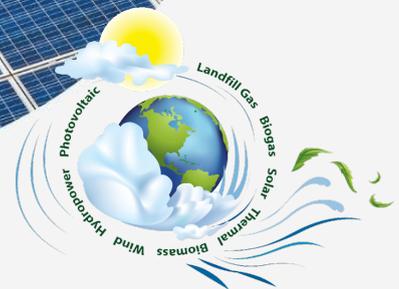




mineral resources
& energy

Department:
Mineral Resources and Energy
REPUBLIC OF SOUTH AFRICA



INDEPENDENT POWER PRODUCER PROCUREMENT OFFICE

IPP PROCUREMENT PROGRAMMES

EVALUATION OF SELLER REFINANCING NOTICES

REFINANCING PROTOCOL / GUIDELINE

UPDATED TO INCLUDE GUIDANCE NOTES 1-5 AND A PROCESS ON
REFINANCING UTILISING CAPITAL MARKET INSTRUMENTS

January 2023

REFINANCING PROTOCOL (THE “PROTOCOL”)

1. INTRODUCTION

- 1.1 The Department of Mineral Resources and Energy (the “**Department**”) commenced with the Independent Power Producer (“**IPP**”) Programme in respect of renewable energy in 2011 (the “**REIPP Programme**”). Pursuant to the REIPP Programme and the awarding of Preferred Bidder status to successful bidders, the Department and Eskom have entered into Implementation Agreements and Power Purchase Agreements respectively with the project companies (the “**Sellers**”), that achieved Financial Close in respect of their projects. The IPP Office has been mandated by the Department to perform all contract management functions associated with the Implementation Agreements.
- 1.2 The Department has received and expects to continue to receive requests from Sellers to change their financing arrangements after Financial Close (hereafter collectively referred to as the “**Refinancing Notices**”).
- 1.3 To deal with such Refinancing Notices and to provide Sellers with a transparent guideline which will apply to the IPP programmes, the Department and the IPP Office have developed this Protocol, which has been based largely upon National Treasury’s work within the ambit of the Standardised PPP Provisions (“**Standardisation**”)¹, with further aspects adapted from the Guidance Notes issued by the United Kingdom’s HM Treasury². The Protocol will guide the consideration of and consent to such Refinancing Notices. As part of the Ministerial Initiative launched by the Minister of Mineral Resources and Energy in September 2019, the principles contained in this Protocol were confirmed by the Department in December 2019.

¹ Refer to Standardisation Part Q: Refinancing

² In particular, Guidance Note on Calculation of the Authority’s Share of a Refinancing Gain

- 1.4 The Department may, upon written request, require the Seller to submit a Refinancing Notice.
- 1.5 This Protocol sets out a framework for the assessment of Refinancing Notices highlighting the key commercial and financial factors that will guide decision-making. The IPP Office in terms of its contract management mandate will assess, verify and grant consent as may be appropriate and as mandated by the Department.
- 1.6 The Protocol shall be referenced in future procurement documentation for IPP Programmes to uniformly regulate changes to the financing arrangements of the Sellers.
- 1.7 For the purpose of this Protocol, “Refinancing” includes any change in the nature of or the terms governing the financing arrangements of a Project as captured in the Base Case Financial Model agreed at Financial Close (the “**FC Model**”)³ and attached as a Schedule to the applicable Implementation Agreement (the “**IA**”). For the avoidance of doubt any early release of cash as a result of a change in the financing arrangements captured in the FC Model, is considered as a Refinancing and would be included within the ambit of this Protocol.
- 1.8 Refinancings which effect, *inter alia*⁴:
 - 1.8.1 a reduction in interest margins applicable to the Debt;
 - 1.8.2 a reduction or release of the cash balances in any reserve accounts or the cancellation or termination (partially or in full) of letters of credit;
 - 1.8.3 an extension in the maturity of the Debt;
 - 1.8.4 a rescheduling of the repayment of principal or the payment of interest included in the Debt;
 - 1.8.5 an increase in the amount of Debt; or

³ It should be noted that a Refinancing might also be undertaken without the direct involvement of the Seller, for example, through a special purpose holding company, which relies on rights granted in respect of the cash flows of the Project and other Project Assets of the Seller (including its rights under contracts).

⁴ This is not a closed list.

- 1.8.6 any change in the type of Debt;
- may each have the effect of increasing or accelerating the dividends or other distributions deriving from the Project for the benefit of the Shareholders, or of reducing their funding commitments in respect of the Project. This upside (collectively, referred to as the “Refinancing Gain”) is to be shared between the Department and the Seller.
- 1.9 For the avoidance of doubt, Letters of Credit obtained in substitution for the release of cash balances from reserve accounts, be these in respect of debt service cover or maintenance, shall form part of the scope of a Refinancing for the purposes of this Protocol.
- 1.10 Where the Debt and or Equity is at bid submission provided in the form of a bridging facility for the period of Construction and or where the Lenders impose a prerequisite requirement for refinancing of External Debt after the achievement of the Commercial Operation Date as part of the bid submission and it complies with all the requirements as set out in the relevant RFP and provided that the benefit thereof has been clearly demonstrated in the Price as contained in that bid submission, the proposed refinancing will not be considered a refinancing for purposes of this Protocol.
- 1.11 Capitalised terms used in this Protocol, if not defined herein, are as defined in the various RFP documents for the applicable IPP Programme⁵.
- 1.12 This Protocol supersedes the previous version of the Protocol dated June 2020 and may in turn be updated from time to time as may be required by the Department.
- 1.13 The IPP Office may issue Guidance Notes to provide further clarity as may be required.

⁵ The independent power producer procurement programmes already conducted or currently being conducted or prepared by the Department, including but not limited to the REIPP Procurement Programme, being conducted pursuant to the determination made by the Minister in consultation with NERSA, pursuant to section 34 of the Electricity Regulation Act.

2. KEY PRINCIPLES

2.1 The key principles underlying the prescribed approach to Refinancing are as follows:

2.1.1 Refinancing may be of benefit to both the Seller and the Department and, as such, a Refinancing may be proposed by either the Seller or the Department;

2.1.2 Refinancing shall constitute **any change to the financing structure of an IPP project as set out in the Financing Agreements entered into by the Seller at Financial Close (the “FC Date”)**. The Department has the right under the terms of the IA to be fully informed of any proposed Refinancing. Furthermore, the Department has the right to consent to or decline any proposed Refinancing. ;

2.1.3 The IPP market in South Africa has matured resulting in better financing terms becoming available. In the broadest sense, both the public and the private sectors have contributed in bringing about this improvement. Therefore, both the public and private sectors should share in the benefits of improved terms;

2.1.4 Apart from the fact that better financing terms have become available to IPPs, different funding instruments have also been placed at the disposal of IPPs. Listed and unlisted bonds and other capital market instruments are accessible to IPPs. Furthermore, National Treasury recently amended Regulation 28 of the Pension Funds Act to widen the scope of potential investments by pension funds;

2.1.5 Increases in the returns to the Seller’s shareholders due to improved performance (over and above those indicated in the FC Model) should generally be for their benefit, however increased returns which derive from changes in the nature of or the terms governing the financing structure of the Project shall be shared between the Department and the Seller’s shareholders;

2.1.6 The portion of the Refinancing Gain accruing to the Seller should be shared

between the Seller's shareholders in the ratio of their shareholdings. Accordingly, any Refinancing may not negatively impact upon the equity financing arrangements relating to the empowerment groups involved in the Seller that were in place at Financial Close. For the avoidance of doubt, this requirement does not extend to any arrangements entered into by the empowerment groups after Financial Close;

- 2.1.7 At a minimum the Refinancing Gains should be shared 50% with the Department however a higher percentage sharing for the benefit of the Department may be agreed on a case-by-case basis;
 - 2.1.8 Key factors to be considered in this context may include the extent to which the Tariff, as bid by the Seller, was subject to effective competition and/or the extent to which the project has performed, or is expected to perform, materially beyond original expectations; and
 - 2.1.9 The benefit of the portion of the Refinancing Gains accruing to the Department should flow through to the electricity consumer through a reduction in the Tariff as set out in the Power Purchase Agreement ("PPA").
- 2.2 The Department through the IPP Office will seek appropriate financial and legal advice when considering a Refinancing request to ensure that the process is implemented in accordance with the principles prescribed in this Protocol and recover the associated cost from the Seller.

3. CONSENT TO REFINANCING NOTICES

3.1 For Refinancing:

- 3.1.1 The Department through the IPP Office has the right to consent to or to decline any proposed Refinancing;
- 3.1.2 When evaluating a proposed Refinancing, consideration will be given as to whether the effects of such proposal might increase the risks borne by the Department;
- 3.1.3 When considering a Refinancing Notice each request will be treated

independently. There may be occasions where, for good reasons, the Department through the IPP Office may refuse to consent to a Refinancing despite the opportunity to share in the resultant Refinancing Gain;

- 3.1.4 As a general rule, no increase in the overall government termination contingent liabilities associated with the project will be allowed as a consequence of any Refinancing undertaken. Therefore, as part of the Refinancing, the calculation of the Compensation on Termination for Government Default in the IA will be amended (refer Appendix A clause 2) to ensure that this requirement is met irrespective of the nature and structure of the proposed Refinancing.

4. PROCESS, METHOD AND TIMING OF CALCULATING, SHARING AND PAYING REFINANCING GAINS

4.1 The high-level principles for calculating, sharing and paying Refinancing Gains are set out below.

4.1.1 Calculation:

- (a) The Refinancing Gain is derived from changes in the Net Present Value (NPV) of dividends or other distributions deriving from the Project for the benefit of the Shareholders (“**Distributions**”), forecast to take place after the Refinancing when compared to the position immediately before the Refinancing;
- (b) Unless the provisions of clause 5 below shall apply, the prescribed discount rate for the NPV calculation is the nominal post-tax internal rate of return on Equity over the full period up to the expiry of the PPA Term as specified in the FC Model at the Effective Date (“Base Case Equity IRR”) as set out in the FC Model. The Department may agree an alternative discount rate with the Seller where such discount rate will result in an improved benefit to the Department when used in the applicable Refinancing; and
- (c) The Seller shall in determining the sharing of the Refinancing Gain provide for the Department’s share to be taken in the form of a Tariff reduction over

the balance of the PPA Term.

4.1.2 Sharing the Refinancing Gain

- (a) The Department's agreed share of the Refinancing Gain shall be calculated:
- (i) without any consideration of adjustment for past operations or performance, or making whole of the project; and
 - (ii) after provision for the Department and Seller's reasonable costs of advisors in connection with the Refinancing, where such costs for each party shall be limited to the lesser of their actual costs incurred or 1% of the Refinancing Gain.
- (b) In order to assess a Refinancing Notice, the Department will need the following information from the Seller:
- (i) The FC Model with the projections that were originally used to calculate the Tariff, adjusted for any Department approved changes in the Project structure and financing (including any prior Refinancing consented to by the Department) which have taken place since the FC Date;
 - (ii) Details of the actual timing and amounts of the cash investments of the Equity (which includes Shareholder Loans) from the Signature Date to date (and estimated to the Refinancing date);
 - (iii) Information on the actual cash flow and financial results of the Seller from the Signature Date to date (and estimated to the Refinancing date), all set out under the same headings as in the FC Model;
 - (iv) Details of the actual timing and amounts of all Distributions from the Signature Date to date (and estimated to the Refinancing date);
 - (v) A pre-Refinancing Financial Model, based on the model in clause 4.1.2(b)(i) above, updated on a forward-looking basis with detailed projections of the cash flows of the Seller from the estimated Refinancing date to the end of the Project Term, taking account of

actual tariffs applicable at proposed date of Refinancing, changes approved by the Department in line with the provisions of the IA and forecast project performance after the Refinancing date. Forecast project performance should be supported by historic records for the applicable performance measures. The pre-Refinancing Financial Model shall include projected Distributions before taking the relevant Refinancing into account;

- (vi) For the purpose of calculating forward looking projections the CPI rate provided for in clause 4.1.3 below shall be applied from the date of the envisaged Refinance for the balance of period modelled in the pre-Refinancing Financial Model;
- (vii) No adjustment shall be made in the pre-Refinancing Model for historic under-performance in accordance with clause 4.1.2(a)(i) above;
- (viii) A signed term sheet and other relevant information on the funding terms of the proposed Refinancing;
- (ix) A post-Refinancing Financial Model, based on the pre-Refinancing Financial Model constructed in accordance with clause 4.1.2(b)(v) above, updated with the projections for the cash flow of the Seller from the estimated Refinancing date to the end of the Project Term, including projected Distributions after taking the relevant Refinancing into account and after allowance has been made for the parties' reasonable costs calculated in accordance with clause 4.1.2(a)(ii) above;
- (x) For the avoidance of doubt, the post-Refinancing Financial Model referred to in clause 4.1.2(b)(ix) above should project the Distributions to shareholders before consideration of the Department's share of the Refinancing Gain.
- (xi) It is emphasised that the only changes permitted in the post-Refinancing Financial Model are those arising as a result of the proposed Refinancing;

- (xii) A calculation of the Department's share in the Refinancing Gain as set out in clause 4.1.1 above. The Refinancing Notice should clearly state the tariff reduction in both ZAR/MWh and percentage terms, with reference to the actual tariff charged to the Buyer applicable at the date of proposed Refinancing as well as the base unindexed tariff as referenced in the PPA;
- (xiii) Information on the assumptions for the projections in the pre-Refinancing and post-Refinancing Financial models;
- (xiv) A revised FC Financial Model, based on the post-Refinancing Financial Model constructed in accordance with clause 4.1.2(b)(ix) above, updated with the projections for the cash flow of the Seller from the estimated Refinancing date to the end of the Project Term, including projected Distributions after taking the relevant Refinancing into account and after allowance has been made for the parties' reasonable costs calculated in accordance with clause 4.1.2(a)(ii) above and the Department's share in the Refinancing Gain;
- (xv) A completed Excel worksheet as supplied to each Seller by the Department setting out the applicable contingent liability profile;
- (xvi) The tables as specified in clause 7.2 below as confirmed with the Department in accordance with clause 7.4 below; and
- (xvii) A checklist containing all of the clauses 4.1.2(b)(i) to 4.1.2(b)(xvi) above with reference to the documents in the Refinancing Notice and supporting documentation where the information required by the relevant clause can be found.

4.1.3 For the purpose of calculating the Refinancing Gain, Sellers must use a CPI rate of 4.5% (four point five percent) or any other rate as may be issued under further Guidance Notes by the Department, as outlined in clause 4.1.2(b)(vi) and clause 4.1.2(b)(ix) above throughout the entire period modelled in their pre-and post-Refinancing Models;

4.1.4 Payment of the Department's share of the Refinancing Gain and

reasonable costs:

- (a) The Department through the IPP Office will invoice the Seller for its reasonable costs, calculated in accordance with clause 4.1.2(a)(ii) above, within 15 days after Financial Close of the Refinancing for payment into the applicable nominated account.
- (b) The Department's share of the Refinancing Gain calculated after allowance for the parties' reasonable costs calculated in accordance with clause 4.1.2(a)(ii) above shall be taken as a reduction in the Tariff.
- (c) The reduction in the Tariff shall not be conditional on the future performance of the project.

5. REVISED EQUITY IRR

- 5.1 Notwithstanding clause 4.1.1(b) above, the Department is willing at its own discretion, given the number of secondary transactions concluded, to consider the application of a "revised Equity IRR" (nominal post-tax) where one or more secondary transactions has been approved by the Department in terms of the IA and have taken place in respect of a specific Seller, where some or all of the original shareholders have been replaced and the new Equity IRR applicable to the most recent transaction (or any other secondary transaction that may be agreed between the Department and the Seller), can be evidenced through the applicable secondary transaction Financial Model.
- 5.2 The Department will assess the proposed revised Equity IRR, and in its assessment will consider factors including, *inter alia*, the date the secondary transaction took place, whether it was approved by the Department, the size of the transaction and whether the proposed revised Equity IRR can be attributed solely to the cash flows of the project, as well as details of all secondary transactions concluded including the size and applicable Equity IRR for each transaction.
- 5.3 The Seller may present the proposed secondary transaction to the Department for

consideration before submission of the Refinancing Notice. Sufficient detail should be provided to inform the Department's consideration.

- 5.4 Confirmation and evidence of the revised Equity IRR must be provided in the model audit letter (as outlined in clause 6 below) and must be submitted as part of the Refinancing Notice.
- 5.5 The IRR as defined in the IA remains applicable for all other purposes.
- 5.6 The revised Equity IRR derived in accordance with this Clause 5 is only to be used for the purposes of calculating the Refinancing Gain in respect of Sellers that have concluded secondary transactions.
- 5.7 For the avoidance of doubt, and in accordance with Clause 3.1.4 above, any change of this nature must not result in an increase in contingent liabilities over and above the level established as at Financial Close.
- 5.8 The Department specifically confirms that the revised Equity IRR will only be applied towards the calculation of the Refinancing Gain in respect of Sellers that have concluded their secondary transactions prior to 23 July 2020. This restriction on the timing of secondary transactions is only applicable to Sellers procured under Bid Window 1, 2, 3 and 3.5 of the REIPP Programme.

6. INDEPENDENT AUDIT LETTER

- 6.1 Sellers will be required to provide an independent model audit review opinion in respect of the Financial Model(s), prepared and signed by a suitably qualified professional firm.
- 6.2 The letter must be addressed to both the Project Company and the Department.
- 6.3 The Department acknowledges that the Seller will receive this audit letter in the style of the individual professional firm, and it will contain that firm's risk management material and disclaimers.
- 6.4 The opinion letter must confirm, at a minimum, the information detailed below:

- 6.4.1 that the auditor will have responsibility and a duty of care to both the Department and the Seller;
- 6.4.2 that the Financial Models reviewed are consistent with the Financial Models submitted to the Department for review and will be used for the purposes of executing the applicable Refinancing;
- 6.4.3 that the discount rate used for the NPV calculation outlined in clause 4.1.1 has been confirmed and evidenced;
- 6.4.4 that the logical integrity, internal consistency and arithmetic accuracy of the formulae, algorithms and calculations within all cells of the Financial Model(s) have been ascertained;
- 6.4.5 that the accounting standards and taxation assumptions used in the Financial Models have been consistently applied throughout;
- 6.4.6 that the Seller's reasonable costs of advisors in connection with the Refinancing are accurately reflected in the applicable Financial Models with consideration to the limitation as outlined in clause 4.1.2 (a)(ii);
- 6.4.7 In the event of a revised Equity IRR being used as the base discount rate for calculating the Refinancing Gain, confirmation that this discount rate has been correctly derived in accordance with this Protocol together with the information as outlined in clause 6.5;
- 6.4.8 that the funding terms and conditions included in the Financial Models are consistent with the applicable debt and equity term sheet(s);
- 6.4.9 that the assumptions used in the applicable Financial Model(s) are consistent with the information provided in accordance with clause 4.1.2(b)(ix) above;
- 6.4.10 that the methodology applied for the calculation of the Refinancing Gain is consistent with the methodology outlined in clause 4 above;
- 6.4.11 that the information provided in the pro-forma Excel worksheets ("the Worksheet") supplied by the Department is consistent with the relevant sections of the Financial Models; and

6.4.12 that the impact on the post-Refinancing Tariff as shown in the applicable tables prepared in the form shown in Table 1 and Table 2 in clause 7 below has been correctly calculated.

6.5 In the event that a revised Equity IRR has been applied in accordance with clause 5 above, the Letter shall include details of the secondary transaction in which the revised Equity IRR was applied as set out below:

Transaction Date	
Selling Shareholder	
Purchasing Shareholder	
Equity Percentage Acquired	
Transaction Value	
Applicable nominal post tax Equity IRR	
Equity IRR verified with reference to ⁶ : 1. Transaction Documents; and/or 2. Transaction Model.	
Confirmation of Transaction Conditions that might have a bearing on the Refinance Process	
Date upon which the Department approved the Transaction	

6.6 The Letter and any dispute arising from it, whether contractual or non-contractual, will be governed by the laws of the Republic of South Africa and will be subject to the exclusive jurisdiction of South African courts.

6.7 The Letter should as a minimum provide the Sellers and the Department with sufficient assurance that both the pre-Refinance Financial Model and the post-Refinance Financial Model are free from material misstatement.

6.8 The Letter shall provide confirmation that the assurance engagement was conducted in accordance with the International Standard on Assurance Engagements 3000 (Revised), Assurance Engagements other than Audits or Reviews of Historical Financial Information (ISAE 3000 (Revised)), issued by the International Auditing and Assurance Standards Board or if not conducted in

⁶ The Model Auditor may enclose supporting documentary proof if considered appropriate.

accordance with ISAE 3000 (revised), state the basis on which the assurance engagement as conducted.

7. MOVEMENT IN INTEREST RATES AND OTHER APPLICABLE FUNDING TERMS BETWEEN SUBMISSION OF THE REFINANCING NOTICE AND COMMERCIAL CLOSE DATE

- 7.1 The Seller shall include the information outlined below in its initial application to NERSA with the request that NERSA approve the amendments necessary to Schedule 7 of the PPA (*Project Documents*) and the applicable revision in Tariff, taking account of the proposed Refinancing, provided that any reduction to the Refinancing Gain accruing to the Department as a result of movements in interest rates and other applicable financing terms between the Submission Date and the Commercial Close Date does not exceed 20% of the reduction in the Tariff as proposed at Submission Date (“**Tolerable Threshold**”).
- 7.2 As part of the Seller’s Refinancing Notice, the Seller shall provide tables in the form indicated in Table 1 and Table 2 below and showing the impact on the post-Refinancing Tariff of changes of +/- 5, 10, 25 and 50 bps in the key financing terms as defined in the term sheets and related documentation provided by the financial institutions supporting the proposed Refinancing.
- 7.3 These terms may include, depending on the nature of the proposed facilities;
- 7.3.1 JIBAR⁷;
 - 7.3.2 CPI;
 - 7.3.3 Fixed and/or variable swap rates; and
 - 7.3.4 Swap termination costs/benefits

⁷ For the purposes of the Tables requested, it should be assumed that the basis point change would occur across the entire JIBAR curve. For example, a 5bps change in every period. At Commercial Close, the JIBAR curve applicable at that point in time should be incorporated in the revised post Refinancing Model.

Table 1: R/MWh change in Tariff reduction due to changes in key financing terms.

	Change in margin/costs	+5 bps	+10 bps	+25 bps	+50 bps	-5 bps	-10 bps	-25 bps	-50 bps
(a)	JIBAR								
(b)	CPI (CPI debt)								
(c)	Swap Rate								
(d)	Swap Termination costs/benefits								

Table 2: Percentage change in Tariff reduction due to changes in key financing terms.

	Change in margin/costs	+5 bps	+10 bps	+25 bps	+50 bps	-5 bps	-10 bps	-25 bps	-50 bps
(a)	JIBAR								
(b)	CPI (CPI debt)								
(c)	Swap Rate								
(d)	Swap Termination costs/benefits								

7.4 The specific terms to be included in the table to be prepared by the Seller shall be agreed with the Department prior to submission of the applicable Refinancing Notice (the “**Adjustable Terms**”). However, the Department may at its discretion request that additional items be added to the list of Adjustable Terms after the Refinancing proposal has been submitted as a result of its consideration of the Refinancing proposal.

- 7.5 The Seller shall confirm that no allowance shall be made at Commercial Close for any changes in funding terms other than the Adjustable Terms. For the avoidance of doubt, no allowance shall be made for any changes to the costs to be incurred by the applicable financial institutions.
- 7.6 Should the changes in the Adjustable Terms between the Submission Date and the Commercial Close Date be associated with a change in the debt hedging profile compared to that shown in the post-Refinancing Financial Model provided at Submission Date, such change in the associated debt hedging profile shall be permitted provided that the reduction in the Refinancing Gain accruing to the Department as a result of movements in the Adjustable Terms does not exceed the Tolerable Threshold.
- 7.7 Should the changes in the Adjustable Terms and the related debt hedging profile between the Submission Date and the Commercial Close Date result in an increase in the Refinancing Gain accruing to the Department, such increase shall be reflected in the post-Refinancing Tariff.
- 7.8 For the avoidance of doubt, no changes shall be permitted to the Refinancing Gain post the adjustment, if any, as envisaged in this clause 7.

8. REFINANCING OF PROJECTS UTILISING CAPITAL MARKET INSTRUMENTS.

- 8.1 In certain instances, IPPs may elect to utilise listed or unlisted bonds or other similar instruments (“Capital Market Instruments”) available in the Capital Markets in order to fund a Refinance.
- 8.2 The Refinancing Notice may not be conditional on the successful conclusion of any intended Capital Market process be it bonds or otherwise. The Seller will be required to make use of a bridging loan arrangement or equivalent that will be substituted by Capital Market Instruments once successfully concluded.
- 8.3 Should the Capital Market Instrument process be unsuccessful the Seller may at its own election proceed with the Refinance utilising the bridging loan or

alternatively elect not to proceed with Refinance. The Seller needs to inform the Department within 10 days of its election.

- 8.4 Should the Seller elect not to proceed with the Refinance following the failure of the Capital Market Instruments raising process the Seller will be liable to the Department for the costs incurred in completing the assessment and obtaining the required approvals.
- 8.5 Should the Capital Market Instrument process be successful, the methodology outlined in clause 7 *supra* will be applicable in the determination of the Refinance gain between the submission of the Refinance Notice and Commercial Close which will be the date on which the Capital Market Instruments are issued.

9. PROCESS AT COMMERCIAL CLOSE

- 9.1 On the Commercial Close Date the Seller shall provide;
- 9.1.1 A revised post-Refinancing Financial Model and a revised FC Financial Model updated to reflect movements in Adjustable Terms between the Submission Date and the Commercial Close Date;
- 9.1.2 A table signed by the person who submitted the submission setting out all changes arising from movements in the Adjustable Terms between the Submission Date and the Commercial Close Date together with the aggregate impact on the post-Refinancing Tariff arising from such changes; and
- 9.1.3 Term sheets and related documentation (e.g., Bloomberg print screens) from the applicable financial institutions confirming the final interest rates and other applicable financing terms.
- 9.2 Provided that the adjustment to the Tariff reduction required as a result of movements in the Adjustable Terms between the Submission Date and the Commercial Close Date does not exceed the Tolerable Threshold, the Seller shall be permitted to execute Commercial Close.

- 9.3 In the event that the adjustment to the Tariff reduction required as a result of movements in the Adjustable Terms between the Submission Date and the Commercial Close Date exceeds the Tolerable Threshold, the Seller shall be required to seek a further approval from NERSA in respect of the required adjustment.
- 9.4 The Seller shall be allowed to propose an increase in the share of the Refinancing Gain accruing to the Department in order to ensure that the adjustment to the Tariff reduction required as a result of movements in the Adjustable Terms between the Submission Date and the Commercial Close Date do not exceed the Tolerable Threshold.
- 9.5 It is a requirement from the IPP Office that Commercial Close shall be within 3 (three) calendar months from the date of receiving all the required approvals. Any extension required by the Seller on last mentioned, will be considered by the Department in its sole discretion and on a case by case basis.
- 9.6 It is a requirement from the IPP Office that Financial Close of the Refinancing shall be within 10 (ten) business days from the finalisation of Commercial Close.

10. AMENDMENT TO THE IMPLEMENTATION AGREEMENT

- 10.1 The IA shall be amended to give effect to the applicable Refinancing Notice using the provided template Agreement in Appendix A of this Refinancing Protocol.
- 10.2 The pre-Refinance Base Case Financial Model applicable immediately prior to the Refinancing shall be attached to the Amendment to the IA as Schedule 5 Part B (*pre-Refinance Financial Model*).
- 10.3 The post-Refinance Base Case Financial Model applicable immediately following Financial Close of the Refinancing, or, if appropriate, successful bond listing, shall be attached to the Amendment to the IA as Schedule 5 Part A (*post-Refinance Financial Model*).

11. THE INDICATIVE PROCESS AND A POSSIBLE TIMETABLE FOR THE CONSENT TO OR APPROVAL OF A REFINANCING NOTICE IS AS FOLLOWS⁸:

Timing*	Action
T+0 BD	The Seller submits: (i) a Refinancing Notice to the Department aligned to the requirements of the Refinancing Protocol; and (ii) the required information to NERSA to start their process for approval of the Tariff reduction.
T+ 15 BD	Initial assessment done and responses received to further information requested by Department
T+ 25 BD	Assessment Completed and recommendation to the Department for approval and to NERSA confirming the Tariff reduction.
T+ 60 BD	Approval of Refinancing and Amendment to IA by the Department's Bid Adjudication Committee (BAC).
T+ 75 BD	NERSA approves for amendment to licence
T+ 90 BD	Finalisation of Amendment to IA and Commercial Close of Refinancing
T+ 100 BD	Eskom sign off for the Amendment to PPA.
T+ 101 BD	Financial Close of Refinancing

* T = Refinancing Request Submission Date; BD = Business days.

11.1 This timetable is indicative, as the circumstances of each transaction will be different, but it is considered a reasonable timescale for the decisions which the Department, Eskom and NERSA has to take in consenting to a Refinancing and approving the necessary IA and PPA Amendments⁹.

11.2 However, it must be noted that although the Department and the IPP Office will endeavour to assist the Seller in obtaining the necessary NERSA approval and the approval from Eskom on the Seller's Amendment to the PPA, the governance processes of NERSA and Eskom are not within the control of the Department.

⁸ Adapted from the United Kingdom's HM Treasury Guidance Note on Calculation of the Authority's Share of a Refinancing Gain.

⁹ These timeframes are premised on the basis of a single Refinancing Notice. In the event that more than one Refinancing Notice is received by the Department and these are required to be assessed simultaneously, the Department depending on resources available may require additional time beyond that indicated in these timeframes and, accordingly, these indicative timelines will be adjusted.

APPENDIX A

[FIRST] AMENDMENT TO THE IMPLEMENTATION AGREEMENT

between

******* (RF) PROPRIETARY LIMITED**

as Seller

and

THE DEPARTMENT OF MINERAL RESOURCES AND ENERGY

as the Department

pursuant to the

**RENEWABLE ENERGY INDEPENDENT POWER PRODUCER PROCUREMENT
PROGRAMME**

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PREAMBLE:

This **[FIRST] AMENDMENT TO THE IMPLEMENTATION AGREEMENT** ("**[First] Amendment to the IA**") is entered into by and between:

- (1) ***** (RF) Proprietary Limited, a limited liability company (Registration No. *****) incorporated under the laws of South Africa and having its principal place of business at ***** in the Republic of South Africa (the "**Seller**"); and
- (2) The Department of Mineral Resources and Energy of the Government of the Republic of South Africa (previously known as the Department of Energy) (the "**Department**");

(together, the "**Parties**", and "**Party**" shall mean either of them).

RECITALS:

- (A) The Seller entered into the Implementation Agreement with the Department on [DATE] (the "**IA**") following the Seller's selection as the preferred bidder by the Department under the Renewable Energy Independent Power Producer Procurement Programme.
- (B) Pursuant to a refinancing initiative initiated by the Department in July 2020, the Seller submitted a written refinancing proposal in terms of clause 8 of the IA (the "**Refinancing Proposal**").
- (C) After assessment of the Refinancing Proposal, the Refinancing Proposal was approved by the Department.
- (D) Clause 24.2 of the IA states that the IA may not be supplemented, amended, varied or modified in any manner except by an instrument in writing signed by a duly authorised officer or representative of the Seller and the Department.
- (E) Accordingly, the Parties wish to enter into this [First] Amendment to the IA to record the amendments to the IA as a result of, and in order to give effect to the Refinancing Proposal.

THE PARTIES AGREE as follows:

1. Definitions and Interpretation

- 1.1. Capitalised terms which are used in this [First] Amendment to the IA shall, unless otherwise defined in this [First] Amendment to the IA, have the same meanings ascribed to them in the IA.
- 1.2. All references in the IA to "*this Agreement*" shall be deemed to be references to the IA as amended by this [First] Amendment to the IA.
- 1.3. The provisions of clause 1 (*Definitions and Interpretation*) of the IA are incorporated *mutatis mutandis* into this [First] Amendment to the IA as if each provision was set out in full herein.

2. Amendments to the IA

The Parties agree that with effect from the date of signature of this Third Amendment to the IA, the IA shall be amended by:

- 2.1. deleting the definitions of Financial Model and Financing Agreements in clause 1 (*Definitions and Interpretation*) and replacing them with the following definitions respectively:

"Financial Model" means the financial base case for the Project as reflected in the computer model attached to this Agreement on disk as Schedule 5 (*Financial Model*), which model incorporates the forecast cash flow statements of the Seller including all expenditure, revenues, taxation and financing of the Construction, Operation and Maintenance of the Facility together with the income statements and balance sheets for the Seller over the Term, and details of all assumptions, calculations and methodology used in the compilation thereof. Where a refinancing has been approved by the Department, the base case Financial Model will be retained as Schedule 5 - Part B and the post refinancing Financial Model, immediately following Financial Close of the Refinancing, will be attached as Schedule 5 – Part A;"

"Financing Agreements" means:

- (a) *the agreements relating to the Debt listed in Schedule 6 (Project Documents) and including all amendments thereto approved in advance by the DoE;*
- (b) *any master agreement, confirmation, schedule or other agreement entered into or to be entered into to comply with the provisions of the agreements referred to in (a) in relation to the hedging of exposure to interest rate changes and foreign currency exchange rate fluctuations only;"*

2.2. amending the first sentence in clause 12.2.4 to read as follows:

"Each calculation to be made by the Independent Expert shall use the relevant Financial Model referred to in clause 12.2.6."

2.3. inserting a new clause 12.2.6, immediately after clause 12.2.5, to read as follows:

"For the purposes of calculating the Debt and the Expected Equity Value on termination for Government Default in terms of this clause 12 (Compensation on Termination for Government Default), the amount payable to the Seller as contemplated in clause 12.1.2 in respect of the Debt and Expected Equity Value shall, subject to the allowable changes contemplated in clause 12.2.4, be the lower of:

12.2.6.1 the aggregate amount calculated with reference to the version of the Financial Model attached as Schedule 5, Part A (Financial Model – post refinancing model); and

12.2.6.2 the aggregate amount calculated with reference to the version of the Financial Model attached as Schedule 5, Part B (Financial Model – base case model),

where:

- (i) *the Debt being calculated in terms of this clause 12.2.6 shall only be the portion of the Debt under the agreements referred to in (a) of the definition of "Financing Agreements", and the portion of the Debt under the*

agreements referred to in (b) of the definition of “Financing Agreements” shall still be the amount determined in terms of clause 12.1.2; and

(ii) the Debt calculation in clause 12.2.6.2 above relates to the Debt under the Financing Agreements before they were changed by the amendment of this Agreement.”

- 2.4. deleting Schedule 5 (*Financial Model*) of the IA in its entirety and replacing it with an updated Schedule 5 (*Financial Model*) Part A (*Financial Model – post refinancing model*) and Part B (*Financial Model – base case model*) attached hereto as **Appendix A**; and
- 2.5. deleting Schedule 6 (*Project Documents*) of the IA in its entirety and replacing it with an updated Schedule 6 (*Project Documents*) attached hereto as **Appendix B**.

3. No Further amendments to the IA

Save as otherwise provided in the IA and clause 2 (*Amendments to the IA*) of this [First] Amendment to the IA, the terms of the IA shall remain unaltered and shall continue in full force and effect.

4. DMRE Warranties

The DMRE represents and warrants to the Seller as on the date of signature of this [First] Amendment to the IA and on each day thereafter during the Term, as follows:

- 4.1. it is duly established under the laws of South Africa and has the right, power and authority to enter into this [First] Amendment to the IA and to perform its obligations hereunder; and
- 4.2. the execution and performance of this [First] Amendment to the IA by it has been duly authorised by all necessary action, and its obligations hereunder constitute valid, binding and enforceable obligations.

5. Incorporation of various clauses from the IA

The provisions of clauses 17 (*Fast Track Dispute Resolution*), 18 (*Dispute Resolution*), 19 (*Liability*), 20 (*Confidentiality*), 21 (*Governing Law and Jurisdiction*), 22 (*Notices*) and 24 (*Miscellaneous*) of the IA are incorporated into this [First] Amendment to the IA *mutatis mutandis* as if each clause was set out in full herein.

6. Entire Agreement

This [First] Amendment to the IA constitutes the entire agreement between the Seller and the Department in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings in respect of such subject matter.

7. Counterparts

This [First] Amendment to the IA may be executed in any number of counterparts or duplicates, each of which shall be an original, and such counterparts or duplicates shall together constitute one and the same agreement.

IN WITNESS WHEREOF, the Parties have caused this [First] Amendment to the IA to be executed by their duly authorised representatives.

*******(RF) PROPRIETARY LIMITED**

By: _____

Name:

Title:

Date:

**THE DEPARTMENT OF MINERAL
RESOURCES AND ENERGY**

By: _____

Name:

Title:

Date: