

# General Terms

For the Allocation Agent Service Provider Agreement

Gas Industry Company Limited

Transpower New Zealand Limited

Dated 4 October 2013

## VERSION CONTROL

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## PARTIES

**Gas Industry Company Limited** a company whose registered office is at Wellington (*the Industry Body*)

**Transpower New Zealand Limited** a company whose registered office is at Wellington (*the Service Provider*)

## BACKGROUND

- A On 23 July 2013, the Industry Body issued an RFP for the selection of the Allocation Agent under the Gas (Downstream Reconciliation) Rules 2008. Under the RFP, the Allocation Agent would also provide the Allocation System used by Allocation Participants to submit data under those Rules.
- B The Service Provider responded to the RFP with a proposal, and was subsequently selected by the Industry Body to become the Allocation Agent.
- C These General Terms govern the Services provided by the Service Provider. The Services themselves are recorded in separately executed Service Descriptions. At the Commencement Date, the parties have agreed:
- (a) an Establishment Service Description; and
  - (b) an On-Going Service Description.

## AGREEMENT

### 1 DEFINITIONS AND CONSTRUCTION

#### 1.2 Defined Terms

In the Agreement, unless the context requires otherwise:

**Agreement** means these General Terms together with any document executed by the parties that is expressed to be entered into under the General Terms, including:

- (a) the Establishment Service Description; and
- (b) the On-going Service Description,

and their Schedules.

**Allocation Participant** has the meaning given to it in the Rules. At the Commencement Date, Allocation Participant means a retailer, distributor, meter owner, or transmission system owner (all as defined in the Rules).

**Allocation System** means the Allocation System under the On-Going Service Description.

**Application** means the Application under the On-Going Service Description.

**Application Data** means Application Data under the On-Going Service Description.

**Business Day** has the meaning given to it in the Rules. At the Commencement Date, Business Day means any day of the week except:

- (a) Saturday and Sunday; and
- (b) any day that Good Friday, Easter Monday, ANZAC Day, the Sovereign's Birthday, Labour Day, Christmas Day, Boxing Day, New Year's Day, the day after New Year's Day, and Waitangi Day are observed for statutory holiday purposes; and

- (c) any other day which the Industry Body has determined not to be a business day as published by the Industry Body.

**Business Owner** for either party, means the person from time to time holding the role of Business Owner for that party.

**Charges** means the charges payable by the Industry Body to the Service Provider under the Agreement, including as specified in:

- (a) the Establishment Service Description; and
- (b) the On-going Service Description.

**Commencement Date** means the date these General Terms were executed by both parties.

**Confidential Information:**

- (a) means, in respect of one party (**Owner**), any information currently held or subsequently acquired by the other party (**Recipient**) relating to the affairs, property or operations of the Owner or its stakeholders, clients, suppliers, agents or Personnel, which is or has been disclosed by or at the request of the Owner to the Recipient through any medium or in any form, or which the Recipient becomes aware of through its dealings with the Owner;
- (b) includes:
  - (i) such information obtained during the RFP process and negotiation of the Agreement; and
  - (ii) the provisions of the Agreement; and
- (c) in relation to the Industry Body, includes all:
  - (i) Application Data; and
  - (ii) Service Data.

**Confidentiality Deed** means the Confidentiality Deed in Schedule 1, or any substitute for that Deed that may be agreed between the parties and NZX Limited.

**Conflict of Interest** means that the Service Provider's or any of its Personnel's personal or business interests or obligations do or could conflict, or be perceived to conflict, with its obligations under the Agreement. It means that the independence, objectivity or impartiality of the Service Provider can be called into question. A Conflict of Interest may be:

- (a) actual (where the conflict currently exists);
- (b) potential (where the conflict is about to happen or could happen); or
- (c) perceived (where other people may reasonably think a conflict exists).

**Contract Variation Process** means the process set out in clause 18.

**Control** of a company means:

- (a) holding more than half the issued shares, other than shares that carry no right to participate beyond a specified amount in a distribution of profits or capital;

- (b) the power to exercise, or control the exercise of, more than half the maximum number of votes that can be exercised at a meeting;
- (c) the power to manage, directly or indirectly, the operation of the business; or
- (d) the power to control, directly or indirectly, the composition of the board of directors or management,

of that company or any of its ultimate or intermediate holding companies, whether through the ownership of voting securities, by contract or otherwise and for these purposes "holding company" has the same meaning as in section 5 of the Companies Act 1993.

**Deliverable** means any and all tangible or intangible property, including Intellectual Property, hardware, software, equipment and documentation, that is supplied (or is to be supplied) by the Service Provider under the Agreement.

**Disengagement Period** means, in relation to any termination or expiry of the Agreement, the period during which the Service Provider is to perform the activities contemplated in clause 17.3 in relation to that termination or expiry, being the period notified to the Service Provider by the Industry Body in accordance with clause 17.2.

**Disengagement Plan** has the meaning given to it in clause 17.1 (Disengagement Plan).

**Disengagement Services** means the services and other activities required under clause 17, but only to the extent such services or activities go beyond those required under the Agreement in the absence of any termination or expiry, and excluding any services or activities that the Agreement expressly designates as the responsibility of the Industry Body.

**Dispute** means any dispute, controversy or claim arising out of or in connection with the Agreement or its formation, but does not include:

- (a) any exercise of (or refusal to exercise) a discretion, except to the extent that the discretion is expressly fettered by the Agreement or at law; or
- (b) any failure to agree on a matter which the Agreement contemplates as being subject to the further agreement of one or both parties, except where the Agreement expressly provides for that matter to be referred to the Dispute Resolution Process or Expert Determination.

**Dispute Resolution Process** means the process in clause 15.

**Establishment Service Description** means the Service Description of that name that was entered into by the parties on or about the date of these General Terms, as modified in accordance with the Contract Variation Process.

**Expert Determination** means the determination of a Dispute in accordance with clause 15.4.

**Force Majeure** means any:

- (a) act of God, fire, earthquake, storm, flood, or landslide;
- (b) strike, lockout, work stoppage or other labour hindrance;
- (c) explosion or nuclear accident;
- (d) sabotage, riot, civil disturbance, insurrection, epidemic, national emergency (whether in fact or law) or act of war (whether declared or not);
- (e) requirement or restriction of, or failure to act by, any government, semi-governmental or judicial entity; and

- (f) without limitation by reference to the foregoing, any other cause beyond the reasonable control of the party claiming the benefit of clause 14,

but does not include:

- (g) any event which the party affected could have prevented or overcome by implementing reasonable precautions against the event;
- (h) in the case of the Service Provider:
- (i) any event which the Service Provider or its Personnel or Subcontractors could have prevented or overcome but for a prior failure to comply with the Service Provider's obligations under the Agreement, including those relating to disaster recovery, business continuity, security and/or the resiliency of the Services or Deliverables; or
  - (ii) any failure of a Subcontractor to enable the Service Provider to perform its obligations under the Agreement, except to the extent that the Subcontractor's failure is itself caused by Force Majeure; or
- (i) a lack of funds for any reason.

**General Terms** means clauses 1 to 19 of these General Terms for the Allocation Agent Service Provider Agreement.

**Go Live Date** means the Go Live Date determined in accordance with the Establishment Service Description.

**Good Practice** means the exercise of that degree of skill, diligence, prudence, foresight and economic management that would reasonably be expected from a skilled and experienced provider of the Services and Deliverables.

**GST** has the meaning given to that term in the Goods and Services Tax Act 1985 and includes any changed rate of GST under that legislation.

**Indexation** means adjustment by reference to the percentage by which the New Zealand Consumers Price Index (All Groups) has changed between:

- (a) its last publication before the Go-Live Date; and
- (b) its last publication before the Indexation calculation is performed.

**Indirect or Consequential Loss** means Loss that does not arise as a direct, natural and/or probable result of the act or omission complained of.

**Intellectual Property** means all intellectual property rights and interests (including common law rights and interests) in any jurisdiction including:

- (a) patents, trademarks, service marks, copyright, registered designs, trade names, domain names, symbols and logos;
- (b) patent applications and applications to register trademarks, service marks and designs; and
- (c) tools, techniques, computer program code, data inventions, discoveries, developments, trade secrets, information and logical sequences (whether or not reduced to writing or other machine or human readable form).

**Laws** means, to the extent they are relevant to the subject matter of the Agreement, any rules of common law, principles of equity, national and local laws, statutes, rules, regulations, proclamations, ordinances and by-laws.

**Loss** includes any liability, expense, cost or damage (including reasonable legal costs).

**Material Subcontracts** has the meaning given in clause 3.8.

**Other Supplier** means any person contracted (or proposed to be contracted) to supply goods and/or services to the Industry Body, other than the Service Provider.

**On-Going Service Description** means the Service Description of that name entered into by the parties on or about the date of these General Terms, as modified in accordance with the Contract Variation Process.

**Personnel:**

- (a) means, in respect of an entity, any director, officer, employee, contracted staff member or other worker of that entity, or of that entity's agents or contractors, who are involved in the provision of the Services and Deliverables; and
- (b) excludes, in respect of the Industry Body, all Personnel of the Service Provider.

**Proposal** means the Service Provider's proposal dated 16 August 2013 in response to the RFP, including all modifications to that proposal which have been accepted by the Industry Body.

**Related Company** has the meaning given to it in section 2(3) of the Companies Act 1993, including any entity that would be a related company within that definition if incorporated as a company in New Zealand.

**RFP** means the Request for Proposals: Allocation Agent issued by the Industry Body on 23 July 2013, together with any amendments, clarifications or supplemental materials subsequently issued by the Industry Body.

**Rules** means the Gas (Downstream Reconciliation) Rules 2008 (as amended from time to time), and any replacement rules.

**Serious Breach** by either party means any material breach of this Agreement, including:

- (a) any breach of the Agreement by that party that materially:
  - (i) reduces the ability of the other party to perform its operations; or
  - (ii) reduces the benefit the other party would otherwise derive from the Agreement
  - (iii) increases the costs the other party will occur in relation to the Agreement, with materiality measured over the 12 months immediately following the breach;
- (b) a failure to:
  - (i) provide a Remedial Plan in accordance with clause 11.2 (Agreeing the Remedial Plan); or
  - (ii) implement a Remedial Plan in accordance with clause 11.4 (Implementation);
- (c) an acknowledgement from the Service Provider in a Remedial Plan that no steps would be effective to mitigate or prevent reoccurrence of a Serious Breach of the Agreement; or
- (d) a series of breaches that together constitute a Serious Breach.

**Service** means any service provided (or that is to be provided) by the Service Provider under the Agreement, including the services specified in:

- (a) the Establishment Service Description; and
- (b) the On-Going Service Description.

**Service Data:**

- (a) means all information (including information in electronic form or transferred into electronic form by the Service Provider) which the Service Provider:
  - (i) directly or indirectly receives from or provides to Allocation Participants or the Industry Body in relation to the Agreement; or
  - (ii) generates or receives in the course of carrying out the Services; but
- (b) excludes all Application Data.

**Service Levels** means the service levels for particular Services as specified in the On-Going Service Description.

**Source Code** has the meaning given to it in the On-Going Service Description.

**Subcontractor** means a contractor appointed by the Service Provider in accordance with clause 3.8.

**T&M Rates** means the rates described in clause 8.2 (T&M Charges) of the On-Going Service Description.

**Term** means the term specified in clause 2 plus any applicable Disengagement Period(s).

**User** means any person authorised by the Industry Body or an Allocation Participant to access the Allocation System or any Services.

**Variation Assessment** has the meaning given in clause 18.4.

**Variation Request** means a request for a variation to the Agreement, which request:

- (a) is provided in writing by one party to the other party; and
- (b) includes a reference number to uniquely identify that Variation Request.

**Website** means the Website under the On-Going Service Description.

1.3 **Construction**

In the construction of the Agreement, unless the context requires otherwise:

**Business Days:** anything required by the Agreement to be done on a day which is not a Business Day may be done on the next Business Day;

**Clauses and Schedules:** a reference to a clause or a schedule is to a clause or schedule of the Agreement and a reference in a schedule to a clause is a reference to a clause in that schedule;

**Contra proferentem:** the language in the Agreement has been chosen by both parties and will not be construed against either of them;

**Currency:** a reference to any monetary amount is to New Zealand currency;

**Defined Terms:** words or phrases appearing in the Agreement with capitalised initial letters are defined terms and have the meanings given to them in the Agreement;

**Documents:** a reference to any document, including the Agreement, includes a reference to that document as amended or replaced from time to time;

**Headings:** headings appear as a matter of convenience and do not affect the construction of the Agreement;

**Inclusions:** a reference to "includes" is a reference to "includes without limitation", and "include", "included" and "including" have corresponding meanings;

**Negative Obligations:** a prohibition against doing any thing is also a prohibition against permitting, suffering or causing that thing to be done;

**Parties:** a reference to a party to the Agreement or any other document includes that party's personal representatives/successors and permitted assigns;

**Person:** a reference to a person includes a corporation sole, a body of persons, whether corporate or unincorporated, and any national, state, regional or local government body or agency;

**Related Terms:** where a word or expression is defined in the Agreement, other parts of speech and grammatical forms of that word or expression have corresponding meanings;

**Schedules:** the Schedules form part of the Agreement;

**Singular, Plural and Gender:** the singular includes the plural and vice versa, and words importing one gender include the other genders;

**Statutes and Regulations:** a reference to an enactment or any regulations is a reference to that enactment or those regulations as amended, or to any enactment or regulations substituted for that enactment or those regulations, and any reference to an enactment includes all regulations made under that enactment; and

**Writing:** a reference to "written" or "in writing" includes all modes of presenting or reproducing text in a form that is legible, permanently visible and capable of being retained and stored (which to avoid doubt may include email).

### 1.3 Order of Priority

(a) Subject to subclause (c), if there is any conflict or ambiguity between the various documents comprising the Agreement, they will be read and applied in the following (descending) order of precedence:

- (i) these General Terms;
- (ii) the On-Going Service Description;
- (iii) the Establishment Service Description,

including in the case of each document, and at the same level of precedence as that document, all components of that document that are specified in subclause (b).

(b) Subject to subclause (c), if there is any conflict or ambiguity within the following components of any document specified in subclause (a), they will be read and applied in the following (descending) order of precedence:

- (i) the body of the document (i.e. excluding the following components);
- (ii) any Schedules to the document;

- (iii) any documents established under the document (such as SOWs under the On-Going Service Description); and
  - (iv) any documents incorporated by reference into the document (such as standard policies or procedures).
- (c) If any part of the Agreement is expressed to prevail over another part of the Agreement, it will do so to the extent stated. To avoid doubt, a variation to a lower priority part of the Agreement will only prevail over a higher priority part of the Agreement to the extent it is expressed to do so.

## 2 **TERM**

### 2.1 **Conditions**

Notwithstanding any other provision of the Agreement, the commencement of the Agreement is conditional on the parties executing the Establishment Service Description and On-Going Service Description. Until this condition is met, the Agreement is of no effect.

### 2.2 **Initial Term**

This Agreement commences on the Commencement Date and, unless earlier terminated in accordance with the Agreement, will continue for an initial Term of five years from the Go-Live Date.

### 2.3 **Extensions**

From time to time the Industry Body may extend the Term, by a period of at least one year for each such extension, provided that the total Term including all extensions under this clause may not exceed 10 years. The Industry Body will provide the Service Provider with written notice of each such extension at least one month before the expiry of the then current Term.

### 2.4 **Convenience Termination**

The Industry Body may terminate the Agreement at any time following the Go-Live Date, on at least 3 months' written notice to the Service Provider. If the Industry Body so terminates the Agreement, the Service Provider may invoice the Industry Body in accordance with clause 16.4 (Early Termination Charges).

## 3 **SERVICES**

### 3.1 **Allocation Agent Appointment**

- (a) With effect from and including the Go-Live Date, pursuant to rule 7.1 of the Rules the Industry Body appoints the Service Provider as Allocation Agent under the Rules, and the Service Provider agrees to that appointment.
- (b) The term of the Service Provider's appointment as Allocation Agent will continue until that appointment is terminated in accordance with:
  - (i) clause 17.7 (Termination of Allocation Agent Appointment); or
  - (ii) rule 7.4 of the Rules.
- (c) In its capacity as the appointed Allocation Agent, the Service Provider agrees to be bound by the Rules for the term of that appointment.
- (d) Termination of the Service Provider's appointment as Allocation Agent does not in itself terminate the Agreement or any Services or reduce the Charges. However, on termination of its appointment as Allocation Agent the Service Provider is no longer:
  - (i) required to perform any obligations under the Agreement; or
  - (ii) entitled to any rights under the Agreement,

to the extent those obligations rely on or, or rights relate to, the Service Provider being the appointed Allocation Agent under the Rules.

(e)

### 3.2 **General Undertakings**

Without limiting its obligations under the Agreement, the Service Provider undertakes that:

- (a) it has (and will provide) all the necessary expertise, experience, resources, Personnel, premises, capacity and ability to perform and discharge its obligations and liabilities under the Agreement in a timely manner, efficiently, diligently and in accordance with Good Practice, and will perform and discharge those obligations and liabilities accordingly;
- (b) each of the Service Provider's Personnel and Subcontractors are suitably qualified and appropriately skilled to carry out its, his or her role in the performance of the Service Provider's obligations to the level required by the Agreement;
- (c) during the Term it has and will have full access and right to all relevant technical information, qualified Personnel, expertise and data required to provide the Services and Deliverables;
- (d) except to the extent specified in the Agreement, it will take full responsibility for the successful provision of each Service and Deliverable, and performance of its other obligations under the Agreement;
- (e) in performing its obligations under the Agreement, it will comply with all Laws and will not do anything (by its acts or omissions) that results directly in the Industry Body, Allocation Participants or Users breaching any such Laws;
- (f) it will comply with all reasonable policies relating to the Services and Deliverables as notified to the Service Provider by the Industry Body from time to time;
- (g) all documentation (other than draft versions) and other information provided to the Industry Body under the Agreement will be materially complete, accurate and suitable for the purposes for which it was supplied;
- (h) it will ensure that any user documentation, assistance and training provided under the Agreement provides adequate instruction and support to enable reasonably competent Users to make use of the Services and Deliverables to the extent reasonably required by the Industry Body;
- (i) it will use its best endeavours to avoid damaging or adversely affecting the Industry Body's reputation, provided that nothing in the Agreement limits or excludes the Service Provider's right to respond to or pursue a Dispute between the parties in accordance with the Dispute Resolution Process.

### 3.3 **Due Diligence**

The Service Provider confirms that:

- (a) it has performed its own due diligence in respect of the Services and Deliverables, and all other matters which may affect the performance of its obligations under the Agreement;
- (b) it has documented in the Agreement all the pre-requisites, assumptions, resources, information and other inputs that will be required from the Industry Body and its agents and contractors in order for the Service Provider to perform its obligations in accordance with the Agreement; and
- (c) the listing of a risk, assumption, dependency or constraint in the Agreement will alter the Service Provider's obligations only to the extent expressly set out in the Agreement.

#### 3.4 **Non-Exclusivity**

The Service Provider acknowledges that it does not have exclusive rights of supply in respect of any goods or services and the Industry Body may at any time provide such goods or services itself or procure them from a third party.

#### 3.5 **Business Continuity Planning**

The Service Provider will document, implement and maintain at all times Good Practice business continuity (including disaster recovery) arrangements in respect of its own business. On request by the Industry Body, the Service Provider will provide the Industry Body with a copy of the Service Provider's business continuity plans.

#### 3.6 **Conflicts of Interest**

The Service Provider warrants that as at the Commencement Date, it has no Conflict of Interest in providing the Services or entering into the Agreement. The Service Provider must do its best to avoid situations that may lead to a Conflict of Interest arising. The Service Provider must tell the Industry Body immediately, and in writing, if any Conflict of Interest arises. If a Conflict of Interest does arise the parties must discuss, agree and record in writing whether it can be managed and, if so, how it will be managed. Each Party must pay its own costs in relation to managing a Conflict of Interest.

#### 3.7 **The Service Provider Personnel**

- (a) The Service Provider is responsible for any act or omission of its Personnel as if it were an act or omission of the Service Provider.
- (b) The Service Provider will ensure that its Personnel comply with all policies, procedures and codes of conduct notified to the Service Provider by the Industry Body from time to time, including those dealing with conduct, security and confidentiality and those with which the Industry Body's own employees are required to comply at the relevant time (**Notified Policies**), except to the extent the Notified Policies:
  - (i) conflict with a provision of the Agreement; or
  - (ii) materially increase the Service Provider's costs of providing a Service (provided the Service Provider requested a Contract Variation to compensate it for those additional costs within 1 month of being notified of the Notified Policy).
- (c) The Service Provider will notify the Industry Body immediately on becoming aware of any non-compliance with the Industry Body's policies, requests or instructions by any of its Personnel. The Industry Body may at any time, on reasonable grounds, request that the Service Provider removes any of its Personnel from provision of any or all of the Services or Deliverables, and the Service Provider will immediately comply with that request unless it can demonstrate that the removal of the Personnel will have a material and detrimental effect on the Service Provider's ability to perform the Services (in which case the parties will use all reasonable endeavours to promptly agree a satisfactory way to resolve the situation).

#### 3.8 **Subcontracting**

- (a) The Service Provider may appoint a subcontractor to perform any of the Service Provider's responsibilities under the Agreement provided the subcontract is only for goods or services that are incidental to, or do not otherwise represent a material part (in quantity or significance) of, the Service Provider's obligations under the Agreement. All other subcontracts of the Service Provider's responsibilities under the Agreement (**Material Subcontracts**) may only be entered into if the Service Provider obtains the Industry Body's prior written consent.
- (b) In respect of each Material Subcontract, the Service Provider must ensure that:
  - (i) the subcontract is approved by the Industry Body in writing, on such conditions as the Industry Body reasonably requires; and

- (ii) the Subcontractor is fully aware of the Service Provider's obligations under the Agreement to the extent necessary in order for the Subcontractor to properly perform its obligations.
- (c) In order to obtain the Industry Body's consent to any Material Subcontract under subclause (b), the Service Provider will first provide to the Industry Body:
  - (i) the name, qualifications and experience of the proposed Subcontractor;
  - (ii) a description of the obligations to be subcontracted and the Services affected; and
  - (iii) a description of the material terms of the subcontract (other than the price).
- (d) If, in the Industry Body's reasonable opinion, any Subcontractor:
  - (i) is not performing in accordance with the requirements of the Agreement:
    - (A) The Industry Body may, by notice to the Service Provider, require the Service Provider to procure that the Subcontractor performs the relevant obligations within 10 Business Days; and
    - (B) if, following that 10 Business Day period, the Industry Body is not satisfied that the Subcontractor's non-performance has been rectified it may, by notice to the Service Provider, require the Service Provider to immediately remove that Subcontractor from the performance of Services, and the Service Provider will immediately comply with that request unless it can demonstrate that the removal of that Subcontractor will have a material and detrimental effect on the Service Provider's ability to perform the Services (in which case the parties will use all reasonable endeavours to promptly agree a satisfactory way to resolve the situation); or
  - (ii) has caused the Service Provider to breach any obligation of confidentiality or security owed to the Industry Body, or if the Industry Body otherwise considers that the Subcontractor is a material threat to the health, safety or security of the Personnel or property of the Industry Body or any Allocation Participant or User, the Industry Body may, by notice to the Service Provider, require the Service Provider to immediately remove the relevant Subcontractor.
- (e) Subcontracting (whether material or not) will not in any way relieve the Service Provider of any obligations or liability under the Agreement, and the Service Provider will be responsible and liable for all acts and omissions of each Subcontractor in connection with any subcontracted activities as if they were acts or omissions of the Service Provider.

### 3.9 **Co-operation with Other Suppliers**

The Service Provider will work co-operatively and collaboratively with all Other Suppliers including by:

- (a) providing Other Suppliers with reasonable access to the Allocation System if reasonably required for them to provide services to the Industry Body;
- (b) providing Other Suppliers with such information and assistance as the Industry Body or the Other Suppliers reasonably request, but only to the extent the Other Supplier would be unable to effectively and efficiently provide their services to the Industry Body without such information or assistance; and
- (c) following the Industry Body's reasonable directions as to the division of responsibilities in relation to the discharge of the Service Provider's and/or the Other Suppliers' respective obligations.

### 3.10 **Inherent Services**

If any services, functions, responsibilities, activities or tasks are not specifically described or included within the definition and description of the Services but now or in the future are required to perform the Services because they are a necessary, inherent or incidental part of the Services they will, to the extent that it is reasonable to do so, be deemed implied by, and included in, the scope of the Services, as if described in the Agreement.

## 4 **INDUSTRY BODY RESPONSIBILITIES**

### 4.1 **Industry Body Assistance**

In addition to its other obligations under the Agreement, the Industry Body will:

- (a) provide the Service Provider with all information reasonably requested by it to enable it to provide the Services and Deliverables;
- (b) give the Service Provider reasonable access to the Industry Body's Personnel, to liaise with the Service Provider's Personnel in relation to the Services; and
- (c) reasonably co-operate with the Service Provider in relation to the performance of the Services.

### 4.2 **The Service Provider Exclusions**

A failure by the Service Provider to perform or observe any of its obligations under the Agreement will not constitute a breach of the Agreement to the extent that the failure is caused by:

- (a) The Industry Body breaching any of its obligations under the Agreement; or
- (b) The Service Provider relying on written information provided by the Industry Body, but only to the extent that such reliance is reasonable in the circumstances, taking into account the roles and responsibilities of the Service Provider contemplated in the Agreement,

except, in each case, where that failure could reasonably have been prevented or overcome by the Service Provider through due diligence or the proper performance of its obligations under the Agreement.

## 5 **CHARGES AND PAYMENT**

### 5.1 **Total Charge**

The Industry Body will pay the Charges to the Service Provider in accordance with this clause 5. Except as expressly provided in the Agreement or otherwise agreed by the parties, the Service Provider will not be entitled to any additional payment for the provision of the Services or Deliverables, the granting of any rights under the Agreement, and/or the performance of any other activities in connection with the Agreement.

### 5.2 **Invoicing and Payment**

The Service Provider will invoice the Charges in accordance with clause 8.1 of the On-Going Service Description, and will ensure that each such invoice is a valid tax invoice under the Goods and Services Tax Act 1985. Subject to clause 5.6, each such invoice received by the Industry Body on or before the fifth Business Day of a month, will be paid by the Industry Body on or before the 20<sup>th</sup> of that same month. If the Service Provider fails to provide the Industry Body with an invoice for any Charge within 6 months of the agreed date for invoicing, the Service Provider is deemed to have waived any right to payment for that Charge.

### 5.3 **Effect of Payment**

Payment of an invoice will be taken only as payment on account and is not evidence or an admission that any Service or Deliverable has been supplied in accordance with the Agreement or otherwise accepted by the Industry Body, nor an admission of liability or

concession to any claim in respect of the invoice, its subject matter or any aspect of the Agreement or the parties' relationship under it.

#### 5.4 **Supporting Documentation**

The Service Provider will include sufficient details in each invoice to enable the Industry Body to identify:

- (a) the particular Deliverables and Services which are the subject of the invoice, and the Charges for each such Deliverable and/or Service;
- (b) in respect of any Charges made at the T&M Rates, the relevant times and rates upon which the Charge is based, and each of the Service Provider's Personnel who performed the work, his/her hours worked and charge-out rate;
- (c) in respect of any Charges which may be charged upon completion of any milestone, details of the milestone and its achievement;
- (d) full details of any approved expenses incurred, together with copies of GST invoices; and
- (e) separately for each charged item, sums due in respect of GST.

#### 5.5 **Taxes**

The Industry Body will pay GST in respect of all taxable supplies made by the Service Provider to the Industry Body under the Agreement. All other Government taxes, duties, imposts and levies assessed or levied on the Service Provider in relation to the Agreement (including penalties thereon) are hereby deemed to be included in the Charges.

#### 5.6 **Disputed Invoices**

If the Industry Body has a bona fide dispute in relation to all or any portion of an invoice submitted by the Service Provider, the Industry Body may:

- (a) withhold payment of the amount subject to the dispute, provided that the Industry Body must:
  - (i) advise the Service Provider of the dispute on or before the payment date for that invoice;
  - (ii) pay the undisputed amount when it becomes due and payable in accordance with the terms of the Agreement; and
  - (iii) provide full details about the disputed amount and the reasons for withholding payment; or
- (b) dispute any part of the invoice after it has been paid, by providing full details about the disputed amount and the reasons for the dispute.

The Service Provider will continue to perform its obligations under the Agreement notwithstanding the dispute.

#### 5.7 **The Industry Body May Withhold Payment**

Without prejudice to the Industry Body's other rights and remedies, and notwithstanding anything else in the Agreement, if the Service Provider is in breach of the Agreement, the Industry Body may withhold payment of a part or all of the Charges due to the Service Provider, so long as the withheld part relates to the Services in respect of which the Service Provider is in breach of the Agreement, is reasonably proportional to the seriousness of the breach and is paid to the Service Provider within 5 Business Days of the breach being remedied by the Service Provider to the reasonable satisfaction of the Industry Body.

## 6 **AUDIT**

In addition to the Industry Body's right to audit the Service Provider under the Rules, the Industry Body may audit the Service Provider, in accordance with Part 4 of the Rules and either together with or separately from any other audit under that Part, for the purpose of:

- (a) auditing the accuracy of the Service Provider's invoices under the Agreement and/or the Service Provider's reporting of its performance against the Service Levels and other performance standards under the Agreement; and/or
- (b) otherwise allowing the Auditor to satisfy itself that the Service Provider is complying with its obligations under the Agreement.

## 7 **RECORDS AND INFORMATION**

### 7.1 **Recordkeeping**

The Service Provider will keep full, true and up-to-date accurate records, books of account and documentation in relation to all material aspects of its activities under the Agreement, the Services, the Deliverables, and the Charges, to a level of detail, completeness and accuracy consistent with Good Practice. The Service Provider will retain the same for not less than 3 years after the end of the Term.

### 7.2 **Access to Other Information**

- (a) Without limiting the Service Provider's obligations elsewhere in the Agreement, the Service Provider will provide the Industry Body or its duly authorised agents (as the case may be) with any documentation, information and explanations requested by the Industry Body on reasonable notice, regarding the Services and Deliverables and/or any invoice issued under the Agreement, provided that this will not oblige the Service Provider to disclose any material that is legally privileged or that shows its cost structure or margins, or any information that is confidential to the Service Provider's other customers or suppliers (although the Service Provider will use reasonable endeavours to obtain permission from those customers or suppliers to disclose such information to the Industry Body, where specially requested by the Industry Body).
- (b) Where the amount of work required of the Service Provider in order to collate and/or provide information under subclause (a) will exceed four hours in respect of any one request, the Service Provider will provide the Industry Body with a quote for the reasonable costs required for that purpose, and will provide the information if the Industry Body agrees to reimburse the Service Provider for those costs in accordance with that quote. To avoid doubt, this subclause (b) will not entitle the Service Provider to charge for providing information where the Service Provider is already obliged to do so under another provision of the Agreement.

## 8 **CONFIDENTIALITY**

### 8.1 **Agreement not Confidential**

The Service Provider acknowledges that the Industry Body must publish the Agreement under rule 8 of the Rules (accordingly the Agreement is not Confidential Information).

### 8.2 **Confidential Information**

Subject to clause 8.3, each party will keep the other party's Confidential Information in the utmost confidence, and will:

- (a) not use or disclose that Confidential Information except as permitted by the Agreement; and
- (b) take all action reasonably necessary to secure the Confidential Information against theft, loss or unauthorised disclosure.

### 8.3 **Permitted Use and Disclosure**

Clause 8.2 will not prohibit:

- (a) either party from using or disclosing any information:
  - (i) with the express prior consent of the other party;
  - (ii) that has become generally known to the public other than through a breach of the Agreement;
  - (iii) that is or came lawfully into its possession independently of its dealings with the other party, except where the receiving party knew or ought to have known that its receipt of the information resulted from a breach by another person of an obligation of confidence; and/or
  - (iv) that it independently developed without reference to the other party's Confidential Information;
- (b) either party disclosing information to:
  - (i) its Personnel with a need to know, to be used to enable that party to perform its obligations or take the intended benefit of its rights under the Agreement, so long as the disclosing party informs such Personnel of the confidential nature of that information and makes a written record of doing so; or
  - (ii) its professional advisors if such disclosure is necessary for the purposes of receiving professional advice and those professional advisors are subject to a duty of confidentiality that covers that information;
- (c) disclosure compelled by any statute or regulations, or any court order;
- (d) disclosure by the Service Provider to the extent necessary to comply with the rules of any exchange on which the securities of the Service Provider or any of its Related Companies are listed or quoted;
- (e) disclosure by the Industry Body of technical and/or operational information describing the Services and Deliverables, for the purpose of enabling a third party to offer or supply goods or services to the Industry Body, so long as that third party gives the Industry Body an undertaking that it will not use that information or those materials for any other purpose, and will destroy or return that information to the Industry Body once it is no longer required for that purpose.

### 8.4 **Media and Marketing**

- (a) The Service Provider will consider any potential media issues that may arise in relation to the supply of the Services, and provide the Industry Body with reasonable notice of any such potential media issues.
- (b) Neither party will make any public announcement about the Agreement, the Services, the Deliverables or its relationship with the other party or any Allocation Participant without first obtaining the other party's approval of the announcement and its content (not to be unreasonably withheld), except that:
  - (i) the Industry Body may make public announcements about any Allocation Participant; and
  - (ii) either party may make public announcements:
    - (A) as required by law;
    - (B) about the Service Provider being the Allocation Agent under the Agreement.

## 9 **INTELLECTUAL PROPERTY**

### 9.1 **Default Ownership**

Except to the extent this clause 9 provides otherwise, nothing in (or done in connection with) the Agreement will confer on any party any rights, interest or title in any Intellectual Property created, acquired or provided by another party in connection with the Agreement.

### 9.2 **Ownership of New Developments**

Subject to the Confidentiality Deed, exclusive ownership of and title to all Intellectual Property in the Deliverables (including the Application, Website and Application Data) that is developed by the Service Provider or its Personnel or Subcontractors under the Agreement will vest immediately and directly in the Industry Body upon its creation. To the extent ownership does not so vest, the Service Provider irrevocably assigns such Intellectual Property to the Industry Body.

### 9.3 **Licence to the Service Provider**

Except to the extent the Industry Body and the Service Provider agree otherwise in writing, the Industry Body grants to the Service Provider:

- (a) a non-exclusive, non-transferable licence for the duration of the Term to use, operate, maintain, enhance and modify any Intellectual Property provided to the Service Provider by the Industry Body in the course of the Agreement:
  - (i) provided the Service Provider does not sublicense or provide any such Intellectual Property to any third party, other than in accordance with subclause (b);
  - (ii) for the sole purpose of carrying out functions relating, directly or indirectly, to the downstream allocation and reconciliation of downstream gas quantities; and
  - (iii) subject to any restrictions which the Industry Body reasonably notifies to the Service Provider from time to time.
- (b) the right to sublicense the licence in subclause (a) to Subcontractors, provided that, before providing a Subcontractor with any Intellectual Property under this sublicense, the Service Provider first ensures that a Subcontractor is subject to confidentiality undertakings in favour of the Service Provider no less onerous than those contained in the Confidentiality Deed.

### 9.4 **Licence to the Industry Body**

Except to the extent the Industry Body and the Service Provider agree otherwise in writing, the Service Provider grants to the Industry Body a non-exclusive, perpetual, irrevocable and sublicenseable licence to use, operate, maintain, enhance, copy, modify and distribute any Intellectual Property in the Deliverables, other than Intellectual Property:

- (a) owned or provided under the Agreement by the Industry Body; or
- (b) owned by NZX Limited under the Confidentiality Deed.

### 9.5 **Moral Rights**

The Service Provider waives, and will use its best endeavours to ensure that its Personnel and Subcontractors will have waived prior to their creation, all "moral rights" in each Deliverable, other than "moral rights" forming part of their pre-existing Intellectual Property in that Deliverable.

### 9.6 **Further Assurances**

Each party undertakes at its own expense to execute and deliver any document and to do all things as may reasonably be required in order to assist, in respect of matters within that party's control, the other party to obtain the full benefit of this clause 9 according to its true intent. This includes assisting the Industry Body to register itself in any country as

proprietor of any Intellectual Property vested in or assigned to the Industry Body under the Agreement, and to perfect the Industry Body's title to any such Intellectual Property.

9.7 **Trade Marks**

Neither party will use any trade mark owned by the other party, except as expressly provided in the Agreement, without first obtaining the other party's consent. This clause does not prevent either party identifying the other party by name.

10 **IP WARRANTY AND INDEMNITY**

10.1 **The Service Provider Warranty**

The Service Provider warrants that:

- (a) the Services and Deliverables will not infringe the Intellectual Property of any third party, except where such infringement arises directly from:
  - (i) the Industry Body's breach of the Agreement; or
  - (ii) any Allocation Participant's breach of any Website terms of use agreed in writing between the parties;
  - (iii) Intellectual Property as provided to the Service Provider by the Industry Body under the Agreement (eg in relation to the Application and Website, this subclause only includes those items as they were at the Commencement Date); and
- (b) it has obtained and/or will make available to the Industry Body all licences, clearances, consents and authorisations necessary for the use of the Services and Deliverables in accordance with the Agreement, other than licences from third parties.

10.2 **IP Indemnity**

The Service Provider will:

- (a) indemnify and hold the Industry Body harmless against all Loss relating to; and
- (b) at its cost defend or settle,

any claim, suit, action or proceeding (in each case, an **Action**) brought by a third party (including any Allocation Participant) against the Industry Body, to the extent that the Action alleges circumstances which, if substantiated, would involve a breach of the warranty in clause 10.1, provided the amount the Service Provider is required to pay under this clause in connection with any Action will be reduced to the extent the Industry Body contributed to such amount by failing to comply with clause 10.3.

10.3 **Defending Actions**

For the purposes of this clause 10, the Industry Body will:

- (a) co-operate fully with the Service Provider (at the Service Provider's cost) in defending or settling the Action and make its relevant Personnel available to give statements, advice and evidence as the Service Provider may reasonably request;
- (b) notify the Service Provider promptly on becoming aware of any Action and give the Service Provider complete authority and, to the extent it is legally and contractually able to do so, information required for the conduct of the defence or settlement of the Action; and
- (c) allow the Service Provider sole control of the conduct of any Action and all negotiations for its settlement or compromise, provided that:

- (i) The Service Provider will consult with the Industry Body on all negotiations and proceedings relating to the Action;
- (ii) in conducting all negotiations and proceedings relating to the Action, the Service Provider will take into consideration the reasonable requirements of the Industry Body; and
- (iii) The Industry Body may (at its own cost) be represented at all negotiations and proceedings relating to the Action.

#### 10.4 **Remedy of Infringement**

As soon as reasonably practicable upon receiving notice of an Action the Service Provider will, at no cost to the Industry Body, and without any disruption to the provision of the Services:

- (a) modify the relevant Intellectual Property so that there is no infringement;
- (b) if such modification is not reasonably technically, legally and commercially practicable, obtain a licence for the relevant Intellectual Property; or
- (c) if neither of the above alternatives is reasonably technically, legally and commercially practicable, provide and implement reasonably equivalent Intellectual Property to replace the relevant Intellectual Property.

### 11 **REMEDIAL PLANS**

#### 11.1 **Performance Issues**

Without limiting the Industry Body's rights or remedies, if at any time the Industry Body considers in good faith that the Service Provider has committed a Serious Breach, the Industry Body may, provided the Service Provider is actually in breach of the Agreement in that respect, require the Service Provider to prepare a plan to remedy the breach by giving the Service Provider written notice (each a **Performance Notice**):

- (a) setting out details of the breach and the reasons why the Industry Body considers it to be a Serious Breach; and
- (b) advising that the Service Provider will be in Serious Breach unless it provides the Industry Body with a proposed Remedial Plan for the breach in accordance with clause 11.2 (Remedial Plan).

To avoid doubt, the provisions of this clause 11 (Remedial Plans) do not limit the Industry Body's ability to allege that the Service Provider has breached the Rules.

#### 11.2 **Agreeing the Remedial Plan**

(a) As soon as possible, and in any event within ten Business Days or such longer period as the Industry Body agrees (with such agreement not to be unreasonably withheld), after receiving a Performance Notice the Service Provider will, in consultation with the Industry Body, prepare and provide the Industry Body with a proposed plan (each a **Remedial Plan**) describing:

- (i) the breach (including where possible its root causes, expected duration and impact on the Service Provider's obligations under the Agreement); and
- (ii) a plan for eliminating the breach, mitigating its effect on the Industry Body and preventing it from reoccurring (including dependencies, assumptions, risks, resources, deliverables, milestones, tasks and success criteria).

(b) The Service Provider will promptly, and in any event within two Business Days of a request by the Industry Body, make such amendments to the proposed Remedial Plan as the Industry Body may reasonably require.

### 11.3 **Determining the Remedial Plan**

If the parties have not for any reason agreed the Remedial Plan within 20 Business Days of the Service Provider receiving the Performance Notice, the Industry Body may refer the matter to Expert Determination. If the Dispute is so referred to Expert Determination, the following will apply in addition to clause 15.4 (Option for Expert Determination):

- (a) Each party's written submissions to the expert under subclause 15.4(b)(iii) must include the Remedial Plan it proposes (each an **Offer**). Each party's Offer may be amended by that party, on written notice received by the expert before his/her final and binding determination.
- (b) The expert will choose the Offer that the expert considers is the fairest, and must not "split the difference" between each Offer. The fairness of an Offer will take into account:
  - (i) the impact of the breach on the Industry Body and Allocation Participants; and
  - (ii) the practicality of avoiding that impact; and
  - (iii) any other relevant matter.

### 11.4 **Implementation**

Once the Industry Body has approved the Remedial Plan in writing or the Remedial Plan has been determined under clause 11.3, the Service Provider will implement the Remedial Plan in accordance with its terms and the Agreement. The Service Provider will be deemed to be in Serious Breach if it does not remedy the breach in accordance with the Remedial Plan.

### 11.5 **Possibility of Null Remedial Plan**

For the avoidance of doubt, if the Service Provider reasonably considers that:

- (a) there has been no breach; or
- (b) no steps are required to mitigate or prevent reoccurrence of the breach,

the Service Provider's proposed Remedial Plan and Offer in relation to that breach may be to do nothing.

## 12 **LIABILITY**

### 12.1 **Exclusion of Liability**

Neither party will under any circumstances be liable to the other for any:

- (a) Indirect or Consequential Loss; or
- (b) loss of profits, turnover, business opportunities or damage to goodwill (whether direct or indirect).

### 12.2 **Service Provider's Limitation of Liability**

Subject to clause 12.1 and any limitation of liability provided by the Rules, the total aggregate liability of the Service Provider under or in connection with the Agreement will not in any circumstances exceed \$2,000,000 (subject to Indexation at the date the latest damages are paid), provided that the Service Provider's liability is not limited under this clause in relation to:

- (a) physical property damage;
- (b) malicious or fraudulent acts or omissions of the Service Provider;
- (c) breach of clauses 8 (Confidential Information) or 9 (Intellectual Property); or

(d) the indemnity in clause 10.2 (IP Indemnity).

**12.3 Industry Body's Limitation of Liability**

Subject to clause 12.1, the total aggregate liability of the Industry Body under or in connection with the Agreement will not in any circumstances exceed \$500,000 (subject to Indexation at the date the latest damages are paid), provided that the Industry Body's liability is not limited under this clause in relation to:

- (a) physical property damage;
- (b) malicious or fraudulent acts or omissions of the Industry Body; or
- (c) breach of clauses 8 (Confidential Information) or 9 (Intellectual Property).

**12.4 Scope of Exclusions and Limitations**

Except to the extent that the provisions of this clause 12 expressly provide otherwise, the limitations and exclusions in this clause 12 will apply to all Loss however it may arise (including as a result of the first party's or any third party's performance, non-performance or delay in performance), regardless of the cause of the Loss or whether the other party had been advised of the possibility of the Loss, and irrespective of the legal basis for recovery of that Loss (whether under the law of contract, equity or tort (including negligence), under statute, or on any other legal basis).

**13 INSURANCE**

**13.1 Types and Amounts of Coverage**

The Service Provider will arrange and keep in force for the duration of the Agreement:

- (a) general third party liability insurance cover for an amount not less than \$10 million per event; and
- (b) professional indemnity insurance cover for an amount not less than \$10 million per event.

**13.2 Specific Requirements**

The Service Provider will:

- (a) within one month of the date of signing the Agreement and promptly following each policy's renewal, provide a certificate of insurance from its insurer certifying that the Service Provider has effected the insurances contemplated in clause 13.1 on the terms required by the Agreement;
- (b) ensure all insurance policies contemplated in clause 13.1 are placed only with reputable insurers, and on normal commercial terms;
- (c) comply with its obligations under each insurance policy contemplated in clause 13.1, and avoid any act or omission which might invalidate any of those policies;
- (d) promptly notify the Industry Body if at any time any insurance policy contemplated in clause 13.1 is cancelled or materially amended, or the premiums payable in respect of that policy are overdue; and
- (e) at the request of the Industry Body from time to time, provide the Industry Body with such evidence as the Industry Body may reasonably require in order to confirm that all insurance policies contemplated in clause 13.1 are in force, and that the Service Provider is complying with its obligations under clause 13.1 (Types and Amounts of Coverage).

## 14 **FORCE MAJEURE**

### 14.1 **Non-Performance Excused**

Subject to clause 14.2, non-performance by either party of any of its obligations under the Agreement (other than the Industry Body's obligation to pay the Charges) will be excused, without liability for non-performance, during the time and to the extent that such performance is prevented, wholly or substantially, by Force Majeure. Any fixed or periodic components of the Charges will be reduced by a reasonable proportion to reflect any reduction in the Services and Deliverables as a result of such Force Majeure affecting the Service Provider.

### 14.2 **Notice**

The party claiming the benefit of this clause 14 will, as soon as is practical and to the extent known to that party, give notice to the other party specifying:

- (a) the nature of the Force Majeure;
- (b) the extent of its inability to perform its obligations under the Agreement; and
- (c) the likely duration of such non-performance.

### 14.3 **Mitigation**

The party claiming the benefit of this clause 14 will:

- (a) take all reasonable steps to remedy or abate the Force Majeure and mitigate its effects on the other party;
- (b) keep the other party fully informed of such steps as have been taken and are planned;
- (c) meet its obligations under the Agreement as far as is practical given the Force Majeure; and
- (d) where the party claiming the benefit of this clause 14 is the Service Provider, refund or credit the Industry Body the Charges to the extent the Services were not provided as a result of the Force Majeure.

### 14.4 **Alternative Supply**

Regardless of clause 3.4, the Industry Body may, after consulting with the Service Provider, make alternative arrangements to ensure performance of any of the Services during the period affected by Force Majeure and for a reasonable time afterwards, including by engaging alternative suppliers. If the Industry Body makes alternative arrangements, it does so at its own cost.

### 14.5 **Resumption of Performance**

Performance of any obligation affected by Force Majeure will be resumed as soon as practicable after the termination or abatement of the Force Majeure.

## 15 **DISPUTE RESOLUTION**

### 15.1 **Dispute Resolution**

All Disputes will be resolved in accordance with the Dispute Resolution Process, although nothing in the Dispute Resolution Process will:

- (a) prevent either party (**the Claimant**) seeking or obtaining any order or relief by way of injunction or declaration or other equitable or statutory remedy against the other party or any other person where the Claimant believes such order or relief is necessary for the urgent protection of the Claimant's rights or property; or

- (b) prevent either party's appeal or enforcement of any judgment or other order made by any court consequent upon that party's relevant application.

#### 15.2 **Dispute Notice**

In the event of a Dispute, either party may give notice (**Dispute Notice**) requiring that the Dispute be submitted to the Dispute Resolution Process.

#### 15.3 **Negotiations**

The parties will enter into negotiations to resolve the Dispute within 10 Business Days of the Dispute Notice being issued. Negotiations will be held as follows:

- (a) Promptly following the date of the Dispute Notice, negotiations will be held between the Business Owners.
- (b) If the Dispute is not resolved within 10 Business Days (or such longer period as the Business Owners may agree) of being referred to the Business Owners, either party may issue a notice referring the matter to the parties' respective Chief Executive, in which case each party will procure that its Chief Executive is available to meet promptly with a view to resolving the Dispute (which may include a meeting by audio-conference or video-conference).

Any agreement to resolve the Dispute that is negotiated in accordance with this clause will not be binding on either party until endorsed in writing by each of the officers, committees and/or boards whose authority is required pursuant to their respective legal and financial policies. Such endorsement will be at the absolute discretion of the relevant party. Negotiations to resolve the Dispute will be discontinued if a Mediation Notice or Arbitration Notice has been given in relation to the Dispute and either party subsequently notifies the other party that it wishes to discontinue negotiations.

#### 15.4 **Option for Expert Determination**

- (a) Either party may refer any Dispute to expert determination:
  - (i) if the Agreement provides that the Dispute is subject or referable to expert determination; or
  - (ii) the parties otherwise agree in writing to refer the Dispute to expert determination.
- (b) If the Dispute is referred to expert determination in accordance with subclause (a), the provisions of clauses 15.5 and 15.6 will not apply and instead the Dispute will be determined in accordance with the following process:
  - (i) The expert will be appointed by agreement between the parties or, failing agreement within 5 Business Days following its reference to expert determination, by the President of the New Zealand Law Society (or his or her nominee) who will be requested to appoint an expert who is suitably qualified and experienced in relation to the subject matter of the Dispute.
  - (ii) The expert will act as an expert and not as an arbitrator, and referral of the Dispute to the expert will not be a submission to arbitration for the purposes of the Arbitration Act 1996 and the provisions of that Act will not govern that referral.
  - (iii) Within 10 Business Days of the expert accepting the appointment, the parties will send initial written submissions on the Dispute to the expert and to each other and, within 5 Business Days of receiving the other party's submission, will submit any written replies they wish to make to the expert and to each other.
  - (iv) The expert will, unless the parties otherwise agree, be directed to deliver a draft written determination to the parties within 15 Business Days of receiving both parties' initial written submissions under subclause (iii). The parties will

provide any feedback to the expert within 5 Business Days of receiving the draft determination. The expert will, unless the parties otherwise agree, be directed to deliver a final written determination to the parties within 10 Business Days of providing the draft determination to them under this subclause.

- (v) Each party will give the expert all necessary assistance that the expert reasonably requires to determine the Dispute, including access to that party's Personnel and Confidential Information.
- (vi) The expert will have the power to compel the parties to produce any information material to the Dispute which that party has in its possession and which that party could be required to produce on discovery in a court proceeding to the expert and to each other.
- (vii) The expert's determination will be final and binding and, to the extent it is lawful to do so, the parties waive any right of appeal or review.
- (viii) The expert will determine the proportion of the expert's fees that the parties will be required to pay, having regard to (amongst other things) the conduct of those parties, and those parties will pay the fees as determined by the expert.

#### 15.5 **Option for Mediation**

If the parties have been unable to agree a resolution to the Dispute within one month (or such longer period as the parties may agree or have agreed under clause 15.3) of the date of the Dispute Notice, either party may refer the Dispute to mediation by written notice to the other party (**Mediation Notice**). The mediation will be conducted as soon as possible in Wellington by a sole mediator and otherwise in accordance with the LEADR New Zealand Incorporated (**LEADR**) Standard Mediation Agreement. The mediator and his/her fee may be agreed by the parties. Failing agreement between the parties within five Business Days of the giving of the Mediation Notice, the mediator will be selected, and the mediator's fee determined, by the chair of LEADR or his/her nominee. The mediation will be discontinued if either party gives an Arbitration Notice as below.

#### 15.6 **Arbitration**

If the Dispute has not been resolved within two months (or such longer period as the Chief Executives may agree) of the date of the Dispute Notice, then either party may issue a notice (**Arbitration Notice**) referring the Dispute to arbitration in accordance with this clause. Each Arbitration Notice will be regarded as a reference of the Dispute to arbitration in accordance with the Arbitration Act 1996 (**the Act**). Each such arbitration will be conducted on the following terms:

- (a) The place of arbitration will be Wellington, New Zealand.
- (b) The tribunal will consist of a sole arbitrator, to be appointed by agreement of the parties, but if the parties fail to reach such agreement within 10 Business Days of the date of the Arbitration Notice, then the arbitrator will be appointed by the President for the time being, or his or her nominee, of the Arbitrators' and Mediators' Institute of New Zealand Inc.
- (c) The arbitration will be conducted as quickly as possible and, as far as is practicable, the arbitrator will issue his or her award within four months of his or her appointment. When determining the procedure and scheduling of the arbitration, the arbitrator will take this time period into consideration.

#### 15.7 **Continuation and termination**

Pending resolution of any Dispute, each party will:

- (a) make all reasonable efforts to resolve the Dispute promptly and in a manner which minimises any impact on the Services, Deliverables and the Industry Body's business; and

- (b) continue to perform its obligations under the Agreement as far as is practicable as if the Dispute had not arisen.

However, nothing in this clause 15 will limit or restrict the ability of either party to terminate the Agreement in accordance with its terms.

## 16 **TERMINATION**

### 16.1 **Termination for the Service Provider Default**

The Industry Body may terminate the Agreement with immediate effect, by notice to the Service Provider, if any one or more of the following occur:

- (a) The Service Provider commits a Serious Breach and:
  - (i) the breach is capable of being remedied;
  - (ii) The Industry Body has given the Service Provider notice of the breach stating that the Industry Body regards that breach as material; and
  - (iii) The Service Provider has failed to remedy the breach within a period of 15 Business Days, or such longer time as may be:
    - (A) specified in that notice for remedying that breach; or
    - (B) agreed in a Remedial Plan for that breach;
- (b) The Service Provider commits a Serious Breach, and that breach is not capable of being remedied;
- (c) The Industry Body has given the Service Provider three or more notices under subclause (a), regardless of whether any of the breaches associated with those notices are remedied;
- (d) there is a change in Control in relation to the Service Provider without the prior consent of the Industry Body, however, this subclause does not apply:
  - (i) during any period while the Service Provider is listed on any stock exchange; or
  - (ii) to any transfer of shares in any of the Service Provider's holding companies, or to any change in Control of those holding companies, that takes place during any period while that holding company is listed on any stock exchange;
- (e) The Service Provider has a Conflict of Interest that is so material as to have an adverse effect on the Services or the Industry Body's business, provided the Industry Body has in good faith used reasonable endeavours to agree with the Service Provider how to avoid that adverse effect; and/or
- (f) The Service Provider is placed in receivership, or wound up, or goes or is put into voluntary administration, liquidation or any other form of insolvency administration (other than for solvent amalgamation or reconstruction).

The Industry Body will have no other right to terminate or cancel the Agreement or any part of it, except as expressly set out in the Agreement.

### 16.2 **Termination for Force Majeure**

Either party may terminate the Agreement with immediate effect, by notice to the other party, if the other party claims it is subject to an event of Force Majeure, and that event prevents (or has prevented) the other party from performing a material obligation or providing a Service or Deliverable for a continuous period of more than 30 days.

### 16.3 Termination by the Service Provider

The Service Provider may terminate the whole of the Agreement immediately by notice to the Industry Body:

- (a) if the Industry Body fails to pay the Service Provider any undisputed amount in excess of \$300,000 that is due and owing to the Service Provider under the Agreement for more than 90 days, the Service Provider has given notice to the Industry Body of that breach stating the Service Provider's intention to terminate the Agreement if such payment is not made within the timeframe specified in that notice (which will not be less than 5 Business Days from the delivery date of that notice), and the Industry Body fails to make that payment within that timeframe;
- (b) if the Industry Body wilfully breaches its obligations under the Agreement in relation to the Service Provider's Intellectual Property or Confidential Information, and the Industry Body has not taken all reasonable steps to remedy that breach within 15 Business Days of the Service Provider giving notice to the Industry Body requiring that breach to be remedied; and/or
- (c) if the Industry Body is placed in receivership, or wound up, or goes or is put into voluntary administration, liquidation or any other form of insolvency administration, other than for solvent amalgamation or reconstruction or following any assignment under clause 19.3 (Assignment).

The Service Provider will have no other right to terminate or cancel the Agreement or any part of it, except as expressly set out in the Agreement.

### 16.4 Early Termination Charges

- (a) The following costs may be invoiced by the Service Provider, and will be paid by the Industry Body, if the Service Provider terminates the Agreement in accordance with clause 16.3 (Termination by the Service Provider) or the Industry Body terminates the Agreement in accordance with clause 2.4 (Convenience Termination):

- (i) **Termination Fee.** An amount calculated as follows:

$$\$500,000 - 100,000 \times A$$

where A = the number of years (including part years) after the Go-live Date that notice of termination is given, up to a maximum of 5 years. For example, if termination notice is given at exactly 2.5 years after the Go-live Date, then the termination fee would be \$250,000. At 3.5 years the termination fee would be \$150,000. And at any time from 5 years after the Go-live Date, there will be no termination fee.

- (ii) **Breakage Costs.** Any costs (such as the Service Provider's own redundancy costs, and costs payable for early termination of contracts entered into by the Service Provider prior to receipt of the termination notice) incurred by the Service Provider directly as a result of the termination of the Agreement which:
    - (A) would not have been incurred had the Agreement continued to the natural expiry of the then current Term;
    - (B) relate directly to the termination of the Services;
    - (C) are unavoidable, proven, reasonable, and not capable of recovery;
    - (D) are incurred under arrangements or agreements that are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms;
    - (E) do not relate to contracts or subcontracts with the Service Provider's Related Companies; and

- (F) do not relate to any period beyond the natural expiry of the then current Term.
- (iii) **Unrecovered Costs.** Any costs incurred by the Service Provider in the performance of the Agreement
  - (A) to the extent such costs remain to be recovered through the Charges, at reasonable amortisation rates; but
  - (B) excluding all associated internal costs of financing, working capital or overheads.
- (b) The Service Provider must use all reasonable endeavours to minimise and mitigate the early termination charge, including by:
  - (i) the appropriation of assets, employees and resources for other purposes. If such assets, employees and resources can be used for other purposes then there will be an equitable reduction in the Breakage Costs and Unrecovered Costs payable by the Industry Body; and
  - (ii) in relation to contracts entered into with third parties, termination by the Service Provider of those contracts at the earliest possible date without breach or where contractually permitted, and, where required by the Industry Body, assigning such contracts to the Industry Body or a third party acting on behalf of the Industry Body.
- (c) The amounts payable under this clause will be reduced or extinguished to the extent that the Service Provider has already received the Charges or the financial benefit of any other remedy given under the Agreement or otherwise, so that there is no double counting in calculating the relevant payment.
- (d) Any dispute as to the amount of the Breakage Costs and Unrecovered Costs may be referred to Expert Determination.
- (e) The amounts paid in accordance with this clause are in full and final settlement of any claim, demand and/or proceedings of the Service Provider in relation to any termination by the Service Provider in accordance with clause 16.3 (Termination by the Service Provider) or the Industry Body in accordance with clause 2.4 (Convenience Termination), other than a claim, demand and/or proceeding to recover any unpaid Charges that are owed to the Service Provider, and the Service Provider will be excluded from all other rights and remedies it would otherwise have been in respect of any such termination.

#### 16.5 **Rights to Survive Termination**

The expiry or termination of the Agreement will be without prejudice to the rights of the parties accrued up to the date of such expiry or termination. During the Disengagement Period, the terms of the Agreement will continue in full force and effect, except where the context requires otherwise. In any case, clauses 1, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 19 will continue indefinitely notwithstanding any termination or expiry of the Agreement.

## 17 **DISENGAGEMENT**

### 17.1 **Disengagement Plan**

On request in writing by the Industry Body from time to time (no more than once per year other than during the Disengagement Period), the Service Provider will prepare or update a plan describing the activities, resources and Charges required in connection with any Disengagement Services that may be required under the Agreement (the **Disengagement Plan**). If the Disengagement Plan or any update to the Disengagement Plan has not been completed by the Service Provider and approved by the Industry Body (such approval not to be unreasonably withheld) within 2 months of request by the Industry Body, then:

- (a) either party may give notice referring the matter to the parties' Business Owners for resolution, and each party will use reasonable endeavours to ensure that those representatives meet promptly thereafter with a view to agreeing the contents of the Disengagement Plan;
- (b) where the matter has not been resolved within 1 month of referral under subclause (a):
  - (i) subject to paragraph (ii), the Disengagement Plan will be either:
    - (A) the last proposed update of the Disengagement Plan submitted by the Service Provider for the Industry Body's approval, with such amendments by the Industry Body as are reasonably necessary to cure any unreasonable provisions or omissions in the version submitted by the Service Provider; or
    - (B) if the Service Provider has not submitted any proposed update of the Disengagement Plan, the then-current Disengagement Plan with reasonable changes prepared by the Industry Body to take into account any subsequent changes to the Services or Deliverables; and
  - (ii) either party may, at any time within 2 months of referral under subclause (a), refer the determination of the Disengagement Plan to Expert Determination.

### 17.2 **Disengagement Period**

The Industry Body must give notices to the Service Provider specifying the start and end dates of any Disengagement Period (each a **Disengagement Notice**). The Disengagement Period must:

- (a) be no longer than 12 months;
- (b) continue for no longer than 7 months after the effective date of the termination or expiry (as applicable); and
- (c) end no earlier than the effective date of the termination or expiry (as applicable).

The Industry Body may extend any Disengagement Period with the Service Provider's prior written agreement (not to be unreasonably withheld) provided each extended Disengagement Period meets the requirements of this clause. In any event, the Disengagement Period will be extended to the extent required for the Service Provider to complete the Disengagement Services.

### 17.3 **Disengagement Services**

During the Disengagement Period in respect of any termination or expiry, and regardless of the reason for the termination or expiry:

- (a) the Service Provider will provide such assistance as the Industry Body requests, in order to achieve the orderly and seamless transition of the Services to the Industry Body and/or its nominated third party provider, with minimal disruption to the Industry Body's business;

- (b) in particular, the Industry Body and the Service Provider will each perform their respective tasks and responsibilities as required under the Disengagement Plan, subject to any changes reasonably necessary given the scope of the Services and the duration of the Disengagement Period;
- (c) in addition, the Service Provider will, to the extent requested by the Industry Body and reasonably necessary for an orderly and seamless transition of the Services to the Industry Body and/or its nominated third party provider, with minimal disruption to the Industry Body's business:
  - (i) provide the Industry Body or its nominated third party provider with:
    - (A) copies of the latest releases of the Application and Website, in object and Source Code format;
    - (B) copies of such versions of the Application Data as are reasonably required by the Industry Body (including any backup copies held by the Service Provider), in an open format reasonably required by the Industry Body;
    - (C) appropriate training and knowledge transfer in relation to the Services any assets to be sold to the Industry Body under this clause; and
    - (D) such other information, assistance and co-operation as the Industry Body or its nominated third party provider may reasonably require; and
  - (ii) sell to the Industry Body or its nominated third party provider at book value any assets which are owned by the Service Provider or its Related Companies and exclusively used by the Service Provider to provide the Services.

#### 17.4 **Continued Service Provision**

- (a) Subject to subclause (b) below, the Service Provider will continue to provide the Services and Deliverables in accordance with the terms of the Agreement, and the terms of the Agreement will continue to apply, during the Disengagement Period.
- (b) Notwithstanding the termination or expiry of the Agreement, the Services will reduce over the Disengagement Period, in accordance with the Disengagement Plan or alternatively (at the Industry Body's option in each instance) by the Industry Body giving notice of ceasing to require any particular component of the Services, so that by the end of the Disengagement Period, the Service Provider is no longer providing any Services.
- (c) Any fixed or periodic components of the Charges will be reduced by a reasonable proportion to reflect any such phased reduction in the Services, and by the end of the Disengagement Period those Charges will cease altogether.

#### 17.5 **Return of Property**

Subject to clause 17.6, on or before the expiry of the Disengagement Period each party will:

- (a) return or destroy (at the other party's election) all Confidential Information and Intellectual Property in its possession or control and belonging, leased or licensed to the other party, and will confirm to the other party that it no longer holds or controls the same (to the extent that such material comprises computer records, the party obliged to return it will deliver a useable electronic copy of such records to the other party in an open file format reasonably requested by that other party); and
- (b) return all physical property in its possession or control and belonging to or leased by the other party, and will confirm to the other party that it no longer holds or controls the same.

#### 17.6 **Retention of Information**

The party returning Confidential Information and Intellectual Property under clause 17.5:

- (a) may retain and (to the extent necessary for such retention) use any Confidential Information and Intellectual Property for such period as is reasonably required in order for that party to:
  - (i) enforce or take the benefit of any rights arising under or in connection with the Agreement and surviving termination or expiry;
  - (ii) resolve any Dispute in progress or reasonably anticipated as at the expiry of the Disengagement Period; and/or
  - (iii) comply with any Laws;
- (b) may retain any Confidential Information or Intellectual Property:
  - (i) of or owned by that party (even if originally provided by the other party); or
  - (ii) in respect of which that party continues to have a licence under clause 9 (so long as that licence is in force); and
- (c) in the case of the Service Provider, may retain and (to the extent necessary for such retention) use all backup copies of the Application, Website and Application Data, provide that such items remain the Industry Body's Confidential Information at all times.

#### 17.7 **Termination of Allocation Agent Appointment**

The Service Provider's appointment as Allocation Agent under clause 3.1 (Allocation Agent Appointment), will be revoked by the Industry Body during the Disengagement Period, at a time of the Industry Body's choosing, on written notice to the Service Provider. To avoid doubt, this clause does not limit the Industry Body's right to terminate the Service Provider's appointment as Allocation Agent in accordance with rule 7.4 of the Rules.

#### 17.8 **Payment for Disengagement Services**

Where the Service Provider terminates the Agreement under clause 16.3, or the Industry Body terminates under clause 2.4, the Industry Body will pay the Service Provider for all Disengagement Services performed by the Service Provider during the Disengagement Period, at the applicable T&M Rates, but excluding:

- (a) any work that could have been required as part of the other Services; and
- (b) the cost of providing the Industry Body with copies of the Application, Website, Application Data, Service Data and the Industry Body's Confidential Information and Intellectual Property (other than backup copies of the Application, Website and Application Data, which may be charged in accordance with clause 17.8 (Payment for Disengagement Services)).

In any other circumstances, the Disengagement Services will be provided at the Service Provider's sole cost.

### 18 **CONTRACT VARIATIONS**

#### 18.1 **Form of Contract Variations**

No amendment to the Agreement (**a Contract Variation**) will be effective unless it is in writing and executed by both parties.

#### 18.2 **Process for Agreeing Contract Variations**

In agreeing each Contract Variation the parties must follow the processes in the remaining provisions of this clause 18 (Contract Variations), provided the parties may agree a truncated process to agree a Contract Variation that is:

- (a) relatively minor (in terms of cost and impact) or urgent; and
- (b) not a material deviation from the Agreement.

### 18.3 **Variation Requests**

From time to time either party may request Contract Variations (including to the Service Levels) by submitting a Variation Request.

### 18.4 **Variation Assessments**

Within 20 Business Days of receiving each Variation Request from the Industry Body, and at the same time as it submits any Variation Request to the Industry Body, the Service Provider will provide the Industry Body with a report containing a detailed specification of the proposed modifications to the Agreement, which specifies how and when the Variation Request is to be implemented and, to the extent relevant, specifies:

- (a) the feasibility of the Variation Request;
- (b) the effect of implementing the Variation Request on the Service Provider's other obligations under the Agreement;
- (c) the cost implications (if any) for the Service Provider and the Industry Body, including any changes to the Charges which the Service Provider considers necessary. In considering changes to the Charges, the Service Provider will:
  - (i) ensure that the Charges for the Contract Variation:
    - (A) are directly related to the Variation Request;
    - (B) if required by the Industry Body, are based on the T&M Rates;
    - (C) are otherwise calculated based on reasonable costs and margin for the Service Provider;
    - (D) do not include any amount that is already covered by the Charges;
  - (ii) use its best endeavours to mitigate its costs relating to any Services that are no longer required as a result of the Contract Variation;
- (d) a description of any consequential material impacts or risks that the modifications may have on the Industry Body or the Service Provider;
- (e) a draft Contract Variation that would give effect to the Variation Request once agreed in accordance with clause 18.1 and which is, to the extent appropriate in the circumstances, consistent with the terms of the Agreement; and
- (f) any other information which is likely to be material to the Industry Body and/or the Service Provider in deciding whether to proceed with the Variation Request,

(each **a Variation Assessment**). The Industry Body will promptly provide the Service Provider with:

- (g) information reasonably requested by the Service Provider to prepare a Variation Assessment that:
  - (i) is, or is likely to be, material to the Variation Assessment;
  - (ii) is held or controlled by the Industry Body; and
  - (iii) The Industry Body is permitted to provide to the Service Provider; and

- (h) such reasonable assistance as is necessary in the circumstances to enable the Service Provider to prepare the Variation Assessment.

#### 18.5 **Report Responses**

The Industry Body will review each Variation Assessment within 15 Business Days of receiving it, and respond advising the Service Provider whether the Industry Body:

- (a) accepts the Variation Assessment, in which case both parties will sign the Contract Variation included in the Variation Assessment;
- (b) requires further information on or minor updates to the Variation Assessment, in which case the Service Provider will promptly (and in any event within 5 Business Days or such other period as the Industry Body and the Service Provider agree) provide to the Industry Body the information or updates required by the Industry Body;
- (c) wishes to negotiate the Variation Assessment, in which case the Industry Body and the Service Provider will use their best endeavours to negotiate and agree the Variation Assessment as soon as is practicable (and in any event within five Business Days), and the Service Provider will provide to the Industry Body an updated Variation Assessment that incorporates the agreed draft Contract Variation promptly upon the Industry Body and the Service Provider reaching such agreement; or
- (d) rejects the Variation Assessment, in which case no further action is necessary,

or if no such response is made by the Industry Body, it will be deemed to have rejected the Variation Assessment.

#### 18.6 **Agreeing Variations**

- (a) A party will not unreasonably refuse to accept any Variation Request or sign any Contract Variation. Unreasonable refusal includes:
  - (i) imposing unreasonable impacts, consequences, conditions or requirements, and/or demanding unreasonable Charges, to undertake the Variation Request;
  - (ii) imposing an unreasonably long timetable for implementation of the Variation Request; and
  - (iii) unreasonably delaying its agreement to the Variation Request.
- (b) If a Contract Variation is not agreed within two months following a party's initial Variation Request in relation to that Contract Variation, that party may refer the matter to Expert Determination.
- (c) If the Dispute is so referred to Expert Determination, the following will apply in addition to clause 15.4 (Option for Expert Determination):
  - (i) Each party's written submissions to the expert under subclause 15.4(b)(iii) must include the terms on which it would agree the Contract Variation (each an **Offer**). Each party's Offer may be amended by that party, on written notice received by the expert before his/her final and binding determination.
  - (ii) The expert will choose the Offer that the expert considers is the fairest, and must not "split the difference" between each Offer. The fairness of an Offer:
    - (A) will be determined by reference to the requirements of clause 18.4(c);
    - (B) will take into account:
      - the costs, benefits and risks of the Contract Variation to each party; and

- each party's knowledge and resources;
- (C) will not take into account:
- the fact that another supplier would have to become familiar with the Industry Body or the Services;
  - any discount that another supplier might offer below its normal competitive charges to displace the Service Provider as a supplier to the Industry Body; or
  - any discount, rebate or other arrangements of this type that may exist between the Industry Body and the Service Provider; and
- (D) may take into account (if relevant) equivalent services and deliverables available from alternative suppliers, and the terms on which those services and deliverables are usually made available.

**18.7 Possibility of No Contract Variation**

For the avoidance of doubt, if a party does not reasonably consider a Variation Request to be technically, legally or commercially practicable, that Party's Offer may be to not have any Contract Variation.

**18.8 Cost of Variation Process**

Subject to each party's responsibility to pay any expert fees in accordance with clause 15.4 (Option for Expert Determination), each party will bear its own costs in relation to the process for agreeing any Contract Variation. Where a Variation Assessment is complex, difficult or not straightforward, then the Industry Body will pay the Service Provider's reasonable costs associated with the preparation of such a Variation Assessment that are agreed in writing by the Industry Body in advance.

**19 OTHER MATTERS**

**19.1 Accuracy of Proposal**

The Service Provider represents that, to the best of its knowledge and belief, all information contained in its Proposal was, and is at the date of the Agreement, accurate, complete and true in all material respects. The Service Provider acknowledges that the Industry Body is entering into the Agreement in reliance on this representation.

**19.2 Mutual Warranties**

In entering into and performing its obligations under the Agreement, each party represents to the other that, subject to any express provision to the contrary in the Agreement, on a continuing basis throughout the Term:

- (a) it has full power and authority to enter into and perform its obligations under the Agreement;
- (b) there is no other agreement, arrangement, understanding or requirement binding on it, that would prevent or impede its entry into or performance of the Agreement or that it would breach by entering into the Agreement; and
- (c) the performance of its obligations under the Agreement will not result in the breach of any statute or regulation.

**19.3 Assignment**

No party may assign, transfer, encumber or otherwise dispose of any rights or obligations under the Agreement without first obtaining the other party's consent (such consent not to be unreasonably withheld or delayed), except that the Industry Body may assign or novate all of its rights and obligations under the Agreement to any Energy Commission established under section 43ZZH of the Gas Act 1992, at any time on prior written notice to the Service Provider.

19.4 **Privity**

Except as expressly provided in the Agreement, the Agreement will not and is not intended to confer any benefit on or create any obligation enforceable at the suit of any person not a party to the Agreement.

19.5 **Notices**

Any notice, consent, approval, agreement, undertaking, report or other communication given by a party for the purposes the Agreement will be of no effect unless given in writing and addressed to the recipient at the address last notified by the recipient to the other party. Until a change is so notified, the address of each party is as follows:

**The Industry Body**

Gas Industry Company Limited

Level 8

95 Customhouse Quay

Wellington 6011

Attn: Andrew Walker

Email: Andrew.Walker@gasindustry.co.nz

**The Service Provider**

Transpower NZ Ltd, trading as Energy  
Market Services,

96 The Terrace

Wellington 6011

Attn: James Whistler

Email: James.Whistler@ems.co.nz

Delivery may be effected by hand, by post with postage prepaid, by email or by facsimile. A notice or other communication will be deemed to have been received:

- (a) in the case of hand delivery or pre-paid post sent from outside New Zealand, at the time of actual delivery to the recipient's address;
- (b) in the case of delivery by pre-paid post sent from within New Zealand, no later than the 3<sup>rd</sup> Business Day after posting;
- (c) in the case of delivery by email, no later than when the recipient's email server acknowledges receipt; or
- (d) in the case of delivery by facsimile, no later than the time of transmission specified in a transmission report from the sending machine which indicates that the facsimile was sent in its entirety to the facsimile number of the recipient.

However, if a notice or other communication is received or deemed to have been received after 5.00 p.m. on a Business Day in the place to which it is sent, or on a day which is not a Business Day in that place, it will be deemed not to have been received until the next Business Day in that place.

19.6 **Further Assurances**

Each of the parties agrees to execute and deliver any documents, including transfers of title and to do all things as may reasonably be required by the other party or parties to obtain the full benefit of the Agreement according to its true intent.

19.7 **Rights and Remedies are Cumulative**

Except to the extent the Agreement expressly provides otherwise, each right and/or remedy of any party under the Agreement is cumulative and not exclusive of any rights provided by law or any other rights or guarantees now or hereafter held by that party.

19.8 **Legal nature of Relationship**

Notwithstanding any other provision in the Agreement, nothing in the Agreement is intended to or will imply or be construed as a fiduciary obligation, or create a legal relationship of partnership or joint venture. Except as expressly permitted by the Agreement, nothing in the Agreement gives any party any right to act on behalf of or bind the other party in any way.

**19.9 Law and Jurisdiction**

This Agreement will be governed by, and construed in accordance with, the laws of New Zealand. Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of New Zealand for the purpose of hearing and determining any disputes or proceedings arising out of, or in any way connected with, the Agreement.

**19.10 No Waiver**

No failure, delay or indulgence by any party in exercising any power or right conferred on that party by the Agreement will operate as a waiver of that power or right. A single exercise of any of those powers or rights does not preclude further exercises of those powers or rights or the exercise of any other powers or rights under the Agreement.

**19.11 Entire Agreement**

This Agreement constitutes the sole and entire understanding with respect to the subject matter hereof and supersedes all prior discussions, representations and understandings, whether written or oral, express or implied.

**19.12 Severability**

Any unlawful provision of the Agreement will be amended to the minimum extent necessary to ensure that it is not unlawful and, as far as is possible, to ensure that it is consistent with the intent and effect of the provision. The remaining provisions will be enforceable as if such unlawful provision had not been included in the Agreement. If the provision is unable to be amended without materially altering the intent and effect of the provision, it will be severed, and the remaining provisions enforceable, but only if the severance does not frustrate the Agreement.

**19.13 Costs**

Each party will meet its own legal, accounting and other professional and advisory costs and expenses incurred in relation to the negotiation, preparation and execution of the Agreement and any future amendments to it. Each party will meet its own costs in performing its obligations under the Agreement unless agreed otherwise.

**19.14 Counterparts**

This Agreement may be executed in any number of counterparts (including facsimile or scanned and emailed copies). So long as each party has received a counterpart or counterparts carrying the signatures of each of the other parties, the counterparts together will constitute a binding and enforceable agreement between the parties.

**SIGNATURES**

**Gas Industry Company Limited by:**

  
\_\_\_\_\_  
Signature

Name: Steve Bielby  
Title: Chief Executive  
Date: 04.10.13

**Transpower New Zealand Limited by:**

  
\_\_\_\_\_  
Signature

Name: KIERAN DEVINE  
Title: C. M. System Ops.  
Date: 04/10/13

## SCHEDULE 1 – CONFIDENTIALITY DEED

Date:

### Parties

- (1) [ ] (NZX)  
(2) [ ] (the *Recipient*)

### BACKGROUND

[*Select the relevant paragraph and delete the other*]

[Gas Industry Co, a company registered under the Companies Act 1993, wishes to appoint the Recipient as Allocation Agent under the Gas (Downstream Reconciliation) Rules 2008. In order to perform the services required by the Allocation Agent, the Recipient requires access to certain information, including software, licensed by NZX to Gas Industry Co, which is confidential and/or proprietary to NZX. This Deed records the terms on which the Recipient will access and use that confidential information.]

[Gas Industry Co, a company registered under the Companies Act 1993, wishes to engage the Recipient to work with the Allocation System, an electronic information exchange and analysis platform required under the Gas (Downstream Reconciliation) Rules 2008. In order to perform the services required by Gas Industry Co, the Recipient requires access to certain information, including software, licensed by NZX to Gas Industry Co, which is confidential and/or proprietary to NZX. This Deed records the terms on which the Recipient will access and use that confidential information.]

### TERMS

#### 1 Defined terms

In this Deed:

*Confidential Information* means:

- (a) any part of any software licensed to Gas Industry Co by NZX pursuant to the “Allocation Agent Service Provider Agreement”, and any other software owned by NZX, including all source code, object code, mark-up, graphics and associated documentation (the *Software*); and
- (b) all alterations, additions or enhancements to the *Software*, whether made before or after the date of this Deed;
- (c) any technical information concerning the *Software*, including its design, specifications, functionality and operation; and
- (d) any information generated (directly or indirectly) by the Recipient or any other person using any information coming within the ambit of paragraph (a), (b) or (c), to the extent that it is so generated,

but does not include information which, when disclosed to or by the Recipient, is generally available to and known by the public other than as a result of any breach of any obligation of confidentiality or which the Recipient can show it has legitimately acquired or developed independently of any information coming within the ambit of this definition;

*Intellectual Property* includes all rights to and interest in:

- (a) any copyright, trade secret, patent, design, trade mark or trade name (including all associated goodwill and registration rights); and
- (b) any other proprietary rights and forms of intellectual property (whether protectable by registration or not) in respect of any know-how, technology, concept, idea, data, component, tool, library, methodology, routine, program or other software, specification, formula, drawing, document, design, system, process, logo, mark, style or other similar thing.

*Permitted Purpose* means providing services to Gas Industry Co in order to perform the downstream allocation and reconciliation of downstream gas quantities;

*Person* includes a corporation sole and also a body of persons, whether corporate or unincorporated;

## 2 **Confidentiality**

The Recipient will keep the Confidential Information strictly confidential and will not disclose it to any Person other than Gas Industry Co, except to the extent expressly permitted under the terms of this Deed.

## 3 **Use of Confidential Information**

The Recipient may use the Confidential Information for the Permitted Purpose but not for any other purpose. In particular, but without limitation, the Recipient will not (except to the extent necessary for the Permitted Purpose):

- (a) use or develop any Confidential Information for its own commercial use;
- (b) use any Confidential Information to engage in competition with NZX or to act in a manner that may or does cause material loss to NZX or that materially adversely affects NZX's business, provided that this paragraph 3(b) shall not restrict the use of Confidential Information by the Recipient for the sole purpose of performing services for Gas Industry Co in relation to the Allocation System; or
- (c) remove any NZX copyright, trademark or other proprietary notice from any Confidential Information;
- (d) reproduce, reverse engineer, decompile, or disassemble the Confidential Information;
- (e) sell, rent, sublicense, transfer or otherwise dispose of the Confidential Information;
- (f) develop any derivative works based on the Confidential Information;

## 4 **Disclosure to Representatives**

4.1 The Recipient may disclose all or any part of the Confidential Information to an officer or employee of the Recipient approved by NZX (a *Representative*) if:

- (a) the Representative needs to know the content of that Confidential Information for the Permitted Purpose; and
- (b) the Recipient has informed the Representative of the confidential nature of the Confidential Information; and

- (c) the Recipient has obtained that Representative's written undertaking to be bound by this Deed and has provided an original of that written undertaking to NZX.

4.2 The Recipient agrees to be responsible under this Deed for all the acts and omissions of that Representative as if they were the acts and omissions of the Recipient.

5 **Disclosure pursuant to a lawful requirement**

If the Recipient becomes legally compelled to disclose any of the Confidential Information the Recipient will immediately give written notice to NZX of the requirements placed on the Recipient and use best endeavours to provide NZX with a reasonable opportunity to seek a protective order or other remedy or waive compliance with the terms of this Deed. In any event, the Recipient agrees to disclose only that part of the Confidential Information which the Recipient is legally required to disclose, and to use reasonable efforts to obtain an assurance that the information disclosed will be treated confidentially.

6 **Security**

The Recipient will take all reasonable steps to protect the Confidential Information from unauthorised access and use, and will comply with any reasonable requirement of NZX relating to the access, storage and use of the Confidential Information.

7 **Return of Confidential Information**

If the Recipient ceases to provide services to the Recipient for the Permitted Purpose, the Recipient will promptly:

- (a) return, or procure the return of, all copies of Confidential Information to Gas Industry Co if directed by Gas Industry Co; and/or
- (b) in any other case, destroy or erase, or procure the destruction or erasure of, all copies (whether on paper or in any electronic information storage and retrieval system or in any other storage medium) of the Confidential Information and any analyses, compilations, studies, notes, memoranda or other documents which contain or reflect any Confidential Information,

and certify to NZX that this clause 7 has been complied with.

8 **Intellectual Property**

8.1 The Recipient agrees that:

- (a) the Confidential Information and all Intellectual Property rights in it are owned by NZX (or, where applicable, NZX's licensors);
- (b) ownership of any alterations, additions or enhancements made to the Confidential Information (including all associated Intellectual Property rights) by the Recipient or anyone for whom the Recipient is responsible will vest absolutely and exclusively in NZX (or, where applicable, NZX's licensors) immediately on their creation, at no cost to NZX; and
- (c) it will not at any time after the date of this Deed in any way question or dispute NZX's ownership of these rights; and
- (d) it will do any thing reasonably required by NZX (including executing and delivering any document) in order for NZX to obtain or retain the ownership of the Confidential Information and the Intellectual Property in accordance with this clause 8.

8.2 The Recipient indemnifies NZX against all liabilities, damages, expenses and losses (including legal costs) in connection with the infringement or alleged infringement of any third party's Intellectual Property rights arising out of or in connection with any

modifications or enhancements made to the Confidential Information by the Recipient (*IP Claim*). The Recipient's obligations under this clause 8.2 are conditional on:

- (a) NZX promptly notifying the Recipient in writing of the IP Claim;
- (b) NZX making no admission regarding the IP Claim without the Recipient's consent;
- (c) the Recipient conducting and/or settling (at its own cost) all negotiations and litigation; and
- (d) NZX giving the Recipient all reasonable assistance at the Recipient's cost.

9 **Non solicitation**

While the Recipient is providing any services to the Recipient, and for a period of 12 months after ceasing to do so, the Recipient will not, and will ensure that its related companies do not, solicit, entice away or attempt to entice away any employee or contractor of NZX either on the Recipient's behalf or on behalf of any other person without first obtaining NZX's prior written consent.

10 **General provisions**

- 10.1 The agreements, obligations, warranties and undertakings on the Recipient's part set out in this Deed will continue in full force until all the Confidential Information has entered the public domain other than directly or indirectly through a default of the Recipient under this Deed.
- 10.2 The Recipient acknowledges that damages alone would be an inadequate remedy for the breach of the Recipient's obligations under this Deed and that the appropriate remedies for such a breach or threatened breach shall include, at NZX's election, orders for specific performance and injunctive relief.
- 10.3 No failure, delay or indulgence by NZX in exercising any power or right under this Deed shall operate as a waiver of that power or right. Nor shall a single or partial exercise of any such power or right preclude further exercises of that power or right or the exercise of any other power or right under this Deed.
- 10.4 If any part of this Deed is held by any court or administrative body of competent jurisdiction to be illegal, void or unenforceable, such determination shall not impair the enforceability of the remaining parts of this Deed which shall remain in full force.
- 10.5 The Recipient also acknowledges that the undertakings and agreements on the Recipient's part set out in this Deed are in addition to, and do not detract from, the duties of confidentiality which are imposed on the Recipient by law and in equity.
- 10.6 This Deed will be governed by and construed in accordance with New Zealand law, and each party irrevocably and unconditionally submits to the exclusive jurisdiction of the courts of New Zealand for the purpose of hearing and determining any disputes or proceedings arising out of or in connection with this Deed.

SIGNED as a DEED