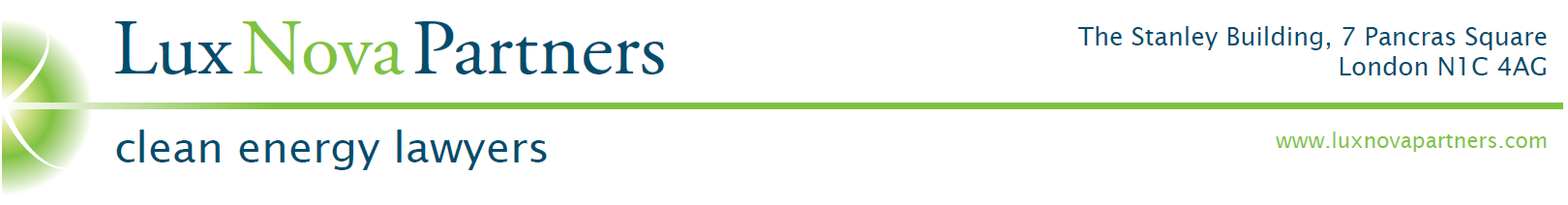
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| (1) *[Developer]*  AND  (2) *[ESCo]* |
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| HEAT NETWORKS INVESTMENT PROJECT  DRAFT: TEMPLATE FRAMEWORK SUPPLY AGREEMENT |



# Version Control

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| --- | --- | --- | --- |
| **Version number** | **Date of issue** | **Comment** | **Author** |
| 1.0 | 31.03.19 | Initial draft to indicate direction of travel | Lux Nova Partners |
| 2.0 | 31.07.19 | Draft for focused consultation | Lux Nova Partners |
| 3.0 | 16.10.19 | Marked up following responses to consultation meeting on 19.09.19 | Lux Nova Partners |

***GUIDANCE NOTE***

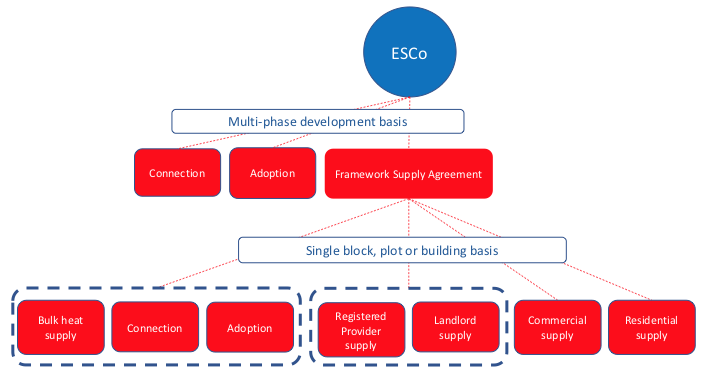
*This Framework Supply Agreement is not relevant to every district heating scheme.*

*However, it may be relevant to a district heating scheme where an energy supplier (ESCo):*

* *has been contracted to connect buildings and/or plots on a development to a district heating scheme and to adopt certain assets comprising the energy system under a Connection and Adoption Agreement;*
* *and is separately contracted to deliver heat under certain forms of contract to customers on the development.*

*The Framework Supply Agreement and the Connection and Adoption Agreement are intended to dovetail.*

*How this Agreement might fit into a project structuring is illustrated in the following diagram:*



*The counterparty to this Framework Supply Agreement and the Connection and Adoption Agreement are intended to be the same entity. Where this Framework Supply Agreement is entered into by a different entity to the Connection and Adoption (for example where an investment entity holds the freehold to the development and therefore grants necessary property/ access rights and enters into the Connection and Adoption Agreement whilst an incoming Developer develops out the development) the two Developer parties may need to enter into a bilateral agreement to link the Agreements.*

*This Framework Supply Agreement includes the provision for Heat Supply (including all relevant heat billing and metering services) to end Customers pursuant to a suite of supply agreements which the Developer shall require all Customer on the Development enter into.*

*The Connection and Adoption Agreement shall cover the detail of connection of ESCo’s Energy System to the Development in order to provide a Heat Supply, including Adoption (or Acceptance) of relevant elements of the Energy System where these have been constructed by the Developer.*

*Unlike a Concession Agreement, this Framework Supply Agreement together with the Connection and Adoption Agreement do not cover the following (on the basis that the Developer is “connecting to” an Energy System rather than granting a Concession for the development of an Energy System):*

* + *Governance of ESCo’s Financial Model;*
  + *Detailed governance of the build out of the Energy System;*
  + *Detailed Operation and Maintenance regime for the Energy System;*
  + *A planned Plant Replacement regime.*

*It is assumed that the connection of separate buildings or plots (within which heat consumers are located on the Development) to ESCo’s Energy System will be governed by the Connection and Supply Agreement (Plot/ Building).*

*It is assumed that the Framework Supply Agreement will be entered into after Planning Permissions have been granted for the relevant Development.*

*The structuring assumption and risk allocation underlying this Framework Supply Agreement is far from the only possible or valid structure and, even adopting the structure described above, there could be a wide range of variant approaches to aspects of the commercial structuring and contracting matrix. Therefore, it is very likely that this template Framework Supply Agreement will serve only as a starting point for drafting of an agreement that will need to be tailored to the particular characteristics of a given district heating scheme.*

*THIS DRAFT IS RELEASED FOR THE PURPOSES OF A CONSULTATION ONLY*

*Neither the content of the above guidance, nor the drafting of this template document, is intended to constitute or to replace the need for expert legal advice, which should be sought on every district heating project. No liability is accepted for use of this template document. All liabilities are excluded to the fullest extent permitted by law.*

# 

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**THIS AGREEMENT** is dated [DATE]

**Parties**

1. [FULL COMPANY NAME] incorporated and registered in England and Wales with company number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS](**Developer**); and
2. [FULL COMPANY NAME] incorporated and registered in England and Wales with company number [NUMBER] whose registered office is [ ] (**ESCo**).

**Recitals**

1. The [DESCRIPTION OF THE DEVELOPMENT] (the “**Development”)** is [a development project being delivered by the Developer which includes delivery of [ ] new homes, [ ] commercial units and [ ][[1]](#footnote-2)]/ [an existing development comprising [ ] homes, [ ] commercial units and [ ]] in the [ LOCATION ] area, [ LOCATION]
2. The Developer and ESCo [acknowledge]/[have agreed] that the Development is connected to the [ESCo’s] Energy System pursuant to the [Connection and Adoption Agreement]/ [Connection Agreement][[2]](#footnote-3) entered into between ESCo and the Developer.
3. This Framework Agreement sets out the terms on which:
   1. ESCo shall provide a Heat Supply to Customers on the Development pursuant to agreed form Customer Supply Agreements and to certain standards; and
   2. the Developer shall provide ESCo with exclusivity in relation to the Heat Supply to occupants of the Development and shall facilitate ESCo’s delivery of the Heat Supply.

**Agreed Terms**

1. Interpretation

The following definitions and rules of interpretation apply in this Agreement.

* 1. Definitions:

**[Acceptance Date:** means the date on which the [Secondary Distribution Network]/ [*include relevant component of the Energy System]*[[3]](#footnote-4) has been Accepted (as such term is defined under the Connection and Adoption Agreement) by the Developer under the Connection and Adoption Agreement].

**Actual Service Readiness:** means the date on which the relevant Building, Commercial Building or Plot Developmentachieves Service Readiness.

**[Adoption Date:** means the date on which the [Secondary Distribution Network]/ [*include relevant component of the Energy System]/[* the Energy System][[4]](#footnote-5) has been Adopted (as such term is defined under the Adoption Agreement) by the Developer under the Connection and Adoption Agreement].

**Affiliate** means, in relation to any person, any subsidiary, any holding company or any subsidiary of such holding company, and holding company and subsidiary shall have the meaning given to them in section 1159 of the Companies Act 2006.

**Authorisations:** means an authorisation, consent, permission, approval, resolution, licence, exemption, filing, notarisation, permit, licence, agreement or registration, (whether statutory, regulatory, contractual or otherwise) including (without limitation), relating to Planning Permissions and all Environmental Laws.

**Base Rate:** means the borrowing base rate published by the Bank of England from time to time.

**Business Day**: a day, other than a Saturday, Sunday or public holiday in England, when banks in London are open for business.

**Change**: means changes as contemplated pursuant to Schedule 13 (Change Procedure).

**Change Control Procedure**: means the procedure set out under Schedule 13 (Change Procedure).

**Change in Law**: means the occurrence of any of the following after the Effective Date:-

1. the enactment or commencement of any new Law, other than any Law which on the Effective Date has been published:-
   1. in a draft Bill as part of a Government Departmental Consultation Paper
   2. in a Bill
   3. in a draft statutory instrument; or
2. the modification or repeal of any Law;
3. a change in the interpretation, application, or enforcement of any Law;
4. any applicable judgment of a relevant court of law which changes a binding precedent; or
5. the imposition of a requirement by a Regulatory Body for an additional Consent that was not required on the Effective Date.

**Change of Control**: in respect of either Party, a change in Control of that Party.

**Charges:** means the Heat Charges [and Electricity Charges (as relevant)][[5]](#footnote-6).

**[CIU:** means a customer interface unit which contains a display and associated ancillary equipment, wiring and apparatus connected to a Customer Meter in a Residential Unit, showing consumption, payment, debt and consumption history as described further in the Technical Specifications.][[6]](#footnote-7)

**[Commercial Building:** means a building located on the Development which is served by its own Connection Point (Commercial Building)][[7]](#footnote-8).

**[Commercial Building Connection:** means the physical connection of a Commercial Building to the Heat Distribution Network at the Connection Point (Commercial Building) to enable a Heat Supply to be provided to that Commercial Building].

**[Commercial Building Customer:** means a customer taking a Heat Supply in a Commercial Building pursuant to a Connection and Supply Agreement (Plot/ Building).]

**[Commercial Building Heat Substation:** means a plant room located within a Commercial Building, within which the Connection Point (Commercial Building) and all relevant ancillary equipment and infrastructure is housed.]

**[Commercial Building Heat Substation Lease:** means a lease of the Commercial Building Heat Substation, granted pursuant to the Connection and Supply Agreement (Plot/ Building)][[8]](#footnote-9).

**Commercial Comparator:** means a Comparator applicable to Commercial Customers.

**Commercial Customer:** means a Commercial Unit Customer or Commercial Building Customer as the context requires.

**Commercial Unit Supply Agreement:** means an agreement between a Commercial Unit Customer and ESCo for a Heat Supply in the form set out under Schedule 6 (Customer Supply Agreements).

**Commercial Unit Customer:** means a customer taking a Heat Supply in a Commercial Unit pursuant to a Commercial Unit Supply Agreement.

**Commercial Unit:** means a self‑contained unit for occupation forming part of the Development which is not a Residential Unit, in respect of which an individual Commercial Heat Supply Agreement has been entered into or is to be entered into pursuant to a Connection and Supply Agreement (Plot/ Building).

**Commercial Unit Heat Exchanger:** means a unit comprising heat exchanger, pump and associated input and output valves and controls used for the transfer of heat from the [Secondary Distribution Network][Heat Distribution Network] to a Commercial Unit, as further detailed in the Technical Specifications.

**[Common Parts:** means any part of the Development which is not a Commercial Building, Commercial Unit or a Residential Unit.][[9]](#footnote-10) .

**Comparator:** means the methodology and supporting documentation for demonstrating that the Heat Charges applicable at that time produces a total annual cost which remains competitive against [ ][[10]](#footnote-11) as set out under Schedule 7 (Customer Charges).

**Compensation Event:** means:

1. prevention, impediment, default or failure of the other Party of its obligations under this Agreement (which shall include the Developer Related Parties and ESCo Related Parties as relevant), whether by act or omission;
2. [a failure by the Developer to grant the necessary property rights required by ESCo to deliver the Heat Supply as detailed under Clause 8.2 (Ownership and Access)] ;[[11]](#footnote-12)
3. [notwithstanding ESCo’s compliance with [Schedule 6 (Acceptance Procedure)]/ [Schedule 7 (Adoption Procedure)] of the Connection and Adoption Agreement, a Defect is discovered in the [*relevant component of Energy System adopted or accepted] / [*Secondary Heating Network] which impacts on the ability of ESCo to deliver the Heat Supply or the ESCo Services];
4. [a failure of the Developer to undertake its obligations relating to rectification in accordance with [Schedule 6 (Acceptance Procedure)]/ [Schedule 7 (Adoption Procedure)] of the Connection and Adoption Agreement.; and
5. [ ][[12]](#footnote-13).

**Competent Person** means a person with the necessary skills, experience and knowledge to perform the relevant task pursuant to this Agreement.

**[Conditions Precedent**: mean [ ]] **[[13]](#footnote-14).**

**Confidential Information**: any information, however conveyed or presented, that relates to the business, affairs, operations, customers, processes, budgets, pricing policies, product information, strategies, developments, trade secrets, know-how, personnel and suppliers of the disclosing Party, together with all information derived by the receiving Party from any such information and any other information clearly designated by a Party as being confidential to it (whether or not it is marked "confidential"), or which ought reasonably be considered to be confidential.

**Connection:** means the Connection of the Development to the Energy System pursuant to the Connection and Adoption Agreement to enable Service Readiness pursuant to this Framework Supply Agreement and/or a Commercial Building Connection or a Plot Connection (as the context requires) made pursuant to a Connection and Supply Agreement (Plot/ Building).

**Connection and Adoption Agreement:** means the agreement entered into between the Developer and ESCo and dated [ ]].

**Connection and Supply Agreement (Plot/ Building**) means an agreement entered into between ESCo and a Plot Developer or Commercial Building Customer (as the context requires), in the form set out under Schedule 8 (Connections) of the Connection and Adoption Agreement).

**Connection Date:** means the date on which Connections are achieved pursuant to the Connection and Adoption Agreement and/or a Connection and Supply Agreement (Plot/ Building) as the context requires.

**Connection Point:** means a Connection Point (Development), Connection Point (Plot) or a Connection Point (Commercial Building) as the context requires.

**[Connection Point (Commercial Building)** means the outlet valve of the [heat exchanger located within a Commercial Building Heat Substation] at which point a Commercial Building is connected directly to the Primary Distribution Network as identified on the Connection Point Drawings.]

**Connection Point (Development):** means the outlet valve of the [Development Boundary Valve, forming part of the Primary Distribution Network]/[Heat Exchanger located within the relevant Substation] and identified in the Connection Point Drawings.

**Connection Point (Plot):** means the outlet valve of the [Plot Boundary Valve, forming part of the [Primary Distribution Network]/[Plot Heat Exchanger located within the Plot Heat Substation] and identified in the Connection Point Drawings.

**Connection Point Drawings:** mean the drawings set out under Schedule 3 (Drawings) identifying the Connection Point (Development), Connection Point (Commercial Building) and Connection Point (Plot) as relevant.

**Consents**: all permissions, consents, approvals, certificates, permits, licences, agreements and authorities (whether statutory, regulatory, contractual or otherwise) necessary for the provision of the ESCo Services, Heat Supply [or Electricity Supply].

**Contract Year**: a period of 12 months (or such shorter period if this agreement is terminated earlier), commencing on the Effective Date.

**Control**: in respect of either Party, the acquisition of either:

(a) the voting rights attaching to 25% or more of the voting shares in that Party; or

1. the power to direct or cause the direction and management of the policies of that Party in accordance with the acquirer's wishes, whether as a result of the ownership of shares, control of the board of directors, contract or any powers conferred by the articles of association or other constitutional documents of that Party.

**Customer:** means, on the Development, the individual, business, organisation or other body who, by way of a Customer Supply Agreement or Connection and Supply Agreement (Plot/ Building), consumes or requires the availability of the Heat Supply [or Electricity].

**Customer Meter:** means the metering equipment intended to be used to measure the Heat Supply delivered to any Customer, as described further in the Technical Specifications.

**Customer Services:** includes metering and billing and customer complaints handling as further set out under Schedule 5 (ESCo Services).

**Customer Supply Agreement(s):** means a Commercial Unit Supply Agreement, a Residential Heat Supply Agreement, a Connection and Supply Agreement (Plot/ Building), or a [Registered]/[Developer Void] Heat Supply Agreement.

**Data Protection Legislation:** means all legislation and regulatory requirements in force from time to time relating to the protection and handling of personal data and the privacy of electronic communications, including, without limitation (i) any data protection legislation from time to time in force in the UK including the Data Protection Act 2018 or any successor legislation, as well as (ii) the General Data Protection Regulation (*(EU) 2016/679*) and any other directly applicable European Union regulation relating to data protection and privacy (for so long as and to the extent that the law of the European Union has legal effect in the UK).

**Data Protection Protocol:** means the data protection processes and duties set out in Schedule 8 (Data Processing) as the same may by updated in writing from time to time in accordance with Clause 15.3 (Data Processing).

**Defect:** means a defect in plant or equipment (other than plant or equipment supplied and installed by ESCo) which is found following the [Acceptance Date] / [Adoption Date] where such defect:

1. does not arise due to ESCo’s or its contractors’ or their respective employees’ negligence; or
2. does not arise due to ESCo’s breach of its obligations under this Agreement or any Customer Supply Agreement in respect of the operation, maintenance, repair or replacement of any part of the Energy System or the relevant item of plant/equipment; or
3. does not arise due to damage caused by residents or other third parties.

**Developer:** means the entity identified as such in the recitals to this Agreement.

**Developer Cap on Liability:** means the cap on liability specified in Clause 20.6 (Limitations on Liability).

**Developer Cure Period:** means a reasonable time limit agreed between the Parties in accordance with Clause 24 (Default Cure and Termination) within which the Developer must take action to remedy a breach.

**Developer Delivery Programme:** means the indicative delivery programme for the Development set out in Schedule 2 (Programmes) including details of proposed Connection Dates, Programmed Service Readiness Dates and [ ] as updated and provided to ESCo from time to time.

**Developer Related Parties:** means the Developer’s employees, subcontractors, agents, Developer Representatives and Affiliates.

**Developer’s Representative**: means the person appointed by the Developer pursuant to Clause 18 (Representatives).

**Developer Termination Grounds:** means:

1. a Notice of Defective Performance has been issued by the Developer pursuant to Clause 24 (Default, Cure and Termination) and ESCo:-
   1. has failed to either put forward a reasonable programme setting out how it proposes to remedy the breach (the “**ESCo Cure Programme**”) or to commence remedying the breaches specified in the Notice of Defective Performance within the ESCo Cure Period; or
   2. has put forward an ESCo Cure Programme but has materially failed to remedy the breaches specified in the Notice of Defective Performance in accordance with the ESCo Cure Programme; and/or
2. a Major Default is caused by a breach of this Agreement by ESCo and which is not capable of remedy, and in respect of which:-
   1. it would be unreasonable to expect the Developer to accept financial compensation for such default (where applicable) and
   2. such Major Default has given the Developer reasonable grounds to believe that ESCo is manifestly incapable of properly fulfilling its obligations pursuant to this Agreement; and/or
3. an Insolvency Event occurs in relation to ESCo; and/or
4. ESCo has breached Clause 27 (Assignment and Other Dealings); and/or
5. the aggregate liability of ESCo to the Developer arising out of or in connection with this Agreement and with respect to any and all claims and costs arising out of or under this Agreement, or arising out of the performance or non‑performance of any other obligation of ESCo in connection with this Agreement, including any non‑contractual obligations arising from this Agreement, exceeds the ESCo Cap on Liability.

**Developer Warning Notice:** has the meaning given under Clause 24.2 (Right to Serve Warning Notice).

**Development:** has the meaning given in Recital (A).

**Development Plan:**  means the plan identified as such in Schedule 1 (Plans) to this Agreement

**Disaster Recovery Plan:** means the plan which sets out ESCo’s contingency plan to enable the continuity of Heat Supply which meets the relevant performance standards set out under the Customer Supply Agreements as set out under Schedule 14 (Disaster Recovery Plan).

**Dispute**: any dispute under this Agreement.

**Dispute Resolution Procedure**: the dispute resolution procedure set out in Clause 24.1 (Dispute resolution procedure).

**Due Date**: has the meaning give in Clause 11.1 (Charging and invoicing).

**Easement Corridor:** has the meaning given under the Lease(s).

**Effective Date**: has the meaning given under Clause 2 (Commencement, Duration and Extension of Term).

**[Electricity Charges:** have the meaning given under Schedule 7 (Customer Charges)].

**[Electricity Network**: the private network of wires and ancillary plant and equipment more particularly described in the Technical Specifications].

**[Electricity Supply**: the supply of electricity to Commercial Building Customers or Commercial Unit Customers, in accordance with Clause 6.2 (Electricity Supply)][[14]](#footnote-15).

**Emergency** means any event where ESCo reasonably considers it necessary to take urgent steps to remedy any matter for reasons of health and safety or events requiring the intervention of the police or emergency services or water leaks that may cause significant material damage whether or not this is as a result of ESCo’s failure to comply with any of its obligations under this Agreement.

**Energy Centre(s):** means the plant room(s) within which the Energy Centre Plant and Equipment is housed as outlined in [ ] on plan(s) [ ] as set out under Schedule 1 (Plans).

**Energy Centre Lease(s)[[15]](#footnote-16)**: means the lease(s) of the Energy Centre(s) granted by the [Developer]/ [Master Developer] to ESCo pursuant to the Connection and Adoption Agreement.

**Energy Plant and Equipment:** means the heating facilities, plant and equipment installed in the Energy Centre for the purposes of production and delivery of Heat and production of Electricity, with any plant and equipment within the associated chimney stack and/or ventilation shaft situated in the Energy Centre.

**Energy System**: means:

* + - 1. the Heat Distribution Network;
      2. the Energy Plant and Equipment;
      3. the Residential HIUs;
      4. the Commercial Unit Heat Exchangers;
      5. the CIUs;
      6. the Customer Meters;
      7. any Temporary Heat Solutions; and
      8. [where applicable, the Electricity Network].

**ESCo:** means the entity identified as such in the recitals to this Agreement.

**ESCo Authorisations:** means any Authorisations required for the delivery of ESCo Services, the Heat Supply [or the Electricity Supply].

**ESCo Cap on Liability** means the cap on liability specified in Clause 20.6 (Limitations on Liability).

**ESCo Cure Period:** means a reasonable time limit agreed between the Parties in accordance with Clause 24.1.1 (Notice of Defective Performance) within which the Developer must take action to remedy a breach.

**ESCo Related Parties:**  means ESCo's employees, subcontractors, agents, ESCo Representatives and Affiliates.

1. **ESCo’s Representative:** means the person appointed by ESCo pursuant to Clause 18 (Representatives).
2. **ESCo Services:**  means the Customer Services and the delivery of the Heat Supply (as the context requires).
3. **ESCo Termination Grounds:** means:
   1. the Developer is in material or persistent breach of its obligations which substantially prevents ESCo from performing its obligations or exercising its rights under this Agreement or a Customer Supply Agreement and such breach is notified by ESCo to the Developer and:-
      1. where the breach is capable of remedy:-

the Developer has failed to put forward a reasonable programme setting out how it proposes to remedy the breach (the “Developer Cure Programme”) or commence remedying the breaches specified in such notification within the Developer Cure Period; or

the Developer has put forward a Developer Cure Programme but has materially failed to remedy the breaches specified in such notification in accordance with the Developer Cure Period; and/or

* + 1. where the breach is not capable of remedy:-

it would be unreasonable to expect ESCo to accept financial compensation for such default (where applicable); and

such breach has given ESCo reasonable grounds to believe that the Developer is incapable of properly fulfilling its obligations pursuant to this Agreement; and/or

* 1. a Major Default is caused by a breach of this Agreement by the Developer and which is not capable of remedy, and in respect of which:-
     1. it would be unreasonable to expect ESCo to accept financial compensation for such default (where applicable); and
     2. such Major Default has given ESCo reasonable grounds to believe that the Developer is manifestly incapable of properly fulfilling its obligations pursuant to this Agreement; and/or
  2. an Insolvency Event occurs in relation to the Developer; and/or
  3. the aggregate liability of the Developer to ESCo arising out of or in connection with this Agreement and with respect to any and all claims and costs arising out of or under this Agreement or arising out of the performance or non‑performance of any other obligation of the Developer in connection with this Agreement, including any non‑contractual obligations arising from this Agreement, exceeds the Developer Cap on Liability.

**ESCo Warning Notice** has the meaning given under Clause 24.2 (Right to Service Warning Notice).

**Expiry Date:** means [ ][[16]](#footnote-17), as may be extended in accordance with Clause 2.2.1 (Commencement and Duration).

**Execution Date:** means the date of this Agreement.

**Failure Event:**  means those events set out in Schedule 11 (Key Performance Indicators).

**Final Termination Notice:** means a notice served pursuant to Clause 24.3.1 (Timing of Service of Final Termination Notice).

**[FOI[[17]](#footnote-18):** means the Freedom of Information Act 2000 and the Environmental Information Regulations 2004 and any subordinate legislation (as defined in section 84 of the Freedom of Information Act 2000) made under the Freedom of Information Act 2000 from time to time together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government Department in relation to such Act].

**Force Majeure Event** means the occurrence after the date of this Agreement of any event beyond the reasonable control of a Party which cannot reasonably be avoided or overcome by that Party and which is not attributable to the acts or omissions of that Party or its Related Party, including (but not limited to):-

war, hostilities (whether war be declared or not), invasions, act of foreign enemies, civil war, sabotage, piracy;

rebellion, terrorism, revolution, insurrection, military or usurped power, riot, civil commotion or disorder;

ionising radiation or contamination by radio‑activity, except as may be attributable to ESCo and/or anESCo Related Party or the Developer and/or a Developer Related Party is the source or cause of such radiation or contamination;

(d) chemical or biological contamination of the Energy System and/or the communal energy supply from any of the events referred to in paragraph (a) above;

(e) contamination, the presence of which was caused by the release, discharge, spillage or deposit of that contamination by a third party;

(f) operation of the forces of nature such as earthquake, hurricane, lightning, typhoon or volcanic activity;

(g) explosions, fires or destruction of plant, machinery or premises;

(h) acts, inactions, defaults or restraint of a statutory undertaking, government or public authority, whether lawful or unlawful, except for:-

(i) acts for which the relevant Party has assumed the risk by virtue of other provisions of this Agreement;

* + 1. acts for which the relevant Party should reasonably have anticipated and mitigated; and
    2. any lack of Authorisation, licence or approval necessary for the performance of this Agreement which is to be issued by any public authority unless ESCo or the Developer (as applicable) has failed to apply for any such Authorisation in accordance with Good Industry Practice;
       - 1. (i) strikes, lockouts or labour disputes generally affecting the construction industry or energy generation industry or any supply chain related to or, service or supply to such industries, or a significant sector of any of them;
  1. the discovery of fossils, antiquities or unexploded ordnance at the Development;
  2. failure or interruption of supply of the following: electricity utility and/or electrical connections, or the failure of gas supply serving the Energy Centre(s); and
  3. an event of Force Majeure under the Energy Centre Lease;

1. which directly causes either Party to be unable to comply with all or a material part of its obligations under this Agreement provided that it shall not include events or circumstances which delay or prevent the ability of the Relevant Party to make any payments when due under this Agreement.

**Good Industry Practice**: those practices, methods, specifications and standards which comply with Law and that a competent and experienced contractor in the district heating industry would be expected to use and/or adopt in relation to the provision of comparable works and services which are substantially similar to the works and/or services (as applicable) or the relevant part of them to be delivered pursuant to this Agreement, having regard to factors such as the nature and size of the Parties , the Service Levels, the Term, the pricing structure and any other relevant factors.

**Group**: in relation to a company, that company, any subsidiary or holding company [from time to time **OR** at the date of this Agreement] of that company, and any subsidiary [from time to time **OR** at the date of this Agreement] of a holding company of that company.

**Group Company**: in relation to a company, any member of its Group.

**Guaranteed Standards for Heat Supply:** means the standards set out in in the Customer Supply Agreements.

**Heat Charges:** means the Standing Charge and the Variable Charge.

**Heat Distribution Network**: means the heating supply network, comprising of the Primary Distribution Network and the Secondary Distribution Network which provides the Heat Supply from the Energy Centres to the relevant Connection Points, Residential HIUs and Commercial Unit Heat Exchanger.

**Heat Supply**: the supply of heat generated by the Energy Plant and Equipment or any Temporary Heat Solution to Customers, enabled by the Heat Distribution Network, and **Heat** shall be construed accordingly.

**Heat Trust Scheme:** means the voluntary scheme established to protect the interests of householders and micro businesses connected to heat networks in the UK, including the Heat Trust Scheme Rules and the Scheme Bye-Laws (at https://www.heattrust.org/the-scheme-rules), or any equivalent replacement scheme thereof.

**Holding Company**: has the meaning give in clause 1.5 (Interpretation).

1. **Indirect Loss** means loss of profit or revenue, loss of opportunity, l loss of use, loss of production, loss of contract or loss of goodwill, the cost of obtaining any new financing or maintaining any existing financing (including the making of any scheduled or other repayment or prepayment of debt and the payment of any other costs, fees or expenses incurred in connection with the obtaining or maintaining of financing) or any other indirect or consequential loss or damage but for the avoidance of doubt, shall not include:
2. any amounts expressly payable under this Agreement, including (without limitation) in relation to termination or a Project Variation;
3. any Losses in the form of reasonable interest, break costs or similar charges, or compensation payments a Party is bound to pay to a third party under a valid, enforceable and pre‑existing contract with such third party as a direct result of any breach of this Agreement by the other Party (and for the avoidance of doubt, such contracts include Customer Supply Agreements); and
4. as loss of profit, loss of use, loss of production, loss of opportunity or loss of contracts (or the opportunity to contract) in respect of any breach by the Developer of its obligations under Clause 4 (Exclusivity).

**Insolvency Event**: in respect of either Party:

1. other than for the purposes of a bona fide reconstruction or amalgamation, such Party passing a resolution for its winding up, or a court of competent jurisdiction making an order for it to be wound up or dissolved, or that Party being otherwise dissolved; or
2. the appointment of an administrator of, or the making of an administration order in relation to, either Party, or the appointment of a receiver or administrative receiver of, or an encumbrancer taking possession of or selling, the whole or any part of the entity's undertaking, assets, rights or revenue; or
3. that Party entering into an arrangement, compromise or composition in satisfaction of its debts with its creditors or any class of them, or taking steps to obtain a moratorium, or making an application to a court of competent jurisdiction for protection from its creditors; or
4. that Party being unable to pay its debts, or being capable of being deemed unable to pay its debts, within the meaning of section 123 of the Insolvency Act 1986 (as may be updated from time to time); or
5. that Party entering into any arrangement, compromise or composition in satisfaction of its debts with its creditors.

**IPRs**: any and all intellectual property rights of any nature anywhere in the world whether registered, registrable or otherwise, including patents, utility models, trade marks, registered designs and domain names, applications for any of the foregoing, trade or business names, goodwill, copyright and rights in the nature of copyright, design rights, rights in databases, moral rights, know-how and any other intellectual property rights which subsist in computer software, computer programs, websites, documents, information, techniques, business methods, drawings, logos, instruction manuals, lists and procedures and particulars of customers, marketing methods and procedures and advertising literature, including the "look and feel" of any websites.

**Key Performance Indicator:** means an indicator of ESCo performance as set out in Schedule 11 (Key Performance Indicators).

**Law:** means any law applicable in England and shall include common law, statute, statutory instrument, proclamation, by‑law, directive, decision, regulation, rule, order, notice, rule of court, instrument, or delegated or subordinate legislation and any enforceable community right within the meaning of section 2 of the European Communities Act 1972 in the United Kingdom, together with any applicable guidance, direction or determination with which ESCo is bound to comply to the extent that the same are published and publicly available or the existence or contents of them have been notified to them and any applicable judgement of a relevant court of law which is binding in England and Wales.

**Leases:** means the Energy Centre Lease[s] and Substation Lease[s] as relevant.

**Loss(es):** means all damages, losses, liabilities, costs, expenses (including legal and other professional charges and expenses) and charges whether arising under statute, contract or at common law, or in connection with judgments, proceedings, internal costs or demands (excluding Indirect Losses ), but, for the avoidance of doubt Losses shall include  [*Insert losses to be covered*] and any costs and/or losses which a Party is entitled to recover pursuant to the terms of this Agreement. *[Drafting Note: The Parties may want to consider specifying which losses they want to be covered].*

**Major Default:** means:

* 1. a material or persistent breach by ESCo of its obligations pursuant to Clause 6 (ESCo’s Obligations) which materially affects the delivery of the Heat Supply or the ESCo Services in accordance with the requirements of this Agreement; and/or
  2. [ 3 ] or more Monthly Service Failures have occurred in any [12] month rolling period pursuant to this Agreement[[18]](#footnote-19); and/or
  3. failure by either Party to make any payments due to the other within [sixty (60)  Business Days] after the date of service of any written demand for payment (which demand may only be made after the date on which the relevant amount became due) unless such failure or delay is permitted under the terms of this Agreement, including where the relevant payment or the amount thereof is the subject of a dispute between the Parties; and/or
  4. [ ][[19]](#footnote-20).

**Metering and Billing Regulations:** means the Heat Network (Metering and Billing) Regulations 2014 as amended or replaced from time to time.

**Monthly Service Failure:** has the meaning given in Schedule 11 (Key Performance Indicators).

**Month**: a calendar month, and monthly: shall be interpreted accordingly.

**Notice:** has the meaning given in Clause 37 (Notices) and **Notify** shall be construed accordingly.

**Notice of Defective Performance:** has the meaning given under Clause 22.1 (Termination).

**Operation and Maintenance Services:** means the operation and maintenance of the [Energy System][[20]](#footnote-21) undertaken pursuant to the Connection and Adoption Agreement .

**Operational Period:** means, for each part of the Energy System, the period commencing on the [Acceptance Date]/ [Adoption Date] of the relevant part of the Energy System and ending upon the Expiry Date or Termination Date (as applicable).

**Parent Company Guarantee:** means a guarantee between the parent of ESCo or the parent of the Developer (as the context requires) guaranteeing the performance of the respective Parties’ obligations under this Agreement.

**Party** or **Parties:** means ESCo and/or the Developer individually or collectively as the context requires.

**Performance Forecast:** has the meaning given in paragraph 4 of Schedule 10 (Governance, Monitoring and Reporting).

**Personal Data**: has the meaning given to that term in the Data Protection Legislation in force from time to time.

**Planning Permissions:** mean as relevant Outline Planning Permission, Detailed Planning Permission or Planning Agreements as defined pursuant to the Connection and Adoption Agreement as the context requires.

**[Plot Connection:** means the physical connection of a Plot Development to the Connection Point (Plot) to enable a Heat Supply to be provided to that Plot Development.][[21]](#footnote-22)

**[Plot Developer:** means a third party developer which owns or shall own a Plot Development].

**[Plot Development:** means an area of the Development which is or shall be owned by a third party and identified in the Development Plan].

**[Plot Heat Substation:** means a plant room located on a Plot Development, within which the Connection Point (Plot) and all relevant ancillary equipment and infrastructure is housed].

**Primary Distribution Network:** means the network of pipes and other ancillary equipment that transfers Heat from the Energy Plant and Equipment to the relevant Connection Point and which will form part of the Heat Distribution Network as further detailed in the Technical Specifications.

**Programmed Service Readiness Date** means the date on which Service Readiness is due to be achieved for each Building, Commercial Building or Plot Development (as relevant)as set out in the Developer Delivery Programme.

**Project:** has the meaning given in the Recitals.

**Project Agreements:** means:

* 1. this Agreement;
  2. the Connection and Adoption Agreement;
  3. the Lease(s);
  4. each of the Connection and Supply Agreement (Plot/ Building)s;
  5. each of the Customer Supply Agreements; and
  6. [*other ancillary agreements].*

**Project Variation:** has the meaning given under Clause 28 (Variation) and where designated as such under this Agreement.

**Recognised Investment Exchange** has the meaning given to it in section 285 of the Financial Services and Markets Act 2000.

**Registered Provider:** has the meaning given under the Housing and Regeneration Act 2008 as may be updated from time to time.

**[Registered Provider]/[[Plot] Developer Void] Heat Supply Agreement** means an agreement for the Heat Supply to a [Registered Provider]/[[Plot] Developer], in the form set out under Schedule 6 (Customer Supply Agreements).

**Regulatory Body**: any government department and regulatory, statutory and any other entity, committee and body which, whether under statute, rules, regulations, code of practice or otherwise, is entitled by any applicable Law to supervise, regulate, investigate or influence the matters dealt with in this Agreement.

**Representatives**: Developer’s Representatives and/or ESCo’s Representatives.

**[Requests for Information:** shall have the meaning set out in the FOIA.]

**Required Insurances:** means the insurances required to be taken out by ESCo and the Developer (respectively) as set out under Schedule 12 (Insurances).

**Residential Comparator:** means a Comparator applicable to Residential Customers.

**Residential Customer:** means a customer taking a Heat Supply in a Residential Unit pursuant to a Residential Heat Supply Agreement.

**Residential Heat Supply Agreement:** means an agreement between a Residential Customer and ESCo for a Heat Supply in the form set out under Schedule 6 (Heat Supply Agreements).

**Residential HIU:** mean the equipment Installed at each Residential Unit used for the transfer of Heat from the Secondary Distribution Network to the Tertiary Heating System within a Residential Unit, as more fully described in the Technical Specifications.

**Residential Unit:** mean self‑contained units of residential accommodation in respect of which an individual Residential Heat Supply Agreement has been or will be entered into.

**Satisfactory Alternative Temporary Heating:** means:

* 1. the temporary heating services satisfy Authorisations;
  2. the temporary heating services allow ESCo to perform the ESCo Services; and
  3. the supply of heat and the means of delivering the temporary heating services is otherwise in accordance with the requirements of this Agreement and the Customer Supply Agreements.

**Secondary Distribution Network:** means the network of pipes and other ancillary equipment that transfers Heat from the relevant Connection Point [up to and including] Residential HIUs and Commercial Unit Heat Exchangers as further detailed in the Technical Specifications.

**[Secondary Distribution Network Services[[22]](#footnote-23)**: means the operation, maintenance and repair of the Secondary Distribution Network and associated services as more particularly described under Schedule 5 (ESCo Services)].

**[Security:** means a mortgage, assignment, charge, pledge, lien or other security interest securing any obligation of any person or any other agreement or arrangement having a similar effect].

**Service Failure**: a failure by ESCo to meet the Service Levels as set out under Schedule 11 (Key Performance Indicators).

**Service Failure Points**: means points accrued by ESCo pursuant to the provisions of Schedule 11 (Key Performance Indicators).

**Service Levels**: the service levels as set out in Schedule 11 (Key Performance Indicators).

**Service Readiness:** means in respect of the Development the stage at which the relevant ESCo Works have been completed in accordance with the requirements of the Connection and Adoption Agreement so that ESCo can provide the ESCo Services to the Customers in accordance with this Agreement and the Customer Supply Agreements.

**Service Period:** means a continuous period of twelve (12) months or part thereof ending on [31 March].

**Site:** means the site on which the Development is located as identified on the Development Plan.

**Site Rules:** means those site rules set out under Schedule 4 (Site Rules).

**[Substation** means a Plot Heat Substation or a Commercial Building Heat Substation as the context requires][[23]](#footnote-24).

**Substation Lease:** means a [Plot Heat Substation Lease] [or a] [Commercial Building Heat Substation Lease] [as relevant].

**Sufficient Security:** means either:

1. a bond or equivalent form of Security from a reputable financial institution (approved by ESCo or the Developer (as the context requires), such approval not to be unreasonably withheld or delayed), in a form reasonably satisfactory to ESCo or the Developer (as the context requires), in an amount equivalent to the [ESCo Cap on Liability or the Developer Cap on Liability (as the context requires)][[24]](#footnote-25); or
2. a guarantee in a form approved by ESCo or the Developer (as the context requires), such approval not to be unreasonably withheld or delayed.

**Standing Charge:** means the charge for maintenance and replacement of components of the Energy System charged to Customers under Customer Supply Agreements, regulated in accordance with Clause 10 (Heat Charges) and Schedule 7 (Customer Charges).

**Tax** means any kind of tax, duty, levy or other charge whether or not similar to any in force at the Effective Date and whether imposed by a local, governmental or other Regulatory Body in the United Kingdom or elsewhere.

**Technical Specifications:** means the specifications annexed at Schedule 4 (Technical Specifications) to the Connection and Adoption Agreement.

**Temporary Heat Solution:** any temporary heat solution provided by ESCo for the provision of heating to Customers when heat supplies from the Energy Plant and Equipment (or the Heat Distribution Network as relevant) are temporarily unavailable (including following any ESCo failure to achieve Service Readiness in accordance with the terms of this Agreement), in accordance with Paragraph 2 (Temporary Heat Solutions) of Schedule 5 (ESCo Services).

**Termination Date**: has the meaning given under the Connection and Adoption Agreement[[25]](#footnote-26).

**Termination Notice**: any notice to terminate this Agreement which is given by either Party in accordance with Clause 24 (Default, Cure and Termination).

**Tertiary Heating System:** means the network of internal pipes and other ancillary equipment located within each Residential Unit that transfers Heat around the Residential Unit from a Residential HIU and its isolation valves, to be designed and installed by the Developer in accordance with the [Connection/Adoption] Agreement.

**Third Party:** means a third party who is not a Party to this Agreement, but shall not include Affiliates of ESCo or the Developer.

**Third Party Subcontractor:** means a works sub-contractor (of any tier) which is not an Affiliate and is not in the same group of companies as the Developer or ESCo (as the context requires), which is undertaking ESCo Services in a value greater than [£250,000].

**[TUPE[[26]](#footnote-27):** means the Transfer of Undertakings (Protection of Employment) Regulations 2006 (246/2006) and/or any other regulations enacted for the purposes of implementing the EC Acquired Rights Directive 77/187 (as amended) into English Law.]

**Unit:** means a Commercial Unit or a Residential Unit as the context requires.

**Unsuitable Entity:** means any person:-

1. who has a material interest in the production, distribution or sale of tobacco products, munitions, alcoholic drinks and/or pornography;
2. whose activities are in the reasonable opinion of the Developer, incompatible with the provision of the ESCo Works or ESCo Services in the area; or
3. whose activities, in the reasonable opinion of the Developer, pose or could pose a threat to security.

**Variable Charge**: mean the variable kWh charge for Heat consumed, charged to Customers under Customer Supply Agreements, regulated in accordance with Clause 10 (Heat Charges) and Schedule 7 (Customer Charges).

**VAT**: value added tax as provided for in the Value Added Tax Act 1994.

**Voids**: means any Residential Unit which remains unsold or unlet for any reason on the first development and/or letting.

**Vulnerable Residential Customers** has the meaning given in the Residential Heat Supply Agreement.

* 1. Clause, Schedule and paragraph headings shall not affect the interpretation of this Agreement.
  2. The Schedules form part of this Agreement and shall have effect as if set out in full in the body of this Agreement. Any reference to this Agreement includes the Schedules.
  3. A reference to a **company** shall include any company, corporation or other body corporate, wherever and however incorporated or established.
  4. A reference to **holding company** or a **subsidiary** means a holding company or a subsidiary (as the case may be) as defined in section 1159 of the Companies Act 2006 [and a company shall be treated, for the purposes only of the membership requirement contained in subsections 1159(1)(b) and (c), as a member of another company even if its shares in that other company are registered in the name of:
     1. another person (or its nominee), whether by way of security or in connection with the taking of security; or
     2. its nominee.
  5. [For the purposes of determining whether a limited liability partnership is a subsidiary of a company or another limited liability partnership, section 1159 of the Companies Act 2006 shall be amended so that: (a) references in sub sections 1159(1)(a) and (c) to voting rights are to the members' rights to vote on all or substantially all matters which are decided by a vote of the members of the limited liability partnership; and (b) the reference in section 1159(1)(b) to the right to appoint or remove a majority of its board of directors is to the right to appoint or remove members holding a majority of the voting rights.]
  6. Unless the context requires otherwise, words in the singular include the plural and in the plural include the singular.
  7. Unless the context requires otherwise, a reference to one gender shall include a reference to the other genders.
  8. A reference to a statute or statutory provision is a reference to it as amended, extended or re-enacted from time to time.
  9. A reference to a statute or statutory provision shall include all subordinate legislation made from time to time under that statute or statutory provision.
  10. [A reference to **writing** or **written** includes fax [and email **OR** but not email]][[27]](#footnote-28).
  11. A reference to **this Agreement** or to any other agreement or document referred to in this Agreement is a reference to this Agreement or such other agreement as varied or novated (in each case, other than in breach of the provisions of this Agreement) from time to time.
  12. References to clauses and Schedules are to the clauses and Schedules of this Agreement and references to paragraphs are to paragraphs of the relevant Schedule .
  13. If there is an inconsistency between the clauses and Schedules respectively, the provisions in the clauses shall prevail in preference to the Schedules.
  14. Any words following the terms **including**, **include**, **in particular**, for example or any other similar expression shall be construed as illustrative and shall not limit the sense of the words, description, definition, phrase or terms preceding those terms.

1. Commencement, duration and extension of term
   1. Save in relation to this Clause 2, 16 (Confidentiality), Clause 17 (Warranties and Representations), 21 (Limitations on Liability), 26 (Dispute Resolution Procedure), 27 (Assignment and Other Dealings), Clause 37 (Notices), Clause 39 (Governing Law) and Clause 40 (Jurisdiction) which will take effect on the Execution Date, this Agreement is conditional upon the Connection and Adoption Agreement becoming unconditional pursuant to Clause 2 thereof, and the Effective Date being confirmed (as defined therein).
   2. On the Connection and Adoption Agreement becoming unconditional, this Agreement shall take effect (for the purposes of this Agreement, the “**Effective Date**”) and shall continue until the earlier of:
      1. the Expiry Date [(as may be extended in accordance with Part 1 (Renewal and Retender)[[28]](#footnote-29) of Schedule 15 (Arrangements on Termination and Expiry)); or
      2. the Termination Date;

(the “**Term**”)

* 1. Upon Termination or Expiry the provisions of Clause 25 (Consequences of Termination or Expiry) shall apply.

1. The Connection and Adoption agreement

The Parties [agree that the Connection and Adoption Agreement shall be entered into simultaneously with this Agreement]/ [acknowledge that the Connection and Adoption Agreement was entered into on [ ]] and shall govern the manner in which ESCo’s Energy System shall be Connected to and shall remain connected to the [Development ] /[Secondary Distribution Network][[29]](#footnote-30) for the term of the Connection and Adoption Agreement.

1. Exclusivity
   1. The Developer hereby grants ESCo the right, on an exclusive basis in relation to the Development, to provide the Heat Supply and enter into the Customer Supply Agreements with Customers for the provision of the Heat Supply subject to and in accordance with the terms of this Agreement.
   2. Subject to Clause 4.3 and to the extent permitted by Law, as a condition of this Agreement, the Developer warrants, represents and, for the duration of the Term, undertakes that:
      1. it shall not install, use or enable or facilitate the installation or use of any form of gas supply, any gas-fired appliance (except appliances used for any purpose other than the generation or conveyance of heating and/or hot water), any boilers, any electric storage heaters, any heat microgeneration equipment (including solar thermal panels and/or ground, water or air source heat pumps) or any other alternative central heating or hot water system for the supply of space and/or water heating to any part of the Development while a Heat Supply for such purpose is being (or is intended to be) made available to that part of the Development using the Energy System.
   3. The restriction under Clause 4.2 shall not apply in relation to:
      1. the provision of heating or hot water to any temporary buildings that are used for construction purposes, which means any structure installed on the premises at the Development and occupied as part of the construction process which is intended to be removed when construction ceases, including, without limitation, site offices, canteens and mess rooms, drying and changing rooms, rest rooms, wash rooms and toilets;
      2. [in relation to the supply of gas for cooking [in any Commercial Unit]];
      3. [where the annual heating demand of a Unit or Commercial Building is less than [ ] kWth];
      4. [the provision of heating or hot water by any temporary means by the Developer in any circumstance where the Heat Supply supplied by ESCo is interrupted or suspended]; and
      5. [ ][[30]](#footnote-31).
2. Mutual Obligations
   1. Each Party agrees:
      1. to co‑operate with the other Party, at its own expense, in the fulfilment of the purposes and intent of this Agreement, provided that nothing in this Clause 5.1.1 shall relieve a Party from complying with its obligations under this Agreement or oblige a Party to fulfil another Party's obligations; and
      2. use all reasonable endeavours to procure the co‑operation between Developer Related Parties and ESCo Related Parties for the purposes of the Parties complying with their respective obligations under this Agreement.
   2. In performing their respective obligations under this Agreement, each Party shall act, and shall use all reasonable endeavours to procure that each ESCo Related Party (in the case of ESCo) or each Developer Related Party (in the case of the Developer) acts, in good faith, in accordance with Good Industry Practice and in compliance with the Site Rules.
   3. Without prejudice to either Party's obligations under Clauses 5.1 and 5.2, each Party shall use all reasonable endeavours to minimise interference with the activities of the other Party at the Development.
   4. The Parties shall comply with their respective obligations under the Leases.
   5. The Parties shall comply with their respective obligations set out under Schedule 10 (Governance, Monitoring and reporting).
   6. The Parties acknowledge and agree that ESCo shall not be responsible for the operation and/or maintenance of any Tertiary Heating System, which shall be the responsibility of the Developer, the relevant Customer and/or the relevant Registered Provider (as applicable).
   7. Without limiting the operation of any other provision of this Agreement, each Party ensure that it shall, and procure that any person appointed by it to undertake such obligations shall at all times:
      1. provide Competent Persons to perform its obligations under this Agreement; and
      2. take all precautions necessary for the protection of itself, its contractors or sub-contractors (of any tier) and any other persons invited onto or otherwise on the Leased or Licensed areas.
3. ESCo’s Obligations
   1. ESCo shall, at its own cost (save to the extent that ESCo is entitled to make charges to the Developer under, or to Customers pursuant to, this Agreement):
      1. perform all of its obligations set out in this Agreement and the Schedules hereto and shall not by action or inaction impede the Developer in the performance of its obligations under this Agreement;
      2. obtain all ESCo Authorisations to the extent such ESCo Authorisations have not been obtained pursuant to the Connection and Adoption Agreement;
      3. obtain accreditation under and comply with the Heat Trust Scheme in respect of the Energy System at the Development;
      4. not cause or permit to be caused any physical damage to any part of the Development or any assets or other property of the Developer and shall promptly make good any damage or loss caused in breach of this Clause 6.1.4 to the reasonable satisfaction of the Developer;
      5. [provide a Parent Company Guarantee in a form satisfactory to the Developer (acting reasonably)][[31]](#footnote-32); and
      6. comply with the Disaster Recovery Plan.
   2. **[Electricity Supply[[32]](#footnote-33)** 
      1. [ESCo/ The Developer] shall design, construct, lay, test and commission the Electricity Network from the Energy Centre Plant and Equipment in accordance with the Connection and Adoption Agreement.
      2. Following satisfactory testing and commissioning of the Electricity Network in accordance with the Connection and Adoption Agreement, ESCo shall supply electricity from the Energy Centre Plant and Equipment via the Electricity Network directly to [ ] and such other Commercial Customers as the Parties may agree. Nothing in this provision shall require ESCo to obtain an Electricity Supply Licence, and it is acknowledged that such Electricity Supply shall be made pursuant to Supply Licence Exemptions A or C (pursuant to Schedule 4 of the Electricity (Class Exemption from the Requirement for a Licence) Regulations 2001), unless and until ESCo obtains, in its complete discretion, an Electricity Supply Licence.]
4. Developer Obligations
   1. The Developer shall:-
      1. [Develop the Development and carry out the Developer Works in accordance with the Connection and Adoption Agreement, Development Plan, the Developer Delivery Programme, the Planning Permissions, the [Energy Strategy] and all Law and Authorisations];[[33]](#footnote-34)
      2. perform all of its obligations set out in this Agreement and the Schedules hereto and shall not by action or inaction impede ESCo in the performance of its obligations under this Agreement;
      3. [provide ESCo with regular updates of the number, type, size and expected build completion dates of all of the Plot Developments, Commercial Buildings and Units, including any changes to the Developer Delivery Programme and shall use its reasonable endeavours to notify ESCo promptly (and, in any event, within ten (10) Business Days of it becoming aware) of any material change in the use or operation of the Development that is likely to have an impact on the heat demand, the Development Plan, the Developer Delivery Programme, the Specifications, any part of the Energy System or the ESCo Services];[[34]](#footnote-35)
      4. not cause or permit to be caused any physical damage to any part of the Energy System, or any assets or other property of ESCo and shall reimburse ESCo for any reasonably incurred costs in relation to making good such Loss suffered by ESCo and caused in breach of this Clause 7.1.4; and
      5. [provide a Parent Company Guarantee in a form satisfactory to ESCo (acting reasonably)][[35]](#footnote-36).
   2. The Developer warrants and represents to ESCo that the Developer has or shall, undertake all necessary consultation, and has satisfied all of its obligations to consult, with Customers and any relevant third parties as required by section 20 of the Landlord and Tenant Act 1985 (and/or any other applicable Law) in relation to the execution of this Agreement and the provision of the ESCo Services, Heat Supply [or Electricity Supply] by ESCo. The Developer shall indemnify ESCo in respect of any Losses ESCo may incur in connection with any breach of this Clause 7.2 (including any Losses incurred by ESCo in connection with any consultation that may be required under the Landlord and Tenant Act 1985 after the Effective Date in respect of the ESCo Services Heat Supply [or Electricity Supply]).
5. access
   1. The Parties acknowledge that ESCo shall be granted access rights for provision of the ESCo Services and delivery of the Heat Supply [or Electricity Supply], pursuant to Clause 9 of the Connection and Adoption Agreement[[36]](#footnote-37) and the Leases.
   2. If, for any reason, ESCo is not able to exercise the relevant property rights as required to be granted (or procured) by the Developer under Clause 9 of the Connection and Adoption Agreement in respect of the Development in order to deliver the Heat Supply as required by this Agreement, or perform any of its other obligations under this Agreement, ESCo shall be relieved of the relevant obligations until such time as it is able to exercise the relevant rights [and a Compensation Event shall be deemed to have occurred][[37]](#footnote-38).
6. Supply arrangements
   1. The Developer and ESCo shall comply with all obligations relating to Connections set out under Clause [11] (Connection and Supply Arrangements) of the Connection and Adoption Agreement.
   2. Except where the Developer or a third party Registered Provider has entered into a Registered Provider Heat Supply Agreement with ESCo pursuant to Clauses [11.5.1 and 11.5.2] (Connection Arrangements) of the Connection and Adoption Agreement or where the Developer has entered into a [Plot] Developer Void Heat Supply Agreement with ESCo pursuant to Clause [11.5.3] (Connection Arrangements) of the Connection and Adoption Agreement, the Developer shall:
      1. use all reasonable endeavours to ensure that on first sale and/or letting Customers of all Units within the relevant [Plot] Development, are provided with a relevant form of Welcome Pack and the relevant form of Customer Supply Agreement prior to exchange of contracts in respect of the sale, transfer or disposal of the freehold interest or leasehold interest in the Unit by the Developer to the prospective Customer;
      2. following any exchange of contracts in respect of the sale, transfer or disposal of the freehold interest or leasehold interest in any Unit by the Developer, the Developer shall notify ESCo of the same and, in respect of each Unit, provide to ESCo:
         1. the prospective Customer's name and contact details;
         2. the building number, door number, postcode and tenure for the Unit;
         3. the reference number for the heat meter at the Unit (if applicable);
         4. the meter reading for the heat meter at the Unit (if applicable); and

use all reasonable endeavours to procure that the Customer enters into a Customer Supply Agreement with ESCo.

* 1. ESCo shall offer to enter into a Customer Supply Agreement (in the relevant form) with each Customer from time to time.
  2. ESCo shall provide the ESCo Services to Customers and the Developer (as applicable) subject to, and in accordance with, the provisions of the relevant Customer Supply Agreement and in accordance with Good Industry Practice and all applicable Law (including the Metering and Billing Regulations).
  3. The Parties acknowledge and agree that:
     1. ESCo has the right to provide the ESCo Services and the Heat Supply;
     2. the obligation on ESCo to provide the ESCo Services and the Heat Supply to a Customer or the Developer (as applicable) is subject to:
        1. there being in effect a Customer Supply Agreement entered into between ESCo and the Customer or the Developer (as applicable), which, for the avoidance of doubt, shall exclude any Customer Supply Agreement which has been terminated or ceases to have effect in accordance with the terms of such agreement;
        2. the installation, design, construction, completion, commissioning and/or Acceptance and/or Adoption of all parts of the Energy System relevant to the provision of the ESCo Services and the Heat Supply to the Customer, or the Developer at the relevant Unit (as applicable) pursuant to the Connection and Adoption Agreement; and
        3. the completion and commissioning of the relevant Tertiary Heating System at the relevant Unit (as applicable) pursuant to the Connection and Adoption Agreement.
  4. Subject to Clause 9.7 below, the Developer shall include within the leases of Residential Units or Commercial Units that it is a party to within the Development, appropriate provisions so as to:
     1. impose an obligation on the relevant tenant or lessee to allow ESCo access to the relevant Residential Unit or Commercial Unit for the purpose of carrying out its obligations under this Agreement to the extent that it is not reasonably possible for ESCo to perform such obligations without access to such premises subject toESCo agreeing to make good any damage caused by such access to the reasonable satisfaction of the Developer or relevant tenant or lessee;
     2. to the extent permitted by law and subject to the exceptions set out in Clause 4.3 (Exclusivity) of this Agreement as applicable, impose an obligation on the relevant tenant or lessee not to install or use any form of gas supply, any gas-fired appliance (except appliances used for any purpose other than the generation or conveyance of heating and/or hot water), any boilers, any electric storage heaters, any heat microgeneration equipment (including solar thermal panels and/or ground, water or air source heat pumps) or any other alternative central heating or hot water system for the supply of space and/or water heating to the Unit while a Heat Supply for such purpose is being (or is intended to be) made available to that Unit using the Energy System; and
     3. allow ESCo enforce the obligations in Clause 9.6.1 under the Contracts (Rights of Third Parties) Act 1999.
  5. The obligations referred to in clause 9.6 above may be expressed in specific or general language provided that the substantive effect of the obligations is the same.

1. Heat charges
   1. ESCo shall ensure that:
      1. the Heat Charges payable by residential Customers comply with the Residential Comparator;
      2. the Heat Charges payable by Commercial Customers comply with the Commercial Comparator, unless otherwise agreed between any Commercial Customer and ESCo; and
      3. the service levels and service credits set out in the forms of Customer Supply Agreement in Schedule 6 (Customer Supply Agreement) are updated from time to time to ensure that they are no less favourable to Customers than the service levels and service credits set out in the Heat Trust Scheme Rules [(in respect of all Customers, including those Commercial Customers not covered by such rules)]; and
      4. [ ].[[38]](#footnote-39)
2. Charging and invoicing
   1. Due Date

Payments shall be due on the dates or within the time periods stated in this Agreement or, if not stated, shall be due on the date 30 days after agreement or determination of the sum payable.

* 1. Business Days

If any payment to be made by a Party to the other Party would become due on a day which is not a Business Day, it shall be paid on the next Business Day.

* 1. Interest
     1. If either Party fails to pay any amount payable by it under this Agreement to the other Party on its due date, interest shall accrue on the overdue amount:-
        1. daily;
        2. from the due date until the date of payment; and
        3. at three per cent per annum above the Base Rate.
     2. Any interest accruing under this Clause 12 shall be:-
        1. compounded with the overdue amount on the last day of each month; and
        2. immediately payable by the Party on demand.
  2. Interest on disputed amounts

In the event that any payment is the subject of a bona fide unresolved Dispute that has been notified by one Party to the other Party in accordance with Clause 26 (Dispute Resolution Procedure) then Clauses 11.3.1 and 11.3.2 shall only apply to the disputed amount finally resolved to be due and payable.

* 1. Scheme for Construction Contracts

If it is determined that this Agreement is one to which the Housing Grants Construction and Regeneration Act 1996 applies, the provisions of this Clause 11shall be supplemented and/or substituted (as appropriate) by the relevant provisions of the Scheme for Construction Contracts (England and Wales) Regulations (as amended).

1. Compensation And Relief events[[39]](#footnote-40)
   1. Subject to Clause 12.5, to the extent that either Party is impaired or prevented from performing any of its obligations under this Agreement due to a Compensation Event, such affected Party (“the claiming party”) shall be entitled to:
      1. relief from its obligations under this Agreement;
      2. a fair and reasonable extension of time; and
      3. payment of reasonable additional costs incurred;

except to the extent caused or contributed to by the affected Party, its agents or contractors.

* 1. To obtain relief from obligations, an extension of time and/or claim compensation the claiming Party must:
     1. as soon as practicable, and in any event within ten (10) Business Days after it became aware that the Compensation Event has caused or is likely to cause a breach of an obligation under this Agreement and/or the claiming Party to incur costs, give to the other Party a Notice of its claim for an extension of time and / or payment of compensation;
     2. within ten (10) Business Days of receipt by the other Party of the Notice referred to in clause 12.2.1 above, give full details of the Compensation Event and the extension of time and/or compensation to be claimed; and
     3. demonstrate to the reasonable satisfaction of the other Party that:
        1. the Compensation Event was the direct cause of the claim for relief, compensation and/or any delay in the achievement of the Service Readiness; and
        2. the relief, compensation and/or time lost, could not reasonably be expected to be mitigated by the claiming Party acting in accordance with Good Industry Practice.
  2. In the event that the claiming Party has complied with its obligations in clause 12.2 above, then:
     1. in the case of an additional cost being incurred by the claiming Party, the other Party shall compensate the claiming Party within [30] days of receipt of a written demand from the claiming Party supported by all relevant information; and
     2. the other Party shall give the claiming Party relief from its obligations under this Agreement.
  3. In the event that information is provided after the dates referred to in clause 12.2 above, then the claiming Party shall not be entitled to any relief, extension of time or compensation in respect of the period for which the information is delayed.
  4. During any period of an event falling under Clause 12.1 in which the Heat Supply is affected, ESCo shall comply with its obligations to Customers in relation to the Heat Supply in accordance with the relevant Customer Supply Agreement.
  5. Each of the Parties shall use reasonable efforts to mitigate the impact of a Compensation Event and to remedy its inability to perform.
  6. If, after any payment of compensation pursuant to Clause 12.3.1 it is determined pursuant to Clause 25.3 (Dispute Resolution) that the claiming Party was not entitled to such compensation, then:
     1. the compensation previously paid or allowed to which the claiming Party was not entitled shall be refunded or re-credited to the other Party; and
     2. interest shall accrue on such amount on a daily basis at three per cent (3%) from the date when such payment was paid or allowed (as appropriate).

1. Intellectual Property
   1. [Subject to clause 14 (Grant of licences)]:
      1. The Developer shall not acquire any right, title or interest in or to the IPRs of ESCo or its licensors, including ESCo’s Background IPRs; and
      2. ESCo shall not acquire any right, title or interest in or to the IPRs of the Developer or its licensors, including the Developer’s Background IPRs.
   2. Where either Party acquires, by operation of law, title to IPRs of the other referred to in clause 13.1, and this acquisition is inconsistent with the allocation of title set out in that clause 13.1, such IPRs shall be assigned by it to the other Party on the request of the other Party, whenever that request is made.
2. [Grant of licences
   1. The Developer grants to ESCo a royalty-free, non-exclusive, non-transferable licence during the Term to use the Developer’s Data, including the right to grant sub-licences to its subcontractors, provided that any relevant subcontractor has entered into a confidentiality undertaking with ESCo in a form reasonably acceptable to the Developer.
   2. ESCo grants to the Developer a royalty-free, non-exclusive, non-transferable licence during the Term to use ESCo’s Data, including the right to grant sub-licences to its subcontractors, provided that any relevant subcontractor has entered into a confidentiality undertaking with the Developer in a form reasonably acceptable to ESCo.
   3. The licences granted in clause 14.1 and clause 14.2 are granted solely to the extent necessary for the performance of the ESCo Services, Heat Supply [or Electricity Supply,] in accordance with this Agreement. Neither Party shall use the licensed materials for any other purpose.
   4. Neither Party shall have any right to use any of the other Party’s names, logos or trade marks on any of its products or services without the other Party’s prior written consent.
   5. In the event of the termination or expiry of this Agreement, the licence referred to in clause 14.1 and any licence granted in accordance with clause 14.4 shall terminate automatically and ESCo shall deliver to the Developer all material licensed to ESCo pursuant to clause 14.1 or clause 14.4 in its possession or control. However, the licences granted pursuant to clause 14.2 shall continue in full force and effect.]
3. Data processing
   1. The Parties shall at all times handle and use all Personal Data they acquire under or in connection with this Agreement or any Customer Supply Agreement in accordance with all applicable Data Protection Legislation.
   2. Without prejudice to Clause 15.1, if any Personal Data is transferred from one Party to the other in connection with performance of this Agreement then each of the Parties shall comply with Schedule 8 (Data processing), which sets out in further detail the legal obligations of the Parties in relation to such a transfer under Data Protection Legislation, taking into account related guidance from regulators, as at the date of this Agreement.
   3. ESCo shall update the Data Protection Protocol from time to time to reflect any relevant Change in Law as it relates to applicable Data Protection Legislation, taking into account related guidance from regulators.
4. Confidentiality
   1. **Duty of confidentiality**

Save as provided by Clause 16.2 each Party shall:

* + 1. keep confidential all Confidential Information it receives or obtains; and
    2. exercise in respect of the Confidential Information the same controls as that Party employs to protect its own Confidential Information.
  1. **Permitted Disclosure**

A Party (the **Disclosing Party**) may disclose or permit the disclosure of Confidential Information:

* + 1. to its employees to the extent that it is reasonably necessary and to any person (including insurance, legal, technical and financial advisers, auditors and accountants) engaged in providing any goods, works or services to the Disclosing Party in connection with and for the purposes of this Agreement;
    2. in the case of the heat supplier to any replacement heat supplier or any entity engaged or which may be engaged on or following the termination of this contract to perform any of the obligations of the heat supplier under this contract;
    3. to the extent that the confidential information:
       1. has become publicly available or generally known to the public at the time of such disclosure otherwise than as a result of a breach of this Clause 16;
       2. was already in the unrestricted possession of the Disclosing Party prior to receiving or obtaining such confidential information as a result of entering into or performing this contract; and
       3. was lawfully received or obtained by the Disclosing Party from any person without restriction on its use or disclosure;
    4. to enable a determination to be made under Clause 26 (Dispute Resolution Procedure).
    5. when required to do so in any jurisdiction:
       1. by Law;
       2. by or pursuant to the rules or any order of any court, tribunal or agency of competent jurisdiction; or
       3. by any securities exchange, Recognised Investment Exchange or regulatory or governmental body having jurisdiction over it wherever situated;
    6. to any regulatory or governmental body (including any Regulatory Body) in any jurisdiction and having jurisdiction over:
       1. the Disclosing Party; or
       2. the obtaining, monitoring and/or enforcement of any Authorisation;
    7. to enable any registration or recording of any Authorisation;
    8. to a relevant tax authority in any jurisdiction to the extent required for the proper management of the taxation affairs of the Disclosing Party;
    9. to insurers for the purpose of obtaining any insurances; and
    10. if such disclosure is expressly permitted by some other provision of this Agreement or if the other Party has given prior written approval to the disclosure (such approval not to be unreasonably withheld or delayed).
  1. **Obligations preserved**
     1. Subject to Clause 16.3.2 and Clause 16.4 if a Party is required to disclose Confidential Information in a manner permitted by Clause 16.2.2, or Clause 16.2.9 then it shall:
        1. inform the person to whom Confidential Information is to be disclosed of the restrictions contained in this Agreement; and
        2. ensure that such person shall observe such restrictions notwithstanding that such person is not Party to this Agreement.
     2. For the avoidance of doubt, a Party is deemed to have satisfied its obligation in Clause 16.3.1(b) if, prior to the disclosure of the Confidential Information, it enters into a contract with the person referred to in Clause 16.3.1(b) which contains an equivalent confidentiality arrangement to this Clause 16.
  2. **Consultation**
     1. If a Party is required to disclose Confidential Information in a manner permitted by Clause 16.2.5, Clause 16.2.6, or Clause 16.2.8, it shall insofar as reasonably practicable:
        1. provide the other Party with advance notice of the requirement and a copy of the information to be disclosed; and
        2. permit the other Party to make representations or objections in relation to it and take into account such reasonable representations and objections that the other Party shall make.
  3. **Exploitation of information**

No Party shall make use of this Agreement or any information (including Confidential Information) issued or provided by or on behalf of either Party in connection with this Agreement otherwise than for the purposes of this Agreement, except with the written consent of the other Party.

* 1. **Continuance of obligations**

The obligations in this Clause 16 shall continue to apply after termination of this Agreement.

* 1. **Return or destruction of confidential information**

Subject to the Developer’s need to have all information necessary to enable the on-going operation and maintenance of the Energy System and the on-going provision of the Heat Supply, on termination of this Agreement for any reason each Party shall, to the extent requested by the other Party who provided them and without retaining copies, destroy all documents or other records containing confidential information or return them to the other Party.

* 1. **Enforcement rights of Parties regarding confidential information**

Each Party accepts and agrees that any Confidential Information received or obtained by that Party as a result of entering into or performing this contract is, by its nature, valuable proprietary commercial information, the misuse of or unauthorised disclosure of which would be likely to cause considerable and uncompensatable damage to the Party from whom that information was received or obtained and accordingly the Parties agree that, without prejudice to any other rights or remedies which may be available in respect of any breach of this Agreement that are expressly provided for in this Agreement, each Party will be entitled to relief by way of injunction, including any interim injunction available from any competent court having jurisdiction over its terms.

1. Warranties and representations
   1. Each Party represents and warrants to the other Party as at the date of this Agreement and throughout the term of this Agreement that:-
      1. it is a corporation (which for the purposes of this Clause 17.1 includes a limited liability partnership), duly incorporated and validly existing under the law of its jurisdiction of incorporation;
      2. it has the power to sue and be sued in its own name and to own its assets and carry on its business as that business is being and will be conducted;
      3. the obligations expressed to be assumed by it in this Agreement are legal, valid, binding and enforceable obligations;
      4. the entry into and performance by it of, and the transactions contemplated by, this Agreement and the Project Agreements do not and will not conflict with:-
         1. any Law or Authorisation applicable to it or binding on its assets;
         2. its constitutional documents; or
         3. any agreement or instrument binding upon it or any of its assets;
      5. 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, this Agreement, the Project Agreements and the transactions contemplated by each of them;
      6. all Authorisations required or desirable:-
         1. to enable it lawfully to enter into, exercise its rights and comply with its obligations in this Agreement and the Project Agreements;
         2. to make this Agreement and the Project Agreements admissible in evidence in its jurisdiction of incorporation; and
         3. to enable it to carry on its business, trade and ordinary activities;

have been obtained or effected and are in full force and effect;

* + 1. no claim exists or is being assessed and no litigation, arbitration or administrative proceedings are presently in progress or, to the best of the knowledge of that Party, pending or threatened against it or any of its assets directly used in relation to or under the Project Agreements (other than the Customer Supply Agreements which shall not have been entered into at the date of this Agreement), which will or might have a material adverse effect on the ability of that Party to perform its obligations under this Agreement or any of the Project Agreements (other than the Customer Supply Agreements which shall not have been entered into at the date of this Agreement); and
    2. no proceedings or other steps have been taken and not discharged (nor, to the best of the knowledge of that Party, threatened) for its winding‑up or dissolution or for the appointment of a receiver, administrative receiver, administrator, liquidator, trustee or similar officer in relation to any of its assets or revenues,

and each Party relies upon the warranties and representations given by the other Party pursuant to this Clause 17.1.

* 1. Subject to Clause 21 (Limitations on Liability) the only claim, right or remedy available to a Party for a breach of warranty or representation expressly set out in this Agreement shall be damages for breach of contract.
  2. Each Party waives all claims, rights and remedies for all representations:-
     1. made to it by any person before entering into this Agreement and each of the Project Agreements; and
     2. not set out in this Agreement or the Project Agreements.
  3. Save as expressly provided in this Agreement and without limiting the operation of Clause 17.6, no warranty, condition, undertaking or term, express or implied, statutory or otherwise, as to the performance of the obligations of any Party pursuant to this Agreement is given or assumed by it, and all such warranties, conditions, undertakings and terms are hereby expressly excluded.
  4. Each Party acknowledges that, in deciding to enter into this Agreement and the Project Agreements, it has not relied on any such representation.
  5. All warranties, conditions and terms which would otherwise be implied into this Agreement by reason of it being a contract for the supply of a service within the meaning of section 12 of the Supply of Goods and Services Act 1982 are hereby expressly excluded.
  6. No Party is dealing as a consumer within the meaning of section 12 of the Unfair Contract Terms Act 1977, nor is this Agreement on any Party's written standard terms of business within the meaning of section 3(1) of the Unfair Contract Terms Act 1977.
  7. This Clause 17 does not exclude or restrict liability for fraudulent misrepresentation or fraudulent concealment.

1. Representatives
   1. Appointment of representatives
      1. The Developer shall appoint up to two Developer Representative(s), the identity of whom shall be subject to the approval of ESCo (such approval not to be unreasonably withheld or delayed) to act in connection with this Agreement.
      2. ESCo shall appoint up to two ESCo Representative(s), the identity of whom shall be subject to the prior approval of the Developer (such approval not to be unreasonably withheld or delayed), to act in connection with this Agreement.
   2. Appointment of successors to representatives
      1. Without prejudice to Clause 18.1.1, the Developer may terminate the appointment of the Developer Representative(s) at any time and shall appoint a successor.
      2. Without prejudice to Clause 18.1.2, ESCo may terminate the appointment of ESCo Representative(s) at any time and shall appointment a successor.
      3. The Developer and ESCo shall at any time be each entitled to appoint a temporary replacement Representative(s) for a period not exceeding twenty (20) Business Days by Notice to the other Party.
   3. Authority of representatives
      1. The Developer Representative(s) shall have full authority to act on behalf of the Developer for all purposes arising out of or in connection with this Agreement. ESCo and ESCo’s Representative(s) shall be entitled to treat any act of the Developer Representative(s) arising out of or in connection with this Agreement as being expressly authorised by the Developer (save where the Developer has notified ESCo in writing that such authority has been limited or revoked) and ESCo shall not be required to determine whether any express authority has in fact been given.
      2. ESCo’s Representative(s) shall have full authority to act on behalf of ESCo for all purposes arising out of or in connection with this Agreement. The Developer and the Developer Representative(s) shall be entitled to treat any act of ESCo’s Representative(s) arising out of or in connection with this Agreement as being expressly authorised by ESCo (save where ESCo has notified the Developer in writing that such authority has been limited or revoked) and the Developer shall not be required to determine whether any express authority has in fact been given.
   4. Notices

Any notice, information, instructions or public communication given to:-

* + 1. the Developer Representative(s) shall be given in writing in accordance with Clause 37 (Notices) and shall be deemed to have been given to the Developer; and
    2. ESCo’s Representative(s) shall be given in writing in accordance with Clause 37 (Notices) and shall be deemed to have been given to ESCo.

1. Compliance and change in laws
   1. In performing its obligations under this Agreement, each of the Parties shall comply with all Laws and shall:
      1. inform the other as soon as it becomes aware of any changes in the Laws that may impact the provision of the Works, ESCo Services, the Heat Supply [or the Electricity Supply];
      2. provide the other with timely details of measures it proposes to take and changes it proposes to make to comply with any such changes;
      3. consult with the other, and if possible agree with other, on the manner, form and timing of changes it proposes to make to meet those changes in the Laws;
      4. only implement any such changes in accordance with the Change Control Procedure; and
      5. use all reasonable endeavours to minimise any disruption caused by any changes in applicable Laws introduced pursuant to this Clause 19.
2. Force majeure
   1. Subject to the remaining provisions of this clause 20, neither Party to this Agreement shall in any circumstances be liable to the other for any delay or non-performance of its obligations under this Agreement to the extent that such delay or non-performance is due to a Force Majeure Event.
   2. In the event that either Party is delayed or prevented from or hindered in performing its obligations under this Agreement by a Force Majeure Event, such Party shall:
      1. give notice in writing of such delay or prevention to the other Party as soon as reasonably possible, stating the commencement date and extent of such delay or prevention, the cause of the delay or prevention and its estimated duration;
      2. use all reasonable endeavours to mitigate the effects of such delay or prevention on the performance of its obligations under this Agreement; and
      3. resume performance of its obligations as soon as reasonably possible after the removal of the cause of the delay or prevention.
   3. A Party cannot claim relief if the Force Majeure Event is attributable to that Party's wilful act, neglect or failure to take reasonable precautions against the relevant Force Majeure Event.
   4. As soon as practicable following the affected Party's notification, the Parties shall consult with each other in good faith and use all reasonable endeavours to agree appropriate terms to mitigate the effects of the Force Majeure Event and to facilitate the continued performance of this Agreement. The affected Party shall take or procure the taking of all steps to overcome or minimise the consequences of the Force Majeure Event in accordance with Good Industry Practice.
   5. The affected Party shall notify the other Party as soon as practicable after the Force Majeure Event ceases or no longer causes the affected Party to be unable to comply with its obligations under this Agreement. Following such notification, this Agreement shall continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event unless agreed otherwise by the Parties .
   6. The Parties shall endeavour to agree any modifications to this Agreement which may be equitable having regard to the nature of an event or events of Force Majeure.
   7. If, in the circumstances referred to in this Clause 20, the Parties have failed to reach agreement on any modification to this Agreement pursuant to Clause 20.6, and the Force Majeure continues for more than [nine (9)] calendar months from the date on which the Affected Party served Notice on the other Parties in accordance with Clause 20.2.1 (“**Prolonged Force Majeure**”), any Party may, at any time whilst the event of Force Majeure continues, terminate this Agreement by Notice to the other, whereupon the provisions of Schedule 15 (Arrangements on Termination) shall apply.
   8. During any period of Force Majeure in which the Heat Supply is affected, ESCo shall comply with its obligations to Customers in relation to the Heat Supply in accordance with the relevant Customer Supply Agreement at no additional cost to the Developer.
3. Limitations on liability
   1. General
      1. Each Party acknowledges and agrees that:
         1. without limiting the operation of Clause 21.1.1(b), the provisions of this Clause 21 are fair and reasonable having regard to the circumstances as at the date hereof and have been subject to full negotiation;
         2. this Agreement satisfies the requirement of reasonableness within the meaning of sections 2(2) and 11 of the Unfair Contract Terms Act 1977; and
         3. the limitations of liability set out in Clauses 21.2 and 21.3 shall, as they apply to a Party, apply to any indemnities given by that Party under this Agreement. *[Drafting Note: The Parties may want to consider whether they want to carve out any indemnities from the liability caps.]*
      2. No Party shall be liable to the other under or in connection with this Agreement (including under the Leases and whether in contract, negligence or otherwise) for any Indirect Losses.
   2. Liability of Developer**[[40]](#footnote-41)**
      1. The Developer's liability to ESCo howsoever arising out of or in connection with this Agreement (including under the Leases and whether in contract, negligence or otherwise) shall:
         1. [in respect of any Losses recoverable by it under any of the insurances required pursuant to Clause 22 (Insurance), be the amount recovered by the Developer under such insurances or that would have been recoverable but for breach by the Developer of its obligations under Clause 22 (Insurance);]
         2. in the case of loss of or damage to physical property, not exceed [ ] ([ ] pounds Sterling) per incident or series of related incidents; or
         3. in the case of all other Losses, not exceed in aggregate [ ] ([ ] pounds Sterling)

(together, the "**Developer Cap on** Liability").

* + 1. The Developer may at any time request an increase in the Developer Cap on Liability by giving written Notice to ESCo of such increase sought, provided that the Developer Cap on Liability shall only be increased with ESCo’s consent (not to be unreasonably withheld or delayed).
  1. Liability of ESCo**[[41]](#footnote-42)**
     1. ESCo's liability to the Developer howsoever arising out of or in connection with this Agreement (including under the Leases and whether in contract, negligence or otherwise) shall:
        1. [in respect of any Losses recoverable by it under any of the insurances required pursuant to Clause 22 (Insurance), be the amount recovered by ESCo under such insurances or that would have been recoverable but for breach by ESCo of its obligations under Clause 22 (Insurance);
        2. in the case of loss of or damage to physical property, not exceed [ ] ([ ] pounds Sterling) per incident or series of related incidents; or
        3. in the case of all other Losses , not exceed in aggregate [ ] ([ ] pounds Sterling).

(together the "**ESCo Cap on Liability** ").

* + 1. ESCo may at any time request an increase in the ESCo Cap on Liability by giving written Notice to the Developer of such increase sought, provided that the ESCo Cap on Liability shall only be increased with the Developer's consent (not to be unreasonably withheld or delayed).
  1. General exclusions
     1. No provision of this Agreement or any of the Project Agreements shall limit the liability of either Party to the other Party in respect of:-
        1. death or personal injury resulting from the negligence of a Party or any of its officers, employees or agents; and
        2. for any Losses resulting from the wilful default of, or fraudulent misrepresentation or fraudulent concealment by, that Party; and
     2. Neither Party shall have any liability to the other Party for any Losses to the extent that the Losses were caused by a breach by that other Party.
     3. To the extent permitted by any applicable Law, neither Party shall be liable to the other under this Agreement for any Indirect Losses.
     4. In respect of any Loss suffered by ESCo in respect of which it has a cause of action against the Developer under any [Plot] Developer Void Heat Supply Agreement or Customer under a Customer Supply Agreement, ESCo shall have no separate cause or right of action against the Developer under this Agreement in respect of the same Loss.

1. Insurance
   1. ESCo shall take out and maintain (or procure the taking out and maintenance of) the insurances described in Schedule 12 (Insurances) and any other insurances as may be required by Law.
   2. The Developer shall take out and maintain (or procure the taking out and maintenance of) the insurances described in Schedule 12 (Insurances) and any other insurances as may be required by Law.
   3. No Party to this Agreement shall take any action or fail to take any reasonable action, or (insofar as it is reasonably within its power) permit anything to occur in relation to it, which would entitle any insurer to refuse to pay any claim under any insurance policy in which that Party is an insured, a co‑insured or additional insured person.
   4. Each Party shall provide the other Party on request:-
      1. reasonable evidence that cover is in place; and
      2. reasonable evidence that the premiums payable under all insurance policies have been paid.
   5. Reinstatement

All insurance proceeds received under any policy maintained by ESCo referred to in this Clause 22 insofar as they relate to damage to the Energy System or any part thereof shall be applied to repair, reinstate and replace each part or parts of the Energy System in respect of which the proceeds were received, as soon as is reasonably practicable.

1. **Mitigation and Setoff**
   1. Mitigation

If either Party incurs any Loss , for any cause arising out of or in relation to this Agreement or any of the Project Agreements, that Party shall take such steps as are reasonable in order to mitigate such Loss .

* 1. Right of set‑off

Whenever any amount shall be agreed or determined to be payable by a Party under this Agreement, such amount may be deducted from or reduced by the amount then due to that Party by the other under this Agreement.

1. Default, Cure and Termination
   1. Notice of Defective Performance

If ESCo is in Major Default of this Agreement, then the Developer, acting reasonably, may issue a Notice specifying that, in its opinion, ESCo's failure to perform its obligations under this Agreement amounts to a Major Default (a "**Notice of Defective Performance**") and giving the reasons for this and, where the position is capable of being rectified, either:-

* + 1. specifying a reasonable time limit within which ESCo must commence and complete rectification action to rectify the position (the "**ESCo Cure Period**"); or
    2. during the ESCo Services, notifying ESCo that the Developer shall undertake remedial action itself in accordance with paragraph 5 of Schedule 5 (ESCo Services), provided the criteria set out therein are satisfied.
  1. Right to Serve Warning Notice
     1. If ESCo Termination Grounds occur then ESCo may, in its discretion at any time within three months of the relevant occurrence of ESCo Termination Grounds, give written Notice (an "**ESCo Warning Notice**") to the Developer of its right to terminate this Agreement.
     2. If Developer Termination Grounds occur then the Developer may, in its discretion at any time within three months of the relevant occurrence of Developer Termination Grounds, give written Notice (a "**Developer Warning Notice**") to ESCo of its right to terminate this Agreement.
  2. Timing of Service of Final Termination Notice
     1. Notwithstanding service of an ESCo Warning Notice by ESCo or a Developer Warning Notice by the Developer, this Agreement will only terminate after service of a further notice (a "**Final Termination Notice**") by ESCo (where an ESCo Warning Notice was served) or the Developer (where a Developer Warning Notice was served) confirming that it wishes to proceed with termination of this Agreement and subject to the remaining provisions of this Agreement, including any provisions of Schedule 15 (Arrangements on Termination).
     2. Any such Final Termination Notice, if to be served, must be served within three months of service of the ESCo Warning Notice or Developer Warning Notice (as the case may be). Following service of a Final Termination Notice, this Agreement shall terminate on the Termination Date save to the extent necessary to give effect to any enduring obligations which expressly survive such termination and without prejudice to the provisions of Clause 25 (Consequences of Termination or Expiry).
  3. Exclusive grounds of termination
     1. The Developer agrees and acknowledges that its right to terminate this Agreement pursuant to the provisions of Clause 24.3 shall be the sole grounds upon which the Developer may terminate this Agreement due to breach of this Agreement by ESCo.
     2. ESCo agrees and acknowledges that its right to terminate this Agreement pursuant to the provisions of Clause 24.3 shall be the sole grounds upon which ESCo may terminate this Agreement due to breach of this Agreement by the Developer.
  4. **Termination of the Connection and Adoption Agreement**

In the event that the Connection and Adoption Agreement terminates, this Agreement shall terminate forthwith.

1. Consequences of termination or expiry[[42]](#footnote-43)
   1. On Termination or Expiry of this Agreement, the provisions of Schedule 15 (Arrangements on Termination and Expiry) shall apply.
   2. **Continuing Provisions**

Save as otherwise expressly provided in this Agreement the Expiry or Termination of this Agreement shall be without prejudice to:

* + 1. any antecedent or accrued rights, reliefs, remedies or liabilities arising out of or in connection with this Agreement prior to or as at the Expiry Date or Termination Date (as applicable);
    2. any rights of the Parties under any provision of this Agreement which is expressed to survive Termination or which is required to give effect to such termination or the consequences of such Termination; and
    3. the continuing rights and obligations of the Parties under Clause 16 (Confidentiality), Clause 21 (Limitations on Liability), Clause 23 (Mitigation and Setoff), this Clause 25 (Consequences of Termination or Expiry), Clause 26 (Dispute Resolution Procedure),t Clause 37 (Notices), Clause 39 (Governing Law) and Clause 40 (Jurisdiction).
  1. **Exit Plan**
     1. Without prejudice to any relevant provisions in the Leases, where this Agreement is terminated by either Party pursuant to clauses 24.2 and 24.3 then the Parties shall agree and implement a plan (the “**Exit Plan**”) containing an exit strategy pursuant to which ESCo will transfer, relinquish and/or assign (as applicable) all the relevant rights, interests and duties under this Agreement or arising from it. The Exit Plan shall be prepared and implemented in accordance with this clause 25 and shall cover and include the following:
        1. transfer procedures to ensure a smooth handover of operation;
        2. interfacing with the Project Agreements;
        3. any additional services and/or assistance reasonably required by the Developer subject to clause 25.3.2; and
        4. any interface with the Connection and Adoption Agreement required.
     2. Not later than [ten (10)] Business Days following receipt by the Developer of ESCo's proposed Exit Plan in accordance withclause 25.3.1 the Parties shall meet to discuss and agree the Exit Plan, acting reasonably and in good faith. The Exit Plan shall set out the proposed exit strategy including details of the scope of any additional services to be provided by ESCo and requested by the Developer pursuant to 25.3.1(c) in order to implement the Exit Plan.
     3. Unless otherwise requested by the Developer, ESCo shall comply with the provisions of the agreed Exit Plan until the transfer, relinquishment and/or assignment of rights, interests and duties under this Agreement or arising from it has been completed in accordance with the provisions of the Exit Plan and all obligations therein have been satisfied by ESCo, as certified in writing by the Developer.
     4. During the period of negotiation and implementation of the Exit Plan, ESCo shall at its own cost continue to make the Heat Supply in accordance with the terms of this Agreement without disruption, unless otherwise instructed by the Developer. If ESCo fails to meet its obligations under this clause 25.3.4, the Developer may, in its discretion, carry out these obligations, or engage any other person to carry out these obligations, and ESCo shall:
        1. co-operate with, and provide reasonable assistance and necessary rights of access to the Developer and any person engaged by the Developer in the carrying out of ESCo's obligations pursuant to this clause 25.3.4; and
        2. without prejudice to the operation of Clause 2 (Commencement, Duration and Extension of Term) but subject to clauses 21.4 (General Exclusions) and 23 (Mitigation and Setoff) immediately on demand indemnify the Developer against any Loss directly arising from ESCo's failure to meet its obligations under this clause 25.3.4.
     5. If:
        1. the Parties are unable to agree the provisions of the Exit Plan within [ten (10)] Business Days following the date of the meeting pursuant to clause 25.3.2; or
        2. ESCo fails to fully implement the Exit Plan in accordance withclause 25.3.3,

then the Developer alone shall devise an appropriate exit strategy pursuant to which ESCo shall, by a date instructed by the Developer, transfer, relinquish and/or assign (as applicable) all rights, interests and duties under this Agreement or arising from it and ESCo shall comply with any reasonable instructions from the Developer in order to implement such exit strategy.

* 1. Employees
     1. The provisions of this clause 25.4 shall apply to the extent that TUPE applies to ESCo’s employees engaged in provision or performance of any task in discharge of ESCo's obligations pursuant to this Agreement.
     2. For the purposes of this clause 25.4, "**Transferring Employees**" shall mean those employees wholly or mainly engaged in the provision of any task in discharge of ESCo’s obligations under this Agreement as the case may be as immediately before the Expiry Date or Termination Date whose employment transfers to the party to whom the obligations to provide heat transfer as appropriate pursuant to TUPE. Upon expiry or termination of this Agreement for whatever reason (such date being termed the "**Transfer Date**"), the provisions of this clause 25.4 shall apply.
     3. ESCo shall or shall procure that all wages, salaries and other benefits of the Transferring Employees and other employees or former employees of ESCo (who had been engaged in the provision of any obligations under this Agreement) and all PAYE tax deductions, pension contributions and national insurance contributions relating thereto in respect of the employment of the Transferring Employees and such other employees or former employees of ESCo up to the Transfer Date, are satisfied.

1. Dispute Resolution Procedure
   1. If a dispute arises out of or in connection with this Agreement or the performance, validity or enforceability of it (**Dispute**), then [, except as expressly provided in this Agreement,] the Parties shall follow the procedure set out in this clause:
      1. either Party shall give to the other written notice of the Dispute, setting out its nature and full particulars (**Dispute Notice**), together with relevant supporting documents. On service of the Dispute Notice, the [EMPLOYEE TITLE] of [Party 1] and [EMPLOYEE TITLE] of [Party 2] shall attempt in good faith to resolve the Dispute;
      2. if the [EMPLOYEE TITLE] of [Party 1] and [EMPLOYEE TITLE] of [Party 2] are for any reason unable to resolve the Dispute within [30] days of service of the Dispute Notice, the Dispute shall be referred to the [SENIOR OFFICER TITLE] of [Party 1] and [SENIOR OFFICER TITLE] of [Party 2] who shall attempt in good faith to resolve it; and
      3. if the [SENIOR OFFICER TITLE] of [Party 1] and [SENIOR OFFICER TITLE] of [Party 2] are for any reason unable to resolve the Dispute within [30] days of it being referred to them, the Parties agree to enter into mediation in good faith to settle the dispute in accordance with [the CEDR Model Mediation Procedure **OR** OTHER PROCEDURE]. Unless otherwise agreed between the Parties within [NUMBER] days of service of the Dispute Notice, the mediator shall be nominated by [CEDR **OR** OTHER BODY **OR** OTHER PERSON]. To initiate the mediation, a Party must serve notice in writing (**ADR notice**) to the other party to the Dispute, referring the dispute to mediation. [A copy of the ADR notice should be sent to [CEDR **OR** OTHER PROVIDER]]. Unless otherwise agreed between the Parties , the mediation will start not later than [NUMBER] days after the date of the ADR notice.
   2. The commencement of mediation shall not prevent the Parties commencing or continuing court proceedings in relation to the Dispute under Clause 40 (Jurisdiction) which clause shall apply at all times.

**OR**

No Party may commence any court proceedings under Clause 40 (Jurisdiction) in relation to the whole or part of the Dispute until [NUMBER] days after service of the ADR notice, provided that the right to issue proceedings is not prejudiced by a delay.]

1. Assignment and other dealings
   1. ESCo shall not assign, novate, transfer or dispose of any of its rights and/or obligations under this Agreement or Customer Supply Agreements without the Developer's consent, unless such assignment, novation, transfer or disposal is to an entity to which the Connection and Adoption Agreement is assigned, novated or transferred to[[43]](#footnote-44).
   2. The Developer shall not assign, novate, transfer or dispose of any of its rights and/or obligations under this Agreement or any of the Leases or Customer Supply Agreements without ESCo’s consent, unless such assignment, novation, transfer or disposal is to an entity to which the Connection and Adoption Agreement is assigned, novated or transferred to.
   3. Either Party may subcontract any of its obligations under this Agreement to any third party (including, without limitation, any Affiliate of such Party), provided that such Party shall remain liable in accordance with this Agreement for the acts and omissions of any such subcontractor.
   4. In the event of a Change of Control of either Party which adversely changes the financial covenant strength of such party, the other Party may:

[review the adequacy of the Parent Company Guarantee provided pursuant to Clause 6.1.5 (ESCo Obligations) or 7.1.5 (Developer Obligations) (as relevant) and (acting reasonably) may require a substitute performance security (whether by way of a substitute guarantee, a bond, a bank guarantee or letter of credit or other form of security) to replace or supplement the Parent Company Guarantee already provided pursuant to Clause 6.1.5 (ESCo Obligations) or 7.1.5 (Developer Obligations)] [[44]](#footnote-45)/

[(acting reasonably) require the provision of a Parent Company Guarantee or another form of security (whether by way of a bond, a bank guarantee or letter of credit or other form of security).][[45]](#footnote-46)

1. Variation
   1. Either Party shall be entitled to request an amendment, change, revision or variation to this Agreement which shall be subject to the Change Control Procedure.
   2. Without prejudice to Schedule 13 (Change Procedure), no variation of this Agreement shall be effective unless it is in writing and signed by the Parties (or their authorised representatives).
2. Waiver

No failure or delay by a Party to exercise any right or remedy provided under this Agreement or by Law shall constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall prevent or restrict the further exercise of that or any other right or remedy.

1. Rights and remedies

[Except as expressly provided in this Agreement, the **OR** The] rights and remedies of the Parties provided under this Agreement are in addition to, and not exclusive of, any of its rights or remedies provided by law.

1. No partnership or agency
   1. Nothing in this Agreement is intended to, or shall be deemed to, establish any partnership or joint venture between any of the Parties , constitute any Party the agent of another Party , or authorise any Party to make or enter into any commitments for or on behalf of any other Party .
   2. Each Party confirms it is acting on its own behalf and not for the benefit of any other person.
2. Publicity
   1. Approval of marketing material
      1. All media releases, public announcements and public disclosures by the Parties in relation to or in connection with this Agreement, the Project Agreements (other than the Customer Supply Agreements) or their subject matter, including but not limited to promotional material (but not including any site specific marketing materials relating specifically to clients, any announcement intended solely for internal distribution or any disclosure required by legal, accounting or regulatory requirements), shall be co‑ordinated with and approved in the first instance by the Developer’s Representative and ESCo’s Representative prior to release. Such consent shall not be unreasonably withheld or delayed and shall be deemed to have been given by any Party which fails to Notify the other Parties of its refusal to grant approval within 10 Business Days.
      2. For the avoidance of doubt, nothing in this Clause 32 shall restrict the Developer's right to publicise or make any announcement about the Development provided that no reference is made to this Agreement, the Project Agreements (other than the Customer Supply Agreements) or the subject matter of any of those agreements, or to the involvement of ESCo, otherwise than in accordance with Clause 32.1.
   2. Public relations and press

Subject to Clause32.1, the Parties shall comply with their respective obligations in Schedule 9 (Marketing and Public Relations) so as to maximise the marketing opportunities arising in relation to the Energy System.

1. Severance
   1. If any provision or part-provision of this Agreement is or becomes invalid, illegal or unenforceable, it shall be deemed deleted, but that shall not affect the validity and enforceability of the rest of this Agreement.
   2. If any provision or part-provision of this Agreement is deemed deleted under clause 33.1 the Parties shall negotiate in good faith to agree a replacement provision that, to the greatest extent possible, achieves the intended commercial result of the original provision.
2. Further assurance

[At its own expense, each **OR** Each] Party shall, and shall use all reasonable endeavours to procure that any necessary third party shall, [promptly] execute and deliver such documents and perform such acts as may [reasonably] be required for the purpose of giving full effect to this Agreement.

1. Entire agreement
   1. Other than in relation to the Project Agreements, this Agreement constitutes the entire agreement between the Parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.
   2. Each Party agrees that it shall have no remedies in respect of any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this Agreement. Subject to Clause 17.8 (Warranties and Representation) each Party agrees that it shall have no claim for innocent or negligent misrepresentation or negligent misstatement based on any statement in this Agreement.
2. Third party rights
   1. This Agreement does not give rise to any rights under the Contracts (Rights of Third parties) Act 1999 to enforce any terms of this Agreement.
   2. The rights of the Parties to rescind or vary this Agreement are not subject to the consent of any other person.
3. Notices
   1. A notice or communication given to a Party under or in connection with this Agreement shall be in writing and sent such Party at the address [or email address] given in this Agreement or as otherwise notified in writing to [the **OR** each] other Party.
   2. This clause 37.2 sets out the delivery methods for sending a notice to a Party under this Agreement and, for each delivery methods, the date and time when the notice is deemed to have been received or given (provided that all other requirements of this clause have been satisfied and subject to the provision in clause 37.3:
      1. if delivered by hand, on signature of a delivery receipt[ or at the time the notice is left at the address];
      2. if sent by [pre-paid first class post or other[ next working day delivery service[ providing proof of [postage **OR** delivery]] at 9.00am on the [second] Business Day after posting[ or at the time recorded by the delivery service];
      3. if sent by pre-paid airmail [providing proof of [postage **OR** delivery]], at [9.00am on the [fifth] Business Day after posting[ or at the time recorded by the delivery service] OR [INSERT TIME AND DATE]; [or]
      4. [if sent by email, at the time of transmission; [or]]; and
      5. [if sent by fax, at the time of transmission.]
   3. If deemed receipt under clause 37.2 would occur outside business hours in the place of receipt, it shall be deferred until business hours resume. In this clause 37.3, business hours means 9.00am to 5.00pm Monday to Friday on a day that is not a public holiday in the place of receipt.
   4. This clause does not apply to the service of any proceedings or other documents in any legal action or, where applicable, any arbitration or other method of dispute resolution.
   5. [A notice given under this Agreement is not valid if sent by email.]
4. Counterparts
   1. This Agreement may be executed in any number of counterparts, each of which when executed [and delivered] shall constitute a duplicate original, but all the counterparts shall together constitute the one Agreement.
   2. [Transmission of [an executed counterpart of this Agreement (but for the avoidance of doubt not just a signature page) **OR** the executed signature page of a counterpart of this Agreement] by email (in PDF, JPEG or other agreed format) shall take effect as delivery of an executed counterpart of this Agreement. If either method of delivery is adopted, without prejudice to the validity of the Agreement thus made, each Party shall provide the others with the original of such counterpart as soon as reasonably possible thereafter.]
   3. [No counterpart shall be effective until each Party has executed [and delivered] at least one counterpart.]
5. Governing law

This Agreement and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the law of England and Wales.

1. Jurisdiction

Each Party irrevocably agrees that the courts of England and Wales shall have [exclusive **OR** non-exclusive] jurisdiction to settle any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with this Agreement or its subject matter or formation.

1. - Plans
2. - Programmes
3. - Drawings

*[Insert relevant diagrams depicting hius/ Heat exchangers]*

1. - Site Rules

*[Insert relevant development site rules]*

1. - ESCo Services

1. **customer services[[46]](#footnote-47)**

ESCo shall:

* 1. enter into Residential Heat Supply Agreements with Residential Customers and supply Heat to the Residential Customers on the terms of the Residential Heat Supply Agreement, amended as agreed between ESCo and the relevant Customer and updated by ESCo from time to time to accord with Good Industry Practice;
  2. enter into Commercial Unit Supply Agreements with Commercial Unit Customers and supply Heat to the Commercial Unit Customers on the terms of the Commercial Unit Supply Agreement, amended as agreed between ESCo and the relevant Customer and updated by ESCo from time to time to accord with Good Industry Practice and ESCo’s internal policies;
  3. deal with any complaints received (whether received orally or in writing) from Customers in a prompt, courteous and efficient manner and provide the results of any Customer satisfaction survey to the Developer;
  4. provide Customers with telephone contact details that enable Customers to contact ESCo [24 hours] per day in respect of the Heat Supply;
  5. read the Customer Meters and bill Customers in accordance with the Customer Supply Agreements;
  6. [set up a website for use by Residential Customers];
  7. maintain a registration with the Heat Trust in order that the Ombudsman for Energy can deal with Residential Customer disputes; and
  8. to reduce the risk of bad debt in relation to Residential Customers, use reasonable endeavours to:
     1. minimise billing errors by ensuring billing is based on actual meter readings as opposed to estimates;
     2. identify Residential Customers in difficulty by incoming call management;
     3. demonstrate flexibility in debt recovery; and
     4. offer sustainable solutions to Residential Customers in extreme hardship.

1. **temporary heat solutions**
   1. In the event of any material loss of Heat Supply suffered by a Customer at a Unit caused by a failure in any part of the Energy System during the Operational Period, ESCo shall (without prejudice to its other obligations under this Agreement), subject to Paragraph 2.4, put in place a Temporary Heat Solution to ensure that the provision of Heat Supply to the Customer at the relevant Unit is resumed as soon as reasonably practicable, and in any event within [72] hours of notification of such failure. *[Drafting Note: Parties will need to consider what temporary heating solutions, or storage solutions that mitigate against supply interruptions, will be appropriate for any particular district heating system/scheme.]*
   2. If ESCo fails to put in place a Temporary Heat Solution within [48] hours of notification of such failure, the Developer may (without prejudice to its other rights and remedies under this Agreement) put in place a Temporary Heat Solution (excluding the use of any natural gas network) to provide Heat Supply to the Customer at the relevant Unit until such time as the failure in the Energy System is rectified and the provision of Heat Supply to the Customer at the relevant Unit can be resumed by ESCo.
   3. ESCo shall reimburse the Developer for the reasonable costs incurred by the Developer in putting in place any such Temporary Heat Solution, unless the failure to provide Heat was caused or contributed to by the Developer or a Developer Related Party (in which case such costs (or costs proportionate to contribution) shall be borne by the Developer).
   4. The Developer shall provide to ESCo all such co-operation and assistance reasonably requested by ESCo in connection with ESCo's installation of a Temporary Heat Solution in the circumstances envisaged by Paragraph 2.1 (including, without limitation, the provision of a suitable location at the Development at which the Temporary Heat Solution shall be installed and the grant to ESCo of a licence to occupy the same).
2. **[Developer Step‑in[[47]](#footnote-48)**

**[ ]]**

1. – Customer Supply Agreements
   * 1. - Residential Supply Agreement
     2. - Commercial Unit Supply Agreement
     3. - Connection and Supply Agreement (Plot/ Building)
     4. – [Registered]/ [[Plot] Developer Void] Supply Agreement
2. – Customer Charges
   * 1. - Residential Charges
3. **CHARGES**
   1. **Heat Charges**
      1. The Heat Charges at the Effective Date shall be [ ].
      2. The Heat Charges shall comprise:
         1. [a Standing Charge]
         2. [a Variable Charge]
   2. ESCo shall be entitled to amend or change the Heat Charges charged to Customers:
      1. if there is a change in Law, taxation or government levies which directly affects or applies to the Heat supplied or the method by which it is generated; or
      2. in accordance with the Price Review in paragraphs 2 and 3 of this Schedule 7, Part 1. *Drafting Note: Changes in law could lead to increases or decreases in heat charges – e.g. a change in tax of input fuel which ESCo could seek to pass-through to customers. If charges are benchmarked against a comparator, the methodology of that comparator (particularly the cost inputs into that comparator model) would need to be reviewed. It ought to be considered also, that, in the future, district heating schemes could be regulated and new laws introduced.]*
4. **VARIABLE CHARGE CALCULATION AND REVIEW** 
   1. ESCo shall review the Variable Charge on [1 April] of each Contract Year during the term of this Agreement (the **Residential Heat Charge Review Date**).
   2. One month prior to the **Residential Heat Charge Review Date**, ESCo shall propose to the Developer a Variable Charge to be applicable for the 12 months following the Heat Charge Review Date (the **Contract Year**).
   3. [The Variable Charge proposed for any Contract Year shall always be [*set as against comparison forms of heating* ] as set out under paragraph 4, and shall be calculated as follows][[48]](#footnote-49):

[ ]

* 1. [In the event that the Developer does not agree that the Variable Charge complies with the Residential Comparator or that the Residential Comparator calculation has been undertaken correctly, the Developer shall be entitled within 30 Business Days of receipt of the Residential Comparator calculation from ESCo, to refer the matter to Expert Determination].
  2. [If the Parties then agree (or it is determined by an Expert) that the Variable Charge proposed pursuant to paragraph 2.2 did not comply with the Residential Comparator or that the calculation had been undertaken incorrectly, ESCo shall revise the Variable Charge as soon as reasonably practicable and issue affected Residential Customers with a rebate as soon as reasonably practicable].

1. **STANDING CHARGES CALCULATION AND REVIEW** 
   1. In addition to commodity charges for Heat, the Residential Customers will also be charged Standing Charges. These charges are a share of the fixed costs (i.e. non commodity charges) associated with the operation and maintenance of the Energy System[[49]](#footnote-50).
   2. The charges also cover a share in the costs of any plant replacement during the term of the Concession.
   3. The Standing Charge will be calculated in accordance with the following formula:

[ ]

subject to an annual inflationary increase of RPIx each Contract Year [and subject to not exceeding the equivalent pricing set out in the Residential Comparator below].

* 1. [The Standing Charge shall not exceed the cost to maintain and replace [ ]][[50]](#footnote-51).

1. **RESIDENTIAL COMPARATOR** 
   1. The basis of the Residential Comparator calculation (which ESCo shall provide to the Developer with supporting documentation) shall be as follows:
      1. The energy demand will be based on the following table (figures expressed in kWh/m2);

|  |  |
| --- | --- |
| 1 Bed | [ ] |
| 2 Bed | [ ] |
| 3 Bed | [ ] |
| 4 Bed | [ ] |

* + 1. *[Include details of Residential Comparator]*
    2. - Commercial Charges
       1. CHARGES
          1. **Heat Charges**

The Heat Charges at the Effective Date shall be [ ]:

The Heat Charges shall comprise:

[a Standing Charge]

[a Variable Charge]

* + - * 1. **[Electricity Charges]**

The Electricity Charge at the Effective Date shall be [ ].

The Electricity Charge for each month shall be calculated as follows:

[ ]

* + - * 1. ESCo shall be entitled to amend or change the Charges charged to Commercial Customers:

if there is a Change in Law, taxation or government levies which directly affects or applies to the Heat Supply [or Electricity Supply] or the method by which it is generated; or

in accordance with the Price Review in paragraphs 2, 3 and 5 of this Schedule 7, Part 1. . *[Drafting Note: Changes in law could lead to increases or decreases in heat charges – e.g. a change in tax of input fuel which ESCo could seek to pass-through to customers. If charges are benchmarked against a comparator, the methodology of that comparator (particularly the cost inputs into that comparator model) would need to be reviewed. It ought to be considered also, that, in the future, district heating schemes could be regulated and new laws introduced.]*

* + - 1. VARIABLE CHARGE CALCULATION AND REVIEW
         1. ESCo shall review the Variable Charge on [1 April] of each Contract Year during the term of this Agreement (the Commercial Heat Charge Review Date).
         2. One month prior to the Commercial Heat Charge Review Date, ESCo shall propose to the Developer a Variable Charge to be applicable for the 12 months following the Heat Charge Review Date (the Contract Year).
         3. [The Variable Charge proposed for any Contract Year shall always be [set as against comparison forms of heating ] as set out under paragraph 4, and shall be calculated as follows] :

[ ]

* + - * 1. [In the event that the Developer does not agree that the Variable Charge complies with the Commercial Comparator or that the Commercial Comparator calculation has been undertaken correctly, the Developer shall be entitled within 30 Business Days of receipt of the Commercial Comparator calculation from ESCo, to refer the matter to Expert Determination].
        2. [If the Parties then agree (or it is determined by an Expert) that the Variable Charge proposed pursuant to paragraph 2.2 did not comply with the Commercial Comparator or that the calculation had been undertaken incorrectly, ESCo shall revise the Variable Charge as soon as reasonably practicable and issue affected Commercial Customers with a rebate as soon as reasonably practicable].
      1. STANDING CHARGES CALCULATION AND REVIEW
         1. In addition to commodity charges for Heat, the Commercial Customers will also be charged Standing Charges. These charges are a share of the fixed costs (i.e. non commodity charges) associated with the operation and maintenance of the Energy System .
         2. The charges also cover a share in the costs of any plant replacement during the term of the Concession.
         3. The Standing Charge will be calculated in accordance with the following formula:

[ ]

* + - * 1. subject to an annual inflationary increase of RPIx each Contract Year [and subject to not exceeding the equivalent pricing set out in the Commercial Comparator below].
        2. [The Standing Charge shall not exceed the cost to maintain and replace [ ]] .
      1. Commercial COMPARATOR
         1. The basis of the Commercial Comparator calculation (which ESCo shall provide to the Developer with supporting documentation) shall be as follows:
         2. The energy demand will be based on the following table (figures expressed in kWh/m2);

|  |  |
| --- | --- |
| Type 1 | [ ] |
| Type 2 | [ ] |
| Type n | [ ] |

* + - * 1. *[Include details of Comparator]*
      1. [electricity charge review[[51]](#footnote-52)]
         1. [ ]

1. - Data Processing
   * + 1. DEFINITIONS
          1. In addition to the definitions set out elsewhere in this Agreement, in this Schedule the following words shall have the following meaning:

**Agreed Purposes:** for ESCo shall be to identify, and set up and manage accounts for, tenants of Units, including:

setting up tenants of Unit's accounts and making any changes to the terms of providing the services;

identifying tenants of Units when tenants of Relevant Units makes enquiries;

market research and providing tenants of Units with up-to-date information on the services which ESCo provides;

providing information to tenants of Units about other relevant services provided by ESCo and any Affiliate of ESCo;

billing and debt recovery;

prevention of fraud or loss;

quality assurance (including recording communications with tenants of Units);

checks with credit reference agencies (who will keep a record of the search); and

identifying any vulnerable customers for the purposes of registration on ESCo’s priority Services Register and access to support services and help.

**Agreed Purposes**: for the Developer shall be:

to enable the Developer to discharge its obligations under this Agreement;

to enable ESCo to connect the Unit to the Heat Distribution Network and provide the Heat Supply to the Customer moving into the Unit; and

to enable the Customer occupying the Unit to comply with the terms of its agreement with the Customer and the terms of their Residential Heat Supply Agreement with ESCo.

**Controller, data controller, processor, data processor, data subject, processing and appropriate technical and organisational measures:**shall have the meanings given to them in the Data Protection Legislation in force at the time.

**Permitted Recipients:**means the Parties to this Agreement, any Affiliates of each Party, the employees and contract workers of each Party, any third parties engaged by each Party to perform obligations in connection with this Agreement and credit reference and fraud prevention agencies.

**Shared Personal Data:** means the Personal Data that may be shared between the Parties under this Agreement, which shall be confined to the following categories of information relevant to the following categories of data subject:

Category of data subject: Individuals occupying the Units – including freehold, leasehold and shared ownership tenants (current and outgoing tenants);

Types of personal data: name, address, phone number, heat use data, KYC data (e.g. recent utility bills/ council tax bills).

* + - 1. Shared Personal Data
         1. This paragraph sets out the framework for the sharing of Personal Data between the Parties as data controllers.
         2. Each Party acknowledges that from time to time one Party will need to disclose Shared Personal Data to the other Party as data controller for the Agreed Purposes. The Parties acknowledge that as at the date of this Agreement the Parties do not consider that either of them acts as data processor for the other, and if that changes during the term of this Agreement then they will need to agree a separate data processing agreement as required by Data Protection Legislation. *[Drafting Note: Parties may want to consider provisions regarding control of shared personal data and also the appointment of third party data processors.]*
      2. Particular obligations relating to data sharing
         1. Each Party shall:

ensure that it has any necessary notices and consents in place to enable lawful transfer of the Shared Personal Data to the other Party and their Permitted Recipients for the Agreed Purposes;

process the Shared Personal Data only for the Agreed Purposes;

not disclose or allow access to the Shared Personal Data to anyone other than the Permitted Recipients;

ensure that all Permitted Recipients are subject to written contractual obligations concerning the Shared Personal Data (including obligations of confidentiality) which are no less onerous than those imposed by this Agreement;

ensure that it has in place appropriate technical and organisational measures to protect against unauthorised or unlawful processing of Personal Data and against accidental loss or destruction of, or damage to, Personal Data; and

not transfer any Shared Personal Data outside the EEA unless (i) the transfer is to a country approved by the European Commission as providing adequate protection pursuant to Article 45 GDPR; (ii) there are appropriate safeguards in place pursuant to Article 46 GDPR; or (iii) one of the derogations for specific situations in Article 49 GDPR applies to the transfer. *[Drafting Note: Parties may want to consider additional obligations regarding data sharing.]*

* + - 1. Mutual assistance
         1. Each Party shall assist the other in complying with all applicable requirements of the Data Protection Legislation. In particular, each Party shall:

promptly inform the other Party about the receipt of any data subject access request in relation to Shared Personal Data received from the other Party;

provide the other Party with reasonable assistance in complying with any data subject access request in relation to Shared Personal Data received from that other Party;

not disclose or release any Shared Personal Data received from the other Party in response to a data subject access request without first consulting the other Party wherever possible;

assist the other Party, at the cost of the other Party, in ensuring compliance with its obligations under the Data Protection Legislation with respect to security, breach notifications, impact assessments and consultations with supervisory authorities or regulators;

notify the other Party without undue delay on becoming aware of any breach of the Data Protection Legislation in relation to Shared Personal Data received from the other Party; and

maintain complete and accurate records and information to demonstrate its compliance with this Schedule.

* + - 1. Indemnity

Each Party shall indemnify the otherfrom and against all Losses suffered or incurred by the other Party and arising out of or in connection with any breach by that Party or any sub-contractors of this Schedule.

1. - Marketing and Public Relations[[52]](#footnote-53)
   * + 1. Marketing and public relations activities
          1. The Parties agree that to enhance the public perception of the energy provision arrangements for the Development a series of marketing and public relations activities should be carried out for mutual benefit.
          2. The Parties shall comply with their obligations under this Schedule 9 so as to so as to maximise the marketing opportunities arising in relation to the Energy System.
          3. Each of the Parties is to be responsible for the costs of complying with its own obligations contained in this Schedule 9.
       2. activities
          1. Such activities shall include:-

ESCo to provide the [*insert details of general publicity/ overview information provided by ESCo to Customers]* and guidance notes to new purchasers of Residential Units and Commercial Units on the Development.

ESCo to provide at its cost (and keep updated) presentation materials, for use within the Developer's show homes / show suites, demonstrating that the cost of heating and providing hot water to a new homes is [*insert details of relevant comparator/ carbon credentials of energy supplied etc]*.

The Parties to work together to deliver positive PR through local media channels highlighting the benefits and "green" credentials of the Energy System, including, where appropriate, the use of local news media to highlight the benefits of the development to the local community.

The Parties to work together to deliver positive PR through appropriate trade publications.

* + - 1. Approval of marketing materials
         1. All media releases, public announcements and public disclosures by the Parties in relation to or in connection with this Agreement, the Project Agreements (other than the Customer Supply Agreements) or their subject matter, including but not limited to promotional material (but not including any site specific marketing materials relating specifically to clients, any announcement intended solely for internal distribution or any disclosure required by legal, accounting or regulatory requirements), shall be co‑ordinated with and approved in the first instance by the Developer Representative(s) and ESCo’s Representative(s) prior to release. Such consent shall not be unreasonably withheld or delayed and shall be deemed to have been given by any Party which fails to Notify the other Parties of its refusal to grant approval within ten (10) Business Days.
         2. The Developer shall be entitled to use images and marketing literature developed by ESCo for marketing purposes subject to written agreement in each case, such agreement not to be unreasonably withheld.
         3. For the avoidance of doubt, nothing in this Schedule 9 shall restrict the Developer's right to publicise or make any announcement about the Development provided that no reference is made to this Agreement, the Project Agreements (other than the Customer Supply Agreements) or the subject matter of any of those agreements, or to the involvement of ESCo, otherwise than in accordance with this Schedule 9.

1. - Governance, Monitoring and Reporting
   * 1. - Monitoring and Reporting
2. **Annual Report[[53]](#footnote-54)**
   1. ESCo shall, by 30 April each year during the term of this Agreement, provide the Developer with an annual report containing details of the following matters for the previous year, that year being the period from 1 April in the preceding calendar year to 31 March in the current calendar year:
      1. the number of current Customers who are subject to Residential Heat Supply Agreements and Commercial Heat Supply Agreements;
      2. the total annual Heat consumption and the split between Residential Customers and Commercial Customers; and
      3. the peak demand for the year.
3. **QUARTERLY PERFORMANCE REPORT**
   1. ESCo shall compile and submit in writing each quarter a performance report that contains as a minimum the following information for the preceding calendar quarter in relation to the Energy System:
      1. A graph plotting hourly Heat Supply against plant capacity available;
      2. A table showing the quantity of Heat Supply supplied during the period to each of the Connections on the Development;
      3. a record of any complaints received from Customers, and of the action taken in response;
      4. the number of instances in which ESCo has failed to respond to the Customer fault reports within the required time period under the Customer Supply Agreements; and
      5. the percentage of Customers whose Heat Supply was suspended due to non-payment.
4. **MONTHLY KPI REPORT**
   1. ESCo shall compile and submit in writing each month a performance report that contains such data as is reasonably required to establish performance as against the Key Performance Indicators as detailed in Schedule 11 (Key Performance Indicators).
5. **Performance Forecast**
   1. ESCo shall, by 30 April each year during the term of this Agreement, provide the Developer with a forecast (the "**Performance Forecast**") of the following matters for the next financial year, being 1 May until the following 30 April:-
      1. the expected number of Customers which will be subject to Residential Heat Supply Agreements and Commercial Heat Supply Agreements; and
      2. the expected Heat Supply demand for the following year split between Residential Customers and Commercial Customers.
6. **Developer Forecast**
   1. The Developer shall by 30 April each year during the term of this Agreement, provide ESCo with a forecast of the following matters for the next financial year, being 1 May until the following 30 April:
      1. the expected programme of Unit sales and/or development;
      2. the updated Developer Delivery Programme; and
      3. any expected changes in the use or operation of the Development likely to have an impact on the Heat Supply and/or the Energy System including but not limited to changes to the intended use of the Development and any other activities which may impact upon the routing or installation of the Heat Distribution Network.
      4. - Governance[[54]](#footnote-55)
         1. Meetings
            1. ESCo’s Representative(s) and the Developer Representative(s) shall schedule and attend a meeting not less than once every [six (6)] months during the Term.
            2. The Developer Representative(s) shall be responsible for taking meeting minutes at each meeting held between the Parties, unless otherwise agreed. The Developer Representative(s) shall circulate meeting minutes of each of the meetings to the Parties within two (2) Business Days of the relevant meeting.
            3. Any matter requiring Notice by one Party to the other under this Agreement shall, irrespective of being referred to in any meeting or the minutes thereof, be Notified separately from the relevant meeting in accordance with the terms of this Agreement.
         2. LIAISON COMMITTEE
            1. ESCo and the Developer shall establish and maintain throughout the Concession a joint liaison committee that will have the following functions:

to provide a means for the joint review of issues relating to all day to day aspects of the performance of the Agreement;

to provide a forum for joint strategic decisions including considering actual and anticipated changes to the market of ESCo and Developer and to consider possible variations to the Agreement to reflect those changes; and

in certain circumstances, pursuant to Clause 26 (Dispute Resolution) to provide a means of resolving disputes or disagreements between the Parties amicably.

1. - Key Performance Indicators[[55]](#footnote-56)
2. To the extent that any Failure Event attracts Service Failure Points the levying of such Service Failure Points shall, without prejudice to the provisions of Clause 24 (Default, Cure and Termination ), be the Developer's sole remedy in respect of such Failure Event.

|  | **Failure Event[[56]](#footnote-57)** | **Service Failure Points[[57]](#footnote-58)** |
| --- | --- | --- |
|  | Failure to provide Heat Supply to the capacity required for [ )] hours (unless ESCo has agreed an alternative timeframe with the relevant Commercial Customer, in which case such alternative timeframe shall apply for that Commercial Customer) | [ ] points per Commercial Unit affected per [ ] hour period |
|  | Failure to provide Electricity Supply to a Commercial Customer for [ )] hours (unless ESCo has agreed an alternative timeframe with the relevant Commercial Customer, in which case such alternative timeframe shall apply for that Commercial Customer) | [ ] points per Commercial Unit or Commercial Building affected per [ ] hour period |
|  | Failure to provide Heat to the capacity required by a Residential Heat Supply Agreement for [ )] hours | [ ] points per Residential Unit affected per [ ] hour period |
| * + - 1. 2. | Failure to provide temporary heaters to Vulnerable Residential Customers where required as per the terms of the Residential Heat Supply Agreement within [ ] hours of notification of the unplanned heat discontinuance or interruption | For every [ ] hour the failure remains unresolved: [ ] points per Vulnerable Residential Customer affected |
| * + - 1. 3. | Failure to respond substantially to a substantiated complaint made in accordance with the Residential Heat Supply Agreement. | [ ] point per complaint |
| * + - 1. 5. | Failure to meet the minimum flow temperatures (+/- [ ] C) at a [Customer Meter] in accordance with the design of the Energy System as set out under Schedule 3 (Technical Specifications), for a period of more than [ ] hours | For each [ ] period of failure: [ ] points, |
| 6. | Failure to remedy a leak from the Heat Distribution Network in a Residential Unit or Commercial Unit that is causing material interference or material physical damage to the Unit within [ ] hours of notification. | [ ] points per Unit affected |
| 7. | Failure to remedy a leak in the Heat Distribution Network that is causing material interference with other building services or material physical damage to the building, within [ ] hours of notification, only where and to the extent that such a leak is a result of ESCo’s failure. | [ ] points for every [ ] hour period that fault remains unresolved. |
| 8. | Failure to remedy a leak in the Heat Distribution Network that is causing material interference or physical damage to the public realm and/or infrastructure within [ ] hours of notification, only where and to the extent that such a leak is a result of ESCo’s failure. | [ ] points for every [ ] hour period that fault remains unresolved. |
| 9. | Failure to provide a report (and/or reasonable adequate details within such reports) as required under Schedule 10 (Governance, Monitoring and Reporting), following not less than [15] Business Days’ notice of such failure to ESCo. | [ ] points for each failure |
| 10. | Faulty Heat Meter (i.e. accuracy not within plus/ minus [5%] not replaced within [ ] days after fault identified | [ ] points for each failure |
| 11. | Faulty Electricity Meter (i.e. accuracy not within plus/ minus [5%] not replaced within [ ] days after fault identified | [ ] points for each failure |

1. The timescales set out in the table above shall be subject to ESCo being granted the necessary access by the Developer or Customer or tenant or authorised agent of the Customer.
2. ESCo shall inform the Developer of all Failure Events in accordance with Schedule 10 (Governance, Monitoring and Reporting).
3. If ESCo accumulates [ ] Service Failure Points or more in any calendar month a "**Monthly Service Failure**" shall be deemed to have occurred.
4. Where a Monthly Service Failure has not been triggered, but ESCo accumulates more than [ ] Service Failure Points in a [ ] month period an “**Aggregated Service Failure”** shall be deemed to have occurred[[58]](#footnote-59).
5. ESCo shall within [ten (10)] Business Days of the end of a month in which a Monthly Service Failure or Aggregated Service Failure has occurred, provide to the Developer a rectification plan for the purpose of rectifying the Failure Event(s) which shall include the steps to be taken to rectify the Failure Event(s) and the timetable for rectification.
6. The Developer shall be entitled to review and provide reasonable amendments to the rectification plan provided such amendments are proportionate in the context of the relevant Failure Event(s).
7. If ESCo and the Developer are unable to agree whether any amendments proposed by the Developer are reasonable either Party shall be entitled to refer the matter for resolution pursuant to the provisions of 26 (Dispute Resolution).
8. If ESCo rectifies the Failure Event(s) in accordance with the agreed or determined rectification programme no further action shall be taken by the Developer in respect of the Monthly Service Failure or Aggregated Service Failure and the Monthly Service Failure or Aggregated Service Failure shall be deemed not to have occurred.
9. If:
   1. [ ] or more Monthly Service Failures occur within the same rolling [ ] month period; or
   2. more than [ ] points accrue in relation to Failure Events within any rolling [ ] month period;

a Major Default shall be deemed to have occurred and the provisions of Clause 24 (Default, Cure and Termination) shall apply.

1. - Insurances
   * 1. - DEVELOPER INSURANCES
2. **Third party LIABILITY insurance (during operational Period)**
   1. Insured parties

The Developer

* 1. Insured interest
     1. Death and personal injury of third parties.
     2. Damage or loss to third party property.
     3. Legal risks (e.g. nuisance claims).
  2. Coverage

Third party death and bodily injury, loss of or damage to third party real or personal property arising out of or in the course of or by reason of the performance by the Developer, its subcontractors, agents or any party authorised by it under this Agreement, save for property insured under the Property Damage Policy.

* 1. Limit

[ ] (£[ )] for each and every claim arising out of any one occurrence or series of occurrences.

* 1. Period of insurance

From the date of Service Readiness until the Expiry or Termination of this Agreement.

1. **professional indemnity insurance (during OPERATIONAL PHASE)**
   1. Insured parties

Developer.

* 1. Insured interest

Any design and/or specification works or services which are the responsibility of the Developer

* 1. Coverage

Legal liability for breach of professional duties in relation to works or services which are the responsibility of the Developer

* 1. Limit

[ ] (£[ ]) in the aggregate during each annual policy period.

* 1. Period of insurance

From the date of Service Readiness until Expiry or Termination of this Agreement.

* + 1. - ESCo INSURANCES

1. **Third party insurance (during operational Period)**
   1. Insured parties

ESCo.

* 1. Additional insureds

The Developer.

* 1. Insured interest
     1. Death and personal injury of third parties.
     2. Damage or loss to third party property.
     3. Legal risks (eg nuisance claims).
  2. Coverage

Third party death and bodily injury, loss of or damage to third party real or personal property arising out of or in the course of or by reason of the performance by ESCo, its sub-contractors, agents or any party authorised by it under this Agreement or the Project Agreements save for property insured under the Property Damage Policy.

* 1. Limit

[ ] (£[ ]) each and every claim arising out of any one occurrence or series of occurrences.

* 1. Period of insurance

From the date of Service Readiness until the expiry or early termination of this Agreement.

1. - Change Procedure
   * 1. - Variation Requests
     2. DEFINITIONS
        1. In this Schedule 13 the following terms shall, unless otherwise defined in this Agreement or the context otherwise requires, have the following meanings:

|  |  |
| --- | --- |
| "**Consequential Change**" | has the meaning given in paragraph 2.7.11; |
| "**Developer Notice of Variation**" | has the meaning given in paragraph 2.1; |
| "**Developer Variation**" | means any Project Variation which is proposed by the Developerpursuant to paragraph 2; |
| "**Developer Variation Objection Notice**" | has the meaning given in paragraph 2.3.1; |
| "**Developer Variation Order**" | has the meaning given in paragraph 2.9.4(a); |
| "**ESCo Notice of Variation**" | has the meaning given in paragraph 3.1; |
| "**ESCo Variation**" | means any Project Variation proposed by ESCo pursuant to paragraph 3; and |
| "**Estimated Change in Costs**" | means the aggregate of any estimated additional costs to be incurred by ESCo or the Developerin carrying out the relevant obligations under this Agreement (whether construction, design, installation, operation, maintenance or supply services) as varied if the Proposed Variation is implemented, less the aggregate of any estimated reduction of such costs; |
| "**Estimated Change in Profit**" | means the aggregate of any estimated reduction in ESCo's expected financial return in connection with this Agreement and the Customer Supply Agreements (including, without limitation, any decrease in revenue receivable by way of Heat Charges [or Electricity Charges]); |
| "**Lump Sum Payments**" | means payments of sums of money by either or both Parties to the other for a DeveloperVariation or ESCo Variation against a timetable to be agreed between the Parties in accordance with this Schedule 13 or determined pursuant to the Dispute Resolution Procedure; |
| "**Outline Proposal**" | has the meaning given in paragraph 2.5; |
| "**Pricing Change**" | has the meaning given in paragraph 2.7.10; |
| “**Project Variation”** | means any change to anticipated heat loads, the Development Plan, the Developer Delivery Programme, any Technical Specifications, any ESCo Works or Developer Works or any other change which has an impact on any part of the Energy System and/or the ESCo Services. |
| "**Proposed Budget**" | has the meaning given in paragraph 2.6.1; |
| "**Proposed Variation**" | means a variation proposed in either a Developer Notice of Variation or an ESCo Notice of Variation (as applicable); and |
| "**Variation Report**" | has the meaning given in paragraph 2.6.2 (Outline Proposal/Variation Report). |

* + 1. DEVELOPER VARIATION
       1. Scope of Developer Variation

If the Developer wishes to request a Developer Variation (other than as a result of a Change in Law, in which case the provisions of Part 2 of this Schedule 13 shall apply), the Developer shall serve on ESCo a written notice (a "**Developer Notice of Variation**") in accordance with this Schedule 13 (provided that the Developer may not request a Developer Variation which may require anything to be performed by ESCo in a way which infringes any Law or Authorisations).

* + - 1. Developer Notice of Variation

If the Developer requires a Developer Variation, it shall serve on ESCo a Developer Notice of Variation setting out:

* + - * 1. the date of the Developer Notice of Variation;
        2. the reason for the Developer Variation;
        3. sufficient details of the Developer Variation to enable ESCo to calculate and provide the Estimated Change in Costs and any Estimated Change in Profit in accordance with paragraph 2.7;
        4. full details of any change required to the Services or the Service Levels or the Connection (and if applicable, the Connection and Adoption Agreement);
        5. whether the Developer Variation also constitutes a Developer Variation pursuant to the Connection and Adoption Agreement;
        6. the date by which the Developer wishes the Developer Variation to have been implemented;
        7. the reasonable date by which ESCo is required to submit its Outline Proposal, being not less than twenty (20) Business Days after the date of service of the Developer Notice of Variation or, if ESCo issues a Developer Variation Objection Notice pursuant to paragraph 2.3.1, not less than ten (10) Business Days after the date of agreement or determination that such objections are not valid; and
        8. any other information that the Developer reasonably considers would assist ESCo in preparing its Variation Report including action the Developer proposes to take.
      1. Developer Variation Objection Notice
         1. Within fifteen (15) Business Days of receiving a Developer Notice of Variation ESCo shall either confirm in writing to the Developer that it will prepare an Outline Proposal for the Developer or issue a notice setting out in detail the grounds on which ESCo objects to the proposed Developer Variation (a **"Developer** **Variation Objection Notice**"), provided that ESCo shall only be entitled to object to a Developer Variation if:
         2. the Developer Variation is not technologically feasible in the reasonable opinion of ESCo;
         3. the Developer Variation would, if implemented, contravene any Law or Authorisations or require anything to be performed by ESCo in a manner which is inconsistent with Good Industry Practice;
         4. the Developer Variation would, if implemented, cause an unacceptable health and safety risk to ESCo, an ESCo Related Party, the Developer, a Developer Related Party or any third parties;
         5. it is not possible to implement the Developer Variation within the period of time specified in the Developer Notice of Variation;
         6. the Developer Variation would, if implemented, cause any Authorisations to be revoked or not renewed or unobtainable (which are not reasonably likely, on a balance of probabilities, to be capable of modification);
         7. the Developer Variation would, if implemented, result in ESCo being in breach of, or have a material adverse effect on the ability of ESCo to perform, its obligations under any agreement to which it is a party; and/or
         8. the Developer Variation would, if implemented, result in a reduction in ESCo's expected financial return in connection with this Agreement (including by way of any decrease in Heat Charges) which is not compensated by the Developer’s payment to ESCo of Lump Sum Payments, including any increase to any amounts payable by ESCo to the Developer pursuant to this Agreement or any decrease to any amounts payable by the Developer to ESCo pursuant to this Agreement.
      2. Dealing with Objections
         1. If the Developer disagrees with the objections raised by ESCo, the Parties shall meet with a view to establishing whether the objections are valid. If, within ten (10) Business Days of receipt of any Developer Variation Objection Notice, the validity or otherwise of ESCo's objections remains to be agreed, either Party may refer the question of validity to the Dispute Resolution Procedure.
         2. The Parties shall act reasonably and in good faith to endeavour to agree amendments to the Developer Notice of Variation such as to resolve ESCo’s objections.
         3. If the Developer agrees with the objections in the Developer Variation Objection Notice, or it is determined under the Dispute Resolution Procedure that the objections in the Developer Variation Objection Notice are valid, the proposed Developer Notice of Variation shall be deemed to be withdrawn.
         4. The Parties shall bear their own costs incurred in the process of dealing with any Developer Variation Objection Notice under paragraph 2.3 and this paragraph 2.4.
      3. Outline Proposal
         1. If, following the issue by the Developer of a Developer Notice of Variation:
         2. ESCo does not issue a Developer Variation Objection Notice under paragraph 2.3 within the period specified in that paragraph; or
         3. it is either agreed or determined under paragraph 2.4 that the objections set out in a Developer Variation Objection Notice are not valid,

then ESCo shall as soon as reasonably practicable and in any event by the date specified in the Developer Notice of Variation issue a proposal to the Developer in accordance with paragraph 2.6 (an "**Outline Proposal**").

* + - * 1. The Outline Proposal shall specify an estimate of the price, a provisional timetable and a summary of the method of implementation of the Developer Variation and shall be accompanied by a suggested budget for ESCo to develop the Variation Report.
      1. Variation Report
         1. If, having considered the Outline Proposal, the Developer wishes to proceed with the Developer Variation, it shall notify ESCo and confirm (acting reasonably) either that the suggested budget for ESCo to develop the Variation Report is agreed by the Developer or propose an alternative budget (the "**Proposed Budget**").
         2. Following the notification referred to in paragraph 2.6.1, ESCo shall as soon a reasonably practicable issue a report to the Developer in accordance with paragraph 2.7 (a "**Variation Report**"). ESCo shall keep the Developer informed as to the costs reasonably and properly incurred in preparing the Variation Report and also ten (10) Business Days before the anticipated date when those costs exceed the Proposed Budget. If the costs incurred by ESCo in preparing the Variation Report exceed the Proposed Budget, the Developer shall (acting reasonably):
         3. inform ESCo that it is increasing the amount of the Proposed Budget; or
         4. withdraw the request for the Developer Variation.
      2. Contents of Variation Report

The Variation Report shall include details of the following:

* + - * 1. the date of the relevant Developer Notice of Variation or ESCo Notice of Variation (as applicable);
        2. ESCo's opinion on any impact of the Proposed Variation on the date of completion of any Works (performed under the Connection and Adoption Agreement);
        3. ESCo's opinion on any other anticipated impact of the Proposed Variation on any ESCo Services, the Heat Supply [or the Electricity Supply];
        4. any amendment required to specific, listed Clauses and/or Schedules of this Agreement as a result of the Proposed Variation;
        5. any Estimated Change in Costs that would result from the Proposed Variation, including:
        6. details of the derivation of the Estimated Change in Costs arising from the Proposed Variation; and
        7. evidence that ESCo and its subcontractors have used and will use reasonable endeavours to minimise any increase in costs and maximise any reduction in costs;
        8. any Estimated Change in Profit that would result from the ProposedVariation;
        9. ESCo's proposals for Lump Sum Payments to be made by either or both Parties to the other in connection with the ProposedVariation in order to:
        10. reimburse the Developer for any Estimated Change in Costs (where the relevant costs are expected to decrease as a result of the Proposed Variation);
        11. reimburse ESCo for any Estimated Change in Costs (where the relevant costs are expected to increase as a result of the Proposed Variation); and/or
        12. compensate ESCo for any Estimated Change in Profit that would result from the Proposed Variation,

including details in relation to the timing of payment of any such Lump Sum Payments (reflecting (to the extent applicable) the amount and timing of any relevant capital expenditure to be incurred by ESCo in relation to the Proposed Variation);

* + - * 1. the proposed methods of certification of any works required in connection with the Proposed Variation;
        2. any Authorisations which, in the opinion of ESCo, will need to be obtained to give effect to the Proposed Variation including any such Authorisations which are required to be obtained or which it would be Good Industry Practice to obtain prior to the implementation of the Proposed Variation and the extent to which ESCo proposes that the implementation of the Proposed Variation should be conditional on any Authorisation being obtained;
        3. where the proposed Proposed Variation would result in a change to Heat Charges (a "**Pricing Change**"), a general description of the process to be applied pursuant to the Customer Supply Agreements in order to effect the Pricing Change;
        4. any other change to this Agreement (a "**Consequential Change**") which would result from or reasonably be required in order to facilitate the implementation of the proposed Proposed Variation (and if ESCo has identified any Consequential Change, it shall, in providing any information or estimates required pursuant to this paragraph 2.7, take into account and provide for and set out the anticipated effects of any such Consequential Change and references to any Proposed Variation in this paragraph 2 shall be deemed to include any Consequential Change and in particular for the purposes of acceptance or withdrawal, or agreement pursuant to paragraph 2.9, of the Proposed Variation, a Proposed Variation and any related Consequential Changes shall be treated as one Proposed Variation);
        5. the steps and measures (which shall be as detailed as reasonably practicable in the circumstances) ESCo intends to take in order to implement the Proposed Variation, including the length of time and programme for implementing the Proposed Variation, taking into account the length of time required to obtain any Authorisations identified pursuant to paragraph 2.7.9 and to implement any Consequential Change; and
        6. the identity of any subcontractors (if any) which ESCo intends to engage for the purposes of effecting the Proposed Variation.
      1. Additional Information
         1. The Developer may (subject to paragraph 2.6 at its own cost) request from ESCo such additional information as the Developer reasonably requires for the purposes of considering the Variation Report and shall make any such request as soon as reasonably practicable after receiving the Variation Report.
         2. ESCo shall provide any information requested by the Developer in accordance with paragraph 2.8.1 as soon as reasonably practicable after receiving such request.
      2. Agreeing the Variation Report
         1. As soon as reasonably practicable after the Developer receives the Variation Report or, if the Developer has requested additional information in accordance with paragraph 2.8.1, as soon as reasonably practicable after the Developer receives such additional information, the Parties shall meet to discuss and attempt to agree the issues set out in the Variation Report.
         2. The Parties shall act reasonably and in good faith to endeavour to agree amendments to the Variation Report such as to enable the Proposed Variation to proceed. Any agreed amendments shall be incorporated into the Variation Report.
         3. If the Parties cannot agree on the contents of the Variation Report within a period of forty (40) Business Days from the date of the Variation Report, either Party may refer the matter for resolution in accordance with the Dispute Resolution Procedure (on the basis of the principles described in this Schedule 13, including that ESCo should be in no better or worse position in respect of Estimated Changes in Costs and Estimated Changes in Profits).
         4. Within thirty (30) Business Days of a Variation Report being agreed or determined, the Developer shall:
         5. issue to ESCo an order (a "Developer Variation Order") requiring ESCo to implement the Developer Variation in accordance with the Variation Report, as agreed or determined. The Developer and ESCo shall comply with the terms of any such Developer Variation Order; or
         6. notify ESCo that it is withdrawing the Developer Notice of Variation.
         7. If the Developer does not comply with paragraphs 2.9.4 within the time period specified in that paragraph, it shall be deemed to have notified ESCo that it is withdrawing the DeveloperNotice of Variation.
      3. Implementation of Developer Variation
         1. Upon receipt of any DeveloperVariation Order (which ESCo shall review and confirm (by counter signature) as being in accordance with the agreed or determined Variation Report):
         2. the Parties shall forthwith implement the relevant Developer Variation in accordance with the terms of the Variation Report, as agreed or determined, subject to any Authorisation being obtained where the Variation Report specifies that the implementation of the Developer Variation is conditional on such Authorisation;
         3. the ESCo Services shall be deemed to be amended as specified in the Variation Report, as agreed or determined;
         4. this Agreement shall be deemed to be amended to the extent specified in the Variation Report (including where a Developer Variation has been issued pursuant to the Connection and Adoption Agreement pursuant to paragraph 2.10.1(c) of the Connection and Adoption Agreement which impacts on this Agreement), as agreed or determined;
         5. (if applicable) the Connection and Adoption Agreement (pursuant to paragraph 2.10.1(b) of Schedule 13 (Change Procedure) of the Connection and Adoption Agreement) shall be deemed to be amended;
         6. the Developer or ESCo shall make any Lump Sum Payments (and any other relevant payments) in accordance with the Variation Report, as agreed or determined (with no double counting to the extent that the Developer Variation is deemed an ESCo Variation under the Connection and Adoption Agreement); and
         7. the Developer Delivery Programme shall be adjusted in the manner agreed or determined.
      4. Non-implementation of Developer Variation

The Developershall reimburse ESCo its reasonable costs properly incurred in preparing a Variation Report where the relevant DeveloperVariation is not implemented, other than where the reason for such non-implementation is that the costs of the DeveloperVariation as set out in the Variation Report are materially greater than or otherwise the timetable or methodology of the DeveloperVariation is materially different to those set out in the Outline Proposal as a result of the deliberate act or wilful default of ESCo.

* + 1. ESCo VARIATION
       1. Scope of ESCo Variation

If ESCo wishes to request an ESCo Variation (other than as a result of a Change in Law in which case the provisions of this Part 2 Schedule 13 shall apply), it shall serve a notice on the Developer(an "**ESCo Notice of Variation**").

* + - 1. ESCo Notice of Variation

The ESCo Notice of Variation shall include all the information which ESCo is required to provide in a Variation Report, as detailed in paragraph 2.7, to the extent that such information is relevant to the proposed ESCo Variation and details of the following:

* + - * 1. ESCo's reasons for proposing the ESCo Variation;
        2. any date or dates by which any decision by the Developeris critical;
        3. full details of any change required to the ESCo Services; and
        4. whether the ESCo Variation also constitutes an ESCo Variation pursuant to the Connection and Adoption Agreement.
      1. Evaluation of the ESCo Notice of Variation
         1. The Developershall evaluate the ESCo Notice of Variation in good faith taking into account all relevant issues, including:
         2. any Lump Sum Payments and/or any other relevant payments required to be made (and the proposed timing of payment of any such Lump Sum Payments and any other relevant payments);
         3. whether the ESCo Variation will affect the quality, timing and/or the likelihood of successful delivery of the ESCo Services;
         4. whether the ESCo Variation will interfere with the relationship of the Developer with third parties; and/or
         5. whether the ESCo Variation materially affects the risks or costs to which the Developer, Customers and/or Registered Providers are exposed.
         6. As soon as reasonably practicable after the Developerreceives the ESCo Notice of Variation, the Parties shall meet to discuss and attempt to agree the issues set out in the ESCo Notice of Variation (or any modifications to it).
         7. As a result of the discussions undertaken pursuant to paragraph 3.3.2, ESCo may modify the ESCo Notice of Variation and shall notify the Developeras soon as reasonably practicable of any such modifications.
      2. Rejection of the ESCo Notice of Variation

Notwithstanding paragraph 3.3, the Developermay (acting reasonably and in good faith) reject the ESCo Notice of Variation by issuing a notice of objection to ESCo listing the specific provision of paragraph 3.3 which applies. If the Parties cannot agree that the grounds of objection are valid, either Party may refer the matter for resolution in accordance with the Dispute Resolution Procedure.

* + - 1. Acceptance of the ESCo Notice of Variation

The Developermay accept the ESCo Notice of Variation as modified pursuant to paragraph 3.3.3 (if applicable) by notifying ESCo (such acceptance not to be unreasonably withheld or delayed).

* + - 1. Implementation of ESCo Variation
         1. Upon receipt of notification from the Developerthat it accepts the ESCo Notice of Variation:
         2. the Parties shall forthwith implement the relevant ESCo Variation in accordance with the terms of the ESCo Notice of Variation as modified pursuant to paragraph 3.3.3 (if applicable), subject to any Authorisation being obtained where the ESCo Notice of Variation specifies that the implementation of the ESCo Variation is conditional on such Authorisation;
         3. the ESCo Services shall be deemed to be amended as specified in the ESCo Notice of Variation as modified pursuant to paragraph 3.3.3 (if applicable);
         4. this Agreement shall be deemed to be amended to the extent specified in the ESCo Notice of Variation as modified pursuant paragraph 3.3.3 (if applicable) (including where an ESCo Variation has been issued pursuant to the Connection and Adoption Agreement pursuant to paragraph 3.6.1(c)); and
         5. (if applicable) the Connection and Adoption Agreement (pursuant to paragraph 3.6.1(b) of Schedule 13 (Change Procedure) of the Connection and Adoption Agreement) shall be deemed to be amended;
         6. the Developer or ESCo shall make any Lump Sum Payments in accordance with provisions specified in the ESCo Notice of Variation as modified pursuant to paragraph 3.3.3 (if applicable) (with no double counting to the extent that the ESCo Variation is deemed an ESCo Variation under the Connection and Adoption Agreement).
    1. - Change in Law
       1. **CHANGE IN LAW AFFECTING ESCo WORKS AND/OR ESCo SERVICES**
          1. To the extent that any Change in Law increases the operational and/or maintenance costs of providing the ESCo Services in order for the ESCo Services to comply with Law, ESCo shall notify the Developer of such Change in Law and shall provide an Impact Assessment in accordance with paragraph 1.3.1. *[Drafting Note: Parties to consider whether there are any circumstances when ESCo would want the right to terminate due to a change in law.]*
          2. To the extent that any Change in Law requires capital investment in the Energy System in order for the ESCo Works and/or ESCo Services to comply with Law, ESCo shall notify the Developer of such Change in Law pursuant to paragraph 1 of Part 2 (Change in Law) of Schedule 15 of the Connection and Adoption Agreement and shall provide an Impact Assessment in accordance with paragraph 1.3.1 of Part 2 (Change in Law) of Schedule 15 of the Connection and Adoption Agreement.
          3. **Impact Assessment**

ESCo shall provide, together with a notice of a Change in Law pursuant to paragraph 1.1 an Impact Assessment. In completing the Impact Assessment, ESCo shall act in good faith, be cognisant of procurement law and comply with Good Industry Practice with the objective of mitigating the overall costs of the Change in Law. The Impact Assessment shall set out sufficient detailed information regarding:

details of the impact of the Change in Law on the ESCo Services and ESCo's ability to meet its other obligations under the Agreement and any variations that will be required as a result of that impact and including (without limitation) and on an open book basis:-

any variation to this Agreement or the Project Agreements;

any impact on the risk profile as a result of the Change in Law;

details of any changes to the insurance arrangements required to cover any additional (or reduced) risks associated with the Change in Law;

details of any sub‑contracts or any other contract arrangements or consents required as a result of the Change in Law;

any capital expenditure required as a result of the Change in Law;

any increase in costs of operation and/or maintenance costs of providing the ESCo Services;

any alteration to the working practices of either Party;

a timetable for the implementation, together with details of any impact on the Developer Delivery Programme or ESCo Programme;

evidence of the methods used or proposed methods to mitigate the impact of the Change in Law;

details of any relief from obligations under this Agreement required by ESCo;

any losses arising from Energy System inefficiencies directly caused by the Change in Law;

proposals in respect of the pass through of such costs to Customers and/or the Developer in accordance with paragraph 1.3.1; and

such other information as the Developer may reasonably request.

If the Developer considers that it requires further information regarding the Impact Assessment, then within ten (10) Business Days of receiving the Impact Assessment, it shall notify ESCo of this fact and detail the further information and/or additional time that it requires. If the Developer requests additional information, ESCo shall provide such additional information within ten (10) Business Days of receiving the Developer’s request.

For the avoidance of doubt any impact of a change in Heat demand arising from a Change in Law shall be borne by ESCo.

* + - * 1. **Costs and impacts of the Change in Law**

Following Notification pursuant to paragraphs 1.1 and 1.3.1 or pursuant to Paragraph 1.4 of Part 2 (Change in Law) of Schedule 15 (Change Protocol) of the Connection and Agreement., the Parties shall seek, acting reasonably and in good faith, to agree:

the quantum of costs evidenced by the Impact Assessment;

Subject to the allocation of costs pursuant to paragraph (c) below only, any agreed variation or modification of this Agreement or the Project Agreements which achieves as closely as possible the effect that the original provision would have achieved but for the Change in Law.

the allocation of the agreed costs, based on the following:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | **Change in Law type** | **Costs to be passed to:** | | |
| **Customers** | **Developer** | **ESCo** |
| 1. |  |  |  |  |
|  |  |  |  |  |
| 3. |  |  |  |  |

* + - * 1. **Implementing the Change in Law**

Once agreed or determined in accordance with paragraph 1.3, ESCo shall carry out all necessary actions to implement the relevant Change in Law and may pass any additional costs associated with Changes in Law on to Customers in accordance with their Customer Supply Agreements or to the Developer pursuant to [a revised Connection Charge ][[59]](#footnote-60) in accordance with the allocations set out at paragraph 1.3.1 above.

In the event the Parties cannot agree then either Party shall be entitled to refer the matter to dispute resolution pursuant to Clause 26 (Dispute Resolution).

To the extent that any Change in Law or regulatory body ruling (including from the Office of Fair Trade), results in the Heat Charges charged to Customers under the Customer Supply Agreements being considered unreasonable or the mechanism of the Comparator being required to change, ESCo shall bear the cost of any decrease in Heat Charges required or increase in capital investment or operation and/ or maintenance costs (as applicable) and shall not be entitled to pass on any consequent increase in costs to either to Customers under Customer Supply Agreements or to the Developer under [ a revised Connection Charge].[[60]](#footnote-61)

1. - Disaster Recovery Plan[[61]](#footnote-62)

*[ESCo to provide, as minimum to include:*

* *System Resilience and Disaster Recovery Strategy*
* *Secondary source of Heat*

*(e.g. boiler plant when CHP is unavailable and any mitigation measures in respect of timing of boiler maintenance)*

* *Tertiary sources of Heat*

*(e.g. back-up thermal stores when the boiler plant and CHP are unavailable/ temporary trailorised boiler plant/ provision of electric heating to vulnerable customers)*

* *Measures to mitigate loss of plant and systems*
* *Zonal design*

*(e.g. measures to enable isolation of elements of the circuit to minimise disruption and management of phasing while different plots are brought on board)*

* *Operation, maintenance and monitoring*

*(e.g policies in respect of spares/ lifecycle and reliability of components, capability within plant to identify potential issues, preventative and corrective maintenance regimes).]*

1. - Arrangements on Termination and Expiry
   * + 1. RENEWAL AND Retender[[62]](#footnote-63)

The provisions of paragraph 1 (Renewable and Retender) of Part 1 (Retender) of Schedule 16 (Arrangements on Termination and Expiry) of the Connection and Adoption Agreement shall apply to any Renewal or Retender of this Agreement.

* + - 1. Termination[[63]](#footnote-64)

The provisions of Part 2 (Termination) of Schedule 16 (Arrangements on Termination and Expiry) of the Connection and Adoption Agreement shall apply following Termination or Expiry of this Agreement.

|  |  |
| --- | --- |
| Signed by **DEVELOPER** in the presence of: | ....................................... |

.......................................

[SIGNATURE OF WITNESS]

[NAME, ADDRESS AND OCCUPATION OF WITNESS]

|  |  |
| --- | --- |
| Signed by **ESCo** in the presence of: | ....................................... |

.......................................

[SIGNATURE OF WITNESS]

[NAME, ADDRESS AND OCCUPATION OF WITNESS]

1. Include any other properties to which heat is supplied by ESCo – eg schools, community centres etc. [↑](#footnote-ref-2)
2. Amend according to contractual structure. [↑](#footnote-ref-3)
3. Include where a relevant part of the Energy System (eg the Secondary Distribution Network) has been constructed by the Developer and will be accepted by (I.e. partial risk shall pass to) ESCo pursuant to the Connection and Adoption Agreement. [↑](#footnote-ref-4)
4. Include where a relevant part of the Energy System (eg the Secondary Distribution Network) or the whole of the Energy System has been constructed by the Developer and will be “adopted” by (I.e. full risk shall pass to) ESCo pursuant to the Connection and Adoption Agreement. [↑](#footnote-ref-5)
5. Include where electricity is supplied to commercial customers. [↑](#footnote-ref-6)
6. Amend as appropriate to reflect technical solution. [↑](#footnote-ref-7)
7. Include to the extent relevant to the Development [↑](#footnote-ref-8)
8. Include as relevant, where a lease is being granted over substation space within a Commercial Building. [↑](#footnote-ref-9)
9. Where Common Parts are served by a separate meter, Developer (or relevant Landlord) should enter into the relevant bulk supply form of the Connection and Supply Agreement (Plot/ Building) in relation to such Common Parts. [↑](#footnote-ref-10)
10. Insert comparator according to relevant business case. [↑](#footnote-ref-11)
11. Include where the Developer is taking full title risk [↑](#footnote-ref-12)
12. List any project specific Compensation Events [↑](#footnote-ref-13)
13. Include to the extent that there are CPs to the effectiveness of the substantive provisions of the Framework Supply Agreement (eg Connection or Adoption/ Acceptance of relevant parts of the Energy System pursuant to the under the Connection and Adoption Agreement. [↑](#footnote-ref-14)
14. Insert to the extent relevant – i.e. ESCo will provide private wire electricity supplies to commercial customers on the Development. [↑](#footnote-ref-15)
15. It is assumed that the Energy Centre Lease shall be granted pursuant to the [Connection / Adoption] Agreement following Adoption/ construction of the Energy Centre/ occupation by ESCo. [↑](#footnote-ref-16)
16. This date should align with the Connection and Adoption Agreement. [↑](#footnote-ref-17)
17. Include to the extent that the Developer is subject to FOIA. [↑](#footnote-ref-18)
18. Calibrate according to KPIs schedule [↑](#footnote-ref-19)
19. Include any other relevant events which should be deemed to be sufficiently severe to constitute “Major Default” [↑](#footnote-ref-20)
20. Insert as relevant with respect to elements of the Energy System that are not owned by ESCo but which are operated and maintained by ESCo pursuant to the [Connection Agreement [↑](#footnote-ref-21)
21. Include where the Development has separate Plots [↑](#footnote-ref-22)
22. Include where the Secondary Distribution Network is Accepted rather than Adopted and risk in relation to eg replacement and insurance remains with the Developer. [↑](#footnote-ref-23)
23. It is assumed that each Plot Development/ Building or Commercial Building will have its own substation room, within which the heat exchanger between the Primary Distribution Network and the Secondary Distribution Network will be housed. [↑](#footnote-ref-24)
24. Consider any alternative future debts that will be owed by the parties [↑](#footnote-ref-25)
25. Note that this assumes that the two Agreements are tied. [↑](#footnote-ref-26)
26. Include to the extent relevant. [↑](#footnote-ref-27)
27. Amend as appropriate [↑](#footnote-ref-28)
28. Renewal and Retender provisions are provided for in Schedule 15. Include to the extent the parties wish the flexibility at the end of the term to either renew/ retender the contract. Note that such renewal or retender should be for the same term and on the same conditions as renewable or retender of the Connection and Adoption Agreement as the sets of Agreements are tied. If the Agreements are uncoupled, additional drafting will be required. [↑](#footnote-ref-29)
29. Amend as appropriate according to technical configuration and ownership structure for the Energy System. [↑](#footnote-ref-30)
30. Include any other Development specific exclusions [↑](#footnote-ref-31)
31. Include where ESCo is a shell company and additional security in relation to performance is required. [↑](#footnote-ref-32)
32. Include to the extent relevant [↑](#footnote-ref-33)
33. Include to the extent appropriate. If an Energy System is being connected to an existing Development (or vice versa) these requirements may not be relevant/ appropriate. [↑](#footnote-ref-34)
34. As per comment on clause 7.1.1 [↑](#footnote-ref-35)
35. Include where the Developer is a shell company and additional security in relation to performance is required. [↑](#footnote-ref-36)
36. Property and access rights are provided for under the Connection and Adoption Agreement with Leases granted on Connection and/or Adoption. If the contractual framework requires, include equivalent of clause 9.2 of the Connection and Adoption Agreement under this Framework Supply Agreement. [↑](#footnote-ref-37)
37. Include to the extent it is commercially agreed that the Developer takes full title risk. [↑](#footnote-ref-38)
38. Consider any other heat pricing requirements, for example in relation to any pass back of benefit to the Customer of ESCo profit (above a particular threshold) in the form of reduced standing charge or reduced charges to eg the Developer/ Plot Developers in the form of reduced Connection Charges. Parties should bear in mind general value for money and evidence of delivery of social value. [↑](#footnote-ref-39)
39. Note that delay damages for failure of either party is captured in the Connection and Adoption Agreement, given that all activities which could lead to delay to Service Readiness (i.e. related to works on site/ programme) are dealt with under the Connection and Adoption Agreement. [↑](#footnote-ref-40)
40. Consideration should be given to how these caps interrelate with the caps on liability under the Connection and Adoption Agreement (e.g. whether there is a global cap across all Project Agreements). [↑](#footnote-ref-41)
41. Comment as per Developer cap on liability. [↑](#footnote-ref-42)
42. Consider whether following termination of the Framework Supply Agreement for ESCo poor performance, bulk supplies of heat are desired under the Connection and Adoption Agreement. Applicable where there is an off-site heat supply, this would enable a Developer to manage the onward supplies of heat and management of relationships with Customers on the Development. Provisions would need included in the Connection and Adoption Agreement to reflect bulk supplies to a specific connection point on the Development, plus appropriate metering and billing for such supply. [↑](#footnote-ref-43)
43. It is assumed that the Developer counterparty to the Connection and Adoption Agreement and the Framework Supply Agreement are the same. If the Developer entity is not the same, appropriate amendments will need made to the Agreements. [↑](#footnote-ref-44)
44. Include where a PCG has already been provided (but is no longer sufficient given the Change of Control) [↑](#footnote-ref-45)
45. Include where a PCG has not previously been required, but given the Change of Control, is now deemed necessary. An alternative provision [↑](#footnote-ref-46)
46. Basic Customer Service provisions included: amend to include additional relevant requirements. [↑](#footnote-ref-47)
47. Include where the Developer wishes a “self-help” remedy in relation to the performance of the ESCo Services. Parameters will need to be carefully prescribed to ensure that this is a limited right of recourse and exercised carefully. [↑](#footnote-ref-48)
48. Include where the variable unit heat pricing is benchmarked as against a comparator with alternative forms of heating. Parties may also want to consider alternative comparators to show more cost reflective pricing for district heating schemes. [↑](#footnote-ref-49)
49. Insert relevant details re components of the Energy System covered by the Standing Charge, bearing in mind Landlord and Tenant Act. [↑](#footnote-ref-50)
50. Insert comparator. [↑](#footnote-ref-51)
51. Include relevant review methodology for electricity charges. [↑](#footnote-ref-52)
52. Amend as appropriate to include agreed marketing and publicity protocols, or delete Schedule if no publicity required. [↑](#footnote-ref-53)
53. Suggested details included for a CHP District Heating Scheme. Amend as appropriate for the relevant technology. [↑](#footnote-ref-54)
54. Amend as appropriate to reflect agreed processes for governance. [↑](#footnote-ref-55)
55. Suggested KPIs only. These should follow the Developers requirements vs ESCo’s relevant business models and relevant negotiations. [↑](#footnote-ref-56)
56. Align with thresholds set out under Customer Supply Agreements [↑](#footnote-ref-57)
57. Consider any arrangements for capping to avoid hair trigger escalation of points (eg, to a certain number of points where all units are served by the same Substation) and for avoidance of double counting for trigger purposes (eg between failure to supply heat and for failure to respond to complaints). [↑](#footnote-ref-58)
58. Calibrate points such that this captures systemic failures that are not sufficiently acute to trigger a Monthly Service Failure. [↑](#footnote-ref-59)
59. Include the relevant mechanism by which the Developer bears costs of a Change in Law [↑](#footnote-ref-60)
60. Include the relevant mechanism by which the Developer bears costs of a Change in Law [↑](#footnote-ref-61)
61. Drafting suggestions based on CHP. Amend as appropriate for alternative heat solutions. [↑](#footnote-ref-62)
62. These provisions assume that the Counterparties to the Connection and Adoption Agreement and the Framework Supply Agreement are the same. To the extent that they differ, appropriate amends will need made to separate the agreements and appropriate (equivalent) provisions to Schedule 16 of the Connection and Adoption Agreement should be included. [↑](#footnote-ref-63)
63. As per comments in relation to renewal and retender. In addition, note that if the Framework Supply Agreement is terminable without the Connection and Adoption Agreement being terminable (i.e. where a bulk supply solution following termination is put in place pursuant to the Connection and Adoption Agreement) appropriate termination provisions should be included under this Framework Supply Agreement. [↑](#footnote-ref-64)