

Optional Downward Flexibility Management (ODFM)

General Terms and Conditions

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1. Introduction

- 1.1 These **ODFM General Terms and Conditions** shall apply to the **ODFM Service Terms**, the **ODFM Glossary and Rules of Interpretation**, and any other document published or to be published by **NGESO** which states (howsoever expressed) that it is governed by or subject to these **ODFM General Terms and Conditions** (in this document, “a **Related Balancing Services Document**”).
- 1.2 If there is any conflict between any of the provisions of these **ODFM General Terms and Conditions** and any **Related Balancing Services Document**, then the provision of the **Related Balancing Services Document(s)** shall prevail.

2. Changes to these ODFM General Terms and Conditions

- ~~2.1 Subject always to paragraph **Error! Reference source not found.2-2**, **NGESO** may update these **ODFM General Terms and Conditions** from time to time by publication of the changes an updated version on its **NGESO's** website which, and each such updated version shall take effect be effective from such time and the date as may be specified by **NGESO**, save shown on its front cover provided always that:-~~
- ~~(i) (unless otherwise required by **Law** no such changes) any updated version shall only apply to any **Balancing Services Contract** whose term shall not have expired by such time and date; and~~
- ~~2.1 (ii) with respect to any **Service Week** if published prior to the deadline for submission of **Weekly Availability Declarations** with respect to that **Service Week** as set out in the **ODFM Service Terms**.~~
- 2.2 To the extent required by the **Electricity Balancing Guidelines**, (and by reference to those provisions of the **Optional Downward Flexibility Management Documents** constituting terms and conditions approved by the **Authority** as the terms and conditions related to balancing pursuant to Article 18 of the **Electricity Balancing Guidelines**), any variation to these **ODFM General Terms and Conditions** will be proposed and implemented in accordance with the applicable requirements in the **Electricity Balancing Guidelines**.
- ~~2.3 When publishing changes to these **ODFM General Terms and Conditions**, **NGESO** may also publish a consolidated version of changes made to these **ODFM General Terms and Conditions**, but the consolidated version will not be a formal document and may not be relied upon in any way.~~

3. ODFM Glossary of Terms and Rules of Interpretation

- 3.1 Unless the context otherwise requires, any capitalised term used in these **ODFM General Terms and Conditions** shall have the meaning given to it (if any) in the prevailing **ODFM Glossary of Terms and Rules of Interpretation**, and the rules of interpretation set out in that document shall also apply.

4. Payments

- 4.1 Where amounts falling due by or to **NGESO** under a **Related Balancing Services Document** are expressed in that **Related Balancing Services Document** to be payable in accordance with this paragraph 4, then with respect to all and any such amounts the following provisions shall apply.
- 4.2 On the eighth (8th) **Business Day** of each calendar month **NGESO** shall send to the **Balancing Service Provider** a statement (the “**Monthly Statement**”) setting out details of the following (to the extent applicable) in respect of the preceding calendar month, together with such other information as may be required to be provided under the **Related Balancing Services Document**:-
- 4.2.1 in relation to each applicable **Balancing Services Contract**:-
- 4.2.1.1 the aggregate number of hours of service provision, with respect to both availability and utilisation;
- 4.2.1.2 details of events of default or service failures, and any consequential amounts withheld by or payable to **NGESO** with respect thereof;
- 4.2.1.3 the amounts payable by or to **NGESO** as a result; and
- 4.2.2 in relation to all applicable **Balancing Services Contracts**, the total net amount falling due to or from the **Balancing Service Provider**.

- 4.3 If the **Balancing Service Provider** disagrees with the content of any **Monthly Statement**, it may notify **NGESO** in writing, with evidence upon which it relies in support of such disagreement, no later than the date falling ten (10) **Business Days** after receipt thereof, but in the absence of any such notification by such date the **Monthly Statement** shall be final and binding on the **Parties** subject only to paragraph 4.5.
- 4.4 Where a disagreement is notified by the **Balancing Service Provider** pursuant to paragraph 4.3, the **Parties** shall discuss and endeavour to resolve the same in good faith, and any revisions to a **Monthly Statement** agreed as a result thereof shall be reflected in a revised **Monthly Statement**, which shall promptly be issued by **NGESO**. In the absence of agreement, the **Monthly Statement** shall be binding upon the **Parties** until such time as otherwise agreed in writing between the **Parties** or as may otherwise be determined by an **Expert** following a referral by either **Party** to an **Expert** for determination, and which in each case shall be reflected in a revised **Monthly Statement** which shall promptly be issued by **NGESO**.
- 4.5 Where, having regard to any **Settlement Run** or to the results of any other monitoring by **NGESO** of service delivery, **NGESO** or the **Balancing Service Provider** discovers that some or all of any calculations and/or amounts falling due shown in any **Monthly Statement** are incorrect, then it shall promptly notify the other in writing whereupon **NGESO** shall, at its discretion subject to verification by NGESO, revise the **Monthly Statement** and re-issue the same to the **Balancing Service Provider**, and the provisions of paragraphs 4.3 and 4.4 shall apply mutatis mutandis to such revised **Monthly Statement**.
- 4.6 In the absence of fraud, neither **NGESO** nor the **Balancing Service Provider** may invoke the provisions of paragraph 4.5, with respect to the contents of any **Monthly Statement** (including any revised **Monthly Statement**) after the period of eighteen (18) months has elapsed following submission of the original **Monthly Statement** in which the calculations and/or amounts in question were first stated, after which date such calculations and/or amounts shown in the last **Monthly Statement** (including any revised **Monthly Statement**) issued by **NGESO** shall be final and conclusive.
- 4.7 No later than expiry of the calendar eighteenth (18th) Business Day of each month, **NGESO** will issue a self-billing invoice (or credit note) in which accordance with paragraph 4.12 reflecting the Monthly Statement (or any issued pursuant to paragraph 4.2 (as may have been revised Monthly Statement) is issued or pursuant to the fifth (5th) Business Day after issue, if foregoing provisions), and no later, than five (5) Business Days after such date of issue **NGESO** shall pay to the **Balancing Service Provider** (or the **Balancing Service Provider** shall pay to **NGESO**, as the case may be) the net amount shown as due from **NGESO** to the **Balancing Service Provider** (or from the **Balancing Service Provider** to **NGESO**, as the case may be) in that **Monthly Statement** (or revised **Monthly Statement**).
- 4.8 All payments shall be made in pounds sterling by direct bank transfer or equivalent transfer of immediately available funds to the other **Party's** bank account, details of which shall be as notified by each **Party** to the other from time to time in accordance with paragraph 10.
- 4.9 If by virtue of the foregoing provisions it is determined or agreed that:
- 4.9.1 the **Balancing Service Provider** was entitled to a further payment from **NGESO**, then the **Balancing Service Provider** shall be entitled to interest at the **Base Rate** on the amount of such further payment from the due date until the date of actual payment; or
- 4.9.2 the **Balancing Service Provider** was not entitled to any payment it has received, then **NGESO** shall be entitled to interest at the **Base Rate** on such amount from the date of payment by **NGESO** until the date of repayment by the **Balancing Service Provider** (or, as the case may be, until the date when **NGESO** makes a payment to the **Balancing Service Provider** pursuant to paragraph 4.7 against which such amount is off-set.
- 4.10 All amounts specified falling due and payable pursuant to any **Related Balancing Services Document** shall be exclusive of any **Value Added Tax** or other similar tax and **NGESO** shall pay to the **Balancing Service Provider** **Value Added Tax** at the rate for the time being and from time to time properly chargeable in respect of the making available and/or provision of the applicable **Balancing Service** under the **Balancing Services Contract**.
- 4.11 Sums payable by one **Party** to the other pursuant this paragraph 4 whether by way of charges, interest or otherwise, shall (except to the extent permitted by these **ODFM General Terms and Conditions** or the applicable **Related Balancing Services Document** or otherwise required by **Law**) be paid in full, free and clear of and without deduction, set-off or deferment in respect of any disputes or claims whatsoever provided that either **Party** shall be entitled to set off any payment due and payable by the other **Party** under these **ODFM General Terms and Conditions** or the applicable **Related Balancing Services Document** against

any payment it makes to that **Party** under these **ODFM General Terms and Conditions** or the applicable **Related Balancing Services Document**.

- 4.12 The **Balancing Service Provider** agrees that **NGESO** shall maintain a self-billing system throughout the term of each and every **Balancing Services Contract** whereby each **Monthly Statement** shall constitute a self-billing invoice for **VAT** purposes. Accordingly, **NGESO** and the **Balancing Service Provider** shall enter into a self-billing agreement in accordance with **VAT** legislation and published guidance from HM Revenue and Customs (“**HMRC**”) from time to time, and agree to comply with all relevant requirements in relation to self-billing, and for such purpose the **Balancing Service Provider** hereby warrants and undertakes to **NGESO** that:-
- 4.12.1 it is registered for **VAT** and will inform **NGESO** forthwith if its ceases to be so registered or changes its **VAT** registration number;
- 4.12.2 it will account to **HMRC** for the **VAT** paid by **NGESO** pursuant to paragraph 4.10; and
- 4.12.3 it will not issue its own **VAT** invoices for provision of the applicable **Balancing Service**.
- 4.13 The provisions of this paragraph 4 shall survive the termination of any **Balancing Services Contract**.

5. Limitations on Liability

- 5.1 Subject to paragraph 5.2, and save where any provision of a **Related Balancing Services Document** or these **ODFM General Terms and Conditions** provides for an indemnity, the **Parties** acknowledge and agree that neither **Party** (the “**Party Liable**”) nor any of its officers, employees or agents shall be liable to the other **Party** for loss arising from any breach of these **ODFM General Terms and Conditions** or any **Related Balancing Services Document** or **Balancing Services Contract** created pursuant thereto other than for loss directly resulting from such breach and which at the date of formation of the **Balancing Services Contract** concerned was reasonably foreseeable as not unlikely to occur in the ordinary course of events from such breach in respect of:
- 5.1.1 physical damage to the property of the other **Party**, its officers, employees or agents; and/or
- 5.1.2 the liability of such other **Party** to any other person for loss in respect of physical damage to the property of any person subject, for the avoidance of doubt, to the requirement that the amount of such liability claimed by such other **Party** should be mitigated in accordance with general law,
- and provided further that the liability of any **Party** in respect of all claims for ~~such loss~~ the losses referred to in this paragraph 5.1 shall not exceed five hundred thousand pounds sterling (£500,000) per incident or series of related incidents.
- 5.2 Nothing in these **ODFM General Terms and Conditions** or any **Related Balancing Services Document** shall exclude or limit the liability of the **Party Liable** for death or personal injury resulting from the negligence of the **Party Liable** or any of its officers, employees or agents, and the **Party Liable** shall indemnify and keep indemnified the other **Party**, its officers, employees and agents from and against all such and any loss or liability which such other **Party** may suffer or incur by reason of any claim on account of death or personal injury resulting from the negligence of the **Party Liable** or its officers, employees or agents.
- 5.3 Subject to paragraph 5.2, and save where any provision of these **ODFM General Terms and Conditions** or any **Related Balancing Services Document** provides for an indemnity, neither the **Party Liable** nor any of its officers, employees or agents shall in any circumstances whatsoever be liable to the other **Party** for:
- 5.3.1 any loss of profit, loss of revenue, loss of use, loss of data, loss of contract or loss of goodwill; or
- 5.3.2 any indirect or consequential loss; or
- ~~5.3.4~~ 5.3.3 loss resulting from the liability of the other **Party** to any other person howsoever and whensoever arising save as provided in paragraphs 5.1.2 and 5.2.
- 5.4 Each **Party** acknowledges and agrees that the other **Party** holds the benefit of paragraphs 5.1, 5.2, and 5.3 for itself and as trustee and agent for its officers, employees and agents.
- 5.5 The rights and remedies provided to the **Parties** by these **ODFM General Terms and Conditions** and the **Related Balancing Services Document** are exclusive and not cumulative and exclude and are in place of all substantive (but not procedural) rights or remedies express or implied and provided by common law or

statute in respect of the subject of these **ODFM General Terms and Conditions** and the **Related Balancing Services Document**, including any rights either **Party** may possess in tort which shall include actions brought in negligence and/or nuisance. Accordingly, and save as provided above, each of the **Parties** hereby waives to the fullest extent possible such rights and remedies provided by common law or statute and releases the other **Party**, its officers, employees and agents to the same extent from all duties, liabilities, responsibilities or obligations provided by common law or statute in respect of the matters dealt with in these **ODFM General Terms and Conditions** and the **Related Balancing Services Document** and undertakes not to enforce any of the same except as expressly provided herein.

5.6 Each of paragraphs 5.1 to 5.5 inclusive shall survive termination of the **Balancing Services Contract** concerned.

5.7 For the avoidance of doubt, nothing in this paragraph 5 shall prevent or restrict any **Party** from enforcing any obligations (including suing for a debt) owed to it under or pursuant to these **ODFM General Terms and Conditions**.

6. Termination of Balancing Services Contracts

6.1 Without prejudice to all and any rights of termination set out in these **ODFM General Terms and Conditions** or in any **Related Balancing Services Document**, a **Party** shall have the right to terminate all and any **Balancing Services Contracts** forthwith on written notice to the other **Party** upon an **Insolvency Event** in relation to that other **Party** or in the event of a material breach by that other **Party** of any provision of these **ODFM General Terms and Conditions** or the applicable **Related Balancing Services Document**.

6.2 For the purposes of paragraph 6.1, and without limitation, the following shall be deemed to be a material breach by a **Party** of these **ODFM General Terms and Conditions**:-

6.2.1 that **Party** fails to pay (other than by inadvertent error in funds transmission which is discovered by other **Party**, notified to the **Defaulting Party** and corrected within five (5) **Business Days** following such notification) any amount properly due or owing from it pursuant to paragraph 4, and such non-payment continues unremedied and not disputed in good faith and upon reasonable grounds at the expiry of seven (7) **Business Days** immediately following receipt by the **Defaulting Party** of written notice from the other **Party** of such non-payment; or

6.2.2 any other material breach by that **Party** of any of its obligations under these **ODFM General Terms and Conditions** which, if capable of remedy, that **Party** fails to remedy within ten (10) **Business Days** after service of a written notice from the other **Party** specifying the breach and requiring it to be remedied.

6.3 Termination of any **Balancing Services Contract** (in whole or in part) shall be without prejudice to the rights and remedies to which a **Party** may be entitled thereunder and shall not affect any accrued rights or liabilities of either **Party** nor the coming into or continuance in force of any provision thereof which is expressly or by implication intended to come into force or continue to apply on or after such termination.

7. Assignment

7.1 All **Balancing Services Contracts** entered into pursuant to **Related Balancing Services Documents** shall be personal to the **Parties**, and except as may be provided therein neither **Party** shall assign, transfer, mortgage, charge or deal in any other manner with any or all of its rights and obligations under a **Balancing Services Contract** or any other rights and/or obligations pursuant to these **ODFM General Terms and Conditions** and any **Related Balancing Services Document** without the prior written consent of the other **Party** (such consent not to be unreasonably withheld or delayed).

7.2 **NGESO** shall not assign or transfer nor purport to assign or transfer the benefit or burden of any **Balancing Services Contract** or any other rights and/or obligations pursuant to these **ODFM General Terms and Conditions** or any **Related Balancing Services Document** save to the holder of a **Licence** with responsibility for carrying out the **Balancing Services Activity**.

8. Confidentiality and Announcements

8.1 General Restrictions

8.1.1 Subject to paragraph 8.2, and to the extent otherwise expressly permitted by these **ODFM General Terms and Conditions** or the applicable **Related Balancing Services Document**, neither **Party** shall, at any time,

without the prior consent of the other **Party** in writing, divulge or permit its officers, employees, agents or contractors to divulge to any person or permit use by any person (other than disclosure to or use by officers or employees to the extent reasonably required to enable such persons to carry out their duties in connection with the **Balancing Services Contract**) of:

- 8.1.1.1 any of the contents of the **Balancing Services Contract**, or any tender or sell or bid order submitted in relation thereto; or
- 8.1.1.2 any commercially confidential information concerning the operations, contracts, commercial or financial arrangements or affairs of the other **Party** received in relation to the **Balancing Services Contract**.
- 8.1.2 Each **Party** undertakes to use **Confidential Information** disclosed to it by the other **Party** solely for the purposes of the **Balancing Services Contract** and shall not use it for any other purpose.
- 8.2 **Exceptions**
 - 8.2.1 The restrictions imposed by paragraph 8.1 shall not apply to the disclosure of any **Confidential Information**:
 - 8.2.1.1 which is in or becomes part of the public domain otherwise than as a result of a breach of paragraph 8.1, or which either **Party** can show was in its written records prior to the date of disclosure of the same by the other **Party**, or which it received from a third party independently entitled to disclose it;
 - 8.2.1.2 which is required by **Law** to be disclosed;
 - 8.2.1.3 to a court, arbitrator or administrative tribunal in the course of **Proceedings** before it to which the disclosing **Party** is a party;
 - 8.2.1.4 in accordance with the provisions of the **Balancing and Settlement Code** or pursuant to any licence of the **Party** concerned;
 - 8.2.1.5 to any parent, subsidiary or fellow subsidiary undertaking on a "need to know" basis only;
 - 8.2.1.6 by the **Balancing Service Provider** to any owner and/or operator of relevant **Plant and Apparatus** to the extent necessary to enable the **Balancing Service Provider** to submit an offer or tender to provide a Balancing Service and fulfil its obligations under any **Related Balancing Services Document** and/or these **ODFM General Terms and Conditions**;
 - 8.2.1.7 required or expressly permitted to be disclosed under the terms of these **ODFM General Terms and Conditions** or any agreement or any **Related Balancing Services Document** or arrangement to which the **Parties** have agreed to be bound.
 - 8.2.2 In this paragraph 8.2, the words "parent", "subsidiary" and "undertaking" shall have the meanings as provided in sections 1159, 1161 and 1162 of the Companies Act 2006.
- 8.3 **Third parties**

Before either **Party** discloses any Confidential Information in any of the circumstances described in paragraph 8.2.1.5 and 8.2.1.6 (other than to its authorised professional advisers), it shall notify the other **Party** of its intention to make such disclosure and procure that the recipient is placed under an obligation of confidentiality on terms equivalent to those contained in this paragraph 8, and the disclosing **Party** shall at all times be liable to the other Party for the failure of such recipient to comply with such terms.
- 8.4 **Public announcements**
 - 8.4.1 Subject to paragraphs 8.2.1.5 and 8.2.1.6, no public announcement or statement regarding the completion, performance or termination of any **Balancing Services Contract** shall be issued or made unless before it is issued or made both the **Parties** have been furnished with a copy of it and have approved it (such approval not to be unreasonably withheld or delayed).
 - 8.4.2 Neither **Party** shall be prohibited from issuing or making any such public announcement or statement to the extent expressly permitted or otherwise contemplated by these **ODFM General Terms and Conditions** or the applicable **Related Balancing Services Document** or if it is necessary to do so in order to comply with any applicable **Law** or the regulations of any recognised stock exchange upon which the share capital of such **Party** is from time to time listed or dealt in.

- 8.4.3 Without limiting paragraph 8.2, and for the purposes of any or all of the statements published from time to time pursuant to Standard Condition C16 of its **Transmission Licence**, **NGESO** may publish in such manner or form as it thinks fit details of all and any **Balancing Services Contracts** including any tender or sell or bid order submitted in relation thereto and any service availability and/or utilisation and payments made to or by **Service Providers** from time to time with respect thereto.

9. Waiver

No failure or delay by any party to exercise any right, power or remedy under these **ODFM General Terms and Conditions** or any **Related Balancing Services Document** (including a partial exercise) will operate as a waiver of it nor will any partial exercise preclude any further exercise of the same, or of some other right, power or remedy.

10. Notices

- 10.1 Unless otherwise specified in these **ODFM General Terms and Conditions** or any **Related Balancing Services Document** or agreed in writing by the Parties, any notice or communication to be given by one **Party** to the other under or in connection with the matters contemplated by these **ODFM General Terms and Conditions** or any **Related Balancing Services Document** shall be addressed to the recipient and sent to the address or facsimile number of the other **Party** set out or referred to below and marked for the attention of the person so given:

10.1.1 **NGESO:**

Address: Faraday House
Warwick Technology Park
Gallows Hill
Warwick CV34 6DA

For the attention of: The Company Secretary

Copy to: Energy Operations Manager

Facsimile number: 0870 602 4808

- 10.1.2 **Balancing Service Provider:** as specified in accordance with the applicable **Related Balancing Services Document** or otherwise by notice in writing by the **Balancing Service Provider** to **NGESO**.

- 10.2 Unless otherwise specified in these **ODFM General Terms and Conditions** or the applicable **Related Balancing Services Document** or agreed in writing by the **Parties**, any notice or communication to be given by one **Party** to the other under or in connection with the matters contemplated by these **ODFM General Terms and Conditions** or the applicable **Related Balancing Services Document** shall be in writing and given by letter delivered by hand or sent by first class prepaid post or facsimile, and shall be deemed to have been received:

- 10.2.1 in the case of delivery by hand, when delivered; or

- 10.2.2 in the case of first class prepaid post, on the second **Day** following the **Day** of posting; or

- 10.2.3 in the case of facsimile, on acknowledgement by the addressee's facsimile receiving equipment (where such acknowledgement occurs before 17:00 hours on the **Day** of acknowledgement) and in any other case on the **Day** following the **Day** of acknowledgement.

11. Dispute Resolution

- 11.1 Save where expressly stated to the contrary in these **ODFM General Terms and Conditions** or in any **Related Balancing Services Document** and subject to any contrary provision of the **Act** or any **Licence**, and subject always to paragraph 11.5, any dispute or difference of whatever nature howsoever arising under, out of or in connection with this these **ODFM General Terms and Conditions** or a **Related Balancing Services Document** or any **Balancing Services Contract** formed pursuant thereto shall be and is hereby referred to arbitration pursuant to the arbitration rules of the **Electricity Supply Industry Arbitration Association** in force from time to time. The seat of arbitration shall be London, and the number of arbitrators shall be one.

- 11.2 Whatever the nationality, residence or domicile of either **Party** and wherever the dispute or difference or any part thereof arose, the laws of England and Wales shall be the proper law of any reference to arbitration hereunder and in particular (but not so as to derogate from the generality of the foregoing) the provisions of the Arbitration Act 1996 (notwithstanding anything in Section 108 thereof) shall apply to any such arbitration wherever the same or any part of it shall be conducted. References in Rule 16.1 of the Electricity Arbitration Association rules to the Rules of the Supreme Court shall be interpreted to refer to equivalent provisions in the Civil Procedure Rules.
- 11.3 For the avoidance of doubt, both **Parties** confirm and agree that nothing in this agreement to arbitrate prevents a **Party**:
- 11.3.1 challenging the award of an arbitral tribunal under sections 67-69 of the Arbitration Act 1996 (and Clause 17.8 of the **Electricity Arbitration Association Rules** is amended accordingly);
- 11.3.2 seeking the remedy of specific performance or any other power or remedy that would be available to the English court from the arbitral tribunal in accordance with s48 of the Arbitration Act 1996;
- 11.3.3 seeking interim relief from the English Court under s44 of the Arbitration Act 1996, or from any other court with competent jurisdiction; or
- 11.3.4 seeking to enforce any arbitral award in the English Court or any court of competent jurisdiction.
- 11.4 Without prejudice to any other mode of service allowed under any relevant law, any **Balancing Service Provider** which is not incorporated in any part of Great Britain agrees that if it does not have, or shall cease to have, a place of business in Great Britain it will promptly appoint, and shall at all times maintain, an agent for the service of process in Great Britain to accept service of process on its behalf in any proceedings commenced in support of, or in relation to arbitration, in the courts of England and Wales.
- 11.5 Where a provision of these **ODFM General Terms and Conditions** or the applicable **Related Balancing Services Document** expressly provides for the referral by a **Party** of any matter in dispute to an **Expert** for determination, the following provisions shall apply:
- 11.5.1 the **Expert** shall act as an expert and not as an arbitrator and shall decide those matters referred to him using his skill, experience and knowledge, and with regard to all such other matters as he in his sole discretion considers appropriate;
- 11.5.2 if the **Parties** cannot agree upon the selection of an **Expert**, the **Expert** shall be determined by the President for the time being of the Law Society of England and Wales;
- 11.5.3 all references to the **Expert** shall be made in writing by either **Party** with notice to the other being given contemporaneously, and the **Parties** shall promptly supply the **Expert** with such documents and information as he may request when considering any referral;
- 11.5.4 the **Expert** shall be requested to use his best endeavours to give his decision upon the question before him as soon as possible in writing following its referral to him, his decision shall, in the absence of fraud or manifest error, be final and binding upon the **Parties**;
- 11.5.5 if the **Expert** wishes to obtain independent professional and/or technical advice in connection with the question before him:
- 11.5.5.1 he shall first provide the Parties with details of the name, organisation and estimated fees of the professional or technical adviser; and
- 11.5.5.2 he may engage such advisor with the consent of the Parties (which consent shall not be unreasonably withheld or delayed) for the purposes of obtaining such professional and/or technical advice as he may reasonably require;
- 11.5.6 the **Expert** shall not be held liable for any act or omission, and his written decision will be given without any liability on the **Expert's** part to either **Party**, unless it shall be shown that he acted fraudulently or in bad faith;
- 11.5.7 save to the extent otherwise expressly provided herein pending the determination by the **Expert**, any subsisting **Balancing Services Contract(s)** shall continue to the extent possible for the **Parties** to perform their obligations; and
- 11.5.8 the **Expert** shall at his discretion be entitled to order that the costs of the reference of a dispute to him shall be paid by the **Parties** in whatever proportions he thinks fit.

12. Governing Law and Jurisdiction

- 12.1 These **ODFM General Terms and Conditions**, the **Related Balancing Services Documents** and each **Balancing Services Contract** shall be governed by and construed in all respects in accordance with the laws of England and Wales.
- 12.2 The **Parties** irrevocably agree that the courts of England shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection these **ODFM General Terms and Conditions** and the applicable **Related Balancing Services Document** and each **Balancing Services Contract** (including non-contractual disputes or claims) and that accordingly any suit, action or proceeding (together in this paragraph 12.2 referred to as "**Proceedings**") arising out of or in connection with these **ODFM General Terms and Conditions** and/or any **Related Balancing Services Document** and/or any **Balancing Services Contract** may be brought to such courts.
- 12.3 The parties waive any objection to **Proceedings** in such courts on the grounds of venue or on the grounds that **Proceedings** have been brought in an inappropriate form.

13. Force Majeure

- 13.1 In so far as either **Party** is prevented from performing any of its obligations under these **ODFM General Terms and Conditions** or any **Related Balancing Services Document** due to an event or circumstance of **Force Majeure**, then neither the **Balancing Service Provider** nor **NGESO** (as the case may be) shall be deemed to be in breach of such obligations for so long as the circumstance of **Force Majeure** continues to prevent such performance.
- 13.2 The **Party** affected by the **Force Majeure** shall give to the other **Party** immediately upon becoming aware of an event or circumstance of **Force Majeure**, a written communication describing the **Force Majeure** (including the nature of the occurrence and its expected duration) and the obligations which it is prevented from performing and shall continue to furnish regular reports with respect thereto to the other **Party** during the period of **Force Majeure**.
- 13.3 As soon as is reasonably practicable, following an event or circumstance of **Force Majeure**, the **Parties** shall meet to discuss how best to continue their respective obligations as set out in these **ODFM General Terms and Conditions** and/or the applicable **Related Balancing Services Document**.
- 13.4 For the avoidance of doubt the non-performance of either **Party's** obligations pursuant to these **ODFM General Terms and Conditions** and/or the applicable **Related Balancing Services Document** arising prior to the event or circumstance of **Force Majeure**, shall not be excused as a result of the event or circumstance of **Force Majeure**.
- 13.5 Either **Party** shall have a right to terminate the provisions of the **Balancing Services Contract** if a **Party** has been prevented from performing its obligations under these **ODFM General Terms and Conditions** and/or the applicable **Related Balancing Services Document** due to an event or circumstance of **Force Majeure** for a continuous period of two calendar months.

14. Severance of Terms

If any provision of these **ODFM General Terms and Conditions** or any **Related Balancing Services Document** is or becomes or is declared invalid, unenforceable or illegal by a **Competent Authority**, such invalidity, unenforceability or illegality shall not prejudice or affect the remaining provisions of these **ODFM General Terms and Conditions** or any **Related Balancing Services Document**, which shall continue in full force and effect notwithstanding such invalidity, unenforceability or illegality.

15. Entire Agreement

These **ODFM General Terms and Conditions** and the **Related Balancing Services Documents** contain or expressly refer to the entire agreement between the **Parties** with respect to each **Balancing Services Contract** and the subject matter thereof, and expressly exclude any warranty, condition or other undertaking implied at law or by custom, and each of the **Parties** acknowledges and confirms that it is not aware of any representation, warranty or other undertaking not fully reflected in the terms of such documents upon which it has relied in entering into each **Balancing Services Contract**.

16. Third Party Rights

The **Parties** acknowledge and agree for the purposes of the Contracts (Rights of Third Parties) Act 1999 that no rights, powers of benefits are or shall be conferred on any person pursuant to any **Balancing Services Contract** save as expressly provided in these **ODFM General Terms and Conditions** and the **Related Balancing Services Documents**.

17. Anti-Corruption and Anti-Slavery

17.1 The **Balancing Services Provider** represents and undertakes to **NGESO** that the **Balancing Services Provider** and has not committed and shall not commit any **Prohibited Act**.

17.2 The **Balancing Services Provider** will

17.2.1 provide **NGESO** with such reasonable assistance as it may require from time to time to enable it to perform any activity required by any relevant government or agency in any relevant jurisdiction for the purpose of compliance with any **Anti-Tax Evasion Laws**, **Anti-Slavery Laws** and **Anti-Bribery Laws**;

17.2.2 promptly report to **NGESO** any breach, or suspected breach, of any of its obligations under this paragraph 17; and

17.2.3 promptly report to **NGESO** any request or demand for any financial or other advantage of any kind received in connection with the performance of a **Balancing Services Contract** by it or any of its or their officers, employees or agents or any other person who performs services for or on behalf of it or them in connection with a **Balancing Services Contract**.

17.3 The **Balancing Services Provider** will, and will procure that all its officers, employees and agents and any other persons who perform services for or on behalf of it or them in connection with a **Balancing Services Contract** will, comply with the **NGESO's** policies on anti-bribery and anti-corruption at all times and will immediately give notice to **NGESO** of any non-compliance with **NGESO's** policies on anti-bribery and anti-corruption of which it becomes aware.

17.3.1 The **Balancing Services Provider** will:

17.3.1.1 conduct proper and adequate checks on any agency or person used by the **Service Provider** to provide labour, employees, contractors or other persons to undertake tasks for the **Balancing Services Provider** in connection with a **Balancing Services Contract** (in each case whether on a permanent or temporary basis) to ensure that any such agency or entity does not engage and has not in the past engaged in any **Modern Slavery Practice**;

17.3.1.2 provide **NGESO** with such reasonable assistance and information as it may require from time to time to enable **NGESO** to:

17.3.1.2.1 perform any activity required by any government, regulatory entity or agency in any relevant jurisdiction for the purpose of compliance with any applicable **Anti-Slavery Laws** or as required by **NGESO**;

17.3.1.2.2 prepare a slavery and human trafficking statement as required by section 54 of the Modern Slavery Act and to include the matters referred to in section 54(5) of the Modern Slavery Act; and

17.3.1.3 conduct due diligence and to measure the effectiveness of the steps **NGESO** is taking or wishes to take to ensure that **Modern Slavery Practice** is not taking place in its business or supply chain.

18. EMR

18.1 Notwithstanding any confidentiality obligations and any restriction on the use or disclosure of information set out in these **ODFM General Terms and Conditions**, the **Balancing Services Provider** consents to **NGESO** and each of its subsidiaries using all and any information or data supplied to or acquired by it in any year under or in connection with any **Balancing Services Contract** for the purpose of carrying out its **EMR Functions**.

18.2 The provisions relating to the resolution of disputes set out in these **ODFM General Terms and Conditions** (if any) are subject to any contrary provision of an **EMR Document**.

18.3 For the purposes of this paragraph 18 only:-

18.3.1 **"AF Rules"** has the meaning given to "allocation framework" in section 13(2) of the Energy Act 2013;

- 18.3.2 **“Capacity Market Rules”** means the rules created pursuant to section 34 of the Energy Act 2013 as modified from time to time in accordance with The Electricity Capacity Regulations 2014;
- 18.3.3 **“EMR Functions”** has the meaning given to “EMR functions” in Chapter 5 of Part 2 of the Energy Act 2013; and
- 18.3.4 **“EMR Document”** means The Energy Act 2013, The Electricity Capacity Regulations 2014, the Capacity Market Rules, The Contracts for Difference (Allocation) Regulations 2014, The Contracts for Difference (Electricity Supplier Obligation) Regulations 2014, The Contracts for Difference (Definition of Eligible Generator) Regulations 2014, The Electricity Market Reform (General) Regulations 2014, the AF Rules and any other regulations or instruments made under Chapter 2 (contracts for difference), Chapter 3 (capacity market) or Chapter 4 (investment contracts) of Part 2 of the Energy Act 2013 which are in force from time to time.