

**REQUEST FOR TENDER**

**FOR**

**NATIONAL NETWORK, LOCAL CONNECTIONS  
PROGRAMME – FLEXIBILITY SERVICES PILOT  
CONTRACT**

**SECTION 2 – SAMPLE CONTRACT**

*Sample Contract*

**DATE:**

**2022**

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**FLEXIBILITY SERVICES AGREEMENT**

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Between

**ESB NETWORKS DAC**  
(as the Company)

and

**[FLEXIBLE SERVICE PROVIDER]**  
(as the Flexible Service Provider)

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**BETWEEN:**

- (1) **ESB Networks Designated Activity Company** a company incorporated in Ireland (registered number IE465172) whose registered office is at Three Gateway, East Wall Road, Dublin 3 D03 R583 (the “**Company**”); and
- (2) [**•**] **LIMITED**, a company incorporated in Ireland(registered number [**•**]) whose registered office is at [**•**] (the “**Flexible Service Provider**”).]

(together the “**Parties**” and each a “**Party**”).

**RECITALS:**

- (1) The Company, as licensed operator of the Network, requires the provision of Flexibility Services (as hereinafter defined) to aid the management and operation of the Network. The Company wishes to contract with providers and/or operators of suitable assets for the provision of such Flexibility Services.
- (2) The Flexible Service Provider is the owner and/or operator of assets, or has entered into arrangements for rights in respect of third party owned assets that have the capability to provide Flexibility Services and wishes to make available each Flexible Service Asset for the provision of such Flexibility Services, for example through aggregated or individual assets. The Company will pay the Flexible Service Provider for these Flexibility Services in accordance with this Agreement.
- (3) The Company wishes to appoint the Flexible Service Provider to provide the Flexibility Services and the Flexible Service Provider has agreed to provide the Flexibility Services to the Company, on and subject to the terms and conditions contained herein.

The Parties hereby confirm that this Flexibility Services Agreement including Schedules shall incorporate the Conditions of Contract (a copy of which is attached) (the “**Conditions**”) and together the Flexibility Services Agreement and the Conditions shall be construed as one agreement (the “**Agreement**”). The priority of such documents shall be as set out below:

- (1) this Flexibility Services Agreement and the Schedules attached; and
- (2) the Conditions.

Terms used herein and not defined shall have the meaning given to them in the Conditions.

## PART 1 – Details of the Flexible Service Provider and Special Conditions

<b>Flexible Service Provider</b>	<b>Flexible Service Provider's company number and registered office</b>
[●]	[●]
<b>Contract number</b>	[D20/CON/888]
<b>Flexible Service Provider's addresses for notices</b>	[●] Address: [●] Contact Number: [●] For the attention of: [●]
<b>Company's addresses for notices</b>	[●] Address: [●] Contact Number: [●] For the attention of: [●]
<b>Flexible Service Provider's Nominated Person</b>	[●]
<b>Company's Nominated Person</b>	[●]

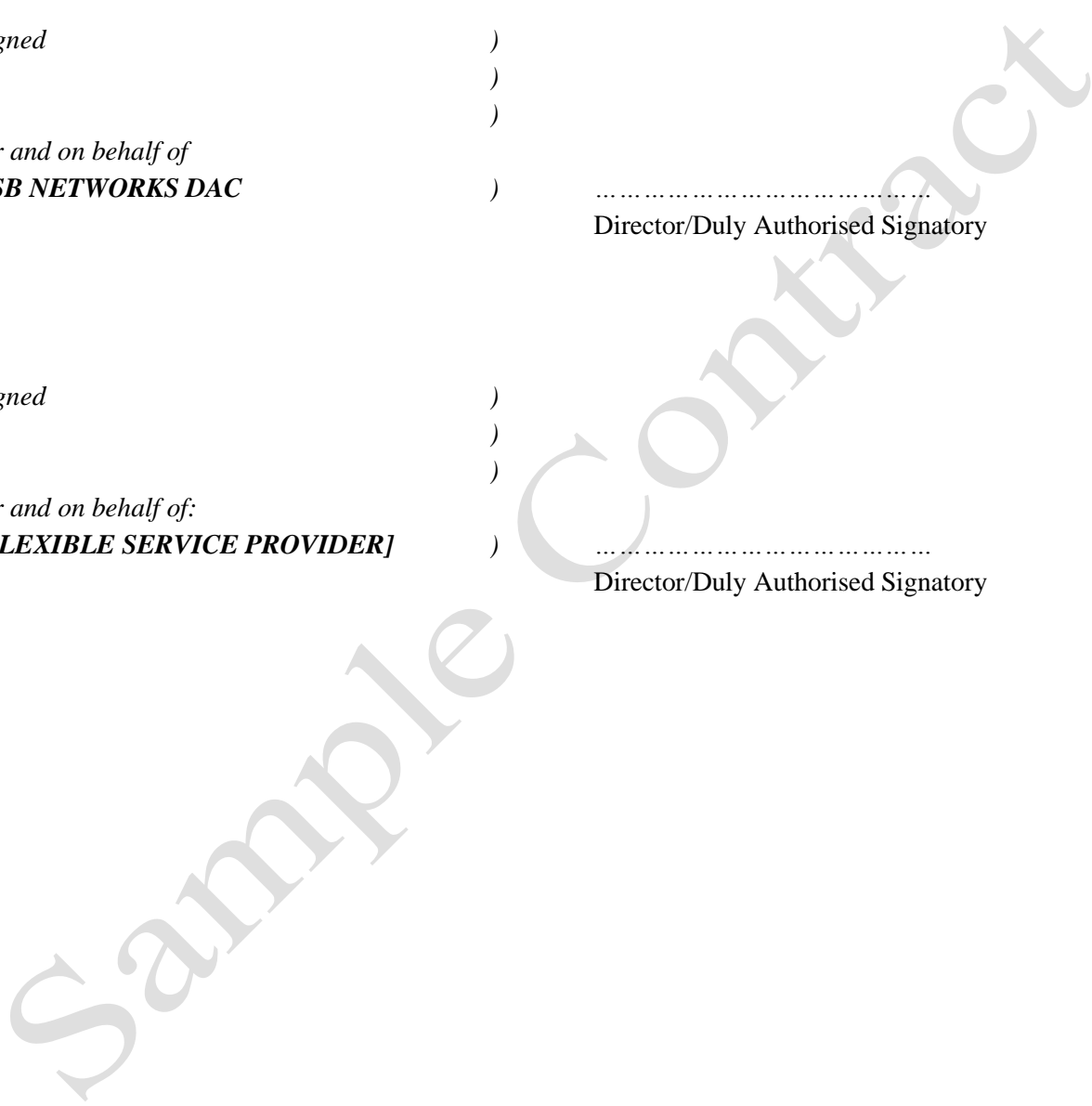
## PART 2 – Commencement and Expiry Dates

<b>Commencement Date</b>	[•]
<b>Expiry Date</b>	[•]

*Signed by the duly authorised representatives of the Parties as an agreement on the date first written above*

*Signed* )  
 )  
 )  
*for and on behalf of* )  
**ESB NETWORKS DAC** ) .....  
 Director/Duly Authorised Signatory

*Signed* )  
 )  
 )  
*for and on behalf of:* )  
**[FLEXIBLE SERVICE PROVIDER]** ) .....  
 Director/Duly Authorised Signatory



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## 1. DEFINITIONS AND INTERPRETATION

In this Agreement and the recitals, unless the context otherwise requires or superseded by additional terms placed within the schedules, the following expressions shall have the meanings set out below:

“**Act**” means the Electricity Regulation Act 1999;

“**Affiliate**” means any holding company or subsidiary company of a Party, or any company which is a subsidiary of such holding company and “**holding company**” and “**subsidiary**” have the meanings given in sections 8 and 7 respectively of the Companies Act 2014;

“**Applicable Law**” means any applicable law, statute, by-law, regulation, order, regulatory policy, guidance or industry code, rule of court or directives or requirements of any regulatory body;

“**Available or Availability**” means that the Flexibility Services, in accordance with the Service Requirements, are available to be delivered to the Company for the duration of the Service Window and Delivery Period as defined in Schedule 1.

“**Availability Fee**” has the meaning in Schedule 2;

“**Availability Payment**” has the meaning in Schedule 2;

“**Availability Status**” means Available or Unavailable;

“**Authority**” means the Commission for Regulation of Utilities;

“**Business Hours**” means between 9:00 am and 5:00 pm on a Business Day;

“**Business Day**” means any day other than a Saturday or a Sunday or a public holiday in the Republic of Ireland;

“**Change in Ownership**” means:

- a) any sale, transfer or disposal of any legal, beneficial or equitable interest in fifty per cent (50%) or more of the shares in the Flexible Service Provider (including the control over the exercise of voting rights conferred on those shares, control over the right to appoint or remove directors or the rights to dividends); and/or
- b) any other arrangements that have or may have or which result in the same effect as sub-clause a) above.

“**Charges**” means the Availability Payment and Utilisation Payment set out in Schedule 2 of this Agreement;

“**Commencement Date**” means the date set out in Part 2 of this Agreement;

“**Confidential Information**” means any information, however it is conveyed, that relates to the business, affairs, developments, trade secrets, know-how, personnel, customers and/or suppliers of a Party (and/or any its Affiliates) together with all information derived from the above, and any other information clearly designated as being confidential (whether or not it is marked as “confidential”) or which ought reasonably to be considered to be confidential;

“**Connection Agreement**” Has the meaning set out in the General Conditions for Connection of Industrial and Commercial Customers and Generators to the Distribution System, and Conditions for Connection to the Distribution System for Customers less than 100kVA;

“**Controller**” has the meaning in the Data Protection Legislation;

**“Data Protection Legislation”** means:

- (a) the GDPR;
- (b) the Data Protection Acts 1988 to 2018;
- (c) the European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 (SI 336/2011),

together with all applicable directives, statutory instruments, orders and rules relating to data protection and privacy issued in any relevant jurisdiction by any Supervisory Authority or other competent authority;

**“Data Subject”** has the meaning in the Data Protection Legislation;

**“Defect”** means an issue that may arise with the FSA equipment, metering or the communication interface between the Company and Flexible Service Provider which results in an apparent non-delivery of Flexibility Services or a misinformed delivery of Flexibility Services;

**“Delivery Period”** means the time periods during the Service Window during which the Flexible Service Provider agrees to make Available, and provide in accordance with this Agreement, the Flexibility Services to the Company, as defined in Schedule 1;

**“Disclosing Party”** means the Party disclosing Confidential Information to the Receiving Party;

**“Discretionary Flexibility Services”** means additional Flexibility Services requested by the Company outside of or in addition to the Service Requirements detailed within this Agreement;

**“Discretionary Service Windows”** means in respect of a FSU/FSA, periods during the Term of the Agreement that are not Service Windows;

**“Discretionary Utilisation Fee”** means the fee for providing Discretionary Flexibility Services as specified in Schedule 1;

**“Discretionary Utilisation Request”** means a request for Flexibility Services from the Company in respect of a FSU/FSA during a Discretionary Service Period;

**“Distributed Energy Resources”** or **“DER”** means a generation, storage or demand response asset connected to the distribution system.

**“Distribution Code”** means the regulations made by the Company setting out the distribution code pursuant to Section 33 of the Act and approved by the Authority as from time to time may be advised, amended, supplemented or replaced with the approval of or by the insistence of the Authority;

**“Distribution Licence”** means the licence issued under section 14 (1)(g) of the Act to the Company as operator of the Network;

**“Due Date for Payment”** has the meaning given to it in Schedule 2;

**“Expiry Date”** means the date this Agreement expires as set out in Part 2 of this Agreement and as can be extended pursuant to Clause 2;

**“Flexible Capacity”** means the change in active power relative to the baseline for the FSU which is offered, and which will be delivered during the Delivery Period as set out in Schedule 1.

**“Flexibility Services”** means, and more particularly described in Schedule 1, the services to be provided by the Flexible Service Provider to the Company under and in accordance with this



Agreement which give the Company the ability to manage the load at a specific point of the Network at certain points in time;

**“Flexible Service Unit”** (FSU) means the single or aggregated flexible services asset(s) in the same flexibility zone identified in Schedule 1 and/or Schedule 3 acting collectively to provide the Flexibility Services. The FSUs, and assets within, shall have the technical and operational capability to collectively deliver the Flexible Services in response to dispatch instructions from the Company in accordance with the relevant Grid Code or Distribution Code and this Agreement.

**“Flexible Service Asset”** (FSA) means the single standalone DER asset and/or installation identified in Schedule 1 and/or Schedule 3 capable of providing the Flexibility Services. The Flexible Service Asset shall have the technical and operational capability to deliver the Flexibility Services in response to dispatch instructions from the Company in accordance with the relevant Grid Code or Distribution Code and this Agreement.

**“Force Majeure”** means any unforeseeable event or circumstance which is beyond either the Company’s or the Flexible Service Provider’s (as the case may be) reasonable control or its employees and which results in or causes its failure to perform any of its obligations under the Agreement, provided that: (a) lack of funds; or (b) any failure or fault in the FSU/FSA, including insufficient fuel, shall not constitute Force Majeure;

**“GDPR”** means General Data Protection Regulation EU 2016/679 and any primary or secondary legislation enacted pursuant to or in the exercise of any rights obligations or options conferred on Ireland by the said Regulation;

**“Good Industry Practice”** means the exercise of the degree of care, skill and diligence, which would reasonably be expected from an experienced and competent person carrying out services of a similar nature, scope and complexity as the Flexibility Services;

**“Grid Code”** means the conditions, procedures, provisions and codes governing the planning and operation of the Transmission System and the scheduling and dispatch of generation pursuant to Section 33 of the Act and approved by the Authority as from time to time revised, amended, supplemented or replaced with the approval of or at the insistence of the Authority;

**“Group”** means in relation to a company, that company, any subsidiary or holding company of that company, and any subsidiary of a holding company of that company. For the purposes of this definition the terms “holding company” and “subsidiary” shall have the meanings assigned to them by in sections 8 and 7 respectively of the Companies Act 2014;

**“Intellectual Property Rights”** means patents, rights in or to inventions, copyright and related rights, trademarks, service marks, business names, rights in get-up goodwill and the right to sue for passing off, rights in designs, rights in domain names and website addresses, rights in computer software, database rights, rights to use and protect the confidentiality of, confidential information (including know-how) and all other intellectual property rights, in each case whether registered or unregistered and including all applications and rights to apply for and be granted, renewals or extensions of, and rights to claim priority from, such rights and all similar or equivalent rights or forms of protection which subsist or will subsist now or in the future in any part of the world;

**“Insolvency Event”** means a Party becoming insolvent or entering into liquidation or receivership or being the subject of an application for an administration order or suffering an administrative receiver or similar officer to be appointed in relation to the whole or any part of its assets or convening a meeting to make a composition or voluntary arrangement with its creditors or

suffering any material judgement to be executed in relation to any of its property or assets or if an encumbrancer takes possession of or sells any Party's assets or if an application is made to a court of competent jurisdiction by a Party for protection from its creditors generally or if any other steps are taken for the winding up of that Party (otherwise than for the purpose of an amalgamation or reconstruction) including the passing of a resolution for the Party's winding-up or the making by a court of competent jurisdiction of an order for the winding-up or the dissolution of that Party;

**"Material Adverse Effect"** means any event or circumstance which, in the opinion of the Company:

- a) is likely to materially and adversely affect the Flexible Service Provider's ability to perform or otherwise comply with all or any of its obligations under this Agreement; or
- b) is likely to materially and adversely affect the business, operations, property, condition (financial or otherwise) or prospects of the Company.

**"MPRN"** means a meter point reference number;

**"Network"** means the electricity distribution system operated by the Company to which the FSU/FSA is connected;

**"Nominated Person"** means the persons appointed by the Flexible Service Provider and the Company to be responsible for ensuring the performance of this Agreement;

**"Non-Operational Notice"** means a formal notice as described in Clause 20;

**"Personal Data"** has the meaning in the Data Protection Legislation;

**"Performance Statement"** has the meaning in Schedule 2;

**"Processing"** has the meaning in the Data Protection Legislation.

**"Proving Test"** means the tests, more particularly described in Schedule 5, undertaken in accordance with Clause 5.4 and Clause 11;

**"Receiving Party"** means the Party receiving Confidential Information from the Disclosing Party;

**"Recovery Time"** means the minimum time required between the end of a Flexibility Service delivery and the commencement of the next Flexibility Service delivery, as defined in Schedule 1;

**"Requested End Time"** means the date and time (to the nearest minute) as notified in accordance with Clause 3 and/or Schedule 4 at which the Requested MW is no longer required to be delivered;

**"Requested MW"** means in relation to Discretionary Flexibility Services the MW requested in accordance with Clause 3 and/or Schedule 4;

**"Requested Start Time"** means the date and time (to the nearest minute) as notified in accordance with Clause 3 and/or Schedule 4 at which the Requested MW shall be delivered;

**"Requirements"** shall mean the Requirements for Agents, Suppliers, Advisors and other Third Parties arising in connection with ESB policies set out at <http://www.esb.ie/main/about-esb/procurement-policy.jsp> and in Schedule 6;

**"Schedules"** means the Schedules annexed to and forming part of this Agreement;

**"Service Failure"** meaning is defined in Schedule 1 Part 3 ;

“**Service Meter**” means the measuring equipment, as defined by the Company in Schedule 5 of this Agreement, that shall be used to determine delivery of the Service;

“**Service Meter Data**” means the meter data recorded at the Service Meter at the FSA (s) listed in Schedule 5;

“**Service Requirements**” means the specification that the Flexibility Services must be capable of meeting, as defined in Schedule 1;

“**Service Window**” means the time periods expressed in days and months, during which the Flexible Service Provider agrees to make Available, and provide in accordance with the Agreement, the Flexibility Services to the Company, as defined in Schedule 1;

“**Statutory Requirements**” means the requirements placed on the Company and/or the Flexible Service Provider or affecting or governing the provision and/or use of the Flexibility Services by Applicable Law and/or the Distribution Licence and/or the Authority and/or any relevant codes of practice issued by any government agency or body including in relation to health, safety and environmental matters;

“**Stop Instruction**” means an instruction from the Company to the Flexible Service Provider, instructing the Flexible Service Provider to cease delivery of the Flexibility Services, as more particularly described in Schedule 4;

“**Supervisory Authority**” means the Data Protection Commission and any supervisory authority having relevant jurisdiction pursuant to the GDPR;

“**Term**” means the duration of this Agreement;

“**Transmission System**” means the system of electric line comprising wholly or mainly high voltage line and electric plant which is used for conveying electricity from a generating station to a substation, from one generation station to another, from one substation to another or to or from any interconnector or to final customers;

“**Unavailable**” means that the Flexibility Services, in accordance with the Service Requirements, are not available to be delivered to the Company;

“**Utilisation Fee**” has the meaning in Schedule 2;

“**Utilisation Payment**” has the meaning in Schedule 2.

“**Utilisation Instructions**” means an instruction by the Company to the Flexible Service Provider to deliver Flexibility Services in accordance with Schedule 4;

“**Zone**” or “**Flexibility Zone**” an area of electrical connectivity where a network need has been identified’ or where the Flexibility Services will be provided and to which the Flexibility Services will be delivered.

1.2 In this Agreement, unless the context otherwise requires:

1.2.1 the singular includes the plural and vice versa;

1.2.2 reference to a gender includes the other gender and the neuter; and

1.2.3 references to an act of the Oireachtas, statutory provision or statutory instrument include a reference to that act of the Oireachtas, statutory provision or statutory instrument as amended, extended or re-enacted from time to time and to any regulations made under it.

- 1.3 Any phrase introduced by the terms “**including**”, “**include**”, “**in particular**” or any similar expression shall be construed as illustrative and shall not limit the sense of the words preceding those terms.
- 1.4 If there is any conflict between the Flexibility Services Agreement and any part of the Schedules, subject to Clause 1.6, the former shall prevail.
- 1.5 If there is any conflict between the Schedules and the Conditions, subject to Clause 1.6, the former shall prevail.

## **2. DURATION AND TERM**

- 2.1 This Agreement shall commence on the Commencement Date and, subject to earlier termination in accordance with Clause 10, shall continue until the Expiry Date.
- 2.2 This Agreement shall terminate automatically on the Expiry Date without notice, unless extended pursuant to Schedule 1.
- 2.3 The Company may give the Flexible Service Provider reasonable notice in writing prior to the Expiry Date that the Term is extended. Extensions of the Term pursuant to this Clause 2.2 shall be limited in number and duration as set out in Schedule 1.

## **3. SCOPE OF FLEXIBILITY SERVICES**

- 3.1 The Flexible Service Provider shall make its FSU/FSA(s) Available for provision of the Flexibility Services in accordance with Schedule 1 and shall provide notice of any Unavailability in accordance with Schedule 4.
- 3.2 The Company may request from the Flexible Service Provider, subject to the Flexible Service Provider’s Availability Status, the provision of the Flexibility Services for Delivery Periods by issuing a Utilisation Instruction in accordance with Clause 3.5.
- 3.3 This Agreement is not a guarantee of Utilisation Instructions and does not constitute a contract for the exclusive provision of Flexibility Services. The Company reserves the right to contract with other providers for the type of services covered by this Agreement.
- 3.4 The provisions of Schedule 4 shall apply in respect of all communications between the Company and the Flexible Service Provider in respect of the Flexibility Services.
- 3.5 Where, and to the extent that a Flexible Service Provider is Available, the Company may request Flexibility Services from the Flexible Service Provider by sending a Utilisation Instruction in accordance with Schedule 4.
- 3.6 The Company may:
- 3.6.1 withdraw any Utilisation Instruction by providing notice to the Flexible Service Provider at any time before the Flexible Service Provider has provided a response under and in accordance with Clause 3.7; and/or
  - 3.6.2 issue a Stop Instruction to the Flexible Service Provider in accordance with Schedule 4.
- 3.7 The Flexible Service Provider must respond to the Utilisation Instruction in accordance with the provisions set out in Schedule 4.
- 3.8 Where the Flexible Service Provider receives a Utilisation Instruction and subject to receipt of any Stop Instruction or has issued an Unavailability Notice, the Flexible Service Provider shall

provide the Flexibility Services to the Company using the FSU/FSA(s) in accordance with the terms in Schedule 1.

#### **4. VARIATION**

- 4.1 Unless otherwise provided in Schedule 2, no variation of this Agreement shall be effective unless it is in writing and signed by the Parties (or their authorised representatives).
- 4.2 The Flexible Service Provider may, with prior approval of the Company (in its sole discretion), change the FSU/FSA(s) providing the service(s) detailed in Schedule 3 by providing a minimum of sixty (60) days' notice of the change and specifying that the new FSU/FSA(s) meets the technical, functional, and non-functional requirements of the specified service.

#### **5. MONITORING AND EQUIPMENT**

- 5.1 Subject to Schedule 5, the Company shall be entitled to, at its sole discretion, monitor, meter and determine the Flexible Service Provider's provision of the Flexibility Services using such data collection and systems as the Company deems appropriate and which may, without limitation, utilise the available metering data analysis techniques for each active FSU/FSA.
- 5.2 The Company reserves the right to collect any meter data that it reasonably requires for the purpose of this Agreement from a third party, including but not limited to an electricity supplier, and the Flexible Service Provider undertakes to secure all necessary consents on behalf of the owner or user of the FSU/FSA, and to perform any action that the Company considers reasonably necessary to facilitate such collection and use of meter data.
- 5.3 The Company shall assess the availability of Flexibility Services and the amount of Flexibility Services delivered by the Flexible Service Provider and may complete this by reference to a Performance Statement. The detail and expected timing of these reports is specified in Schedule 2.
- 5.4 Should the Company identify a failure affecting the communications with the Flexible Service Providers Dispatch or Data Provision Equipment the Company may notify the Flexible Service Provider and that it requires a Proving Test in accordance with the requirements set out in Schedule 5.
- 5.5 Should the Company identify a failure affecting the Company's meter equipment with any of the Flexible Service Assets, the Company shall notify the Flexible Service Provider and the Company will endeavour to resolve the failure as soon as is reasonably practicable. Metering shall be carried out in accordance with the Flexibility Specification document referenced in Schedule 1.
- 5.6 If applicable and unless otherwise agreed, on expiry or termination of this Agreement each Party shall remove and return to the other Party any equipment at its FSA site provided by the other Party for the purpose of the Agreement within an acceptable timeframe as agreed by both Parties.

#### **6. RECORDS AND AUDIT**

- 6.1 The Flexible Service Provider shall keep or cause to be kept proper and accurate records of all matters relating to the performance of its obligations under this Agreement. The records shall be maintained in a form suitable for audit purposes, shall be kept separate from any other records of the Flexible Service Provider and shall be retained for the period required by any applicable statutory provision and in any event during the Term of this Agreement and for a period of not less than seven (7) years thereafter.

- 6.2 The Company or a reputable independent third-party auditor nominated by it may, on reasonable notice to the Flexible Service Provider and during normal working hours, inspect and review the records for the purposes of verifying the Flexible Service Provider's compliance with its obligations under this Agreement and/or to meet any other audit or information requirement that may be required by applicable law and/or any regulatory body or the Authority.
- 6.3 The Flexible Service Provider shall co-operate fully and promptly with any such audit and/or inspection conducted by the Company and whatever reasonable assistance may be required by the Company in relation to any audit.
- 6.4 The Flexible Service Provider shall take or procure to be taken such steps as may be necessary to ensure that all paperwork issued by or on behalf of the Flexible Service Provider to the Company (including, without limitation, invoices, correspondence and delivery notes), is complete, accurate and clearly references the relevant purchase order date and number and/or contract number.

## **7. FLEXIBLE SERVICE PROVIDER'S OBLIGATIONS**

- 7.1 The Flexible Service Provider shall:
- 7.1.1 Ensure or procure the Availability of the FSU/FSA(s) and perform the Flexibility Services in compliance with this Agreement and all Applicable Laws, Statutory Requirements and Good Industry Practice;
  - 7.1.2 ensure that all technical, communication and data provision requirements set out in Schedule 1 and Schedule 4 and are complied with at all times;
  - 7.1.3 provide the Flexibility Services in accordance with all health, safety and environment legislation and approved codes of practice;
  - 7.1.4 remedy any Defect of the Flexibility Services with Good Industry Practice and to the satisfaction of the Company;
  - 7.1.5 act diligently in all of its dealings with the Company;
  - 7.1.6 ensure that it is available on reasonable notice to provide such assistance or information as the Company may reasonably require in connection with the Flexibility Services;
  - 7.1.7 disclose the existence of any agreement or arrangement the Flexible Service Provider may have in respect of the FSU/FSA(s) that provides Flexibility Services under this Agreement that could reasonably impact Availability of the FSU/FSA(s) or the ability of the Flexible Service Provider to perform its obligations under this Agreement;
  - 7.1.8 at the request of the Company, make available to the Company information in relation to the metering equipment at the FSU/FSA(s).
  - 7.1.9 permit and grant (or secure) rights of access to and over and egress from the FSA(s) site to the Company and/or its agents or sub-contractors (upon reasonable notice and within normal working hours) as the Company may reasonably require in order to inspect and test the FSU/FSA(s), or to install, maintain, replace or remove communication equipment belonging to the Company in relation to the provision of flexibility services.

## **8. REPRESENTATIONS AND WARRANTIES**

- 8.1 Without prejudice to its other obligations under and/or pursuant to this Agreement, each Party warrants and undertakes to the other Party at all times that:
- 8.1.1 it is a duly incorporated company validly existing under the law of its jurisdiction of incorporation;
  - 8.1.2 it has the right, power, capacity and authority to enter into and perform its obligations under this Agreement;
  - 8.1.3 the entry into and performance by it of this Agreement does not and will not contravene or conflict with any law or regulation or judicial or official order applicable to it;
  - 8.1.4 it will not be in material breach of any other agreement or arrangement of whatever nature with any person which could or may affect the performance of its obligations under this Agreement;
  - 8.1.5 all information it provides to the other Party will be complete and accurate;
  - 8.1.6 no Insolvency Event is continuing or might reasonably be anticipated; and
  - 8.1.7 no litigation, arbitration or administrative proceedings are taking place, pending, or to the Party's knowledge threatened against it, any of its directors or any of its assets, which, if adversely determined might reasonably be expected to have a Material Adverse Effect.
- 8.2 Without prejudice to its other obligations under and/or pursuant to this Agreement and in addition to the foregoing, the Flexible Service Provider warrants and undertakes to the Company at all times that:
- 8.2.1 the FSU/FSA(s) providing the Flexibility Services has live connection(s) to the Company's electricity Network and associated MPRN and Connection Agreement(s),
  - 8.2.2 it has obtained and maintains in force for the Term, either directly or through agreement with its FSU/FSA(s), all licences, permissions, authorisations, consents and permits needed to supply the Flexibility Services in accordance with the terms of this Agreement, including those referenced in Clause 8.2.10;
  - 8.2.3 it has neither fixed nor adjusted any Charge under or in accordance with any agreement or arrangement with any other person, and that it has neither communicated to a person (other than its professional advisers) the amount or approximate amount of any Charge (other than in confidence in order to obtain quotations necessary for insurance purposes) nor entered into any agreement or arrangement with any other person to restrain that other person from entering into an agreement for Flexibility Services with the Company;
  - 8.2.4 it shall disclose any change of circumstances which could affect the delivery of the Flexibility Services;
  - 8.2.5 in respect of FSU/FSA projects in development, the Flexible Service Provider has in place a defined schedule of design, build and commissioning which shall promptly be made available to the Company on request for its review of the same;
  - 8.2.6 it shall take all reasonable steps to achieve commissioning of the FSU/FSA project on time and in accordance with the construction schedule;
  - 8.2.7 if, at any time during the Term, the provision of Flexibility Services would cause the Flexible Service Provider to be in breach or non-compliance as described in Clause

- 8.2.10, the Flexible Service Provider will not accept or comply with any Utilisation Instruction and will provide notification to the Company as required by Schedule 4;
- 8.2.8 where relevant, it is and remains responsible for health and safety compliance at the FSU/FSA(s) providing the Flexibility Services and shall use best endeavours to ensure that all activities relevant to this contract comply with all health, safety and environment legislation and approved codes of practice;
- 8.2.9 insofar as any FSA is occupied by an Affiliate of the Flexible Service Provider or any other third party from time to time, the Flexible Service Provider shall be responsible for ensuring that where any provision in this Agreement imposes an obligation on the Flexible Service Provider to do or refrain from doing a particular thing in relation to a FSU/FSA(s), the relevant Affiliate or third party complies with that obligation as if it were the named "Flexible Service Provider" party to this Agreement.
- 8.2.10 the provision of Flexibility Services will not cause it or the FSU/FSA(s) to be in breach of any enactment relating to safety or standards, the Grid Code, Distribution Code, any Connection Agreement, any agreement for the supply of electricity, or any other agreement or arrangement of whatever nature with any other person.

## **9. CHARGES AND PAYMENT**

Unless any alternative provision is explicitly stated in Schedule 2 the provisions in this Clause 9 shall be adhered to.

- 9.1 The Company agrees to pay the Charges to the Flexible Service Provider as full remuneration for the satisfactory performance by the Flexible Service Provider of the Flexibility Services in accordance with this Agreement.
- 9.2 The Charges shall be calculated by the Company in accordance with Schedule 2.
- 9.3 The Flexible Service Provider agrees that each invoice issued or accepted by it will include details of, as regards the Flexibility Services to which the invoice relates:
- a) the date on and time at which the Flexibility Services were provided;
  - b) the relevant Availability Payment details (if any); and
  - c) the relevant Utilisation Payment details (if any).
- 9.4 The Company shall not be held responsible for late payment of any invoices where the foregoing provisions relating to submission are not followed by the Flexible Service Provider.
- All invoices must be sent to the Manager, Accounts Payable, ESB, Gracedieu Road, Waterford quoting the Company's Order No. and containing the information set out in Schedule 2.
- 9.5 Subject to compliance with the procedures set out in Schedule 2 if the Flexible Service Provider does not receive payment by the Due Date for Payment, the Flexible Service Provider shall be entitled, upon making a written claim to the Company during or within a reasonable period after the end of the delay in payment, to receive financing charges compounded monthly on the amount unpaid during the period of the delay. This period shall be deemed to commence on the Due Date for Payment. The financing charges referred to herein shall be calculated at the annual rate of interest applicable for late payment, which shall be the rate applied by the European Central Bank published in the Official Journal of the European Communities at the Due Date for Payment plus half (0.5) a percentage point and shall be payable in Euro. Accordingly, to the extent that they are otherwise agreed and specified in this Clause 9.6, each of the provisions of the Statutory



Instrument 580 of 2012, European Communities (Late Payment in Commercial Transactions) Regulations 2012 which imply certain terms into a contract unless they are otherwise agreed or specified, shall not apply to this Agreement.

- 9.6 Where either Party disputes any invoice (whether in whole or in part), interest under Clause 9.6 is payable only after the dispute is resolved, and only on those sums found or agreed to be due following resolution of the dispute, from the Due Date for Payment until payment is made.
- 9.7 All payments and all other sums referred to in this Agreement are stated exclusive of VAT. Where applicable, VAT shall be payable by the payer to the payee only upon receipt of a valid VAT invoice.
- 9.8 Where, during the Term, the Flexible Service Provider wishes to change its bank details or address for payment, then the Flexible Service Provider must follow the provisions set out in Clause 20.
- 9.9 The Flexible Service Provider shall at all times during the Term hold a current Tax Clearance Certificate from the Irish Revenue Commissioners and shall provide a copy of such Certificate to the Company.

## **10. TERMINATION**

- 10.1 Each of the Parties shall have the right, if it is not the Party in breach or in relation to which any of the events concerned occurs, to immediately terminate this Agreement on giving written notice of termination to the other if at any time during the Term of this Agreement:

10.1.1 a Party is in material and/or persistent breach of this Agreement;

10.1.2 in relation to the Party to which the notice is addressed:

- a) a notice is issued to convene a meeting for the purpose of passing a resolution, or any written resolution is circulated, to wind it up, or such a resolution is passed other than a resolution for its solvent reconstruction or reorganisation;
- b) a resolution is passed by its directors to seek a winding up, or a petition for a winding up order is presented against it, or such an order is made;
- c) a receiver, administrative receiver, receiver and manager, interim receiver, custodian, sequestrator, administrator or similar officer is appointed in respect of that Party or over a substantial part of its assets, or any steps are taken to appoint such an officer in respect of that Party, or an encumbrancer takes steps to enforce or enforces its security, or any distress, attachment, sequestration or execution or other similar process affects any of its assets and is not discharged within fourteen (14) days;
- d) a proposal for a voluntary arrangement is made in relation to it;
- e) it takes any step (including starting negotiations) with a view to readjusting, rescheduling or deferring any part of its indebtedness, or it proposes or makes any general assignment, composition or arrangement with or for the benefit of all or some of its creditors (other than for the sole purpose of a solvent amalgamation or solvent reconstruction), or it makes or suspends or threatens to suspend making payments to all or some of its creditors or it submits to any type of voluntary arrangement;
- f) is unable to pay its debts as they fall due;
- g) any step or event is taken or arises outside the Republic of Ireland which is similar or analogous to any of the steps or events listed at 10.1.2a) to 10.1.2f) above;

- h) it suspends or ceases, or threatens to suspend or cease, to carry on all or a substantial part of its business;
- i) any of the events in 10.1.2b) to 10.1.2j) above occurs in relation to any of its Affiliates; and
- j) Clause 14.5 of this Agreement applies.

10.2 Not used.

***Accrued liabilities***

10.3 On termination, the rights and liabilities of the Parties that have accrued before termination shall subsist.

***Surviving provisions***

10.4 This Clause and the following provisions of this Agreement shall survive termination or expiry, without limit of time:

- 10.4.1 Clause 1 (*Definitions and interpretation*);
- 10.4.2 Clause 6 (*Records and Audit*);
- 10.4.3 Clause 9 (*Charges and Payment*);
- 10.4.4 Clause 10.5 (*Consequences of Termination or Expiry*);
- 10.4.5 Clause 11.4(*Service Failure and Material Breach*);
- 10.4.6 Clause 13 (*Indemnity, Liability & Insurance*);
- 10.4.7 Clause 15 (*Confidentiality, Information Disclosure & Publicity*);
- 10.4.8 Clause 16 (*Intellectual Property Rights*);
- 10.4.9 Clause 18 (*Data Protection*);
- 10.4.10 Clause 21 (*Dispute Resolution*);
- 10.4.11 Clause 25 (*Waiver*); and
- 10.4.12 Clause 28 (*Governing Law and Jurisdiction*).

***Consequences of termination or expiry***

10.5 Where requested by the other Party, on termination or expiry of this Agreement each Party shall delete or return Confidential Information provided by the other Party for the purpose of the Agreement.

10.6 Following termination or expiry of this Agreement, the Flexible Service Provider shall promptly at the Flexible Service Provider's cost:

- 10.6.1 deliver to the Company for approval a final invoice detailing all monies due to it under the Agreement;
- 10.6.2 submit to the Company within thirty (30) Business Days all invoices with supporting documents for payment of all outstanding sums in connection with the provision of the Flexibility Services.

**11. SERVICE FAILURE AND MATERIAL BREACH**

11.1 Notwithstanding its obligations under Clause 11.2, the Flexible Service Provider shall notify the Company as soon as reasonably practicable upon becoming aware of the inability (howsoever

caused) of the Flexible Service Provider to provide the Flexibility Services in all or any part of any contracted Service Window.

11.2 In the event of a Service Failure by the Flexible Service Provider, the Company may require the Flexible Service Provider to:

- a) provide the Company with a written explanation as to the cause of the failure of service delivery;
- b) implement a rectification plan for improving performance and/or reducing the number of occurrences of Unavailability, which may include at the Company's discretion, a repeat of any Proving Tests undertaken by the FSU/FSA;
- c) propose a variation to the Service Requirements as specified in Schedule 1; or
- d) take any other action that may be agreed with the Company in order to alleviate a Service Failure (as reasonably required in the circumstances).

11.3 If the Flexible Service Provider fails to comply with the terms of Clause 11.2, the Flexible Service Provider's proposals are not accepted by the Company, the Parties fail to reach agreement on actions or the Flexible Service Provider's performance in respect of the Service Failure notified by the Company does not significantly improve within thirty (30) days of the date of the notice, such failure will be deemed a material breach of this Agreement for the purposes of Clause 10.1.

11.4 Where the Company terminates this Agreement as a result of a material and/or persistent breach by the Flexible Service Provider under Clause 10.1, the Company shall be entitled to recover from the Flexible Service Provider the cost, loss and expenses reasonably incurred by the Company as a result of the termination, including where relevant appointing a replacement Flexible Service Provider.

## **12. FORCE MAJEURE**

12.1 A Party is not in breach or default of this Agreement to the extent that it is prevented, hindered or delayed in performing any of its obligations under this Agreement as a result of a Force Majeure Event.

12.2 If a Force Majeure Event occurs, the following process will apply:

- (a) The affected Party will notify the other Party as soon as reasonably practicable of:
  - (i) The occurrence and description of the Force Majeure Event;
  - (ii) The date on which the Force Majeure Event commenced and its likely duration (if known);
  - (iii) The effect of the Force Majeure Event on the Party's ability to perform its obligations under the Agreement.
- (b) The affected Party will use reasonable endeavours to mitigate the impact of the Force Majeure Event on its ability to perform its obligations under the Agreement.

12.3 If a Force Majeure Event prevents, hinders or delays a Party in performing its obligations under the Agreement for a continuous period of at least eight (8) weeks, either Party may terminate the Agreement on giving ninety (90) days written notice.

### **13. INDEMNITY, LIABILITY & INSURANCE**

13.1 The Flexible Service Provider shall indemnify the Company against all loss, damage, costs, legal costs, professional and other expenses of any nature whatsoever incurred or suffered by the Company as a result of:

13.1.1 injury or death of any person; or

13.1.2 loss or damage to any property

arising out of the breach or negligent performance or failure in performance by the Flexible Service Provider of the terms of this Agreement.

13.2 Notwithstanding any other provision in this Agreement, the total liability of either Party to the other Party under or in connection with this Agreement whether in contract, tort or howsoever arising shall not exceed in aggregate an amount equal to the total Charges paid or payable to the Flexible Service Provider under this Agreement. This Clause shall not limit or exclude either Party's liability:

13.2.1 in the case of fraud, misrepresentation or wilful misconduct; or

13.2.2 in the case of death or personal injury or damage to property. or

13.2.3 in the case of any matter for which it would be unlawful for the Parties to exclude liability.

13.3 Neither Party shall have any liability to the other Party under this Agreement for any indirect or consequential loss of any kind howsoever caused.

13.4 The Flexible Service Provider shall procure (and on request provide evidence to the Company of) appropriate insurances as required by law and as follows:

13.4.1 Public Liability Insurance with a minimum indemnity limit of €6.5million euro, in respect of each and every claim, with a worldwide excluding USA/Canada jurisdiction clause;

13.4.2 Employer's Liability Insurance with a minimum indemnity limit of €13 million euro, in respect of each and every claim, with a worldwide excluding USA/Canada jurisdiction clause;

Where possible the Flexible Service Provider shall add the Company as a named party on its insurance policies.

13.5 If the Flexible Service Provider appoints a sub-contractor in connection with the provision of the Flexibility Services, the Flexible Service Provider shall ensure that the sub-contractor maintains appropriate insurance to the extent set out in Clause 13.4. If the Flexible Service Provider acts as an aggregator in connection with the provision of the Flexibility Services, it shall ensure that the FSU/FSA owners and operators for which it acts maintain appropriate insurance to the extent set out in Clause 13.

### **14. ASSIGNMENT, SUB-CONTRACTING AND CHANGE IN OWNERSHIP**

14.1 The Company may at any time assign or transfer all of its rights and obligations under this Agreement to an Affiliate or to another person who by statute becomes a legal successor to the Company.

- 14.2 Except as set out in Clause 14.1, this Agreement is personal to the Parties and neither Party shall assign, transfer, mortgage, charge, sub-contract or deal in any other manner with any or all of its rights and obligations under this Agreement without the prior written consent of the other Party .
- 14.3 If either Party sub-contracts any part of the provision or obligations of Flexibility Services, then the responsible Party shall be fully responsible for the acts, omissions or defaults of any sub-contractor (and its employees) as if they were the acts, omissions or defaults of the responsible Party.
- 14.4 If ownership, occupancy or use (for the purpose of providing the Flexibility Services) of any FSA(s) site changes, or may change, during the Term, the Flexible Service Provider shall immediately notify the Company of the same. The Company and the Flexible Service Provider shall if required, and at the reasonable request of the Company discuss the implications of the change and the options available to minimise any disruption that may be caused by the change.
- 14.5 The Company reserves the right to terminate this Agreement if a Change in Ownership of the Flexible Service Provider occurs and may treat a Change of Ownership as a material breach for the purposes of Clause 10.1. Any termination under clause 14.5 would be provided in writing and effective immediately

## **15. CONFIDENTIALITY, INFORMATION DISCLOSURE AND PUBLICITY**

- 15.1 The Company may be required to disclose certain information in accordance with this document under obligations within the Distribution Licence, the Grid Code, the Distribution Code, by the Authority or otherwise in accordance with Applicable Law or Statutory Requirements . Information shared will include but may not be limited to providers names, awarded prices, volumes and contract durations. It shall not be a breach of this clause 15 for the Company to disclose this information. The Company may also share information relating to this Agreement for the purpose of industry initiatives in relation to network constraint management and electricity network optimisation.
- 15.2 Save as permitted by clause 15.1, or except with the consent of the Disclosing Party, or as required by law, a court order, or by any relevant regulatory, or government authority, or to the extent that information has come into the public domain through no fault of the Receiving Party, each Party shall treat as strictly confidential and shall not disclose all commercial and technical information relating to the other Party received or obtained as a result of entering into or performing this Agreement.
- 15.3 Save as permitted by clause 15.1 neither Party shall use the name, brands and/or logos of the other Party for any purpose without the other Party's prior written approval. In the event that the other Party grants its approval to any use of its name, brand and/or logo, it may make such approval subject to such conditions and restrictions on use as it considers appropriate. Written approval should not be unreasonably withheld. The Company shall be entitled to make publicity releases and/or announcements regarding either this Agreement and/or the Company's activities under the Agreement.

## **16. INTELLECTUAL PROPERTY RIGHTS**

- 16.1 This Agreement does not transfer any interest in Intellectual Property Rights.
- 16.2 All Intellectual Property Rights owned by or licensed to either Party shall at all times both during the Term of the Agreement and after its termination or expiry, belong to or be licensed to the Party providing that intellectual property and neither Party shall make any use of the other Party's

Intellectual Property other than to the extent reasonably necessary in performing its obligations pursuant to this Agreement, provided that nothing in this Clause 16 shall operate so as to exclude any non-excludable rights of either Party.

## **17. COMPANY PROPERTY**

17.1 Each Party shall retain its rights in its own physical property used for the purposes of this Agreement. Any equipment, tools, drawings, specifications, data and other materials supplied by or on behalf of the Company to the Flexible Service Provider:

17.1.1 shall at all times be and shall remain the exclusive property of the Company;

17.1.2 shall be held by the Flexible Service Provider in safe custody at its own risk and maintained and kept in good condition by the Flexible Service Provider until returned by the Company;

17.1.3 shall be marked visibly by the Flexible Service Provider as the property of the Company; and

17.1.4 shall not be disposed of other than in accordance with the written instructions of the Company nor used otherwise than as authorised by the Company in writing.

## **18. DATA PROTECTION**

18.1 Each Party undertakes that, in the performance of its respective obligations under this Agreement, it shall comply with the Data Protection Legislation.

18.2 The Parties agree that:

18.2.1 the provision of the Flexibility Services does not involve the processing of Personal Data by either Party on behalf of the other Party;

18.2.2 each Party is an independent Controller in respect of any Personal Data it may process in the performance of its obligations under this Agreement, and the Parties are not joint controllers in respect of any such Personal Data; and.

18.2.3 if either Party becomes aware at any time during the term of this Agreement, or if a court or competent Supervisory Authority or other competent authority shall determine, that the performance of any Party's obligations under this Agreement involves the processing of Personal Data by such Party on behalf of the other Party and/or that the Parties are joint controllers in respect of any Personal Data, then:

18.2.4 the Parties will act reasonably to negotiate, agree and adopt, as soon as is reasonably practicable, such amendments to this Agreement as shall be necessary to ensure that all processing complies with the Data Protection Legislation; and

18.2.5 pending the adoption of such amendments to this Agreement, the relevant processing shall be suspended.

18.3 If either party receives a request from a Data Subject seeking to exercise the Data Subject's rights under the DPA, and such request relates to Personal Data in respect of which the other Party is a Controller, the Party receiving the request shall promptly inform the other Party, and both Parties shall co-operate with each other to ensure that such request is acknowledged and complied with as required by and in accordance with the DPA

## **19. ESB THIRD PARTY REQUIREMENTS**

- 19.1 The Flexible Service Provider shall meet its obligations hereunder in an ethical and professional manner, observing at all times all laws applicable to the provision of the Flexibility Services by it to the Company.
- 19.2 The Flexible Service Provider represents, warrants and covenants that as of the date of this Agreement, neither it nor any of its Affiliates, officers, directors, representatives, sub-contractors or agents (collectively "Provider Affiliates") has:
- (i) offered, paid, promised or authorized any bribe, inducement, facilitation payment or benefit of any kind to, or
  - (ii) accepted any bribe, inducement, facilitation payment or benefit of any kind from, any person or entity employed or owned by or acting for or on behalf of any ESB company (including without limitation any employee, officer, director of any ESB company) or otherwise.
- 19.3 The Flexible Service Provider further represents, warrants and covenants that as of the date of this Agreement, neither it nor any of its Provider Affiliates has paid, offered or promised to pay, or authorized the payment, directly or indirectly, of any monies or anything of value to any government or similar official, political party or party official, or any candidate for political office, for purposes of: (a) influencing any official act or decision of any official, party, government, government agency or government-owned or controlled entity for the purpose of; (b) inducing any official or party to do or omit to do an act in violation of a lawful duty; or (c) securing any improper advantage, in order to obtain or retain business, or direct business to, any person or entity, in any way related to this Agreement. For purposes of the foregoing, "government official" includes, without limitation, any officer, employee or representative of any state-owned or controlled entity or company.
- 19.4 The Flexible Service Provider declares that it is familiar with and understands the terms of the Requirements. The Flexible Service Provider further covenants and agrees that it complies with and shall continue to comply with each and every obligation contained in the Requirements. The Flexible Service Provider shall, if requested by the Company (not more than once annually) certify in writing that it has complied with the Requirements in effect for the previous year or part thereof for which the Flexibility Services were provided.
- 19.5 In addition to the rights and remedies set out in the Requirements, if the Company has reason to believe that the statements and undertakings given by the Flexible Service Provider in this Clause 19 have been or would be infringed in the future, the Company shall have the right to carry out an audit of the Flexible Service Provider and/or suspend the payment of payment(s) to the Flexible Service Provider, until the Company has conclusively and satisfactorily confirmed that there has been no such infringement.
- 19.6 In the event of the Flexible Service Provider or any Provider Affiliate engaging in any unlawful act or practice in relation to the delivery of money or anything of value in connection with the subject matter of this Agreement and/ or any breach of any of the covenants set out in this clause 19, the Company shall (notwithstanding any other rights conferred by law or under this Agreement) have the right to terminate this Agreement forthwith upon notice to the Flexible Service Provider. In the event of such termination the Flexible Service Provider shall have no right to any compensation, indemnification or remedy whatsoever other than the right to receive payment in respect of Flexibility Services provided prior to the date of such unlawful act or breach.

## **20. NOTICES**

- 20.1 The processes for notices and communications in respect of operational matters are set out in Schedule 4.
- 20.2 All formal notices or other communications to be served under this Agreement (“**Non-Operational Notice**”) shall be given in writing and shall be delivered or sent to the addresses for notice set out in Part 1 of the Flexibility Services Agreement or to such other address as each Party may have notified in writing to the other Party.
- 20.3 A Non-Operational Notice shall be delivered by hand, sent by pre-paid first-class post, or by recorded delivery post (or equivalent recorded postal delivery service).
- 20.4 A Non-Operational Notice or other communication shall be deemed to have been received:
- 20.4.1 if delivered by hand or recorded delivery post within Business Hours at the time of delivery or, if delivered by hand outside Business Hours, at the next start of Business Hours;
- 20.4.2 if sent by express post, at 9.00 a.m. on the second Business Day after posting.
- 20.5 E-mail communications may be valid for Non-Operational Notices the purposes of this Agreement, where agreed between the Parties. Such email notices shall be deemed to have been received on the day of sending, or where outside of Business Hours on the first Business Day thereafter.
- 20.6 In verifying service of a Non-Operational Notice, it shall be sufficient to prove that delivery was made or that the envelope containing the notice was properly addressed and posted.
- 20.7 This Clause does not apply to the service of any legal proceedings, or other documents in any legal action or other method of dispute resolution.

## **21. DISPUTE RESOLUTION**

- 21.1 The Parties shall use good faith efforts to resolve any operational issue, dispute, claim or proceeding arising out of or relating to this Agreement. In the event that a dispute cannot be resolved within thirty (30) days of written notice of the dispute, the dispute shall be escalated to the Parties’ senior representatives (named in Schedule 4, or as otherwise notified by either Party to the other) who have authority to settle the same.
- 21.2 If any dispute cannot be resolved in such manner then the matter shall be referred to a senior arbitrator to be agreed upon by the Parties or in default of agreement to be nominated by the President for the time being of The Incorporated Law Society of Ireland in accordance with and subject to the provisions of the Arbitration Act, 2010 or any statutory modifications or re-enactment for the time being in force. The award of the said arbitrator shall be final and binding on both Parties

## **22. SEVERANCE**

- 22.1 If any provision of this Agreement is declared by a judicial or other competent authority to be wholly or partly void, voidable, illegal or otherwise unenforceable in whole or in part, that provision (or part provision) shall be deemed severed from this Agreement and the other provisions of this Agreement and the remainder of the relevant provision shall continue in full force and effect.
- 22.2 If any provision of this Agreement are so found to be wholly or partly invalid or unenforceable, but would be valid or enforceable if some part of the provision were deleted, restricted or limited



in a particular manner, the provision in question shall apply with the minimum deletions, restrictions or limitations as may be necessary to make it valid or enforceable.

22.3 The Company and the Flexible Service Provider each acknowledge that it has entered into this Agreement on an arm's length basis and that it has taken independent legal advice in so doing.

**23. NOT USED**

**24. NO AGENCY OR PARTNERSHIP**

24.1 Nothing in this Agreement shall be deemed to constitute a partnership or joint venture or contract of employment between the Parties nor constitute either Party the agent of the other.

24.2 Neither Party shall act or describe itself as the agent of the other, nor shall it make or represent that it has authority to make any commitments on the other's behalf, including but not limited to the making of any representations or warranty and the exercise of any right or power.

**25. WAIVER**

25.1 If a Party delays or fails to exercise (in whole or part) any right, claim or remedy conferred by or arising under or in connection with this Agreement or by law, this will not operate as a waiver of, or as preventing the further exercise or the enforcement of, that right, claim or remedy. Any single or partial exercise or waiver of any such right, claim or remedy shall not preclude its further exercise or the exercise of any other right, claim or remedy.

25.2 A waiver of any right, claim or remedy conferred by or arising under or otherwise in connection with this Agreement or by law shall be effective only if it is given in writing and is signed by or on behalf of the Party giving it.

**26. ENTIRE AGREEMENT**

26.1 This Agreement and the documents referred to in it together constitute the entire agreement and understanding of the Parties relating to the matters contemplated by this Agreement and those documents, and supersede any previous drafts, agreements, understandings or arrangements between any of the parties relating to the subject matter of this Agreement and those documents, which shall cease to have any further effect.

**27. COUNTERPARTS**

27.1 Where executed in counterparts:

27.1.1 This Agreement shall not take effect until all of the counterparts have been delivered; and

27.1.2 delivery will take place when the date of delivery is agreed between the Parties after execution of this Agreement as evidenced by the date inserted at the start of this Agreement.

27.2 Where not executed in counterparts, this Agreement shall take effect after its execution upon the date agreed between the Parties as evidenced by the date inserted at the start of this Agreement.

**28. GOVERNING LAW AND JURISDICTION**

28.1 The validity, construction and performance of this Agreement and any claim, dispute or matter (whether contractual or non-contractual) arising under or in connection with this Agreement or its enforceability shall be governed by and construed in accordance with Irish law.

28.2 Each Party irrevocably submits to the exclusive jurisdiction of the courts of the Republic of Ireland, over any claim, dispute or matter arising under or in connection with this Agreement or its enforceability or the legal relationships established by this Agreement (including non-contractual disputes or claims) and waives any objection to proceedings being brought in such courts or on the grounds that proceedings have been brought in an inconvenient forum.

**29. COVID-19**

29.1 The Flexible Service Provider shall be deemed to be providing the Flexibility Services in the full knowledge, experience and foresight of the effects, costs and additional services and requirements arising as a consequence of the COVID-19 pandemic. Therefore, the Flexible Service Provider has taken account of, and, included in the Charges for all delays, additional costs, expenses, materials, works and services as may be reasonably be expected to arise as a consequence of the continuation of the COVID-19 pandemic. The Flexible Service Provider hereby accepts and acknowledges that it has entered this Agreement in the full knowledge and understanding of the effects of the COVID- 19 pandemic, of their costs, services and scope of work and the Flexible Service Provider hereby forever waives the right to bring any pre-existing, existing or future claims against the Company for any additional or increased fees, costs, expenses, extensions of time and the rights to seek any force majeure relief, as a result of the effects of the COVID-19 pandemic. The parties therefore hereby further accept that the COVID-19 pandemic shall not constitute a Force Majeure event for the purposes of this Agreement. Furthermore, for the avoidance of doubt, each party to this Agreement shall bear all of its own additional costs, fees expenses or other liabilities whatsoever arising from any Governmental restrictions, guidance or laws imposed in any country which relate to the COVID-19 pandemic and which affect the performance by that party of this Agreement.

## SCHEDULE 1 - SERVICE DESCRIPTION

### Part 1 Extensions

Permitted Extensions: *one*

Extension Periods: *1 year*

### Part 2 Service Requirements Sample

Service Criteria	Sample Contracted details
Type of Product (Sustain, Secure, Dynamic, Restore)	<i>Restore</i>
Flexibility Zone	<i>Zone A</i>
Flexible Service Provider ID	<i>FSP_025</i>
Flexible Service Unit ID	<i>FSU_099</i>
Flexible Service Asset ID (if appropriate)	<i>FSA_099</i>
Baseline Position	<i>0.25MW</i>
Flexible Capacity (MW)	<i>0.1MW</i>
Service Window (MM/YYYY – MM/YYYY)	<i>Oct 22 – Mar 23 inclusive</i> <i>Oct 23 – Mar 24</i>
Service Window (Days of week)	<i>Monday – Friday, excluding public holidays in Republic of Ireland</i>
Delivery Period (HH:MM – HH:MM)	<i>16:00 – 19:00</i>
Max ramp rate import (MW/min)	
Max ramp rate export (MW/min)	
Recovery Period (hours)	<i>21 hours</i>

Flexible Service Providers must meet all requirements in the Flexibility Specification [Section 3 of the RfT will be embedded here at Contract stage];

### **Part 3 - Service Failure**

1. A Service Failure shall be defined as any of the following:

- a) if the Flexible Service Provider fails to deliver Flexibility Services in accordance with a Utilisation Instruction and has a Utilisation Performance Scalar Percentage (defined in Schedule 2) of zero two or more times in a Service Window in respect of a Flexible Service Unit.

OR

- (b) if the Flexible Service Provider has an Availability Scalar of less than 80% in a given calendar month in respect of a Flexible Service Unit. The Flexible Service Provider must declare Unavailability in accordance with Schedule 4 and the Flexible Service Provider will be measured against this. The Flexible Service Units will not be considered Unavailable due to distribution network outages which result in the disconnection of the FSU for the purposes of Service Failure.

2. Any exercise by the Company of its rights under Clause 11 (Service Failure and Material Breach) of the Agreement or under this Schedule 1 shall not limit or affect any other rights or remedies available to it under this Agreement or otherwise.

#### **1. VARIATION TO DELIVERY PERIODS**

1.1 The Company may, with prior written agreement from the Flexible Service Provider, make single or marginal variations to individual Delivery Period or Flexible Capacity requirements within the following boundaries:

1.1.1 a Delivery Period may change by up to one (1) hour inclusive of extension, early instruction or delayed instruction.

1.1.2 Flexible Capacity may be increased or decreased no more than ten per cent (10%) of the contracted requirement.

1.1.3 The Company may seek to make service variations of this nature on no more than two (2) occasions in any contractual year, and no more than four (4) times in any contractual term.

1.1.4 Any required changes greater than those above must be the subject of either a Discretionary Service or procurement of a new service.

#### **2. DISCRETIONARY FLEXIBILITY SERVICES**

2.1 From time to time, the Company may at its discretion request from the Flexible Service Provider, and subject to the Flexible Service Provider's Availability Status, additional Flexibility Services for Discretionary Service Windows and Delivery Periods ("Discretionary Flexibility Services").

2.2 The Company may request Discretionary Flexibility Services from the Flexible Service Provider by sending a Discretionary Utilisation Request in accordance with Schedule 4.

2.3 The Company may:

- 2.3.1 withdraw any Discretionary Utilisation Request by providing written notice to the Flexible Service Provider at any time before the Flexible Service Provider has provided a response under and in accordance with Clause 5.2; and/or
- 2.3.2 issue a Stop Instruction to the Flexible Service Provider in accordance with Schedule 4.
- 2.4 The Flexible Service Provider may accept the Discretionary Utilisation Request in accordance with the provisions set out in Schedule 4. The Flexible Service Provider's acceptance in accordance with this Clause 5.4 shall be final and binding.
- 2.5 Where the Flexible Service Provider fulfils the conditions set out in Clause 5.4 and subject to receipt of any Stop Instruction, the Flexible Service Provider shall provide the Discretionary Flexibility Services to the Company using the FSU/FSA(s) in accordance with the Accepted Start Time, Accepted End Time and Accepted [MW/MVAR].
- 2.6 In performing the Discretionary Flexibility Services pursuant to this Agreement, the Flexible Service Provider must comply with the Flexibility Specification set out in Schedule 1.
- 2.7 If the Flexible Service Provider fails to respond in accordance with Clause 5.4, the Flexible Service Provider will be deemed to have declined the request.
- 2.8 No Discretionary Utilisation Fee shall be due to the Flexible Service Provider by the Company for any Discretionary Flexibility Services delivered in excess of the Accepted [MW/MVAR].

**SCHEDULE 2- FLEXIBILITY SERVICE CHARGES**

**Part 1 Rates Schedule**

FSU ID	Zone	Product	Availability Fee (€/MW/h)	Utilisation Fee (€/MW/h)

Sample Contract

## Part 2 Invoicing/Payment terms

1. The Company shall calculate the amounts due to the Flexible Service Provider on a monthly basis according to the terms set forth in this Agreement. The Company shall prepare and provide the Flexible Service Provider a Performance Statement no later than the day which is ten (10) Business Days after the last Business Day of the previous month.
  2. The Performance Statement will consist of availability and utilisation settlement calculations identifying the Availability Payment and the Utilisation Payment payable in respect of Flexibility Services provided by the Flexible Service Provider to the Company in the previous month as set out in this Schedule 2.
  3. The Flexible Service Provider shall review the contents of the Performance Statement and:
    - (a) provided that there is no dispute or unresolved issue, shall prepare and forward to the Company an invoice in respect of the net payment due as detailed on the Performance Statement plus VAT (if applicable); or
    - (b) in the event that disputes, or unresolved issues exist, the Parties shall promptly seek to resolve them in good faith. Where such disputes or issues remain unresolved, the Flexible Service Provider shall prepare and forward to the Company an invoice in respect of:
      - (i) all undisputed amounts; and
      - (ii) where a disputed amount is an aggregate amount made up of component parts or series of component parts, all undisputed components of that aggregate amount,
- and shall refer the disputes or unresolved issues for resolution pursuant to Clause 21 (Dispute Resolution).
4. The Company will then make payment via bank transfer to the Flexible Service Provider no later than the last Business Day of the month following the month in which the invoice is received (which shall be the Due Date for Payment).
  5. In the event that the Company requires the Flexible Service Provider to perform any Discretionary Flexibility Services, the Flexible Service Provider shall issue invoices on a monthly basis for any such services completed in the preceding month following a Performance Statement being sent by the Company.

**Format of the Performance Statement (Figures for illustration purposes)**

<b>Flexible Service Provider:</b>	<i>Provider 1 FSP_025</i>			<b>Performance Statement ID:</b>	<i>PS_001</i>	
<b>Month Covered</b>	<i>October</i>			<b>Year</b>	<i>2023</i>	
<b>FSU ID:</b>	<i>FSU_099</i>			<b>Zone:</b>	<i>Dublin North Central</i>	
<b>Product</b>	<b>Flexible Capacity (MW)</b>	<b>Availability Fee (€/MW)</b>	<b>Delivery Period</b>	<b># of service days in Current Month</b>	<b>Availability Scalar</b>	<b>Capacity Scalar</b>
<i>Secure</i>	<i>0.5</i>	<i>10</i>	<i>3hrs</i>	<i>20</i>	<i>1</i>	<i>1</i>
<b>Calculated Availability Payment:</b>					<b>€300</b>	
<b>Product/Date</b>	<b>Flexible Capacity (MW)</b>	<b>Utilisation Fee (€/MW)</b>	<b>Settlement Capacity (MW)</b>	<b>Utilisation Duration (hrs)</b>	<b>Utilisation Scalar</b>	<b>Utilisation Payments Due</b>
<i>Secure 03/10/2023</i>	<i>0.5</i>	<i>10</i>	<i>0.5</i>	<i>2hrs</i>	<i>100%</i>	<i>10</i>
<i>Secure 04/10/2023</i>	<i>0.5</i>	<i>10</i>	<i>0.4</i>	<i>3hrs</i>	<i>60%</i>	<i>9</i>
<i>Secure 05/10/2023</i>	<i>0.5</i>	<i>10</i>	<i>0.3</i>	<i>1.5hr</i>	<i>0%</i>	<i>0</i>
<b>Calculated Utilisation Payment:</b>						<b>€19</b>
<b>Calculated Total Payment</b>						<b>€319</b>
<b>This performance statement reflects the calculated performance of the FSU based on instructed and metered performance. Please confirm acceptance of this performance statement by enclosing with invoice for payment.</b>						



### Part 3- Calculation of Availability Payment and Utilisation Payment

#### Availability Payment Calculation:

Availability Payment = Availability Fee \* Flexible Capacity\* Delivery Period\* Number of Service Days per month \* Availability Performance Scalar

- where Availability Payment means the monthly payment for the Flexible Service Provider's availability of Flexibility Services as defined in Schedule 1.
- where Availability Fee is as defined in Schedule 2
- where Flexible Capacity is as defined in Schedule 1
- where Delivery Period is as defined in Schedule 1
- where number of service days per month will correspond to Service Window days in the month set out by Company in Schedule 1, less any public holidays.
- Where the Availability Performance Scalar is defined below

The below will describe Availability Performance Scalars with two performance measures set out:

Availability Performance Scalar = Availability scalar \* Capacity scalar

1. Availability scalar = (Number of service days per month – number of days declared Unavailable)/ number of service days per month.  
This will measure performance for Unavailability declaration in advance of delivery of service as well as for Unavailability without declaration prior to delivery of service.
2. Capacity scalar = (Delivered Flexible Capacity)/(Flexible Capacity \*5)

Where Delivered Flexible Capacity is the sum of the Settlement Capacities for  $\Sigma_1^5$  for the preceding 5 utilisation events.

*Delivered Flexible Capacity =  $\Sigma_1^5$  (Settlement Capacity for each utilisation event)*

3. Where utilisation Event is the period in which the Provider is instructed to deliver the Flexible Capacity following a Utilisation Instruction set out in Schedule 4. For the commencement of services when event history is not available, the first 5 utilisation events will be equal to the Proving Test outcome.
4. Availability Fees will not be due and Availability Payments for Flexible Services will not commence until a satisfactory Proving Test has been completed and the Flexible Capacity approved. See Schedule 5 for details on Proving Tests.

#### Utilisation Payments calculation:

Utilisation Payment =  $\Sigma$  (Utilisation Fee (€/MW/h) \*(Settlement Capacity) \* Utilisation duration (End time –Start time) \* Utilisation Performance scalar percentage

- Where Utilisation Payment means the monthly payment the Flexible Service Provider will be paid in respect to delivering Flexible Capacity corresponding to all Utilisation Instructions received in that month.
- Where the Utilisation Fee is defined in Schedule 2
- Where Settlement Capacity is defined as

$$\text{Settlement Capacity} = \frac{\sum_1^N \text{MIN}\left(\left| \text{Baseline Position} - \frac{\text{Metered Energy}}{\text{Metering interval}} \right|, \text{Flexible Capacity}\right)}{N}$$

- Where the Utilisation duration is defined by the Utilisation Instruction.
- Where the Utilisation Performance Scalar is defined in Schedule 2
- N = total number of metering intervals (15mins or 30mins depending on meter type) for the instructed delivery period.
- Baseline Position (is as defined for the relevant asset type in the Flexibility Specification referenced in Schedule 1)
- Metered Energy is the energy recorded during the metering interval by the defined meter listed in Schedule 5.

No Utilisation Fee shall be due to the Flexible Service Provider in respect to any Flexibility Services delivered in excess of the Flexible Capacity (MW) or Flexibility Services delivered when not instructed.

### Utilisation Performance Scalars

The Company needs to ensure the Flexible Service Provider is delivering the Flexible Capacity during utilisation events. This will be measured using a performance event scalar applied to single utilisation events. This is to incentivise on individual event delivery performance. Firstly, utilisation performance needs to be measured, of which the table below shows noting that these are linear relationships. It establishes the % of Settlement Capacity/Flexible Capacity during the Delivery Period.

Settlement Capacity/Flexible Capacity	Utilisation Performance Scalar Percentage
100%	100%
90%	90%
80%	80%
70%	70%
60 %<	60%
Below 60%	0%

### Rules for Stacking of Services / Payments

If a FSP has contracted for two products, as described in the Flexibility Specification in a zone with the same Service Window and Delivery Period, the following applies when the products are delivered by the same FSU Flexible Capacity:

**Availability:** If both products have an Availability payment, the FSP will receive the greater of the two availability payments for the duration of the contracted Service Window.

**Utilisation:** If both products have a Utilisation payment, the FSP will receive the Utilisation payment for whichever product is being utilised at that point in time.

If one of the contracted products is Restore, it will be prioritised. This means that if a FSU is being utilised to deliver Sustain/Secure/Dynamic, and loss of supply occurs, the FSU, once reconnected, will be utilised to deliver Restore. The FSP will be paid the utilisation rate for Secure/Dynamic up to the point where loss of supply occurs, and then the Restore Utilisation rate once reconnection is established.

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### SCHEDULE 3 - FLEXIBLE SERVICE PROVIDER'S ASSET DETAILS

The information below captures the Flexible Service Providers assets approved to deliver the service(s). If there are multiple Flexible Services Assets within the Flexible Service Unit, please complete a column for each asset.

Flexible Service Provider Name			
Flexible Service Unit ID			
	FSA 1	FSA 2	FSA 3
<b>FSA ID</b>			
<b>Asset Type (demand side, generation, solar, hydro, battery storage, autoproducer)</b>			
<b>Maximum Import Capacity (MIC) in MW/kVA</b>			
<b>Maximum Export Capacity (MEC) in MW/kVA</b>			
<b>MPRN</b>			
<b>Asset flexible capacity in MW</b>			
<b>Means by which flexibility is being delivered (demand down, generation up)</b>			
<b>Agreed communication method (for scheduling and dispatch (phone, email, text, direct signal etc)</b>			
<b>Contact details for FSA (Name, number, email address)</b>			

## SCHEDULE 4 – COMMUNICATIONS

### Part 1:

#### Definitions

In this Schedule 4, the following terms shall have the meaning ascribed hereto:

*“Accepted End Time” means the date and time (to the nearest minute) as notified in accordance with the below parameters in which the Accepted Flexible Capacity [MW/MVAR] is no longer required to be delivered;*

*“Accepted [MW/MVAR]” means the [MW/MVAR] accepted in accordance with accordance with the below parameters;*

*“Accepted Start Time” means the date and time (to the nearest minute) as notified in accordance with the below parameters at which the Accepted Flexible Capacity [MW/MVAR] shall be delivered;*

### Part 2: Senior Representatives

: *[Note: Insert details of senior reps for each Party (see Clause 21)]*

### Part 3: Process and systems for communications

Utilisation Instructions	Stop Instructions	Unavailability notices	Discretionary Utilisation Request
<p><i>[Note: Set out process for issuing Utilisation Instructions]</i></p> <p>The Utilisation Instruction must specify for a FSU/FSA(s)</p> <ul style="list-style-type: none"> <li>the Zone to which the Utilisation Instruction relates;</li> <li>The FSU ID</li> <li>The Flexible Product*</li> <li>Start Time;</li> <li>End Time; and</li> <li>the Flexible Capacity (MW).</li> <li>Purchase Order reference number</li> </ul> <p><b>Utilisation Instruction Process</b></p> <p>A Utilisation Instruction will be issued electronically (email, SMS, phone or as agreed) from the ESB Network’s control centre to the Flexible Service Provider.</p> <p>The Flexible Service Provider will acknowledge the utilisation</p>	<p><i>[Note: Set out process for issuing Stop Instructions]</i></p> <p>The Stop Instruction must specify for a FSU/FSA</p> <ul style="list-style-type: none"> <li>the Zone to which the Utilisation Instruction relates;</li> <li>The FSU ID</li> <li>The Flexible Product*</li> <li>End Time;</li> </ul> <p><b>Stop Instruction Process</b></p> <p>A Stop instruction will be issued from the System Operator’s control centre electronically to the Flexible Service Provider.</p> <p>The Flexible Service Provider will acknowledge the Stop instruction by electronic means by responding with a Stop Acknowledgement indication within 1 minutes of receipt of the instruction.</p> <p>The Flexible Service Provider will then cease the delivery the contract</p>	<p>If the Flexibility Service Provider is aware that the Flexible Service Asset will not be available for any upcoming Delivery Period, irrespective of whether a Utilisation Instruction has been received:</p> <p>The Flexibility Services Provider shall issue to the Company an Unavailability Notification (by agreed electronic format) as soon as is reasonably practicable of such unavailability occurring (including identification of the affected times). This shall specify:</p> <ul style="list-style-type: none"> <li>The FSU ID</li> <li>Flexible Products for which the asset(s) or units(s) are unavailable</li> <li>Affected Flexible Capacity (MW)</li> <li>Start time of unavailability</li> </ul>	<p><i>[Note: Set out process for issuing Discretionary Utilisation Request]</i></p> <p>The Discretionary Utilisation Request must specify for a FSU/FSA:</p> <ul style="list-style-type: none"> <li>the Zone to which the Discretionary Utilisation Request relates;</li> <li>The FSU ID</li> <li>The Flexible Product*</li> <li>the Requested Start Time;</li> <li>the Requested End Time; and</li> <li>the Requested MW.</li> <li>Purchase Order reference number</li> </ul> <p>A Discretionary Utilisation instruction will be issued electronically (email, SMS, phone or as agreed) from the ESB Network’s control centre to the Flexible Service Provider.</p> <p>The Flexible Service Provider will accept the Discretionary Utilisation</p>

<p>instruction by electronic means by responding with a Utilisation Acknowledgement within 60 minutes of receipt of the instruction for Secure and within 10 minutes of receipt of instruction for Dynamic and Restore.</p> <p>The Flexible Service Provider will then deliver the contracted Flexible Capacity in line with the Utilisation Instruction and any parameters set out in Schedule 1.</p> <p>Failure of the Flexible Service Provider to respond with a Utilisation Acknowledgement to a Utilisation Instruction in 60 minutes for Secure and 10mins for Dynamic and Restore is deemed a failure to deliver under Schedule 1 Part 3.</p>	<p>service in line with parameters set out in Schedule 1.</p> <p>Failure of the Flexible Service Provider to respond with a Stop Acknowledgement indication to a Stop instruction in 1 minute is deemed a failure to deliver under Schedule 1 Part 3.</p>	<ul style="list-style-type: none"> <li>• Expected duration of Unavailability.</li> <li>• Reason for the Unavailability</li> </ul>	<p>Request by electronic means by responding with a Utilisation Acceptance within 60 minutes of receipt of the instruction for Secure and within 10 minutes of receipt of instruction for Dynamic and Restore.</p> <p>This shall state the</p> <p>Accepted Start Time,</p> <p>Accepted End Time</p> <p>Accepted MW</p> <p>The Flexible Service Provider will then deliver the Accepted MW in line with any parameters set out in Schedule 1.</p> <p>Should the Flexible Service Provider fail to respond with a Utilisation Acceptance the Flexible Service Provider will be deemed to have declined the request.</p>
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\*As defined in the Flexibility Specification referenced in Schedule 1.

Where the End Time is not specified in the Utilisation Instruction, the End Time shall be the earlier of:

1. The end time of the Delivery Period in which the Start Time occurred.
2. The End Time as specified in a Stop Instruction,

Where the End Time is not specified in the Stop Instruction, the End Time shall be immediate:

### **Acceptance of Discretionary Utilisation Requests**

The Flexible Service Provider may accept the Discretionary Utilisation Request by responding (by any method as approved by the Company) to the Discretionary Utilisation Request setting out:

- the Accepted Start Time, which cannot be earlier than, but must be no later than fifteen (15) minutes from, the Requested Start Time;
- the Accepted End Time, which can be no later than the Requested End Time but otherwise has to be at least fifteen (15) minutes from the Accepted Start Time; and
- the Accepted MW, which shall be at least 0.1MW and can be no greater than the Requested MW.

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## Part 4 Reporting processes and requirements

### *Escalations process*

<i>Escalation Level</i>	<i>Company Representative</i>	<i>Flexible Service Provider Representative</i>
1	<i>Relevant Company Authorised Person</i>	[•]
2	<i>Relevant Company Manager/Commercial Manager</i>	[•]
3	<i>Relevant Company Performance Manager</i>	[•]

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**[FORM OF UNAVAILABILITY NOTIFICATION / REMEDY NOTIFICATION]**

*[In accordance with Clause 3.1, this is a notification of Unavailability of Flexibility Services.]*

<i>Company Name:</i>	
<i>Zone ID:</i>	
<i>Flexible Service Unit:</i>	
<i>Flexible Products Affected</i>	
<i>Flexible Capacity affected</i>	
<i>From Date/Time:</i>	<i>[Unavailable from]</i>
<i>To Date/Time:</i>	<i>[Unavailable to]</i>
<i>Reason:</i>	
<i>Name:</i>	<i>[of individual making notification]</i>
<i>Date:</i>	<i>[of notification]</i>

## SCHEDULE 5 - PERFORMANCE MONITORING

### Proving Test

1. The Flexible Service Provider shall undertake and pass the Proving Test in relation to the FSU/FSA at least 15 Business Days before the start of the Service Window as specified in Schedule 1 Part 2.
2. The Flexible Service Provider shall ensure that all FSU/FSAs required to deliver the Flexibility Services are ready to provide Flexibility Services by the start of the relevant Service Window but no later than the date of the Proving Test.
3. The Proving Test shall assess, in respect of the FSU/FSA identified in Schedule 3, the Flexible Service Provider's ability to complete the following as set out in Schedule 1 and the Flexibility Specification referenced in Schedule 1:
  - a) Receive and respond to instructions from the Company including the Notice Period;
  - b) Deliver the contracted Flexible Capacity by the Response Time
  - c) Maintain the contracted Flexibly Capacity for the nominated Delivery Period
  - d) Demonstrate delivery of the Flexible Capacity through the MRSO meter data
4. A Proving Test for Restore will be based on Dynamic with respect to Notice Period.
5. If meter data is unavailable during the Proving Test, alternative metering may be put in place.
6. Where the FSU/FSA is deemed by the Company to have failed the Proving Test by not meeting any of the requirements in 3 above, the Company shall notify the Flexible Service Provider as soon as is reasonably practicable. The Flexible Service Provider shall arrange with the Company a repeat of the Proving Test to take place during the period of 14 days after notification of a failed Proving Test. The outcome of the second Proving Test shall be conclusive.
7. Where the outcome of the second Proving Test shows less Flexible Capacity than set out in Schedule 1 Part 2, the Company may require a proposed variation to the Flexible Capacity in Schedule 1 in accordance with the outcome of the Proving Test.
8. Where the outcome of the Proving Test shows the duration of the Flexible Capacity is less than that set out in Schedule 1, Part 2, the Company shall update the Delivery Period in Schedule 1 in accordance with the outcome of the Proving Test.
9. Each Party shall bear its own cost in relation to a Proving Test.
10. If a Proving Test is required under Clause 11.2 (b), the Company will notify the FSP as soon as reasonably possible and the FSP must complete a repeat Proving test within 30 days of this notification.
11. The Company shall have the right to access and attend a Proving test.
12. Where the Flexible Service Provider has failed two consecutive Proving Tests conducted in accordance with this Schedule, it shall constitute a Service Failure.

## Metering

Metering requirements set in B9.6 of the PQQ will apply. ESB Networks will use the meter data to monitor and validate delivery of the contracted flexibility capacity.

### Part A: Access to Meter Data

- a) As ESB Networks is the Meter Registration System Operator (MRSO), the National Networks, Local Connection Programme can source the meter data, for validation of delivery and settlement, directly from the MRSO database. This will be agreed with the contracted FSP.

### Part B: Metering Miscellaneous

- b) The FSP should provide technical details of any customer meter (if applicable) within a FSU and a single line diagram of each FSA identifying the location of the meter.
- c) If meter data is unavailable for a Delivery Period in which an FSP has received a utilisation instruction, and no alternative data source is available, the Company will, in good faith, assume that the contracted Flexible Capacity has been delivered.

### Service Meter (for customer meter)

Measuring equipment	Service Meter Data
<i>[Note: Provide details of the measuring equipment]</i>	<i>[Note: Define Service Meter Data]</i>

### SINGLE LINE DIAGRAM OF THE FLEXIBLE SERVICE ASSET

**SCHEDULE 6- THIRD PARTY REQUIREMENTS**

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