

Redacted

21 FEBRUARY 2013

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CONCESSION AGREEMENT  
RELATING TO THE  
SHIRORO HYDRO ELECTRIC POWER PLANT  
NIGERIA

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THE BUREAU OF PUBLIC ENTERPRISES

- and -

SHIRORO HYDRO ELECTRIC PLC

- and -

NORTH SOUTH POWER COMPANY LIMITED



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**THIS CONCESSION AGREEMENT** is made on this 21<sup>st</sup> day of February 2013

**BY AND BETWEEN:**

**BUREAU OF PUBLIC ENTERPRISES ("BPE")**, a body established under the Public Enterprises (Privatisation and Commercialisation) Act Cap P38 Laws of the Federation of Nigeria, 2004 ("**the Privatisation Act**") with offices at 11, Osun Crescent, Off Ibrahim Babangida Way, Maitama District, Abuja, Nigeria;

**SHIRORO HYDRO ELECTRIC PLC**, a limited liability company established under the Laws of Nigeria, with its registered office located in Shiroro Power Station Complex, Shiroro, Niger State, Nigeria (the "**Company**"); and

**NORTH SOUTH POWER COMPANY LIMITED**, a limited liability company established under the Laws of Nigeria, with its registered office located at No.1 Rima Street, Maitama, Abuja, Nigeria (the "**Concessionaire**"),

each a "**Party**" and collectively the "**Parties**".

**RECITALS:**

- (A) The Company is a limited liability company registered under the laws of Nigeria and licensed pursuant to the provisions of the Electric Power Sector Reform Act 2005 ("**EPSR Act**") to, inter alia, take over as a going concern, the generation, operations and activities of Power Holding Company of Nigeria Plc ("**PHCN**") at the Power Station and in this respect to acquire, employ and make use of such of PHCN's assets and employees and assume and/or enjoy such of the rights, undertakings, obligations and functions of PHCN that pertain to and/or are incidental to the generation of electricity in accordance with the provisions of the EPSR Act;
- (B) The Company's authorised share capital is five million (5,000,000) Naira divided into ten million (10,000,000) ordinary shares wholly owned by FGN through Ministry of Finance Incorporated ("**MOFI**") and BPE;
- (C) FGN desires and intends to confer on the private sector the operation, restoration and maintenance of hydroelectric power production facilities located on the Shiroro Reservoir in the Federal Republic of Nigeria (the "**Power Station**") and the related Hydro Property (as hereinafter defined) and NCP and BPE are authorised under the Privatisation Act to undertake the transaction for and on its behalf;
- (D) NCP was established pursuant to the Privatisation Act to, inter alia, approve policies on privatisation and commercialisation and approve guidelines and criteria for valuation of public enterprises to be privatised and was further empowered under section 24 of the EPSR Act to privatise the Company, through the mechanisms it deems most appropriate;
- (E) NCP has determined, in accordance with the provisions of section 24 of the EPSR Act, that the appropriate method to privatise the Company shall be to grant a concession and has authorised BPE, as its secretariat, to implement the concession transaction;
- (F) BPE was established under the Privatisation Act as a body corporate with the power to implement the NCP's privatisation policies, to prepare public enterprises approved by NCP for privatisation and to ensure the success of the privatisation and commercialisation exercise;
- (G) In accordance with the EPSR Act, the Privatisation Act (including the privatisation procedures made there under) and the Infrastructure Concession Regulatory Commission (Establishment Etc) Act of 2005, BPE has solicited tenders for the development, construction, operation and maintenance of the Power Station and received bids from all interested parties;





- (H) The Concessionaire submitted the most financially competitive bid which is also in accordance with the minimum technical requirements and has therefore been selected to develop, construct, operate and maintain the Power Station in accordance with the terms of this Agreement;
- (I) The Operations requires the Concessionaire to operate and maintain the existing capacity of the Power Station, to restore generation capacity at the Power Station which is currently damaged and to design, construct, operate and maintain new generation capacity and to comply with the performance requirements and standards detailed in this Agreement; and
- (J) The Company is the owner of certain assets relating to or used in connection with the operation of the Power Station and has agreed to lease the Hydro Property used in connection with the operation of the Power Station to the Concessionaire for the term of this Agreement.

**NOW, THEREFORE,** in consideration of the mutual benefits to be derived and the representations and warranties, conditions and promises herein contained, and intending to be legally bound, the Parties hereby agree as follows:

## **1. DEFINITIONS**

### **1.1 Definitions**

Unless the context otherwise requires, capitalised terms used in this Agreement shall have the respective meanings given to them below.

**"Actions"** means any claims, lawsuits, actions or proceedings.

**"Additional Consents"** means the approvals, consents, authorisations or other requirements not listed in Schedule 6 and which are required from any Regulatory Authority under any Laws of Nigeria by the Concessionaire and for the Contractors in the context of the Operations.

**"Affected Party"** has the meaning given to it Clause 16.1.

**"Affiliate"** means, in relation to any person, any other person directly or indirectly Controlled by, or Controlling of, or under common Control with, that person and, in the case of a trust, any trustee or beneficiary (actual or potential) of that trust and, in the case of an individual, any person connected with him. **"Control"** for the purpose of this definition means:

- (A) the power (whether directly or indirectly, and whether by the ownership of share capital, the possession of voting power, contract or otherwise) to appoint and/or remove all or such of the members of the board of directors or other governing body of a person as are able to cast a majority of the votes capable of being cast by the members of that board or body on all, or substantially all, matters, or otherwise to control or have the power to control the policies and affairs of that person; and/or
- (B) the holding and/or possession of the beneficial interest in and/or the ability to exercise the voting rights applicable in shares or other securities in any person (whether directly or by means of holding such interests in one or more other persons) which confer in aggregate on the holders thereof 50 per cent or more of the total voting rights exercisable at general meetings of that person on all, or substantially all, matters, and

**"Controlled"** and **"Controlling"** shall be construed accordingly.





**"Agreement"** means this concession agreement, together with all Schedules attached hereto, as the same may be amended from time to time.

**"Ancillary Services"** has the meaning assigned to that term in the Grid Code.

**"Ancillary Services Agreement"** means the ancillary services agreement between the Company and TCN in relation to the Power Station.

**"Annual Fee"** means the amount for each Operating Year as detailed in paragraph b(iii) of Part A of Schedule 8.

**"Applicable Laws"** means all laws, regulations, directives, statutes, subordinate legislation, common law and civil codes of any relevant jurisdiction, all judgements, orders, notices, instructions, decisions and awards of any court or competent authority or tribunal and all codes of practice having force of law, statutory guidance and policy notes.

**"Approved Indebtedness"** has the meaning given to it in Schedule 13.

**"Arbitration Rules"** has the meaning given to it in Clause 18.3.

**"Authorised Representatives"** has the meaning given to it in Clause 18.2.

**"BPE Account"** means the bank account of BPE, details of which are set out in Part B of Schedule 8 (*Payment of Concession Fees*);

**"Bulk Trader"** means Nigeria Bulk Electricity Trading PLC, a company duly incorporated under the laws of the Federal Republic of Nigeria and having its registered office at No. 11 Osun Crescent, Off Ibrahim Babangida Boulevard, Maitama District, P.M.B. 442, Garki, Abuja, Nigeria now operating from the 8th Floor, Bank of Industry Building, Off Herbert Macaulay Way, Central Business District, Abuja (which expression shall where the context so admits include its successors-in- title and assigns).

**"Business Day"** means any day of the week other than a Saturday or Sunday, a Federal Government declared public holiday, a Niger State-declared public holiday, or a day on which banks are authorised by law or executive order to be closed in the Federal Republic of Nigeria.

**"Change in Law"** means:

- (A) the adoption, promulgation, bringing into effect, repeal, amendment, reinterpretation, change in application, change in interpretation or modification after the date hereof of any Law of Nigeria, by any Regulatory Authority;
- (B) the imposition of any material condition not required as of the date hereof in connection with the issuance, renewal or modification of any Consent, by any Regulatory Authority; or
- (C) the change or modification of the terms of the Generation Licence or the Water Licence after the date hereof by a Regulatory Authority or the imposition of other obligations imposing a cost on the Concessionaire;

but the term 'Change in Law' shall not include any Change in Tax or any change or modification implemented to address and rectify any Concessionaire Event of Default or as a direct result of any Concessionaire Action or Inaction.

**"Change in Tax"** means the adoption, promulgation, bringing into effect, repeal, amendment, reinterpretation, change or failure in application against the provisions of the relevant legislation, change in interpretation or modification after the date hereof by any Regulatory Authority of any Law of Nigeria relating to any tax, duty, licence fee or other revenue-producing measure, including any application of any tax (including withholding taxes on distributions to shareholders to the extent such withholding taxes are final tax





liabilities of the shareholders and are not subject to any credit or adjustment, including any credit or adjustment against any other tax liability), duty, licence fee or other revenue-producing measure which is imposed on the Concessionaire.

**"Commencement Date"** shall have the meaning provided in Clause 2.2.

**"Commencement Fee"** means the Fixed Entry Fee and the Upfront Annual Fee.

**"Concession Fees"** means the fees payable for the Concession under this Agreement and listed in Schedule 8, namely the:

- (A) Commencement Fee;
- (B) Annual Fee payable in accordance with paragraph b(iii) of Part A of Schedule 8; and
- (C) Royalty.

**"Concession Term"** means the period from the Commencement Date until the earlier of termination in accordance with Clause 17.3 and the date falling thirty (30) years after the Commencement Date.

**"Concessionaire Action or Inaction"** means any action or inaction of the Concessionaire, which action or inaction is inconsistent with or would constitute a breach of this Agreement and which action or inaction has a Material Project Effect.

**"Concessionaire Debt"** means the aggregate principal amount of any Concessionaire indebtedness outstanding plus any amounts of fees, and interest due and payable but unpaid on such outstanding indebtedness and any interest rate swap breakage costs payable to the relevant lender(s) in respect of the above amounts, in each case under the financing arrangements entered into by the Concessionaire with any third party financial institution/bank on arm's length terms.

**"Concessionaire Default Purchase Price"** has the meaning given to it in Schedule 13.

**"Concessionaire Event of Default"** has the meaning given to it in Clause 17.1.

**"Concessionaire's Moveable Assets"** has the meaning given to it in Schedule 12.

**"Consents"** means the Specified Consents and the Additional Consents.

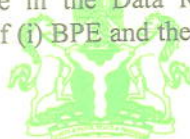
**"Contracts"** means (i) the contracts entered into by the Company and which are to be transferred, assigned and novated to the benefit of the Concessionaire on the Commencement Date, as further described in Schedule 4 and (ii) the Pre-Commencement Date Agreements.

**"Contractor"** means any Person (including the Technical Services Provider) with whom the Concessionaire contracts in accordance with the terms of this Agreement for the provision of goods or services relating to the design, construction, operation or maintenance of any part of the Power Station.

**"Customs Duties"** means those duties, taxes, charges or import fees imposed by the Laws of Nigeria on goods imported into, or exported from, the Federal Republic of Nigeria.

**"Data Room"** means the electronic and physical data room comprising the copies of the documents and other information made available by or on behalf of BPE or the Company for inspection by or on behalf of the Concessionaire (including the Concessionaire's advisers) in relation to or connected with the operations and listed in the Data Room Index.

**"Data Room Index"** means the industry-wide index and the Company's specific index of the documents made available in the Data Room which index has been signed for identification by or on behalf of (i) BPE and the Company and (ii) the Concessionaire and





which are attached to this Agreement respectively as Schedule 17 ("Industry Wide Index") and Schedule 18 ("Company Specific Index").

**"Disclosed information"** means:

- (A) any information included in the Information Memorandum or the Data Room;
- (B) any documents or correspondence forming part of the Q&A Process; or
- (C) any documents or correspondence provided or otherwise communicated at any presentations or meetings between the BPE, the Company and the Concessionaire and/or their respective advisers.

**"Dispute"** has the meaning given to it in Clause 18.1.

**"Dispute Notice"** has the meaning given to it in Clause 18.2.

**"Employee"** means a person on the payroll of the Company on the Commencement Date and following the Commencement Date.

**"Encumbrance"** means any claim, charge, mortgage, security, lien, option, equity, of sale, hypothecation or other third party rights, retention of title, right of pre-emption, right of first refusal or security interest of any kind.

**"Environmental Impact Study"** means a study, conducted in accordance with internationally accepted standards and the Laws of Nigeria, of the impact of the Operations on the environment.

**"EPSR Act"** has the meaning given to it in Recital A.

**"Equity"** means, at the relevant time, an amount equal to the aggregate of:

- (A) share capital;
- (B) share premium;
- (C) amounts due in respect of shareholder loans which are subordinated to Senior Debt (and for the avoidance of doubt Senior Debt, even where held by a shareholder, shall not be included within Equity); and
- (D) distributable reserves available for distribution (and which have not been resolved to be distributed),

in each case as stated in the latest audited accounts of the Concessionaire, or such other accounts as shall be expressly agreed in writing by BPE and the Concessionaire for the purpose of any calculation of Equity, or in the absence of such agreement, as determined in accordance with the dispute resolution procedure set out in Clause 18. **"Expert"** has the meaning given to it in Clause 19.1.

**"Exchange Rate"** has the same meaning as the meaning given to it in the Power Purchase Agreement;

**"Extension Period"** has the meaning given to it in Clause 17.3.2.

**"FGN"** means the Government of the Federal Republic of Nigeria.

**"FGN Default Purchase Price"** has the meaning given to it in Schedule 13.

**"FGN Event of Default"** has the meaning given to it in Clause 17.2.

**"Fixed Assets"** means the immoveable property affixed to the Site as further described in Schedule 2.



**"Fixed Entry Fee"** means the sum paid by the Concessionaire to BPE in an amount of fifteen million United States Dollars (US\$15,000,000) to be paid in two (2) tranches in accordance with Clause 2.2.1(A)(1), Clause 11.2.1 and Schedule 8.

**"Force Majeure Event"** has the meaning given to it in Clauses 16.1 and 16.2.

**"Force Majeure Purchase Price"** has the meaning given to it in Schedule 13.

**"Foreign Currency"** means any currency other than Naira.

**"Founding Shareholders"** mean the shareholders of the Concessionaire at the date of this Agreement.

**"Generation Licence"** means the generation licence issued to the Company by NERC in accordance with section 64(3) of the EPSR Act on or before the Commencement Date.

**"Good Design and Engineering and Construction Practices"** means in accordance with internationally recognised standards of good practice in operation and maintenance, including where applicable in design, engineering and construction.

**"Good Industry Practice"** means the exercise of that degree of skill, diligence, care and foresight, which would reasonably and ordinarily be expected from a prudent, skilled and experienced constructor and operator in the same industry engaged in the same or similar circumstance in order to operate and maintain hydroelectric dams, reservoirs and power stations and the assets relating thereto lawfully, safely, efficiently and economically.

**"Grid Code"** means the Grid Code for the Electricity Industry of Nigeria 2007 made pursuant to an Order of NERC dated 18th June 2007.

**"Grid Connection Agreement"** means the grid connection agreement between the Company and TCN governing the terms and conditions of connection of the Power Stations to TCN's Transmission Network System.

**"Hydro Property"** means the Site, the Moveable Assets and the Fixed Assets including the dam structure but excluding any property or fixed assets at the Site not required for the performance of the Operations. For avoidance of doubt, the Hydro Property shall also be deemed to include the Restorations and any improvements thereon made by the Concessionaire during the Concession Term.

**"ICRC"** means Infrastructure Concession Regulatory Commission established under the ICRC Act.

**"ICRC Act"** means the Infrastructure Concession Regulatory Commission Act 2005.

**"Industry Documents"** means, the Power Purchase Agreement, the Grid Connection Agreement and the Ancillary Services Agreement.

**"Information Memorandum"** means the information memorandum released on behalf of BPE and the Company dated September 1, 2012 in relation to the Hydro Property and the business related thereto and the transactions contemplated by this Agreement.

**"Initial Budget"** means the budget in respect of the Operations of the Concessionaire for the period of five (5) years from the date of this Agreement, as attached at Schedule 14.

**"Insurance Policies"** has the meaning given to it in Clause 13.1.1.

**"Insurance Proceeds"** has the meaning given to it in Schedule 13.

**"kW"** means kilowatt, a unit of power.

**"Lapse of Consent"** means any Consent:

(A) that is revoked by the Regulatory Authority which issued it;





- (B) that is not issued, renewed or, having lapsed, is not reissued, within one hundred and eighty (180) days of application by the Concessionaire for that Consent to be issued, renewed or reissued, as the case may be, and as a result the Concessionaire's ability to perform its obligations under this Agreement is materially and adversely affected;
- (C) that is made subject, subsequent to its grant, upon renewal or otherwise, to any terms or conditions which materially and adversely affect the Concessionaire's ability to perform its obligations under this Agreement;
- (D) that, in the case of a customs clearance or similar Consent required solely in order to import any item required for the Operations is not issued within twenty one (21) Business Days of application by the Concessionaire,

except in each of the above circumstances where such circumstance has arisen due to Concessionaire Action or Inaction, or through the exercise by FGN, BPE or any Regulatory Authority of its powers under the Laws of Nigeria as contemplated by Clause 8.3.

**"Laws of Nigeria"** means:

- (A) the Nigerian constitution and all Nigerian laws, statutes, treaties, rules, codes, ordinances, regulations, certificates, decisions, orders, memoranda, circulars, decrees, resolutions, directives, rulings, interpretations, approvals, licences, and permits of any Regulatory Authority; and
- (B) judgments, decrees, injunctions, writs, orders or like actions of any Regulatory Authority, court, arbitrator or other administrative, judicial or quasi-judicial tribunal or agency of competent jurisdiction,

in each case (i) that applies to the Concessionaire or the Operations and (ii) as amended, supplemented, replaced, reinterpreted by a Regulatory Authority or court or otherwise modified from time to time.

**"Lenders' Waiting Period"** has the meaning provided to it in Clause 17.11.1(A).

**"LIBOR"** means in relation to the amount and currency of the sum in question, London Interbank Offered Rate interest rate quoted by the British Bankers' Association at telerate page 3750 for a three (3) month period on the London Interbank Market at or about 11.00am on the first Business Day of the period specified hereunder in respect of which interest (or an amount equivalent to interest) is to be calculated.

**"Licences"** means the Generation Licence and the Water Licence.

**"Longstop Date"** has the meaning provided to it in Clause 2.2.1.

**"Loss"** means any loss, liability, cost (including legal costs and experts' and consultants' fees), charge, judgments, expenses, Actions and demands.

**"Market Rules"** means the Market Rules for the Electricity Sector of Nigeria 2009.

**"Material Adverse Effect"** means any of the following occurring after the date of this Agreement, which is either (i) subsisting at the Commencement Date; or (ii) which is likely to be subsisting at the Commencement Date:

- (A) damage and/or destruction to the Hydro Property that is caused by a natural or human factor where such damage and/or destruction is of such significance that the operations are, or are likely to be, halted or unable to be resumed or carried under normal circumstances for a continuous period of ninety (90) days or more following the occurrence of such damage and/or destruction; or
- (B) theft or disposal of 25% or more of the Hydro Property.





**"Material Project Effect"** means a material and adverse effect on:

- (A) the ability of the Parties or either of them to timely perform their obligations or exercise their rights under this Agreement; or
- (B) the timely execution of the Operations.

**"Minimum Capacity Target"** shall mean the Shiroro Minimum Capacity Target having the meaning given to it in Schedule 7.

**"Minimum Performance Targets"** means the Minimum Capacity Target and Restoration Target as set out in Schedule 7.

**"Minister"** means the Minister charged with responsibility for matters relating to water resources.

**"MOFI"** means the Ministry of Finance Incorporated established under Ministry of Finance Incorporated Act CAP M15 Laws of the Federation of Nigeria 2004.

**"Moveable Assets"** means the moveable property of the Company used by the Company for the purposes of performing the Operations on the Commencement Date.

**"MW"** means "megawatt", a unit of power being one thousand kilowatts (1,000 kW).

**"Naira"** means the currency that is the legal tender of the Federal Republic of Nigeria.

**"Natural Force Majeure Event"** has the meaning given to it in Clause 16.3.

**"NCP"** means National Council on Privatisation established under the Privatisation Act.

**"NERC"** means the Nigerian Electricity Regulatory Commission.

**"Operating Year"** means each consecutive period of twelve (12) months starting on the date of execution of this Agreement.

**"Operations"** means the operations and activities described in Clause 3.1.1.

**"Party"** means any of the signatories to this Agreement and their permitted successors or assigns.

**"Performance Default"** has the meaning given in paragraph 1 of Schedule 7.

**"Person"** means an individual, corporation, partnership, joint venture, trust, unincorporated organisation, Regulatory Authority or any other legal entity.

**"PHCN"** means the Power Holding Company of Nigeria Plc.

**"Political Force Majeure Event"** has the meaning given to it in Clause 16.4.

**"Post-Acquisition Plan"** means the business plan for the Company for the period of five (5) years from the date of this Agreement, as attached at Schedule 15, as varied by the Concessionaire under the terms of this Agreement.

**"Power Purchase Agreement" or "PPA"** means the power purchase agreement relating to the sale of electricity generated from the Power Station, entered into by the Company and Nigeria Bulk Electricity Trading Plc in the Federal Republic of Nigeria as novated in favour of the Concessionaire or such other power purchase agreement as entered into by the Concessionaire during the Concession Term.

**"Power Station"** means the Shiroro Power Station.

**"Pre-Commencement Date Contracts"** means (i) any contracts executed between 1 January 2012 and signature; and (ii) any contracts for the refurbishment and rehabilitation of the Hydro Property entered into by BPE or the Company between the date of signature of this Agreement and the Commencement Date, provided such contract has been notified





to and approved by the Concessionaire (such consent not to be unreasonably withheld or delayed).

**"Pre-Commencement Date Refurbishment Costs"** means the costs and expenditure incurred by the Company and/or BPE in the refurbishment and rehabilitation of the Hydro Property pursuant to the Pre-Commencement Date Contracts from 1 January 2012 until Commencement Date as determined pursuant to Clause 2.4.

**"Preferred Bidder's Bank Guarantee"** means the bank guarantee issued by the Concessionaire's bank in favour of BPE.

**"Privatisation Act"** means the Public Enterprises (Privatisation and Commercialisation) Act Cap P38 Laws of the Federation of Nigeria 2004.

**"Protected Assets"** means any defence-related property of FGN or assets protected by the diplomatic and consular privileges under the Diplomatic Immunities and Privileges Act, CAP D9 Laws of the Federation of Nigeria 2004, or any analogous legislation.

**"Q&A Process"** means any information made available by or on behalf of BPE and/or the Company in response to questions raised by and on behalf of the Concessionaire in connection with the Concessionaire's access to the Data Room and the Concessionaire's due diligence of the Hydro Property and related business.

**"Qualifying Shareholder Debt"** means the aggregate principal amount of any Shareholder indebtedness outstanding plus any amounts of fees, and interest due and payable but unpaid on such outstanding indebtedness and any interest rate swap breakage costs payable to the relevant lender(s) in respect of the above amounts, in each case under the financing arrangements entered into by the Shareholder or any Affiliate thereof with any third party financial institution/bank on arm's length terms for the purchase of any Share Capital.

**"Refurbishment Costs Notice"** has the meaning given to it in Clause 2.4.1.

**"Regulatory Authority"** means (i) any department, authority, instrumentality, agency or any other relevant entity from which a Consent is to be obtained from time to time; or (ii) any federal or state legislative authority or any other authority, body or other person, including ICRC and NERC, having jurisdiction under the Laws of Nigeria with respect to the Concessionaire or the Operations.

**"Reinstatement Costs"** has the meaning given to it in Schedule 12.

**"Related Agreements"** has the meaning given to it in Clause 18.9.

**"Related Person"** means, in relation to any person, an Affiliate or (as the case may be) any of its holding companies or subsidiaries of its holding companies from time to time.

**"Relevant Rules"** means any of the Grid Code, the Metering Code, the Market Rules, the Nigerian Electricity Health and Safety Standards Manual and any other regulation or order made by NERC.

**"Restorations"** means the restorations to be made to the Hydro Property by the Concessionaire in accordance with the provisions of paragraph 5 of Schedule 7.

**"Restoration Target"** shall mean the Shiroro Rehabilitation Target having the meaning given to it in Schedule 7.

**"Retention Amount"** has the meaning given to it in Clause 17.10.

**"Royalty"** has the meaning attributed thereto in Schedule 8.





**"Security Interest"** means any mortgage, pledge, lien, charge, assignment, hypothecation or security interest or any other agreement or arrangement having a similar effect.

**"Selected Employee"** means an individual to whom the Concessionaire has made an offer of employment pursuant to Schedule 5, which offer has been accepted.

**"Senior Debt"** means Concessionaire Debt and/or Qualifying Shareholder Debt, as the case may be.

**"Share Capital"** means shares in the capital of the Concessionaire with voting or other rights of management and control and securities of the Concessionaire that are convertible into such shares at the option of the holder.

**"Shareholder"** means any shareholder from time to time of the Concessionaire which is either (i) a Founding Shareholder, or (ii) has acquired shares in the Concessionaire (whether by way of transfer, assignment, allotment or otherwise) in accordance with the terms of this Agreement.

**"Shiroro Minimum Capacity Target"** has the meaning given in paragraph 1 of Schedule 7.

**"Shiroro Power Station"** means the hydroelectric power station located on the Shiroro Reservoir and further detailed in Schedule 2.

**"Shiroro Reservoir"** means the reservoir situated on the River Kaduna in Niger State and known as the Shiroro Reservoir further detailed in Schedule 1.

**"Shiroro Restoration Target"** has the meaning given in paragraph 1 of Schedule 7.

**"Site"** means the site on which the Power Station is constructed plus certain adjoining land, as further described in Schedule 1.

**"Specified Consents"** means all consents, approvals, authorisations, notifications, concessions, acknowledgements, Licences, licences, permits or similar items required to be obtained by the Concessionaire from any Regulatory Authority for the Operations, specified in Schedule 6.

**"State Entity"** means either the Government of any of the States of the Federal Republic of Nigeria or any person or entity Controlled by the Government of any of the States of the Federal Republic of Nigeria, and **"Control"** for the purpose of this definition means the direct holding and/or the direct possession of the beneficial interest in and/or the ability to exercise the voting rights applicable in shares or other securities in any person or entity which confer in aggregate on the Government of any of the States of the Federal Republic of Nigeria fifty per cent (50%) or more of the total voting rights exercisable at general meetings of that person or entity on substantially all matters;

**"TCN"** means the Transmission Company of Nigeria responsible for providing Electricity transmission services, system operations and market operations as defined in sub-clause 25(b) of the EPSR Act 2005 and the Market Rules.

**"TCN's Transmission Network System"** means the system consisting (wholly or mainly) of high voltage electric lines owned or operated by TCN and used for the transmission of electricity from one power station to a sub-station or to another power station or between sub-stations or to or from any external source.

**"Technical Services Agreement"** means an agreement dated 14 May 2012 entered into between the Concessionaire and the Technical Services Provider, a copy of which has been annexed in Schedule 16.





**"Technical Services Provider"** means China International Water Electric Corporation and China Three Gorges Company both companies incorporated under the laws of the People's Republic of China and having their registered offices at No. 1 Yuyuantan South Road, Building B, China Three Gorges Corporation Haidan District, Beijing, China.

**"Term"** has the meaning provided in Clause 2.1.

**"Termination Period"** has the meaning provided in Clause 2.1.1(C).

**"Total Capital"** means, from time to time, an amount equal to Equity plus Senior Debt.

**"Transfer Price"** means the amount paid following termination of the Concession Term by BPE to the Concessionaire pursuant to Clause 17.4 and Schedule 13.

**"Transition Period"** has the meaning provided in Schedule 11.

**"United States Dollars"** or **"US\$"** means the currency that is the legal tender of the United States of America.

**"Upfront Annual Fee"** means an amount of ninety six million, six hundred fifty four thousand, five hundred thirty four United States Dollars (US\$ 96,654,534) representing the first five (5) Annual Fees discounted at a rate of ten percent (10%) per annum to be paid upfront in two (2) tranches in accordance with Clause 2.2.1(A)(2), Clause 11.2.2 and Schedule 8.

**"Waste Material"** means unwanted material left over from a manufacturing process or refuse from places of human or animal habitation and shall include hazardous waste being a by-product of anthropogenic activities that is either ignitable, corrosive, reactive or toxic and that can pose a substantial or potential hazard to human health or the environment when improperly managed.

**"Water Licence"** means the licence to be issued by the Minister of Water Resources pursuant to the Water Resources Act Cap W2 Laws of the Federation of Nigeria, 2004 in respect of the use and control of waters at the Shiroro Reservoir on the River Kaduna.

## 1.2 Rules of Interpretation

In this Agreement, unless the context requires otherwise:

- 1.2.1 the headings are for convenience only and shall not be considered in construing this Agreement;
- 1.2.2 the singular includes the plural and vice versa;
- 1.2.3 references to Articles, Clauses and Schedules are references to articles and Clauses of, and schedules to, this Agreement;
- 1.2.4 the terms "include" and "including" mean without limitation;
- 1.2.5 where provision is made for the giving of notice, certificate, determination, consent or approval by any person that notice, certificate, determination, consent or approval shall be in writing, and the words "notified", "certified", "determined", "consents" or "approved" shall be construed accordingly;
- 1.2.6 reference made to any publication, statute, rule, regulation, instrument or standard means the same as amended, supplemented or re-enacted from time to time; and
- 1.2.7 reference made to any contract or agreement means the same as amended, supplemented or replaced from time to time in accordance with its terms.



## 2. COMMENCEMENT DATE AND TERM

### 2.1 Term

2.1.1 The term ("Term") of this Agreement comprises three phases:

- (A) a transitional period commencing on the date of signature until the Commencement Date, during which Clauses 1, 2, 7, 8, 10, 11, 15, 16, 18 and 19 together with the relevant Schedules, including Schedule 11 (Transition Plan) shall take effect;
- (B) the Concession Term, during which all provisions shall be in full force and effect; and
- (C) a Termination Period (as hereinafter defined) during which the Concessionaire shall re-transfer the Hydro Property and the Parties shall co-operate to ensure a smooth transfer of Operations from the Concessionaire back to the Company.

### 2.2 Conditions Precedent

2.2.1 The Commencement Date shall occur on the date being ten (10) days after the last of the following conditions has been discharged but subject to such date occurring on or before six (6) months from the date of execution of this Agreement (or such later date as the Parties may agree) (the "Longstop Date").

- (A) the Concessionaire transferring to the BPE Account the Commencement Fee as follows:
  - (1) twenty five per cent (25%) of the Fixed Entry Fee being an amount of three million, seven hundred and fifty thousand United States Dollars (US\$3,750,000); and
  - (2) twenty five per cent (25%) of the Upfront Annual Fee being an amount of twenty four million, one hundred and sixty three thousand, six hundred and thirty four United States Dollars (US\$24,163,634),within fifteen (15) Business Days from the date of execution of this Agreement, such payment to be made in accordance with Schedule 8;
- (B) the Industry Documents being entered into by the parties thereto;
- (C) the Specified Consents (excluding the Generation Licence) as listed in Schedule 6 being requested and issued in accordance with Clause 8;
- (D) NERC consenting to the transfer of the Generation Licence from the Company to the Concessionaire, subject only to the occurrence of the Commencement Date;
- (E) the Concessionaire providing to BPE not later than ten (10) Business Days prior to the Longstop Date, a performance bond in favour of BPE from a reputable A-rated financial institution acceptable to BPE in an amount not less than fifteen million United States Dollars (US\$15,000,000) in the form set out in Schedule 9, such performance bond to remain in full force and effect from the Commencement Date to the date of termination of this Agreement (without prejudice to the obligations and liabilities of the issuer of the performance bond that have accrued under the performance bond prior to the date of termination of this Agreement) and to cover the Concessionaire's performance obligations under this Agreement;





2.2.2 Each Party shall use all reasonable endeavours to obtain the satisfaction of the conditions requiring action by such Party under this Clause 2.2.

2.2.3 If:

- (A) the Commencement Fee is not paid into BPE Account in accordance with Clause 2.2.1 and Schedule 8, the Concessionaire shall be deemed to have withdrawn its proposal for the concession hereof ("the Proposal") and the BPE may terminate this Agreement with immediate effect by notifying the Concessionaire of such termination in writing (without limiting BPE's right to claim liquidated damages under Clause 2.2.6) and upon such notification this Agreement shall terminate except in respect of any rights and liabilities which have accrued before termination. Termination pursuant to this Clause 2.2.3 shall be without prejudice to other legal rights and remedies available to BPE and or the Company;
- (B) any condition, other than the Payment of the Commencement Fee detailed in Clause 2.2.1(A), has not been satisfied by the Party of whom action is required on or before the Longstop Date, then, unless otherwise agreed in writing by the Parties, the other Party shall have the right to terminate this Agreement fifteen (15) days after the delivery of written notice to the Party of whom action is required, provided that the appropriate action has not been taken within such period to satisfy the condition. For the avoidance of doubt where either BPE or the Company fail to discharge a condition, the right to terminate shall accrue to the Company; or
- (C) any condition detailed in Clause 2.2.1(C), (D) or (E) has been fulfilled but on the relevant Commencement Date such agreement, consent, approval, licence, bond or guarantee (as appropriate) ceases to be in full force and effect, then, unless otherwise agreed in writing by the Parties, any Party shall have the right to terminate this Agreement provided it has given the other Parties at least fifteen (15) days' notice of such intention and appropriate action has not been taken within such period to remedy such defect.

2.2.4 If it becomes sufficiently clear that any condition detailed in Clause 2.2.1(B), (C), (D) or (E) will not or cannot be fulfilled by the Party of whom action is required by or at any time before the Longstop Date then the Concessionaire (if the Party on whom action is required is BPE or the Company) or BPE (if the Party on whom action is required is the Concessionaire) shall have the right to terminate this Agreement fifteen (15) days after the delivery of written notice to the Party of whom action is required.

2.2.5 In the event the Agreement is terminated due to the fault of the Company or BPE, then each Party shall be excused and relieved of all obligations and liabilities under this Agreement save as otherwise specified in Clause 17, and BPE shall reimburse any amount paid in accordance with Clause 2.2.1(A) to the Concessionaire.

2.2.6 In the event the Agreement is terminated in accordance with Clauses 2.2.3 or 2.2.4 due to the fault of the Concessionaire, then each Party shall be excused and relieved of all obligations and liabilities under this Agreement save as otherwise specified in Clause 17, and BPE shall be entitled to liquidated damages and to retain:

- (A) an amount equal to five per cent (5%) of the Fixed Entry Fee being an amount of seven hundred and fifty thousand United States Dollars (US\$750,000); and



agreement (or determination, if applicable). For the avoidance of doubt, where only certain items are disputed, the Concessionaire shall pay the agreed items notwithstanding that the disputed items may have been referred to an Expert for determination.

### 3. BASIC RIGHTS AND OBLIGATIONS

#### 3.1 Concession

In consideration of the covenants and agreements set out in this Agreement and other good and valuable consideration, including but not limited to the Concession Fees, from the Commencement Date and during the Concession Term:

3.1.1 each of BPE and the Company shall use their respective endeavours and provide all reasonable assistance to procure that, in accordance with and subject to the terms of the Industry Documents, the Specified Consents (including the Licences) and this Agreement the Concessionaire shall be entitled to:

- (A) operate and maintain the Power Station;
  - (B) design and conduct the Restorations;
  - (C) generate power at the Site;
  - (D) sell the electricity produced; and
  - (E) to provide the Ancillary Services,
- and collectively referred to as the "Operations".

3.1.2 The Company confirms that, subject and pursuant to the terms of this Agreement, it shall:

- (A) delegate to the Concessionaire all such powers and authority as are necessary and within its powers for the Concessionaire to perform the Operations;
- (B) lease the Hydro Property, to the Concessionaire and the Concessionaire shall lease such Hydro Property from the Company free and clear of all Security Interests, subject to the terms and conditions set out in this Agreement;
- (C) transfer the employment of the Selected Employees in accordance with Schedule 5; and
- (D) assign, transfer and novate to the Concessionaire any Contracts entered into by the Company and necessary for the performance of the Operations.

3.1.3 The provisions of, and rights conferred by, this Clause 3.1 in their entirety together with the rights and obligations conferred by this Agreement shall constitute the "Concession".

3.1.4 BPE, acting under the instructions of NCP, confirms the grant of the Concession to the Concessionaire subject and pursuant to the terms of this Agreement.

3.1.5 The Parties acknowledge and agree that their rights and obligations under this Agreement shall be subject to:

- (A) the Laws of Nigeria;
- (B) any Consent; and
- (C) the lawful requirements of any Regulatory Authority;

and, in the event of any conflict between the Parties' rights and obligations under this Agreement and any of those laws, consents and requirements, those laws,





consents and requirements shall prevail and the Parties' rights and obligations under this Agreement shall be deemed to be modified to the extent required to enable the Parties to comply with such laws, consents and requirements.

#### **4. USE OF HYDRO PROPERTY**

##### **4.1 Permitted use of Hydro Property**

The Concessionaire shall only use the Hydro Property to perform the Operations and any activities ancillary thereto, and shall not use the Hydro Property for any other purpose without the Company's prior written approval. The Concessionaire shall not conduct any activities within the Site other than the performance of the Operations. The Concessionaire shall not conduct such permitted use, or allow such permitted use to be conducted, in violation of the Laws of Nigeria or in any manner that would:

- 4.1.1 violate, invalidate or cause a loss of coverage under any insurance in force on or after the Commencement Date with respect to the Hydro Property;
- 4.1.2 cause injury or damage to the Hydro Property (except for reasonable wear and tear) or to the person or property of any Person on the Hydro Property;
- 4.1.3 cause diminution in the value or usefulness of all or any portion of the Hydro Property (except for reasonable wear and tear);
- 4.1.4 disturb or unreasonably interfere with or endanger any Person;
- 4.1.5 create a nuisance or waste in on or about the Site; or
- 4.1.6 constitute a breach of the Industry Documents or the Specified Consents (including the Licences).

##### **4.2 Alteration of Hydro Property**

- 4.2.1 The Concessionaire shall furnish to the Company and the Regulatory Authority (if applicable) the following no later than sixty (60) days after the Commencement Date:
  - (A) the plans and drawings for the Restoration works;
  - (B) the names and addresses of the proposed Contractors for such Restoration works; and
  - (C) such other documentation as may be reasonably requested by the Company or any Regulatory Authority in relation to the Restoration works.
- 4.2.2 For the avoidance of doubt, the Restorations and any improvements shall form part of the Hydro Property.
- 4.2.3 Any improvements or approved alterations made by the Concessionaire to the Hydro Property which cannot be removed by the Concessionaire by the date of termination of this Agreement shall be and shall remain the property of the Company and any claim for or reimbursement by the Concessionaire for the cost of the value thereof shall be determined in accordance with the provisions of Clause 18.

##### **4.3 Construction Contracts**

- 4.3.1 Any improvements or alterations to the Hydro Property shall be notified to the Company in advance together with details of all salient terms, for its approval, such consent not to be unreasonably withheld or delayed.





- 4.3.2 Such consent shall be deemed if no objection is raised by the Company, within thirty (30) days of such terms being provided by the Concessionaire.

#### 4.4 Applicable Standards

The Concessionaire shall ensure that the Restorations made and any other improvements and/or alterations made are in compliance with:

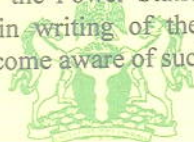
- 4.4.1 the Laws of Nigeria;
- 4.4.2 international conventions, protocols and international agreements to which the Federal Republic of Nigeria is a party;
- 4.4.3 Good Industry Practice;
- 4.4.4 the Industry Documents; and
- 4.4.5 the Specified Consents (including the Licences).

#### 4.5 Rights to Monitor and Inspect

- 4.5.1 Without limiting or reducing the Concessionaire's obligations under Clause 4.4 and without prejudice to (i) the rights of ICRC to monitor concessions under the ICRC Act and (ii) NERC to monitor the Operations under the EPSR Act and the Generation Licence, the Company and BPE shall through their respective designated representatives, have the right to inspect the Restorations and any other improvements or alterations during performance of the same and after they have been completed.
- 4.5.2 On completion of each of the Restorations and any other improvements or alterations, the Concessionaire shall notify the Company/BPE and any Regulatory Authority (if applicable) in writing that they are in accordance with the plans approved by the Company, BPE and any Regulatory Authority (if applicable) and comply with the Laws of Nigeria; the Company/BPE shall, through their respective designated representatives, have sixty (60) days to inspect such Restorations or any other improvements or alterations and to require such reasonable alterations as are necessary for compliance with the applicable standards in accordance with Clause 4.4.
- 4.5.3 Any inspection by the Company/BPE pursuant to Clauses 4.5.1 or 4.5.2 shall be undertaken in accordance with the provisions set out in Clause 9.7.

#### 4.6 Maintenance

- 4.6.1 The Concessionaire shall be responsible for the maintenance of the Hydro Property including the associated navigational locks so that at all times from the Commencement Date and during the Concession Term, the Hydro Property shall meet the requirements set out in this Agreement (including the Minimum Performance Targets).
- 4.6.2 All maintenance work conducted on the Power Station shall be equal or better in quality to the original material and workmanship standard and shall comply with the Laws of Nigeria and Good Industry Practice.
- 4.6.3 The Concessionaire shall obtain and maintain all Consents required for such maintenance work in accordance with the Laws of Nigeria.
- 4.6.4 Save in relation to damage which shall be the object of the Restoration, in the event that any part of the Power Station is damaged, the Concessionaire shall notify the Company in writing of the same within three (3) days after the Concessionaire has become aware of such damage.





- 4.6.5 The Concessionaire shall commence the process of repairing such damage within twelve (12) days and shall complete such repair to the damaged Power Station within a reasonable period to be mutually agreed between the Company and the Concessionaire. In the event that the Concessionaire fails to commence the process of repairing within such period, then the Company may give notice in writing to the Concessionaire requiring the Concessionaire to commence the process of repairing within twelve (12) days.
- 4.6.6 If the Concessionaire has failed to commence the process of repairing upon expiry of the notice by the Company, then the Company may offer the repair work for tender and the Parties shall agree the appointment of a contractor to perform the repair work. In such instance, the Concessionaire shall be responsible for the cost of the repair and if the Company is required to make any payment towards such repair work, the Concessionaire shall reimburse the Company its actual costs reasonably incurred together with interest in accordance with Clause 20.17.
- 4.7 **Peaceful and quiet enjoyment**
- 4.7.1 To the extent that the Concessionaire complies with the terms and conditions of this Agreement, the Concessionaire shall peacefully and quietly hold, occupy, use and enjoy the Hydro Property.
- 4.7.2 In the event that the Concessionaire suffers any claims, causes of action, damages, or losses which may accrue and arise from the acts or omissions of any employee, official or agent of the Company having a right of use over the Site prior to the Commencement Date, the Company shall indemnify, defend, and hold harmless the Concessionaire from and against any such claims.

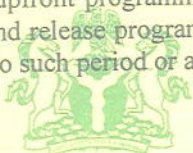
## **5. HYDRO PROPERTY**

### **5.1 Lease of the Hydro Property**

- 5.1.1 Subject to the terms and conditions of this Agreement, and by executing this Agreement, the Company hereby grants the Concessionaire a lease, from the Commencement Date, for the Concession Term, of the Company's right, title and interest in and to the Hydro Property.
- 5.1.2 If necessary, the Company and the Concessionaire agree to execute any necessary assignment agreements, novation agreements or other instruments of transfer required to implement the lease.

### **5.2 Use of Water**

- 5.2.1 The right to use the water flows of the River Kaduna at the Shiroro Reservoir from the Commencement Date and until the expiry or termination of this Agreement shall be subject to the terms of the award of the Water Licence and all relevant Applicable Laws including but not limited to the Water Resources Act Cap W2 Laws of the Federation of Nigeria, 2004.
- 5.2.2 Notwithstanding the foregoing, the Concessionaire expressly acknowledges that:
- (A) the Minister shall retain the option to manage the timing, quantity of retention and release of all water from the Shiroro Reservoir including for irrigation purposes and in such circumstances, the Minister, shall provide to the Concessionaire an upfront programme and planning schedule setting out the timing, quantities and release programme for each ten (10) day period at least ten (10) days prior to such period or as otherwise agreed between the Parties;





- (B) FGN, or as applicable, any Regulatory Authority, shall retain all fishing rights and no fishing rights shall be afforded by this Agreement;
- (C) In the event that (i) the Concessionaire elects not to build or commission further units or power plants at the site, or (ii) following a Minister, or as applicable, any Regulatory Authority, request, the Concessionaire elects not to build additional power plants or units at the Shiroro Reservoir on the basis of such proposal, then FGN, or as applicable, any Regulatory Authority, shall have the right to build, commission and/or concession such additional power plants, units and facilities.

## **6. TRANSFER OF EMPLOYEES AND CONTRACTS**

### **6.1 Employees**

The Concessionaire shall, within six (6) months from the Commencement Date diligently consider which of the Employees it requires in its Operations and will offer employment to the Selected Employees in accordance with the provisions of Schedule 5.

### **6.2 Contracts**

- 6.2.1 Subject to the terms and conditions of this Agreement, upon the Commencement Date, the Company shall assign, transfer and novate (as applicable) the Contracts to the Concessionaire, and the Concessionaire shall accept such assignment, transfer and novation from the Company.
- 6.2.2 Notwithstanding the provisions of Clause 6.2.1 above, to the extent that the terms of any such Contracts prohibit such transfer or require the consent or approval of a third party, the Parties shall determine whether to seek such consent or otherwise implement a back-to-back arrangement so as to pass through all rights, obligations and liabilities to the Concessionaire.

## **7. OPERATIONS**

### **7.1 Operations**

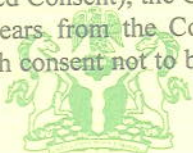
7.1.1 The Concessionaire shall at all times conduct the Operations:

- (A) in a safe, efficient, effective and economic manner;
- (B) with due care and skill; and
- (C) in accordance with the Laws of Nigeria, this Agreement, Good Industry Practice, the Relevant Rules, the Specified Consents (including the Licences) and the terms of the Industry Documents;

in order to increase the available capacity of the Power Stations so as to achieve at least the Minimum Performance Targets.

7.1.2 The Concessionaire undertakes that it shall at all times comply with and implement the Initial Budget and Post-Acquisition Plan, save that where there is any conflict or inconsistency between such Post-Acquisition Plan and/or Initial Budget and the matters detailed in Clause 7.1.1 or 3.1.5, the matters detailed in Clause 7.1.1 or 3.1.5 (as applicable) shall, unless otherwise agreed or provided, prevail.

7.1.3 Without prejudice to the lawful requirements of NERC (including the conditions of any relevant Specified Consent), the Concessionaire undertakes that it shall for a period of five (5) years from the Commencement Date, obtain BPE's prior consent in writing (such consent not to be unreasonably withheld) for any annual





revision to the then current approved Initial Budget and/ or Post-Acquisition Plan. Any such request shall be made in writing to BPE no later than three (3) months prior to the end of the then current financial year, attaching the Initial Budget and/or Post-Acquisition Plan to be revised and setting out full details of the revisions requested and the justification and basis for such request. On receipt of such request, BPE may request additional information from the Concessionaire in respect of such revision. Within thirty (30) days of the receipt of the said request or the additional information (as applicable), BPE shall inform the Concessionaire of its decision in respect of such revision of the Initial Budget and/or Post-Acquisition Plan to be revised.

- 7.1.4 In the event that BPE does not consent to the revision of the Initial Budget and/or the Post-Acquisition Plan as requested by the Concessionaire pursuant to Clause 7.1.3, the then current Initial Budget and/or Post-Acquisition Plan (as applicable) shall, subject to the lawful requirements of NERC (including the conditions of any relevant Specified Consent), continue in effect until a further revised Initial Budget and/or the Post-Acquisition Plan is approved by BPE.

## **7.2 Compliance with the Minimum Performance Targets**

- 7.2.1 The provisions of Schedule 7 shall apply with respect to:

- (A) the operation of the Power Stations;
- (B) the Shiroro Minimum Capacity Target for each Power Station; and
- (C) the Shiroro Restoration Target for each Power Station.

## **7.3 Duty to cooperate**

- 7.3.1 The Parties shall cooperate in good faith to ensure the smooth and effective transfer of the provision of the Operations from the Company to the Concessionaire on the Commencement Date in accordance with Schedule 11.

- 7.3.2 In performing the Operations, the Concessionaire shall cooperate with the Company, BPE, the Bulk Trader and any Regulatory Authority (as applicable) so as to enable the Company and BPE to perform their monitoring, supervisory and other duties relating to the Power Station.

## **7.4 Financing of Operations**

- 7.4.1 Without prejudice to the lawful requirement of NERC (including the conditions of any relevant Specified Consent), the Concessionaire shall be responsible for the planning of the financing of its performance of the Operations. Any financing arrangements which would fall within the definition of Approved Indebtedness in Schedule 13 shall be subject to the prior approval of the BPE to both the amount of such Senior Debt and the terms and conditions (including as to security) on which such Senior Debt is provided, such approval not to be unreasonably withheld or delayed and shall include a direct agreement between the lender and BPE which reflects, inter alia, the terms of Clause 17.11 of this Agreement. The Concessionaire shall notify BPE of the proposed amount and terms and conditions of any financing agreements which it wants to be treated as Approved Indebtedness. On receipt of the said notice, BPE may request additional information from the Concessionaire in respect of such proposed financing arrangements. Within thirty (30) days of the receipt of the said notice or the additional information (as applicable), BPE shall inform the Concessionaire of whether or not it approves such financing arrangements in the amount and on the terms and conditions notified to it. Where BPE fails to provide its decision within





such thirty (30) days it shall be deemed to have approved the proposed financing arrangement in the amount and on the terms and conditions proposed. Approved Indebtedness as at the date of this Agreement is set out in Schedule 3. The Concessionaire may use this Agreement as security for obtaining finance in respect of the Operations. For the avoidance of doubt, no security shall be created over the Hydro Property which would prevent the Concessionaire from complying with its obligation upon termination or expiry of the Concession Term to transfer, convey or assign the Hydro Property to the Company free and clear of all Encumbrances.

- 7.4.2 The Concessionaire undertakes to ensure that the Equity in the Total Capital of the Concessionaire shall be: (i) not less than thirty percent (30%) on the Commencement Date; and (ii) not less than twenty five percent (25%) at any time thereafter during the first five (5) years of the Commencement Date.

**7.5 Contractors and responsibility**

- 7.5.1 The Concessionaire may delegate its responsibilities to conduct the Restorations and any improvements to one or more Contractors.
- 7.5.2 The Concessionaire may delegate its responsibility to operate and maintain the Power Station to a Contractor subject to prior approval of BPE and any Regulatory Authority (if applicable).
- 7.5.3 The Parties acknowledge that the Concessionaire has entered into the Technical Services Agreement with the Technical Services Provider. The Concessionaire undertakes to ensure that the Technical Services Provider performs the Technical Services Agreement in a manner which enables the Concessionaire to comply with its obligations under this Agreement. The Concessionaire shall not permit any material variation or amendment of the terms of the Technical Services Agreement or the services provided thereunder nor any further delegation, sub-contracting or assignment by the Technical Services Provider of its functions, rights and obligations under the Technical Services Agreement without the prior approval of BPE.
- 7.5.4 Any BPE consent or approval required under this Clause 7.5 shall be deemed if no objection is raised by BPE within thirty (30) days of such approval or consents being requested by the Concessionaire.
- 7.5.5 The Concessionaire shall at all times remain liable for the performance of its obligations under this Agreement, notwithstanding any delegation to any Contractor.

**7.6 Environmental Protection, Health, Resettlement, and Safety**

- 7.6.1 BPE shall, prior to the Commencement Date submit to the Concessionaire an Environmental Impact Study prepared in accordance with internationally accepted standards and the Laws of Nigeria.
- 7.6.2 The Concessionaire shall at all times comply with the terms of the Environmental Impact Study together with the Laws of Nigeria and shall take additional steps, as reasonably necessary or required in accordance with Good Design and Engineering and Construction Practices and Good Industry Practice to protect the environment, promote safety and undertake appropriate resettlement measures.
- 7.6.3 The Concessionaire shall promptly notify the Company of any environmental accidents or emergencies and shall report periodically, but at least annually, on





remediation programmes and emergency response plans for environmental impact from the Operations.

- 7.6.4 In the event of an environmental accident, the Concessionaire shall develop an environmental management plan in accordance with the Laws of Nigeria, and issue a report to the Company and BPE, at least weekly, assessing the environmental damage and updating the status of the remediation programme until the completion of such remediation.

## **8. PERMITS AND APPROVALS**

### **8.1 Applications by the Concessionaire for Consents**

- 8.1.1 The Concessionaire shall make or cause to be made to the Relevant Authorities, in a timely fashion, all applications as required and appropriate (whether initial or renewal applications) for all Specified Consents and Additional Consents including those consents required at the Commencement Date, and shall diligently pursue all such applications.
- 8.1.2 The information supplied in the applications shall be complete and accurate and shall satisfy the substantive and procedural requirements of the applicable Laws of Nigeria applied in a non-discriminatory manner. All applications for Consents shall be accompanied by the applicable fee.
- 8.1.3 Subject to the Concessionaire's compliance with Clauses 8.1.1 and 8.1.2, the Company and BPE where applicable shall provide all reasonable assistance to the Concessionaire in respect of the application for any Specified Consents and Additional Consents that may be required from time to time and shall not directly or indirectly oppose the grant of such consents without valid grounds.

### **8.2 Status of Consent Applications**

- 8.2.1 The Concessionaire shall make or cause to be made to the Company at least quarterly during the term of this Agreement, reports listing its schedule for submitting Consent application forms or renewal application forms, the status of any Consent applications then outstanding, notifications of the grant, renewal or denial of any Consent and notifications of any violations of any Consent. Each report shall include copies of all applications and notifications discussed in the report. The first section of each report shall also summarise any problems regarding any Consent or Consent application that may affect the Concessionaire's performance under this Agreement.
- 8.2.2 In the event of any Lapse of Consent, the Concessionaire shall submit a report pursuant to this Clause 8.2 within three (3) Business Days thereof unless such Lapse of Consent could not reasonably be known to the Concessionaire without notification from the issuing Regulatory Authority, in which case the Concessionaire shall submit a report pursuant to this Clause 8.2 within three (3) Business Days of such notification.

### **8.3 Conditions to Consents**

Any Regulatory Authority may attach such non-discriminatory terms and conditions to the issuance or renewal of any of the Consents as are reasonably required to ensure compliance with the Laws of Nigeria, and the attachment of such terms or the Company and conditions shall not in and of itself constitute a breach of this Agreement by BPE, a Force Majeure Event under Clause 16 (unless such attachment constitutes a Change in Law), or a FGN Event of Default under Clause 17.2.





#### **8.4 Liaison**

- 8.4.1 The Concessionaire shall appoint at least one (1) member of its staff to be available to the Relevant Authorities to consult on and expedite the resolution of any problem or issue that may arise relating to any Regulatory Authority.
- 8.4.2 The Company shall appoint one (1) senior employee and two (2) alternate senior employees who shall act as liaison between the Concessionaire and each Regulatory Authority that has obligations to the Concessionaire under this Agreement or any of the Consents and who shall be charged with providing reasonable assistance to the Concessionaire in expediting resolution of any problem or issue that may arise relating to that Regulatory Authority.

#### **8.5 Support for Obligations**

Upon reasonable request by the Concessionaire, the Company shall use its reasonable endeavours to support the Concessionaire's performance of its obligations to conduct the Operations, subject to the Concessionaire's continuing compliance with its obligations under this Agreement.

#### **8.6 Support to Obtain Consents**

- 8.6.1 Upon request by the Concessionaire, the Company, and BPE where applicable, shall support and use all reasonable endeavours to expedite the consideration and the granting by the Regulatory Authority of applications by the Concessionaire for the issue or renewal of Consents which are made in accordance with its obligations under Clauses 8.1 and 8.2. Such support shall include the provision by the Company or BPE of advice as to the content of such applications and liaison with and between the Concessionaire and the Regulatory Authority as to the progress of such applications.
- 8.6.2 Notwithstanding Clause 8.6.1:
- (A) the Company, and BPE shall be under no obligation to grant or issue or cause the Regulatory Authority to grant or issue a Consent if the applicant has failed to meet any requirements for the grant or issue of such Consent; and
  - (B) the Company, and BPE shall be under no obligation to renew or cause the renewal of any Consent which has been revoked by a Regulatory Authority due to a failure by the Person to whom the relevant Consent had been issued to abide by any material term or condition attached to such Consent.

### **9. COVENANTS**

#### **9.1 Assurance against Discriminatory Action**

The Company, and BPE shall not take any discriminatory action which materially and adversely affects the Operations or the performance of the Concessionaire's obligations or the enjoyment of the Concessionaire's rights under this Agreement provided that the foregoing shall not in any way limit or restrict the ability of BPE or of any Regulatory Authority to freely to agree with or impose upon companies and investors in other power projects, obligations which:

- 9.1.1 are consistent with FGN's power policy, as developed from time to time and do not materially and adversely affect the performance of the Concessionaire's obligations under this Agreement; or
- 9.1.2 are justified by a relevant factual difference between the Concessionaire or the Operations and the other company or investor and do not materially and





adversely affect the performance of the Concessionaire's obligations or violate its rights under this Agreement.

**9.2 Acquisition of Shares or Assets**

Subject to the Laws of Nigeria, the Company and BPE undertake to the Concessionaire that neither of them will take or support any action to expropriate, compulsorily acquire or nationalise the Concession, the Hydro Property, the Concessionaire, any Share Capital or any assets of the Concessionaire.

**9.3 Access**

Subject to the applicable Laws of Nigeria and any relevant third party consents, the Concessionaire shall have the right to negotiate rights of way, easements and other types of access to land, property, facilities and utilities near or adjacent to the Site in order to perform its obligations and benefit from its rights hereunder.

**9.4 Restriction on Transfer of Shares**

9.4.1 BPE and the Company undertake to the Concessionaire that each shall not, in the exercise of the powers vested in it by law, prevent any non-Nigerian entities from holding shares in the Concessionaire other than where FGN considers in its sole discretion that it would be prejudicial to the national security interests of the Federal Republic of Nigeria for such non-Nigerian entities to hold shares in the Concessionaire, it being recognised that the fact that a proposed investor is a non-Nigerian entity shall not in and of itself be an appropriate reason for such prohibition.

9.4.2 The Concessionaire shall procure that the Shareholders take all necessary measures (including negative covenants in any shareholders' agreement relating to the Concessionaire and by inscribing an appropriate legend on any certificates evidencing Share Capital issued by it) to reflect and procure that:

(A) until the fifth anniversary of the Commencement Date:

- (1) twenty per cent (20%) of the total Share Capital of the Concessionaire may be held by one or more Persons who are not Founding Shareholders;
- (2) the holding by one or more Persons who are not Founding Shareholders of more than twenty per cent (20%) but less than forty-nine per cent (49%) of the total Share Capital of the Concessionaire shall require the prior written consent of BPE, such consent not to be unreasonably withheld;
- (3) at least fifty-one per cent (51%) of the total Share Capital of the Concessionaire is held by the Founding Shareholders;

(B) after the fifth anniversary of the Commencement Date:

- (1) twenty per cent (20%) of the total Share Capital of the Concessionaire may be held by one or more Persons who are not Founding Shareholders;
- (2) the holding by one or more Persons who are not Founding Shareholders of more than twenty per cent (20%) of the total Share Capital of the Concessionaire shall require the prior written consent of BPE, such consent not to be unreasonably withheld.

9.4.3 The provisions contained in Clause 9.4.2 shall not apply to:





- (A) any transfer of shares in the Concessionaire required by any Laws of Nigeria or by the operation of the Laws of Nigeria or by order of a court, tribunal, or government authority or agency with appropriate jurisdiction;
  - (B) any transfer of shares in the Concessionaire resulting from the creation or enforcement of a security interest in or over any Share Capital in accordance with a security package which shall have been approved in writing by BPE;
  - (C) any transfer of shares in the Concessionaire between Shareholders and Affiliates thereof or between such Affiliates provided that such transferee shall at all times during such period remain an Affiliate of the Shareholder.
- 9.4.4 The Concessionaire shall provide a copy of any shareholders' agreement relating to it to BPE and the Company and shall notify BPE and the Company of any amendments to such shareholders' agreement.
- 9.4.5 The Concessionaire shall give notice to BPE and the Company of any proposed transfer of shares in the Concessionaire or in the parent company of the Concessionaire.

**9.5 Restriction on Transfer of Assets**

Save as provided in Clause 7.4, the Concessionaire shall not sell, charge, grant security over, transfer, encumber or otherwise dispose of any rights in any Hydro Property whether voluntarily or involuntarily and whether all or in part without the prior written consent of the Company and BPE.

**9.6 Accounts and Reports**

- 9.6.1 The Concessionaire shall prepare and maintain registers, books, records and other means of recording information in the quality and quantity required for facilitating efficient management and supervision of the Operations, for providing information to the Company, and for informing the public and its customers of the quality and performance of its operations.
- 9.6.2 The Concessionaire shall maintain complete and accurate records in United States Dollars (and, to the extent required by the Laws of Nigeria or by the board of directors of the Concessionaire, in Naira) accounting for all transactions relating to the Operations. Financial records and accounts shall be maintained in accordance with applicable international generally accepted accounting principles as agreed to by the Company. Such records shall be subject to inspection by the Company upon reasonable notice.
- 9.6.3 Beginning on the Commencement Date, the Concessionaire shall prepare and maintain current records of the Power Station in sufficient detail as required by the Company, to provide a full understanding of the state of the Operations. Such records shall be comprised of physical drawings, databases and calculation sheets along with historical records relating to their constitution, repairs, and maintenance, including all works carried out as replacements, rehabilitation and maintenance.
- 9.6.4 The Concessionaire shall provide the Company and any Regulatory Authority (if applicable) with copies of the foregoing records as requested by such person.
- 9.6.5 The Concessionaire shall provide to the Company, and any Regulatory Authority (if applicable), any other information as such person may reasonably require, including without limitation:





- (A) prompt notification of accidents within the Power Station causing death or serious injury;
  - (B) prompt notification of incidents causing any pollution or other forms of environmental damage;
  - (C) prompt notification of material industrial relations issues;
  - (D) prompt notification of material public complaints; and
  - (E) notification of additions to and disposals of mechanical equipment and other significant assets no later than seven (7) Business Days prior to such disposal.
- 9.6.6 The Concessionaire shall, at its own cost and expense, make arrangements reasonably satisfactory to the Company with respect to the installation and operation of an accounting and cost control system and for the appointment as auditors of a firm of independent chartered accountants reasonably acceptable to the Company.
- 9.6.7 Within ninety (90) days following the Commencement Date, the Concessionaire shall, at its own cost and expense, select and contract an independent external financial auditor to perform a statutory audit. The Company and/or BPE may appoint, at its own cost and expense, an independent auditor to undertake the duties of an external auditor including without limitation:
- (A) verification of the standards and quality of the Operations;
  - (B) review of the performance of any statutory or contractual obligation of the Concessionaire; and
  - (C) verification of financial records of the Concessionaire.
- 9.6.8 The Concessionaire shall prepare an annual report which shall include, at a minimum, the following technical and financial information:
- (A) any circumstances having an impact on the financial obligations of the Concessionaire under this Agreement;
  - (B) numbers and categories of customers, of personnel employed, levels of operations, performance and operations quality compliance;
  - (C) renovation works and repairs carried out or to be carried out;
  - (D) exceptional events such as pollution incidents, strikes, etc.;
  - (E) emergencies;
  - (F) measures, if any, taken by the Concessionaire during the applicable year with respect to its obligations hereunder related to the protection and preservation of the environment;
  - (G) the operations performed during the applicable year; and
  - (H) an audited set of accounts prepared in accordance with generally accepted international accounting principles and practices.
- 9.6.9 The Concessionaire shall submit such annual report to the Company within one hundred and twenty (120) days after the end of each year during the term of this Agreement (or such earlier date as required under the Laws of Nigeria). The Parties shall agree upon the format of such annual report and the Concessionaire shall provide any clarification requested by the Company.





- 9.6.10 The Concessionaire shall provide the Company with such certificates of insurance with respect to each type of insurance set out in Schedule 10, which certificates of insurance shall state that such insurance has been obtained and is in full force and effect, that all premiums on such insurance are current, and that such insurance is not subject to cancellation' without prior written notice to the Company;

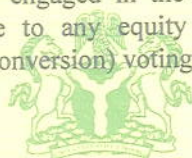
**9.7 Access and inspection**

- 9.7.1 The Concessionaire shall permit the Company, ICRC, NERC, any Regulatory Authority and their respective designated representatives and agents during the Concessionaire's working hours to enter and inspect the Power Station for the purpose of verifying the Concessionaire's compliance with this Agreement and any other requirements under the Laws of Nigeria provided that any such visit shall not unreasonably interfere with the Concessionaire's performance of the Operations. The Company, any Regulatory Authority, ICRC or NERC shall notify the Concessionaire in writing at least five (5) Business Days in advance of any inspection of the names of the individuals to be permitted access and the time and date of such visit.
- 9.7.2 The Concessionaire shall permit the Company, ICRC, NERC, any Regulatory Authority and their respective designated representatives and agents without prior notification to enter and inspect the Power Station in the event of a crisis, incident or other untoward position or threat to public, health, environment and safety, provided that any such visit shall not unreasonably interfere with the Concessionaire's performance of the Operations.
- 9.7.3 The Concessionaire shall also grant access to the Site to the Company, ICRC, NERC, any Regulatory Authority and their respective designated representatives on mutually agreed terms for the purpose of fulfilling its obligations under this Agreement provided that any such visit shall not unreasonably interfere with the Concessionaire's performance of the Operations.
- 9.7.4 The Company, ICRC, NERC and any Regulatory Authority (if applicable) and their respective designated representatives shall have the right of access through the Site to other facilities controlled by such party or any one of them under circumstances where reasonable, alternative means of access are not available subject to the prior consent of the Concessionaire provided that any Person granted such right of way shall follow the rules concerning safety, traffic, security and other regulations relating to the Site and the performance of the Operations prescribed by the Concessionaire, which rules shall not be discriminatory in application.
- 9.7.5 The Concessionaire shall grant access to the Site to Relevant Authorities for the purpose of carrying out any activities which they are legally entitled to carry out on the Site pursuant to the Laws of Nigeria.

**9.8 Scope of Activities**

The Concessionaire agrees that its sole activities shall be with respect to the Operations, and any and all activities incidental thereto, and that it shall not:

- 9.8.1 engage in any other activities; or
- 9.8.2 form any subsidiaries engaged in the business of the Company or otherwise purchase or subscribe to any equity or other interest entitled to (whether immediately or upon conversion) voting or other rights of management or control





in any other company, in each case without the prior written consent of the Company and BPE.

## **10. REPRESENTATIONS AND WARRANTIES**

### **10.1 BPE Representations and Warranties**

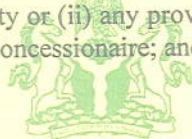
BPE hereby represents and warrants to the Concessionaire that:

- 10.1.1 BPE has full power and authority to execute and deliver this Agreement.
- 10.1.2 BPE has full power and authority to perform its obligations hereunder.
- 10.1.3 The execution, delivery and performance of this Agreement by or on behalf of BPE:
  - (A) has been duly authorised by all requisite action on the part of BPE; and
  - (B) will not violate the Laws of Nigeria.
- 10.1.4 This Agreement has been duly executed and delivered by BPE.
- 10.1.5 This Agreement constitutes a legal, valid and binding obligation of BPE, enforceable against it in accordance with its terms subject to general principles of equity.
- 10.1.6 No filing or registration with, no notice to and no permit, authorisation, consent or approval of any Person is required for the execution, delivery or performance of this Agreement by BPE except for such permits, authorisations, consents or approvals as have been obtained.
- 10.1.7 BPE is not in default under any agreement or instrument of any nature whatsoever to which it is a party or by which it is bound in any manner that would have a material adverse effect on its ability to perform its obligations hereunder or the validity or enforceability of this Agreement.
- 10.1.8 There is no action, suit, proceeding or investigation pending, or to BPE's knowledge, threatened, against it which, if adversely determined, would have a material adverse effect on its ability to perform its obligations hereunder or the validity or enforceability of this Agreement.

### **10.2 Concessionaire Representations and Warranties**

The Concessionaire hereby represents and warrants to BPE and the Company that:

- 10.2.1 The Concessionaire is a limited liability company, duly organised and validly existing under the Laws of Nigeria, and has all requisite corporate power and authority to own or lease and operate its properties and to carry on its business as proposed to be conducted.
- 10.2.2 The Concessionaire has full corporate power and authority to execute and deliver this Agreement and to perform its obligations hereunder.
- 10.2.3 The execution, delivery and performance of this Agreement by the Concessionaire:
  - (A) has been duly authorised by all requisite corporate action on the part of the Concessionaire, and no other proceedings on the part of the Concessionaire or any other Person are necessary for such authorisation;
  - (B) will not violate (i) the Laws of Nigeria or any applicable order of any Regulatory Authority or (ii) any provision of the memorandum and articles of association of the Concessionaire; and





- (C) will not violate, be in conflict with, result in a breach of or constitute (with due notice or lapse of time or both) a default under any indenture, agreement for borrowed money, bond, note, instrument or other agreement to which the Concessionaire is a party or by which the Concessionaire or its property is bound, excluding defaults or violations that would not, individually or in the aggregate, have a material adverse effect on the business, properties, financial condition or results of operation of the Concessionaire, or on its ability to perform its obligations hereunder.

- 10.2.4 This Agreement has been duly executed and delivered by the Concessionaire.
- 10.2.5 This Agreement constitutes a legal, valid and binding obligation of the Concessionaire, enforceable against it in accordance with its terms, subject to (i) bankruptcy, insolvency, reorganisation, moratorium, or other similar laws now or hereafter in effect relating to creditors' rights and (ii) to general principles of equity.
- 10.2.6 To the best of its knowledge, after reasonable inquiry, no filing or registration with, no notice to and no permit, authorisation, consent or approval of any Person is required for the execution, delivery or performance of this Agreement by the Concessionaire, except for the Specified Consents.
- 10.2.7 The Concessionaire is not in default under any agreement or instrument of any nature whatsoever to which it is a party or by which it is bound in any manner that would have a material adverse effect on its ability to perform its obligations hereunder or the validity or enforceability of this Agreement.
- 10.2.8 There is no action, suit, proceeding or investigation pending or, to the Concessionaire's knowledge, threatened (i) for the dissolution of the Concessionaire, or (ii) against the Concessionaire, which, if adversely determined, would have a material adverse effect on its ability to perform its obligations hereunder or the validity or enforceability of this Agreement.
- 10.2.9 It is not in violation of any Laws of Nigeria or judgment entered by any Regulatory Authority, which violations, individually or in the aggregate, would affect its performance of any obligations under this Agreement. There are no legal or arbitration proceedings or any proceeding by or before any Regulatory Authority, now pending or (to the best knowledge of the Concessionaire) threatened against the Concessionaire that, if adversely determined, could reasonably be expected to have an adverse effect on the financial condition, operations, prospects or business, as a whole, of the Concessionaire, or its ability to perform under this Agreement.
- 10.2.10 It has:
- (A) carefully examined this Agreement, together with all Schedules attached hereto, thoroughly and become familiar with all their respective terms and provisions;
  - (B) investigated to its satisfaction the Laws of Nigeria and it can perform its obligations hereunder in accordance therewith;
  - (C) the experience, resources, qualifications, and capabilities to perform its obligations hereunder; and
  - (D) made all investigations and inspections that it deems necessary to perform its obligations hereunder, including without limitation investigations and inspections of the Site.

