

PART 6 OF THE SCHEDULE: LENDERS DIRECT AGREEMENT

PART 6 OF THE SCHEDULE

Lender Direct Agreement - Project Agreement

THIS AGREEMENT IS MADE ON

AMONG:

- (1) [] (the "Trust");
- (2) [] on behalf of itself and as [agent] for the Senior Funders (in this capacity the ["Agent"]); and
- (3) [] Limited company no [] whose registered office is at [] ("Project Co")

IT IS AGREED AS FOLLOWS:

1. INTERPRETATION

1.1 Definitions

In this Agreement:

"Affiliates"	Means [];
"Appointed Representative"	Means a Representative that has been notified to the Trust pursuant to a Step-In Notice;
"Enforcement Event"	Means [acceleration of maturity - see relevant clause of Senior Funder Agreement/bond trust deed]
"Event of Default"	[Insert wording from Senior Funders Agreement]
"Event of Insolvency"	Means [incorporate appropriate cross references from Project Agreement] (inclusive) of a Project Co Event of Default;
"Notice of Intent"	Means the notice given by the Agent to the Trust pursuant to Clause 4.2 stating that the Agent intends to issue a Step In Notice;
"Novation Agreement"	Means an agreement in the form of Part 2 of the

	Schedule to this Agreement;
"Novation Date"	Means the date a novation takes effect in accordance with Clause 7.4;
"Project Agreement"	Means an agreement dated [] between Project Co and the Trust relating to the Project;
"Representative"	Means: <ul style="list-style-type: none"> (a) the Agent, any Senior Funder and/or any of their Affiliates; (b) an administrative receiver, receiver or receiver and manager of Project Co appointed under the Security Documents; (c) an administrator of Project Co; (d) a person directly or indirectly owned or controlled by the Agent and/or any Senior Funders; or (e) any other Suitable Substitute Contractor, provided that the Agent and the Senior Funders remain banks or other financial institutions;
"Required Period"	Means the period starting on the date of a Termination Notice and ending 60 Business Days later;
"Security Documents"	<i>[list the security documents forming part of the Financing Agreements]</i>
"Senior Funders"	Means [insert details if not included in Project Agreement];
"Step-In Date"	Means, subject to Clause 4, the date on which the Agent gives the Trust a Step-In Notice;
"Step-In Notice"	Means the notice given by Project Co to the Trust pursuant to Clause 4.1 stating that the Agent is

exercising the step-in rights under this Agreement and identifying the Appointed Representative;

"Step-In Period"

Means the period from the Step-In Date up to and including the earlier of:

- (a) the Step-Out Date;
- (b) the date of any transfer under Clause 7;
- (c) the date of any termination for breach under Clause 5;
- (d) the date of expiry of the Project Agreement; and
- [(e) the later of the date falling 1 year after the Actual Completion Date and the date falling 2 years after the Step-In Date;]

"Step-In Undertaking"

Means a Step-In Undertaking in the form of Part 1 of the Schedule to this Agreement;

"Step-Out Date"

Means the date falling 20 Business Days after the date of a Step-Out Notice;

"Step-Out Notice"

Means a notice from the Agent or Appointed Representative to the Trust pursuant to Clause 6 (Step Out);

"Suitable Substitute Contractor"

Means a person approved by the Trust (such approval not to be unreasonably withheld or delayed) as:

- (a) having the legal capacity, power and authority to become a party to and perform the obligations of Project Co under the Project Agreement; and
- (b) employing persons having the appropriate qualifications, experience and technical competence and having the resources available to it (including committed financial resources and sub-

contracts) which are sufficient to enable it to perform the obligations of Project Co under the Project Agreement;

- (c) where no officers of the person has committed a criminal offence or act of grave misconduct in the course of his business or profession;
- (d) which is not an entity forming part of the same group of companies as the Project Co or any subcontractor of the Project Co whose contract has been terminated for default within the preceding 12 months; and
- (e) which is not a [Prohibited Person].

"Termination Notice"

Means a notice given by the Trust to the Agent under Clause 3.2.

1.2 Interpretation

- 1.2.1 Capitalised terms defined in the Project Agreement shall have the same meaning in this Agreement.
- 1.2.2 The clause and paragraph headings in this Agreement are for ease of reference only and are not to be taken into account in the construction or interpretation of any provision to which they refer.
- 1.2.3 Unless the context otherwise requires:
 - (i) a reference in this Agreement to any clause, sub-clause, paragraph, schedule or annex is, except where it is expressly stated to the contrary, a reference to such clause, sub-clause, paragraph, schedule or annex of this Agreement;
 - (ii) without prejudice to any requirement to obtain the consent of the Trust to the same, references in this Agreement to this Agreement or to any other such document shall include any permitted variation, amendment or supplements to such document;
 - (iii) references in this Agreement to any enactment, order, regulation or other similar instrument shall be construed as a reference to the

enactment, order, regulation or instrument (including any EU instrument) as amended or re-enacted;

- (iv) without prejudice to any requirement to obtain the consent of the Trust to the same, references in this Agreement to a person includes firms and corporations and their successors and permitted assignees or transferees;
- (v) words in this Agreement importing any one gender include both other genders and may be used interchangeably; and
- (vi) words in this Agreement importing the singular meaning, include the plural meaning and vice versa.

2. Consent to Security

- 2.1 The Trust acknowledges notice of, and, subject to Clause 16, consents to, the security interest granted over Project Co's rights under the Project Agreement effected by Project Co in favour of the [Security Trustee] under the Security Documents.
- 2.2 The Trust confirms that it has not, prior to its execution of this Agreement, received written notice of any other security interest granted over Project Co's rights under the Project Agreement.
- 2.3 Except as specifically provided for in this Agreement, the Trust has no obligations (whether express, implied, collateral or otherwise) to the Agent, the Security Trustee and/or the Senior Funders in connection with this Agreement or the Project Agreement or the Project.

3. No Termination for Project Co Event of Default without Notice

- 3.1 Subject only to Clauses 3.2 and 5, the Trust may terminate the Project Agreement at any time if it is entitled to do so under the terms of the Project Agreement.
- 3.2 Prior to the Step-In Date or the Novation Date the Trust shall not terminate or serve notice terminating the Project Agreement in respect of a Project Co Event of Default without giving to the Agent:
 - 3.2.1 at least the Required Period of prior written notice (a "Termination Notice") stating:
 - (i) that a Project Co Event of Default has occurred and the proposed [Termination Date]; and

(ii) the grounds for termination in reasonable detail, and

3.2.2 not later than the date falling 20 Business Days after the date of a Termination Notice, a notice containing details of any amount owed by Project Co to the Trust and any other liabilities or obligations of Project Co to the Trust of which the Trust is aware (having made proper enquiry) which are:

(i) accrued and outstanding at the date of the Termination Notice; and/or

(ii) which will fall due after the date of the Termination Notice and on or prior to the end of the Required Period.

4. Right to Appoint Representative

4.1 Subject to Clause 4.2 and, subject to Clause 16, without prejudice to the Agent's rights under the Security Documents, the Agent may give the Trust a Step-In Notice (a "Step-In Notice") at any time:

4.1.1 during which a Project Co Event of Default is subsisting whether or not a Termination Notice has been served but:

(i) without prejudice to any right of the Trust to exercise any termination right in respect of the same subject to the service of a Termination Notice or to exercise any termination right arising other than in respect of a Project Co Event of Default in each case prior to the issue of such Step-In Notice; and

(ii) provided that where a Termination Notice has been served such Step-In Notice must be issued on or prior to the expiry of the relevant Required Period; or

4.1.2 during the Required Period.

4.2 The Agent shall give the Trust not less than 25 Business Days prior notice (a "Notice of Intent") of:

4.2.1 its intention to issue a Step-In Notice; and

4.2.2 the identity of the proposed Appointed Representative.

4.3 Where a Notice of Intent is issued and at that time no Termination Notice has been served the Trust shall, not later than 20 Business Days after the date of that Notice of

Intent, give to the Agent a notice containing details of any amount owed by Project Co to the Trust and any other liabilities or obligations of Project Co to the Trust of which the Trust is aware (having made proper enquiry) which are:

- 4.3.1 accrued and outstanding at the date of the Notice of Intent
- 4.3.2 which will fall due after the date of the Notice of Intent and on or prior to the date falling [60] Business Days after the date of the Notice of Intent.

4.4 Subject to:

- 4.4.1 clause 4.2; and
- 4.4.2 the prior written approval of the Trust (which shall not be unreasonably withheld or delayed) in the case of an Appointed Representative proposed under paragraph (e) of the definition of Representative,

on the issue of the Step-In Notice, the Appointed Representative shall assume jointly with Project Co the rights of Project Co under the Project Agreement and thereafter, until the end of the Step-In Period the Trust shall deal with the Appointed Representative and not Project Co.

5. Termination

5.1 Notwithstanding any other provision of this Agreement, the Trust may not terminate the Project Agreement as a result of a Project Co Event of Default:

5.1.1 at any time other than during a Step In Period or on or after the Novation Date unless a Termination Notice has been delivered by the Trust in accordance with Clause 3.2 and until the first to occur of:-

- (i) the expiry of 35 Business Days from the Termination Notice without the Agent having delivered to the Trust a Notice of Intent;
- (ii) receipt by the Trust of written notice by the Security Trustee that it does not intend to issue a Step-In Notice on or prior to the expiry of the Required Period;
- (iii) the expiry of the Required Period without a Step In Notice having been issued in accordance with Clause 4.1;
- (iv) the Step Out Date

unless the Novation Date has occurred

5.1.2 during any Step-In Period except unless:

- (i) any amount (to the extent the same is a payment liability) referred to in Clause 3.2.(b)(i) above or, where no Termination Notice has been issued, any amount referred to in Clause 4.3(a) above, has not been paid to the Trust on or before the Step-In Date; or
- (ii) any amount (to the extent the same is a payment liability) referred to in Clause 3.2.(b)(ii) or, where no Termination Notice has been issued, any amount referred to in Clause 4.3(b) above, has not been paid on or before the last day of the Required Period or, where no Termination Notice has been issued, on or before the date following 60 Business Days after the date of the Notice of Intent or, if later, the Step-In Date; or
- (iii) amounts (to the extent the same are payment liabilities) of which the Trust was not aware (having made proper enquiry) at the time of any notice issued under Clauses 3.2(b) or 4.3 and which should have been included in such notices, subsequently become payable and are not discharged on or before the date falling 20 Business Days after the date on which the liability for these amounts is notified to the Agent, or if later, the Step-In Date; or
- (iv) on any other breach by the Appointed Representative of the Step-In Undertaking, other than as referred to at Clauses 5.1(b)(i) to (iii) above, which breach is not remedied within 30 Business Days of delivery of written notice by the Trust to the Appointed Representative of the same; or
- (v) without prejudice to Clauses 5.1(b)(i) to (iv) above, on grounds arising after the Step-In Date in accordance with the terms of the Project Agreement (provided that deductions that arose under [the performance incentive system or due to unavailability] prior to the Step-In Date shall not be taken into account during the Step-In Period for the purpose of determining any termination rights (but shall be taken into account for the purposes of calculating any amount payable by the Trust under the Project Agreement) but such deductions (to the extent applicable under the terms of the Project Agreement) shall be taken into account after the Step-Out Date.

- (vi) without prejudice to Clauses 5.1(b)(i) to (iv) above on grounds arising prior to the Step-In Date where:
 - (a) the grounds arose prior to the Actual Completion Date, and the Actual Completion Date does not occur on or before the date [12] months after the date on which the Trust would have been entitled to terminate the Project Agreement for non-completion of the Works; or
 - (b) the grounds arose after the Actual Completion Date, and neither the Appointed Representative nor Project Co is using all reasonable endeavours (including implementation of any remedial programme) to remedy any breach of the Project Agreement that:
 - (1) arose prior to the Step-In Date; and
 - (2) which is continuing (and capable of remedy); and
 - (3) which would have entitled the Trust to terminate the Project Agreement; or
 - (c) the grounds (whenever they first arose) did not give rise to any right to terminate until after the Step-In Notice; or

5.1.3 on or after the Novation Date:

- (i) on a breach by the Suitable Substitute Contractor of the Novation Agreement which breach is not remedied within 30 Business Days of delivery of written notice by the Trust to the Suitable Substitute Contractor of the same;
- (ii) without prejudice to paragraph (c)(i) above, on grounds arising after the Novation Date in accordance with the terms of the Project Agreement; and
- (iii) without prejudice to paragraphs (c)(i) and (ii) above, if the Actual Completion Date does not occur on or before the date [] months after the date on which the Trust would have been entitled to terminate the Project Agreement for non-completion of the Works.

6. Step-Out

- 6.1 The Appointed Representative may at any time during the Step-In Period deliver to the Trust a Step-Out Notice which shall specify the Step-Out Date.
- 6.2 On expiry of the Step-In Period:
- 6.2.1 the obligations and liabilities of the Appointed Representative against the Trust under the Project Agreement arising after the expiry of the Step-in Period shall be assumed by Project Co to the exclusion of the Appointed Representative; and
- 6.2.2 the Trust shall no longer deal with the Appointed Representative and shall deal with Project Co in connection with the Project Agreement.
- 6.3 Project Co shall continue to be bound by the terms of the Project Agreement, notwithstanding the occurrence of a Step-In Notice, a Step-In Period, a Step-Out Notice, Step-Out Date, any action by the Agent or Appointed Representative or the Senior Funders and/or any provision of this Agreement.

7. Novation

- 7.1 Subject to Clause 7.2, at any time:
- 7.1.1 after an Enforcement Event has occurred; or
- 7.1.2 during the Step-In Period; or
- 7.1.3 prior to the expiry of any Required Period

the Agent may, subject to Clause 7.2, on not less than 20 Business Days' prior notice to the Trust and any Appointed Representative, procure the transfer of Project Co's rights and liabilities under the Project Documents to a Suitable Substitute Contractor in accordance with the provisions of Clause 7.4.

- 7.2 The Trust shall notify the Agent as to whether any person to whom the Agent proposes to transfer Project Co's rights and liabilities under the Project Documents is a Suitable Substitute Contractor, on or before the date falling 20 Business Days after the date of receipt from the Agent of all information reasonably required by the Trust to decide whether the proposed transferee is a Suitable Substitute Contractor.
- 7.3 The Trust shall not unreasonably withhold or delay its decision on whether the proposed transferee is a Suitable Substitute Contractor and it shall, without limitation, be reasonable for the Trust to withhold its consent if there are unremedied breaches

under the Project Documents and there is no rectification plan reasonably acceptable to the Trust in respect of the breaches.

7.4 Upon approval by the Trust of the Suitable Substitute Contractor the Project Co, the Agent and the Suitable Substitute Contractor will execute a [Novation Agreement] whereupon:

7.4.1 Project Co and the Trust will be released from their obligations under the Project Agreement to each other (the "discharged obligations");

7.4.2 the Suitable Substitute Contractor and the Trust will assume obligations towards each other which differ from the discharged obligations only insofar as they are owed to or assumed by the Suitable Substitute Contractor instead of Project Co;

7.4.3 the rights of Project Co against the Trust under the Project Documents and vice versa (the "discharged rights") will be cancelled;

7.4.4 the Suitable Substitute Contractor and the Trust will acquire rights against each other which differ from the discharged rights only insofar as they are exercisable by or against the Suitable Substitute Contractor instead of Project Co;

7.4.5 any then subsisting ground for termination of the Project Agreement by the Trust shall be deemed to have no effect for the purposes of any termination rights arising therefrom and any subsisting Termination Notice shall be automatically revoked;

7.4.6 the Trust shall enter into a direct agreement with the Suitable Substitute Contractor and a representative of Senior Funders lending to the Suitable Substitute Contractor on substantially the same terms as this Agreement; and

7.4.7 any [deductions] that arose under the [performance incentive system] or due to [unavailability] prior to that time shall not be taken into account in determining whether a Project Co Event of Default has occurred but shall be taken into account for the purposes of determining any payments due by the Trust under the Project Agreement.

8. Miscellaneous

8.1 The Trust shall at Project Co's expense, take whatever action the Agent, an Appointed Representative or a Suitable Substitute Contractor taking a transfer in

accordance with Clause 7.1 may require for perfecting any transfer or release under Clause 4 [*Representative*], Clause 6 [*Step-Out*] and Clause 7 [*Novation*] including the execution of any transfer or assignment, and the giving of any notice, order or direction and the making of any registration which, in each case, the Agent or Appointed Representative or Suitable Substitute Contractor reasonably requires.

8.2 The Trust shall not take any action to wind up, appoint an administrator or sanction a voluntary arrangement (or similar) in relation to Project Co.

8.3 This Agreement shall remain in effect until the earlier of:

8.3.1 the date on which all amounts which may be or become owing by Project Co to the Senior Funders under the Financing Agreements have been irrevocably paid in full;

8.3.2 the date of termination of the Project Agreement; or

8.3.3 the date of transfer of Project Co's rights and liabilities under the Project Documents to a Suitable Substitute Contractor pursuant to Clause 7.1.

8.4 The Agent shall promptly notify the Trust of:

8.4.1 any Event of Default and any action taken in connection with such Event of Default, any decisions to accelerate the maturity of any amounts owing by Project Co to the Senior Funders under the Senior Funder Agreement and/or any decisions to demand repayment; and

8.4.2 the date referred to in Clause 8.3(a) above on or before the date falling 20 Business Days after its occurrence.

8.5 Project Co joins in this Agreement to acknowledge and consent to the arrangements set out and agrees not knowingly to do or omit to do anything that may prevent any party from enforcing its rights under this Agreement.

8.6 For the avoidance of doubt, if there is any conflict or inconsistency between the provisions of this Agreement and the Project Agreement, the provisions of this Agreement shall prevail.

9. Assignment

9.1 No party to this Agreement may assign or transfer any part of its rights or obligations under this Agreement save as provided in this Clause 9.

- 9.2 The Agent may assign or transfer its rights and obligations under this Agreement to a successor Agent in accordance with the [Financing Agreements], provided the assignee or transferee is a bank or other financial institution, without the consent of the Trust.
- 9.3 Any Senior Funder may assign or transfer its rights under the [Financing Agreements] in accordance with the terms of the [Financing Agreements] provided the assignee or transferee is a bank or other financial institution.
- 9.4 The Trust may transfer its rights and obligations under this Agreement to any permitted assignee of its interest in the Project Agreement and the Agent and the Senior Funders shall co-operate with the Trust in completing the formalities of any transfer or assignment including by executing any additional documents as may be required by the Trust.
- 9.5 If Clause 9.2 applies in relation to the Agent, the Trust shall enter into a new direct Agreement with the new Agent on substantially the same terms as this Agreement.

10. Entire Agreement

Unless otherwise stated in this Agreement, this Agreement constitutes the entire agreement between the parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of this Agreement. No party has relied on any representation except as expressly set out in this Agreement.

11. Waiver

- 11.1 The failure of any party to exercise any contractual right or remedy shall not constitute a waiver thereof until communication in writing under Clause 11.2.
- 11.2 No waiver shall be effective unless it is communicated in writing to the other party.
- 11.3 A waiver of any right or remedy arising from a breach of contract shall not constitute a waiver of any right or remedy arising from any other breach of this Agreement.

12. Severability

If any term, condition or provision contained in this Agreement shall be held to be invalid, unlawful or unenforceable to any extent, such term, condition or provision shall not affect the validity, legality or enforceability of the remaining parts of this Agreement.

13. Confidentiality

The Agent shall be bound to comply with the obligations on the part of Project Co contained in Clause [52] of the Project Agreement in relation to all information and matters obtained from any other party under or in connection with the Project.

14. Notices consents and approvals

14.1 Any notice served under or in connection with this Agreement is to be in writing and shall be deemed to have been served:-

14.1.1 if delivered at the time of delivery; or

14.1.2 if posted at noon (Greenwich mean time) one Business Day after posting;
or

14.1.3 if set by fax at the time shown in the relevant transmission report for the complete fax.

provided that a notice or other communication received on a non-Business Day or after 5p.m. in the place of receipt shall be deemed to be received at 9a.m. on the next following Business Day in such place.

14.2 Any notice to be given to the Trust should be marked for the attention of [] and delivered to [] or faxed to [] or such other party or address or fax number as notified in writing to the Agent by the Trust.

14.3 Any notice to be given to the Agent should be marked for the attention of [] and delivered to [] or faxed to [] or such other party address or fax number as notified in writing to the Trust by the Agent.

14.4 Any consent or approval under this Agreement is required to be obtained before the act or event to which it applies is carried out or done and is to be treated as effective only if the consent or approval is given in writing.

15. Project Agreement provisions re assignment and Change of Control

Nothing in this Agreement constitutes:

15.1 a waiver of the provisions of Clauses [Assignment] or [Change of Control] of the Project Agreement in relation to any assignation or transfer pursuant to an

enforcement of the security constituted by or the Security Documents or exercise of any other rights pursuant to the terms of the Security Documents;

15.2 a consent to a transfer by the Agent or any of the Senior Funders to a party other than a bank or financial institution of its rights under this Agreement.

16. Governing law

16.1 This Agreement is governed by the laws of Scotland.

16.2 The parties agree that the courts of Scotland shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Agreement and irrevocably submit to the jurisdiction of those courts.

In witness whereof these presents consisting of this and the [] preceding pages and the Schedule in 2 parts are executed as follows:-

Signed for and on behalf of []Witness
[Trust] by [], as AuthorisedFull Name
Signatory at [] on []Address
2002 before this witness

Signed for and on behalf of []Witness
[Agent] by [], as AuthorisedFull Name
Signatory at [] on []Address
2002 before this witness

Signed for and on behalf of []Witness
Limited by [], as AuthorisedFull Name
Signatory at [] on []Address
2002 before this witness

SCHEDULE**Part 1****Form of Step-In Undertaking**

The Appointed Representative undertakes from the Step-In Date

1. To pay all amounts due and outstanding from the Project Co to the Trust as notified by the Trust pursuant to Clauses 3.2(b) and 4.3;
2. To use all reasonable endeavours promptly to perform or procure the performance of all outstanding obligations and liabilities of the Project Co under the Project Agreement then unperformed and undischarged as notified by the Trust pursuant to Clauses 3.2(b) and 4.3 (except as provide for in paragraph 1 above) and in any event within 20 Business Days after the date on which the liability for these amounts is notified by the Trust or, if later, the Step-In Date; and
3. To promptly perform and discharge, or to procure the performance and discharge of, all other obligations and liabilities of the Project Co under the Project Agreement jointly and severally with the Project Co in accordance with the provisions of the Project Agreement and in any event in the case of payment liabilities arising in respect of the period prior to the Step-In Date but not notified by the Trust pursuant to Clauses 3.2(b) and 4.3 on the last day of the Required Period or, where no Termination Notice has been issued, on or before the date following 60 Business Days after the date of the Notice of Intent or if later the Step-In Date.

SCHEDULE

Part 2

Form of Novation Agreement

NOVATION AGREEMENT among

- (1) [] (the "Trust");
- (2) [] on behalf of itself and as [agent] for the Senior Funders (in this capacity the ["Agent"])
- (3) [] LIMITED (company number []) whose registered office is at [] ("Project Co"); and
- (4) [] LIMITED (company number []) whose registered office is at [] ("Suitable Substitute Contractor")

CONSIDERING THAT pursuant to Clause 7 of a Lender Direct Agreement dated [] 20 [] (the **Direct Agreement**) among the Trust, the Agent and the Project Co, the Substituted Entity has agreed to become a Suitable Substitute Contractor as provided for in the Direct Agreement and the Council has consented to such Suitable Substitute Contractor where required in accordance with Clause 7 of the Direct Agreement.

NOW IT IS HEREBY AGREED AND DECLARED THAT:-

- (1) **Novation** In consideration of the Trust agreeing to the Suitable Substitute Contractor becoming a Suitable Substitute Contractor pursuant to the provisions of the Clause 7 of the Direct Agreement, the Suitable Substitute Contractor hereby affirms and ratifies the Project Agreement as amended by the Direct Agreement and, by the execution of this Deed, agrees by way of a novation by way of delegation to observe and be bound by and to perform the terms and provisions of the Project Agreement in so far as they apply to a Suitable Substitute Contractor pursuant to the provisions of Clause 7 of the Direct Agreement as if it was an original party as such to the Project Agreement.
- (2) **Notices** The Suitable Substitute Contractor's address for notices and demands under the Project Agreement is as follows:-

Address:

Fax:

email:

Telephone:

Attention:

- (3) **Law** This Deed is governed by the law of Scotland [and add full submission to jurisdiction if necessary]: IN WITNESS WHEREOF.

