements"** means the content requirements, in a form and content reasonably satisfactory to the DPA Counterparty, in respect of the report to be provided by the Generator to the DPA Counterparty pursuant to clause 6.3(b)(i) (Reporting Obligations) relating to the progress towards the design, procurement, manufacturing, construction, completion, testing and commissioning of the Facility. The reports shall include, but shall not be limited to, the following:

- (a) an executive summary;
- (b) a schedule of forecast and actual key events with a balanced mix of critical and near critical path milestones;
- (c) a progress to date, in narrative format, of the Project (including an engineering status, a procurement status, a construction status, and a Facility commencement status);
- (d) financing progress prior to Milestone Delivery Date;
- (e) an updated 'S' curve for progress of design, procurement, construction and commissioning;
- (f) a project schedule detailing the initial baseline schedule and the actual progress achieved;
- (g) a baseline critical path together with any updated version of that as applicable;
- (h) an earned value analysis figure depicting progress against baseline with commentary on deviations from plan;
- (i) [Cost Data]; and



- (j) key risks with associated potential impact (quantified) on cost and schedule outturn.]<sup>12</sup>

**"Month"** means a calendar month;

**"Monthly Availability Payment"** has the meaning given to that term in clause 13.1 (Billing Statements);

**"Net Available Capacity"** has the meaning given to that term in schedule 3 (Availability Payment Calculations);

**"Net Dependable Capacity"** has the meaning given to that term in schedule 3 (Availability Payment Calculations);

**"Net Dependable Capacity Estimate"** means the Generator's estimate of the Net Dependable Capacity from time to time, being the Initial Net Dependable Capacity Estimate as may be adjusted pursuant to clause 8.1 (Adjustment to the Net Dependable Capacity Estimate);

**"NDC Anniversary"** has the meaning given to that term in clause 8.4 (Annual NDC Test);

**"NDCE Adjustment Deadline"** has the meaning given to that term in clause 8.1 (Adjustment to the Net Dependable Capacity Estimate);

**"NDCE Adjustment Notice"** has the meaning given to that term in clause 8.1 (Adjustment to the Net Dependable Capacity Estimate);

**"Non-affected Party"** has the meaning given to that term in clause 22.2(a) (Conditions to Force Majeure relief);

**"OCP Acceptance Tests"** means the tests, carried out simultaneously and in accordance with the Commissioning Tests, to be completed by the Generator pursuant to paragraphs 2(a) and 3(b) of Part B of schedule 2 (Conditions Precedent), in order to determine the (i) Net Dependable Capacity; (ii) Test Achieved CO<sub>2</sub> Capture Rate; (iii) Plant Net Efficiency; and (iv) Start Up Times;

**"OCP Required CO<sub>2</sub> Capture Rate"** means a Test Achieved CO<sub>2</sub> Capture Rate which is equal or greater than the higher of: (i) ten (10) percentage points lower than the CO<sub>2</sub> Capture Rate Estimate; and (ii) eighty per cent. (80%);

**"Operational Conditions Precedent"** means the conditions precedent set out in Part B of schedule 2 (Conditions Precedent) and **"Operational Condition Precedent"** shall be construed accordingly;

**"Other Change in Law"**<sup>13</sup> means a Change in Law made by Her Majesty's Government of the United Kingdom or which Her Majesty's Government of the United Kingdom has formally required a Competent Authority to make and which in either such case has an undue (being not objectively justifiable) discriminatory effect on the out-of-pocket costs incurred or saved by the Generator or the Project when compared with the out-of-pocket costs incurred or saved as a result of such Change in Law by:

- (a) all other generators which operate generating facilities deploying CO<sub>2</sub> Capture Technology;

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<sup>12</sup> Note to Reader: The content of the reports are subject to further review by BEIS.

<sup>13</sup> Note to Reader: This definition is subject to further review by BEIS.

- (b) all generators which operate generating facilities deploying the same or similar generation technology (or combustion process) as the Facility but which do not deploy CO<sub>2</sub> Capture Technology;
- (c) all generators which operate generating facilities deploying one (1) or more Material Generation Technologies; or
- (d) all other generators which operate generating facilities deploying CO<sub>2</sub> Capture Technology other than the Facility's CO<sub>2</sub> Capture Technology,

in each case in the United Kingdom, provided that the fact that a Change in Law has a disproportionate effect shall not, of itself, mean that it is discriminatory;

**"Other Extra Variable Costs"** has the meaning given to that term in schedule 4 (Variable Payment Calculation);

**"Party"** means one or other of the parties to the Agreement;

**"Payments"** means the Availability Payment and the Variable Payment;

**"Permitted Auditor"** has the meaning given to that term in clause 6.4 (Right to Audit);

**"Plant Net Efficiency"** means the plant net efficiency (*expressed as a percentage*) of the Facility, equal to the PNE Metered Electricity Output divided by PNE Facility Heat Input, on a continuous and reliable basis at Reference Site Conditions, with the Capture Plant operating simultaneously at (where applicable): (i) the OCP Required CO<sub>2</sub> Capture Rate, as demonstrated by the OCP Acceptance Test; or (ii) the Required CO<sub>2</sub> Capture Rate, as demonstrated by either the OCP Acceptance Test or the Longstop Date Acceptance Test (where relevant);

**"Plant Net Efficiency Estimate"** means [*an estimate of the Plant Net Efficiency of the Facility (expressed in a percentage) provided by the Generator*];

**"PNE Metered Electricity Output"** means the BM Unit Metered Volume for the Facility as measured by the Electricity Metering Equipment during a Test;

**"PNE Facility Heat Input"** means the quantity of heat (*expressed in MWh*) entering the Facility as measured by the Generator on a lower heating value basis during a Test;

**"Power Plant"** means the plant equipment, and other facilities described in schedule 1 (The Facility) capable of generating and metering electricity, including all associated infrastructure required to integrate such facilities within the Project but excluding the Capture Plant<sup>14</sup>;

**"Power Plant CO<sub>2</sub> Emissions"** has the meaning given to that term in schedule 4 (Variable Payment Calculation);

**"Power Plant Outage Event"** means an event requiring the submission of an electricity outage capacity declaration to REMIT declaring that the Power Plant is unavailable, curtailed or derated;

**"Power Plant Outage Relief Event"** has the meaning given to that term in clause 10.6(a) (Outage Relief Events);

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<sup>14</sup> Note to Reader: We note that the definitions of "Capture Plant" and "Power Plant" may be adjusted if the Capture Plant is inherent to the cycle design of the Power Plant.

**"Proceedings"** means any proceeding, suit or action relating to or arising out of a Dispute or the Agreement but excluding any [Metering Dispute]<sup>15</sup>;

**"Project"** means the design, development, construction, completion, testing, commissioning, operation, maintenance and decommissioning of the Facility;

**"Project Commitments"** means the requirements detailed in schedule 8 (Project Commitments) to be delivered by the Generator to the DPA Counterparty;

**"Prolonged FM Event"** has the meaning given to that term in clause 3.2 (Termination for Prolonged Force Majeure);

**"Prolonged FM Event Notice"** has the meaning given to that term in clause 3.2 (Termination for Prolonged Force Majeure);

**"Prolonged FM Termination Notice"** has the meaning given to that term in clause 3.2 (Termination for Prolonged Force Majeure);

**"QCIL Adjusted Capture Rate Payment"** has the meaning given to that term in clause 20.2 (QCIL Compensation);

**"QCIL Adjusted Revenues Payment"** has the meaning given to that term in clause 20.2 (QCIL Compensation);

**"QCIL Capex Costs"** means all QCIL Costs relating to the acquisition, disposal, modification or construction of any asset in respect of the Project;

**"QCIL Capex Payment"** has the meaning given to that term in clause 20.2 (QCIL Compensation);

**"QCIL Capex Savings"** means all QCIL Savings relating to the acquisition, disposal, modification or construction of any asset in respect of the Project;

**"QCIL Compensation"** means (i) a QCIL Opex Payment; (ii) a QCIL Capex Payment; (iii) a QCIL Adjusted Revenues Payment; (iv) a QCIL Construction Event Payment; (v) a QCIL Operations Cessation Event Payment; and (vi) any combination of any of the foregoing, as such amounts are calculated in accordance with clause 20.2(a);

**"QCIL Construction Event"** means a Qualifying Change in Law which is implemented, occurs or becomes effective after the date of the Agreement and before the Start Date and which will permanently prevent the Generator, acting in accordance with the Reasonable and Prudent Standard, from commissioning [the whole of the Facility] by virtue of the necessary construction, conversion, installation, testing, completion or commissioning of [the Facility] becoming illegal;

**"QCIL Construction Event Payment"** has the meaning given to that term in clause 20.2 (QCIL Compensation);

**"QCIL Costs"** means in relation to a Qualifying Change in Law, all out-of-pocket costs (including Qualifying Change in Law tax liabilities) which have been, will be or are reasonably likely to be incurred in respect of the Project by the Generator arising directly as a result or in anticipation of such Qualifying Change in Law being implemented, occurring or becoming effective, but excluding: (i) any termination amount; (ii) all costs incurred in respect of the agreement or determination of the amount of the termination amount; and (iii) all costs associated with the Generator's financing arrangements in respect of the Project (including interest incurred in respect of such financing arrangements);

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Drafting Note: To be determined if Gas Supply Metering Dispute and/or CO2 Metering Dispute will be captured.

**"QCiL Effective Date"** means the date on which a Qualifying Change in Law has been implemented, has occurred or has become effective;

**"QCiL Operations Cessation Event"** means:

- (a) a Qualifying Change in Law which is implemented, occurs or becomes effective on or after the Start Date and which will permanently prevent the Generator, acting in accordance with a Reasonable and Prudent Standard, from operating [the whole of the Facility] by virtue of such operation becoming illegal; or
- (b) a Qualifying Shutdown Event which occurs on or after the Start Date;

**"QCiL Operations Cessation Event Payment"** has the meaning given to that term in clause 20.2 (QCiL Compensation);

**"QCiL Opex Costs"** means all QCiL Costs which are not QCiL Capex Costs;

**"QCiL Opex Payment"** has the meaning given to that term in clause 20.2 (QCiL Compensation);

**"QCiL Opex Savings"** means all QCiL Savings which are not QCiL Capex Savings;

**"QCiL Savings"** means, in relation to a Qualifying Change in Law, all savings (including avoided out-of-pocket costs, reliefs from or reductions in Qualifying Change in Law tax liabilities, insurance proceeds and other compensation) which have been, will be or are reasonably likely to be made or received in respect of the Project by the Generator arising directly as a result or in anticipation of such Qualifying Change in Law being implemented, occurring or becoming effective;

**"QCiL Termination Payment"** has the meaning given to that term in clause 5.4(a);

**"QSE Notice"** has the meaning given to that term in clause 20.3 (Qualifying Shutdown Event);

**"Qualifying Change in Law"** means:

- (a) a Discriminatory Change in Law;
- (b) a Specific Change in Law; or
- (c) an Other Change in Law,

which, in each case, is not a Foreseeable Change in Law. [No decision by any Subsidy Control Competent Authority in respect of the application of the Subsidy Control Rules to the Agreement and/or Dispatchable Power Agreements (including the annulment, invalidation, suspension, revocation, modification or replacement of any prior decision pursuant to such rules) shall constitute a Qualifying Change in Law]<sup>16</sup>;

**"Qualifying Shutdown Event"** means:

- (a) Her Majesty's Government of the United Kingdom or the Secretary of State or any other Minister of the Crown or any department of Her Majesty's Government of the United Kingdom (each, a **"Government Authority"**): (i) applying, implementing or changing the Law which is in force from time to time, (ii) applying or exercising its

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<sup>16</sup> Note to Reader: This definition is subject to further review by BEIS including to ensure consistency, insofar as appropriate, with AR4 CfD drafting as it develops.

powers under the Law or (iii) applying, implementing and/or changing policy or guidance which has effect from time to time; or

- (b) the exercise of power by a UK Competent Authority, where such exercise of powers was required by a direction made under statutory powers by a Government Authority; or
- (c) the exercise of power by a UK Competent Authority, where the UK Competent Authority has not acted independently of a Government Authority in such exercise of powers, and for this purpose a UK Competent Authority shall be deemed to have acted independently of a Government Authority unless such exercise of power was procured by the Government Authority,

other than any application, implementation, change, exercise of powers or other action required by, or necessary for compliance with, international law, policy or guidance (provided such international law, policy or guidance was not promoted by such Government Authority and, in relation to any international law, policy or guidance proposed after the date of the Agreement, such Government Authority has used its reasonable endeavours to prevent the adoption of such international law, policy or guidance (such reasonable endeavours not to include an obligation on any Government Authority to take legal proceedings to challenge such adoption)), and which the Generator can demonstrate (i) imposes a requirement that permanently prevents [the whole of the Facility] from operating or (ii) constitutes the refusal or the failure to give approval to a request for consent to any re-start of [the whole Facility] for a period exceeding [twenty four (24)] months (each, a "**Shutdown Event**") unless, in any such case, the Shutdown Event was for reasons:

- (i) relating to or in connection with matters of health, safety, security, environment, transport or damage to property (the "**Relevant Matters**") affecting (directly or indirectly): (1) the Facility or the generation of electricity or the capture of CO<sub>2</sub> therefrom; (2) the Generator; (3) the land on which the Facility is situated; (4) the management of any of (1) to (3); or (5) the generation of electricity using the same Generation Technology as the Facility (whether in the UK or elsewhere), but in this case, provided the Relevant Matters also relate or apply to one (1) or more of (1) to (4), where at the time of the Shutdown Event it was justifiable in the circumstances as they related or applied to the relevant one(s) of (1) to (5) to prevent the operation, or refuse to consent to any re-start, of [the whole of the Facility];
- (ii) arising out of, in connection with, or resulting from the negligence, breach or fault of, or a failure to act in accordance with a Reasonable and Prudent Standard by, the Generator or any of its Representatives, where at the time of the Shutdown Event it was justifiable in the circumstances to prevent the operation, or refuse to consent to any re-start, of the whole of the Facility; or
- (iii) [relating to any decision by any Subsidy Control Competent Authority in respect of the application of the Subsidy Control Rules in the Agreement or Dispatchable Power Agreements (including the annulment, invalidation, revocation, modification, suspension or replacement of any prior decision pursuant to such rules)];<sup>17</sup>

**"Reasonable and Prudent Standard"** means the standard of a person seeking in good faith to comply with its contractual obligations and, in so doing and in the general conduct of its undertaking, exercising that degree of skill, diligence, prudence and foresight that would reasonably and ordinarily be expected from a skilled and experienced person complying with all applicable Laws, Directives, Industry Documents and Required

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<sup>17</sup> Note to Reader: This definition is subject to further review by BEIS including to ensure consistency, insofar as appropriate, with AR4 CfD drafting as it develops.

Authorisations and engaged in the same type of undertaking under the same or similar circumstances and conditions;

**"Recalculation Amounts"** means the CO<sub>2</sub> Capture Rate Recalculation Amount and/or the Metered Electricity Output Recalculation Amount;

**"Reference Plant"** has the meaning given to that term in schedule 4 (Variable Payment Calculation);

**"Reference Plant CO<sub>2</sub> Emissions"** has the meaning given to that term in schedule 4 (Variable Payment Calculation);

**"Reference Plant Gas Consumption"** has the meaning given to that term in schedule 4 (Variable Payment Calculation);

**"Reference Plant Review"** means a review conducted by the DPA Counterparty pursuant to, and within the parameters specified in, schedule 9 (Review Procedures);

**"Reference Site Conditions"** has the meaning given to that term in schedule 4 (Variable Payment Calculation);

**"REMIT"** means the dedicated 'REMIT' section of the [*the platform provider to be determined*]<sup>18</sup> pursuant to EUR 2011/1227;

**"REMIT Declaration Capacity Data"** has the meaning given to that term in clause 10.2 (REMIT Declaration Capacity Data);

**"Representatives"** means:

- (a) in respect of the DPA Counterparty:
  - (i) its directors, officials, officers, employees, agents, consultants and advisers; and
  - (ii) the DPA Settlement Services Provider and its directors, officers, employees, agents, consultants and advisers;
- (b) in respect of the Generator:
  - (i) its directors, officers or employees;
  - (ii) any of its contractors, agents, consultants and advisers which are engaged in connection with the Project or the Agreement; and
  - (iii) the directors, officers, employees, agents, consultants and advisers of any of its contractors which are engaged in connection with the Project or the Agreement;
- (c) in respect of any Government Entity, its directors, officials, officers, employees, agents, consultants and advisers; or
- (d) in respect of any other person, its directors, officers, officials, employees, agents, consultants and advisers;

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<sup>18</sup> Note to Reader: The platform provider to be determined.

**"Request for Information"** means:

- (a) a request for information (as such term is defined in Section 8 of the FoIA); or
- (b) a request that environmental information (as such term is defined in the EIR) be made available pursuant to the EIR;

**"Requested Milestone Supporting Information"** has the meaning given to that term in clause 7.2 (Response to Milestone Requirement Notice);

**"Required Authorisation"** means, in relation to each Party and at any time, each licence, accreditation, authorisation, permit, consent, certificate, resolution, clearance, exemption, order, confirmation, permission or other approval of or from any Competent Authority required at such time to enable the relevant Party to perform or fulfil its obligations under the Agreement and, in the case of the Generator, for the Project;

**"Required CiL Amendment"** means any amendment or supplement to the Agreement which is, as a direct result of a Change in Applicable Law being implemented, occurring or becoming effective, necessary to ensure that the Required CiL Amendment Objectives are met (provided that any such amendment or supplement shall not affect either: (i) the commercial intent of the Agreement; or (ii) the overall balance of risks, rights and obligations between the Parties, in each case as provided for in the Agreement);

**"Required CiL Amendment Objectives"** means that: (i) the Agreement continues in force; and (ii) no provision of the Agreement is rendered illegal, invalid, unenforceable or inoperable;

**"Required CO<sub>2</sub> Capture Rate"** means a Test Achieved CO<sub>2</sub> Capture Rate which is the higher of: (i) five (5) percentage points lower than the CO<sub>2</sub> Capture Rate Estimate; and (ii) eighty five per cent. (85%);

**"Required Metering Data"** has the meaning given to that term in clause 9.2 (Estimates of Metering Data);

**"Required Net Dependable Capacity"** means ninety per cent. (90%) of the Net Dependable Capacity Estimate;

**"Required Plant Net Efficiency"** means ninety five per cent. (95%) of the Plant Net Efficiency Estimate;

**"Required Start Up Times"** means one hundred and twenty five per cent. (125%) of the Start Up Times Estimates;

**"Residual Value Adjustment"** means an adjustment to reflect the revenue that the Parties agree, or is determined pursuant to the Dispute Resolution Procedure, the Generator will generate (including wholesale electricity market revenue, balancing system services revenue and ancillary services revenue) from electricity that the Facility will generate from the date on which the Agreement terminates as a result of a T&S Unavailability Event until the expiry of the Term, with such revenue calculated on a forward-looking basis:

- (a) based on the Facility's [Assumed Net Dependable Capacity], [Assumed Load Factor] and [Assumed Net Efficiency] (with each term reflecting forecast degradation factors and other appropriate factors);
- (b) assuming that when generating such electricity the Facility's Availability of Capture is zero (0);

- (c) based on estimates of relevant rates or prices from one or more leading economist in the England and Wales wholesale electricity market who is independent of the Parties; and
- (d) discounted by the [Applicable Discount Rate] to reflect the time-value of the adjustment;

**"Respondent"** has the meaning given to that term in clause 27.3(b) (Expert Determination);

**"Sample"** means a portion extracted from the total quantity of a substance that contains (as far as reasonably practicable) the constituents in the same proportions that are present in that total quantity being sampled. **"Sampling"** shall be construed accordingly;

**"Secretary of State"** means, unless otherwise expressly stated or the context otherwise requires, the Secretary of State for Business, Energy and Industrial Strategy;

**"Section C (system operator standard conditions) Direction"** means a direction issued by the Authority or the Secretary of State, where appropriate, in accordance with standard condition A2 (Application of Section C) of the Electricity Transmission Licence;

**"Senior Representative"** means a senior employee or officer selected by a Party to represent it in relation to clause 27.2 (Resolution by the Senior Representatives);

**"Senior Representative Settlement"** means any agreement reached by the Senior Representatives which resolves a Dispute or any part of a Dispute;

**"Settlement Unit"** means the AP Settlement Unit or the VP Settlement Unit (as applicable);

**"SOTO Code"** means the System Operator – Transmission Owner Code required to be in place pursuant to standard condition B12 (System Operator – Transmission Owner Code) of the Electricity Transmission Licence;

**"Specific Change in Law"** means a Change in Law the terms of which specifically (and not merely indirectly or consequentially or by virtue of the disproportionate effect of any Change in Law that is of general application) apply to:

- (a) generating facilities which deploy CO<sub>2</sub> Capture Technology, or CO<sub>2</sub> Capture Technology forming part of such generating facilities, and not to other generating facilities, or the generation from, or generation related processes carried out at, other generating facilities; or
- (b) the holding of shares in companies, the membership of partnerships, limited partnerships or limited liability partnerships, the participation in joint ventures (whether or not incorporated) or the holding of any other economic interest in an undertaking whose main business is the development, construction, operation and maintenance of installations referred to in paragraph (a) above and not other generating facilities;

**"Start Date"** means the date so notified to the DPA Counterparty by the Generator in accordance with clause 6.2(c) (Fulfilment of Conditions Precedent), such date to be:

- (a) no earlier than [*number of days to be inserted*] after the date of such notice;
- (b) no earlier than the first day of the Target Commissioning Window;
- (c) no earlier than the date of the CP Fulfilment Notice; and



(d) no later than the Longstop Date,

and provided that on such first-mentioned date:

- (i) all the Generator Repeating Representations and the representation set out in clause 15.1(g) (No litigation) are true by reference to the facts and circumstances then existing;
- (ii) no Default has occurred which is continuing; and
- (iii) all Conditions Precedent (with the exception of those waived in accordance with clause 6.5 (Waiver)) continue to be fulfilled;

**"Start Up Times"** means each time taken (*expressed in hours*) to [start up]<sup>19</sup> the Facility a: (i) hot start, (ii) warm start and (iii) cold start, with the Capture Plant operating simultaneously at (where applicable): (i) the OCP Required CO<sub>2</sub> Capture Rate, as demonstrated by the OCP Acceptance Test; or (ii) the Required CO<sub>2</sub> Capture Rate, as demonstrated by either the OCP Acceptance Test or the Longstop Date Acceptance Test (where relevant);

**"Start Up Times Estimates"** means [*each estimate of the Start Up Times (for a hot start, warm start and cold start) of the Facility (expressed in hours) provided by the Generator*];

**"Subsidy"** shall have the meaning given to the term "subsidy" in the Subsidy Control Act [2022];<sup>20</sup>

**"Subsidy Control Competent Authority"** has the meaning given to that term in the definition of Subsidy Control Rules;<sup>21</sup>

**"Subsidy Control Rules"** means: (i) any subsidy control provisions in Law or having legally binding effect in the United Kingdom; and (ii) any relevant decisions or judgments of any UK Competent Authority having jurisdiction in the United Kingdom to enforce or administer such subsidy control provisions (a **"Subsidy Control Competent Authority"**);<sup>22</sup>

**"Supplier Obligation"** means the levy arrangements pursuant to the Energy Act 2013;

**"Supporting Information"** means any and all calculations, confirmations, data, documentation, evidence (including expert's reports), explanations, information, measurements, readings, reports (including expert's reports), representations and statements (whether in written or documentary form);

**"Suspension CO<sub>2</sub> Capture Rate"** means [fifty per cent. (50%)];

**"Suspension CO<sub>2</sub> Capture Rate Breach"** has the meaning given to that term in clause 10.8 (Failure to comply with Minimum CO<sub>2</sub> Capture Rate Obligation: Suspension);

**"Suspension Period"** has the meaning given to that term in clause 9.4(a) (Prolonged Failure to Provide Metering Data);

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<sup>19</sup> Note to Reader: This definition is subject to further development by BEIS.

<sup>20</sup> Note to Reader: This definition is subject to further review by BEIS including to ensure consistency, insofar as appropriate, with AR4 CfD drafting as it develops.

<sup>21</sup> Note to Reader: This definition is subject to further review by BEIS including to ensure consistency, insofar as appropriate, with AR4 CfD drafting as it develops..

<sup>22</sup> Note to Reader: This definition is subject to further review by BEIS including to ensure consistency, insofar as appropriate, with AR4 CfD drafting as it develops.

**"Target Commissioning Date"** means *[the target commissioning date notified by the Generator to the Delivery Body in its application for the Dispatchable Power Agreement which will be a date falling within the Initial Target Commissioning Window]*;

**"Target Commissioning Window"** means the Initial Target Commissioning Window for the Facility, as such period may be extended day for day for each day of delay to the Project by reason of:

- (a) a Force Majeure in respect of which the Generator is the FM Affected Party but only to the extent that the Generator has satisfied the requirements of clause 22 (Force Majeure) and this definition in order to be entitled to such extension;
- (b) the failure of the Electricity Transmission System Operator, Electricity Transmission Licensee or Electricity Licensed Distributor to carry out in a timely manner any required system reinforcement or connection works specified in the construction agreement attributable to the Facility and to which any Electricity Transmission System Operator, Electricity Transmission Licensee or Electricity Licensed Distributor is a party (except to the extent that such failure is due to the fault or negligence of the Generator or its Representatives);
- (c) the failure of the Gas Licensed Transporter to carry out in a timely manner any required system reinforcement or connection works specified in the construction agreement attributable to the Facility and to which any Gas Licensed Transporter is a party (except to the extent that such failure is due to the fault or negligence of the Generator or its Representatives); or
- (d) the failure of the T&S Operator to carry out in a timely manner: (A) any connection works specified in the T&S Construction Agreement; or (B) any required works to the T&S Network in order for the Facility to export captured CO<sub>2</sub> to the T&S Network (except to the extent that such failure is due to the fault or negligence of the Generator or its Representatives),

and provided that in the case of delays caused by reasons in (b), (c), and/or (d) above:

- (i) the Generator gives notice as soon as reasonably practicable to the DPA Counterparty of the nature and extent of the failure; and
- (ii) there shall be no extension for any day of delay to the Project that could have been avoided by the Generator and its Representatives using reasonable endeavours:
  - (A) to mitigate the effects of such failure (including delay to the Project);
  - (B) to carry out its obligations under the Agreement in any way that is reasonably practicable; and
  - (C) to resume the performance of its obligations under the Agreement as soon as reasonably practicable;

**"T&S Capacity Fee"** has the meaning given to that term in schedule 3 (Availability Payment Calculations);

**"T&S Connection Agreement"** means the agreement between the T&S Operator and the Generator governing the connection to and use of the T&S Network by the Generator;

**"T&S Connection Confirmation"** has the meaning given to that term in Part B of schedule 2 (Conditions Precedent);

**"T&S Construction Agreement"** means the agreement between the T&S Operator and the Generator relating to the construction of infrastructure connecting the [Capture Plant] to the T&S Network at the CO<sub>2</sub> Delivery Point(s);

**"T&S Network"** means the network consisting (wholly or mainly) of:

- (a) pipelines used for the transportation of CO<sub>2</sub> from one generating station to a storage facility or to or from any CO<sub>2</sub> pipeline network; or
- (b) [routes used for the transportation of CO<sub>2</sub> from one capture plant to a storage facility or to or from any CO<sub>2</sub> pipeline network]<sup>23</sup>; and
- (c) storage facilities for the permanent storage of CO<sub>2</sub>,

owned or operated by the T&S Operator within the United Kingdom;

**"T&S Operator"** means the licensed company operating and maintaining the T&S Network;

**"T&S Outage Event"** means an event or circumstance that prevents the Facility from accessing the [full capacity that the Generator has reserved under the T&S Connection Agreement] for entry to the T&S Network;

**"T&S Termination Payment"** has the meaning given to that term in clause 5.2(a)(i) (Consequences of T&S Unavailability Event termination);

**"T&S Unavailability Event"** means an event or circumstance that delays or prevents the Facility from first connecting to and accessing the T&S Network, or which prevents the Facility from continuing to connect to and access the T&S Network, in each case for a continuous period of at least [●]<sup>24</sup>;

**"T&S Volumetric Fee"** has the meaning given to that term in schedule 4 (Variable Payment Calculation);

**"T&S Volumetric Payment Rate"** has the meaning given to that term in schedule 4 (Variable Payment Calculation);

**"Technical Compliance Termination Event"** means an event as set out in clause 18.5 (Failure to remedy Metering Obligations breach);

**"Term"** has the meaning given to that term in clause 2.2 (Duration);

**"Termination Event"** has the meaning given to that term in clause 4 (Termination Events);

**"Termination Payments"** means the Default Termination Payment and the T&S Termination Payment and **"Termination Payment"** shall be construed accordingly;

**"Test Achieved CO<sub>2</sub> Capture Rate"** means the CO<sub>2</sub> capture rate (expressed as a percentage (%)) for the Facility during a Test and calculated as follows:

$$TACRph = \frac{CO_{2exp}}{CO_{2gen} - CO_{2gen,TS}}$$

where:

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<sup>23</sup> Note to Reader: Definition to be kept under review as transport and storage business model develops.

<sup>24</sup> Note to Reader: BEIS is still considering the trigger for T&S Unavailability Events and also how to categorise when it is due to Generator fault.

TACR <sub>ph</sub>	=	Test Achieved CO <sub>2</sub> Capture Rate (%)
CO <sub>2</sub> <sub>exp</sub>	=	Metered CO <sub>2</sub> Output in a Test period ( <i>tCO<sub>2</sub></i> )
CO <sub>2</sub> <sub>gen</sub>	=	Calculated CO <sub>2</sub> Generated in a Test period ( <i>tCO<sub>2</sub></i> )
CO <sub>2</sub> <sub>gen_TS</sub>	=	Calculated CO <sub>2</sub> Generated where a T&S Outage occurs in a Test period ( <i>tCO<sub>2</sub></i> )

**"Tests"** means the OCP Acceptance Test, the Longstop Date Acceptance Test, and the Annual NDC Test (as applicable);

**"Third Party"** has the meaning given to that term in clause 30.5 (No third party rights);

**"Total Metered Fuel Consumption"** means the aggregate metered fuel consumption of the Facility as measured at the Gas Supply Point(s);

**"Total Project Pre-Commissioning Costs"** means [*an amount to be determined*]<sup>25</sup>;

**"Treaty"** has the meaning given to that term in Article 2(1)(a) of the Vienna Convention on the law of treaties 1969; and

**"UK Competent Authority"** means a Competent Authority of the United Kingdom;

**"Uniform Network Code"** means the uniform network code prepared pursuant to the Gas Transporter Licence;

**"Variable Payment"** means the payment calculated in accordance with schedule 4 (Variable Payment Calculation) to be made by the DPA Counterparty to the Generator in the circumstances set out in clause 11 (Variable Payment);

**"Variable Payment Billing Period"** means the period starting at 00:00 on a day and ending at 00:00 on the following day, and **"VP Billing Period"** shall be construed accordingly;

**"Variable Payment Billing Statement"** has the meaning given to that term in clause 13.1 (Variable Payment Billing Statement);

**"Variable Payment Due Date"** has the meaning given to that term in clause 14.1 (Due Date for payment); and

**"VP Settlement Unit"** means each day occurring during the Term after the Start Date and starting at 00:00 on each such day and ending at 00:00 on the following day.

## 1.2 Interpretation

- (a) Any reference to the Agreement shall be deemed to include the schedules.
- (b) Save for the purposes of clause 20 (Change in Law) and the definition of Change in Law, any reference in the Agreement to a Law, Directive or other similar enactment or instrument (each, an **"enactment"**) includes references to:
  - (i) that enactment as amended, supplemented or applied by or under any other enactment before, on or after the date of the Agreement;

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<sup>25</sup> Note to Reader: To be determined by BEIS.

- (ii) any enactment which re-enacts, restates or replaces (in each case with or without modification) that enactment; and
  - (iii) any subordinate legislation made (before, on or after the date of the Agreement) under any enactment, including one within paragraph (i) or (ii) above.
- (c) Unless a contrary indication appears, any reference in the Agreement to:
- (i) the Agreement or any other agreement or Industry Document is, save for the purposes of clause 20 (Change in Law) and the definition of "**Change in Law**", a reference to the "**Agreement**" or other agreement or "**Industry Document**" as amended, supplemented, restated, novated or replaced from time to time;
  - (ii) a "**clause**" or "**schedule**" is a reference to a clause of, or a schedule to, the Agreement;
  - (iii) the words "**include**" or "**including**" shall be construed without limitation to the generality of the preceding words;
  - (iv) a "**person**" includes any individual, firm, company, corporation, unincorporated organisation, government, state or agency of a state or any association, trust or partnership (whether or not having separate legal personality) or any other entity;
  - (v) a person includes its successors and permitted assignees or permitted transferees and, where a person ceases to exist, such other person to which all or some of its powers and functions may from time to time be transferred;
  - (vi) time shall be a reference to time in London, England;
  - (vii) words in the singular may be interpreted as including the plural, and vice versa; and
  - (viii) words of any gender include each other gender.
- (d) Any capitalised words, terms, phrases and abbreviations used specifically in any schedule shall have the meanings set out in that schedule.
- (e) clause and schedule headings are for ease of reference only.
- (f) If there is a conflict between the main body of the Agreement and a schedule, the main body of the Agreement shall prevail except as expressly provided for in the main body of the Agreement.

### 1.3 **Symbols and currency**

- (a) Any reference in this Agreement to "**£**" or "**pounds**" or "**Sterling**" is to be the lawful currency of the United Kingdom.
- (b) Any reference in this Agreement to "**MW**" is to megawatts and to "**MWh**" is to megawatt hours.
- (c) Any reference in this Agreement to "**tCO<sub>2</sub>**" is to tonnes of CO<sub>2</sub>.

1.4 **No interest in the Facility**

Other than as expressly set out in the Agreement, nothing in the Agreement is intended to create, or shall create, a legal or beneficial interest in the Facility or the Project in favour of any person other than the Generator.

## PART 2 TERM AND TERMINATION

### 2. TERM

#### 2.1 Commencement

Subject to clause 6 (Conditions Precedent), the Agreement shall commence on the date of the Agreement.

#### 2.2 Duration

(a) Subject to termination of the Agreement in the circumstances described in clauses 3.1 (Pre-Start Date termination), 3.2 (Termination for Prolonged Force Majeure), 3.3 (Termination for T&S Unavailability Event), 3.4 (Default termination), and 3.7 (Qualifying Change in Law termination), the Agreement shall continue until the [●]<sup>26</sup> anniversary of the earlier of:

- (i) the Start Date; and
  - (ii) the last day of the Target Commissioning Window,
- (the "**Term**").

#### 2.3 End of the Term

At the end of the Term, the Agreement shall terminate automatically and without compensation.

### 3. TERMINATION

#### 3.1 Pre-Start Date termination

If:

- (a) (i) the Generator fails or is unable to deliver the Milestone Requirement Notice by the Milestone Delivery Date in accordance with clause 7.1 (Milestone satisfaction); or (ii) neither Milestone Requirement has been complied with and fulfilled by the Milestone Delivery Date;
- (b) at any time prior to the Start Date, a Termination Event has occurred and is continuing;
- (c) any of the Initial Conditions Precedent are not fulfilled by the Generator or waived by the DPA Counterparty within twenty (20) Business Days of the date of the Agreement; or
- (d) any of the Operational Conditions Precedent are not fulfilled by the Generator or waived by the DPA Counterparty on or before the Longstop Date,

the DPA Counterparty shall have the right, but not the obligation, to terminate the Agreement with immediate effect upon giving the Generator notice of the same specifying, in the case of clause 3.1(b), the relevant Termination Event.

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<sup>26</sup> Note to Reader: This term will be specified by each Generator and will be between 10 and 15 years. Please refer to the discussion in the October 2021 Update.

### 3.2 Termination for Prolonged Force Majeure

- (a) If an event or circumstance of Force Majeure (excluding any Force Majeure that occurs by reason of a Change in Law) that first occurs between the date of this Agreement and the Milestone Satisfaction Date, prevents or delays the development, construction, completion, testing or commissioning of the Facility for a continuous period of at least [twelve (12)] months, as determined by the DPA Counterparty (a "**Prolonged FM Event**"), the DPA Counterparty shall have the right, but not the obligation, to notify the Generator in writing that the DPA Counterparty may terminate the Agreement following the expiry of a further [six (6)] month period in accordance with clause 3.2(b) (a "**Prolonged FM Event Notice**").
- (b) If a Prolonged FM Event has not been overcome and is continuing for a further period of at least [six (6)] months following the Generator's receipt of a Prolonged FM Event Notice, the DPA Counterparty shall have the right, but not the obligation, to notify the Generator in writing that the Agreement will terminate with immediate effect ("**Prolonged FM Termination Notice**") on the date of such Prolonged FM Termination Notice.

### 3.3 Termination for T&S Unavailability Event

If a T&S Unavailability Event has occurred and is continuing, the DPA Counterparty shall have the right, but not the obligation, to terminate the Agreement with immediate effect upon giving the Generator notice of the same ("**T&S Unavailability Termination Date**").

### 3.4 Default termination

- (a) If at any time on or after the Start Date a Termination Event has occurred and is continuing, the DPA Counterparty shall have the right, but not the obligation, by notice to the Generator, to designate a day as an early termination date with respect to the Agreement ("**Default Termination Date**"), specifying the relevant Termination Event.
- (b) If the DPA Counterparty gives notice designating a Default Termination Date, the Agreement shall terminate on the Default Termination Date even if the circumstances giving rise to the Termination Event are no longer continuing.

### 3.5 Termination for failing Minimum Commissioning Requirements

If:

- (a) the Net Dependable Capacity demonstrated at the Longstop Date Acceptance Tests is lower than the Required Net Dependable Capacity;
- (b) the Test Achieved CO<sub>2</sub> Capture Rate demonstrated at the Longstop Date Acceptance Tests is lower than the Required CO<sub>2</sub> Capture Rate;
- (c) the Plant Net Efficiency demonstrated at the Longstop Date Acceptance Tests is lower than the Required Plant Net Efficiency;
- (d) the Start Up Times demonstrated at the Longstop Date Acceptance Tests are higher than the Required Start Up Times; or
- (e) the Generator does not give a Longstop Date Capacity Notice on or prior to the date which is ten (10) Business Days after the later of:
  - (i) the Longstop Date; and



- (ii) the date which is ten (10) Business Days after the DPA Counterparty has given notice to the Generator reminding the Generator of the requirement to give a Longstop Date Capacity Notice,

the DPA Counterparty shall have the right, but not the obligation, to terminate the Agreement with immediate effect upon giving the Generator notice.

### 3.6 Termination for a Prolonged Minimum CO<sub>2</sub> Capture Rate Breach

- (a) With effect from the Start Date, the Generator undertakes to the DPA Counterparty that for each AP Billing Period, the Achieved and Declared Capture Rate Average will be equal to or greater than the Minimum CO<sub>2</sub> Capture Rate (a "**Minimum CO<sub>2</sub> Capture Rate Obligation**").
- (b) If the Generator is in breach of the Minimum CO<sub>2</sub> Capture Rate Obligation for either three (3) consecutive AP Billing Periods or three (3) non-consecutive AP Billing Periods within six (6) consecutive AP Billing Periods (a "**Minimum CO<sub>2</sub> Capture Rate Breach**"), the DPA Counterparty may at any time give notice to the Generator (a "**Capture Rate Breach Notice**"). Such notice shall remain valid and effective until:
  - (i) the Generator rectifies the Minimum CO<sub>2</sub> Capture Rate Breach by achieving an Achieved and Declared Capture Rate Average equal to or greater than the Required CO<sub>2</sub> Capture Rate for three (3) consecutive AP Billing Periods (a "**Capture Rate Rectification**"); or
  - (ii) the Generator provides the DPA Counterparty with a rectification plan in form and content satisfactory to the DPA Counterparty (a "**Capture Rate Rectification Plan**") as soon as reasonably practicable after the date the Generator receives the Capture Rate Breach Notice and implements such plan in accordance with its terms in order to achieve a Capture Rate Rectification.
- (c) If the Generator fails to:
  - (i) remedy the Minimum CO<sub>2</sub> Capture Rate Breach within [eighteen (18)] months of the date of first Capture Rate Breach Notice; or
  - (ii) implement a Capture Rate Rectification Plan in accordance with its terms in order to achieve a Capture Rate Rectification,

the DPA Counterparty shall have the right, but not the obligation, to terminate the Agreement, by giving written notice to the Generator (a "**Capture Rate Termination Notice**"), following which the Agreement will terminate with immediate effect on the date of such Capture Rate Termination Notice ("**Capture Rate Termination Date**").

### 3.7 Qualifying Change in Law termination

- (a) If a Qualifying Change in Law is implemented, occurs or becomes effective and:
  - (i) gives rise to or results in a QCiL Construction Event or a QCiL Operations Cessation Event (including a Qualifying Shutdown Event), the DPA Counterparty shall give notice to the Generator terminating the Agreement; or
  - (ii) does not give rise to or result in a QCiL Construction Event or a QCiL Operations Cessation Event (including a Qualifying Shutdown Event) but clause 20.2(b) applies, the DPA Counterparty may give notice to the Generator terminating the Agreement.

- (b) The DPA Counterparty shall not terminate the Agreement under clause 3.7(a)(i) in circumstances in which the Generator has provided a Generator QCiL Notice unless and until the Parties have agreed that a QCiL Construction Event or QCiL Operations Cessation Event has occurred or a determination to that effect has been made pursuant to the Dispute Resolution Procedure.

### 3.8 **No other termination right**

The termination rights in this clause 3 are the only rights that either Party has to terminate the Agreement.

## 4. **TERMINATION EVENTS**

A Termination Event means the occurrence at any time with respect to the Generator of any of the following events:

### (a) **Insolvency**

the Generator:

- (i) is dissolved or becomes insolvent;
- (ii) makes a general assignment, arrangement or composition with or for the benefit of its creditors;
- (iii) has a resolution passed for its winding-up, official management or liquidation (other than pursuant to a consolidation, amalgamation or merger);
- (iv) seeks or becomes subject to the appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official;
- (v) has a secured party take possession of all or substantially all its assets or has a distress, diligence, execution, attachment, sequestration or other legal process levied, enforced or sued on or against all or substantially all its assets; or
- (vi) is subject to any event with respect to it which under the applicable laws of any jurisdiction has an analogous effect to any of the events specified above,

except where any of the events set out this clause 4(a) is attributable to the DPA Counterparty not paying when due any amount which, but for the operation of clause 29 (Limited Recourse Arrangements, Undertakings and Acknowledgements), would have been due pursuant to the Agreement;

### (b) **Non-payment**

the Generator fails to pay any amount when due under the Agreement and that failure is not remedied on or before [twenty (20)] Business Days after the DPA Counterparty gives the Generator notice of that failure;

### (c) **Breach of key obligations**

- (i) the Generator is no longer the legal and beneficial owner of the Facility (subject only to any third party rights arising by reason of any security interest created or subsisting over or in respect of the Facility);
- (ii) the Generator is in breach of any of clause 30.1 (Assignment); or

- (iii) any director, officer or other senior manager of the Generator commits or procures fraud, or aids, abets or counsels fraud (and fraud is in fact committed) in relation to the Agreement; and

(d) **Metering**

a Technical Compliance Termination Event or a Metering Access Termination Event occurs.

5. **CONSEQUENCES OF TERMINATION**

5.1 **Consequences of Pre-Start Date termination, termination for Prolonged Force Majeure and termination for failing Minimum Commissioning Requirements**

If the DPA Counterparty terminates the Agreement pursuant to clause 3.1 (Pre-Start Date termination), clause 3.2 (Termination for Prolonged Force Majeure) or clause 3.5 (Termination for failing Minimum Commissioning Requirements):

- (a) no termination payment shall be payable in consequence by either Party to the other Party; and
- (b) neither Party shall be entitled to make any claim against the other Party under or in connection with the Agreement save in respect of any antecedent breach of any provision of the Agreement.

5.2 **Consequences of T&S Unavailability Event termination**

- (a) If the DPA Counterparty terminates the Agreement pursuant to clause 3.3 (T&S Unavailability Event termination):
  - (i) the DPA Counterparty shall on, or as soon as reasonably practicable after, the T&S Unavailability Termination Date calculate the termination payment ("**T&S Termination Payment**") in accordance with clause 5.2(b);
  - (ii) the DPA Counterparty shall notify the Generator of the amount of the T&S Termination Payment; and
  - (iii) the DPA Counterparty shall pay the T&S Termination Payment to the Generator (or as the Generator may direct) within [*a period to be determined*] of notification of the amount of the T&S Termination Payment, which amount shall bear interest in accordance with clause 14.5 (Default Interest).
- (b) The T&S Termination Payment shall be equal to:
  - (i) all irrecoverable and unavoidable out-of-pocket costs (including tax liabilities) which have been or will be incurred by the Generator in respect of the Project arising directly from the T&S Unavailability Event, if and to the extent that such costs comprise:
    - (A) development/pre-development costs in respect of the [Power Plant] and/or [Capture Plant];
    - (B) decommissioning costs in respect of the [Power Plant] and/or [Capture Plant];
    - (C) break costs associated with the Generator's contractual or financing arrangements in respect of the Project; or

- (D) costs which are wholly attributable to the construction, installation, testing, completion or commissioning of the [Power Plant] and/or [Capture Plant], with such costs being adjusted in accordance with [*a repayment / amortisation profile which is to be confirmed*] where the T&S Unavailability Event occurs following the Start Date,

with such costs to:

- (E) exclude all other compensation which will be payable to the Generator in connection with the T&S Unavailability Event and all costs associated with the Generator's financing arrangements referred to above;
- (F) be reduced by all savings which have been or will be made by the Generator in respect of the Project arising directly from the T&S Unavailability Event; and
- (G) be reduced by the Residual Value Adjustment.

### 5.3 **Consequences of Default termination and termination for a Prolonged Minimum CO<sub>2</sub> Capture Rate Breach**

If the DPA Counterparty terminates the Agreement pursuant to clause 3.4 (Default termination) or clause 3.6 (Termination for a Prolonged Minimum CO<sub>2</sub> Capture Rate Breach):

- (a) the DPA Counterparty shall on, or as soon as reasonably practicable after, the Generator Termination Date calculate the Default Termination Payment in accordance with schedule 5 (Calculation of Termination Amounts);
- (b) the DPA Counterparty shall notify the Generator of the amount of the Default Termination Payment;
- (c) the Generator shall pay the Default Termination Payment to the DPA Counterparty (or as the DPA Counterparty may direct) within [*a period to be determined*] of notification of the amount of the Default Termination Payment, which amount shall bear interest in accordance with clause 14.5 (Default Interest);
- (d) if the DPA Counterparty terminates the Agreement pursuant to clause 3.6 (Termination for a Prolonged Minimum CO<sub>2</sub> Capture Rate Breach), the Default Termination Payment shall be reduced by any unpaid Payments which the DPA Counterparty has suspended in accordance with clause 10.8 (Failure to comply with Minimum CO<sub>2</sub> Capture Rate Obligation: Suspension) and not paid to the Generator; and
- (e) the DPA Counterparty shall have the right, but not the obligation, to set off the Default Termination Payment against any or all other amounts owing (whether or not matured, contingent or invoiced) by the DPA Counterparty to the Generator. The right of set off shall be without prejudice and in addition to any other right to which the DPA Counterparty is otherwise entitled. If an amount is unascertained, the DPA Counterparty may reasonably estimate the amount to be set off, subject to subsequent adjustment within [*a period to be determined*] of the amount becoming ascertained.

### 5.4 **Consequences of Qualifying Change in Law termination**

If the DPA Counterparty terminates the Agreement pursuant to clause 3.7(a) (Qualifying Change in Law termination):

- (a) the DPA Counterparty shall on, or as soon as reasonably practicable after, the termination date calculate the termination payment ("**QCIL Termination Payment**")

in accordance with clause 20.2(g) where a QCiL Construction Event has occurred or clause 20.2(h) where a QCiL Operations Cessation Event (including a Qualifying Shutdown Event) has occurred;

- (b) the DPA Counterparty shall notify the Generator of the amount of the QCiL Termination Payment; and
- (c) the DPA Counterparty shall pay the QCiL Termination Payment to the Generator (or as the Generator may direct) within [*a period to be determined*] of notification of the amount of the QCiL Termination Payment, which amount shall bear interest in accordance with clause 14.5 (Default Interest).

## 5.5 **Survival**

Upon termination or expiry of the Agreement, the Parties shall have no further obligations under the Agreement but termination or expiry shall not affect:

- (a) save to the extent taken into account in the calculation of the Termination Payment (if any), the provisions of the Agreement as they relate to the payment of any sum due by one Party to the other under the Agreement;
- (b) the continued existence and validity of, and the rights and obligations of the Parties under, clause 1 (Definitions and Interpretation), clause 3 (Termination), this clause 5, [clause 12 (Other Payments)], clause 13 (Billing Statements), clause 14 (Payment Mechanics), and clauses 23 (Confidentiality) to 32 (Language) (inclusive)<sup>27</sup>; or
- (c) any other right or obligation [*to be identified*] which is expressed to survive termination.

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<sup>27</sup>

Note to Reader: The surviving provisions are subject to further review.

## PART 3 CONDITIONS PRECEDENT AND MILESTONE REQUIREMENT

### 6. CONDITIONS PRECEDENT

#### 6.1 Conditions Precedent<sup>28</sup>

The rights and obligations of the Parties under clause 10 (Availability Payment), clause 11 (Variable Payment), clause 13 (Billing Statements), clause 14 (Payment Mechanics), and clause 18 (Generator's Undertakings: Metering) are conditional upon the fulfilment or waiver of the Conditions Precedent and shall commence on the Start Date.

#### 6.2 Fulfilment of Conditions Precedent

- (a) The Generator shall use reasonable endeavours to fulfil or procure the fulfilment of:
  - (i) the Initial Conditions Precedent as soon as reasonably practicable and in any event no later than the date which falls twenty (20) Business Days after the date of the Agreement; and
  - (ii) the Operational Conditions Precedent as soon as reasonably practicable and in any event before the Longstop Date.
- (b) The DPA Counterparty shall notify the Generator as soon as reasonably practicable after the DPA Counterparty considers that:
  - (i) the Initial Conditions Precedent have been fulfilled (or waived in accordance with clause 6.5 (Waiver)); and
  - (ii) the Operational Conditions Precedent have been fulfilled (or waived in accordance with clause 6.5 (Waiver)) ("**Operational CP Fulfilment Notice**").
- (c) Upon receipt of the Operational CP Fulfilment Notice, the Generator shall notify the DPA Counterparty of the date that the Generator has selected as the "**Start Date**" in accordance with, and subject to, the definition of that term in clause 1.1 (Definitions).

#### 6.3 Reporting Obligations

##### *Operational Conditions Precedent: General Reporting Obligations*

- (a) The Generator shall keep the DPA Counterparty fully informed as to progress towards fulfilment of the Operational Conditions Precedent and in particular (but without limitation) shall:
  - (i) provide the DPA Counterparty with reports (in form and content reasonably satisfactory to the DPA Counterparty and in accordance with the reasonable requirements of the DPA Counterparty as to the timing and frequency of such reports) as to the progress made in or towards fulfilment of the Operational Conditions Precedent;
  - (ii) notify the DPA Counterparty by means of a Directors' Certificate [each time] the Generator considers an Operational Condition Precedent has been fulfilled; and

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<sup>28</sup> Note to Reader: The full agreement will detail which provisions are effective at the date of: i) the Agreement; ii) the satisfaction of the Initial CPs; and iii) the satisfaction of the Operational CPs.

- (iii) notify the DPA Counterparty by means of a Directors' Certificate together with reasonable details in support promptly upon the Generator becoming aware:
  - (A) of any fact, matter or circumstance which will or is reasonably likely to prevent any of the Operational Conditions Precedent being fulfilled within the Target Commissioning Window or by the Longstop Date; or
  - (B) that any of the Operational Conditions Precedent are no longer fulfilled at any time prior to the Start Date together with details of any remedial action that the Generator is taking or proposes to take,

in each case unless compliance with the same has been waived in writing by the DPA Counterparty.

*Operational Conditions Precedent: Construction Reporting Obligations*

- (b) The Generator shall keep the DPA Counterparty fully informed as to the progress towards the design, procurement, manufacturing, construction, completion, testing and commissioning of the Facility from the date of the Agreement until the occurrence of the Start Date and in particular (but without limitation) shall:
  - (i) provide the DPA Counterparty with reports (in a form and content reasonably satisfactory to the DPA Counterparty) on [a quarterly basis]<sup>29</sup> as to the progress towards the design, procurement, manufacturing, construction, completion, testing and commissioning of the Facility. As a minimum, each report shall include the Minimum Reporting Content Requirements;
  - (ii) [provide the DPA Counterparty with the Supporting Information provided to the Generator's board of Directors (or an equivalent body or committee, as applicable) as to the progress towards the design, procurement, manufacturing, construction, completion, testing and commissioning of the Facility]; and
  - (iii) notify the DPA Counterparty by means of a Directors' Certificate, together with reasonable details, in support promptly upon the Generator becoming aware of any fact, matter or circumstance which will or is reasonably likely to delay the design, procurement, manufacturing, construction, completion, testing and commissioning of the Facility, including:
    - (A) any remedial action that the Generator is taking or proposes to take;
    - (B) a revised Project timetable (and any delay in relation [to the Longstop Date]); and
    - (C) the estimated additional costs to the Project.

**6.4 Right to Audit**

- (a) If the DPA Counterparty considers (acting reasonably) that the Generator has breached its obligations under clause 6.3 (Reporting Obligations) of this Agreement, the DPA Counterparty may direct the Generator to grant (or procure the grant of) to the DPA Counterparty, its authorised agents, consultants and/or advisers (each a "**Permitted Auditor**") a right of access to its premises, personnel, systems, records and any other information as such Permitted Auditor requires to confirm whether such breach has occurred (an "**Audit**"). The Generator shall provide, and shall

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<sup>29</sup> Note to Reader: The frequency of the reporting is to be considered further

procure that any subcontractor provides, all required cooperation, access, assistance and information to enable the Permitted Auditors to carry out such Audit.

- (b) The scope of any such Audit shall be limited to matters relevant to this Agreement and shall take place during regular office hours after the Permitted Auditor has provided reasonable prior written notice to the Generator.
- (c) The Generator shall reimburse the DPA Counterparty for all out-of-pocket costs, expenses and fees incurred by the Permitted Auditors in connection with the Audit.

## 6.5 **Waiver**

The DPA Counterparty may agree by notice to the Generator to waive the fulfilment of all or any of the Conditions Precedent.

## 6.6 **Subsidy Control**

[●]]<sup>30</sup>

## 7. **MILESTONE REQUIREMENT**

### 7.1 **Milestone satisfaction**

- (a) No later than the Milestone Delivery Date, the Generator shall notify the DPA Counterparty (a "**Milestone Requirement Notice**") that the Generator considers that it has complied with and fulfilled a Milestone Requirement. A Milestone Requirement Notice shall include either:
  - (i) such invoices, payment receipts and other Supporting Information with respect to the Project as the Generator considers relevant to evidence that it and its direct shareholders have in aggregate spent 10 per cent. (10%) or more of the Total Project Pre-Commissioning Costs on the Project; or
  - (ii) such Information as is specified, identified or listed as the Project Commitments and such Supporting Information as the Generator considers relevant to evidence compliance with or fulfilment of the Project Commitments (and for this purpose, where the Project Commitments relate to Material Equipment, taking into consideration the need to demonstrate to the DPA Counterparty's satisfaction that contracts, agreements and purchase orders relating to such Material Equipment constitute significant financial commitments that are real, genuine and made in good faith),  
  
(each, a "**Milestone Requirement**").
- (b) A Milestone Requirement Notice shall be accompanied by a Directors' Certificate in relation to the information contained in, and enclosed with, the Milestone Requirement Notice.

### 7.2 **Response to Milestone Requirement Notice**

- (a) The DPA Counterparty shall, no later than [twenty (20)] Business Days after receipt of the Milestone Requirement Notice, give a notice to the Generator (a "**Milestone Assessment Response Notice**"). A Milestone Assessment Response Notice shall specify whether the DPA Counterparty considers that:

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<sup>30</sup> Note to Reader: Subsidy control provisions are subject to further review by BEIS.



- (i) the Generator has or has not complied with and fulfilled a Milestone Requirement; or
  - (ii) it has not been provided with sufficient Supporting Information to determine whether the Generator has complied with and fulfilled a Milestone Requirement and, if so, details of the additional Supporting Information which the DPA Counterparty requires to determine whether the Generator has complied with and fulfilled a Milestone Requirement (the "**Requested Milestone Supporting Information**").
- (b) If the DPA Counterparty states in a Milestone Assessment Response Notice that:
- (i) the Generator has complied with and fulfilled a Milestone Requirement, then the Milestone Requirement will be deemed to have been complied with and fulfilled for the purposes of the Agreement;
  - (ii) the Generator has not complied with and fulfilled a Milestone Requirement, then the Milestone Requirement will be deemed not to have been complied with and fulfilled for the purposes of the Agreement unless and until a resolution or determination to the contrary is made pursuant to the Dispute Resolution Procedure; or
  - (iii) the Generator has not provided the DPA Counterparty with sufficient Supporting Information to determine whether the Generator has complied with and fulfilled a Milestone Requirement:
    - (A) the Generator shall provide the Requested Milestone Supporting Information as soon as reasonably practicable, and in any event no later than ten (10) Business Days after receipt of a Milestone Assessment Response Notice, or such longer period as is specified by the DPA Counterparty; and
    - (B) upon receipt of the Requested Milestone Supporting Information, the DPA Counterparty shall as soon as reasonably practicable, and in any event no later than twenty (20) Business Days after receipt of such Requested Milestone Supporting Information, give a further Milestone Assessment Response Notice to the Generator (the "**Further Milestone Assessment Response Notice**"). A Further Milestone Assessment Response Notice shall specify whether the DPA Counterparty considers that the Generator has or has not complied with and fulfilled a Milestone Requirement.

### 7.3 **Waiver**

The DPA Counterparty may agree by notice to the Generator to waive the fulfilment of the Milestone Requirement.

### 7.4 **Notification of difficulties in achieving the Milestone Requirement**

The Generator shall promptly notify the DPA Counterparty, giving reasonable details upon becoming aware of any fact, matter or circumstance which will or is reasonably likely to prevent the Generator fulfilling the Milestone Requirement by the Milestone Delivery Date, accompanied by a Directors' Certificate in relation to the information contained in, and enclosed with, such notice.

## PART 4 NET DEPENDABLE CAPACITY

### 8. NET DEPENDABLE CAPACITY

#### 8.1 Adjustment to the Net Dependable Capacity Estimate

- (a) The Generator may, if it considers that the Net Dependable Capacity will be lower than the Net Dependable Capacity Estimate, give a notice to the DPA Counterparty (a "**NDCE Adjustment Notice**"). An NDCE Adjustment Notice must be given to the DPA Counterparty no later than the Milestone Delivery Date (the "**NDCE Adjustment Deadline**") and shall:
- (i) specify:
    - (A) the amount by which the Net Dependable Capacity will be lower than the Net Dependable Capacity Estimate;
    - (B) the new Net Dependable Capacity Estimate which is to apply to the Facility as a result of such reduction (the "**Revised NDCE**");
  - (ii) include details of any change in the Facility which will result from the reduction to the Net Dependable Capacity Estimate (which shall include revised details of the assets comprising the Facility and any revised aerial view of the unique geographical location of (a) the Facility; and (b) the Facility Metering Equipment); and
  - (iii) include such Supporting Information as the Generator considers to be relevant to evidence the detail of any changes to the asset comprising the Facility which will result from the reduction to the Net Dependable Capacity Estimate.
- (b) The Revised NDCE shall constitute the Net Dependable Capacity Estimate with effect from the date of the NDCE Adjustment Notice, provided that if an NDCE Adjustment Notice specifies a Revised NDCE which is less than ninety per cent. (90%) of the Initial Net Dependable Capacity Estimate, such NDCE Adjustment Notice shall be invalid and of no effect.
- (c) Any NDCE Adjustment Notice shall be irrevocable and the Generator may not subsequently increase the Net Dependable Capacity Estimate.
- (d) The Generator may give an NDCE Adjustment Notice on only one (1) occasion prior to the NDCE Adjustment Deadline. Any NDCE Adjustment Notice given to the DPA Counterparty after the NDCE Adjustment Deadline shall be invalid and of no effect.

#### 8.2 OCP Capacity Notice

- (a) The Generator shall, following the OCP Acceptance Tests, give a notice to the DPA Counterparty (an "**OCP Capacity Notice**"). An OCP Capacity Notice shall specify:
- (i) the Net Dependable Capacity;
  - (ii) the Test Achieved CO<sub>2</sub> Capture Rate;
  - (iii) the Plant Net Efficiency; and
  - (iv) the Start Up Times,
- which has been Commissioned as at the date of such notice, and shall include relevant Supporting Information.

- (b) An OCP Capacity Notice shall be accompanied by a Directors' Certificate in relation to the information contained in, and enclosed with, the OCP Capacity Notice.
- (c) The DPA Counterparty shall give a notice to the Generator (an "**OCP Capacity Response Notice**") within [twenty (20)] Business Days after receiving the OCP Capacity Notice. An OCP Capacity Response Notice shall specify that either:
  - (i) the DPA Counterparty agrees with the Net Dependable Capacity, the CO<sub>2</sub> Capture Rate, the Plant Net Efficiency and the Start Up Time as specified in the OCP Capacity Notice; or
  - (ii) the DPA Counterparty:
    - (A) has not been provided with sufficient Supporting Information to determine the Net Dependable Capacity, the CO<sub>2</sub> Capture Rate, the Plant Net Efficiency and/or the Start Up Times; or
    - (B) does not agree with Net Dependable Capacity, the CO<sub>2</sub> Capture Rate, the Plant Net Efficiency and/or the Start Up Times which has been Commissioned as specified in the OCP Capacity Notice giving reasons,

and in each case requesting details of any additional or revised Supporting Information.

### 8.3 Longstop Date Capacity Notice

- (a) The Generator shall, following the Start Date, and in any event no later than ten (10) Business Days after the Longstop Date, give a notice to the DPA Counterparty (a "**Longstop Date Capacity Notice**"). A Longstop Date Capacity Notice shall specify:
  - (i) the Net Dependable Capacity;
  - (ii) the CO<sub>2</sub> Capture Rate;
  - (iii) the Plant Net Efficiency; and
  - (iv) the Start Up Times,

which has been Commissioned as at the date of such notice, and shall include relevant Supporting Information.
- (b) A Longstop Date Capacity Notice shall be accompanied by a Directors' Certificate in relation to the information contained in, and enclosed with, the Longstop Date Capacity Notice.
- (c) The DPA Counterparty shall give a notice to the Generator (a "**Longstop Date Capacity Response Notice**") within [twenty (20)] Business Days after receiving the Longstop Date Capacity Notice. A Longstop Date Capacity Response Notice shall specify that either:
  - (i) the DPA Counterparty agrees with the Net Dependable Capacity, the CO<sub>2</sub> Capture Rate, the Plant Net Efficiency and the Start Up Times as specified in the Longstop Date Capacity Notice; or
  - (ii) the DPA Counterparty:
    - (A) has not been provided with sufficient Supporting Information to determine the Net Dependable Capacity, the CO<sub>2</sub> Capture Rate, the Plant Net Efficiency and/or the Start Up Times; or

- (B) does not agree with the Net Dependable Capacity, the CO<sub>2</sub> Capture Rate, the Plant Net Efficiency and/or the Start Up Times which has been Commissioned as specified in the Longstop Date Capacity Notice giving reasons,

and in each case requesting details of any additional or revised Supporting Information.

#### 8.4 **Annual NDC Test**

- (a) The Generator shall, on or around each anniversary of the Start Date ("**NDC Anniversary**") (but in any event no later than [ten (10)] Business Days after each NDC Anniversary), give a notice to the DPA Counterparty (an "**Annual NDC Notice**") specifying the Net Dependable Capacity as at the date of such notice, including relevant Supporting Information.
- (b) An Annual NDC Notice shall be accompanied by a Directors' Certificate in relation to the information contained in, and enclosed with, the Annual NDC Notice.
- (c) The DPA Counterparty shall give a notice to the Generator (an "**Annual NDC Response Notice**") within [twenty (20)] Business Days after receiving the Annual NDC Notice. An Annual NDC Response Notice shall specify that either:
  - (i) the DPA Counterparty agrees with the Net Dependable Capacity as specified in the Annual NDC Notice; or
  - (ii) the DPA Counterparty:
    - (A) has not been provided with sufficient Supporting Information to determine the Net Dependable Capacity; or
    - (B) does not agree with the Net Dependable Capacity which has been Commissioned as specified in the Annual NDC Notice giving reasons,and in each case requesting details of any additional or revised Supporting Information.

## PART 5 PAYMENT CALCULATIONS

### 9. CO<sub>2</sub> CAPTURE RATE METERING DATA

#### 9.1 Provision of CO<sub>2</sub> Capture Rate Metering Data

The Generator shall promptly provide or procure the provision of all CO<sub>2</sub> Capture Rate Metering Data to the DPA Counterparty with Supporting Information (including any other data required to carry out the relevant calculations in accordance with paragraph 3 (Calculation of Supporting Formulae) of schedule 3 (Availability Payment Calculations)) to the DPA Counterparty).

#### 9.2 Estimates of CO<sub>2</sub> Capture Rate Metering Data

- (a) If the DPA Counterparty has not received all or part of the CO<sub>2</sub> Capture Rate Metering Data from the Generator (such missing data being the "**Required Metering Data**") in respect of any AP Settlement Unit (an "**Estimated Data Settlement Unit**") within an AP Billing Period (an "**Estimated CO<sub>2</sub> Capture Rate Billing Period**") on or prior to the CO<sub>2</sub> Capture Rate Metered Cut-Off Time, the Achieved CO<sub>2</sub> Capture Rate for the Estimated Data Settlement Unit, as set out in the Billing Statement relating to such Estimated CO<sub>2</sub> Capture Rate Billing Period (an "**Estimated CO<sub>2</sub> Capture Rate Billing Statement**"), shall be calculated by the DPA Counterparty in accordance with clauses 9.2(b) and 9.2(c) and used in schedule 3 (Availability Payment Calculations) or in schedule 4 (Variable Payment Calculation) (as applicable).
- (b) The estimated Achieved CO<sub>2</sub> Capture Rate for each Estimated Data Settlement Unit within an Estimated CO<sub>2</sub> Capture Rate Billing Period (the "**Estimated CO<sub>2</sub> Capture Rate**") shall be calculated by the DPA Counterparty using (at its discretion):
- (i) [the CO<sub>2</sub> Capture Rate Metering Data for the most recent AP Settlement Unit prior to the Estimated Data Settlement Unit for which the DPA Counterparty has received all the CO<sub>2</sub> Capture Rate Metering Data; or
- (ii) the CO<sub>2</sub> Capture Rate Metering Data for the Estimated Data Settlement Unit to the extent it is available and, for each item of Required Metering Data that is not available, the CO<sub>2</sub> Capture Rate Metering Data corresponding to such relevant unavailable item for the most recent AP Settlement Unit prior to the Estimated Data Settlement Unit for which the DPA Counterparty has received it,]<sup>31</sup>

in each case adjusted by the DPA Counterparty (acting reasonably) to reflect:

- (A) the Facility's generating load factor and other relevant conditions during such Estimated Data Settlement Unit; and
- (B) CO<sub>2</sub> Capture Rate Metering Data for previous [AP Settlement Units].
- (c) The Generator shall promptly provide Supporting Information in relation to the Facility's generating load factor and other relevant conditions where required by the DPA Counterparty for the purposes of calculating the Estimated CO<sub>2</sub> Capture Rate.

#### 9.3 Recalculations of Estimated CO<sub>2</sub> Capture Rate

If the DPA Counterparty is subsequently notified of the Required Metering Data for an Estimated Data Settlement Unit:

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<sup>31</sup> Note to Reader: This provision is subject to further review by BEIS.

- (a) the DPA Counterparty shall recalculate the Achieved CO<sub>2</sub> Capture Rate for such Estimated Data Settlement Unit using such Required Metering Data; and
- (b) if the calculation performed by the DPA Counterparty pursuant to clause 9.3(a) results in a different Achieved CO<sub>2</sub> Capture Rate than that calculated by the DPA Counterparty in relation to the Estimated Data Settlement Unit and reflected in the relevant Estimated CO<sub>2</sub> Capture Rate Billing Statement, then:
  - (i) the recalculated Achieved CO<sub>2</sub> Capture Rate shall be used by the DPA Counterparty to recalculate the Payments for the relevant Estimated Data Settlement Unit; and
  - (ii) any adjustment to the Availability Payment for the Estimated CO<sub>2</sub> Capture Rate Billing Period ("**CO<sub>2</sub> Capture Rate Recalculation Amount**") shall be included as such in the relevant Availability Payment Billing Statement which is next issued by the DPA Counterparty.

#### 9.4 **[Prolonged Failure to Provide Metering Data]**

- (a) If the DPA Counterparty is required to calculate the Estimated CO<sub>2</sub> Capture Rate under clause 9.2 in respect of all or any part of the CO<sub>2</sub> Capture Rate Metering Data for [*a period of time to be determined*], the DPA Counterparty may (subject to clause 9.4(b)) elect to suspend payment of any Payments which would otherwise be payable by the DPA Counterparty in respect of any AP Billing Period:
  - (i) that occurs in the period after the notification referred to in clause 9.4(b) until [*a period to be determined*] have elapsed during which all of the CO<sub>2</sub> Capture Rate Metering Data necessary for calculating the Payment has been provided by the Generator (a "**Suspension Period**"); and
  - (ii) for which the Generator has not provided all or any part of the CO<sub>2</sub> Capture Rate Metering Data to the DPA Counterparty.
- (b) Prior to exercising any suspension right under clause 9.4(a), the DPA Counterparty shall notify the Generator of:
  - (i) its intention to exercise such suspension right; and
  - (ii) the first AP Billing Period in relation to which such election to suspend shall apply.
- (c) If the Generator subsequently complies with its obligation to provide all of the CO<sub>2</sub> Capture Rate Metering Data in respect of all of the AP Billing Periods in a Suspension Period in respect of which payment has been suspended pursuant to clause 9.4(a), then the DPA Counterparty shall pay any amounts to the Generator which would have been payable but for the operation of clause 9.4(a) during such Suspension Period (without any interest being payable on such amounts).]<sup>32</sup>

## 10. **AVAILABILITY PAYMENT**

### 10.1 **Application**

The DPA Counterparty shall pay the Generator the Availability Payment in accordance with the terms of this clause 10 (Availability Payment), clause 13 (Billing Statements) and clause 14 (Payment Mechanics), with effect from the Start Date with such payment calculated in accordance with schedule 3 (Availability Payment Calculations).

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<sup>32</sup> Note to Reader: This provision is subject to further review by BEIS.

## 10.2 **REMIT Declaration Capacity Data**

- (a) The Generator shall submit electricity capacity data declarations and details of Power Plant Outage Events (together with supporting details) in accordance with [REMIT] (the "**REMIT Declaration Capacity Data**").
- (b) If [REMIT] is unavailable at any time, the Generator shall promptly provide the REMIT Declaration Capacity Data, in a form and content satisfactory to the DPA Counterparty (acting reasonably) and with the frequency that such data would have been provided had REMIT been available, to the DPA Counterparty.

## 10.3 **Captured CO<sub>2</sub> Declaration Capacity Data**

The Generator shall submit CO<sub>2</sub> capture capacity data declarations and details of Capture Plant Outage Events (together with Supporting Information) in a form and content satisfactory to the DPA Counterparty (acting reasonably) and with the frequency that such data is required to be provided in accordance with [*a methodology and framework to be determined*]<sup>33</sup>.

## 10.4 **T&S Outage Event Declarations**

The Generator shall provide or procure the provision of details relating to T&S Outage Events (with Supporting Information) in a form and content satisfactory to the DPA Counterparty (acting reasonably) and with the frequency that such data is required to be provided in accordance with [*a methodology and framework to be determined*]<sup>34</sup>.

## 10.5 **Determination of Deemed CO<sub>2</sub> Capture Rate**

- (a) Where the Deemed CO<sub>2</sub> Capture Rate is applicable for an AP Settlement Unit, it shall be based on the lower of the following:
  - (i) the availability of capture for the relevant AP Settlement Unit, as declared by the Generator in accordance with [*the declaration method to be determined*]<sup>35</sup> (the "**Declared CO<sub>2</sub> Capture Rate**"); and
  - (ii) the relevant Deemed Rate.
- (b) The "**Deemed Rate**" shall be equal to:
  - (i) where the relevant AP Settlement Unit falls during the first (1st) AP Billing Period of the Term, the Test Achieved CO<sub>2</sub> Capture Rate demonstrated at the OCP Acceptance Tests or Longstop Date Acceptance Tests (where applicable);
  - (ii) where the relevant AP Settlement Unit falls during the period commencing on the first (1st) day of the second (2nd) AP Billing Period until the last day of the twelfth (12th) AP Billing Period of the Term, the average of the Achieved CO<sub>2</sub> Capture Rate for all AP Billing Periods that have elapsed prior to the relevant AP Settlement Unit; or
  - (iii) where the relevant AP Settlement Unit falls at any time following the first (1st) day of the thirteenth (13th) AP Billing Period, the average Achieved CO<sub>2</sub>

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<sup>33</sup> Note to Reader: We note further work is to be undertaken to set out the methodology and framework for making availability of capture declarations.

<sup>34</sup> Note to Reader: We note further work is to be undertaken to set out the methodology and framework for T&S Outage Event declarations.

<sup>35</sup> Note to Reader: We note further work is to be undertaken to set out the methodology and framework for making availability of capture declarations.

Capture Rate for the previous rolling twelve (12) AP Billing Periods prior to the relevant AP Settlement Unit.

- (c) The DPA Counterparty may request a CO<sub>2</sub> Capacity Test at any time to verify the Deemed CO<sub>2</sub> Capture Rate.

#### 10.6 **Outage Relief Events**

- (a) Where a Power Plant Outage Event occurs as a direct result of the Facility's connection to:

- (i) the Electricity Distribution System and/or Electricity Transmission System being de-energised, disconnected or disrupted; or
- (ii) the Gas Distribution System and/or Gas Transmission System being disconnected or disrupted,

except to the extent that:

- (A) such de-energisation, disconnection and/or disruption arises out of or in connection with any act, omission, breach or default of the Generator (including any breach by the Generator of an Industry Document, or the Generator has entered into an interruptible gas and/or electricity supply agreement); or
- (B) prior to such event occurring, the Generator has declared to the DPA Counterparty that the Power Plant is unavailable due to a Power Plant Outage Event which is not related to the events set out in limbs 10.6(a)(i) or 10.6(a)(ii) above,

(a **"Power Plant Outage Relief Event"**), the Facility shall be deemed to have Availability of Generation equal to one (1) for the applicable AP Settlement Unit for the purposes of calculating the Availability Payment in accordance with schedule 3 (Availability Payment Calculations).

- (b) Where a Capture Plant Outage Event occurs as a direct result of a T&S Outage Event, except to the extent that:

- (i) the T&S Outage Event arises out of or in connection with any act, omission, breach or default of the Generator (including any breach by the Generator of an Industry Document); or
- (ii) prior to the occurrence of the T&S Outage Event, the Generator has declared to the DPA Counterparty that the Capture Plant is unavailable due to a Capture Plant Outage Event which is not related to the T&S Outage Event,

(a **"Capture Plant Outage Relief Event"**), the Availability of Capture shall equal the Deemed CO<sub>2</sub> Capture Rate (and shall be determined pursuant to clause 10.5) for the applicable AP Settlement Unit for the purposes of calculating the Availability Payment in accordance with schedule 3 (Availability Payment Calculations).

- (c) The Generator shall, promptly following the occurrence of a Power Plant Outage Relief Event or Capture Plant Outage Relief Event, submit a notice to the DPA Counterparty, evidencing in reasonable detail (with Supporting Information):

- (i) the Power Plant Outage Relief Event or the Capture Plant Outage Relief Event; and



- (ii) the steps that the Generator has taken and/or proposes to take to mitigate the effect of the relevant event,

together with a Directors' Certificate in relation to such Supporting Information stating whether the Generator, having made due and careful enquiry, considers the relevant event to be a Power Plant Outage Relief Event or Capture Plant Outage Relief Event (as relevant). The DPA Counterparty may request a CO<sub>2</sub> Capacity Test to verify the Deemed CO<sub>2</sub> Capture Rate where clause 10.6(b) applies.

#### 10.7 T&S Capacity Fee

- (a) If by the Start Date the T&S Network has not been commissioned to enable the Facility to export captured CO<sub>2</sub> to the T&S Network, the T&S Capacity Fee component of the Availability Payment shall not be payable by the DPA Counterparty until the T&S Network is commissioned, and the T&S Capacity Fee shall be deemed to be zero (0) for the applicable period for the purposes of calculating the Availability Payment in accordance with schedule 3 (Availability Payment Calculations).
- (b) The T&S Capacity Fee component of the Availability Payment shall be adjusted by reference to any change to the corresponding payment terms in the T&S Connection Agreement<sup>36</sup>. The DPA Counterparty shall calculate, and notify the Generator of, the resultant change to the Availability Payments in accordance with schedule 3 (Availability Payment Calculations).

#### 10.8 Failure to comply with Minimum CO<sub>2</sub> Capture Rate Obligation: Suspension

- (a) Without prejudice to clause 3.6 (Termination for a Prolonged Minimum CO<sub>2</sub> Capture Rate Breach), if the Generator's Achieved and Declared Capture Rate Average is less than the Suspension CO<sub>2</sub> Capture Rate for either three (3) consecutive AP Billing Periods or three (3) non-consecutive AP Billing Periods within six (6) consecutive AP Billing Periods (a "**Suspension CO<sub>2</sub> Capture Rate Breach**"), the DPA Counterparty may (subject to clause 10.8(b)) elect to suspend the Payments<sup>37</sup> which would have otherwise been payable to the Generator in respect of any AP Billing Period that occurs in the period after the notification referred to in clause 10.8(b) until the Generator rectifies the Suspension CO<sub>2</sub> Capture Rate Breach by achieving an Achieved and Declared Capture Rate Average equal to or greater than the Required CO<sub>2</sub> Capture Rate for three (3) consecutive AP Billing Periods (the "**Minimum CO<sub>2</sub> Capture Rate Suspension Period**").
- (b) Prior to exercising any suspension right under clause 10.8(a), the DPA Counterparty shall notify the Generator of:
  - (i) its intention to exercise such suspension right; and
  - (ii) the first AP Billing Period in relation to which such election to suspend shall apply.
- (c) If the Generator subsequently rectifies the Suspension CO<sub>2</sub> Capture Rate Breach pursuant to clause 10.8(a), the DPA Counterparty shall pay any amounts to the Generator which would have been payable (based on the Availability of Capture during the Minimum CO<sub>2</sub> Capture Rate Suspension Period) but for the operation of

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<sup>36</sup> Note to Reader: The T&S Capacity Fee payable by the Generator under the T&S Connection Agreement is likely to be indexed to the fee that will be verified by the T&S regulator. Please refer to the discussion in Section 3 of the December 2020 Update.

<sup>37</sup> Note to Reader: BEIS is continuing to consider the treatment of T&S Capacity Fees during periods in which payments to the Generator are suspended

clause 10.8(a) during such Minimum CO<sub>2</sub> Capture Rate Suspension Period (without any interest being payable on such amounts).

## 10.9 Indexation

The Availability Payment Rate shall be fully indexed annually by reference to the change in CPI<sup>38</sup>. The DPA Counterparty shall calculate, and notify the Generator of, the resultant change to the Availability Payment Rate.

## 11. VARIABLE PAYMENT

### 11.1 Application

The DPA Counterparty shall pay the Variable Payment to the Generator in accordance with terms of this clause 11 (Variable Payment), clause 13 (Billing Statements) and clause 14 (Payment Mechanics), with effect from the Start Date, with such payment calculated in accordance with schedule 4 (Variable Payment Calculation).

### 11.2 Payments Due

- (a) If, in respect of a VP Settlement Unit, the Variable Payment Rate is greater than zero (0), the DPA Counterparty shall pay the Generator such Variable Payment for the relevant VP Settlement Unit in accordance with clause 13.
- (b) If, in respect of a VP Settlement Unit, the Variable Payment Rate is less than zero (0), no payment will be due by either Party for the relevant VP Settlement Unit.

### 11.3 Gas Price

- (a) The DPA Counterparty shall calculate the Gas Price for each VP Settlement Unit. The Gas Price shall be expressed in pence/therm and shall be calculated, in respect of each VP Settlement Unit, in accordance with the following formula:

$$\text{Gas Price} = \frac{(\text{GRP}_{k1} \times \text{MWh}_{k1}) + (\text{GRP}_{k2} \times \text{MWh}_{k2})}{\text{Total}_{\text{MWh}}}$$

where:

Gas Price	=	Gas Price ( <i>pence/therm</i> )
GRP <sub>k1</sub>	=	The applicable Gas Reference Price between 0:00h and 05:59h of the VP Settlement Unit ( <i>pence/therm</i> )
MWh <sub>k1</sub>	=	The Metered Electricity Output between 0:00h and 05:59h of the VP Settlement Unit ( <i>MWh</i> )
GRP <sub>k2</sub>	=	The applicable Gas Reference Price between 6:00h and 23:59h of the VP Settlement Unit ( <i>pence/therm</i> )
MWh <sub>k2</sub>	=	The Metered Electricity Output between 6:00h and 23:59h of the VP Settlement Unit ( <i>MWh</i> )
Total <sub>MWh</sub>	=	Metered Day Electricity Output in the VP Settlement Unit ( <i>MWh</i> )

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<sup>38</sup> Note to Reader: The CPI base date is still to be confirmed.

- (b) The DPA Counterparty may replace the Gas Reference Price pursuant to the Gas Reference Price Review. The DPA Counterparty shall notify the Generator of the resultant change to the Gas Reference Price.

#### 11.4 Carbon Price

- (a) The DPA Counterparty shall calculate the Carbon Price for each VP Settlement Unit. The Carbon Price shall be expressed in £/tCO<sub>2</sub> and shall, in respect of each VP Settlement Unit, be the Carbon Reference Price in relation to such VP Settlement Unit.
- (b) The DPA Counterparty may replace the Carbon Reference Price pursuant to the Carbon Reference Price Review. The DPA Counterparty shall notify the Generator of the resultant change to the Carbon Reference Price.

#### 11.5 Adjustments

##### *Indexation*

- (a) The Other Extra Variable Costs shall be indexed annually by reference to the change in CPI<sup>39</sup>. The DPA Counterparty shall calculate, and notify the Generator of, the resultant change to the Other Extra Variable Costs.

##### *T&S Volumetric Fee*

- (b) The T&S Volumetric Fee component of the Variable Payment shall be adjusted by reference to any change to [the corresponding payment terms in the T&S Connection Agreement]<sup>40</sup>. The DPA Counterparty shall calculate, and notify the Generator of, the resultant change to the T&S Volumetric Fee.

##### *Adjustments to the Base Performance Assumptions*

- (c) The DPA Counterparty may adjust the Base Performance Assumptions pursuant to the Reference Plant Review. The DPA Counterparty shall calculate, and notify the Generator of, the resultant change to the Base Performance Assumptions.

#### 11.6 Estimates of Loss Adjusted Metered Electricity Output

- (a) If the DPA Counterparty has not received notification from a BSC Company or a BSC Agent of the Loss Adjusted Metered Electricity Output for any Settlement Unit (an "**Estimated Output Settlement Unit**") within a VP Billing Period (an "**Estimated Output Billing Period**") on or prior to the Metered Electricity Output Cut-Off Time, the Loss Adjusted Metered Electricity Output for the Estimated Output Settlement Unit, as set out in the Variable Payment Billing Statement relating to such Estimated Output Billing Period (an "**Estimated Output Billing Statement**"), shall be calculated by the DPA Counterparty in accordance with clause 11.6(b).
- (b) The estimated Loss Adjusted Metered Electricity Output for each Estimated Output Settlement Unit comprised within an Estimated Output Billing Period (the "**Estimated Metered Electricity Output**") shall be calculated by the DPA Counterparty as being the Loss Adjusted Metered Electricity Output in the most recent Settlement Unit prior to the Estimated Output Settlement Unit for which the

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<sup>39</sup> Note to Reader: The CPI base date is still to be confirmed.

<sup>40</sup> Note to Reader: The T&S Volumetric Fee payable by the Generator under the T&S Connection Agreement is likely to be indexed to the fee that will be verified by the T&S regulator. Please refer to the discussion in Section 3 of the December 2020 Update.

DPA Counterparty has received notification of the Loss Adjusted Metered Electricity Output from a BSC Company or a BSC Agent.

#### 11.7 **Recalculations of Estimated Metered Electricity Output**

If a BSC Company or a BSC Agent subsequently notifies the DPA Counterparty of the Loss Adjusted Metered Electricity Output for an Estimated Output Settlement Unit:

- (a) the DPA Counterparty shall recalculate the Metered Electricity Output for such Settlement Unit using such Loss Adjusted Metered Electricity Output; and
- (b) if the calculation performed by the DPA Counterparty pursuant to clause 11.7(a) results in a different Metered Electricity Output than that calculated by the DPA Counterparty in relation to the Estimated Output Settlement Unit and reflected in the relevant Estimated Output Billing Statement, then:
  - (i) the recalculated Metered Electricity Output shall be used by the DPA Counterparty to recalculate the Variable Payment for the relevant Estimated Output Settlement Unit; and
  - (ii) any adjustment to the Variable Payment for the Estimated Output Billing Period ("**Metered Electricity Output Recalculation Amount**") shall be included as such in the Variable Payment Billing Statement which is next issued by the DPA Counterparty.

[Calculation of Reconciliation Amounts]<sup>41</sup>

#### 12. **OTHER PAYMENTS**

##### 12.1 **[Gainshare mechanism]**<sup>42</sup>

[To be determined]

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<sup>41</sup> Note to Reader: BEIS intends will develop these provisions in the full form DPA.

<sup>42</sup> Note to Reader: The inclusion of a gainshare mechanism and credit support provisions in the DPA is subject to further consideration by BEIS. Please refer to the discussion in Section 4 of the December 2020 Update and the October 2021 Update.

## **PART 6 BILLING AND PAYMENT**

### **13. BILLING STATEMENTS**

#### **13.1 Availability Payment Billing Statement**

On and from the Start Date and within [seven (7)] Business Days after the last day of each AP Billing Period thereafter, the DPA Counterparty shall send to the Generator a statement (the "**Availability Payment Billing Statement**") showing the Availability Payment payable in respect of the previous AP Billing Period (the "**Monthly Availability Payment**") with such statement to confirm:

- (a) the Monthly Availability Payment for the relevant AP Billing Period with Supporting Information (including the accompanying calculation in accordance with schedule 3 (Availability Payment Calculations));
- (b) the Availability of Capture for each AP Settlement Unit falling within the relevant AP Billing Period with Supporting Information (including the accompanying calculation in accordance with schedule 3 (Availability Payment Calculations));
- (c) the Net Available Capacity for each AP Settlement Unit falling with the relevant AP Billing Period with an accompanying summary of REMIT declaration capacities;
- (d) the Net Dependable Capacity for the relevant AP Billing Period with Supporting Information;
- (e) any Power Plant Outage Events and/or Capture Plant Outage Events (excluding Power Plant Outage Relief Events and/or Capture Plant Outage Relief Events) within the relevant AP Billing Period with Supporting Information (including the duration of the relevant event(s));
- (f) the use of any Estimated CO<sub>2</sub> Capture Rate in the calculation thereof; and
- (g) any CO<sub>2</sub> Capture Rate Recalculation Amounts within the relevant AP Billing Period in accordance with clause 9.3 (Recalculations of Estimated CO<sub>2</sub> Capture Rate).

#### **13.2 Variable Payment Billing Statement**

On and from the Start Date and within [seven (7)] Business Days after the last day of each VP Billing Period thereafter, the DPA Counterparty shall send to the Generator a statement ("**Variable Payment Billing Statement**") showing:

- (a) the Variable Payment for the relevant VP Billing Period, with Supporting Information (including the accompanying calculation with schedule 4 (Variable Payment Calculation));
- (b) the Metered Day Electricity Output in respect of the relevant VP Billing Period;
- (c) the Gas Prices in respect of the relevant VP Billing Period;
- (d) the Carbon Price in respect of the relevant VP Billing Period;
- (e) the T&S Volumetric Fee in respect of the relevant VP Billing Period;
- (f) any Full T&S Outage Events and/or Full Capture Plant Outage Events within the relevant VP Billing Period with Supporting Information (including the duration of the relevant event(s));
- (g) the use of any Estimated Metered Electricity Output in the calculation thereof; and

- (h) any Recalculation Amounts within the relevant VP Billing Period in accordance with clause 11.7 (Recalculations of Estimated Metered Electricity Output).

#### 14. **PAYMENT MECHANICS**

##### 14.1 **Due Date for payment**

- (a) Subject to clause 29 (Limited recourse) and clause 14.1(b), on or before [twenty eight (28)] days after receipt of:
  - (i) an Availability Payment Billing Statement ("**Availability Payment Due Date**"), the DPA Counterparty shall pay the Generator the Monthly Availability Payment in such AP Billing Period in accordance with the Availability Payment Billing Statement; and
  - (ii) a Variable Payment Billing Statement ("**Variable Payment Due Date**"), the DPA Counterparty shall pay the Generator the Variable Payment in such VP Billing Period in accordance with the Variable Payment Billing Statement,

such payments to be made in Sterling by direct bank transfer or equivalent transfer of immediately available funds to the credit of the account in the United Kingdom specified by the Generator (which account may, but need not be, in its name).

- (b) In addition to any other remedies that the DPA Counterparty may have, the DPA Counterparty shall have the right, but not the obligation, to withhold or suspend payment under the Agreement at any time when the Generator is not complying with the Metering Obligations by reason of the Generator's fault or negligence or that of its Representatives.

##### 14.2 **Set Off**

Each Party may set off any matured obligations due by the other Party pursuant to the Agreement against any matured obligation owed by that Party to the other Party pursuant to the Agreement.

##### 14.3 **No deduction or withholding**

- (a) Save as provided in clause 5.3(c) (Consequences of Default termination), all payments under the Agreement shall be made free of any restrictions or conditions and without deduction or withholding (except to the extent required by law) on account of any other amount, whether by way of set off or otherwise.
- (b) If a Party is required to deduct or withhold on account of tax, then that Party shall:
  - (i) promptly notify the other Party of such requirement;
  - (ii) pay to the relevant authorities the full amount required to be deducted or withheld promptly upon the earlier of determining that such deduction or withholding is required or receiving notice that such amount has been assessed against that other Party; and
  - (iii) promptly forward to that other Party an official receipt (or a certified copy), or other documentation reasonably acceptable to that other Party, evidencing such payment to such authorities.

#### 14.4 **Disputed payments**

- (a) If a Party disputes in good faith any sum shown in a Billing Statement as being payable by that Party, it shall:
  - (i) subject to clause 29 (Limited recourse) and clause 14.1(b) (Due Date for payment), make payment of the full amount set out in such Billing Statement on or before the Due Date; and
  - (ii) give notice of the amount in dispute and the reasons for the dispute to the other Party.
- (b) The Parties shall seek to settle the disputed amount using the Dispute Resolution Procedure.
- (c) A Party shall not be entitled to initiate any dispute concerning any sum shown in, or which should have been shown in, a Billing Statement more than [*a period to be determined*] months after the date of that Billing Statement.

#### 14.5 **Default Interest**

- (a) Subject to clauses 14.5(c) and 30.10 (Costs), if either Party fails to pay any sum payable by it pursuant to the Agreement (including any amounts payable under any Arbitral Award or Expert determination) on the due date for payment, Default Interest shall accrue on that sum for the period from the due date for payment to the date of actual payment of that sum (after as well as before award or judgment).
- (b) The right to receive Default Interest pursuant to the Agreement (and as calculated in accordance with this clause 14.5 (Default Interest)) is not exclusive of any rights and remedies provided by law in respect of the failure to pay the relevant sum on the due date or at all, provided that the Late Payment of Commercial Debts (Interest) Act 1988 shall not apply in respect of any unpaid sum due pursuant to the Agreement.
- (c) Default Interest shall be payable by the DPA Counterparty only in circumstances in which the DPA Counterparty is in breach of clauses 29.1(a), 29.1(b), or 29.1(c), but not otherwise.

## PART 7 REPRESENTATIONS, WARRANTIES AND UNDERTAKINGS

### 15. GENERATOR'S REPRESENTATIONS AND WARRANTIES

#### 15.1 Agreement Date Representations

The Generator represents and warrants to the DPA Counterparty that, as at the date of Agreement, the following statements are true, accurate and not misleading:

(a) **Status**

It is a limited liability company, duly incorporated and validly existing under the laws of the jurisdiction of its incorporation and it has the power to own its assets and carry on its business as contemplated by the Agreement.

(b) **Power and authority**

It has the power to enter into, perform and deliver, and has taken all necessary action to authorise its entry into, performance and delivery of, the Agreement and the obligations contemplated by the Agreement.

(c) **Enforceability**

The obligations expressed to be assumed by it under the Agreement are legal, valid, binding and enforceable subject only to legal reservations.

(d) **Non-conflict with other obligations**

The entry into and performance by it of, and the transactions contemplated by, the Agreement do not conflict with:

- (i) any Law or Directive applicable to it to an extent or in a manner which has or is reasonably expected to have a material adverse effect<sup>43</sup>;
- (ii) its constitutional documents;
- (iii) any Required Authorisations to an extent or in a manner which has or is reasonably expected to have a material adverse effect; or
- (iv) any agreement or instrument binding upon it or any of its assets to an extent or in a manner which has or is reasonably expected to have a material adverse effect.

(e) **Required Authorisations**

All Required Authorisations have been obtained or effected and are in full force and effect and all conditions of any Required Authorisations have been complied with in all material respects.

(f) **No Default**

No Default with respect to the Generator has occurred and is continuing or might reasonably be expected to result from its entry into or performance of the Agreement.

(g) **No litigation**

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<sup>43</sup> Note to Reader: BEIS intends to align the definition of this term in the full form DPA with the definition of "Material Adverse Effect" in the AR3 CfD.



No litigation, arbitration or administrative suit or proceeding, adjudication, expert determination, tax claim or tax investigation which is current, pending or, so far as it is aware by reason of a formal written notice before action or similar, threatened against it which, if adversely determined, would have or would reasonably be expected to have a material adverse effect.

(h) **No requirement to deduct or withhold**

It is not required by any applicable law, as modified by the published practice of any relevant Competent Authority, of any jurisdiction in which it is resident for tax purposes, to make any deduction or withholding for or on account of any tax from any payment to be made by it to the DPA Counterparty under the Agreement.

15.2 **Start Date representation**

The Generator represents and warrants to the DPA Counterparty that, as at and from the Start Date, the following statements are true, accurate and not misleading:

(a) **Ownership**

The Generator is the legal and beneficial owner of the Facility, subject only to such rights and benefits as have been assigned by way of security to or in favour of any lender, affected person or parent undertaking of the Generator (or an agent or security trustee on its behalf) in accordance with clause 30.1 (Assignment).

(b) **Facility Generation Technology and Facility Capture Technology**

The generation and capture technology deployed by the Facility is the Facility Generation Technology and the Facility Capture Technology (as applicable).

15.3 **Repeating Representations**

The Generator Repeating Representations are deemed to be made by the Generator by reference to the facts and circumstances then existing on the Start Date.

16. **DPA COUNTERPARTY'S REPRESENTATIONS AND WARRANTIES**

16.1 The DPA Counterparty represents and warrants to the Generator that, as at the date of the Agreement, the following statements are true, accurate and not misleading:

(a) **Status**

It is a limited liability company, duly incorporated and validly existing under the laws of England and Wales and it has the power to own its assets and carry on its business as contemplated by the Agreement.

(b) **Power and authority**

It has the power to enter into, perform and deliver, and has taken all necessary action to authorise its entry into, performance and delivery of, the Agreement and the obligations contemplated by the Agreement.

(c) **Enforceability**

The obligations expressed to be assumed by it under the Agreement are legal, valid, binding and enforceable subject only to legal reservations.

(d) **Non-conflict with other obligations**

The entry into and performance by it of, and the transactions contemplated by, the Agreement do not conflict with:

- (i) any Law or Directive applicable to it to an extent or in a manner which has or is reasonably expected to have a material adverse effect;
- (ii) any authorisation, licence, accreditation, permit, consent, certificate, resolution, clearance, exemption order, confirmation or other approval of or from any Competent Authority required to enable it to perform and comply with its obligations under the Agreement to an extent or in a manner which has or is reasonably expected to have a material adverse effect;
- (iii) its constitutional documents; or
- (iv) any agreement or instrument binding upon it or any of its assets to an extent or in a manner which has or is reasonably expected to have a material adverse effect on its ability to perform its obligations under the Agreement.

(e) **No requirement to deduct or withhold**

It is not required by any Law or Directive applicable to it, as applied, interpreted or modified by the published practice of any relevant Competent Authority of any jurisdiction in which it is resident for tax purposes, to make any deduction or withholding for or on account of any tax from any payment to be made by it to the Generator pursuant to the Agreement.

16.2 The representations in clauses 16.1(a) to 16.1(d) are deemed to be made by the DPA Counterparty by reference to the facts and circumstances then existing on the Start Date.

17. **GENERATOR'S UNDERTAKINGS: GENERAL**

17.1 **General**

The Generator undertakes to the DPA Counterparty as follows:

(a) **Compliance with Laws**

It shall at all times comply with all Laws and Directives to which it may be subject if failure to do so would have or would reasonably be expected to have a materially adverse effect.

(b) **Required Authorisations**

It shall promptly obtain, and at all times comply in all material respects with and do all that is necessary to maintain in full force and effect, all Required Authorisations to the extent that failure to do so would have or would reasonably be expected to have a materially adverse effect.

(c) **Industry Documents**

It shall at all times comply in all material respects with all terms of those Industry Documents to which it is a party or by which it is bound if failure to do so would have or would reasonably be expected to have a materially adverse effect.

(d) **No insolvency action**

It shall not petition, apply for, institute, support or vote for the administration, winding-up or liquidation of the DPA Counterparty or seek any other relief as against the DPA Counterparty under any administration, insolvency or bankruptcy law or similar law affecting creditors' rights generally.

(e) **Ownership**

It shall at all times be the legal and beneficial owner of the Facility, subject only to third party rights arising by reason of any security interest created or subsisting over or in respect of the Facility.

(f) **Compliance of technology**

The Generator shall at all times ensure that the generation technology and the capture technology deployed by the Facility is the Facility Generation Technology and the Facility Capture Technology (as applicable), provided that (without prejudice to any other provision of this Agreement) this provision shall not prevent the operation of the Power Plant in unabated mode.

(g) **Notification**

The Generator shall:

- (i) provide the DPA Counterparty promptly with such information regarding compliance by the Generator with the undertakings in this clause 17 as the DPA Counterparty may reasonably request.
- (ii) give notice to the DPA Counterparty as soon as reasonably practicable upon becoming aware of the occurrence of any Default (together with the details of the steps, if any, being taken to remedy it).

18. **GENERATOR'S UNDERTAKINGS: METERING**

18.1 **Electricity Metering Obligation**

With effect from the Start Date, the Generator undertakes to the DPA Counterparty to ensure that at all times the Electricity Metering Equipment relating to the Facility:

- (a) has been installed at the metering point(s) identified in schedule 6 (Metering Points);
- (b) has been and is installed, configured, registered and maintained in accordance with the requirements of the Balancing and Settlement Code;
- (c) accurately records the BM Unit Metered Volume, with such BM Unit Metered Volume comprising:
  - (i) all output electricity generated by the Facility; and
  - (ii) all input electricity used by the Facility; and
- (d) is configured exclusively in relation to the Facility and measures the input and output electricity referred to in clause 18.1(c) separately from any other input and output electricity.

18.2 **CO<sub>2</sub> Metering Obligation**

- (a) The Generator shall ensure that at all times, with effect from the Start Date, the CO<sub>2</sub> Metering Equipment relating to the Facility:
  - (i) has been installed at the metering point(s) identified in schedule 6 (Metering Points);
  - (ii) has been and is installed, configured, registered, operated and maintained in accordance with the requirements of the CO<sub>2</sub> Metering Specification, including to ensure that captured CO<sub>2</sub> which fails to comply with the Captured Carbon Dioxide Quality Standards is not exported to the T&S Network;
  - (iii) is configured exclusively in relation to the Facility and no other CO<sub>2</sub> output is metered through such meters; and
  - (iv) is operational and capable of measuring accurately the CO<sub>2</sub> output from the Facility at the CO<sub>2</sub> Delivery Point.
- (b) The Generator shall ensure that at all times with effect from the Start Date the captured CO<sub>2</sub> from the Facility complies with the Captured Carbon Dioxide Quality Standards.

### 18.3 Gas Supply Metering Obligation

The Generator shall ensure that at all times, with effect from the Start Date, the Gas Supply Metering Equipment relating to the Facility:

- (a) has been installed at the metering point(s) identified in schedule 6 (Metering Points);
- (b) has been and is installed, configured, registered and maintained in accordance with the requirements of the [Uniform Network Code]<sup>44</sup>;
- (c) is configured exclusively in relation to the Facility and no other gas supply is metered through such meters; and
- (d) is operational and capable of measuring accurately the gas supply from the Facility at the Gas Supply Point.

### 18.4 Investigate any fault or issue

With effect from the Start Date, the Generator undertakes to the DPA Counterparty to investigate any fault or issue with:

- (a) the Electricity Metering Equipment of which it is notified by the DPA Counterparty or which it is required to investigate pursuant to the Balancing and Settlement Code;
- (b) the Gas Supply Metering Equipment of which it is notified by the DPA Counterparty or which it is required to investigate pursuant to the [Uniform Network Code]; and/or
- (c) the CO<sub>2</sub> Metering Equipment of which it is notified by the DPA Counterparty or which it is required to investigate pursuant to [to be determined].

### 18.5 Metering Obligations breach

The DPA Counterparty may at any time notify the Generator if it considers that the Generator is in breach of its obligations under clauses 18.1 to 18.4. If the Generator fails

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<sup>44</sup> Note to Reader: The relevant code referenced is subject to further review.

to remedy such breach within [*a period to be specified in the Agreement*], then a **Technical Compliance Termination Event** will be deemed to have occurred.

#### 18.6 **Metering schematic obligation**

- (a) If there is a Material Change to the Facility Metering Equipment, then the Generator shall notify the DPA Counterparty as soon as reasonably practicable after such change, setting out details of the Material Change that has been effected and provide an updated version of the relevant schematic diagram (the "**Metering Schematic Obligation**").
- (b) If the Generator is in breach of the Metering Schematic Obligation, the DPA Counterparty may elect to suspend payment of any payments which would otherwise be payable by the DPA Counterparty to the Generator in any period during which the Generator is in breach of such obligation, provided that, prior to effecting any such suspension, the DPA Counterparty notifies the Generator of: (i) its intention to suspend payment; and (ii) the date from which it proposes to effect such suspension.
- (c) If the Generator subsequently complies with its Metering Schematic Obligation, then the DPA Counterparty shall pay any amounts to the Generator which would have been payable but for the operation of clause 18.6(b) above (without any interest being payable on such amounts).

#### 18.7 **Access to and testing of meters**

The Generator shall grant the DPA Counterparty and any suitable persons nominated by the DPA Counterparty the right of access, at reasonable times and on reasonable notice, to the Facility and such plant, property or assets owned, occupied or controlled by the Generator and to which the Generator can lawfully grant access as may be reasonably necessary in order for the DPA Counterparty to read and verify the Facility Metering Equipment and inspect and conduct tests in respect of such metering equipment from time to time ("**Metering Access Rights**").

#### 18.8 **Failure to provide Metering Access Rights**

- (a) If the Generator is in breach of its obligation to permit the DPA Counterparty to exercise the Metering Access Right, the DPA Counterparty may elect to suspend payment of any payments which would otherwise be payable by the DPA Counterparty to the Generator in any period during which the Generator is in breach of such obligation, provided that, prior to effecting any such suspension, the DPA Counterparty notifies the Generator of: (i) its intention to suspend payment; and (ii) the date from which it proposes to effect such suspension.
- (b) If the Generator subsequently complies with its obligation to permit the DPA Counterparty to exercise the Metering Access Rights, then the DPA Counterparty shall pay any amounts to the Generator which would have been payable but for the operation of clause 18.8(a) above (without any interest being payable on such amounts).
- (c) If the Generator:
  - (i) is in breach of its obligation to permit the DPA Counterparty to exercise the Metering Access Rights; and
  - (ii) has not permitted the DPA Counterparty to exercise such Metering Access Rights within [twenty (20)] Business Days of receipt of a notice requesting the same,

then a **Metering Access Termination Event** will be deemed to have occurred.

## 19. GENERATOR'S UNDERTAKINGS: INFORMATION PROVISION

### 19.1 Provision of information to the DPA Counterparty

In addition and without prejudice to its obligations under clauses 6.3 (Reporting Obligations), 7.4 (Notification of difficulties in achieving the Milestone), 17.1 (Generator's undertakings: General) and 22.3 (Provision of Force Majeure information), the Generator, acting in accordance with the Reasonable and Prudent Standard, shall promptly provide the DPA Counterparty (and, if requested by the DPA Counterparty, the DPA Settlement Services Provider) with:

- (a) the Generator's estimate of the expected Start Date, the Net Dependable Capacity Estimate as at the Start Date and the commissioning profile of the Facility;
- (b) all information requested by the DPA Counterparty to comply with its obligations under the Agreement;
- (c) as from [*a period (to be determined) prior to*] the Start Date and [*at intervals to be determined*], forecasts of the expected:
  - (i) Availability of Generation;
  - (ii) CO<sub>2</sub> Capture Rate;
  - (iii) Metered Electricity Output; and
  - (iv) [*any other information to be determined*],
- (d) details of any material events or circumstances that will or are reasonably likely to affect significantly the following:
  - (i) Availability of Generation;
  - (ii) CO<sub>2</sub> Capture Rate;
  - (iii) Metered Electricity Output; or
  - (iv) [*any other information to be determined*],
- (e) all information reasonably requested by the DPA Counterparty regarding the financial condition, business and operations of the Generator;
- (f) all information reasonably requested by the DPA Counterparty for the purposes of compiling, evaluating and publishing statistics relating to the outcome of the Dispatchable Power Agreement and the CCUS Programme;
- (g) all information reasonably requested by the DPA Counterparty for the purposes of assessing compliance by the Generator with the Metering Obligations;
- (h) the details of any litigation, proceedings, determinations, claims or investigations against the Generator which could have a material adverse impact on the Generator's ability to comply with its obligations under the Agreement;
- (i) the data required to determine the Availability of Generation, CO<sub>2</sub> Capture Rate, and the Metered Electricity Output in respect of each Settlement Unit and other data required by the DPA Counterparty or the DPA Settlement Services Provider to perform its functions under or in connection with the Agreement (including that required for settlement); and

- (j) as soon as reasonably practicable, all information reasonably requested that represents the status and progress of the Project to date against contractual and Project milestones, showing the critical path of the Project towards these milestones up to the delivery of the Longstop Date Capacity Notice.

19.2 **Accuracy of information**

The Generator shall ensure that:

- (a) all forecasts and forward-looking statements provided by or on behalf of the Generator under clause 19.1 (Provision of information to the DPA Counterparty) shall be prepared on a reasonable basis and shall be made in good faith after careful consideration; and
- (b) all other information relating to the Project, the Facility or the Generator provided by or on behalf of the Generator under clause 19.1 (Provision of information to the DPA Counterparty) is true, complete and accurate in all material respects and not misleading.

## PART 8 CHANGE IN LAW

### 20. QUALIFYING CHANGE IN LAW

#### 20.1 Procedure

- (a) If a Party considers that a Qualifying Change in Law has occurred or is shortly to occur, it may give notice to the other Party of that fact together with:
- (i) supporting evidence in reasonable detail of the Qualifying Change in Law;
  - (ii) the date it considers the Qualifying Change in Law to have occurred or is expected to occur, as the case may be;
  - (iii) specify why it considers that the notified Change in Law constitutes, or will constitute, a Qualifying Change in Law, including whether it considers the Qualifying Change in Law to be a Discriminatory Change in Law, a Specific Change in Law or an Other Change in Law; and
  - (iv) in the case of a notice given by the Generator with respect to a Qualifying Change in Law (a "**Generator QCIL Notice**"):
    - (A) a statement, together with Supporting Information, in reasonable detail, of: (x) the costs and/or savings which the Generator reasonably expects to incur and/or make (taking account of the Generator's obligation to minimise costs and maximise cost savings under clause 20.5 (Mitigation)), and (y) whether an Adjusted Output Period and/or an Adjusted Capture Period has occurred and/or will occur and the costs and/or savings which the Generator has incurred and/or saved or reasonably expects to incur and/or save as a direct result of such Adjusted Output Period and/or Adjusted Capture Period, in each case over the remainder of the Term arising from the occurrence of the Qualifying Change in Law ("**Identified Costs**") (and excluding, for the avoidance of doubt, costs referred to in clause 20.7 (Indemnity)); and
    - (B) Supporting Information evidencing, in reasonable detail, the steps that the Generator has taken and/or proposes to take to mitigate the effect of the Qualifying Change in Law,together with a Directors' Certificate in relation to such Supporting Information stating whether the Generator, having made due and careful enquiry, considers the relevant Change in Law to be a Qualifying Change in Law.
- (b) If the DPA Counterparty gives notice to the Generator under clause 20.1(a) with respect to a Change in Law which the DPA Counterparty considers may be a Qualifying Change in Law, the Generator shall as soon as practicable, and in any event within [forty (40)] Business Days after receipt of such notice, provide the DPA Counterparty with:
- (i) the Supporting Information set out in clause 20.1(a) (on the assumption that the Change in Law is a Qualifying Change in Law);
  - (ii) a Directors' Certificate in relation to such Supporting Information stating whether the Generator, having made due and careful enquiry, considers the relevant Change in Law to be a Qualifying Change in Law.
- (c) The DPA Counterparty shall be under no obligation to consider any notice from the Generator under clause 20.1(a) unless and until the Generator has provided the DPA



Counterparty with all the information, documents and evidence required of it under that clause.

- (d) As soon as practicable, and in any event within [fifteen (15)] Business Days, after the earlier of: (x) notice by the Generator under clause 20.1(a) together with all the information, documents and evidence required of it under that clause; and (y) notice by the DPA Counterparty under clause 20.1(a) and the provision by the Generator of the information referred to in clause 20.1(b), as the case may be, the Parties shall meet to discuss and, in good faith, seek to agree:
- (i) whether a Qualifying Change in Law has occurred or will occur and the date or expected date of such occurrence;
  - (ii) in the case of a Qualifying Change in Law:
    - (A) the QCiL Effective Date;
    - (B) whether the relevant Qualifying Change in Law will, or is reasonably expected to, result in Identified Costs;
    - (C) the amounts, forecasts and estimates applicable to that Qualifying Change in Law and any other matters necessary to determine the quantum of the QCiL Compensation; and
    - (D) the steps or additional steps, as the case may be, which the Generator should take to mitigate the effect of the Qualifying Change in Law;
  - (iii) the QCiL Compensation in respect of such Qualifying Change in Law; and
  - (iv) where applicable, any adjustments to the Net Dependable Capacity, Availability of Generation, Availability of Capture, Gas Cost Differential and/or CO<sub>2</sub> Cost Differential that are required as a direct result of the Qualifying Change in Law.

## 20.2 **QCIL Compensation**

- (a) Subject to clause 20.2(b), compensation in respect of a Qualifying Change in Law shall be calculated:
- (i) if there are QCiL Opex Costs and/or QCiL Opex Savings, in accordance with clause 20.2(c) (a "**QCIL Opex Payment**");
  - (ii) if there are QCiL Capex Costs and/or QCiL Capex Savings, in accordance with clause 20.2(d) (a "**QCIL Capex Payment**");
  - (iii) if there is an Adjusted Output Period, in accordance with clause 20.2(e) (a "**QCIL Adjusted Revenues Payment**");
  - (iv) if there is an Adjusted Capture Period in accordance with clause 20.2(f) (a "**QCIL Adjusted Capture Rate Payment**");
  - (v) if there is a QCiL Construction Event, in accordance with clause 20.2(g) (a "**QCIL Construction Event Payment**"); and
  - (vi) if there is a QCiL Operations Cessation Event, in accordance with clause 20.2(h) (a "**QCIL Operations Cessation Event Payment**").
- (b) If a Qualifying Change in Law occurs which gives rise to or results in: (i) QCiL Costs; (ii) an Adjusted Output Period where the electrical capacity of the Facility is reduced

(a **"Reduced Output Period"**); (iii) an Adjusted Capture Period where the Achieved CO<sub>2</sub> Capture Rate of the Facility is reduced (a **"Reduced Capture Period"**) or (iv) any combination of the foregoing:

- (i) before the Start Date, and the amount of the QCiL Compensation that would otherwise be payable in respect of the estimated QCiL Costs, and/or impact of the Reduced Output Period and/or Reduced Capture Period is greater than the amount of the QCiL Construction Event Payment that would have been payable if such Qualifying Change in Law were to have constituted a QCiL Construction Event; or
- (ii) on or after the Start Date, and the amount of the QCiL Compensation that would otherwise be payable in respect of the estimated QCiL Costs and/or impact of the Reduced Output Period and/or Reduced Capture Period is greater than the amount of the QCiL Operations Cessation Event Payment that would have been payable if such Qualifying Change in Law were to have constituted a QCiL Operations Cessation Event,

then:

- (iii) the DPA Counterparty shall have the right, but not the obligation, to give notice to the Generator terminating the Agreement under clause 3.7(a)(ii);
- (iv) the amount of the QCiL Compensation payable by the DPA Counterparty to the Generator in respect of the Qualifying Change in Law shall be limited to:
  - (A) if clause 20.2(b)(i) applies, the amount of the QCiL Construction Event Payment that would have been payable under clause 20.2(g); or
  - (B) if clause 20.2(b)(ii) applies, the amount of the QCiL Operations Cessation Event Payment that would have been payable under clause 20.2(h); and
- (v) where the DPA Counterparty gives notice to the Generator terminating the Agreement under clause 3.7(a)(ii), no termination payment shall be payable in consequence by either Party to the other Party and neither Party shall be entitled to make any claim against the other Party under or in connection with the Agreement save in respect of any antecedent breach of any provision of the Agreement.

#### *QCIL Opex Payment*

- (c) Any QCiL Opex Payment shall be effected, at the election of the DPA Counterparty (after consultation with the Generator), either:
  - (i) as an adjustment to the Other Extra Variable Costs component of the Variable Payment<sup>45</sup>, which shall be increased if the QCiL Opex Costs exceed the QCiL Opex Savings, and decreased if the QCiL Opex Savings exceed the QCiL Opex Costs; or
  - (ii) as daily payments, which shall be payable by the DPA Counterparty to the Generator if the QCiL Opex Costs exceed the QCiL Opex Savings, or by the Generator to the DPA Counterparty if the QCiL Opex Savings exceed the QCiL Opex Costs.

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<sup>45</sup>

Note to Reader: The precise formulae to calculate such adjustment are still to be confirmed.

*QCIL Capex Payment*

- (d) Any QCIL Capex Payment shall be effected, at the election of the DPA Counterparty (after consultation with the Generator), as a lump sum payment, staged payments or daily payments which shall be payable:
  - (i) by the DPA Counterparty to the Generator if the QCIL Capex Costs exceed the QCIL Capex Savings; or
  - (ii) by the Generator to the DPA Counterparty if the QCIL Capex Savings exceed the QCIL Capex Costs.

*QCIL Adjusted Revenues Payment<sup>46</sup>*

- (e) Any QCIL Adjusted Revenues Payment shall be effected, at the election of the DPA Counterparty (after consultation with the Generator), as a lump sum payment, staged payments, and/or daily payments which shall be payable:
  - (i) by the DPA Counterparty to the Generator if the relevant Qualifying Change in Law results in a decrease in the Generator's Revenue due to a reduction in the electrical capacity of the Facility as a direct result of the relevant Qualifying Change in Law; or
  - (ii) by the Generator to the DPA Counterparty if the relevant Qualifying Change in Law results in an increase in the Generator's Revenue due to an increase in the electrical capacity of the Facility as a direct result of the relevant Qualifying Change in Law,

irrespective of whether or not the relevant Qualifying Change in Law occurs before, on or after the Start Date.

For the purposes of this limb (e), "**Generator's Revenue**" means the revenue that the Parties agree, or is determined pursuant to the Dispute Resolution Procedure, that the Generator would have generated during the relevant calculation period (including wholesale electricity market revenue, balancing system services revenue and ancillary services revenue) in respect of electricity that the Facility would have generated during such period but for the occurrence of the Qualifying Change in Law, with such revenue calculated periodically on a backward-looking basis:

- (A) based on the Facility's Availability of Generation, [Actual Load Factor], [Actual Net Efficiency] and Loss Adjusted Metered Electricity Output during the relevant period;
- (B) based on the actual revenue that the Generator generates during the relevant period; and
- (C) assuming that had the Facility not been affected by the Qualifying Change in Law, the Facility's Achieved CO<sub>2</sub> Capture Rate would have been equal to the Required CO<sub>2</sub> Capture Rate when generating electricity during the relevant period.

*QCIL Adjusted Capture Rate Payment*

- (f) Any QCIL Adjusted Capture Rate Payment shall be effected, at the election of the DPA Counterparty (after consultation with the Generator), as [a lump sum payment,

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<sup>46</sup>

Note to Reader: The precise formulae to calculate such payment are still to be confirmed.

staged payments, daily payments and/or an adjustment to the Availability Payment Rate] which shall be payable:

- (i) by the DPA Counterparty to the Generator if the relevant Qualifying Change in Law results in a decreased Availability Payment paid to the Generator due to a reduction in the Achieved CO<sub>2</sub> Capture Rate of the Facility as a direct result of the relevant Qualifying Change in Law; or
- (ii) by the Generator to the DPA Counterparty if the relevant Qualifying Change in Law results in an increased Availability Payment paid to the Generator due to an increase in the Achieved CO<sub>2</sub> Capture Rate of the Facility as a direct result of the relevant Qualifying Change in Law.

*QCIL Construction Event Payment*<sup>47</sup>

(g) Any QCIL Construction Event Payment shall be effected as a lump sum payment or staged payments at the election of the DPA Counterparty (after consultation with the Generator) payable to the Generator by the DPA Counterparty as an amount equal to all irrecoverable and unavoidable out-of-pocket costs (including tax liabilities) which have been or will be or are reasonably likely to be incurred by the Generator in respect of the Project arising directly from the relevant QCIL Construction Event, if and to the extent that such costs comprise:

- (i) development/pre-development costs in respect of the [Power Plant] and/or [Capture Plant];
- (ii) decommissioning costs in respect of the [Power Plant] and/or [Capture Plant];
- (iii) break costs associated with the Generator's contractual or financing arrangements in respect of the Project; or
- (iv) costs which are wholly attributable to the construction, installation, testing, completion or commissioning of the [Power Plant] and/or [Capture Plant],

with such costs to:

- (v) exclude all other compensation which will be payable to the Generator in connection with the relevant QCIL Construction Event and all costs associated with the Generator's financing arrangements referred to above; and
- (vi) be reduced by all savings which have been, will be or are reasonably likely to be made by the Generator in respect of the Project arising directly from the relevant QCIL Construction Event.

*QCIL Operations Cessation Event Payment*<sup>48</sup>

(h) Any QCIL Operations Cessation Event Payment shall be effected as a lump sum payment or staged payments at the election of the DPA Counterparty (after

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<sup>47</sup> Note to Reader: The QCIL Construction Event provisions (including the compensation provisions) of the DPA will need to distinguish between QCIL Construction Events that shut down i) the whole Facility (i.e. the Power Plant and Capture Plant) and ii) only the Capture Plant (where it is technically feasible for the relevant Generator to continue running the Power Plant unabated).

<sup>48</sup> Note to Reader: The QCIL Operations Cessation Event provisions (including the compensation provisions) of the DPA will need to distinguish between QCIL Operations Cessation Events that shut down i) the whole Facility (i.e. the Power Plant and Capture Plant) and ii) only the Capture Plant (where it is technically feasible for the relevant Generator to continue running the Power Plant unabated).

consultation with the Generator) payable to the Generator by the DPA Counterparty as an amount equal to:

- (i) all irrecoverable and unavoidable out-of-pocket costs (including tax liabilities and break costs) which have been or will be incurred by the Generator in respect of the Project arising directly from the relevant QCiL Operations Cessation Event, but excluding:
  - (A) all other compensation which will be payable to the Generator in connection with the relevant QCiL Operations Cessation Event;
  - (B) all costs (other than break costs) associated with the Generator's financing arrangements in respect of the Project; and
  - (C) all savings which have been, will be or are reasonably likely to be made by the Generator in respect of the Project arising directly from the relevant QCiL Operations Cessation Event; and
- (ii) revenue that the Parties agree, or is determined pursuant to the Dispute Resolution Procedure, the Generator would have generated (including wholesale electricity market revenue, balancing system services revenue and ancillary services revenue) from electricity that the Facility would have generated but for the occurrence of the QCiL Operations Cessation Event from the date of the QCiL Operations Cessation Event until the expiry of the Term, with such revenue calculated on a forward-looking basis:
  - (A) based on the Facility's [Assumed Net Dependable Capacity], [Assumed Load Factor] and [Assumed Net Efficiency] (with each term reflecting forecast degradation factors and other appropriate factors);
  - (B) assuming that when generating such electricity the Facility's Achieved CO<sub>2</sub> Capture Rate is equal to the Required CO<sub>2</sub> Capture Rate;
  - (C) based on estimates of relevant rates or prices from one or more leading economist in the England and Wales wholesale electricity market who is independent of the Parties; and
  - (D) discounted by the [Applicable Discount Rate] to reflect the time-value of the compensation payment<sup>49</sup>.

### 20.3 Qualifying Shutdown Event

- (a) If a Qualifying Shutdown Event has occurred, the Generator may give notice to that effect to the DPA Counterparty (a "**QSE Notice**"). A QSE Notice shall:
  - (i) include reasonable details of the Qualifying Shutdown Event;
  - (ii) specify the date on which the Qualifying Shutdown Event occurred;
  - (iii) specify the Generator's good faith estimate of the QCiL Costs and the QCiL Savings, reasonably likely to be made or received in respect of the Project by the Generator arising directly from such QCiL Operations Cessation Event occurring;
  - (iv) include such Supporting Information, in reasonable detail, which the Generator considers to be relevant and supportive of the foregoing; and

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<sup>49</sup> Note to Reader: The precise formulae to calculate such compensation are still to be confirmed.

- (v) include Supporting Information evidencing, in reasonable detail, the steps that the Generator has taken and/or proposes to take to comply with clause 20.5 (Mitigation) and the Reasonable and Prudent Standard.
- (b) Any QSE Notice shall be accompanied by a Directors' Certificate in relation to the information contained in, and enclosed with, the QSE Notice.
- (c) A QSE Notice shall be deemed to constitute a Generator QCiL Notice and the provisions of clause 20 (Qualifying Change in Law) shall apply (with the necessary modifications) for the purposes of:
  - (i) agreeing or determining whether a Qualifying Shutdown Event has occurred;
  - (ii) (if a Qualifying Shutdown Event has occurred) agreeing or determining the amount of QCiL Compensation resulting from the occurrence of such Qualifying Shutdown Event (on the basis that a Qualifying Shutdown Event constitutes a QCiL Operation Cessation Event) and the terms and conditions upon which such QCiL Compensation will be paid or effected; and
  - (iii) agreeing or determining any and all other related matters pertinent to the foregoing.

#### 20.4 **True-Up**

*[It is intended that the QCiL True-Up provisions in the AR3 CfD Standard Terms and Conditions will be replicated in the Agreement]*

#### 20.5 **Mitigation**

- (a) The Generator shall promptly take all reasonable steps, acting in accordance with the Reasonable and Prudent Standard, to minimise any costs and maximise any cost savings arising from a Qualifying Change in Law and/or Qualifying Shutdown Event (including by recommencing generation and capture as soon as reasonably practicable), provided that this obligation to mitigate shall not be construed as requiring the Generator not to comply in full with its obligations under the Agreement.
- (b) The Generator shall, as soon as reasonably practicable, notify the DPA Counterparty of the mitigating steps that it has taken, is taking and proposes to take and shall promptly provide such further information regarding such mitigation as the DPA Counterparty may reasonably request.

#### 20.6 **Disputes**

- (a) If the Parties are not able to agree any of the matters referred to in this clause 20, either Party may refer the Dispute to the Dispute Resolution Procedure.
- (b) Until the Dispute has been resolved by agreement between the Generator and the DPA Counterparty or determination in accordance with the Dispute Resolution Procedure, there shall be no QCiL Compensation payable.

#### 20.7 **Indemnity**

The Generator shall, promptly on demand, indemnify the DPA Counterparty against all out-of-pocket costs the DPA Counterparty properly incurs in giving or responding to any notice of a Qualifying Change in Law or a Qualifying Shutdown Event, in evaluating whether a Qualifying Change in Law or Qualifying Shutdown Event has occurred, and in its discussions and dealings with the Generator with respect to the Qualifying Change in Law or Qualifying Shutdown Event. This indemnity shall not apply in respect of any such costs resulting from

the DPA Counterparty disputing that a Qualifying Change in Law or Qualifying Shutdown Event has occurred if an agreement or determination is reached to the contrary.

## 21. **CHANGE IN APPLICABLE LAW**

### 21.1 **CiAL Review**

(a) The DPA Counterparty shall conduct a CiAL Review if:

(i) it determines that:

(A) any Change in Applicable Law: (i) has been implemented, has occurred or has become effective; or (ii) is expected to be implemented, to occur or to become effective; and

(B) as a result of such Change in Applicable Law being implemented, occurring or becoming effective one (1) or more of the Required CiL Amendment Objectives will cease to be met; or

(ii) the CiAL Request Criterion<sup>50</sup> is met,

(each, a "**CiAL Review Trigger**").

(b) If the Generator considers that:

(i) any Change in Applicable Law: (i) has been implemented, has occurred or has become effective; or (ii) is expected to be implemented, to occur or to become effective; and

(ii) as a result of such Change in Applicable Law being implemented, occurring or becoming effective one (1) or more of the Required CiL Amendment Objectives will cease to be met,

the Generator may give a notice to the DPA Counterparty requesting the DPA Counterparty to undertake a CiAL Review (a "**CiAL Request Notice**"). A CiAL Request Notice:

(A) shall specify why, and the date on which, the Generator considers that a Change in Applicable Law: (a) has been implemented, has occurred or has become effective; or (b) is expected to be implemented, occur or become effective;

(B) shall specify why the Generator considers that the Change in Applicable Law results or will result in one (1) or more of the Required CiL Amendment Objectives ceasing to be met; and

(C) may set out the Generator's opinion of the Required CiL Amendment(s),

together with such Supporting Information, in reasonable detail, which the Generator considers to be relevant to and supportive of the foregoing.

### 21.2 **Notification of outcome of CiAL Review**

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<sup>50</sup> Note to Reader: A certain threshold would trigger the DPA Counterparty to carry out a CiAL Review as was the case under AR3. The definition and procedure will be detailed in the full DPA contract.

The DPA Counterparty shall give a notice to the Generator of the outcome of a CiAL Review (a "**CiAL Review Outcome Notice**") as soon as reasonably practicable following the conclusion of a CiAL Review. A CiAL Review Outcome Notice shall:

- (a) set out the outcome of the CiAL Review and, if applicable, the Required CiL Amendments; and
- (b) specify the date from which such Required CiL Amendments are to take effect.

### 21.3 **CiAL Dispute**

- (a) The Generator may, no later than [twenty (20)] Business Days after receipt of a CiAL Review Outcome Notice, give a notice to the DPA Counterparty that it wishes to raise a Dispute in relation to the outcome of such CiAL Review (a "**CiAL Dispute**").
- (b) The Generator acknowledges and agrees that it may only raise a Dispute with respect to the outcome of any CiAL Review if there is a manifest error or fraud in any determination by the DPA Counterparty as to:

- (i) the outcome of the CiAL Review; or
- (ii) the Required CiL Amendments,

in each case contained within the CiAL Review Outcome Notice, and any CiAL Dispute which is based upon grounds other than those specified in this clause 21.3(b) shall be invalid and of no effect.

- (c) The Expert Determination Procedure shall apply to a CiAL Dispute.

### 21.4 **Compliance with the Agreement**

- (a) The occurrence of a Change in Applicable Law that has the result of one (1) or more of the Required CiL Amendment Objectives ceasing to be met shall not:
  - (i) constitute a Force Majeure for the purposes of the Agreement; or
  - (ii) provide either Party the right to suspend or terminate its obligations under the Agreement,

provided that paragraph (A) above shall not preclude a Change in Law from constituting Force Majeure.

- (b) Subject to this clause 21 (Change in Applicable Law), the Parties shall be relieved from liability, and deemed not to be in breach of the Agreement for any failure or delay in the performance under the Agreement if and to the extent such failure or delay is directly attributable to the occurrence and continuation of a Change in Applicable Law, provided that nothing in this clause 21 (Change in Applicable Law) shall relieve either Party from any obligation to pay any sum due and payable to the other Party pursuant to the Agreement.



## PART 9 PROTECTIONS: FORCE MAJEURE

### 22. FORCE MAJEURE

#### 22.1 Relief due to Force Majeure

Subject to the provisions of this clause 22 (Force Majeure), a Party affected by Force Majeure (an "**FM Affected Party**") shall:

- (a) be relieved from liability and deemed not to be in breach of the Agreement nor liable for any failure or delay in the performance of any of its obligations under the Agreement if and to the extent such failure or delay is directly attributable to occurrence and continuance of such Force Majeure; and
- (b) be entitled to an extension of one or more of the Longstop Date, Milestone Delivery Date and/or the Target Commissioning Window, for any delay if and to the extent such delay is directly attributable to the occurrence and continuance of such Force Majeure, subject to the requirements of the definition of that term.

#### 22.2 Conditions to Force Majeure relief

The FM Affected Party's relief from liability under clause 22.1 (Relief due to Force Majeure) is subject to and conditional upon:

- (a) the FM Affected Party giving notice as soon as reasonably practicable to the other Party ("**Non-affected Party**") in writing of the nature and extent of the Force Majeure causing its failure or delay in performance; and
- (b) the FM Affected Party using all reasonable endeavours to mitigate the effects of the Force Majeure, to carry out its obligations under the Agreement in any way that is reasonably practicable and to resume the performance of its obligations under the Agreement as soon as reasonably possible.

#### 22.3 Provision of Force Majeure information

- (a) In addition to its notification obligation under clause 22.2 (Conditions to Force Majeure relief), the FM Affected Party shall give notice as soon as reasonably practicable to the Non-affected Party in writing (to the extent that such Information is reasonably available) of:

- (i) the steps being taken by the FM Affected Party to remove or mitigate the effect of the Force Majeure (including delay to the Project) and to carry out its obligations under the Agreement;
- (ii) the anticipated date of resumption of performance of its obligations under the Agreement; and
- (iii) such other details relating to the Force Majeure and its effects (including delay to the Project) as may be reasonably requested by the Non-affected Party,

and, to the extent that such Information is not reasonably available at the time a notice is given, the FM Affected Party shall provide such Information to the Non-affected Party as soon as it becomes reasonably available.

- (b) The FM Affected Party shall notify the Non-affected Party [*the interval period to be determined*]:
  - (i) of any update to the Information provided under clause 22.3(a) and shall give notice as soon as reasonably practicable to the Non-affected Party upon it

becoming aware of any material developments or additional material Information relating to the Force Majeure and its effects; and

- (ii) where the Force Majeure is a continuing one, that it is continuing, accompanied by an explanation and Information to show that the events or circumstances concerned continue to meet all requirements of the definition of Force Majeure.

## **PART 10 CONFIDENTIALITY, ANNOUNCEMENTS AND FREEDOM OF INFORMATION**

### **23. CONFIDENTIALITY**

#### **23.1 Confidentiality restrictions: application to the terms of the Agreement**

The Parties agree that, subject to clause 24 (Announcements), the provisions of the Agreement shall not be treated as Confidential Information and may be disclosed without restriction.

#### **23.2 Generator Confidential Information**

- (a) The DPA Counterparty shall keep all Generator Confidential Information confidential and shall not disclose Generator Confidential Information without the prior written consent of the Generator other than as permitted by this clause 23.
- (b) The DPA Counterparty shall not make use of any Generator Confidential Information otherwise than for fulfilling the DPA Counterparty Permitted Purposes, except with the express prior written consent of the Generator.
- (c) clause 23.2(a) shall not apply to any disclosure:
  - (i) by the DPA Counterparty of Generator Confidential Information (on a confidential basis):
    - (A) to its Representatives to enable or assist the DPA Counterparty to fulfil the DPA Counterparty Permitted Purposes;
    - (B) to any transferee to fulfil the DPA Counterparty Permitted Purposes;
    - (C) to any person engaged in providing services to the DPA Counterparty to enable or assist the DPA Counterparty to fulfil the DPA Counterparty Permitted Purposes;
    - (D) to any Government Entity (or to its Representatives or to any person engaged in providing services to such Government Entity) where the DPA Counterparty considers such disclosure is required to enable or assist:
      - (aa) the DPA Counterparty to fulfil the DPA Counterparty Permitted Purposes; or
      - (bb) the relevant Government Entity: (i) to fulfil any of its functions arising out of or in connection with the Agreement or any other Dispatchable Power Agreement; or (ii) perform any function ancillary or related functions arising out of or for the purposes of this Agreement or any other Dispatchable Power Agreement; or (ii) fulfil any functions, duties or obligations arising by virtue of or pursuant to the Energy Act 2013; and
    - (E) to the Electricity Transmission System Operator, Electricity Transmission Licensee or any Electricity Licensed Distributor, the Gas Licensed Transporter, the T&S Operator, the Economic Regulator, the DPA Settlement Services Provider or the Delivery Body (or to their respective Representatives) to the extent that the DPA Counterparty considers such disclosure is necessary to enable or assist: (a) the DPA Counterparty to fulfil the DPA Counterparty Permitted Purposes; or (b) such person to fulfil or perform any of its functions, duties or

obligations arising out of or in connection with this Agreement or for the purposes of any other Dispatchable Power Agreement or to fulfil or perform any ancillary or related function, duty or obligation (including any such functions, duties or obligations arising by virtue of or pursuant to the Energy Act 2013);

provided that:

(1) the DPA Counterparty shall use all reasonable endeavours to inform the recipient of the Generator Confidential Information of the DPA Counterparty's obligations under clause 23.2; and

(2) in the case of disclosure of Generator Confidential Information pursuant to clauses 23.2(c)(i)(A), 23.2(c)(i)(B), or 23.2(c)(i)(C) the DPA Counterparty shall ensure that the recipient of the Generator Confidential Information shall be subject to the same obligation of confidentiality as contained in clause 23.2;

- (ii) to enable a Dispute to be instigated, progressed, consolidated with other disputes, settled or determined pursuant to and in accordance with the Dispute Resolution Procedure (except where such Generator Confidential Information has been provided on a "without prejudice" or "without prejudice save as to costs" basis);
- (iii) to enable an Electricity Metering Dispute to be instigated, progressed, settled or determined in accordance with the provisions of the Balancing and Settlement Code;
- (iv) (subject to clause 23.2(d)) by the DPA Counterparty of Generator Confidential Information:
  - (A) to any Parliamentary committee, but only if and to the extent that the DPA Counterparty considers such disclosure is required to enable or assist it to fulfil any DPA Counterparty Permitted Purpose;
  - (B) to the Secretary of State to enable or assist the Secretary of State to make a disclosure to Parliament or to any Parliamentary committee, but only if and to the extent that the Secretary of State has notified the DPA Counterparty that such disclosure is required to enable or assist the Secretary of State to fulfil its functions;
  - (C) [to the Secretary of State to enable or assist the Secretary of State to make a disclosure to a Subsidy Control Competent Authority or other Competent Authority or otherwise to comply with the Subsidy Control Rules, but only if and to the extent that the DPA Counterparty considers such disclosure is required in connection with the application of the Subsidy Control Rules or in connection with any decision by a Subsidy Control Competent Authority relating to those rules; or
  - (D) to a Subsidy Control Competent Authority or other Competent Authority or an interested party under the Subsidy Control Rules, but only if and to the extent that the DPA Counterparty considers such disclosure is necessary in connection with the application of the Subsidy Control Rules or in connection with any decision by a Subsidy Control Competent Authority relating to those rules]<sup>51</sup>;

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<sup>51</sup> Note to Reader: This provision is subject to further review by BEIS including to ensure consistency, insofar as appropriate, with AR4 CfD drafting as it develops.

- (v) which is required:
  - (A) by the FoIA;
  - (B) by the EIR; or
  - (C) (subject to clause 23.2(d)) for the purposes of compliance with any other Law or Directive having the force of law or, if not having the force of law, compliance with which is in accordance with the general practice of the DPA Counterparty; or
- (vi) by the DPA Counterparty of Generator Confidential Information:
  - (A) to which the Generator has agreed in writing in advance; or
  - (B) that is otherwise expressly permitted under the terms, or required for the operation or fulfilment, of the Agreement.
- (d) Prior to any disclosure of Generator Confidential Information by the DPA Counterparty pursuant to clause 23.2(c)(iv) or 23.2(c)(v)(C), the DPA Counterparty shall use reasonable endeavours to notify the Generator of the Generator Confidential Information to be disclosed, provided that:
  - (i) it is lawful and reasonably practicable in the circumstances to do so; and
  - (ii) in the case of any disclosure pursuant to clause 23.2(c)(iv)(A) or 23.2(c)(iv)(B), it is not inconsistent with Parliamentary convention.
- (e) The disclosure of Generator Confidential Information by the DPA Counterparty in reliance on the exception set out in clause 23.2(c)(v)(A) or 23.2(c)(v)(B) shall be subject to the provisions of clause 25 (Freedom of information).

### 23.3 **DPA Counterparty: liability for Representatives and service providers**

The DPA Counterparty shall be responsible for:

- (a) any failure by its current or former Representatives or any person to whom Generator Confidential Information is disclosed pursuant to clauses 23.2(c)(i)(B) or 23.2(c)(i)(C) to comply with clause 23.2(a) as if they were subject to it; and
- (b) any use by its current or former Representatives or any person to whom Generator Confidential Information is disclosed pursuant to clauses 23.2(c)(i)(B) or 23.2(c)(i)(C), of any Generator Confidential Information in breach of clause 23.2(b), as if they were subject to it.

### 23.4 **DPA Counterparty Confidential Information**

- (a) The Generator shall keep all DPA Counterparty Confidential Information confidential and shall not disclose DPA Counterparty Confidential Information without the prior written consent of the DPA Counterparty other than as permitted by this clause 23.
- (b) The Generator shall not make use of any DPA Counterparty Confidential Information otherwise than for the purpose of fulfilling the Generator Permitted Purpose, except with the express prior written consent of the DPA Counterparty.

- (c) clause 23.4(a) shall not apply to any disclosure:
- (i) by the Generator of DPA Counterparty Confidential Information (on a confidential basis):
    - (A) to its Representatives to enable or assist the Generator to fulfil the Generator Permitted Purpose;
    - (B) to members of its Group (and their respective Representatives) to enable or assist the Generator to fulfil the Generator Permitted Purpose;
    - (C) to any transferee to fulfil the Generator Permitted Purpose;
    - (D) to the providers or prospective providers to the Generator of debt financing, refinancing or credit support and their professional advisers, provided that such disclosure is restricted to Information necessary for the purposes of assessing the financing, refinancing or credit support;
    - (E) to *bona fide* prospective purchasers of the Facility provided that such disclosure is restricted to Information necessary for the purpose of assessing the potential purchase;
    - (F) to the Electricity Transmission System Operator, Electricity Transmission Licensee or any Electricity Licensed Distributor, the Gas Licensed Transporter, the T&S Operator, the Economic Regulator, the DPA Settlement Services Provider or the Delivery Body (or to their respective Representatives) to the extent that the DPA Counterparty considers such disclosure is necessary to enable or assist: (a) the Generator to fulfil the Generator Permitted Purposes; or (b) such person to fulfil or perform any of its functions, duties or obligations arising out of or in connection with this Agreement or for the purposes of any other Dispatchable Power Agreement or to fulfil or perform any ancillary or related function, duty or obligation (including any such functions, duties or obligations arising by virtue of or pursuant to the Energy Act 2013); or
    - (G) for the purposes of:
      - (aa) the examination and certification by its auditors of the Generator's accounts; or
      - (bb) complying with a proper request from its insurance adviser or insurer on placing or renewing any insurance policies,provided that:
      - (1) the Generator shall use reasonable endeavours to inform the recipient of the DPA Counterparty Confidential Information of the Generator's obligations under clause 23.4; and
      - (2) in the case of disclosure of DPA Counterparty Confidential Information pursuant to clause 23.4(c)(i)(A) to 23.4(c)(i)(E), the Generator shall ensure that the recipient of the DPA Counterparty Confidential Information shall be subject to the same obligation of confidentiality as contained in clause 23.4;
  - (ii) to enable a Dispute to be instigated, progressed, consolidated with other disputes, settled or determined pursuant to and in accordance with the Dispute Resolution Procedure (save where such DPA Counterparty

Confidential Information has been provided on a "without prejudice" or "without prejudice save as to costs" basis);

- (iii) to enable an Electricity Metering Dispute to be instigated, progressed, settled or determined in accordance with the provisions of the Balancing and Settlement Code;
- (iv) (subject to clause 23.4(d)) which is required by any Law or Directive (including the rules of any securities exchange or clearing system) having the force of law or, if not having the force of law, compliance with which is in accordance with the general practice of the Generator; or
- (v) by the Generator of DPA Counterparty Confidential Information:
  - (A) to which the DPA Counterparty has agreed in writing in advance; or
  - (B) that is otherwise expressly permitted under the terms, or required for the operation or fulfilment, of the Agreement.
- (d) Prior to any disclosure of DPA Counterparty Confidential Information by the Generator pursuant to clause 23.4(c)(iv), the Generator shall use reasonable endeavours to notify the DPA Counterparty of the DPA Counterparty Confidential Information to be disclosed, provided that it is lawful and reasonably practicable in the circumstances to do so.

#### 23.5 **Generator: liability for Representatives, service providers**

The Generator shall be responsible for:

- (a) any failure by its current or former Representatives or any person to whom DPA Counterparty Confidential Information is disclosed pursuant to clauses 23.4(c)(i)(B) to 23.4(c)(i)(E) to comply with clause 23.4(a) as if they were subject to it; and
- (b) any use by its current or former Representatives or any person to whom DPA Counterparty Confidential Information is disclosed pursuant to clause 23.4(c)(i)(B) or 23.4(c)(i)(C), of any DPA Counterparty Confidential Information in breach of clause 23.4(b) as if they were subject to it; and
- (c) any failure by any person to whom DPA Counterparty Confidential Information is disclosed pursuant to clauses 23.4(c)(i)(D) or 23.4(c)(i)(E) to comply with the restrictions on usage of DPA Counterparty Confidential Information provided for in such clauses.

#### 24. **ANNOUNCEMENTS**

##### 24.1 **No announcements**

The Generator shall not make, publish, issue or release any announcement or public statement in relation to, or which refers to, the Agreement or any related or ancillary matter, without the express prior written consent of the DPA Counterparty (such consent not to be unreasonably withheld or delayed).

##### 24.2 **Generator permitted announcements**

Notwithstanding clause 24.1 (No announcements), the Generator may make, publish, issue or release any announcement or public statement in relation to, or which refers to, the Agreement or any related or ancillary matter if and to the extent required by any Law or Directive (including the rules of any securities exchange or clearing system) having the force of law or, if not having the force of law, compliance with which is in accordance with

the general practice of the Generator, provided the Generator shall agree the contents of such announcement or public statement with the DPA Counterparty before it is made, published, issued or released (such consent not to be unreasonably withheld or delayed).

**24.3 DPA Counterparty permitted announcements**

The DPA Counterparty may make, publish, issue or release any announcement or public statement in relation to, or which refers to, the Agreement or any related or ancillary matter that it considers to be necessary, desirable or appropriate (acting reasonably) provided that, if and to the extent that such announcement or statement contains any Generator Confidential Information, the making, publication, issuance or release of such announcement or public statement does not breach clause 23 (Confidentiality).

**25. FREEDOM OF INFORMATION**

**25.1 The Generator acknowledges that:**

- (a) the DPA Counterparty is subject to the requirements of the FoIA and the EIR and the Generator shall assist and cooperate with the DPA Counterparty, at the Generator's expense, to enable it to comply with its disclosure obligations under the FoIA and the EIR; and
- (b) the DPA Counterparty shall be responsible for determining in its absolute discretion, and notwithstanding any other provision in the Agreement or any other agreement, whether the Information it holds (or held on its behalf) that is the subject of a Request for Information:
  - (i) is exempt or excepted from disclosure under the FoIA or the EIR, as appropriate; and
  - (ii) is to be disclosed in response to a Request for Information,

and in no event shall the Generator respond directly to a Request for Information unless expressly authorised to do so in writing by the DPA Counterparty.

**25.2** If the DPA Counterparty receives a Request for Information in relation to Information that the Generator is holding on behalf of the DPA Counterparty and which the DPA Counterparty does not hold itself, the DPA Counterparty shall refer to the Generator such Request for Information and the Generator shall:

- (a) provide the DPA Counterparty with a copy of all such Information in its possession or power in the form that the DPA Counterparty requires as soon as practicable and in any event within five (5) Business Days of the DPA Counterparty's request or such other period as the DPA Counterparty may specify; and
- (b) provide all necessary assistance as reasonably requested by the DPA Counterparty in connection with any such Information to enable the DPA Counterparty to respond to a Request for Information within the time for compliance set out in Section 10 of the FoIA or Regulation 5 of the EIR.

**25.3** The Generator shall ensure that all Information held on behalf of the DPA Counterparty is retained for disclosure and shall permit the DPA Counterparty to inspect such Information as requested from time to time.

**25.4** If the Generator receives a Request for Information in relation to the DPA Counterparty or in connection with the Agreement, the Generator shall transfer any such Request for Information to the DPA Counterparty as soon as practicable after receipt and in any event within two (2) Business Days, and the provisions of this clause 25 shall apply as if the Request for Information had been received by the DPA Counterparty.



- 25.5 The Generator acknowledges that any notification to the DPA Counterparty which identifies Generator Confidential Information is of indicative value only and that the DPA Counterparty may nevertheless be obliged to disclose Generator Confidential Information in accordance with the requirements of the FoIA and the EIR.
- 25.6 The Generator acknowledges that the DPA Counterparty may, acting in accordance with the Code of Practice on the discharge of public authorities' functions under Part 1 of the FoIA (issued under Section 45 of the FoIA) or the Code of Practice on the discharge of the obligations of public authorities under the EIR (issued under Regulation 16 of EIR), be obliged under the FoIA or the EIR to disclose Information unless an exemption applies. The DPA Counterparty may at its discretion consult the Generator with regard to whether the FoIA or the EIR applies to the Request for Information and whether an exemption applies.
- 25.7 Nothing in this clause 25 shall restrict or prevent the publication by the DPA Counterparty of any Information in accordance with:
- (a) any publication scheme (as defined in the FoIA) adopted and maintained by the DPA Counterparty in accordance with the FoIA; or
  - (b) any model publication scheme (as defined in the FoIA) applicable to the DPA Counterparty as may be published from time to time by the Information Commissioner,

provided that, in deciding whether to publish Generator Confidential Information in accordance with any such publication scheme or model publication scheme, the DPA Counterparty shall take account of whether, in its sole opinion, such Generator Confidential Information would be exempt from disclosure under the FoIA.

## **PART 11 INTELLECTUAL PROPERTY RIGHTS**

### **26. INTELLECTUAL PROPERTY RIGHTS**

#### **26.1 Retention of Intellectual Property Rights**

Each Party shall retain any Intellectual Property Rights developed by or on behalf of that Party, whether pursuant to or independently from the Agreement.

#### **26.2 Licence of Intellectual Property Rights**

Each Party shall license its Intellectual Property Rights to the other Party on a non-exclusive, royalty-free, non-transferable basis with the right to grant sub-licences (including after termination or expiry of the Agreement), for the DPA Counterparty Permitted Purposes and the Generator Permitted Purposes (as the case may be).

#### **26.3 Indemnity for infringement of Intellectual Property Rights**

Each Party shall indemnify the other Party in respect of any infringement of third party Intellectual Property Rights, to the extent that such infringement arises as a result of a Party exercising its licence to use the other Party's Intellectual Property Rights in accordance with clause 26.2 (Licence of Intellectual Property Rights).

## PART 12 DISPUTE RESOLUTION

### 27. DISPUTE RESOLUTION PROCEDURE

#### 27.1 Outline of the Dispute Resolution Procedure

- (a) If a Dispute arises, the objective of the Parties shall be to seek to ensure that the Dispute is resolved as quickly, as efficiently and as cost-effectively as possible. Each Party shall, at each stage of the Dispute Resolution Procedure, endeavour in good faith to resolve such Dispute through negotiation in accordance with the foregoing objective.
- (b) The Generator and the DPA Counterparty shall continue to observe and perform all of their respective duties, responsibilities and obligations under the Agreement notwithstanding any Dispute which falls to be resolved in accordance with this clause 27.
- (c) Except as otherwise expressly provided in the Agreement, if a Dispute arises, either Party may serve a Dispute Notice on the other Party in order to initiate the Dispute Resolution Procedure. The Dispute Notice shall include the following details:
  - (i) the subject matter of the Dispute and the issues to be resolved (including, in the context of a Dispute under clause 14.4 (Disputed payments), the disputed amount);
  - (ii) the position the referring Party believes is correct and the referring Party's reasons for that position;
  - (iii) the identity of the referring Party's Senior Representative;
  - (iv) details of any other disputes of which the Party is aware that may be consolidated or joined;
  - (v) copies of any documents which the referring Party considers to be important and/or relevant; and
  - (vi) a statement of the relief, determination, remedy or recourse which the referring Party seeks.
- (d) Following the service by any Party of a Dispute Notice:
  - (i) the Parties shall seek to resolve the Dispute in accordance with clause 27.2 (Resolution by the Senior Representatives) by convening a meeting of the Senior Representatives of the Parties; and
  - (ii) if the Senior Representatives are unable to settle, compromise or resolve the Dispute in accordance with clause 27.2 (Resolution by the Senior Representatives), the Dispute shall be resolved by referring it to the Arbitral Tribunal in accordance with clause 27.4 (Arbitration) with the exception of Disputes relating to [a limited number of specific circumstances to be listed], where the Dispute shall be referred to an Expert for determination in accordance with clause 27.3 (Expert Determination).

#### 27.2 Resolution by the Senior Representatives

- (a) The Parties shall procure that their respective Senior Representatives shall meet within [*a period to be determined*] of the date of service of the Dispute Notice, and if necessary shall meet more than once in that period, to seek to resolve the Dispute by agreement.

- (b) If the Senior Representatives of the Parties are able to resolve the Dispute within [*a period to be determined*] of the date of the Dispute Notice (or within such further time as the Senior Representatives of the Parties may agree in writing), the Senior Representative Settlement shall be documented in writing and shall be signed by the Senior Representative of each Party but shall not be legally binding unless and until both Parties have observed and complied with this clause 27.2(b).
- (c) If the Senior Representatives of the Parties are unable to resolve the Dispute within [*a period to be determined*] of the date of service of the Dispute Notice (or within such further time as the Senior Representatives of the Parties may agree in writing), either Party may refer the Dispute to an Expert for determination in accordance with clause 27.3 (Expert Determination) or to arbitration in accordance with clause 27.4 (Arbitration), as the case may be.
- (d) Unless the Parties otherwise agree in writing, any statement, concession, waiver or agreement (other than a Senior Representative Settlement) made by a Party in the course of discussions pursuant to this clause 27.2 shall be without prejudice to the Dispute. The Parties agree not to raise, refer to or rely on any such statement, concession, waiver or agreement (other than a Senior Representative Settlement) in any subsequent expert determination, arbitration or other legal proceedings whether related to the Dispute or otherwise.

### 27.3 **Expert Determination**

- (a) Either Party may, subject to clause 27.2 (Resolution by the Senior Representatives), refer a Dispute to be determined by an Expert if either: (i) the Parties have agreed in writing that a Dispute is amenable to determination by an Expert pursuant to clause 27.2(c); or (ii) the Dispute is an Expert Determination Dispute. Such referral shall be effected by either Party giving a notice (an "**Expert Determination Notice**") to the other Party. An Expert Determination Notice shall include:
  - (i) the nature and a brief description of the Dispute;
  - (ii) details of where and when the Dispute has arisen;
  - (iii) the nature of the relief, determination, remedy or recourse sought;
  - (iv) details of any other disputes of which the Party is aware that may be consolidated or joined; and
  - (v) a proposal as to the identity of the Expert, and terms of reference, of the Expert and the relevant expertise that the referring Party considers qualifies the Expert to determine the relevant Expert Determination Dispute.
- (b) The Party receiving the Expert Determination Notice (Respondent) shall, within [*a period to be determined*] of service of the Expert Determination Notice, notify the other Party (Claimant) whether or not it is willing to appoint the Expert proposed by the Claimant. If the Respondent does not agree with the Claimant's proposal, the Respondent must propose an alternative Expert for consideration by the Claimant. If the Parties have failed to agree on the appointment of the Expert within [*a period to be determined*] of the date of the Expert Determination Notice (or such other period as the Parties may agree), any Party may request that the Expert be appointed by the LCIA, which shall be requested to choose a suitably qualified and experienced Expert for the Dispute in question, whose appointment shall be binding on the Parties.
- (c) Within [*a period to be determined*] of receipt of the proposed appointment or nomination, the Expert shall confirm its appointment in writing to the Parties stating:
  - (i) its willingness and availability to act; and

- (ii) that the Expert has no conflict of interest which prevents it from determining the Dispute.
- (d) Within [*a period to be determined*] of the Expert having agreed to act, the Claimant shall refer the Dispute to the Expert by sending a report on the Dispute to the Expert and to the Respondent. The report shall include the following:
- (i) the subject matter of the Dispute and the issues to be resolved;
  - (ii) the position the Claimant believes is correct and the Claimant's reasons for that position;
  - (iii) copies of all the documents the Claimant considers to be important and relevant;
  - (iv) a statement of the determination, remedy or recourse the Claimant seeks; and
  - (v) details of any other disputes of which the Party is aware that may be consolidated or joined.
- (e) The date on which the Expert and the other Party receive the Claimant's submission shall be the Date of Referral.
- (f) The Respondent may, but is not obliged to, submit a response to the Expert and copies of any documents on which the Respondent intends to rely within [*a period to be determined*] of the Date of Referral (Date of Response).
- (g) The Expert shall reach a decision within [*a period to be determined*] of the Date of Response.
- (h) In determining any Dispute referred to the Expert, the Expert:
- (i) shall act fairly and impartially;
  - (ii) shall establish the timetable and procedure for the expert determination;
  - (iii) shall take the initiative in ascertaining the facts and the law;
  - (iv) shall reach its decision in accordance with the applicable laws in relation to the Dispute referred to the Expert;
  - (v) if requested by one of the Parties, shall provide reasons for its decision, which shall be communicated to the Parties; and
  - (vi) shall not be entitled to amend the Agreement as part of its determination.
- (i) The Arbitration Act 1996 and the law relating to arbitrators and arbitrations shall not apply to the Expert or its decision or the procedure by which the Expert reaches its decision.
- (j) In determining any Dispute referred to the Expert for a decision the Expert at its sole and absolute discretion shall take the initiative in ascertaining the facts and the law as the Expert considers necessary in respect of the referral which may include:
- (i) considering any written representations, statements and experts' reports submitted to the Expert by the Parties;

- (ii) instructing an expert and/or taking Counsel's opinion as to any matter raised in the Dispute, but the Expert shall not be entitled to delegate any decision to such expert or Counsel; and
  - (iii) opening up, reviewing and revising any opinion, assessment, certificate, instruction, determination or decision of whatsoever nature given or made under the Agreement provided that the Expert may not in so doing purport to decide any matter excluded from this Expert Determination Procedure.
- (k) The Expert shall not be liable for anything done or omitted in the discharge or purported discharge of its functions as Expert unless such act or omission is in bad faith, and any employee, agent or adviser of the Expert shall be similarly protected from liability.
  - (l) If the Expert is at any time unable or unwilling to act or fails to come to a decision within the specified time allowed, either Party may proceed to seek the appointment of a replacement Expert as if the Expert Determination Notice had just been served.
  - (m) The replacement Expert shall be authorised to determine any Dispute which was submitted to the Expert's predecessor but which the Expert's predecessor had not decided at the time when the Expert's predecessor became unable or unwilling to act.
  - (n) The Expert's decision shall be final and binding upon the Parties.
  - (o) If either Party does not comply with the decision of the Expert, the other Party may take proceedings in the courts of England and Wales to secure enforcement of the decision.
  - (p) The Expert may, in its determination, provide that one or other or both of the Parties pay the Expert's fees and each other's legal costs in such proportions as the Expert may specify on the general principle that costs should reflect the Parties' relative success and failure in the expert determination. In the absence of such a direction, each Party shall bear its own legal costs and the fees and expenses of the Expert shall be paid in equal shares by the Parties.

#### 27.4 **Arbitration**

- (a) Either Party may refer a Dispute to arbitration in accordance with the LCIA Arbitration Rules provided that the Dispute has not been resolved by the Parties' Senior Representatives in accordance with clause 27.2 (Resolution by the Senior Representatives) or by an Expert in accordance with clause 27.3 (Expert Determination).
- (b) Any Dispute referred to arbitration shall be resolved in accordance with the LCIA Arbitration Rules, which rules are to be treated as incorporated by reference into this clause 27.4.
- (c) The Arbitral Tribunal shall make its award in writing (the "**Arbitral Award**"). The Parties agree that all final Arbitral Award shall be binding on the Parties save that no Arbitral Award shall impose an amendment to the Agreement.
- (d) The Arbitral Tribunal shall consist of three (3) Arbitrators except where the Parties have agreed in writing that the Arbitral Tribunal shall consist of one (1) Arbitrator (the "**Mutual Appointment Decisions**").
- (e) If the Arbitral Tribunal is to consist of:

- (i) three (3) Arbitrators, each Party shall nominate one (1) Arbitrator to be appointed by the LCIA as contemplated by the LCIA Arbitration Rules and the third Arbitrator shall be nominated by the Arbitrators nominated by the Parties and shall act as chairman; or
  - (ii) one (1) Arbitrator, the parties shall use reasonable endeavours to agree on the identity of the Arbitrator no later than ten (10) Business Days after the Mutual Appointment Decision, failing which the Arbitrator shall be appointed by the LCIA as contemplated by the LCIA Arbitration Rules.
- (f) The seat, or legal place, of any arbitration shall be London.
- (g) The language to be used in any arbitral proceedings shall be English.

#### 27.5 **Consolidation of Connected Disputes**

Where a Dispute arises under the Agreement and a dispute arises under any other Dispatchable Power Agreement ("**Connected Disputes**") which, in the reasonable opinion of the Expert appointed in any of the Connected Disputes or the first Arbitral Tribunal appointed in any of the Connected Disputes (as the case may be), are so closely connected as a result of there being common questions of fact or law that it is expedient for them to be resolved in the same proceedings, that Expert or Arbitral Tribunal (as the case may be) shall have the power to order that the proceedings to resolve the Connected Disputes shall be consolidated, and the Parties agree to participate in good faith with the consolidated process and be bound by the decision of the Expert or the Arbitral Tribunal, as the case may be.

#### 27.6 **No Other Proceedings**

- (a) Subject to limb (b) and clause 27.7 below, any and all Disputes are to be finally resolved in accordance with the Dispute Resolution Procedure, and neither Party shall commence any Proceedings in respect of a Dispute other than in accordance with the Dispute Resolution Procedure. If either Party commences any Proceedings in breach of the Dispute Resolution Procedure, it shall not oppose an application for strike-out, termination, discontinuance or stay of such Proceedings.
- (b) Notwithstanding any other provision of the Dispute Resolution Procedure, either Party may at any time:
  - (i) commence or prosecute Proceedings against the other Party in the courts of England and Wales for:
    - (A) an order to obtain urgent injunctive or other equitable relief, including specific performance;
    - (B) judgment to enforce a Senior Representatives Settlement, the determination of an Expert, or an Arbitral Award; and/or
  - (ii) give a notice of arbitration to the other Party so as to prevent the expiry of any applicable period of limitation or prescription, or the application of the equitable doctrine of laches.

#### 27.7 **Metering Disputes**

- (a) Electricity Metering Disputes shall be resolved solely as Trading Disputes in accordance with the Balancing and Settlement Code and the Dispute Resolution Procedure shall not apply to any such Electricity Metering Disputes.

- (b) [Gas Supply Metering Disputes shall be resolved in accordance with [Uniform Network Code]].
- (c) CO<sub>2</sub> Metering Disputes shall be resolved in accordance with the relevant industry code. If the relevant industry code is not available, it shall be resolved in accordance with clause 27.3 (Expert Determination).



**PART 13 GENERAL PROVISIONS REGARDING LIABILITIES, REMEDIES AND WAIVERS**

**28. LIABILITIES, REMEDIES AND WAIVERS**

**28.1 Liabilities**

**(a) Consequential loss**

Without prejudice to the calculation of the Termination Payment and save where any provision of the Agreement provides for an indemnity, neither Party shall be liable to the other Party under or pursuant to the Agreement or in tort (including negligence and/or breach of statutory duty) or otherwise at law for:

- (i) any loss, damage, cost or other expense to the extent that the same does not arise naturally from the breach and cannot reasonably be supposed to have been in the contemplation of the Parties at the date of the Agreement as the probable result of such breach; or
- (ii) any loss of profit, loss of revenue, loss of use, loss of goodwill or any special, indirect or consequential loss,

in each case incurred by the other Party in connection with any breach of the terms of the Agreement.

**(b) Reasonable pre-estimate**

Each Party acknowledges that the Termination Payment is reasonable in light of the anticipated harm and the difficulty of estimation or calculation of actual damages upon early termination of the Agreement. The Generator waives the right to contest the Termination Payment as an unreasonable penalty.

**(c) No Double-Recovery**

The Generator may recover only once in respect of the same loss. The DPA Counterparty shall not be liable to pay any compensation under any term of the Agreement to the extent that the subject of the claim has been compensated for, or the same loss has been recovered by the Generator under the Agreement.

**28.2 No waiver**

- (a) No waiver by either Party of any breach by the other of the Agreement shall operate unless expressly made in writing, and any such waiver shall not be construed as a waiver of any other breach.
- (b) No delay or omission by either Party in exercising any right, power or remedy provided by law or under or pursuant to the Agreement shall:
  - (i) affect that right, power or remedy; or
  - (ii) operate as a waiver of it.
- (c) The single or partial exercise by either Party of any right, power or remedy provided by law or under or pursuant to the Agreement shall not, unless otherwise expressly stated, preclude any other or further exercise of it or the exercise of any other right, power or remedy.

### 28.3 **Consents**

Any consents, approvals, waivers or agreements to be given by the DPA Counterparty pursuant to the Agreement shall be given in writing and may be given or withheld by the DPA Counterparty at its sole and absolute discretion and, if given, may be given on and subject to such terms and/or conditions as the DPA Counterparty may in its sole discretion determine. The exercise of discretion by the DPA Counterparty shall in no way limit the manner in or extent to which that discretion may be exercised in future or give rise to any amendment or modification to the Agreement.

### 28.4 **Entire agreement**

- (a) The Agreement together with [other relevant agreements to be listed] constitutes the entire agreement and understanding of the Parties with respect to its subject matter and supersedes and extinguishes any agreements, understandings and/or representations previously given or made with respect thereto other than those included in the Agreement.
- (b) Each Party acknowledges that in entering into the Agreement it has not relied on, and shall have no right or remedy in respect of, any pre-contractual statement (whether made negligently or innocently) other than as expressly set out in the Agreement.
- (c) Nothing in this clause 28.4 shall limit or exclude liability for fraud.
- (d) For the purpose of this clause 28.4, 'pre-contractual statement' means any draft, agreement, undertaking, representation, warranty, promise, assurance, arrangement or public statement of any nature whatsoever, whether or not in writing, relating to the subject matter of the Agreement made or given by either Party, the Secretary of State or the Delivery Body at any time prior to the date of the Agreement.

### 28.5 **Severability**

If any provision or part of a provision of the Agreement is or becomes illegal, invalid or unenforceable in any respect in any jurisdiction, that shall not affect or impair:

- (a) the legality, validity, or enforceability in that jurisdiction of any other provision of the Agreement; or
- (b) the legality, validity, or enforceability in other jurisdictions of that or any other provision of the Agreement.

## 29. **LIMITED RECOURSE ARRANGEMENTS, UNDERTAKINGS AND ACKNOWLEDGEMENTS**

### 29.1 **DPA Counterparty payment undertakings**

- (a) The DPA Counterparty shall make appropriate requests to Electricity Suppliers on the basis provided for by the Supplier Obligation for the purpose of ensuring that it is in sufficient funds to meet its liabilities in full pursuant to the Agreement.
- (b) The DPA Counterparty shall, to the extent consistent with the DPA Counterparty's proper exercise of its functions and duties pursuant to the Energy Act 2013 or any other statutory function or duty, as soon as reasonably practicable:
  - (i) take such steps as are necessary to recover from an Electricity Supplier any sum which the Electricity Supplier is required by virtue of the Supplier Obligation to pay to the DPA Counterparty and which has not been paid by the date on which it is required by virtue of the Supplier Obligation to be paid

and which is necessary to ensure the DPA Counterparty can meet its liabilities in full pursuant to the Agreement;

- (ii) at the times and otherwise in the manner prescribed by the Supplier Obligation, issue and enforce notices to Electricity Suppliers requiring the provision and/or payment of financial collateral to ensure the DPA Counterparty can meet its liabilities in full pursuant to the Agreement;
  - (iii) take such action (including the taking and prosecution of legal proceedings) against Electricity Suppliers as is necessary to ensure that the DPA Counterparty can meet its liabilities in full pursuant to the Agreement;
  - (iv) pursue any Electricity Supplier which has defaulted in making payment pursuant to the Supplier Obligation as a civil debtor unless (acting reasonably) the DPA Counterparty considers that there are more appropriate means of pursuing the defaulting Electricity Supplier or securing payment due to the Generator;
  - (v) take such action (including the taking and prosecution of legal proceedings) to recover and receive from other sources of funds (if any) available to the DPA Counterparty, including:
    - (A) moneys standing to the credit of any designated risk, reserve or shortfall fund; and/or
    - (B) moneys available by reason of any 'make whole', loss mutualisation or similar arrangements among Electricity Suppliers or others in respect of any shortfall in amounts due and owing but not paid by Electricity Suppliers to the DPA Counterparty for the purposes of enabling the DPA Counterparty to make payments pursuant to Dispatchable Power Agreements,as is necessary for the purpose of meeting its liabilities in full pursuant to the Dispatchable Power Agreement; and
  - (vi) notify the Secretary of State if the DPA Counterparty has reason to believe that it will have insufficient funds available to make when due the totality of the payments to generators that are required pursuant to the Dispatchable Power Agreements.
- (c) The DPA Counterparty shall notify the Generator if it is of the opinion that it will have insufficient funds to meet its liabilities in full pursuant to the Agreement.
- (d) The DPA Counterparty agrees that in circumstances where the DPA Counterparty has failed to pay an amount on the due date therefor pursuant to the Agreement:
- (i) damages alone would not be an adequate remedy for any breach by it of its obligations set out in paragraphs 29.1(b)(i) to 29.1(b)(v).
  - (ii) accordingly, the Generator will be entitled to the remedies of injunction, specific performance and other equitable relief for any threatened or actual breach by the DPA Counterparty of its obligations set out in paragraphs 29.1(b)(i) to 29.1(b)(v); and
  - (iii) it will not raise any objection to an application by the Generator for any such remedies.
- (e) Without prejudice to clause 29.2 (Limited Recourse), the maximum liability of the DPA Counterparty in respect of breach by it of clauses 29.1(a), 29.1(b), and 29.1(c)

shall be limited to an amount equivalent to the Default Interest on the amount which has not been paid by the DPA Counterparty to the Generator pursuant to the Agreement by reason of the relevant breach for the period from what would have been the date of payment but for such breach to the date of actual payment, provided that the limit of liability in this clause 29.1(e) shall not apply where the breach is caused by the gross negligence or wilful misconduct of the DPA Counterparty.

## 29.2 **Limited recourse**

- (a) Notwithstanding any other provision of the Agreement:
  - (i) the liability of the DPA Counterparty pursuant to the Agreement shall not exceed the aggregate of:
    - (A) the amounts from time to time received and held by the DPA Counterparty, and allocated to the Agreement, pursuant to the Supplier Obligation; and
    - (B) any other funds of the type referred to in clause 29.1(b)(v) from time to time received and held by the DPA Counterparty, and allocated to the Agreement, whether pursuant to the Supplier Obligation or otherwise; and
  - (ii) the DPA Counterparty shall not be in default pursuant to the Agreement in not making any payment that is due and owing if and to the extent that it shall not have received the amounts and other funds referred to in 29.2(a) which are necessary to make such payment, but if and to the extent that such payment is not made, the DPA Counterparty shall continue to owe an amount equal to the amount of the payment due and owing but not paid and shall make such payment promptly (and in any event within two (2) Business Days) after and to the extent of its receipt of such corresponding and allocated amounts and other funds.

## 29.3 **Damages for breach**

- (a) The Parties acknowledge and agree that:
  - (i) the DPA Counterparty shall have full right and liberty to recover from the Generator any loss, damage, cost or expense suffered or incurred by the DPA Counterparty as a result of a breach by the Generator of the Agreement and for this purpose no regard shall be had to the right or ability (if any) of the DPA Counterparty to recover such loss, damage, cost or expense from all or any Electricity Suppliers or any other person pursuant to any regulations made pursuant to the Energy Act 2013 (including the Supplier Obligation); and
  - (ii) to the extent that any such loss, damage, cost or expense is recovered by the DPA Counterparty from the Generator, it is the intent that the DPA Counterparty will not keep those amounts but will, pursuant to the regulations made pursuant to the Energy Act 2013 (including the Supplier Obligation):
    - (A) use such amounts to make good any loss, damage, cost or expense suffered or incurred by the DPA Counterparty;
    - (B) pass or return those amounts to the Electricity Supplier(s) or other persons entitled thereto pursuant to such regulations; and/or
    - (C) use such amounts for the benefit of such Electricity Supplier(s) or other person(s).



## PART 14 MISCELLANEOUS

### 30. GENERAL PROVISIONS

#### 30.1 Assignment

##### (a) Restriction on transfers

Subject to this clause 30.1, neither Party may:

- (i) assign to any person all or any of its rights or benefits under the Agreement;
- (ii) make a declaration of trust in respect of or enter into any arrangement whereby it agrees to hold in trust for any person all or any of its rights or benefits under the Agreement; or
- (iii) transfer (whether by way of novation, sub-contract, delegation or otherwise) to any person, or enter into an arrangement whereby any person is to perform, any or all of its obligations under the Agreement,

without the prior written consent of the other Party.

##### (b) Permitted Transfer by the DPA Counterparty

Notwithstanding clause 30.1(a) (Restriction on transfers), no consent of the Generator shall be required for the DPA Counterparty to:

- (i) transfer all or any of its rights, benefits or obligations under the Agreement to:
  - (A) any person pursuant to a transfer scheme in accordance with the Energy Act 2013; or
  - (B) any person designated as a DPA Counterparty in accordance with the Energy Act 2013,

and the DPA Counterparty shall ensure (to the extent that it is so able) that in any such case all accrued payment liabilities, if any, of the DPA Counterparty under the Agreement also transfer to the same person; or

- (ii) sub-contract or delegate to any person, or enter into an arrangement whereby any person is to perform, any or all of its obligations under the Agreement,

on such terms (subject as above) as the DPA Counterparty considers appropriate.

##### (c) Transfers by the DPA Counterparty

If the DPA Counterparty effects a transfer pursuant to clause 30.1(b) (Permitted Transfer by the DPA Counterparty), the Generator shall at its own cost enter into such further agreements as are necessary in order to substitute the relevant transferee for the DPA Counterparty and to give effect to any consequential amendments to the Agreement that are necessary to give effect thereto.

##### (d) Permitted Assignment by the Generator

- (i) Notwithstanding clause 30.1(a) (Restriction on transfers), no consent of the DPA Counterparty shall be required to effect an assignment by the Generator of all (but not part) of its rights and benefits under the Agreement by way of security to or in favour of any bank or financial institution (or an agent or

security trustee on its behalf) in relation to the financing or refinancing of the Generator's business activities.

- (ii) The Generator shall effect an assignment pursuant to this clause 30.1(d) by giving the DPA Counterparty prior written notice [*of not less than a period to be determined*] specifying the details of the assignee.

(e) **Transfers by the Generator**

If the DPA Counterparty consents to the transfer by the Generator of all of its rights, benefits and obligations under the Agreement to a transferee, the Generator shall effect a transfer of the Facility to the same transferee contemporaneously with the transfer of the Agreement.

30.2 **Direct agreement**

At the request of any bank or financial institution (or agent or security trustee on its behalf) in whose favour the Generator assigns its rights under the Agreement in accordance with clause 30.1(d) (Permitted Assignment by the Generator), the DPA Counterparty shall at the cost of the Generator enter into a direct agreement with such person in such form as the DPA Counterparty may approve.

30.3 **No variation**

No variation to the provisions of the Agreement shall be valid unless it is in writing and signed by each Party.

30.4 **Notices**

(a) **Communications in writing**

Any communication to be made under or in connection with the Agreement shall only be effective if it is in writing and is in English. Faxes are not permitted and, unless otherwise expressly stated, website publication is not permitted. Email is permitted.

(b) **Addresses**

The address and (where such communication is expressly permitted by email) email address, and the department or officer (if any) for whose attention the communication is to be made, of each Party for any communication to be made under or in connection with the Agreement is:

- (i) in the case of the Generator, that identified with its name below: [*insert relevant contact details*]
- (ii) in the case of the DPA Counterparty, that identified with its name below: [*insert relevant contact details*]

provided that a Party may change its notice details on giving notice to the other Party of the change in accordance with this clause 30.4. That notice shall only be effective on the date falling [*period to be determined*] after the notification has been received or such later date as may be specified in the notice.

(c) **Deemed receipt**

Any communication given under the Agreement shall, in the absence of evidence of earlier receipt, be deemed to have been received:

- (i) if delivered by hand, on the Business Day of delivery or on the next Business Day after the date of delivery if delivered on a day other than a Business Day;
- (ii) if sent by first class post within the United Kingdom, on the *[to be determined]* Business Day after the day of posting or, if sent from one country to another, on the *[to be determined]* Business Day after the day of posting; or
- (iii) if sent by email (where such communication is expressly permitted by email), when sent if sent before *[to be determined]* hours on a Business Day or otherwise on the first Business Day after it is sent.

(d) **Service of process**

The provisions of this clause 30.4 shall not apply in relation to any document relating to service of process.

30.5 **No third party rights**

- (a) Subject to clause 30.5(b), the Parties do not intend that any term of the Agreement should be enforceable, by virtue of the Contracts (Rights of Third Parties) Act 1999, by any person who is not a party to the Agreement.
- (b) The following clauses confer a benefit on certain persons named therein who are not a party to the Agreement (each, for the purposes of this clause 30.5, a Third Party) and, subject to clause 30.5(c), is intended to be enforceable by the Third Parties: *[to be completed]*.
- (c) Notwithstanding the provisions of this clause 30.5, the Agreement may be varied in any way and at any time by the Parties only without the consent of any Third Party.

30.6 **Further assurance**

Each Party shall at its own cost do or procure the doing of all things and execute or procure the execution of all further documents necessary to give full force and effect to the rights given and the transactions contemplated by the Agreement.

30.7 **Generator cooperation**

- (a) [If the DPA Counterparty is notified or becomes aware that a Subsidy Control Competent Authority or other Competent Authority has decided that the DPA Counterparty or other public body must recover any subsidy granted or paid in relation to the Agreement and that decision has not been annulled, the DPA Counterparty shall, if it is the party to which such order is addressed or if otherwise required by the Secretary of State, promptly notify the Generator of the sums to be repaid and the Generator shall repay or procure the repayment of the relevant sums so notified to the DPA Counterparty or as the DPA Counterparty directs without delay.
- (b) The Generator shall, on reasonable notice, provide the DPA Counterparty with the information and assurances reasonably necessary to comply with the terms of any decision of a Subsidy Control Competent Authority or other Competent Authority



pursuant to the Subsidy Control Rules in relation to the Agreement and/or Dispatchable Power Agreements.]<sup>52</sup>

### 30.8 **No partnership**

Nothing in the Agreement and no action taken by the Parties under the Agreement shall constitute a partnership, joint venture or agency relationship between the Parties.

### 30.9 **DPA Counterparty contracting as principal**

- (a) The Generator acknowledges and agrees that the DPA Counterparty is contracting as principal and not on behalf of or as an agent for the Secretary of State or the Delivery Body and the Generator irrevocably and unconditionally agrees that:
- (i) it shall not have or bring any claim or action against the Secretary of State or the Delivery Body or the Representatives of the DPA Counterparty or the Delivery Body in respect of the Agreement;
  - (ii) nothing in the Agreement shall impute or impose any liability, duty, responsibility or obligation upon the DPA Counterparty (other than pursuant to and in accordance with the express terms of the Agreement); and
  - (iii) it shall not hold itself out as having any authority to act for or represent the DPA Counterparty in any way, nor act in any way which confers on the Generator any express, implied or apparent authority to incur any obligation or liability on behalf of the DPA Counterparty.
- (b) The Generator acknowledges and agrees that none of the DPA Counterparty, the Secretary of State or the Delivery Body is:
- (i) acting as a fiduciary of the Generator; or
  - (ii) advising the Generator as to any financial, legal, tax, investment, accounting or regulatory matters in any jurisdiction,

and shall not have any responsibility or liability to the Generator with respect thereto.

### 30.10 **Costs**

Except where otherwise expressly specified in the Agreement, each Party shall bear its own legal costs and other costs associated with the entry into the Agreement, including any costs incidental to the negotiation, preparation and execution of the Agreement.

### 30.11 **Counterparts**

The Agreement may be executed in any number of counterparts and by the Parties to it on separate counterparts, but shall not be effective until each Party has executed at least one counterpart. Each counterpart shall constitute an original but all of the counterparts together shall constitute one and the same instrument.

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<sup>52</sup> Note to Reader: This provision is subject to further review by BEIS including to ensure consistency, insofar as appropriate, with AR4 CfD drafting as it develops..

31. **GOVERNING LAW**

31.1 **Governing law**

The Agreement and any non-contractual obligations arising out of or in connection with it shall be governed by and construed in accordance with English law.

31.2 **Jurisdiction**

The Agreement, and any dispute or claim arising out of or in connection with it or its subject matter, existence, negotiation, validity, termination or enforceability (including non-contractual disputes or claims) shall be finally governed by the Dispute Resolution Procedure.

31.3 **Agent for service of process**

If the Generator is not incorporated within England or Wales and does not have, or ceases to have, a permanent place of business within England or Wales, it shall immediately irrevocably appoint an agent to accept service of process on its behalf within England or Wales.

32. **LANGUAGE**

32.1 **English language**

Unless otherwise agreed in writing by the DPA Counterparty, all information provided by the Generator under or in connection with the Agreement shall be in English.

32.2 **Translations**

In the case of any information which is translated into English, prior to its being delivered to the DPA Counterparty pursuant to the Agreement, the Generator shall ensure that any such translation is carried out (at the Generator's cost) by a recognised and appropriately qualified and skilled translation agent.

32.3 **Translation costs**

Any agreement by the DPA Counterparty under clause 32.1 (English language) may be given conditional upon an undertaking by the Generator to bear any costs or expenses incurred by the DPA Counterparty in translating the relevant information into English.

**SCHEDULE 1**

**The Facility**

*[Description of the Facility to be inserted]*

## **SCHEDULE 2**

### **Conditions Precedent**

#### **Part A Initial Conditions Precedent**

**1. Legal Opinion**

Delivery to the DPA Counterparty of a legal opinion addressed to the DPA Counterparty, in form and content satisfactory to the DPA Counterparty (acting reasonably), from the legal advisers to the Generator confirming that the Generator:

- (a) is duly formed and validly existing under the laws of the jurisdiction of formation; and
- (b) has the power to enter into and perform, and has taken all necessary action to authorise its entry into and performance of, the Agreement.

**2. KYC Documentation**

Delivery to the DPA Counterparty of evidence, in form and content satisfactory to the DPA Counterparty (acting reasonably) of compliance by the Generator with "know your customer" or similar identification procedures or checks under all applicable laws and regulations pursuant to the transactions contemplated by the Agreement.

**3. The Facility**

Delivery to the DPA Counterparty of the following:

- (a) a description of the Power Plant, in form and content satisfactory to the DPA Counterparty (acting reasonably), including:
  - (i) details of the assets comprising the Power Plant; and
  - (ii) an aerial view of the unique geographical location of the Power Plant, whether an extract from the Ordnance Survey map or equivalent, showing the proposed or existing locations of: (a) the Power Plant; (b) the Electricity Metering Equipment; (c) Gas Supply Metering Equipment; (d) the Electricity Delivery Points and (e) Gas Supply Points;
- (b) a description of the Capture Plant, in form and content satisfactory to the DPA Counterparty (acting reasonably), including:
  - (i) details of the assets comprising the Capture Plant;
  - (ii) an aerial view of the unique geographical location of the Capture Plant, whether an extract from the Ordnance Survey map or equivalent, showing the proposed locations of: (a) the Capture Plant; (b) the CO<sub>2</sub> Metering Equipment; and (c) the CO<sub>2</sub> Delivery Points; and
  - (iii) a process flow diagram of the Capture Plant, demonstrating that the Capture Plant will comply with the CO<sub>2</sub> Metering Specification.

**4. Key Project Documents**

Delivery to the DPA Counterparty of evidence, in form and content satisfactory to the DPA Counterparty, that the following documents have been entered into or obtained by the Generator:

- (a) a grid connection offer signed by the Generator and the Electricity Transmission System Operator;
- (b) a gas connection offer signed by the Generator and the Gas Licensed Transporter;
- (c) a T&S Connection Agreement signed by the Generator and the T&S Operator;
- (d) [a T&S Construction Agreement signed by the Generator and the T&S Operator]; and
- (e) applicable planning consents for Facility and associated infrastructure, with the challenge period having expired (or any challenge having been unsuccessful with no further rights of appeal).

5. **Other**

Delivery to the DPA Counterparty of evidence, in form and content satisfactory to the DPA Counterparty, of the following:

- (a) a declaration by the authorised person(s) of the Generator that the Facility will use eligible fuels, with a description of the fuels to be used;
- (b) the Generator's:
  - (i) Companies Register Certificate of Incorporation;
  - (ii) most recent Annual Return (where available); and
  - (iii) VAT Certificate of Registration;
- (c) a copy of the resolution of the Generator's board of directors approving the terms of and the transactions contemplated by this Agreement and resolving that it executes, delivers and performs the Agreement;
- (d) [a declaration by the authorised person(s) of the Generator that it is not in receipt of any other scheme of funding by a Government Entity; and]<sup>53</sup>
- (e) [*the supply chain requirements are being considered by BEIS*]<sup>54</sup>

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<sup>53</sup> Note to Reader: This provision is subject to further review by BEIS including to ensure consistency, insofar as appropriate, with AR4 CfD drafting as it develops.

<sup>54</sup> Note to Reader: Supply chain requirements are subject to further consideration by BEIS.

**Part B**  
**Operational Conditions Precedent**

**1. DPA Settlement Services Provider**

Delivery to the DPA Counterparty of the following written confirmation from the DPA Settlement Services Provider that:

- (a) it has received all information required by it relating to the terms of the Agreement prior to the Start Date; and
- (b) the Generator has in place the systems and processes which are necessary for the continued provision of the information required by it relating to the terms of the Agreement.

**2. Electricity Generation**

Delivery to the DPA Counterparty of the following:

- (a) evidence, in form and content satisfactory to the DPA Counterparty (acting reasonably) that a Net Dependable Capacity of not less than [*eighty five per cent. (85%)*] of the Net Dependable Capacity Estimate has been Commissioned;
- (b) evidence, in form and content satisfactory to the DPA Counterparty (acting reasonably) that the Generator is complying in full with the Electricity Metering Obligations at clause 18 (Generator's Undertakings: Metering);
- (c) a date and time stamped copy of the electrical schematic diagram, certified as being correct and up to date by a director or company secretary of the Generator and showing the locations of the Electricity Metering Equipment associated with all assets comprised within the Facility (including details of the type of Balancing and Settlement Code - approved metering installed in compliance with the Electricity Metering Obligations);
- (d) evidence, in form and content satisfactory to the DPA Counterparty (acting reasonably) that the Electricity Metering Equipment is fully compliant with the Balancing and Settlement Code;
- (e) the expected generation output data, in form and content satisfactory to the DPA Counterparty (acting reasonably) not to be delivered before delivery of the evidence referred to in clause 2(a); and
- (f) evidence, in form and content satisfactory to the DPA Counterparty (acting reasonably) that Start Up Times of not more than the Required Start Up Times have been Commissioned.

**3. CO<sub>2</sub> Capture**

Delivery to the DPA Counterparty of the following:

- (a) evidence, in form and content satisfactory to the DPA Counterparty (acting reasonably) that the Generator is complying in full with the CO<sub>2</sub> Metering Obligations at clause 18 (Generator's Undertakings: Metering);
- (b) evidence, in form and content satisfactory to the DPA Counterparty (acting reasonably) that the OCP Required CO<sub>2</sub> Capture Rate has been Commissioned;

- (c) evidence, in form and content satisfactory to the DPA Counterparty (acting reasonably) that the captured CO<sub>2</sub> from the Commissioned Facility complies with the Captured Carbon Dioxide Quality Standards;
- (d) a date and time stamped copy of the schematic diagram, certified as being correct and up to date by a director or company secretary of the Generator and showing the locations of the CO<sub>2</sub> Metering Equipment (including CO<sub>2</sub> Delivery Points) associated with all assets comprised within the Facility (including details of the type of metering and CO<sub>2</sub> Metering Equipment installed in compliance with the CO<sub>2</sub> Metering Obligation); and
- (e) evidence, in form and content satisfactory to the DPA Counterparty, that the Facility has connected to the T&S Network [to enable the export of CO<sub>2</sub> to the T&S Network in accordance with the CO<sub>2</sub> Flow Rate Estimate] and in accordance with the T&S Operator's compliance requirements ("**T&S Connection Confirmation**"), unless where: (i) the T&S Network is unavailable; and (ii) the Generator has completed the [necessary T&S Network connection works], this Operational Condition Precedent shall be temporarily waived by the DPA Counterparty until the T&S Network is available. Within [*a period to be determined*] of the Generator becoming aware that the T&S Network is available, the Generator shall provide the T&S Connection Confirmation within [*a period to be determined*].

4. **Gas Supply and Plant Efficiency**

Delivery to the DPA Counterparty of the following:

- (a) evidence, in form and content satisfactory to the DPA Counterparty (acting reasonably) that the Generator is complying in full with the Gas Supply Metering Obligations at clause 18 (Generator's Undertakings: Metering);
- (b) a date and time stamped copy of the schematic diagram, certified as being correct and up to date by a director or company secretary of the Generator and showing the locations of the Gas Supply Metering Equipment (including Gas Supply Points) associated with all assets comprised within the Facility (including details of the type of metering and Gas Supply Metering Equipment installed in compliance with the Gas Supply Metering Obligation); and
- (c) evidence, in form and content satisfactory to the DPA Counterparty (acting reasonably) that a Plant Net Efficiency of not less than [*ninety per cent. (90%)*] of the Plant Net Efficiency Estimate has been Commissioned.

5. **[Supply Chain**

[*the supply chain requirements are being considered by BEIS*]]<sup>55</sup>

6. **[Subsidy Declaration Operational CP**

Delivery to the DPA Counterparty of a written confirmation from the Generator, in form and content satisfactory to the DPA Counterparty (acting reasonably), that either:

- (a) no Subsidy has been received by the Generator or by any other person in relation to the costs of the Project (excluding the subsidy arising under the Agreement); or

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<sup>55</sup> Note to Reader: The inclusion and precise wording/operation of the supply chain OCP is subject to further review by BEIS.

- (b) Subsidy has been received by the Generator or by any other person in relation to the costs of the Project (excluding the subsidy arising under the Agreement), and that such Subsidy has been repaid to the granter of the subsidy in full.]<sup>56</sup>

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<sup>56</sup> Note to Reader: This provision is subject to further review by BEIS including to ensure consistency, insofar as appropriate, with AR4 CfD drafting as it develops.



## SCHEDULE 3

### Availability Payment Calculations

[Note to Reader: The following formulae are provisional and throughout 2021 BEIS will be testing and further developing such formulae as required]

#### 1. DEFINITIONS: AVAILABILITY PAYMENT CALCULATIONS

In this Schedule 3 (Availability Payment Calculations):

**"Achieved CO<sub>2</sub> Capture Rate"** means the CO<sub>2</sub> capture rate (*expressed as a percentage (%)*) for the Facility during the relevant AP Billing Period calculated in accordance with paragraph 3 (Calculation of Supporting Formulae) of this schedule or as calculated by the DPA Counterparty in accordance with clauses 9.2(b) and 9.2(c);

**"AP Metered CO<sub>2</sub> Output"**<sup>57</sup> means the mass quantity of CO<sub>2</sub> (*expressed in tCO<sub>2</sub>*) entering the T&S Network as measured at the CO<sub>2</sub> Delivery Point(s) during the relevant AP Billing Period;

**"AP Calculated CO<sub>2</sub> Generated"** means the mass quantity of CO<sub>2</sub> (*expressed in tCO<sub>2</sub>*) generated by the Facility, based upon the AP Total Metered Fuel Consumption and AP Fuel Composition during the AP Billing Period, converted to an equivalent mass quantity of CO<sub>2</sub> based upon an oxidation factor of 1.0 as per the guidelines set out in "Joint Environmental Programme, Guidance for the Monitoring and Reporting of CO<sub>2</sub> Emissions from Power Stations, EUETS Phase 2";

**"AP Calculated CO<sub>2</sub> Generated with T&S Outage"** means the mass quantity of CO<sub>2</sub> (*expressed in tCO<sub>2</sub>*) generated by the Facility, based upon the AP Total Metered Fuel Consumption and AP Fuel Composition during periods of T&S Outage Events over the AP Billing Period converted to an equivalent mass quantity of CO<sub>2</sub> based upon an oxidation factor of 1.0 as per the guidelines in "Joint Environmental Programme, Guidance for the Monitoring and Reporting of CO<sub>2</sub> Emissions from Power Stations, EUETS Phase 2";

**"AP Fuel Composition"** means the composition of the fuel used by the Facility, as measured at the Gas Supply Point(s), during the relevant AP Billing Period;

**"AP Total Metered Fuel Consumption"** means the aggregate metered fuel consumption of the Facility as measured at the Gas Supply Point(s) during the relevant AP Billing Period.

**"Availability of Capture"** means the CO<sub>2</sub> capture rate (*expressed as a percentage (%)*) during the relevant AP Billing Period, based on the Achieved CO<sub>2</sub> Capture Rate and Deemed CO<sub>2</sub> Capture Rate, calculated in accordance paragraph 3 (Calculation of Supporting Formulae) of this schedule;

**"Availability of Generation"** means the generation availability of the Facility (*expressed as a percentage (%)*) during the relevant AP Billing Period, calculated in accordance paragraph 3 (Calculation of Supporting Formulae) of this schedule;

**"Availability Payment Rate"** means [*to be agreed between the Generator and the DPA Counterparty*] (*expressed in £/MWh*), as adjusted pursuant to clause 10.9 (Indexation);

**"Deemed CO<sub>2</sub> Capture Rate"** means the CO<sub>2</sub> capture rate (*expressed as a percentage (%)*) for any AP Settlement Unit determined pursuant to clause 10.5 (Deemed CO<sub>2</sub> Capture

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<sup>57</sup> Note to Reader: BEIS' expectation is that captured CO<sub>2</sub> which fails to comply with the Captured Carbon Dioxide Quality Standards will not be exported to the T&S Network through the valve equipment at the CO<sub>2</sub> Delivery Point(s), and will therefore not be considered to be "Metered CO<sub>2</sub> Output".

Rate) or subsequently verified through a CO<sub>2</sub> Capacity Test that is undertaken pursuant to clause 10.5 or clause 10.6(c);

**"Net Available Capacity"** means, subject to clause 10.6(a) (Outage Relief Events), the declared available capacity (*expressed in MW*) of the Facility by the Generator in relation to any Power Plant Outage Event during the AP Billing Period;

**"Net Dependable Capacity"** means the net generating capacity (*expressed in MW*) of the Facility on a continuous and reliable basis available at the Electricity Delivery Point(s), at Reference Site Conditions, with the Capture Plant operating simultaneously at (where applicable): (i) the OCP Required CO<sub>2</sub> Capture Rate, as demonstrated by the OCP Acceptance Test; (ii) the Required CO<sub>2</sub> Capture Rate, as demonstrated by the Longstop Date Acceptance Test; or (iii) the Required CO<sub>2</sub> Capture Rate, as demonstrated by the Annual NDC Test. For the purposes of the Availability payment, the Net Dependable Capacity shall be the lower of: (A) the net generating capacity demonstrated at the relevant Test; or (B) the Net Dependable Capacity Estimate;

**"Power Plant Outage Event Duration"** means the duration (*expressed in hours*) of a Power Plant Outage Event for the relevant AP Settlement Unit; and

**"T&S Capacity Fee"** means any transmission and storage capacity fee for captured CO<sub>2</sub> (*expressed in £*) payable in accordance with the T&S Connection Agreement<sup>58</sup>, during the relevant AP Billing Period.

## 2. CALCULATION OF AVAILABILITY PAYMENT

The Availability Payment shall, subject to and in accordance with clause 10 (Availability Payment), be calculated for each AP Billing Period in accordance with the following formula:

$$AP = \sum (AG_i \times AC_i \times NDC \times APR_i) + TSCF$$

where:

AP	=	Availability Payment in AP Billing Period (£)
AG <sub>i</sub>	=	Availability of Generation (%) during an AP Settlement Unit (i)
AC <sub>i</sub>	=	Availability of Capture (%) during an AP Settlement Unit (i)
APR <sub>i</sub>	=	Availability Payment Rate (£/MW) during an AP Settlement Unit (i)
TSCF	=	T&S Capacity Fee (£)
NDC	=	Net Dependable Capacity (MW)

## 3. CALCULATION OF SUPPORTING FORMULAE

### 3.1 Calculation of Availability of Generation

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<sup>58</sup> Note to Reader: The T&S Capacity Fee payable by the Generator under the T&S Connection Agreement is likely to be indexed to the fee that will be verified by the T&S regulator. Please refer to the discussion in Section 3 of the December 2020 Update.

The formulae for calculating the Availability of Generation ( $AG_i$ ) for each AP Settlement Unit is:

- (a) with no Power Plant Outage Event occurring during the AP Settlement Unit is as follows:

$$AG_i = 1$$

- (b) with a Power Plant Outage Relief Event occurring during the AP Settlement Unit is as follows:

$$AG_i = 1$$

- (c) with a Power Plant Outage Event either starting, continuing or ending during the AP Settlement Unit is as follows:

$$AG_i = AG_{OE_n} = 1 - \frac{\sum ((NAC_{OE_n} - NAC_j) \times \Delta T_j)}{NAC_{OE_n} \times \Delta T_{Settlement Units}}$$

where:

$AG_{OE_n}$	=	Availability of Generation during Power Plant Outage Event $n$ (%)
$NAC_{OE_n}$	=	Net Available Capacity immediately preceding the Power Plant Outage Event ( $MW$ )
$NAC_j$	=	Net Available Capacity during time segment $j$ ( $MW$ )
$\Delta T_j$	=	Duration of time segment $j$ of the relevant outage event ( $hours$ )
$\Delta T_{Settlement Units}$	=	Power Plant Outage Event Duration ( $hours$ )

### 3.2 Calculation of the Availability of Capture

The formula for calculating the Availability of Capture ( $AC_i$ ) for each AP Settlement Unit:

- (a) with a Capture Plant Outage Relief Event occurring during the AP Settlement Unit is as follows:

$$AC_i = DCR_i$$

where:

$AC_i$	=	Availability of Capture (%)
$DCR_i$	=	Deemed CO <sub>2</sub> Capture Rate (%)

- (b) with: (i) no Capture Plant Outage Relief Event occurring during the AP Settlement Unit; and (ii) Metered Electricity Output equal or less than zero (0), is as follows:

$$AC_i = DCR_i$$

where:

AC = Availability of Capture (%)  
 DCR<sub>i</sub> = Deemed CO<sub>2</sub> Capture Rate (%)

(c) with: (i) no Capture Plant Outage Relief Event occurring during the AP Settlement;  
 and (ii) Metered Electricity Output more than zero (0), is as follows:

$$AC_i = ACR_{ph}$$

The formula for calculating the Achieved CO<sub>2</sub> Capture Rate (ACR<sub>ph</sub>) is as follows:

$$ACR_{ph} = \frac{CO2_{exp}}{CO2_{gen} - CO2_{gen\_TS}}$$

where:

ACR<sub>ph</sub> = Achieved CO<sub>2</sub> Capture Rate (%)  
 CO<sub>2</sub><sub>exp</sub> = AP Metered CO<sub>2</sub> Output (tCO<sub>2</sub>)  
 CO<sub>2</sub><sub>gen</sub> = AP Calculated CO<sub>2</sub> Generated (tCO<sub>2</sub>)  
 CO<sub>2</sub><sub>gen\_TS</sub> = AP Calculated CO<sub>2</sub> Generated with T&S Outage (tCO<sub>2</sub>)

## SCHEDULE 4

### Variable Payment Calculations

[Note to Reader: The formula(s) are provisional and throughout 2021 BEIS will be testing and further developing the formulas as required]

#### 1. DEFINITIONS: VARIABLE PAYMENT CALCULATIONS

In this Schedule 4 (Variable Payment Calculations):

**"Carbon Price"** means the carbon price (*expressed in £/tCO<sub>2</sub>*) calculated in accordance with clause 11.4 (Carbon Price);

**"CO<sub>2</sub> Cost Differential"** means the CO<sub>2</sub> cost differential in respect of the Facility calculated in accordance with paragraph 3.2 (CO<sub>2</sub> Cost Differential) of this schedule (*expressed in £/MWh*);

**"Gas Cost Differential"** means the gas cost differential in respect of the Facility calculated in accordance with paragraph 3.1 (Gas Cost Differential) of this schedule (*expressed in £/MWh*);

**"Gas Price"** means the gas price (*expressed in pence/therm*) calculated in accordance with clause 11.3 (Gas Price);

**"Metered Day Electricity Output"** means in the VP Billing Period, the Loss Adjusted Metered Electricity Output (*expressed in MWh*) as reported by a BSC Company or BSC Agent to the DPA Counterparty, and as adjusted to not take into account the Loss Adjusted Metered Electricity Output during a Full Capture Plant Outage Event and/or a Full T&S Outage Event;

**"Other Extra Variable Costs"** means the additional operational costs attributable to the Facility [*to be agreed between the Generator and the DPA Counterparty*] (*expressed in £/MWh*), as adjusted pursuant to clause 11.5 (Adjustments);

**"Power Plant CO<sub>2</sub> Emissions"** means the Facility's CO<sub>2</sub> emissions (*expressed in tCO<sub>2</sub>/MWh*), at Reference Site Conditions, [*to be agreed between the Generator and the DPA Counterparty*];

**"Power Plant Gas Consumption"** means the Facility's gas consumptions (*expressed in therms/MWh*), at Reference Site Conditions, [*to be agreed between the Generator and the DPA Counterparty*];

**"Reference Plant"** means a hypothetical reference competing unabated power project operating at the Reference Site Conditions;

**"Reference Plant CO<sub>2</sub> Emissions"** means the Reference Plant's CO<sub>2</sub> emissions (*expressed in tCO<sub>2</sub>/MWh*), at Reference Site Conditions, [*to be determined by the DPA Counterparty*] and subject to adjustments by the DPA Counterparty pursuant to the Reference Plant Review<sup>59</sup>;

**"Reference Plant Gas Consumption"** means the Reference Plant's gas consumption (*expressed in therms/MWh*), at Reference Site Conditions, [*to be determined by the DPA*]

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<sup>59</sup>

Note to Reader: Please refer to the discussion of this Reference Plant assumption in the May 2021 Update.

Counterparty], and subject to adjustment by the DPA Counterparty pursuant to the Reference Plant Review<sup>60</sup>;

**"Reference Site Conditions"** means the reference site conditions detailed in paragraph 3.4 (Reference Site Conditions) of this schedule;

**"T&S Volumetric Fee"** means any volumetric transmission and storage fee (*expressed in £/tCO<sub>2</sub>*) for captured CO<sub>2</sub> payable in accordance with the T&S Connection Agreement<sup>61</sup>;

**"T&S Volumetric Payment Rate"** means the volumetric transmission and storage payment in respect of the Facility calculated in accordance with paragraph 3.3 (T&S Volumetric Payment Rate) of this schedule (*expressed in £/MWh*);

**"Variable Payment Rate"** means the payment rate calculated in accordance with paragraph 2 (Calculation of Variable Payment) of this schedule (*expressed in £/MWh*); and

**"VP Metered CO<sub>2</sub> Output"**<sup>62</sup> means the mass quantity of CO<sub>2</sub> (*expressed in tCO<sub>2</sub>*) entering the T&S Network as measured at the CO<sub>2</sub> Delivery Point(s) during the relevant VP Billing Period;

## 2. CALCULATION OF VARIABLE PAYMENT

The Variable Payment shall, subject to and in accordance with clause 11 (Variable Payment), be calculated for each VP Billing Period in accordance with the following formula:

$$VP = VPR \times MWh$$

$$VPR = GC + CC + OC + TSVPR$$

where:

VP	=	Variable Payment in the VP Billing Period (£)
VPR	=	Variable Payment Rate (£/MWh)
MWh	=	Metered Day Electricity Output (MWh)
GC	=	Gas Cost Differential (£/MWh)
CC	=	CO <sub>2</sub> Cost Differential (£/MWh)
OC	=	Other Extra Variable Costs (£/MWh)
TSVPR	=	T&S Volumetric Payment Rate (£/MWh)

## 3. CALCULATION OF SUPPORTING FORMULAE

### 3.1 Gas Cost Differential

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<sup>60</sup> Note to Reader: Please refer to the discussion of this Reference Plant assumption in the May 2021 Update

<sup>61</sup> Note to Reader: The T&S Volumetric Fee payable by the Generator under the T&S Connection Agreement is likely to be indexed to the fee that will be verified by the T&S regulator. Please refer to the discussion in Section 3 of the December 2020 Update.

<sup>62</sup> Note to Reader: BEIS' expectation is that captured CO<sub>2</sub> which fails to comply with the Captured Carbon Dioxide Quality Standards will not be exported to the T&S Network through the valve equipment at the CO<sub>2</sub> Delivery Point(s), and will therefore not be considered to be "Metered CO<sub>2</sub> Output".

(a) The formula for calculating the Gas Cost Differential (GC) is as follows:

$$GC = \frac{GP}{100} \times (GU_{CCUS} - GU_{Ref})$$

where:

GC	=	Gas Cost Differential (£/MWh)
GP	=	Gas Price (pence/therm)
GU <sub>Ref</sub>	=	Reference Plant Gas Consumption (therms/MWh)
GU <sub>ccus</sub>	=	Power Plant Gas Consumption (therms/MWh)

### 3.2 CO<sub>2</sub> Cost Differential

(a) The formula for calculating CO<sub>2</sub> Cost Differential (CC) is as follows:

$$CC = CP \times (CO2E_{CCUS} - CO2E_{Ref})$$

where:

CC	=	CO <sub>2</sub> Cost Differential (£/MWh)
CP	=	Carbon Price (£/tCO <sub>2</sub> )
CO2E <sub>Ref</sub>	=	Reference Plant CO <sub>2</sub> Emissions (tCO <sub>2</sub> /MWh)
CO2E <sub>ccus</sub>	=	Power Plant CO <sub>2</sub> Emissions (tCO <sub>2</sub> /MWh)

### 3.3 T&S Volumetric Payment Rate

(a) The formula for calculating the T&S Volumetric Payment Rate (TSVPR) is as follows:

$$TSVPR = TSVF \times \frac{CO2_{exp}}{MWh}$$

where:

TSVPR	=	T&S Volumetric Payment Rate (£/MWh)
TSVF	=	T&S Volumetric Fee (£/tCO <sub>2</sub> )
CO2 <sub>exp</sub>	=	VP Metered CO <sub>2</sub> Output (tCO <sub>2</sub> )
MWh	=	Metered Day Electricity Output

### 3.4 Reference Site Conditions

The Reference Site Conditions are as follows:

[The Reference Site Conditions are to be determined]

## SCHEDULE 5

### Calculation of Termination Amounts

#### 1. DEFAULT TERMINATION PAYMENT

- 1.1 The "**Default Termination Payment**" shall, subject to clause 5.3 (Consequences of Default termination and termination for a Prolonged Minimum CO<sub>2</sub> Capture Rate Breach), be calculated in accordance with the following formula:

$$\textit{Default Termination Payment} = \textit{NDCE} \times \textit{TFR}$$

where:

NDCE	=	Net Dependable Capacity Estimate ( <i>MW</i> )
TFR	=	Termination Fee Rate ( <i>£/MW</i> ) set out below in paragraph 1.2

- 1.2 In the event the DPA Counterparty exercises its right to terminate the Agreement under clause 3.4 (Default termination) or clause 3.6 (Termination for a Prolonged Minimum CO<sub>2</sub> Capture Rate Breach) the Termination Fee Rate shall be [*£35,000*].
- 1.3 The Generator shall not be liable to pay more than one Default Termination Payment.



**SCHEDULE 6**

**Metering Points**

*[Description of the Electricity Delivery Points, CO<sub>2</sub> Delivery Points and Gas Supply Points to be inserted.]*

**SCHEDULE 7**

**CO<sub>2</sub> Metering Specification**

*[Description of CO<sub>2</sub> Metering Specification and Captured Carbon Dioxide Quality Standards to be inserted.]*

## SCHEDULE 8

### Project Commitments

Delivery to the DPA Counterparty of the following:

- (a) a copy of a resolution of the Generator's board of directors (or an equivalent management committee or body) to:
  - (i) undertake the Project;
  - (ii) approve the total financial commitments required to commission the Project (the "**Total Project Spend**"); and
  - (iii) approve a timetable for undertaking the Project which demonstrates that the Facility can reasonably be expected to be Commissioned no later than the Longstop Date;
- (b) a Directors' Certificate certifying that:
  - (i) the Generator has, or will have, sufficient financial resources to meet the Total Project Spend;
  - (ii) any contract entered into and provided as Supporting Information pursuant to the Milestone Requirement Notice, in the reasonable opinion of the Generator by reference to the facts and circumstances then existing, is:
    - (A) legal, valid and binding; and
    - (B) entered into with one or more counterparties who are each able to perform their obligations under such contract;
  - (iii) the Generator has a leasehold or freehold interest in the site where the Facility is based (the "**Facility Site**") or a contract to obtain the same;
  - (iv) the Facility Site is not subject to any covenants, restrictions, agreements, planning obligations, estate contracts, options, rights of way or other encumbrances which materially inhibit the use of the Facility Site for the purposes of the Project;
  - (v) there are available to the Facility Site such rights, easements and services as are necessary to undertake the Project and operate the Facility;
  - (vi) the Generator has identified all necessary consents to undertake the Project (the "**Necessary Consents**"); and
  - (vii) there is a credible strategy in place to obtain the Necessary Consents and the Necessary Consents are not subject to any condition for which there does not exist a plan to satisfy that condition, such that the Generator is not aware of any necessary consents and planning permissions which cannot be obtained or complied with,

((iii) to (vii), together the "**Facility Requirements**");
- (c) Supporting Information evidencing (i) that the Generator has, or will have, sufficient financial resources to meet the Total Project Spend and (ii) the Facility Requirements;
- (d) Supporting Information evidencing the following:

- (i) entry by the Generator into an engineering, procurement and construction contract for the Facility, providing for the supply and installation of the Material Equipment.
- (ii) entry by the Generator into an agreement for the supply of the Material Equipment.
- (iii) entry by the Generator into: (i) a framework agreement for the supply of the Material Equipment; and (ii) a binding purchase order for the Material Equipment.

For the purpose of this schedule, the following definition shall apply to this Agreement:

**"Material Equipment"** means such equipment, which, acting in accordance with a Reasonable and Prudent Standard, the Generator could reasonably be expected to have ordered and/or concluded a supply agreement in respect of the start of the Target Commissioning Window, and in any event, such equipment shall include:

*Power Plant Items*

- (i) gas turbine and generator;
- (ii) heat recovery steam generator (boiler);
- (iii) steam turbine and generator;
- (iv) gas turbine / steam turbine step-up (HV) transformers;
- (v) unit transformers;

*Capture Plant Items*

- (vi) absorber column;
- (vii) stripper column; and
- (viii) CO<sub>2</sub> compressors.

## SCHEDULE 9

### Review Procedures

1. **Reference Plant**

*[The review procedure of the Reference Plant and Base Performance Assumptions are to be developed]*<sup>63</sup>

2. **Gas Reference Price**

*[The review procedure of the Gas Reference Price is to be developed]*<sup>64</sup>

3. **Carbon Reference Price**

*[The review procedure of the Carbon Reference Price is to be developed]*<sup>65</sup>

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<sup>63</sup> Note to Reader: The DPA Counterparty will review and update the Reference Plant definition across all DPA recipients no more frequently than every 5 years, starting in 2027, to ensure that the Reference Plant definition accurately reflects the best available CCGT technology on the system at the time of review Please refer to the discussion of this in the October 2021 Update.

<sup>64</sup> Note to Reader: Please refer to the discussion of this in the October 2021 Update.

<sup>65</sup> Note to Reader: Please refer to the discussion of this in the October 2021 Update.

## ANNEX 3



Department for  
Business, Energy  
& Industrial Strategy

# Carbon Capture, Usage and Storage

An Update on the Dispatchable Power Agreement Business Model

October 2021



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# Disclaimer

This update sets out further details on the government's current proposals on the potential business model for power plants with Carbon Capture Usage and Storage (CCUS). The proposals, as set out in this document, and the updated provisional Dispatchable Power Agreement Heads of Terms (DPA HoTs) published simultaneously as Annex A, in whatever form they are expressed, are indicative only and do not constitute an offer by government and do not create a basis for any form of expectation or reliance.

The proposed terms, in this document and the DPA HoTs, are not final and are subject to further development by the government, and approval by Ministers, in consultation with relevant regulators and the devolved administrations, as well as the development and Parliamentary approval of any necessary legislative amendments, and completion of necessary contractual documentation. We reserve the right to review and amend all provisions within the document and its Annexes, for any reason and in particular to ensure that proposals are consistent with any new subsidy control regime.

This update takes into account engagement that has taken place since publication of the Dispatchable Power Agreement (DPA) Business Models update in May 2021. This includes engagement with the Power CCUS Expert Group, project developers, and relevant regulators, stakeholders and the DPA Counterparty. BEIS will continue such engagement as it works to refine its proposals, including engagement with the devolved administrations, to ensure that the proposed policies take account of devolved responsibilities and policies across the UK.

# Introduction

In December 2020, we published an update on the DPA model followed by a further update in May 2021. The purpose of this document, which should be read in conjunction with the December and May publications and the updated DPA HoTs published alongside this document (which replace the draft Heads of Terms published in December 2020), is to set out further details and updates regarding the DPA model, reflecting work undertaken since May 2021 and feedback we have received to date.

The key objectives for the DPA were set out in the December 2020 and May 2021 updates and are reiterated below:

## **Provide sufficient investor confidence**

It is important to balance the inherent uncertainty of a dispatchable role with the need for power CCUS to be an investable proposition. The design of the DPA availability payment mechanism forms a basis for a level of revenue certainty, but investors will need to consider the revenues which they can make from the wholesale electricity market and other markets such as those for balancing and ancillary services when building a business case. The DPA is designed to ensure the investment proposition remains without removing the incentives of the CCUS project to participate efficiently in existing markets.

## **Incentivise the plant to react to the wholesale electricity market**

By providing availability payments which are decoupled from dispatch, the plant should be incentivised to react to market prices and provide dispatchable output without incentivising the power CCUS project to generate at all times, which would displace lower-cost and lower-carbon sources of generation such as renewables and nuclear. The flexibility of power CCUS projects should allow them to complement the intermittency of renewables by outputting the level of power needed to meet changes in electricity demand, whilst still capturing emissions from generation.

## **Displace comparable unabated generation and react to carbon prices**

The variable payment is designed to be sufficient to ensure that a power CCUS project dispatches ahead of the unabated equivalent reference plant by accounting for the difference in costs arising from installing and operating carbon capture equipment. Incentivising power CCUS plants to displace higher carbon alternatives will maximise the contribution of these plants to electricity system decarbonisation. The level of the payment should be reactive to carbon prices and power plant costs, meaning that it is only paid when necessary.

## **Ensure affordability and value for money for consumers**

Costs of the DPA will be recovered from consumers. This means that any spend should be efficient and look to deliver value for money for consumers through minimising unit costs, maximising competition and reducing barriers to entry.

We will continue to engage extensively with prospective developers and wider stakeholders in 2021 to test and further develop the business model design outlined in this document. Our

objective is to create frameworks which deliver on our deployment ambitions and create a sustainable market for CCUS infrastructure and capture services.

This document is being published alongside an update to the Industrial Carbon Capture (ICC) business model and the provisional Heads of Terms for the ICC Contract.

# Legal and Contractual Framework

We set out below our updated thinking on the key commercial, legal and structural principles for the DPA, a private law, commercial contract between the Generator and the DPA Counterparty which will be the Low Carbon Contracts Company Ltd, to be entered into pursuant to powers provided in section 10 Energy Act 2013. As outlined in the December 2020 update, the DPA will be the key tool used to encourage low carbon electricity generation by bringing forward investment in power CCUS plants initially in GB where there is an existing Contract for Difference (CfD) regime, but potentially across the UK, and to incentivise such facilities to operate in dispatchable mode at the appropriate place in the merit order.

Unless stated otherwise in this section, terms not defined in this section will have the same meaning given to them in the DPA HoTs.

## Term length

In the May 2021 update we proposed that the DPA should have a 15 year contract term for new build power CCUS plants, and that we expected a shorter DPA term was likely to be appropriate for retrofit projects. This was to reflect that retrofit projects could have lower capital costs and a shorter remaining asset life.

Following feedback from stakeholders and further consideration, we are now proposing that all projects, regardless of whether they are new build, repowered or retrofit, will have flexibility to choose an appropriate term length that is between 10 and 15 years.

The intention is to provide flexibility across a range of different approaches to implementing power CCUS whilst also facilitating competitive pricing and term lengths that are proportionate to the remaining operational life of each respective project. We consider that individual projects are best placed to determine the length of contract that will help secure investment and offer the best support for their route to market over the lifetime of the Facility, while minimising both the total and annual cost to consumers. We would expect any applicant to be able to justify the rationale for any term length that it proposed as part of the application process.

A term length between 10 and 15 years offers both an investible proposition and value for money for consumers. While longer contracts may help to provide greater investment certainty and may serve to lower annual costs to consumers, shorter contracts are likely to provide a lower overall cost to consumers across the term of the DPA. Longer contracts additionally provide greater certainty of generation capacity for the government. We consider that a term length of between 10 and 15 years strikes an effective balance between these competing considerations and offers flexibility to account for the full range of potential power CCUS projects.

## Conditions Precedent

### Minimum OCP and Longstop Date Commissioning Requirements

In the May 2021 update we outlined that the proposed durations for the Target Commissioning Window and Longstop Period are each 12 months. A Generator will need to satisfy a set of Operational Conditions Precedent (OCP) by the end of the Target Commissioning Window for payments under the DPA to commence. The Operational Conditions Precedent will include OCP Acceptance Test minimum thresholds for the Facility's Net Dependable Capacity, CO<sub>2</sub> Capture Rate, Plant Net Efficiency and Start Up Time.

If the Operational Conditions Precedent are satisfied after the expiry of the Target Commissioning Window, but before the Longstop Date, payments will still commence, but the DPA contract term will begin to run (and so will be eroded) from the end of the Target Commissioning Window, with payments not commencing until the Operational Conditions Precedent are satisfied. The DPA Counterparty will have the right to terminate the DPA if the Operational Conditions Precedent are not satisfied by the Longstop Date<sup>1</sup>.

The Generator will also need to complete Longstop Date Acceptance Tests by the Longstop Date, demonstrating the Facility's Net Dependable Capacity, CO<sub>2</sub> Capture Rate, Plant Net Efficiency, and Start Up Time. These acceptance tests will have minimum thresholds that are equal to or higher than (as applicable) the OCP Acceptance Test thresholds (although they can be carried out at the same time as the OCP Acceptance Tests) and will have termination rights associated with them.

The paragraphs and table below set out the respective thresholds for both the OCP Acceptance Tests and the Longstop Date Acceptance Tests.

#### **NDC**

A Facility will be required to achieve:

- **85%** of their Net Dependable Capacity Estimate to satisfy the relevant OCP Acceptance Test; and
- **90%** of their Net Dependable Capacity Estimate to satisfy the relevant Longstop Date Acceptance Test.

#### **CO<sub>2</sub> Capture Rate**

A Facility will be required to achieve a CO<sub>2</sub> Capture rate of no less than:

- the 'OCP Required CO<sub>2</sub> Capture Rate', which is the higher of i) **10 percentage points** below their CO<sub>2</sub> Capture Rate Estimate and ii) **80%** to satisfy the relevant OCP Acceptance Test; and
- the 'Required CO<sub>2</sub> Capture Rate', which is the higher of i) **5 percentage points** below their CO<sub>2</sub> Capture Rate Estimate and ii) **85%** to satisfy the relevant Longstop Date Acceptance Test.

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<sup>1</sup> **Note to Reader:** Further details are provided in the May 2021 Update in the section 'Target Commissioning Window'.

These floors of 80% and 85% are designed to reflect the fact that projects must have a CO<sub>2</sub> Capture Rate Estimate of at least 90%.

### Plant Net Efficiency

A Facility will be required to achieve a Plant Net Efficiency of:

- **90%** of their Plant Net Efficiency Estimate to satisfy the relevant OCP Acceptance Test; and
- **95%** of their Plant Net Efficiency Estimate to satisfy the relevant Longstop Date Acceptance Test.

### Start Up Times

A Facility will be required to start up and reach full load within:

- **125%** of their Start Up Time Estimates to satisfy the relevant OCP Acceptance Test; and
- **125%** of their Start Up Time Estimates to satisfy the relevant Longstop Date Acceptance Test.

Start Up Times will be tested during the Start Up/Shutdown Tests for cold, warm and hot starts. During these tests, the Facility must also achieve the OCP Required CO<sub>2</sub> Capture Rate at the OCP stage and the Required CO<sub>2</sub> Capture Rate at the Longstop Date stage.

### Correction Curves

CO<sub>2</sub> Capture Rates will be tested concurrently with Net Dependable Capacity and Plant Net Efficiency during both the OCP Acceptance Tests, and Longstop Date Acceptance Tests. This is necessary as both Net Dependable Capacity and Plant Net Efficiency need to be recorded at reference site conditions with the Capture Plant operating simultaneously at the OCP Required CO<sub>2</sub> Capture Rate and Required CO<sub>2</sub> Capture Rate set out above. Correction curves will be used to adjust the Net Dependable Capacity and Plant Net Efficiency test results to the reference site conditions (including any adjustment required to account for differences between the CO<sub>2</sub> Capture Rates achieved during the relevant tests and the OCP Required CO<sub>2</sub> Capture Rate and Required CO<sub>2</sub> Capture Rate set out above).

Criteria	Operational Conditions Precedent Acceptance Test Threshold	Longstop Date Acceptance Test Threshold
Net Dependable Capacity	85% of Net Dependable Capacity Estimate	90% of Net Dependable Capacity Estimate
CO <sub>2</sub> Capture Rate	-10 percentage points compared to CO <sub>2</sub> Capture Rate Estimate (with floor of 80%)	-5 percentage points compared to CO <sub>2</sub> Capture Rate Estimate (with floor of 85%)



Plant Net Efficiency	90% of Plant Net Efficiency Estimate	95% of Plant Net Efficiency Estimate
Start Up Times	125% of Start Up Time Estimates	125% of Start Up Time Estimates

**Table 1: Table summarising the minimum commissioning requirements for a power CCUS plant**

## Milestone Requirement

In line with AR4 CfD requirements, the Generator will be required to demonstrate either i) an actual spend of 10% of Total Project Pre-Commissioning Costs, or ii) the satisfaction of specified ‘Project Commitments’, by the Milestone Delivery Date to satisfy the Milestone Requirement.

The definition of the Total Project Pre-Commissioning Costs is still under development and will be updated in due course.

## Project Commitments

In the December 2020 update we set out that the project commitments contained within the DPA would be in line with the AR3 CfD and were to deter speculative or underdeveloped projects from applying for a DPA.

As part of these project commitments, we require projects to provide supporting evidence which shows that they have entered into commercially binding agreements to acquire the necessary ‘Material Equipment’ to deliver the project on time. Valid agreements such as engineering, procurement, and construction (EPC) contracts, direct supply agreements, or frameworks agreements with binding purchase orders would be acceptable supporting evidence.

We propose that to meet the definition of ‘Material Equipment’, an agreed list of equipment must meet the following requirements:

- key items on the construction programme’s critical path must be included;
- any long lead items that should reasonably be expected to be procured by the Milestone Delivery Date so that the Facility can be commissioned by the start of the Target Commissioning Window must be included; and
- such items must be of sufficient value to give confidence to the DPA Counterparty that the developer is financially committed to the project.

For example, it is expected that for a CCGT with post combustion capture, the list of equipment will include at a minimum:

- Gas Turbine and Generator (GTG)
- Heat Recovery Steam Generator (HRSG)
- Steam Turbine and Generator

- Gas Turbine / Steam Turbine Step-up (HV) transformers
- Unit transformers
- Absorber column
- Stripper column
- CO<sub>2</sub> Compressors

The relevant list of Material Equipment for other power CCUS technologies may include different equipment items.

### **Milestone Delivery Date**

The Milestone Delivery Date is the date which falls 18 months after the signature of the DPA. In line with the AR4 CfD, this 18 month period will be capable of a day-for-day extension for Force Majeure (subject to satisfying certain Force Majeure extension conditions which are summarised in the DPA HoTs and subject to the Termination for Prolonged Force Majeure provisions as detailed below) or by failure of the Transmission Network Operator or Distribution Network Operator to provide connections or to reinforce the network.

In addition, given the characteristics of power CCUS plants, under the DPA additional extensions to the Milestone Delivery Date could result from failure of a Gas Licenced Transporter to provide connections to or reinforce the gas network, or failure of a T&S Operator to make the relevant T&S Network available in a timely fashion.

## Changes to NDC

### **Permitted Reductions**

We are minded to allow a Generator to make permitted reductions to their agreed Initial Net Dependable Capacity Estimate under the DPA of up to 10% prior to the Milestone Delivery Date (a 'Permitted Reduction'). We consider that this may mitigate early design uncertainty for FOAK projects, striking a balance between providing sufficient flexibility to the Generator to allow project design to be altered, while also providing certainty for government that sufficient low carbon capacity will be delivered. We do not consider it necessary to match the 25% permitted reductions under the renewable CfD as power CCUS plants should not have the same level of construction risk and modularity as an offshore wind project and there is no history of thermal projects requiring permitted reductions of this size in the CfD portfolio.

### **NDC Cap**

The value of the Net Dependable Capacity used to calculate Availability Payments under the DPA will be set by the latest NDC measured during OCP Acceptance Tests, Longstop Date Acceptance Tests, or each year's annual NDC test (the 'Annual NDC Test'), which in any event will be subject to a cap equal to the Net Dependable Capacity Estimate (as such estimate is reduced by any Permitted Reduction made before the Milestone Delivery Date). In addition, the number of MWh of generation to which Variable Payments will be applied will be capped for every half hour period of generation by reference to the Net Dependable Capacity Estimate. This ensures that there is proportionate budgetary control in the allocation and application of DPAs.

## Economic Benefits

In the December 2020 update we noted that we considered that eligibility criteria for the DPA would include submission of a supply chain plan. We also included wording in the provisional Heads of Terms published in December, noting that the supply chain OCP was subject to further review by HMG. We are continuing to consider what requirements are appropriate under the DPA for supply chain plans and to facilitate demonstration of economic benefits and will include any such proposals in a future update.

## Testing

A combination of Full Load Tests and Start Up/Shut Down Tests that follow established international plant performance testing standards will be required to demonstrate that minimum performance levels have been achieved during OCP Acceptance Tests and Longstop Date Acceptance Tests.

### Full Load Tests

Net Dependable Capacity, Plant Net Efficiency and Capture Rate will be measured during the Full Load Test. The Full Load Test shall consist of three test run periods. We are currently minded to set each Full Load Test run period at a minimum of 1 hour duration but are continuing to consider the technical requirements and appropriate durations for these tests. Prior to commencement of the Full Load Test the plant shall achieve the required stabilisation criteria for steady state operation. The test result will be corrected to Reference Site Conditions based upon agreed correction curves in the test procedure which are expected to include correction curves between Net Dependable Capacity / Plant Net Efficiency and:

- Ambient Temperature
- Ambient Pressure
- Relative Humidity
- Seawater Temperature (if applicable)
- Wind Speed (if applicable)
- Generator Frequency
- Generator Power Factor
- Fuel Composition / LHV
- Achieved CO<sub>2</sub> Capture Rate

### Start Up/Shutdown Tests

Start Up Times and the CO<sub>2</sub> Capture Rate will be measured under cold, warm, and hot start conditions during the Start Up/Shutdown Tests, which will form part of the OCP Acceptance Tests and Longstop Date Acceptance Tests. A Facility must reach full load within 125% of the Start Up Time Estimate, and a test run period is inclusive of the time taken to fully start-up and shutdown the Facility. The CO<sub>2</sub> Capture Rate over the Start Up/Shutdown Test period must be at least the OCP Required CO<sub>2</sub> Capture Rate or the Required CO<sub>2</sub> Capture Rate as applicable during the relevant OCP Acceptance Tests and Longstop Date Acceptance Tests.

The definition of each start type shall be based upon:

- Cold Start: Where the preceding shutdown of the Facility has taken place more than 64 hours prior to the start.
- Warm Start: Where the preceding shutdown of the Facility has taken place more than 12 hours prior to the start.
- Hot Start: Where the preceding shutdown of the Facility has taken place more than 8 hours prior to the start.

BEIS currently considers that each Start Up/Shutdown Test should last for:

- Cold Start: 12 hours.
- Warm Start: 12 hours.
- Hot Start: 2 test periods lasting 2 hours each.

We are continuing to consider the technical requirements and appropriate durations for the Cold Start, Warm Start and Hot Start test runs.

## Audit

The DPA Counterparty shall have the right to conduct an audit of records and information held by or on behalf of the Generator in relation to the DPA reporting requirements if they consider that the Generator has breached its reporting obligations under the DPA. The Generator shall reimburse the DPA Counterparty for all out-of-pocket costs of such an audit in the event this right is exercised. This is to ensure prompt and accurate reporting to the DPA Counterparty under the DPA.

## Termination

We summarised certain termination rights for the DPA Counterparty and their corresponding consequences in the December 2020 update. These termination rights included: i) Pre-Start Date termination; ii) termination for Prolonged Force Majeure; iii) termination for T&S Unavailability; and iv) Default termination. In addition, following the AR4 CfD we also included termination arising as a result of a Qualifying Change in Law which gives rise to a QCiL Construction Event or a QCiL Operations Cessation Event.

We also indicated in the December 2020 update that we were considering whether there should be termination and/or contractual consequences for poor performance, and furthermore in the May 2021 update the inclusion of a Minimum CO<sub>2</sub> Capture Rate obligation. Further to the May 2021 update, we have provided an updated position on the Minimum CO<sub>2</sub> Capture Rate obligation which is detailed below in the section 'Updates to the Availability Payment Formula'.

We set out below our updated thinking on the DPA termination provisions.

## Pre-Start Date termination

In the December 2020 update we proposed, following the AR3 CfD, that the DPA will contain various rights for the DPA Counterparty to terminate the DPA prior to the occurrence of the Start Date in relation to the commissioning of the Facility. Such rights are included to ensure that DPA funding which has been committed to support the deployment of power CCUS plants is not tied up indefinitely in a project that has no realistic prospect of being commissioned. The DPA will therefore include a right (but not an obligation) for the DPA Counterparty to terminate the DPA where:

- a) Initial Conditions Precedent: The Generator fails to fulfil the Initial Conditions Precedent within 20 business days after the date of the Agreement (subject to any waiver by the DPA Counterparty);
- b) Milestone Requirement: The Generator fails to fulfil a Milestone Requirement before the Milestone Delivery Date; or
- c) Longstop Date: The Generator fails to fulfil the Operational Conditions Precedent, which are set out in more detail above, by the Longstop Date.

Both the Milestone Delivery Date and the Longstop Date will be adjusted day-for-day for any delays which occur due to Force Majeure and/or for any delays that are due to the additional circumstances that are described in the 'Milestone Requirement' section above (e.g. Transmission Network Operator delay). These positions largely mirror those within the AR3 CfD, with certain capture technology-specific adaptations being made for the DPA.

In addition, following the AR4 CfD, if at any time prior to the Start Date, a Default Termination Event (see Default Termination section below) has occurred and is continuing the DPA Counterparty may also terminate the DPA.

As proposed in the December 2020 update, a Pre-Start Date termination will be on a no-liability basis.

## Termination for failing Minimum Commissioning Requirements

In addition to the Operational Conditions Precedent, and as discussed above, a Generator will also have to demonstrate that the Facility meets the Longstop Date Acceptance Test Thresholds set out above for CO<sub>2</sub> Capture Rate, Net Dependable Capacity, Plant Net Efficiency and Start Up Times by the Longstop Date.

If a Generator fails to meet these thresholds by the Longstop Date, then the DPA Counterparty will have the right (but not obligation) to terminate the DPA. Such a termination event will be on a no-liability basis.

## Termination for Prolonged Force Majeure

In the December 2020 update we indicated that we may include a DPA Counterparty right to terminate the DPA where the Generator is significantly delayed due to a continuing, unresolved Force Majeure. Further to that update, we confirm that this termination event will be included

within the DPA. This is to ensure that committed DPA funding is not tied up indefinitely in a project that has no realistic prospect of being commissioned.

The prolonged Force Majeure termination right will apply where a continuing, unresolved Force Majeure event, that first occurs between the date of signing the DPA and the date the Generator meets a Milestone Requirement, prevents or delays the development, construction, completion, testing or commissioning of the Facility for at least 18 months. Where such an event occurs, the DPA Counterparty will have the right (but not obligation) to terminate the DPA while the Prolonged FM event still ongoing.

We have considered the significant capital expenditure that projects would incur in order to complete commissioning and have therefore shortened the window in which the Prolonged FM Event must first occur so that such window ends on the date the Generator meets a Milestone Requirement, rather than at the end of the Target Commissioning Window (as initially proposed in the December 2020 Update).

As proposed in the December 2020 Update, we confirm that Prolonged FM Event termination will be on a no-liability basis given the non-fault nature of the event.

## Termination for T&S Unavailability

In the December 2020 update we noted that where a non-fault event prevents the Facility from accessing the T&S Network for a continuous period (with such period to be determined), BEIS was considering whether to give the DPA Counterparty the right to terminate the DPA. In such circumstances, we said that it may be reasonable for the relevant Generator(s) to be compensated in an amount to be determined.

We are continuing to consider the appropriate contractual triggers that would result in termination for T&S unavailability under the DPA.

We have, however, given further consideration to the compensation that should be paid to a Generator in the event that a DPA is terminated as a result of T&S unavailability, and propose that such compensation should be comprised of:

- development and pre-development costs (e.g. surveys and EIAs);
- decommissioning costs;
- financing and contractual break costs (but excluding any other finance costs); and
- construction costs.

in all cases incurred in relation to the DPA for the Facility, with such compensation reduced to reflect i) any savings made by the Generator in relation to the T&S unavailability event, ii) the residual economic value of the Facility (including any market revenues that can be generated from continued unabated operation) and iii) the repayment or amortisation of the relevant construction costs (where the DPA terminates after the Start Date).

While we continue to develop the T&S unavailability provisions, we are aiming to ensure with these compensation principles that a Generator is not at risk of being unable to pay down its invested capital costs for the project if termination occurs due to prolonged T&S unavailability, provided they have taken all appropriate mitigation action.

## Default termination

In the December 2020 update we proposed that the Default termination provisions in the DPA are likely to follow those in the AR3 CfD, by giving the DPA Counterparty the right to terminate the DPA for Generator events of default comprising the following: (i) insolvency; (ii) non-payment which is not rectified within a specific cure period; (iii) breach of key obligations relating to ownership of the Facility (e.g. no assignment and fraud); and (iv) breach of key obligations relating to the fuel, CO<sub>2</sub> and electricity meters. We confirm that these default events will be included in the DPA.

The list of Default termination events in the December 2020 update included an event of Credit Support Default. BEIS now proposes that credit support (and acceptable credit standing) will not be required under the DPA, therefore we have not considered credit support default in this list of default termination events. However, we are continuing to consider the possibility of introducing a credit support and/or acceptable credit standing requirement where a gainshare mechanism is applied to a DPA.

## Termination Fees

Further to the December 2020 Update, we confirm that the Generator will be obliged to pay compensation to the DPA Counterparty as a result of a Default termination event which occurs after the Start Date, including termination for a prolonged Minimum CO<sub>2</sub> Capture Rate Breach but excluding termination for a failure to meet the Longstop Date Acceptance Test thresholds (which may occur after the Start Date).

The termination amount payable by the Generator will be calculated as follows:

$$\text{Default Termination Payment} = \text{Net Dependable Capacity Estimate} \times \text{Termination Fee Rate}$$

For each of these termination events, a Termination Fee Rate of £35,000 per megawatt of the Facility's Net Dependable Capacity Estimate (as adjusted by a Permitted Reduction) will apply, as set out in the table below.

Default Termination Event	Termination Fee Rate
Insolvency	£35,000/MW
Non payment	£35,000/MW
Metering breach	£35,000/MW
Breach of Key Obligations	£35,000/MW
Prolonged Minimum CO <sub>2</sub> Capture Rate Breach	£35,000/MW

**Table 2: Table showing the termination events which carry a termination fee**

A Generator will not be liable to pay more than one Default Termination Payment. In the event that more than one termination event applies, a single fee of £35,000/MW will apply.

If the DPA Counterparty terminates the DPA for a prolonged Minimum CO<sub>2</sub> Capture Rate Breach, the Default Termination Payment due to the DPA Counterparty will be reduced by any unpaid amounts which the DPA Counterparty has suspended (as detailed further in the Minimum CO<sub>2</sub> Capture Rate section below).

Given the differing payment mechanism to the CfD, we have proposed an alternative Default Termination Payment calculation for the DPA that we consider to be reasonable and proportionate. The approach to the calculation is informed by experience in administering the Capacity Market and has been adapted to the underlying business model for, and payment mechanics of, the DPA. The fee level is designed to reflect the loss of low carbon, dispatchable generation to the consumer and the electricity network, as well as the potential impact on the wider CCUS programme and ecosystem, and out of pocket costs of the DPA Counterparty. In BEIS' view, the proposed termination calculation strikes the right balance between ensuring that Generators fulfil their obligations throughout the term of each DPA, whilst remaining proportionate to the severity of the circumstances leading to a default termination event.

## Qualifying Change in Law

In the December 2020 Update, we stated that the DPA would contain change in law provisions, the form and scope of which remained to be determined, but which were anticipated to be similar to those in the renewable CfD. In the May 2021 update we set out our position on Qualifying Change in Law ("QCIL") definitions. We have now developed the compensation offered to Generators for different categories of QCIL events.

### Categories

Compensation will be payable to a Generator (or where the savings arising from the QCIL exceed the costs to the DPA Counterparty) for a QCIL that:

- permanently prevents construction of a Facility;
- affect a Facility's Capex;
- affect a Facility's Opex;
- affect a Facility's Availability of Generation, Availability of Capture, Net Dependable Capacity or Plant Net Efficiency;
- affect a Facility's generation of electricity; or
- permanently prevents a Facility from operating.

As discussed below, certain costs will be excluded from the compensation formulations while, generally speaking, any savings will be netted off any costs that arise as a result of the relevant QCIL (and vice versa). Typical no double recovery provisions will apply to ensure that a Generator is not compensated for the same loss (e.g. where a QCIL affects both a Facility's Capex and a Facility's Availability of Capture).



## QCIL permanently preventing construction

Where a QCIL permanently prevents the completion of the construction of the Facility by making the Facility illegal, the DPA is automatically terminated, and a 'QCIL Construction Event Payment' will be payable either as a lump sum or staged payments by the DPA Counterparty to the Generator. The Generator will be entitled to recover all irrecoverable and unavoidable out-of-pocket costs (including tax Liabilities) which have been or will be incurred by the Generator in respect of the Facility arising directly from the relevant QCIL Construction Event, if and to the extent that such costs comprise:

- development and pre-development costs in respect of the Facility;
- decommissioning costs in respect of the Facility;
- break costs in respect of the Facility; or
- construction costs in respect of the Facility.

The amount the Generator is entitled to recover will be reduced by savings which have been or will be made by the Generator in respect of the Facility arising directly from the relevant QCIL Construction Event including:

- avoided out-of-pocket costs;
- tax reliefs or reductions;
- insurance proceeds; and
- any other compensation.

## QCIL affecting Capex

Where a QCIL results in net Capex costs or savings, the Generator or the DPA Counterparty will receive compensation in order to put the relevant party in the position it would have been in had the QCIL not occurred. Such compensation will be payable at the election of the DPA Counterparty as a lump sum payment, staged payments or daily payments: i) by the DPA Counterparty to the Generator if there are net Capex costs or ii) by the Generator to the DPA Counterparty if there are net Capex savings.

Net Capex costs or savings are defined for the purposes of this calculation as all out-of-pocket costs or all savings which have been, will be or are reasonably likely to be incurred or made in respect of the Facility by the Generator relating to the acquisition, modification, construction or disposal of any asset relating to the Facility and arising directly as a result of or in anticipation of the relevant QCIL (including the costs of site preparation, initial delivery and handling costs, installation and assembly costs, testing costs and professional fees).

## QCIL affecting Opex

Where a QCIL results in net Opex costs or savings, the Generator or the DPA Counterparty will receive compensation in order to put the relevant party in the position it would have been in had the QCIL not occurred. Such compensation will be payable as staged payments or daily payments i) by the DPA Counterparty to the Generator if there are net Opex costs or ii) by the Generator to the DPA Counterparty if there are net Opex savings. Net Opex costs or savings

are defined for the purposes of this calculation as all out-of-pocket costs or all savings which have been, will be or are reasonably likely to be incurred or made in respect of the Facility by the Generator, arising directly as a result of or in anticipation of the relevant QCiL, which are not QCiL Capex costs or savings.

## QCiL affecting Net Dependable Capacity, Availability of Generation, Availability of Capture or Plant Net Efficiency

Where a QCiL reduces or increases a Facility's Net Dependable Capacity, Availability of Generation, Availability of Capture or Plant Net Efficiency (and therefore reduces or increases the Payments that will be made under the DPA), whether for a set period (e.g. while a Generator is implementing the QCiL) or for the remaining term of the DPA, those respective values will be adjusted (on a backward-looking basis to adjust payments already made to the Generator during a period impacted by the QCiL and on a forward-looking basis for future payment calculations under the DPA affected by the QCiL) based on:

- for Net Dependable Capacity or Availability of Generation, the incremental difference between the actual or forecast value of Net Dependable Capacity or Availability of Generation as impacted by the QCiL, and the forecast value of Net Dependable Capacity or Availability of Generation without the impact of the QCiL;
- for Availability of Capture the incremental difference between the actual/forecast value of Availability of Capture as impacted by the QCiL, and the forecast value of Availability of Capture without impact of the QCiL (which shall not exceed the previous 12 month average ACRph); and
- for Plant Net Efficiency, the impact on  $GU_{CCUS}$  (Power Plant Gas Consumption) and  $CO_{2ECCUS}$  (Power Plant  $CO_2$  Emissions) attributable to the QCiL.

## QCiL affecting generation

A period of reduced or increased generation by the Facility as a direct result of a QCiL will result in a "QCiL Adjusted Revenues Payment" to the Generator or DPA Counterparty. Compensation will be payable at the election of the DPA Counterparty as either a lump sum payment, staged payment or daily payments, where the QCiL leads to increased revenue for the Generator due to an increase in Facility generation (in which case the Generator will pay the DPA Counterparty) or where revenue is decreased due to a decrease in Facility generation (in which case the DPA Counterparty will pay the Generator). This will size of the payment will be determined by calculating the revenue that the Generator would have generated (including wholesale electricity market revenue, balancing system services revenue and ancillary services revenue) from electricity that the Facility would have generated but for the occurrence of the QCiL from the date of the QCiL until the expiry of the Term, with such revenue calculated on a backward-looking basis.

## QCIL permanently preventing operations

Compensation will be payable under the DPA if either of the following occurs: i) a QCIL which permanently prevents the Generator from operating the whole of the Facility by virtue of such operation becoming illegal; or ii) a CiL which the Generator can demonstrate imposes a requirement that permanently prevents the whole of the Facility from operating or constitutes the refusal or failure to give approval to a request for consent to re-start the operation of the whole Facility for a period which is likely to exceed twenty four (24) months (following the provisions of the renewable CfD).

In either case, a "QCIL Operations Cessation Event Payment" will be payable to the Generator by the DPA Counterparty as a lump sum payment or staged payments at the election of the DPA Counterparty. Such compensation will comprise an amount equal to: i) all irrecoverable and unavoidable out-of-pocket costs (including tax liabilities and break costs) which have been or will be incurred by the Generator in respect of the Facility arising directly from the relevant QCIL or CiL (but excluding certain costs), plus revenue that the Generator would have received (including wholesale electricity market revenue, balancing system services revenue and ancillary services revenue) from electricity that the Facility would have generated but for the occurrence of the QCIL from the date of the QCIL until the expiry of the Term, with such revenue calculated on a forward-looking basis, minus any savings resulting from the QCIL Operation Cessation Event.

## Cap on QCIL compensation

If a QCIL affects a Facility's: Capex; Opex; Availability of Generation, Availability of Capture, Net Dependable Capacity or Plant Net Efficiency; generation of electricity; or any combination thereof, the total QCIL compensation due to the Generator will be capped by reference to:

- the QCIL Construction Event Payment that would have been payable to the Generator had a QCIL Construction Event occurred (pre-Start Date); or
- the QCIL Operations Cessation Event Payment that would have been payable to the Generator had a QCIL Operations Cessation Event occurred (post-Start Date).

As discussed in the Termination section, where the DPA Counterparty is required to pay QCIL compensation to a Generator which is equivalent to either the QCIL Construction Event Payment or QCIL Operations Cessation Event Payment, the DPA Counterparty may elect to terminate the DPA with no liability to pay the Generator any additional compensation.

# Payment Mechanism

The proposed DPA consists of two payments: an Availability Payment for low carbon generation capacity and a Variable Payment to adjust the position of the power CCUS plant in the merit order relative to unabated CCGTs.

## Updates to the Variable Payment

### Definition of a Settlement Unit and Billing Period for the Variable Payment

In the December 2020 update, we set out that Variable Payments could be settled on a daily basis. In line with this, we are currently minded to set both the Settlement Unit and Billing Period for the Variable Payment, at one day, from 00:00 to 00:00. This aligns with the electricity day and is consistent with transfer of ownership rules, supplier levy calculations and the CfD payments schedule. It also represents an appropriate level of granularity given the use of day ahead gas and carbon futures prices.

We anticipate the DPA Counterparty will use the BSC Interim Information Settlement run (produced within 5 working days) to produce a credit note statement within 7 working days with payment being made within 28 working days of the relevant Settlement Unit (day).

As the gas day runs from 06:00 to 06:00, while the Settlement Unit for the Variable Payment, (the 'VP Settlement Unit') will run from 00:00 to 00:00, this will necessitate applying two day-ahead gas prices to each VP Settlement Unit calculation – the first running from 00:00 to 06:00 and the second running from 06:00 to 00:00.

### Definition of the Reference Plant

The Variable Payment formula should calculate the difference in costs between a power CCUS plant and an unabated Reference Plant. The Reference Plant should represent the best available unabated CCGT technology. Initially the DPA will define the Reference Plant as an H-Class CCGT with defined thermal efficiency of 62.4% on a lower heat value (LHV) basis, and 56.2% on a higher heat value (HHV) basis<sup>2</sup>.

The Reference Plant will be the same across all DPA recipients, including across both retrofit and newbuild power CCUS projects.

The DPA Counterparty will review and update the Reference Plant definition across all DPA recipients no more frequently than every 5 years, starting in 2027, to ensure that the Reference Plant definition accurately reflects the best available CCGT technology on the system at the time of review. Such review may update both the net thermal efficiency and specific CO<sub>2</sub> emissions (based on the NTS fuel mix) of the Reference Plant.

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<sup>2</sup> The Electricity Generation Costs 2020 report (<https://www.gov.uk/government/publications/beis-electricity-generation-costs-2020>) published in August 2020 sets out the efficiency for a H Class CCGT at both a LHV and a HHV basis.

As proposed in the December 2020 update, the thermal efficiency and specific CO<sub>2</sub> emissions for the Reference Plant can only improve through the Reference Plant review process.

## Non-payment and Capture Rate Multipliers

The Variable Payment is intended to ensure that abated generation displaces equivalent unabated generation in the merit order. This is only achieved if CO<sub>2</sub> is captured and exported to the T&S Network. For this reason, the Variable Payment will not be paid for those full half-hour periods in which there is a Capture Plant Outage Event or T&S Outage Event.

In December we said that “BEIS is likely to apply a CO<sub>2</sub> capture rate multiplier to the Variable Payment to avoid creating a perverse incentive for the power CCUS plant to capture less CO<sub>2</sub> and to ensure that subsidies are being paid out only where the power CCUS plant is meeting the objectives of the CCUS Programme.” We are no longer minded to apply any form of multiplier to the Variable Payment formula, to minimise the distortive effects and to avoid perverse incentives in marginal dispatch situations.

## Updates to the Availability Payment Formula

### Minimum CO<sub>2</sub> Capture Rate

In the December 2020 update we proposed introducing contractual consequences and/or a further termination event, in cases where the Generator's CO<sub>2</sub> Capture Rate performance is poor for a prolonged period of time. Then in the May 2021 update we noted that in the event that a Generator's Achieved CO<sub>2</sub> Capture Rate in successive AP Billing Periods falls below a minimum threshold level for a set number of consecutive AP Billing Periods, the DPA Counterparty may (following notification to the Generator of its intention to exercise such right) suspend or withhold Availability Payments and Variable Payments until such time as the Achieved CO<sub>2</sub> Capture Rate for a subsequent AP Billing Period is greater than or equal to the minimum threshold level.

We are now proposing the following provisions in relation to the 'Minimum CO<sub>2</sub> Capture Rate'.

### **Prolonged Minimum CO<sub>2</sub> Capture Rate Breach: Termination Notice**

From the Start Date, if a Generator's "Achieved and Declared Capture Rate Average" (which shall be the average of their Achieved CO<sub>2</sub> Capture Rate weighted by the number of AP Settlement Units to which the Achieved CO<sub>2</sub> Capture Rate has been applied, and their Declared CO<sub>2</sub> Capture Rates, weighted by the number of AP Settlement Units to which the Deemed CO<sub>2</sub> Capture Rates have been applied) falls below 70% in any 3 whole AP Billing Periods (whether consecutive or not) within a rolling 6 month period, then the DPA Counterparty may issue a notice of termination to the Generator.

Following the notice of termination, the DPA Counterparty may terminate the DPA after 18 months have passed from the date of that notice unless:

- the Generator demonstrates an Achieved and Declared Capture Rate Average of no less than 85% for 3 whole, consecutive AP Billing Periods within such 18 month period; or
- the Generator implements a rectification plan that has been agreed with the DPA Counterparty, and which is expected to enable the Generator to demonstrate an Achieved and Declared Capture Rate Average of no less than 85% for 3 whole, consecutive AP Billing Periods (although this may take longer than 18 months following the notice of termination).

in which case the notice of termination will be removed.

### **Prolonged Minimum CO<sub>2</sub> Capture Rate Breach: Suspension**

If a Generator's Achieved and Declared Capture Rate Average falls below 50% in any 3 whole AP Billing Periods (whether or not consecutive and whether or not the DPA Counterparty has already issued a termination notice to the Generator) within a rolling 6 month period, then all payments under the DPA may be suspended following notice from the DPA Counterparty.

Such suspension may be lifted by the Generator demonstrating an Achieved and Declared Capture Rate Average of no less than 85% for 3 whole, consecutive AP Billing Periods. If the Generator successfully lifts the suspension, then all suspended payments (calculated on the basis of the Availability of Capture during each relevant period of suspension) shall be repaid without interest and payments will resume under the DPA going forward.

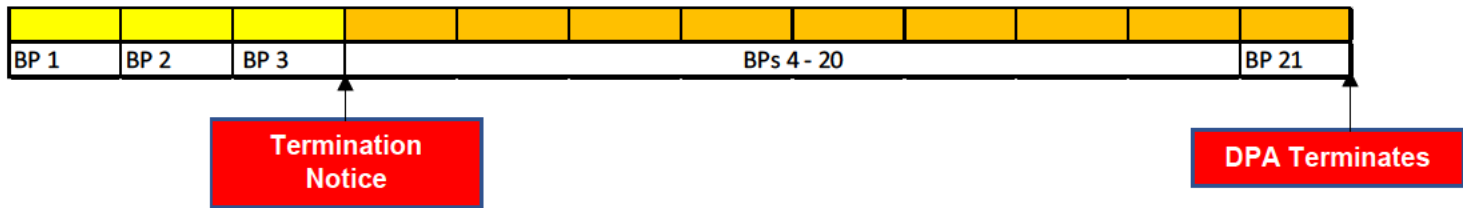
If the Generator is unsuccessful in lifting the suspension and the DPA Counterparty terminates the DPA in the circumstances described above or for any other reason, then all suspended payments will be permanently withheld from the Generator. Where the DPA terminates in the circumstances described above (and not for any other reason), the total amount of the suspended payments will reduce the termination fees that the Generator is required to pay the DPA Counterparty (which are discussed above in further detail).

BEIS will continue to review the use and definition of Achieved and Declared Capture Rate Average for both the termination and suspension thresholds described above as the Deemed Capture Rate and CO<sub>2</sub> Capture Rate declaration systems under the DPA are developed. The intention in each case is to account for CO<sub>2</sub> Capture Rate over the month regardless of whether the Facility is dispatching or not.

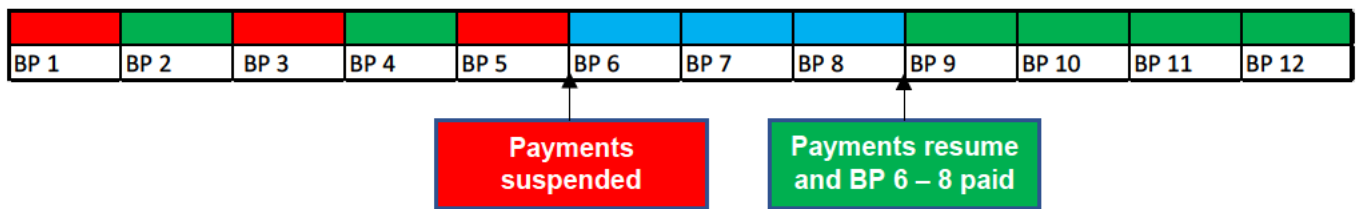
Our aim with these provisions is to strike a balance between protections for the consumer against funding underperforming projects, and the commercial risk faced by first of a kind projects. The initial termination threshold aims to strike that balance by ensuring that DPAs for continually underperforming projects can be terminated, while providing an 18 month window in which the Generator can rectify the issues giving rise to poor performance. We would expect projects to be able to demonstrate an 85% CO<sub>2</sub> Capture Rate in order to achieve cure at a minimum, representing a CO<sub>2</sub> Capture Rate closer to expected normal performance under the DPA and the Required CO<sub>2</sub> Capture Rate that must be demonstrated by the Generator to satisfy the Longstop Date Acceptance Test.

The additional right to suspend payments under the DPA below a 50% CO<sub>2</sub> Capture Rate is intended to ensure that consumers do not pay for uncured generating capacity which would result in the emission of more CO<sub>2</sub> than is captured and stored. This helps to ensure that the DPA mechanisms are proportionate to the policy goals of the DPA business model.

**Figure 1: Diagram to show two example situations where the Minimum CO<sub>2</sub> Capture Rate provisions apply**



Example 1: a Facility has an Achieved and Declared Capture Rate Average below 70% for three consecutive AP Billing Periods (BP 1, BP 2 and BP 3), and the Generator is issued with a notice of termination. The Facility then has an Achieved and Declared Capture Rate Average below 85% for the following 18 months, and the DPA Counterparty makes the decision to terminate the Generator’s DPA.



Example 2: a Facility has an Achieved and Declared Capture Rate Average below 50% for three out of six consecutive AP Billing Periods (BP 1, BP 3 and BP 5). The Generator is issued with a notice of termination, and its payments are suspended. The Facility then has an Achieved and Declared Capture Rate Average equal to or higher than 85% for the following 3 months (BP 6, BP 7 and BP 8), so the notice of termination is lifted, payments resume and the payments for BP 6, BP 7 and BP 8 are paid.

Key:

	Equal to or higher than 70% Achieved and Declared Capture Rate Average (normal payment period)
	Below 70% Achieved and Declared Capture Rate Average (normal payment period)
	Below 50% Achieved and Declared Capture Rate Average (normal payment period)
	Equal to or higher than 85% Achieved and Declared Capture Rate Average (cure period)
	Below 85% Achieved and Declared Capture Rate Average (cure period)

## DPA Payment Mechanism – additional updates

### Simultaneous Plant and Capture Outage

In the December 2020 update we said that “where outages of power and capture plant are simultaneous, for that period the lowest of the availability of generation and availability of capture will be used in the formula, whereas the highest of the two will be set to equal 1.” This will no longer apply following updates to the payment formulae under the DPA in the May 2021 update, as we consider that both the Availability of Generation and Availability of Capture terms need to be fully reflected in the Availability Payment formula to ensure proportionality of the payments made under the DPA.

### Gas and CO<sub>2</sub> reference prices

The DPA will account for the higher gas costs and lower carbon costs of a power CCUS plant compared to the Reference Plant through the Variable Payment, in the form of the Gas Cost Differential and Carbon Cost Differential. The Gas Cost Differential in the Variable Payment is based on the thermal efficiency of the power CCUS plant under reference conditions and the Reference Plant, plus a Gas Price indicator. The Carbon Cost Differential is similarly based on the thermal efficiency of the power CCUS plant under reference conditions, the specific CO<sub>2</sub> emissions of the fuel used by both the Facility and the Reference Plant, plus a Carbon Price Indicator.

In the December 2020 update we noted that the Gas Price indicator should reflect the granularity of the power CCUS plant’s gas purchasing decisions and that the most liquid market for gas is day-ahead. The DPA will therefore use the settlement price for a day-ahead natural gas contract for delivery at the UK National Balancing Point as the Gas Price indicator.

The Carbon Price indicator should represent the effective carbon price faced by the Power CCUS plant and the Reference Plant. The Carbon Price indicator will therefore be based on a Carbon Reference Price which is equal to the sum of the Carbon Price Support (CPS) (which is set by HM Treasury) and the UK Emissions Trading Scheme Carbon Price (UKETS CP), defined as the December Futures Contract Price within the Secondary Markets as reported by ICE Futures Europe. This is historically the most common trading platform for the EU Emissions Trading Scheme, and so we currently consider this to be the best indicator for the December Futures Contract Price.

In the December 2020 update we noted that the DPA will not take account of any hedging arrangements, therefore there will be an incentive for the Generator to trade commodities to achieve the most efficient outcomes. This continues to be the adopted position.

The Gas Price Indicator and the Carbon Price Indicator may be reviewed at any time where a trigger event occurs and will be assessed according to a set of key principles which are generally aligned with the existing CfD review procedure principles. The principles review triggers will include, but are not limited to:

- market events such as splitting of GB Gas Market,
- low volumes of data,
- following a dispute,
- on request from portfolio holders, or
- where relevant laws and schemes are amended/repealed.



## Indexation

In the December 2020 update we noted that it was likely that the Availability Payment Rate would be fully indexed to inflation to protect investors from inflationary pressure. This continues to be the case and we consider that the Consumer Price Index is the appropriate measure of inflation to which the Availability Payment Rate should be indexed. This is consistent with both existing electricity market support mechanisms and wider support mechanisms for utilities such as water.

In addition, we consider that the 'Other Extra Variable Costs' term in the Variable Payment should be indexed to Consumer Price Index to reflect inflationary pressure on the initial value agreed for this term in the DPA.

## Gainshare

In order to ensure that the commercial terms of each DPA reflect value for money for the consumer and comply with subsidy control principles, BEIS is continuing to consider whether it will be necessary to introduce DPA gainshare provisions during the evaluation/negotiation stages of Phase 2, in relation to areas of a project's finances which may be more difficult to model as part of the initial assumptions made during DPA negotiations. While this is not an exhaustive list, BEIS has identified the following four key areas which may be included as part of any gainshare discussions in which the DPA Counterparty may seek to share a limited portion of any project gains:

1. Actual project Capex is lower than initial assumptions
2. Actual operational revenues are higher than initial assumptions
3. Divestments lead to higher shareholder returns than initially assumed
4. Refinancing leads to higher shareholder returns than initially assumed

As prospective DPA applicants may be aware, an important function of gainshare mechanisms is to prevent overcompensation arising by reason of the implementation of subsidy support mechanisms. This fact has been recognised in recent years by the UK Government and will be a key consideration when BEIS decides whether such mechanisms will be required for the DPA.

## Other Extra Variable Costs

The Variable Payment will include a term representing the additional variable costs, other than gas, carbon emissions and T&S fees, of operating the power CCUS plant compared to the Reference Plant. The Generator will need to demonstrate that the costs it proposes are included in this term would not have been incurred by the Reference Plant. For reference, the following items could be considered, by way of example only, to be applicable to the Other Extra Variable Costs term in the Variable Payment, although the precise scope will vary between projects:

- Consumables, e.g.

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- Nitrogen gas for system and equipment layup
- Cooling water for carbon capture plant
- CO<sub>2</sub> compressor / centrifugal pump bearing lubricant
- Miscellaneous lubricants/grease for carbon capture plant

## Next Steps

This document reflects the work we have done to date to progress the DPA design following publication of the December 2020 and May 2021 update documents. We will continue to develop further the detailed structures and mechanisms of the DPA with the objective of finalising the model early in 2022. This work will be undertaken in close coordination with the development of the business models for T&S, industrial carbon capture, hydrogen and CIF.

In relation to the DPA business model further updates planned for the next year include:

Update	Indicative date
Phase-2 CCUS Cluster Sequencing Launch including publication of the full eligibility criteria, evaluation criteria and assessment process.	Q4 2021 The launch of Phase-2 is planned to be in parallel with, or soon after, the Track-1 cluster announcement from w/c 25 <sup>th</sup> October <sup>3</sup> .
DPA Update and publication of draft full contract	Q1 2022

CCUS is integral to the UK's Green Industrial Revolution. 'CCUS Supply Chains: a roadmap to maximise the UK's potential<sup>4</sup> published in May 2021 stated that "as we deliver on our ambitions, it is vital that our economy and, in particular, our UK CCUS supply chain companies realise the economic benefits of this large-scale infrastructure programme." It also noted government's intention "to provide a further update on our approach to UK CCUS supply chains by the end of 2021". We expect that any further business model supply chain updates may be developed with such future publications, as well as learnings from other sectors, in mind.

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<sup>3</sup> Further information is available here: <https://www.gov.uk/government/publications/cluster-sequencing-for-carbon-capture-usage-and-storage-ccus-deployment-phase-1-expressions-of-interest/update-on-phase-1-eligible-clusters-and-phase-2-timeline>

<sup>4</sup> The CCUS Supply Chain roadmap can be found at: <https://www.gov.uk/government/publications/carbon-capture-usage-and-storage-ccus-supply-chains-a-roadmap-to-maximise-the-uks-potential>

# Worked Example

## NDC Cap

The following worked example demonstrates the application of the proposed NDC cap to the Availability Payment and Variable Payment.

The value of the Net Dependable Capacity used to calculate Availability Payments under the DPA will be set by the latest NDC measured during OCP Acceptance Tests, Longstop Date Acceptance Tests, or each year's annual NDC test (the 'Annual NDC Test'), which in any event will be subject to a cap equal to the Net Dependable Capacity Estimate (as such estimate is reduced by or any Permitted Reduction made before the Milestone Delivery Date). In addition, the number of MWh of generation to which Variable Payments will be applied will be capped for every half hour period of generation by reference to the Net Dependable Capacity Estimate. This ensures that there is proportionate budgetary control in the allocation and application of DPAs.

The worked example considers a CCGT with post combustion capture plant with Net Dependable Capacity of 1100 MW (at reference site conditions) and design capture rate of 90% for operation during an AP Billing Period from 1<sup>st</sup> February 2021 to 28<sup>th</sup> February 2021 (total number of Settlement Units in AP Billing Period = 1344).

### *Availability Payment*

The Availability Payment Rate is assumed to be £5.708/MW/Settlement Unit (based on £100/kW/year and 17520 Settlement Units in a year). For simplification, the T&S Capacity Fee (TSCF) is assumed to be zero.

- Net Dependable Capacity Estimate = 1100 MW
- The plant declares a Net Available Capacity = 1200 MW for all Settlement Units in AP Billing Period
- There are no outages/derating events during the AP Billing Period
- The Achieved Capture Rate during the AP Billing Period = 90%

$$AP = \sum (AG_i \times AC_i \times NDC \times APR_i) + TSCF$$

$AG_i = 1$  for all Settlement Units

$AC_i = 90\%$  for all Settlement Units

$NDC = 1100$  MW for all Settlement Units

$APR_i = £5.708$ /MW/Settlement Unit

$TSCF = £0$  (simplification)

Therefore,

$$AP = 1344 \times (1 \times 90\% \times 1100\text{MW} \times £5.708/\text{MW}/\text{SU}) + £0 = £7,594,836$$

### *Variable Payment*

This example shows the NDC cap operating over a single VP Settlement Unit and VP Billing period, which is 1 day.

The Variable Payment Rate is assumed to be £1/MWh for this Settlement Unit. This is an example indicative figure for simplification.

- The plant operates at constant output = 1200 MW throughout the VP Billing Period.
- However, the NDC Estimate = 1100 MW.

$$VP = VPR \times MWh$$

$$VPR = GC + CC + OC + TSVPR$$

VPR = £1/MWh for the Settlement Unit

MWh = 1100MW x 24h = 26400 MWh for the Settlement Unit

Therefore,

VP = £1/MWh x 26400 MWh = £26,400

# Glossary

Term	Description
AR3	Allocation Round Three (referring to the third contract for difference allocation round for renewable technologies).
AR4	Allocation Round Four (referring to the upcoming fourth contract for difference allocation round for renewable technologies).
AP	Availability Payment
BEIS	Department for Business, Energy and Industrial Strategy
BMRS	Balancing Mechanism Reporting Services
Capex	Capital expenditure
CCGT	Combined Cycle Gas Turbine
CCUS	Carbon Capture, Usage and Storage
CCS	Carbon Capture and Storage
Cluster	Transportation and storage network (incorporating the onshore and offshore network and offshore storage facility) and an associated first phase of carbon capture projects.
CfD	Contract for Difference
CIF	CCS Infrastructure Fund
CM	Capacity Market
CO <sub>2</sub>	Carbon Dioxide
DPA	Dispatchable Power Agreement
December 2020 update	The Carbon Capture, Usage and Storage Business Models update published in December 2020: <a href="https://www.gov.uk/government/publications/carbon-capture-usage-and-storage-ccus-business-models">https://www.gov.uk/government/publications/carbon-capture-usage-and-storage-ccus-business-models</a>
FEED	Front End Engineering Design
FID	Final Investment Decision

FOAK	First-Of-A-Kind
GB	Great Britain
HHV	Higher Heating Value
HMG	Her Majesty's Government
HoTs	Heads of Terms (for the Dispatchable Power Agreement)
ICC	Industrial Carbon Capture
JEP	Joint Environmental Programme
LHV	Lower Heating Value
May 2021 update	The Carbon capture, usage and storage (CCUS): business models update published in May 2021: <a href="https://www.gov.uk/government/publications/carbon-capture-usage-and-storage-ccus-business-models">https://www.gov.uk/government/publications/carbon-capture-usage-and-storage-ccus-business-models</a>
MW	Megawatt
MWh	Megawatt hours
NDC	Net Dependable Capacity
NTS fuel mix	The fuel mix used in the National Transmission System.
OCP	Operational Conditions Precedent
Opex	Operating expenditure
QCIL	Qualifying Change in Law
REMIT	Regulation on Wholesale Energy Market Integrity and Transparency
Storage	Geological store for the captured CO <sub>2</sub> from the end of the injection well.
TCW	Target Commissioning Window
T&S	Transport and Storage
T&SCo	A company licensed to provide transport and storage services

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UK	United Kingdom of Great Britain and Northern Ireland
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