

**DRAFT CONCESSION AGREEMENT**

**Shimla Water supply and Sewerage System Project**

to

Build, refurbish, Operate and Maintain the Water supply and Sewerage System of Shimla City, Himachal Pradesh (India)  
on Public Private Partnership (PPP) Mode

**Shimla Municipal Corporation**

Shimla

## Table of Contents

Part I: Preliminary.....	7
ARTICLE 1 : DEFINITIONS AND INTERPRETATION .....	10
1.1 Definitions .....	10
1.2 Interpretation.....	10
1.3 Measurements and arithmetic conventions .....	11
1.4 Priority of Agreements and errors/discrepancies.....	11
Part II: The Concession .....	13
ARTICLE 2 : SCOPE OF THE PROJECT .....	14
2.1 Scope of the Project .....	14
ARTICLE 3 : GRANT OF CONCESSION .....	16
3.1 The Concession .....	16
ARTICLE 4 : CONDITIONS PRECEDENT .....	17
4.1 Conditions Precedent .....	17
4.2 Non-fulfillment of Conditions Precedent.....	19
ARTICLE 5 : OBLIGATIONS OF THE CONCESSIONAIRE.....	20
5.1 Obligations of the Concessionaire .....	20
5.2 Obligations relating to Project Agreements.....	20
5.3 Obligations relating to Change in Ownership.....	21
5.4 Employment of foreign nationals .....	22
5.5 Employment of trained personnel.....	22
5.6 Sole purpose of the Concessionaire.....	22
ARTICLE 6 : OBLIGATIONS OF THE AUTHORITY.....	23
6.1 Obligations of the Authority.....	23
6.2 Maintenance obligations prior to Appointed Date.....	23
ARTICLE 7 : REPRESENTATIONS AND WARRANTIES.....	24
7.1 Representations and Warranties of the Concessionaire .....	24
7.2 Representations and Warranties of the Authority.....	25
7.3 Disclosure .....	26
ARTICLE 8 : DISCLAIMER.....	27
8.1 Disclaimer.....	27
Part III : Development and Operations.....	28
ARTICLE 9 : PERFORMANCE SECURITY .....	29
9.1 Performance Security .....	29
9.2 Appropriation of Performance Security.....	29
9.3 Release of Performance Security .....	29
ARTICLE 10 : ACCESS TO SERVICE AREA.....	30
10.1 The Site .....	30
10.2 Licence, Access and Right of Way.....	30
10.3 Procurement of the Site .....	31
10.4 Site to be free from Encumbrances .....	32
10.5 Protection of Site from encroachments .....	32
10.6 Special/temporary right of way .....	32
10.7 Access to the Authority and Independent Engineer .....	32
10.8 Access to Service Area.....	32
ARTICLE 11 : UTILITIES, ASSOCIATED ROADS AND TREES .....	34
11.1 Existing utilities and roads .....	34
11.2 Shifting of obstructing utilities.....	34
11.3 New utilities and roads .....	34

	11.4 Felling of trees .....	34
ARTICLE 12 :	CONSTRUCTION OF THE PROJECT FACILITIES .....	35
	12.1 Obligations prior to commencement of construction.....	35
	12.2 Drawings .....	35
	12.3 Augmentation of the Water Supply and Sewerage System .....	36
ARTICLE 13 :	MONITORING OF CONSTRUCTION.....	37
	13.1 Monthly progress reports.....	37
	13.2 Inspection.....	37
	13.3 Tests.....	37
	13.4 Delays during construction.....	37
	13.5 Suspension of unsafe Construction Works .....	38
	13.6 Video recording .....	38
ARTICLE 14 :	COMPLETION CERTIFICATE .....	39
	14.1 Tests.....	39
	14.2 Completion Certificate .....	39
	14.3 Provisional Certificate.....	39
	14.4 Completion of Punch List items.....	39
	14.5 Withholding of Provisional Certificate.....	40
	14.6 Rescheduling of Tests.....	40
	14.7 Damages for delay .....	40
ARTICLE 15 :	CHANGE OF SCOPE .....	41
	15.1 Change of Scope .....	41
	15.2 Procedure for Change of Scope.....	41
	15.3 Payment for Change of Scope .....	41
	15.4 Restriction on certain works .....	42
	15.5 Power of the Authority to undertake works .....	42
ARTICLE 16 :	OPERATION AND MAINTENANCE.....	43
	16.1 O&M obligations of the Concessionaire .....	43
	16.2 O&M Requirements .....	44
	16.3 Maintenance Programme.....	44
	16.4 De-commissioning due to Emergency .....	45
	16.5 System Closure.....	45
	16.6 Damages for breach of maintenance obligations.....	46
	16.7 Authority's right to take remedial measures .....	46
	16.8 Overriding powers of the Authority.....	46
	16.9 Restoration of loss or damage to Water Supply and Sewerage System .....	47
	16.10 Modifications to the Water Supply and Sewerage System.....	47
	16.11 Excuse from performance of obligations.....	47
ARTICLE 17 :	SAFETY REQUIREMENTS .....	48
	17.1 Safety Requirements .....	48
	17.2 Expenditure on Safety Requirements .....	48
ARTICLE 18 :	MONITORING OF OPERATION AND MAINTENANCE .....	49
	18.1 Monthly status reports.....	49
	18.2 Inspection.....	49
	18.3 Tests.....	49
	18.4 Remedial measures .....	49
	18.5 Monthly Fee Statement .....	49
ARTICLE 19 :	INDEPENDENT ENGINEER .....	50
	19.1 Appointment of Independent Engineer .....	50
	19.2 Duties and functions.....	50
	19.3 Remuneration .....	50
	19.4 Termination of appointment .....	50

	19.5	Authorised signatories .....	50
	19.6	Dispute resolution .....	51
Part IV: Financial Covenants.....			52
ARTICLE 20 :		INTENTIONALLY LEFT BLANK.....	53
ARTICLE 21 :		GRANT.....	54
	21.1	Grant .....	54
	21.2	Grant Disbursement .....	54
ARTICLE 22 :		SERVICE FEE.....	55
	22.1	Service Fee .....	55
	22.2	Intentionally Left Blank.....	55
	22.3	Energy Charges .....	55
	22.4	Calculation of Service Fee in Nth Year .....	55
	22.5	Verification of Service Fee .....	56
ARTICLE 23 :		TARIFF .....	56
	23.1	Collection and appropriation of Tariff .....	56
	23.2	Revision of Tariff .....	56
ARTICLE 24 :		ESCROW ACCOUNT.....	58
	24.1	Escrow Account .....	58
	24.2	Deposits into Escrow Account.....	58
	24.3	Withdrawals during Concession Period .....	58
	24.4	Withdrawals upon Termination.....	58
ARTICLE 25 :		INSURANCE .....	58
	25.1	Insurance during Concession Period .....	58
	25.2	Notice to the Authority.....	59
	25.3	Evidence of Insurance Cover .....	59
	25.4	Remedy for failure to insure .....	59
	25.5	Waiver of subrogation.....	59
	25.6	Concessionaire's waiver.....	59
	25.7	Application of insurance proceeds.....	59
ARTICLE 26 :		ACCOUNTS AND AUDIT .....	60
	26.1	Audited accounts .....	60
	26.2	Appointment of auditors.....	60
	26.3	Certification of claims by Statutory Auditors .....	61
	26.4	Dispute resolution .....	61
Part V : Force Majeure and Termination .....			62
ARTICLE 27 :		FORCE MAJEURE.....	63
	27.1	Force Majeure .....	63
	27.2	Non-Political Event.....	63
	27.3	Indirect Political Event.....	63
	27.4	Political Event .....	64
	27.5	Duty to report Force Majeure Event .....	64
	27.6	Effect of Force Majeure Event on the Concession .....	65
	27.7	Allocation of costs arising out of Force Majeure .....	65
	27.8	Termination Notice for Force Majeure Event.....	66
	27.9	Termination Payment for Force Majeure Event .....	66
	27.10	Dispute resolution .....	66
	27.11	Excuse from performance of obligations.....	66
ARTICLE 28 :		COMPENSATION FOR BREACH OF AGREEMENT.....	67
	28.1	Compensation for default by the Concessionaire .....	67
	28.2	Compensation for default by the Authority.....	67
	28.3	Extension of Concession Period .....	67
	28.4	Compensation to be in addition .....	67

ARTICLE 29 :	SUSPENSION OF CONCESSIONAIRE'S RIGHTS .....	68
	29.1 Suspension upon Concessionaire Default.....	68
	29.2 Authority to act on behalf of Concessionaire .....	68
	29.3 Revocation of Suspension .....	68
	29.4 Termination .....	68
ARTICLE 30 :	TERMINATION .....	69
	30.1 Termination for Concessionaire Default.....	69
	30.2 Termination for Authority Default.....	71
	30.3 Termination Payment .....	71
	30.4 Other rights and obligations of the Authority .....	72
	30.5 Survival of rights.....	72
ARTICLE 31 :	DIVESTMENT OF RIGHTS AND INTEREST .....	73
	31.1 Divestment Requirements .....	73
	31.2 Inspection and cure .....	73
	31.3 Vesting Certificate .....	73
	31.4 Additional Facilities.....	74
	31.5 Divestment costs etc.....	74
ARTICLE 32 :	DEFECTS LIABILITY AFTER TERMINATION .....	75
	32.1 Liability for defects after Termination.....	75
Part VI :	Other Provisions .....	76
ARTICLE 33 :	ASSIGNMENT AND CHARGES .....	77
	33.1 Restrictions on assignment and charges .....	77
	33.2 Permitted assignment and charges .....	77
	33.3 Substitution Agreement.....	77
	33.4 Assignment by the Authority .....	77
ARTICLE 34 :	LIABILITY AND INDEMNITY .....	78
	34.1 General indemnity .....	78
	34.2 Indemnity by the Concessionaire.....	78
	34.3 Notice and contest of claims .....	79
	34.4 Defence of claims .....	79
	34.5 No consequential claims .....	80
	34.6 Survival on Termination .....	80
ARTICLE 35 :	RIGHTS AND TITLE OVER THE SITE .....	81
	35.1 Licensee rights .....	81
	35.2 Access rights of the Authority and others .....	81
	35.3 Property taxes.....	81
	35.4 Restriction on sub-letting .....	81
ARTICLE 36 :	DISPUTE RESOLUTION.....	82
	36.1 Dispute resolution .....	82
	36.2 Conciliation .....	82
	36.3 Arbitration .....	82
	36.4 Adjudication by Regulatory Authority or Commission .....	83
ARTICLE 37 :	DISCLOSURE.....	84
	37.1 Disclosure of Specified Documents .....	84
	37.2 Disclosure of Documents relating to safety.....	84
ARTICLE 38 :	REDRESSAL OF PUBLIC GRIEVANCES .....	85
	38.1 Complaints Register .....	85
	38.2 Redressal of complaints .....	85
ARTICLE 39 :	MISCELLANEOUS.....	86
	39.1 Governing law and jurisdiction .....	86
	39.2 Waiver of immunity.....	86
	39.3 Depreciation.....	86

	39.4	Delayed payments .....	86
	39.5	Waiver .....	86
	39.6	Liability for review of Documents and Drawings .....	87
	39.7	Exclusion of implied warranties etc.....	87
	39.8	Survival.....	87
	39.9	Entire Agreement .....	87
	39.10	Severability .....	88
	39.11	No partnership.....	88
	39.12	Third Parties .....	88
	39.13	Successors and Assigns .....	88
	39.14	Notices.....	88
	39.15	Language .....	88
	39.16	Counterparts.....	89
ARTICLE 40 :		DEFINITIONS.....	90
	40.1	Definitions.....	90

**Part I: Preliminary**

## CONCESSION AGREEMENT

THIS AGREEMENT is entered into on this the \*\*\* day of \*\*\*, 20\*\*

### AMONGST

1 **THE SHIMLA MUNICIPAL CORPORATION (SMC)** represented by its Commissioner and having its principal offices at The Mall, Shimla, Himachal Pradesh (hereinafter referred to as the "**Authority**" which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns) of **ONE PART**;

AND

2 **THE GOVERNOR OF HIMACHAL PRADESH** represented by the Principal Secretary, Urban Development Department, Government of Himachal Pradesh (hereinafter referred to as the "Government" which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns) of the **SECOND PART**;

AND

3 **[\*\*\*\* LIMITED]**, a company incorporated under the provisions of the Companies Act, 1956 and having its registered office at \*\*\*\*, (hereinafter referred to as the "Concessionaire" which expression shall, unless repugnant to the context or meaning thereof, include its successors, and permitted assigns and substitutes) of the **THIRD PART**.

### WHEREAS:

- (A) The Authority had resolved to rejuvenate the existing water supply and sewerage system in the city of Shimla by upgradation of the existing water supply and sewerage infrastructure on build, operate and transfer ("BOT") basis in accordance with the terms and conditions to be set forth in a concession agreement.
- (B) The Authority had accordingly invited proposals by its Tender Notice No. \*\*\* dated \*\*\* (the "Tender Notice") for short listing of bidders for construction, operation and maintenance of the above referred Water Supply and Sewerage System at Shimla on BOT basis and had shortlisted certain bidders including, inter alia, the consortium comprising \*\*\*\*, \*\*\*\* and \*\*\*\* (collectively the "Consortium") with \*\*\*\* as its lead member.
- (C) The Authority had prescribed the technical and commercial terms and conditions, and invited bids from the shortlisted bidders pursuant to the Tender Notice for undertaking the Project.
- (D) After evaluation of the bids received, the Authority had accepted the bid of the Selected Single Bidder/ Consortium and issued its letter of acceptance No. \*\*\* dated \*\*\* (hereinafter called the "LOA") to the Selected Single Bidder/ Consortium requiring, inter alia, the execution of this Concession Agreement within 60 (sixty) days of the date of issue thereof.
- (E) The Consortium has since promoted and incorporated the Concessionaire as a limited liability company under the Companies Act 1956, and has requested the Authority to accept the Concessionaire as the entity which shall undertake and perform the obligations and exercise the rights of the Consortium under the LOA, including the obligation to enter into this Concession Agreement pursuant to the LOA for executing the Project.
- (F) By its letter dated \*\*\*, the Concessionaire submitted the Construction Performance Security of Rs \_\_\_\_ Crore (Rupees \_\_\_\_ Crore), Project Development Fee of Rs \_\_\_\_ (Rupees \_\_) and has also joined in the said request of the Consortium to the Authority to accept it as the entity which shall undertake and perform the obligations and exercise the rights of the Consortium including the obligation to enter into this Concession Agreement pursuant to the LOA. The Concessionaire has further represented to the effect that it has been promoted by the Consortium for the purposes hereof.
- (G) The Authority has agreed to the said request of the Consortium and the Concessionaire, and has accordingly agreed to enter into this Concession Agreement with the Concessionaire for execution of the Project on BOT basis, subject to and on the terms and conditions set forth hereinafter.
- (H) The Government, being a confirming party, shall supplement the role of the Authority, wherever applicable. The Government hereby agrees to serve as a guarantor towards the roles and obligations of the Authority as detailed out in this Concession Agreement.



NOW THEREFORE in consideration of the foregoing and the respective covenants and agreements set forth in this Concession Agreement, the sufficiency and adequacy of which is hereby acknowledged, and intending to be legally bound hereby, the Parties agree as follows:

## **ARTICLE 1 :       DEFINITIONS AND INTERPRETATION**

### **1.1       Definitions**

The words and expressions beginning with capital letters and defined in this Agreement (including those in Article 48) shall, unless the context otherwise requires, have the meaning ascribed thereto herein, and the words and expressions defined in the Schedules and used therein shall have the meaning ascribed thereto in the Schedules.

### **1.2       Interpretation**

1.2.1   In this Agreement, unless the context otherwise requires,

- (a)       references to any legislation or any provision thereof shall include amendment or re-enactment or consolidation of such legislation or any provision thereof so far as such amendment or re-enactment or consolidation applies or is capable of applying to any transaction entered into hereunder;
- (b)       references to laws, laws of India or Indian law or regulation having the force of law shall include the laws, acts, ordinances, rules, regulations, bye laws or notifications which have the force of law in the territory of India and as from time to time may be amended, modified, supplemented, extended or re-enacted;
- (c)       references to a "person" and words denoting a natural person shall be construed as a reference to any individual, firm, company, corporation, society, trust, Authority, state or agency of a state or any association or partnership (whether or not having separate legal personality) of two or more of the above and shall include successors and assigns;
- (d)       the table of contents, headings or sub-headings in this Agreement are for convenience of reference only and shall not be used in, and shall not affect, the construction or interpretation of this Agreement;
- (e)       the words "include" and "including" are to be construed without limitation and shall be deemed to be followed by "without limitation" or "but not limited to" whether or not they are followed by such phrases;
- (f)       references to "construction" include, unless the context otherwise requires, investigation, design, developing, engineering, procurement, delivery, transportation, installation, processing, fabrication, testing, commissioning and other activities incidental to the construction, and "construct" shall be construed accordingly;
- (g)       any reference to any period of time shall mean a reference to that according to Indian Standard Time;
- (h)       any reference to day shall mean a reference to a calendar day;
- (i)       references to a "business day" shall be construed as a reference to a day (other than a Sunday) on which banks in Shimla are generally open for business;
- (j)       any reference to month shall mean a reference to a calendar month as per the Gregorian calendar;
- (k)       references to any date, period or Project Milestone shall mean and include such date, period or. Project Milestone as may be extended pursuant to this Agreement;
- (l)       any reference to any period commencing "from" a specified day or date and "till" or "until" a specified day or date shall include both such days or dates; provided that if the last day of any period computed under this Agreement is not a business day, then the period shall run until the end of the next business day;
- (m)       the words importing singular shall include plural and vice versa;

- (n) references to any gender shall include the other and the neutral gender;
- (o) "lakh" means a hundred thousand (100,000) and "crore" means ten million (10,000,000);
- (p) "indebtedness" shall be construed so as to include any obligation (whether incurred as principal or surety) for the payment or repayment of money, whether present or future, actual or contingent;
- (q) references to the "winding-up", "dissolution", "insolvency", or "reorganisation" of a company or corporation shall be construed so as to include any equivalent or analogous proceedings under the law of the jurisdiction in which such company or corporation is incorporated or any jurisdiction in which such company or corporation carries on business including the seeking
- (r) of liquidation, winding-up, reorganisation, dissolution, arrangement, protection or relief of debtors;
- (s) any reference, at any time, to any agreement, deed, instrument, licence or document of any description shall be construed as reference to that agreement, deed, instrument, licence or other document as amended, varied, supplemented, modified or suspended at the time of such reference; provided that this Sub-clause shall not operate so as to increase liabilities or obligations of the Authority hereunder or pursuant hereto in any manner whatsoever;
- (t) any agreement, consent, approval, authorisation, notice, communication, information or report required under or pursuant to this Agreement from or by any Party or the Independent Engineer shall be valid and effective only if it is in writing under the hand of a duly authorised representative of such Party or the Independent Engineer, as the case may be, in this behalf and not otherwise;
- (u) the Schedules and Recitals to this Agreement form an integral part of this Agreement and will be in full force and effect as though they were expressly set out in the body of this Agreement;
- (v) references to Recitals, Articles, Clauses, Sub-clauses or Schedules in this Agreement shall, except where the context otherwise requires, mean references to Recitals, Articles, Clauses, Sub-clauses and Schedules of or to this Agreement, and references to a Paragraph shall, subject to any contrary indication, be construed as a reference to a Paragraph of this Agreement or of the Schedule in which such reference appears; and
- (w) the damages payable by either Party to the other of them, as set forth in this Agreement, whether on per diem basis or otherwise, are mutually agreed genuine pre-estimated loss and damage likely to be suffered and incurred by the Party entitled to receive the same and are not by way of penalty (the "Damages").

1.1.2 Unless expressly provided otherwise in this Agreement, any Documentation required to be provided or furnished by the Concessionaire to the Authority and/ or the Independent Engineer shall be provided free of cost and in three copies, and if the Authority and/or the Independent Engineer is required to return any such Documentation with their comments and/or approval, they shall be entitled to retain two copies thereof. The rule of construction, if any, that a contract should be interpreted against the parties responsible for the drafting and preparation thereof, shall not apply.

1.1.3 Any word or expression used in this Agreement shall, unless otherwise defined or construed in this Agreement, bear its ordinary English meaning and, for these purposes, the General Clauses Act 1897 shall not apply.

### **1.3 Measurements and arithmetic conventions**

All measurements and calculations shall be in the metric system and calculations done to 2 (two) decimal places, with the third digit of 5 (five) or above being rounded up and below 5 (five) being rounded down.

### **1.4 Priority of Agreements and errors/discrepancies**

1.4.1 This agreement, and all other agreements and documents forming part of this agreement are to be taken as mutually explanatory and, unless otherwise expressly provided elsewhere in this agreement, the priority of this agreement and other documents and agreements forming part hereof shall, in the event of any conflict between them, be in the following order:

- (a) this agreement; and

(b) all other agreements and documents forming part hereof;

i.e. the agreement at (a) above shall prevail over the agreements and documents at (b) above.

1.1.4 Subject to Clause 1.4.1 in case of ambiguities or discrepancies within this Agreement, the following shall apply:

(a) between two or more Clauses of this Agreement, the provisions of a specific Clause relevant to the issue under consideration shall prevail over those in other Clauses;

(b) between the Clauses of this agreement and the Schedules, the Clauses shall prevail and between Schedules and Annexes, the Schedules shall prevail;

(c) between the written description on the Drawings and the Specifications and Standards, the latter shall prevail;

(d) between the dimension scaled from the Drawing and its specific written dimension, the latter shall prevail; and

(e) between any value written in numerals and that in words, the latter shall prevail.

## **Part II: The Concession**

## **ARTICLE 2 : SCOPE OF THE PROJECT**

### **2.1 Scope of the Project**

The scope of the Project (the "**Scope of the Project**") shall mean and include, during the Concession Period:

- (a) Design the Water Supply and Sewerage System to be installed in the Service Area set forth in Schedule-A and in conformity with the Specifications and Standards set forth in Schedule-C and the provisions of this Agreement;
- (b) Install capacity utilization of existing water supply and sewerage system including refurbishment, rehabilitation and expansion of transmission and distribution network;
- (c) Reduction of non-revenue water by reduction of physical losses through leakage management and reduction of commercial losses in water supply system through identification and regularization of unauthorized connections, meeting and improvement in billing and collection systems;
- (d) Construction of the Water Supply and Sewerage System in the Service Area set forth in Schedule-A and as specified in Schedule-B and in conformity with the Specifications and Standards set forth in Schedule-C;
- (e) Operation and maintenance of the Water Supply and Sewerage System in accordance with the provisions of this Agreement;
- (f) Provision of 24\*7 water supply service targeting entire population duly developing the distribution network to reach the end User;
- (g) Introduction of SCADA (Supervisory control and data acquisition), ring fencing, GIS mapping and dedicated fire fighting system;
- (h) Providing ducts, trestles (concrete pillars) wherever possible for laying of main and feeder line specifically along the national highway, state highway and the Mall Road; and
- (i) Performance and fulfillment of all other obligations of the Concessionaire in accordance with the provisions of this Agreement and matters incidental thereto or necessary for the performance of any or all of the obligations of the Concessionaire under this Agreement.

In order to improve the water supply and quality of services level, SMC has planned a comprehensive water project for the Shimla City. The Project focus is on:

- Measures to improve the efficiency
- Undertake condition assessment
- Formulate and implement the project components for improvement of service levels
- Effective operation and maintenance of the water supply system
- Carrying out the rehabilitation and expansion schemes
- Effective billing and collection
- SCADA, GIS mapping and dedicated fire fighting system

The sewerage project, which is to be implemented under JNNURM funding, consists of sewerage and sewerage

treatment. The sewerage project components are listed as below:

- Rejuvenation of Sewerage network
- Rehabilitation of missing lines
- Rehabilitation of worn out sewerage system
- Providing sewerage system for left out areas in various zones
- Upgradation/ rehabilitation of existing sewerage pumping system and STPs
- Construction and improvement of approach roads to STPs
- Refurbishment and expansion of sewerage systems
- Provision of necessary house service connections ensuring collection of grey water
- Reduction of infiltration and ex-filtration through leakage management in sewage collection system. Identification and regularization of unauthorized connections, improvements in billing and collection.
- Installations of Gen-Sets at STPs for operation of STPS during power failure
- To measure and meter the treated water at STPs
- To generate hydro electricity from treated effluents of STP

## ARTICLE 3 : GRANT OF CONCESSION

### 3.1 The Concession

- 3.1.1 Subject to and in accordance with the provisions of this Agreement, the Applicable Laws and the Applicable Permits, the Authority hereby grants to the Concessionaire the concession set forth herein including the exclusive right, licence and authority during the subsistence of this Agreement to construct, operate and maintain the Project (the "**Concession**") for a period of **23 (twenty three) years** commencing from the Appointed Date, and the Concessionaire hereby accepts the Concession and agrees to implement the Project subject to and in accordance with the terms and conditions set forth herein:
- 3.1.2 Subject to and in accordance with the provisions of this Agreement, the Concession hereby granted shall oblige or entitle (as the case may be) the Concessionaire to:
- (a) investigate, study, design, engineer, procure, finance, construct, augment, rehabilitate, operate and maintain the Project Facilities and to exercise and/or enjoy the rights, powers, benefits, privileges, authorisations and entitlements as set forth in this Agreement to provide the Services in the Service Area;
  - (b) enter upon and use the Service Areas during the Concession Period including all rights of way and easements relating to the Project and access to the Project Facilities, including the Existing Assets, so that the Concessionaire, its agents, sub-contractors and any third party it might designate may perform its rights and obligations under this Agreement, including the right to conduct any kind of work in the streets and other public places of the Service Area, in order to have access to the Project Facilities;
  - (c) starting from the Appointed Date, extract water from the Water Sources set forth in Schedule-A, treat the extracted water in conformity with the O&M Requirements set forth in Schedule-J, lift the treated water to water reservoirs, supply treated water to the Service Area on a 24X7 basis, collect wastewater from Sewerage Service Area, treat the collected waste-water in the sewerage treatment plants and release treated wastewater to Disposal Areas set forth in Schedule-A;
  - (d) prepare and issue Water Bills to the Users, collect Tariff, connection and reconnection charges including interest thereon, if any, on behalf of the Authority and deposit the same in the Escrow Account, for the Services effective from the Appointed Date till Expiry or Termination Date as the case may be. However, it is being clarified here that the security charges deposit, as provided by the Users w.r.t the new connections, shall be directly given to the Authority with the detailed information of the Users;
  - (e) exercise such other rights as the Authority may determine as being necessary or desirable and which it consents to in writing, for the purposes incidental and necessary for the provision of the Services to the Users;
  - (f) during the Operations Period, option to utilize the services of employees assigned by the Authority for the purpose of provisioning of Services to Users in the Service Area. However, the Concessionaire shall be required to bear all the costs and expenses i.e. salaries etc of the employees, as assigned by the Authority;
  - (g) perform and fulfill all of the Concessionaire's obligations under and in accordance with this Agreement;
  - (h) bear and pay all costs, expenses and charges in connection with or incidental to the performance of the obligations of the Concessionaire under this Agreement; and not assign, transfer or sublet or create any lien or Encumbrance on this Agreement, or the Concession hereby granted or on the whole or any part of the Water Supply and Sewerage System nor transfer, lease or part possession thereof, save and except as expressly permitted by this Agreement or the Substitution Agreement.



## ARTICLE 4 : CONDITIONS PRECEDENT

### 4.1 Conditions Precedent

4.1.1 Save and except as expressly provided in Articles , 9, 10, 20, 27, 36 and 39, the respective rights and obligations of the Parties under this Agreement shall be subject to the satisfaction in full of the conditions precedent specified in this Clause 4.1 (the "**Conditions Precedent**").

4.1.2 The Concessionaire may within 150 (one hundred and fifty) days from the date of this Agreement or on an earlier day acceptable to the Authority, by notice require the Authority to satisfy any or all of the Conditions Precedent set forth in this Clause 4.1.2 within a period of 30 (thirty) days of the notice, or such longer period not exceeding 60 (sixty) days as may be specified therein, and the conditions precedent required to be satisfied by the Authority prior to the Appointed Date shall be deemed to have been fulfilled when the Authority shall have:

- (a) provided to for the Concessionaire the necessary rights including pipeline routes and other Easementary Rights in order to permit design, construction, rehabilitation, testing, commissioning and operation and maintenance of the Project facilities; provided that the conditions set forth in Clause 10.3.2 shall also be satisfied on or prior to the Appointed Date;
- (b) provided complete details of the network relevant for operations and inventory of assets being handed over to the Concessionaire including the alignment of the existing pipelines and the location of the Existing Assets and the design thereof;
- (c) give comments/ observations (if any) to the detailed project report (DPR) of the Water Supply and Sewerage System submitted by the Concessionaire under Clause 4.1.3(a), within a time period of 20 (twenty) days from the date of its receipt. Failure to do so will be considered deemed approval of the DPR by the Authority;
- (d) procured all Applicable Permits relating to environmental protection and conservation of the Sites/ Service Areas:

Provided that the Authority may from time to time by notice extend, for up to 6 (six) months, the period for procuring the approval set forth in Sub-clause (d) above and in that event the affected sections of the Water Supply and Sewerage System shall be included in the Appendix referred to in Clause 10.3 and dealt with in accordance with the provisions thereof; and provided further that upon procurement of such approval, the Concessionaire shall be entitled to a period of 12 (twelve) months therefrom for completion of the Project Facilities affected by Sub-clause (d) above.

4.1.3 The Conditions Precedent required to be satisfied by the Concessionaire prior to the Appointed Date shall be deemed to have been fulfilled when the Concessionaire shall have:

- (a) submitted detailed project report (DPR) of Water Supply and Sewerage System at Shimla, to the Authority for its approval, within a time period of 100 (One hundred) days from the date of this Agreement, consisting of the following:
  - **In relation to the Water Supply:**
    - Approach and Methodology
    - Details of present status of the existing water supply
    - Details of the project areas
    - Details of land acquisition
    - Detailed layout of the alignment of project lines
    - Details of the forest/ environment clearances which are required to be taken by the Authority
    - Projection of water demand
    - Design of distribution system

- Layout of distribution system
- Design criteria of all the zones
- Connectivity of distribution system
- Design and layout of all the zones
- Introduction of SCADA system
- List of detailed drawings w.r.t all the zones
- Design of service reservoir
  
- **In relation to the Sewerage System:**
  - Approach and Methodology
  - Details of present status of the existing sewerage system
  - Details of land acquisition
  - Details of the forest/ environment clearances which are required to be taken by the Authority
  - Description of old existing sewerage system
  - Details of Municipal Sewerage By Laws
  - Design criteria for sewerage system
  - Flow assumptions, depth of flow, minimum size of sewers
  - Selection of sewer pipes and appurtenances
  - Design parameters of Sewerage Treatment Plans (STPs)
  - Specification design of reinforce cement concrete system
  - Geotechnical Information
  - Construction details of manhole covers and frame, rungs, channels and benching, hatch boxes, vent shafts, oil and grease traps etc.

However, the Concessionaire shall ensure that the DPR has been prepared as per the applicable Local Byelaws, Norms, Specifications and Standards, as detailed out in this Agreement etc;

- (b) incorporated the necessary suggestions/ amendments proposed by the Authority, within a period of 15 (fifteen) days from the date of receipt of such suggestions from the Authority. However, it is clarified here that the Concessionaire shall not start the construction until and unless the Authority approves the DPR of the Project again after carrying out necessary amendments, which shall not be unduly delayed.;
- (c) executed and procured execution of the Escrow Agreement;
- (d) executed and procured execution of the Substitution Agreement;
- (e) procured all the Applicable Permits specified in Schedule-D unconditionally or if subject to conditions then all such conditions shall have been satisfied in full and such Applicable Permits are in full force and effect;
- (f) executed the Financing Agreements and delivered to the Authority 3 (three) true copies thereof, duly attested by a Director of the Concessionaire;
- (g) delivered to the Authority 3 (three) true copies of the Financial Package and the Financial Model, duly attested by a Director of the Concessionaire, along with 3 (three) soft copies of the Financial Model in MS Excel version or any substitute thereof, which is acceptable to the Senior Lenders;
- (h) delivered to the Authority from the Consortium Members, their respective confirmation, in original, of the correctness of their representations and warranties set forth in Sub-clauses (k), (1) and (m) of clause 7.1 of this Agreement; and
- (i) delivered to the Authority a legal opinion from the legal counsel of the Concessionaire with respect to the authority of the Concessionaire to enter into this Agreement and the enforceability of the provisions thereof:

Provided that upon request in writing by the Concessionaire, the Authority may, in its discretion, waive any of the Conditions Precedent set forth in this Clause 4.1.3.

- 4.1.4 Each Party, at its respective costs and expenses, shall make all reasonable endeavors to satisfy the Conditions Precedent within the time stipulated and shall provide the other Party with such reasonable cooperation as may be required to assist that Party in satisfying the Conditions Precedent for which that Party is responsible.
- 4.1.5 The Parties shall notify each other in writing at least once a month on the progress made in satisfying the Conditions Precedent. Each Party shall promptly inform the other Party when any Condition Precedent for which it is responsible has been satisfied.
- 4.1.6 Upon satisfaction in full of all Conditions Precedent for a Party, the other Party shall forthwith notify in writing to such Party the compliance with Conditions Precedent.
- 4.1.7 The later of the date of notification of compliance to the Concessionaire or the Government shall be the Appointed Date, whereupon the obligations of the Parties under this Concession Agreement shall commence and whereon the Government shall issue the Notice to Commence to the Concessionaire.

## **4.2 Non-fulfillment of Conditions Precedent**

- 4.2.1 In the event that any of the Conditions Precedents relating to the Concessionaire have not been fulfilled within 150 (One Hundred and Fifty) days of the signing of this Agreement and also, the Government has not waived them fully or partially, this Agreement shall cease to have any effect as of that date and shall be deemed to have been terminated by the mutual agreement of the Parties and no Party shall subsequently have any rights or obligations under this Agreement and the Government shall not be liable in any manner whatsoever to the Concessionaire or persons claiming through or under it.

### **4.2.2 Damages for delay by the Government**

In the event that the Concessionaire has fulfilled its Conditions Precedent and (i) the Government does not procure fulfillment of any or all of the Conditions Precedent set forth in Clause 4.1.2 within a period of 150 (One Hundred and Fifty) days from the date of this Agreement, and (ii) the delay has not occurred as a result of breach of this Agreement by the Concessionaire or due to Force Majeure, the Government shall pay to the Concessionaire damages in an amount calculated at the rate of 0.1% (zero point one per cent) of the Construction Performance Security for each day's delay until the fulfillment of such Conditions Precedent, subject to a maximum of 20% (twenty percent) of the Construction Performance Security. In the event when the maximum damages as above has become payable and the Government has still not been able to procure fulfillment of any or all the Conditions Precedent set forth in Clause 4.1.2 and the period for achievement of the same has not been mutually extended then the Government shall be liable to return, to the Concessionaire, the Construction Performance Security submitted before the signing of the Concession Agreement.

### **4.2.3 Damages for delay by the Concessionaire**

In the event that the Government has fulfilled its Conditions Precedent and (i) the Concessionaire does not procure fulfillment of any or all of the Conditions Precedent set forth in Clause 4.1.3 within a period of 150 (One Hundred and Fifty) days from the date of this Agreement, and (ii) the delay has not occurred as a result of failure to fulfill the obligations under Clause 4.1.2 or other breach of this Agreement by the Government or due to Force Majeure, the Concessionaire shall pay to the Government Damages in an amount calculated at the rate of 0.2% (zero point two per cent) of the Construction Performance Security for each day's delay until the fulfillment of such Conditions Precedent, subject to a maximum of 20% (twenty per cent) of the Construction Performance Security. In the event when the maximum damages as above has become payable and the Concessionaire has still not been able to procure fulfillment of any or all the condition Precedent set forth in Clause 4.1.3 and the period for achievement of the same has not been mutually extended then the Government shall be liable to forfeit the Construction Performance Security submitted before the signing of the Concession Agreement.

- 4.2.4 In the event this Agreement is terminated under Clause 4.2.1 due to non-fulfillment of Conditions Precedent by the Concessionaire, the Government shall not be liable in any manner whatsoever to the Concessionaire or its contractors, agents and employees. In addition to this, the Government shall forfeit the Construction Performance Security submitted before the signing of the Concession Agreement, by the Concessionaire.

- 4.2.5 Instead of terminating this Agreement as provided in Clause 4.2.1 above or as the case may be, the Parties may extend the time for fulfilling the Conditions Precedent by mutual agreement.

## **ARTICLE 5 : OBLIGATIONS OF THE CONCESSIONAIRE**

### **5.1 Obligations of the Concessionaire**

- 5.1.1 Subject to and on the terms and conditions of this Agreement, the Concessionaire shall at its cost and expense procure finance for and undertake the design, engineering, procurement, construction, operation and maintenance of the Water Supply and Sewerage System and observe, fulfill, comply with and perform all its obligations set out in this Agreement or arising hereunder.
- 5.1.2 The Concessionaire shall comply with all Applicable Laws and Applicable Permits (including renewals as required) in the performance of its obligations under this Agreement.
- 5.1.3 Subject to Clauses 5.1.1 and 5.1.2, the Concessionaire shall discharge its obligations in accordance with Good Industry Practice and as a reasonable and prudent person.
- 5.1.4 The Concessionaire shall, at its own cost and expense, in addition to and not in derogation of its obligations elsewhere set out in this Agreement:
- (a) make, or cause to be made, necessary applications to the relevant Authority Instrumentalities with such particulars and details, as may be required for obtaining all Applicable Permits (other than those set forth in Clause 4.1.2) and obtain and keep in force and effect such Applicable Permits in conformity with the Applicable Laws;
  - (b) procure, as required, the appropriate proprietary rights, licences, agreements and permissions for materials, methods, processes and systems used or incorporated into the Water Supply and Sewerage System;
  - (c) perform and fulfill its obligations under the Financing Agreements;
  - (d) make reasonable efforts to maintain harmony and good industrial relations among the personnel employed by it or its Contractors in connection with the performance of its obligations under this Agreement;
  - (e) make reasonable efforts to facilitate the acquisition of land required for the purposes of the Agreement;
  - (f) ensure and procure that its Contractors comply with all Applicable Permits and Applicable Laws in the performance by them of any of the Concessionaire's obligations under this Agreement;
  - (g) not do or omit to do any act, deed or thing which may in any manner be violative of any of the provisions of this Agreement;
  - (h) support, cooperate with and facilitate the Authority in the implementation and operation of the Project in accordance with the provisions of this Agreement; and
  - (i) transfer the Water Supply and Sewerage System to the Authority upon Termination of this Agreement, in accordance with the provisions thereof.

### **5.2 Obligations relating to Project Agreements**

- 5.2.1 It is expressly agreed that the Concessionaire shall, at all times, be responsible and liable for all its obligations under this Agreement notwithstanding anything contained in the Project Agreements or any other agreement, and no default under any Project Agreement or agreement shall excuse the Concessionaire from its obligations or liability hereunder.
- 5.2.2 The Concessionaire shall submit to the Authority the drafts of all Project Agreements or any amendments or

replacements thereto for its review and comments, and the Authority shall have the right but not the obligation to undertake such review and provide its comments, if any, to the Concessionaire within 15 (fifteen) days of the receipt of such drafts. Within 7 (seven) days of execution of any Project Agreement or amendment thereto, the Concessionaire shall submit to the Authority a true copy thereof, duly attested by a Director of the Concessionaire, for its record. For the avoidance of doubt, it is agreed that the review and comments hereunder shall be limited to ensuring compliance with the terms of this Agreement. It is further agreed that any failure or omission of the Authority to review and/ or comment hereunder shall not be construed or deemed as acceptance of any such agreement or document by the Authority. No review and/ or observation of the Authority and/ or its failure to review and/ or convey its observations on any document shall relieve the Concessionaire of its obligations and liabilities under this Agreement in any manner nor shall the Authority be liable for the same in any manner whatsoever.

- 5.2.3 The Concessionaire shall not make any replacement or amendments to any of the Financing Agreements without the prior written consent of the Authority if such replacement or amendment has, or may have, the effect of imposing or increasing any financial liability or obligation on the Authority, and in the event that any replacement or amendment is made without such consent, the Concessionaire shall not enforce such replacement or amendment nor permit enforcement thereof against the Authority. For the avoidance of doubt, the Authority acknowledges and agrees that it shall not unreasonably withhold its consent for restructuring or rescheduling of the Debt Due.
- 5.2.4 The Concessionaire shall procure that each of the Project Agreements contains provisions that entitle the Authority to step into such agreement, in its sole discretion, in substitution of the Concessionaire in the event of Termination or Suspension.
- 5.2.5 Notwithstanding anything to the contrary contained in this Agreement, the Concessionaire agrees and acknowledges that selection or replacement of an O&M Contractor and execution of the O&M Contract shall be subject to the prior approval of the Authority from national security and public interest perspective, the decision of the Authority in this behalf being final, conclusive and binding on the Concessionaire, and undertakes that it shall not give effect to any such selection or contract without prior approval of the Authority. For the avoidance of doubt, it is expressly agreed that approval of the Authority hereunder shall be limited to national security and public interest perspective, and the Authority shall endeavour to convey its decision thereon expeditiously. It is also agreed that the Authority shall not be liable in any manner on account of grant or otherwise of such approval and that such approval or denial thereof shall not in any manner absolve the Concessionaire or its Contractors from any liability or obligation under this Agreement.

### **5.3 Obligations relating to Change in Ownership**

- 5.3.1 The Concessionaire shall not undertake or permit any Change in Ownership, except with the prior written approval of the Authority.
- 5.3.2 Notwithstanding anything to the contrary contained in this Agreement, the Concessionaire agrees and acknowledges that:
- (i) all acquisitions of Equity by an acquirer, either by himself or with any person acting in concert, directly or indirectly, including by transfer of the direct or indirect legal or beneficial ownership or control of any Equity, in aggregate of not less than 15% (fifteen per cent) of the total Equity of the Concessionaire; or
  - (ii) acquisition of any control directly or indirectly of the Board of Directors of the Concessionaire by any person either by himself or together with any person or persons acting in concert with him shall be subject to prior approval of the Authority from national security and public interest perspective, the decision of the Authority in this behalf being final, conclusive and binding on the Concessionaire, and undertakes that it shall not give effect to any such acquisition of Equity or control of the Board of Directors of the Concessionaire without such prior approval of the Authority. For the avoidance of doubt, it is expressly agreed that approval of the Authority hereunder shall be limited to national security and public interest perspective, and the Authority shall endeavour to convey its decision thereon expeditiously. It is also agreed that the Authority shall not be liable in any manner on account of grant or otherwise of such approval and that such approval or denial thereof shall not in any manner absolve the

Concessionaire from any liability or obligation under this Agreement.

For the purposes of this Clause 5.3.2:

- (a) the expression "acquirer", "control" and "person acting in concert" shall have the meaning ascribed thereto in the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations, 1997 or any statutory re-enactment thereof as in force as on the date of acquisition of Equity, or the control of the Board of Directors, as the case may be, of the Concessionaire;
- (b) the indirect transfer or control of legal or beneficial ownership of Equity shall mean transfer of the direct or indirect beneficial ownership or control of any company or companies whether in India or abroad which results in the acquirer acquiring control over the shares or voting rights of shares of the Concessionaire; and
- (c) power to appoint, whether by contract or by virtue of control or acquisition of shares of any company holding directly or through one or more companies (whether situate in India or abroad) the Equity of the Concessionaire, not less than half of the directors on the Board of Directors of the Concessionaire or of
- (d) any company, directly or indirectly whether situate in India or abroad, having ultimate control of not less than 15% (fifteen per cent) of the Equity of the Concessionaire shall constitute acquisition of control, directly or indirectly, of the Board of Directors of the Concessionaire.

#### **5.4 Employment of foreign nationals**

The Concessionaire acknowledges, agrees and undertakes that employment of foreign personnel by the Concessionaire and/or its contractors and their subcontractors shall be subject to grant of requisite regulatory permits and approvals including employment/residential visas and work permits, if any required, and the obligation to apply for and obtain the same shall and will always be of the Concessionaire and, notwithstanding anything to the contrary contained in this Agreement, refusal of or inability to obtain any such permits and approvals by the Concessionaire or any of its contractors or sub-contractors shall not constitute Force Majeure Event, and shall not in any manner excuse the Concessionaire from the performance and discharge of its obligations and liabilities under this Agreement.

#### **5.5 Employment of trained personnel**

The Concessionaire shall ensure that the personnel engaged by it in the performance of its obligations under this Agreement are at all times properly trained for their respective functions.

#### **5.6 Sole purpose of the Concessionaire**

The Concessionaire having been set up for the sole purpose of exercising the rights and observing and performing its obligations and liabilities under this Agreement, the Concessionaire or any of its subsidiaries shall not, except with the previous written consent of the Authority, be or become directly or indirectly engaged, concerned or interested in any business other than as envisaged herein.

## **ARTICLE 6 : OBLIGATIONS OF THE AUTHORITY**

### **6.1 Obligations of the Authority**

6.1.1 The Authority shall, at its own cost and expense undertake, comply with and perform all its obligations set out in this Agreement or arising hereunder.

6.1.2 The Authority agrees to provide support to the Concessionaire and undertakes to observe, comply with and perform, subject to and in accordance with the provisions of this Agreement and the Applicable Laws, the following:

- (a) upon written request from the Concessionaire, and subject to the Concessionaire complying with Applicable Laws, provide all reasonable support and assistance to the Concessionaire in procuring Applicable Permits required from any Government Instrumentality for implementation and operation of the Project;
- (b) hand over the operation and maintenance of the Project Facilities to the Concessionaire for implementation of the Project;
- (c) undertake that the alignment of the existing pipelines and the location of the Existing Assets and the design thereof are of fundamental importance to the Project and undertakes that it or any Government Agency within its jurisdiction or control or acting on its behalf shall not require the alteration of such alignment and/or location during the Concession Period;
- (d) assist the Concessionaire in procuring Police assistance for ensuring safety of the Project Facilities, removal of trespassers and security on the Water Supply and Sewerage System;
- (e) assign its employees to the Concessionaire to assist the Concessionaire in the discharge of its duties during the Concession Period. However, the Concessionaire shall be required to bear all the costs and expenses i.e. salaries etc of the employees, as assigned by the Authority;;
- (f) support, cooperate with and facilitate the Concessionaire in the implementation and operation of the Project in accordance with the provisions of this Agreement; and
- (g) upon written request from the Concessionaire and subject to the provisions of Clause 5.4, provide reasonable assistance to the Concessionaire and any expatriate personnel of the Concessionaire or its Contractors to obtain applicable visas and work permits for the purposes of discharge by the Concessionaire or its Contractors their obligations under this Agreement and the Project Agreements.

### **6.2 Maintenance obligations prior to Appointed Date**

During the Development Period, the Authority shall maintain the Water Supply and Sewerage System, at its own cost and expense, so that its operational worthiness and safety are at no time materially inferior as compared to its condition 7 (seven) days prior to the last date for submission of the Bid, and in the event of any material deterioration or damage other than normal wear and tear, undertake repair thereof, or pay to the Concessionaire the cost and expense, as determined by the Independent Engineer, for undertaking such repair after the Appointed Date. For the avoidance of doubt, the Authority shall undertake only routine maintenance during the Development Period, and it shall undertake special repairs only for ensuring safe operation of the Water Supply and Sewerage System, or in the event of excessive deterioration or damage caused due to unforeseen events such as floods or earthquakes.

## **ARTICLE 7 : REPRESENTATIONS AND WARRANTIES**

### **7.1 Representations and Warranties of the Concessionaire**

The Concessionaire represents and warrants to the Authority that:

- (a) it is duly organised and validly existing under the laws of India, and has full power and authority to execute and perform its obligations under this Agreement and to carry out the transactions contemplated hereby;
- (b) it has taken all necessary corporate and other actions under Applicable Laws to authorise the execution and delivery of this Agreement and to validly exercise its rights and perform its obligations under this Agreement;
- (c) it has the financial standing and capacity to undertake the Project in accordance with the terms of this Agreement;
- (d) this Agreement constitutes its legal, valid and binding obligation, enforceable against it in accordance with the terms hereof, and its obligations under this Agreement will be legally valid, binding and enforceable obligations against it in accordance with the terms hereof;
- (e) it is subject to the laws of India, and hereby expressly and irrevocably waives any immunity in any jurisdiction in respect of this Agreement or matters arising thereunder including any obligation, liability or responsibility hereunder;
- (f) the information furnished in the Bid and as updated on or before the date of this Agreement is true and accurate in all respects as on the date of this Agreement;
- (g) the execution, delivery and performance of this Agreement will not conflict with, result in the breach of, constitute a default under, or accelerate performance required by any of the terms of its Memorandum and Articles of Association or those of any member of the Consortium or any Applicable Laws or any covenant, contract, agreement, arrangement, understanding, decree or order to which it is a party or by which it or any of its properties or assets is bound or affected;
- (h) there are no actions, suits, proceedings, or investigations pending or, to its knowledge, threatened against it at law or in equity before any court or before any other judicial, quasi-judicial or other authority, the outcome of which may result in the breach of this Agreement or which individually or in the aggregate may result in any material impairment of its ability to perform any of its obligations under this Agreement;
- (i) it has no knowledge of any violation or default with respect to any order, writ, injunction or decree of any court or any legally binding order of any Government Instrumentality which may result in any material adverse effect on its ability to perform its obligations under this Agreement and no fact or circumstance exists which may give rise to such proceedings that would adversely affect the performance of its obligations under this Agreement;
- (j) it has complied with Applicable Laws in all material respects and has not been subject to any fines, penalties, injunctive relief or any other civil or criminal liabilities which in the aggregate have or may have a material adverse effect on its ability to perform its obligations under this Agreement;
- (k) it shall at no time undertake or permit any Change in Ownership except in accordance with the provisions of Clause 5.3 and that the Bidder/ Concessionaire acknowledges that it was pre-qualified and short-listed on the basis of Technical Capacity and Financial Capacity of those of its Consortium Members and continues to commit that the Lead Member shall, until the 2<sup>nd</sup> (second) anniversary of the date of commercial operation of the Project, hold equity share capital representing not less than 51% (fifty one per cent) of the subscribed and paid-up equity of the Concessionaire; and other consortium members shall, until the 2<sup>nd</sup> (second) anniversary of the date of commercial operation of



the Project, hold equity share capital representing not less than 20% (twenty per cent) of the subscribed and paid up equity of the Concessionaire. However, it is being clarified here that the Lead Member shall ensure to hold equity share capital representing not less than 26% (twenty six per cent) of the subscribed and paid-up equity of the Concessionaire, throughout the Concession Period;

- (l) the Consortium Members and their Associates have the financial standing and resources to fund the required Equity and to raise the debt necessary for undertaking and implementing the Project in accordance with this Agreement;
- (m) each Consortium Member is duly organised and validly existing under the laws of the jurisdiction of its incorporation, and has requested the Authority to enter into this Agreement with the Concessionaire pursuant to the Letter of Acceptance, and has agreed to and unconditionally accepted the terms and conditions set forth in this Agreement;
- (n) all its rights and interests in the Water Supply and Sewerage System shall pass to and vest in the Authority on the Transfer Date free and clear of all liens, claims and Encumbrances, without any further act or deed on its part or that of the Authority, and that none of the Project Assets shall be acquired by it, subject to any agreement under which a security interest or other lien or Encumbrance is retained by any person, save and except as expressly provided in this Agreement;
- (o) no representation or warranty by it contained herein or in any other document furnished by it to the Authority or to any Government Instrumentality in relation to Applicable Permits contains or will contain any untrue or misleading statement of material fact or omits or will omit to state a material fact necessary to make such representation or warranty not misleading; and
- (p) no sums, in cash or kind, have been paid or will be paid, by it or on its behalf, to any person by way of fees, commission or otherwise for securing the Concession or entering into this Agreement or for influencing or attempting to influence any officer or employee of the Authority in connection therewith.

## **7.2 Representations and Warranties of the Authority**

The Authority represents and warrants to the Concessionaire that:

- (a) it has full power and authority to execute, deliver and perform its obligations under this Agreement and to carry out the transactions contemplated herein and that it has taken all actions necessary to execute this Agreement, exercise its rights and perform its obligations, under this Agreement;
- (b) it has taken all necessary actions under the Applicable Laws to authorise the execution, delivery and performance of this Agreement;
- (c) it has the financial standing and capacity to perform its obligations under the Agreement;
- (d) this Agreement constitutes a legal, valid and binding obligation enforceable against it in accordance with the terms hereof;
- (e) there are no actions, suits or proceedings pending or, to its knowledge, threatened against it at law or in equity before any court or before any other judicial, quasi-judicial or other authority, the outcome of which may result in the default or breach of this Agreement or which individually or in the aggregate may result in any material impairment of its ability to perform its obligations under this Agreement;
- (f) it has no knowledge of any violation or default with respect to any order, writ, injunction or any decree of any court or any legally binding order of any Government Instrumentality which may result in any material adverse effect on the Authority's ability to perform its obligations under this Agreement;
- (g) it has complied with Applicable Laws in all material respects;
- (h) all information provided by it in the Tender Notice and invitation to bid in connection with the Project is, to the best of its knowledge and belief, true and accurate in all material respects;
- (i) it has the right, power and authority to manage and operate the Water Supply and Sewerage System up

to the Appointed Date;

- (j) it has good and valid right to provide water supply and sewerage services within the Service Area, and has power and authority to grant a licence in respect thereto to the Concessionaire; and
- (k) upon the Concessionaire performing the covenants herein, it shall not at any time during the term hereof, interfere with peaceful exercise of the rights and discharge of the obligations by the Concessionaire, in accordance with this Agreement.

### **7.3 Disclosure**

In the event that any occurrence or circumstance comes to the attention of either Party that renders any of its aforesaid representations or warranties untrue or incorrect, such Party shall immediately notify the other Party of the same. Such notification shall not have the effect of remedying any breach of the representation or warranty that has been found to be untrue or incorrect nor shall it adversely affect or waive any obligation of either Party under this Agreement.

## **ARTICLE 8 :       DISCLAIMER**

### **8.1       Disclaimer**

8.1.1       The Concessionaire acknowledges that prior to the execution of this Agreement, the Concessionaire has, after a complete and careful examination, made an independent evaluation of the Tender Notice, Scope of the Project, Specifications and Standards, Service Area, local conditions, physical qualities of ground, subsoil and geology, water demand and all information provided by the Authority or obtained procured or gathered otherwise, and has determined to its satisfaction the accuracy or otherwise thereof and the nature and extent of difficulties, risks and hazards as are likely to arise or may be faced by it in the course of performance of its obligations hereunder. Save as provided in Clause 7.2, the Authority makes no representation whatsoever, express, implicit or otherwise, regarding the accuracy and/or completeness of the information provided by it and the Concessionaire confirms that it shall have no claim whatsoever against the Authority in this regard.

8.1.2       The Concessionaire acknowledges and hereby accepts the risk of inadequacy, mistake or error in or relating to any of the matters set forth in Clause 8.1.1 above and hereby acknowledges and agrees that the Authority shall not be liable for the same in any manner whatsoever to the Concessionaire, the Consortium Members and their Associates or any person claiming through or under any of them.

### **Part III : Development and Operations**

## **ARTICLE 9 : PERFORMANCE SECURITY**

### **9.1 Performance Security**

- 9.1.1 The Concessionaire shall ensure that for the entire Concession Period, it will maintain Performance Security (i.e. the Construction Performance Security and O&M Performance Security) as specified in Schedule S and in the format as specified in Schedules E1 and E2, which shall remain valid at all times through the period specified.
- 9.1.2 The Concessionaire, for the performance of its obligations hereunder during the Construction Period, has provided to the Authority, an irrevocable and unconditional guarantee from a Bank for a sum equivalent to Rs. 10 Crore (Rupees Ten Crore) in the form set forth in Schedule-E1 (the "**Construction Performance Security**").
- 9.1.3 The applicable Performance Security shall be from a scheduled bank or a financial institution approved by the Authority, payable at Shimla.
- 9.1.4 Notwithstanding anything to the contrary contained in this Agreement, in the event applicable Performance Security is not provided by the Concessionaire within the time period as stipulated within this Agreement, then all the rights, privileges, claims and entitlements of the Concessionaire under or arising out of this Agreement shall be deemed to have been waived by, and to have ceased with the concurrence of the Concessionaire, and this Agreement shall be deemed to have been terminated by mutual agreement of the Parties.

### **9.2 Appropriation of Performance Security**

Upon occurrence of a Concessionaire Default or failure to meet any Condition Precedent, the Authority shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to encash and appropriate the relevant amounts from the applicable Performance Security as Damages for such Concessionaire Default or failure to meet any Condition Precedent. Upon such encashment and appropriation from the applicable Performance Security, the Concessionaire shall, within 30 (thirty) days thereof, replenish, in case of partial appropriation, to its original level of the applicable Performance Security, and in case of appropriation of the entire applicable Performance Security provide a fresh Performance Security, as the case may be, and the Concessionaire shall, within the time so granted, replenish or furnish fresh Performance Security as aforesaid failing which the Authority shall be entitled to terminate this Agreement in accordance with Article 37. Upon replenishment or furnishing of a fresh Performance Security, as the case may be, as aforesaid, the Concessionaire shall be entitled to an additional Cure Period of 90 (ninety) days for remedying the Concessionaire Default or to meet any Condition Precedent, and in the event of the Concessionaire not curing its default or meeting such Condition Precedent within such Cure Period, the Authority shall be entitled to encash and appropriate such applicable Performance Security as Damages, and to terminate this Agreement in accordance with Article 37.

### **9.3 Release of Performance Security**

- 9.3.1 The applicable Performance Security shall remain in force and effect for the period, as stipulated in Schedule-S of the Agreement; provided, however, that the applicable Performance Security shall not be released if the Concessionaire is in breach of this Agreement. Upon request made by the Concessionaire for release of the applicable Performance Security along with the particulars which establish satisfaction of the requirements specified under this Clause 9.3, the Government shall release the applicable Performance Security forthwith.

## **ARTICLE 10 : ACCESS TO SERVICE AREA**

### **10.1 The Site**

The site of the Water Supply and Sewerage System shall comprise of the areas, facilities and structures described in Schedule-A and in respect of which the Easementary Rights shall be provided and granted by the Authority to the Concessionaire as a licensee under and in accordance with this Agreement (the "**Site**"). For the avoidance of doubt, it is hereby acknowledged and agreed that references to the Site shall be construed as references to the real estate required for refurbishment and upgradation of the Water Supply and Sewerage System as set forth in Schedule-A.

### **10.2 Licence, Access and Right of Way**

10.2.1 The Authority hereby grants to the Concessionaire access to the Site for carrying out any surveys, investigations and soil tests that the Concessionaire may deem necessary during the Development Period, it being expressly agreed and understood that the Authority shall have no liability whatsoever in respect of survey, investigations and tests carried out or work undertaken by the Concessionaire on or about the Site pursuant hereto in the event of Termination or otherwise.

10.2.2 In consideration of this Agreement and the covenants and warranties on the part of the Concessionaire herein contained, the Authority, in accordance with the terms and conditions set forth herein, hereby grants to the Concessionaire, commencing from the Appointed Date, leave and licence rights in respect of all the land (along with any buildings, constructions or immovable assets, if any, thereon) comprising the Site which is described, delineated and shown in Schedule-A hereto (the "**Licensed Premises**"), on an "as is where is" basis, free of any Encumbrances, to operate and maintain the said Licensed Premises, together with all and singular rights, liberties, privileges, easements and appurtenances whatsoever to the said Licensed Premises, hereditaments or premises or any part thereof belonging to or in any way appurtenant thereto or enjoyed therewith, for the duration of the Concession Period and, for the purposes permitted under this Agreement, and for no other purpose whatsoever.

10.2.3 The licence, access and right of way granted by this Agreement to the Concessionaire shall always be subject to existing rights of way and the Concessionaire shall perform its obligations in a manner that the Services at all times during the Construction Period.

10.2.4 It is expressly agreed that the Licence granted hereunder shall terminate automatically and forthwith, without the need for any action to be taken by the Authority to terminate the Licence, upon the Termination of this Agreement for any reason whatsoever.

10.2.5 The Concessionaire hereby irrevocably appoints the Authority (or its nominee) to be its true and lawful attorney, to execute and sign in the name of the Concessionaire a transfer or surrender of the License granted hereunder at any time after the Concession Period has expired or has been terminated earlier in terms hereof, a sufficient proof of which will be the declaration of any duly authorised officer of the Authority, and the Concessionaire consents to it being registered for this purpose.

10.2.6 It is expressly agreed that:

- (i) trees on the Site are property of the Authority except that the Concessionaire shall be entitled to exercise usufructory rights thereon during the Concession Period;
- (ii) any archaeological discoveries shall belong to and vest in the Authority and the Concessionaire shall promptly report the discovery thereof to the Authority and follow its instructions for safe removal thereof; and
- (iii) mining rights do not form part of the licence granted to the Concessionaire under this Agreement and the

Concessionaire hereby acknowledges that it shall not have any mining rights or any interest in the underlying minerals or fossils on or under the Licensed Premises. For the avoidance of doubt, mining rights mean the right to mine any and all minerals or interest therein.

### 10.3 Procurement of the Site

- 10.3.1 Pursuant to the notice specified in Clause 4.1.2, the Authority Representative and the Concessionaire shall, on a mutually agreed date and time, inspect the Site and prepare a memorandum containing an inventory of the Site including the vacant and unencumbered land, buildings, structures, road works, trees and any other immovable property attached to the Site. Such memorandum shall have appended thereto an appendix (the "Appendix") specifying in reasonable detail those parts of the Site to which vacant access and Right of Way has not been granted to the Concessionaire. Signing of the memorandum, in two counterparts (each of which shall constitute an original), by the authorised representatives of the Parties shall be deemed to constitute a valid licence and Right of Way to the Concessionaire for free and unrestricted use and development of the vacant and unencumbered Site during the Concession Period under and in accordance with the provisions of this Agreement and for no other purpose whatsoever. For the avoidance of doubt, it is agreed that valid licence and Right of Way with respect to the parts of the Site as set forth in the Appendix shall be deemed to have been granted to the Concessionaire upon vacant access thereto being provided by the Authority to the Concessionaire.
- 10.3.2 Without prejudice to the provisions of Clause 10.3.1, the Parties hereto agree that on or prior to the Appointed Date, the Authority shall have granted vacant access and Right of Way to the Site, and in the event Financial Close is delayed solely on account of delay in grant of such vacant access and Right of Way, the Authority shall be liable to payment of Damages under and in accordance with the provisions of Clause 4.2.
- 10.3.3 On and after signing the memorandum and until the Transfer Date, the Concessionaire shall maintain a round-the-clock vigil over the Site and shall ensure and procure that no encroachment thereon takes place, and in the event of any encroachment or occupation on any part thereof, the Concessionaire shall report such encroachment or occupation forthwith to the Authority and undertake its removal at its cost and expenses.
- 10.3.4 The Authority shall make best efforts to provide and grant the Right of Way to the Concessionaire in respect of all land included in the Appendix.
- 10.3.5 Upon receiving Right of Way in respect of any land included in the Appendix, the Concessionaire shall complete the Construction Works thereon within a reasonable period to be determined by the Independent Engineer in accordance with Good Industry Practice; provided that the issue of Provisional Certificate shall not be affected or delayed on account of vacant access to any part of the Site not being granted to the Concessionaire or any construction on such part of the Site remaining incomplete on the date of Tests on account of the delay or denial of such access thereto. For the avoidance of doubt, it is expressly agreed that Construction Works on all lands for which Right of Way is granted within 90 (ninety) days of the Appointed Date shall be completed before the Project Completion Date. It is further agreed that the obligation of the Concessionaire to complete the affected Construction Works shall subsist so long as the Authority continues to pay the Damages specified herein, and upon the Authority ceasing to pay such Damages after giving 60 (sixty) days' notice thereof to the Concessionaire, the obligation of the Concessionaire to complete such works on such part of the Site shall cease forthwith.
- 10.3.6 The Concessionaire shall, if so required by the Authority, procure on behalf of the Authority, on the terms and to the extent specified by the Authority, the additional land required for construction of works specified in Change of Scope Order issued under Article 16, in accordance with this Agreement and upon procurement, such land shall form part of the Site and vest in the Authority; provided that the Concessionaire may, by notice given to the Authority no later than 60 (sixty) days from the Appointed Date or the date of Change of Scope Order, as the case may be require the Authority to initiate and undertake proceedings for acquisition of such land under the provisions of the Applicable Laws and the Authority shall take all such steps as may be reasonably necessary for such land acquisition forthwith; provided further that the cost of land acquired under this Clause 10.3.6 shall be borne by the Authority in accordance with the Act; provided also that the land to be acquired by the Authority hereunder shall be deemed to be included in the Appendix referred to in this Clause 10.3 and dealt with in accordance with the provisions thereof. It is further agreed that the Authority may, at any time after the Bid Date, suo moto acquire the land required hereunder.10.3.7

10.3.7 The Concessionaire may procure at its cost and expense and on its own the land that may be required by it for Additional Facilities and the Authority shall have no obligation or liability in respect thereof. For the avoidance of doubt, the Concessionaire shall seek prior consent of the Authority to connect any Additional Facility to the Water Supply and Sewerage System and such consent shall not be unreasonably withheld.

#### **10.4 Site to be free from Encumbrances**

Subject to the provisions of Clause 10.3, the Site shall be made available by the Authority to the Concessionaire pursuant hereto free from all Encumbrances and occupations and without the Concessionaire being required to make any payment to the Authority on account of any costs, compensation, expenses and charges for the acquisition and use of such Site for the duration of the Concession Period, except insofar as otherwise expressly provided in this Agreement. For the avoidance of doubt, it is agreed that existing rights of way, easements, privileges, liberties and appurtenances to the Licensed Premises shall not be deemed to be Encumbrances.

#### **10.5 Protection of Site from encroachments**

During the Concession Period, the Concessionaire shall protect the Site from any and all occupations, encroachments or Encumbrances, and shall not place or create nor permit any Contractor or other person claiming through or under the Concessionaire to place or create any Encumbrance or security interest over all or any part of the Site or the Project Assets, or on any rights of the Concessionaire therein or under this Agreement, save and except as otherwise expressly set forth in this Agreement.

#### **10.6 Special/temporary right of way**

The Concessionaire shall bear all costs and charges for any special or temporary right of way required by it in connection with access to the Site. The Concessionaire shall obtain at its cost such facilities on or outside the Site as may be required by it for the purposes of the Water Supply and Sewerage System and the performance of its obligations under this Agreement.

#### **10.7 Access to the Authority and Independent Engineer**

The licence, right of way and right to the Site granted to the Concessionaire hereunder shall always be subject to the right of access of the Authority and the Independent Engineer and their employees and agents for inspection, viewing and exercise of their rights and performance of their obligations under this Agreement.

#### **10.8 Access to Service Area**

10.8.1 The Authority hereby grants to the Concessionaire, effective from the Appointed Date and during the Concession Period, access to the Service Area to investigate, study, design, engineer, procure, finance, construct, augment, rehabilitate, operate and maintain the Project Facilities in accordance with the provisions of the Agreement as the Concessionaire may deem necessary at the Concessionaire's cost, expense and risk, without causing damage to the Existing Assets and disruption of water supply and sewerage services to the Users.

Provided that the Concessionaire may, with the prior consent of the Authority, carry out suitable temporary or permanent modifications to the Existing Assets.

10.8.2 It is understood by the Parties that the ownership of the Project Facilities shall, throughout the Concession Period, remain with the Authority and is neither intended to be transferred, nor being transferred in any manner to the Concessionaire or under this Agreement.

10.8.3 The right to use the Project Facilities shall be granted for the purpose of fulfilling the obligations of the Concessionaire under this Agreement and not for any other purpose.

10.8.4 On obtaining access to the Service Area the Concessionaire shall, subject to the provisions of Article 3.1.2, have the right to enter upon, use the same and to make at its costs, charges and expenses such investigation, development and improvements in the Service Area as may be necessary or appropriate to implement the



Project and provide the Project Facilities in accordance with the provisions of this Agreement.

- 10.8.5 The Easementary Rights are granted to the Concessionaire for the purpose of fulfilling the obligations of the Concessionaire under this Agreement and not for any other purpose.
- 10.8.6 The Concessionaire shall not part with or create any Encumbrance on the whole or any part of the Service Area or Project Facilities.
- 10.8.7 The Concessionaire and the Authority shall prior to transfer of the Project Facilities jointly create and agree upon the inventory of Existing Assets, their condition and status, current performance indicators. This would act as the baseline inventory for implementation of the Project. The details arrived from this joint survey shall be attached as part of Schedule A to this Agreement.

## **ARTICLE 11 : UTILITIES, ASSOCIATED ROADS AND TREES**

### **11.1 Existing utilities and roads**

Notwithstanding anything to the contrary contained herein, the Concessionaire shall ensure that all existing roads, right of way or utilities on, under or above the Site are kept in continuous satisfactory use, if necessary, by providing suitable temporary or permanent diversions with the authority of the controlling body of that road, right of way or utility, and the Authority shall, upon written request from the Concessionaire, initiate and undertake at the Concessionaire's cost, legal proceedings for acquisition of any right of way necessary for such diversion.

### **11.2 Shifting of obstructing utilities**

The Concessionaire shall, subject to Applicable Laws and with assistance of the Authority, undertake shifting of any utility including electric lines and telephone cables, to an appropriate location or alignment within or outside the Site if and only if such utility causes a material adverse effect on the construction, operation or maintenance of the Water Supply and Sewerage System. The cost of such shifting shall be borne by the Authority or by the entity owning such utility, if the Authority so directs, and in the event of any delay in shifting thereof, the Concessionaire shall be excused for failure to perform any of its obligations hereunder if such failure is a direct consequence of delay on the part of the entity owning such electric lines, water pipes or telephone cables, as the case may be.

### **11.3 New utilities and roads**

11.3.1 The Concessionaire shall allow, subject to such conditions as the Authority may specify, access to, and use of the Site for laying telephone lines, electric cables or other public utilities. Where such access or use causes any financial loss to the Concessionaire, it may require the user of the Site to pay compensation or damages as per Applicable Laws- For the avoidance of doubt, it is agreed that use of the Site under this Clause shall not in any manner relieve the Concessionaire of its obligation to maintain the Water Supply and Sewerage System in accordance with this Agreement and any damage caused by such use shall be restored forthwith.

### **11.4 Felling of trees**

The Authority shall assist the Concessionaire in obtaining the Applicable Permits for felling of trees to be identified by the Authority for this purpose if and only if such trees cause a material adverse effect on the construction, operation or maintenance of the Water Supply and Sewerage System. The cost of such felling shall be borne by the Authority, and in the event of any delay in felling thereof for reasons beyond the control of the Concessionaire, it shall be excused for failure to perform any of its obligations hereunder if such failure is a direct consequence of delay in the felling of trees. For the avoidance of doubt, the Parties hereto agree that the felled trees shall be deemed to be owned by the Authority and shall be disposed in such manner and subject to such conditions as the Authority may in its sole discretion deem appropriate.

## **ARTICLE 12 : CONSTRUCTION OF THE PROJECT FACILITIES**

### **12.1 Obligations prior to commencement of construction**

Prior to commencement of Construction Works, the Concessionaire shall:

- (a) submit to the Authority and the Independent Engineer its detailed design, construction methodology, quality assurance procedures, and the procurement, engineering and construction time schedule for completion of the Project in accordance with the Project Completion Schedule as set forth in Schedule-F;
- (b) appoint its representative duly authorised to deal with the Authority in respect of all matters under or arising out of or relating to this Agreement; and
- (c) undertake, do and perform all such acts, deeds and things as may be necessary or required before commencement of construction under and in accordance with this Agreement, the Applicable Laws and Applicable Permits.

### **12.2 Drawings**

In respect of the Concessionaire's obligations with respect to the Drawings of the Water Supply and Sewerage System as set forth in Schedule-H, the following shall apply:

- (a) The Concessionaire shall prepare and submit, with reasonable promptness and in such sequence as is consistent with the Project Completion Schedule, three copies each of all Drawings to the Independent Engineer for review;
- (b) By submitting the Drawings for review to the Independent Engineer, the Concessionaire shall be deemed to have represented that it has determined and verified that the design and engineering, including field construction criteria related thereto, are in conformity with the Specifications and Standards;
- (c) Within 15 (fifteen) days of the receipt of the Drawings, the Independent Engineer shall review the same and convey its observations to the Concessionaire with particular reference to their conformity or otherwise with the Scope of the Project and the Specifications and Standards. The Concessionaire shall not be obliged to await the observations of the Independent Engineer on the Drawings submitted pursuant hereto beyond the said 15 (fifteen) days period and may begin or continue Construction Works at its own discretion and risk;
- (d) If the aforesaid observations of the Independent Engineer indicate that the Drawings are not in conformity with the Scope of the Project or the Specifications and Standards, such Drawings shall be revised by the Concessionaire and resubmitted to the Independent Engineer for review. The Independent Engineer shall give its observations, if any, within 7 (seven) days of receipt of the revised Drawings;
- (e) No review and/or observation of the Independent Engineer and/or its failure to review and/or convey its observations on any Drawings shall relieve the Concessionaire of its obligations and liabilities under this Agreement in any manner nor shall the Independent Engineer or the Authority be liable for the same in any manner;

- (f) Within 90 (ninety) days of the Project Completion Date, the Concessionaire shall furnish to the Authority and the Independent Engineer a complete set of as-built Drawings, in 2 (two) hard copies and in such other medium as may be acceptable to the Authority, reflecting the Water Supply and Sewerage System as actually designed, engineered and constructed, including an as-built survey illustrating the layout of the Water Supply and Sewerage System and setback lines, if any, of the buildings and structures forming part of Project Facilities.

### **12.3 Augmentation of the Water Supply and Sewerage System**

- 12.3.1 On or after the Appointed Date, the Concessionaire shall undertake construction of Water Supply and Sewerage System as specified in Schedule-B, and in conformity with the Specifications and Standards set forth in Schedule-C. The 1080th (one thousand and eightieth) day from the Appointed Date shall be the scheduled date for completion of Upgradation (the "**Scheduled Completion Date**") and the Concessionaire agrees and undertakes that the Upgradation shall be completed on or before the Scheduled Completion Date.
- 12.3.2 The Concessionaire shall construct the Water Supply and Sewerage System in accordance with the Project Completion Schedule set forth in Schedule-F. In the event that the Concessionaire fails to achieve any Project Milestone within a period of 90 (ninety) days from the date set forth for such Milestone in Schedule-F, unless such failure has occurred due to Force Majeure or for reasons solely attributable to the Authority, it shall pay Damages to the Authority in a sum calculated at the rate of 0.1% (zero point one per cent) of the amount of Performance Security for delay of each day until such Milestone is achieved; provided that if any or all Project Milestones or the Scheduled Completion Date are extended in accordance with the provisions of this Agreement, the dates set forth in Schedule-F shall be deemed to be modified accordingly and the provisions of this Agreement shall apply as if Schedule-F has been amended as above; provided further that in the event Project Completion Date is achieved on or before the Scheduled Completion Date, the Damages paid under this Clause 12.3.2 shall be refunded by the Authority to the Concessionaire, but without any interest thereon. For the avoidance of doubt, it is agreed that recovery of Damages under this Clause 12.3.2 shall be without prejudice to the rights of the Authority under this Agreement, including the right of Termination thereof.
- 12.3.3 In the event that Upgradation is not completed within 360 (three hundred and sixty) days from the Scheduled Completion Date, unless the delay is on account of reasons solely attributable to the Authority or due to Force Majeure, the Authority shall be entitled to terminate this Agreement.

## **ARTICLE 13 : MONITORING OF CONSTRUCTION**

### **13.1 Monthly progress reports**

During the Construction Period, the Concessionaire shall, no later than 7 (seven) days after the close of each month, furnish to the Authority and the Independent Engineer a monthly report on progress of the Construction Works and shall promptly give such other relevant information as may be required by the Independent Engineer.

### **13.2 Inspection**

During the Construction Period, the Independent Engineer shall inspect the Water Supply and Sewerage System at least once a month and make a report of such inspection (the "Inspection Report") stating in reasonable detail the defects or deficiencies, if any, with particular reference to the Scope of the Project and Specifications and Standards. It shall send a copy of the Inspection Report to the Authority and the Concessionaire within 7 (seven) days of such inspection and upon receipt thereof, the Concessionaire shall rectify and remedy the defects or deficiencies, if any, stated in the Inspection Report. Such inspection or submission of Inspection Report by the Independent Engineer shall not relieve or absolve the Concessionaire of its obligations and liabilities hereunder in any manner whatsoever.

### **13.3 Tests**

13.3.1 For determining that the Construction Works conform to the Specifications and Standards, the Independent Engineer shall require the Concessionaire to carry out or cause to be carried out Tests, at such time and frequency and in such manner as may be specified by the Independent Engineer from time to time, in accordance with Good Industry Practice for quality assurance. The size of sample for such tests shall normally comprise 10% (ten per cent) of the quantity and/or number of tests prescribed by PWD for the construction works undertaken by the Authority through their contractors. The Concessionaire shall, with due diligence, carry out or cause to be carried out all the tests in accordance with the instructions of the Independent Engineer and furnish the results thereof to the Independent Engineer. The costs incurred on such tests and any other Test which is undertaken for determining the rectification of any defect or deficiency in construction shall be borne by the Concessionaire.

13.3.2 In the event that results of any tests conducted under this Clause 13.3 establish any defects or deficiencies in the Construction Works, the Concessionaire shall carry out remedial measures and furnish a report to the Independent Engineer in this behalf. The Independent Engineer shall require the Concessionaire to carry out or cause to be carried out tests to determine that such remedial measures have brought the Construction Works into compliance with the Specifications and Standards, and the procedure set forth in this Clause 13.3 shall be repeated until such Construction Works conform to the Specifications and Standards. For the avoidance of doubt, it is agreed that tests pursuant to this Clause 13.3 shall be undertaken in addition to and independent of the tests that shall be carried out by the Concessionaire for its own quality assurance in accordance with Good Industry Practice. It is also agreed that a copy of the results of such tests shall be sent by the Concessionaire to the Independent Engineer forthwith.

### **13.4 Delays during construction**

If the Concessionaire does not achieve any of the Project Milestones or the Independent Engineer shall have reasonably determined that the rate of progress of Construction Works is such that System Upgradation is not likely to be achieved by the Scheduled Completion Date, it shall notify the Concessionaire to this effect, and the Concessionaire shall, within 15 (fifteen) days of such notice, by a communication inform the Independent Engineer in reasonable detail about the steps it proposes to take to expedite progress and the period within which it shall achieve the Project Completion Date.

### **13.5 Suspension of unsafe Construction Works**

- 13.5.1 Upon recommendation of the Independent Engineer to this effect, the Authority may by notice require the Concessionaire to suspend forthwith the whole or any part of the Construction Works if, in the reasonable opinion of the Authority, such work threatens the safety of the Users and pedestrians.
- 13.5.2 The Concessionaire shall, pursuant to the notice under Clause 13.5.1, suspend the Construction Works or any part thereof for such time and in such manner as may be specified by the Authority and thereupon carry out remedial measures to secure the safety of suspended works and the Users. The Concessionaire may by notice require the Independent Engineer to inspect such remedial measures forthwith and make a report to the Authority recommending whether or not the suspension hereunder may be revoked. Upon receiving the recommendations of the Independent Engineer, the Authority shall either revoke such suspension or instruct the Concessionaire to carry out such other and further remedial measures as may be necessary in the reasonable opinion of the Authority, and the procedure set forth in this Clause 13.5 shall be repeated until the suspension hereunder is revoked.
- 13.5.3 Subject to the provisions of Clause 27.7, all reasonable costs incurred for maintaining and protecting the Construction Works or part thereof during the period of suspension (the "Preservation Costs"), shall be borne by the Concessionaire; provided that if the suspension has occurred as a result of any breach of this Agreement by the Authority, the Preservation Costs shall be borne by the Authority.
- 13.5.4 If suspension of Construction Works is for reasons not attributable to the Concessionaire, the Independent Engineer shall determine any extension of the dates set forth in the Project Completion Schedule to which the Concessionaire is reasonably entitled, and shall notify the Authority accordingly whereupon the Authority shall extend such Project Completion Schedule dates in accordance with the recommendations of the Independent Engineer. In the event that the Scheduled Completion Date is extended pursuant hereto, the Concession Period shall be deemed to be extended by a period equal in length to the period of extension of the Scheduled Completion Date.

### **13.6 Video recording**

During the Construction Period, the Concessionaire shall provide to the Authority for every calendar quarter, a video recording, which will be compiled into a 3 (three)-hour compact disc or digital video disc, as the case may be, covering the status and progress of Construction Works in that quarter. The first such video recording shall be provided to the Authority within 7 (seven) days of the Appointed Date and thereafter, no later than 15 (fifteen) days after the close of each quarter.

## **ARTICLE 14 : COMPLETION CERTIFICATE**

### **14.1 Tests**

14.1.1 At least 30 (thirty) days prior to the likely completion of the Water Supply and Sewerage System, the Concessionaire shall notify the Independent Engineer of its intent to subject the Water Supply and Sewerage System to Tests. The date and time of each of the Tests shall be determined by the Independent Engineer in consultation with the Concessionaire, and notified to the Authority who may designate its representative to witness the Tests. The Concessionaire shall provide such assistance as the Independent Engineer may reasonably require for conducting the Tests. In the event of the Concessionaire and the Independent Engineer failing to mutually agree on the dates for conducting the Tests, the Concessionaire shall fix the dates by not less than 10 (ten) days notice to the Independent Engineer.

14.1.2 All Tests shall be conducted in accordance with Schedule-H. The Independent Engineer shall observe, monitor and review the results of the Tests to determine compliance of the Water Supply and Sewerage System with Specifications and Standards and if it is reasonably anticipated or determined by the Independent Engineer during the course of any Test that the performance of the Water Supply and Sewerage System or any part thereof does not meet the Specifications and Standards, it shall have the right to suspend or delay such Test and require the Concessionaire to remedy and rectify the defects or deficiencies. Upon completion of each Test, the Independent Engineer shall provide to the Concessionaire and the Authority copies of all Test data including detailed Test results. For the avoidance of doubt, it is expressly agreed that the Independent Engineer may require the Concessionaire to carry out or cause to be carried out additional Tests, in accordance with Good Industry Practice, for determining the compliance of the Water Supply and Sewerage System with Specifications and Standards.

### **14.2 Completion Certificate**

Upon completion of Construction Works and the Independent Engineer determining the Tests to be successful, it shall forthwith issue to the Concessionaire and the Authority a certificate substantially in the form set forth in Schedule-I (the "**Completion Certificate**").

### **14.3 Provisional Certificate**

The Independent Engineer may, at the request of the Concessionaire, issue a provisional certificate of completion substantially in the form set forth in Schedule-I (the "**Provisional Certificate**") if the Tests are successful and the Water Supply and Sewerage System can be safely and reliably placed in commercial operation though certain works or things forming part thereof are outstanding and not yet complete. In such an event, the Provisional Certificate shall have appended thereto a list of outstanding items signed jointly by the Independent Engineer and the Concessionaire (the "**Punch List**"); provided that the Independent Engineer shall not withhold the Provisional Certificate for reason of any work remaining incomplete if the delay in completion thereof is attributable to the Authority.

### **14.4 Completion of Punch List items**

14.4.1 All items in the Punch List shall be completed by the Concessionaire within 90 (ninety) days of the date of issue of the Provisional Certificate and for any delay thereafter, other than for reasons solely attributable to the Authority or due to Force Majeure, the Authority shall be entitled to recover Damages from the Concessionaire to be calculated and paid for each day of delay until all items are completed, at the lower of (a) 0.1% (zero point one per cent) of the Performance Security, and (b) 0.2% (zero point two per cent) of the cost of completing such items as estimated by the Independent Engineer. Subject to payment of such Damages, the Concessionaire shall be entitled to a further period not exceeding 120 (one hundred and twenty) days for completion of the Punch List items. For the avoidance of doubt, it is agreed that if completion of any item is delayed for reasons solely attributable to the Authority or due to Force Majeure, the completion date thereof shall be determined by the Independent Engineer in accordance with Good Industry Practice, and such completion date shall be deemed to

be the date of issue of the Provisional Certificate for the purposes of Damages, if any, payable for such item under this Clause 14.4.1.

- 14.4.2 Upon completion of all Punch List items, the Independent Engineer shall issue the Completion Certificate/Failure of the Concessionaire to complete all the Punch List items within the time set forth in Clause 14.4.1 for any reason, other than conditions constituting Force Majeure or for reasons solely attributable to the Authority, shall entitle the Authority to terminate this Agreement.

#### **14.5 Withholding of Provisional Certificate**

- 14.5.1 If the Independent Engineer determines that the Water Supply and Sewerage System or any part thereof does not conform to the provisions of this Agreement and cannot be safely and reliably placed in commercial operation, it shall forthwith make a report in this behalf and send copies thereof to the Authority and the Concessionaire. Upon receipt of such a report from the Independent Engineer and after conducting its own inspection, if the Authority is of the opinion that the Water Supply and Sewerage System is not fit and safe for commercial service, it shall, within 7 (seven) days of receiving the aforesaid report, notify the Concessionaire of the defects and deficiencies in the Water Supply and Sewerage System and direct the Independent Engineer to withhold issuance of the Provisional Certificate. Upon receipt of such notice, the Concessionaire shall remedy and rectify such defects or deficiencies and thereupon Tests shall be undertaken in accordance with this Article 14. Such procedure shall be repeated as necessary until the defects or deficiencies are rectified.

- 14.5.2 Notwithstanding anything to the contrary contained in Clause 14.5.1, the Authority may, at any time after receiving a report from the Independent Engineer under that Clause, direct the Independent Engineer to issue a Provisional Certificate under Clause 14.3, and such direction shall be complied forthwith.

#### **14.6 Rescheduling of Tests**

If the Independent Engineer certifies to the Authority and the Concessionaire that it is unable to issue the Completion Certificate or Provisional Certificate, as the case may be, because of events or circumstances on account of which the Tests could not be held or had to be suspended, the Concessionaire shall be entitled to re-schedule the Tests and hold the same as soon as reasonably practicable.

#### **14.7 Damages for delay**

System Upgradation shall be deemed to be complete when the Completion Certificate or the Provisional Certificate, as the case may be, is issued under the provisions of Article 14.

Subject to the provisions of Clause 12.3, if System Upgradation is not achieved prior to the 91st (ninety first) day from the Scheduled Completion Date, unless the delay is on account of reasons solely attributable to the Authority or due to Force Majeure, the Concessionaire shall pay Damages to the Authority in a sum calculated at the rate of 0.1% (zero point one per cent) of the amount of Performance Security for delay of each day until System Upgradation is achieved.



## **ARTICLE 15 : CHANGE OF SCOPE**

### **15.1 Change of Scope**

15.1.1 The Authority may, notwithstanding anything to the contrary contained in this Agreement, require the provision of additional works and services, which are not included in the Scope of the Project as contemplated by this Agreement ("Change of Scope"). Any such Change of Scope shall be made in accordance with the provisions of this Article 15 and the costs thereof shall be expended by the Concessionaire and reimbursed to it by the Authority in accordance with Clause 15.3.

15.1.2 If the Concessionaire determines at any time that a Change of Scope in the Works is necessary for providing safer and improved services to the Users, it shall by notice in writing require the Authority to consider such Change of Scope. The Authority shall, within 15 (fifteen) days of receipt of such notice, either accept such Change of Scope with modifications, if any, and initiate proceedings therefor in accordance with this Article 16 or inform the Concessionaire in writing of its reasons for not accepting such Change of Scope.

### **15.2 Procedure for Change of Scope**

15.2.1 In the event of the Authority determining that a Change of Scope is necessary, it shall issue to the Concessionaire a notice specifying in reasonable detail the works and services contemplated thereunder (the "**Change of Scope Notice**").

15.2.2 Upon receipt of a Change of Scope Notice, the Concessionaire shall, with due diligence, provide to the Authority such information as is necessary, together with preliminary Documentation in support of:

- (a) the impact, if any, which the Change of Scope is likely to have on the Project Completion Schedule if the works or services are required to be carried out during the Construction Period, and
- (b) the options for implementing the proposed Change of Scope and the effect, if any, each such option would have on the costs and time thereof, including a detailed breakdown by work classifications specifying the material and labour costs calculated in accordance with the schedule of rates applicable to the works assigned by the Authority to its contractors, along with the proposed premium/discount on such rates; provided that the cost incurred by the Concessionaire in providing such information shall be reimbursed by the Authority to the extent such cost is certified by the Independent Engineer as reasonable.

15.2.3 Upon receipt of information set forth in Clause 15.2.2, if the Authority decides to proceed with the Change of Scope, it shall convey its preferred option to the Concessionaire, and the Parties shall, with assistance of the Independent Engineer, thereupon make good faith efforts to agree upon the time and costs for implementation thereof. Upon reaching an agreement, the Authority shall issue an order (the "**Change of Scope Order**") requiring the Concessionaire to proceed with the performance thereof. In the event that the Parties are unable to agree, the Authority may, by issuing a Change of Scope Order, require the Concessionaire to proceed with the performance thereof pending resolution of the Dispute, or carry out the works in accordance with Clause 15.5.

15.2.4 The provisions of this Agreement, insofar as they relate to Construction Works and Tests, shall apply mutatis mutandis to the works undertaken by the Concessionaire under this Article. 16.

### **15.3 Payment for Change of Scope**

15.3.1 Within 7 (seven) days of issuing a Change of Scope Order, the Authority shall make an advance payment to the

Concessionaire in a sum equal to 20% (twenty per cent) of the cost of Change of Scope as agreed hereunder, and in the event of a Dispute, 20% (twenty per cent) of the cost assessed by the Independent Engineer. The Concessionaire shall, after commencement of work, present to the Authority bills for payment in respect of the works in progress or completed works, as the case may be, supported by such Documentation as is reasonably sufficient for the Authority to determine the accuracy thereof. Within 30 (thirty) days of receipt of such bills, the Authority shall disburse to the Concessionaire such amounts as are certified by the Independent Engineer as reasonable and after making a proportionate deduction for the advance payment made hereunder, and in the event of any Dispute, final adjustments thereto shall be made under and in accordance with the Dispute Resolution Procedure.

- 15.3.2 Notwithstanding anything to the contrary contained in Clause 15.3.1, all costs arising out of any Change of Scope Order issued during the Construction Period shall be borne by the Concessionaire, subject to an aggregate ceiling of 0.25% (zero point two five per cent) of the Total Project Cost. Any costs in excess of the ceiling shall be reimbursed by the Authority in accordance with Clause 15.3.1. In the event that the total cost arising out of Change of Scope Orders (if any) issued prior to the Project Completion Date is less than 0.25% (zero point two five per cent) of the Total Project Cost, the difference thereof shall be credited by the Concessionaire to the Escrow Account within a period of 180 (one hundred and eighty) days of the Project Completion Date.

#### **15.4 Restriction on certain works**

- 15.4.1 Notwithstanding anything to the contrary contained in this Article 15, the Authority shall not require the Concessionaire to undertake any works or services if such works or services are likely to delay completion of System Upgradation; provided that in the event that the Authority considers such works or services to be essential, it may issue a Change of Scope Order, subject to the condition that the works forming part of or affected by such Order shall not be reckoned for purposes of determining completion of System Upgradation and issuing the Provisional Certificate.

- 15.4.2 Notwithstanding anything to the contrary contained in this Article 15, the Concessionaire shall be entitled to nullify any Change of Scope Order if it causes the cumulative costs relating to all the Change of Scope Orders to exceed 5% (five per cent) of the Project Cost, in any continuous period of 3 (three) years immediately preceding the date of such Change of Scope Order or if such cumulative costs exceed 20% (twenty per cent) of the Project Cost, at any time during the Concession Period.

#### **15.5 Power of the Authority to undertake works**

- 15.5.1 Notwithstanding anything to the contrary contained in Clauses 15.2 and 15.3, the Authority may, after giving notice to the Concessionaire and considering its reply thereto, award such works or services to any person on the basis of open competitive bidding; provided that the Concessionaire shall have the option of matching the first ranked bid in terms of the selection criteria and thereupon securing the award of such works or services. For the avoidance of doubt, it is agreed that the Concessionaire shall be entitled to exercise such option only if it has participated in the bidding process and its bid does not exceed the first ranked bid by more than 10% (ten percent) thereof.

- 15.5.2 The works undertaken in accordance with this Clause 15.5 shall conform to the Specifications and Standards and shall be carried out in a manner that minimizes the disruption in operation of the Water Supply and Sewerage System. The provisions of this Agreement, insofar as they relate to Construction Works and Tests, shall apply mutatis mutandis to the works carried out under this Clause 15.5.

## ARTICLE 16 : OPERATION AND MAINTENANCE

### 16.1 O&M obligations of the Concessionaire

16.1.1 In respect of the Concessionaire's obligations with respect to the Operations and Maintenance of the Water Supply and Sewerage System as set forth in this Agreement, the following shall apply:

- (a) Not later than 90 (ninety) days from the Appointed Date, the Concessionaire shall, in consultation with the Independent Engineer, evolve a repair and maintenance manual (the "**Maintenance Manual**") for the regular and preventive maintenance of the Water Supply and Sewerage System in conformity with the O&M Requirements, Safety Requirements and Good Industry Practice, and shall provide 5 (five) copies thereof to the Authority and 2 (two) copies to the Independent Engineer. The Maintenance Manual shall be revised and updated once every 3 (three) years and the provisions of this Clause 16.1 shall apply, mutatis mutandis, to such revision. The Maintenance Manual shall spell out in detail the standards, schedules, procedures, type, periodicity, list of key personnel responsible for operations and maintenance and other details of the operation and maintenance activities to be carried out for the Project during the Operation Period so as to fulfil the O&M Requirements; and
- (b) No review and/or observation of the Independent Engineer and/or its failure to review and/or convey its observations on the O&M Plan shall relieve the Concessionaire of its obligations and liabilities under this Agreement in any manner nor shall the Independent Engineer or the Authority be liable for the same in any manner.

16.1.2 During the Operation Period, the Concessionaire shall operate and maintain the Water Supply and Sewerage System in accordance with this Agreement either by itself, or through the O&M Contractor and if required, modify, repair or otherwise make improvements to the Water Supply and Sewerage System to comply with the provisions of this Agreement, Applicable Laws and Applicable Permits, and conform to Good Industry Practice. The obligations of the Concessionaire hereunder shall include:

- (a) undertaking repairs and maintenance of the Project Facilities, at its own cost and expense;
- (b) ensuring that the treated water is supplied in the entire Service Area as per the O&M Requirements;
- (c) ensuring that the wastewater (sewage) is collected from the entire Sewerage Service Area and treated and discharged as per O&M Requirements;
- (d) upon intimation by the Authority, providing water or/and sewerage connection to a property within the period of 7 (seven) days from the receipt of such intimation;
- (e) ensure proper utilization of the existing pumping machines to optimum capacity;
- (f) improving the water transmission system to deliver 80% (eighty percent) of the lifted water in the reservoir;
- (g) providing the capacity banks at each pumping stations to the satisfaction of HPSEB within the Construction Period;
- (h) accumulating and storing of rainwater for reuse before it reaches the aquifer. The Concessionaire shall ensure that it has been used to provide drinking water, water for livestock, water for irrigation, as well as other

typical uses. Rainwater collected from the roofs of houses and local institutions can make an important contribution to the availability of drinking water and can also supplement the subsoil water level and increase urban greenery.

- (i) ensure to attend all the billing complaints as raised by the Users;
  - (j) collecting Tariff from Users and depositing all such collected amounts into the Escrow Account within 3 (three) working days of collection;
  - (k) carrying out plumbing and replacing, with the approval of the Authority, illegal property water and/or sewerage connections with legal connections where the property owner accepts to legitimize the connection, to facilitate in disconnection of such unauthorized connections by the Authority; .
  - (l) cooperating with the Authority in implementation of communication programmes to garner support for the Project among stakeholders and to spread awareness about various programmes and initiatives promoted by the Authority from time to time;
  - (m) reporting to the Authority in respect of unauthorized water and sewerage connections and those connections for which Users have defaulted on the payment in the Service Area. Within 30 (thirty) days of such intimation the Authority shall, with the assistance of the Concessionaire, undertake remedial actions by way of either regularizing the unauthorized connections or disconnecting such properties from the network within the Service Area and initiate proceedings as necessary for collecting the dues from such connection;
  - (n) protection of the environment and provision of equipment and materials therefor;
  - (o) at its own cost undertaking regular and emergency chlorination measures at times of outbreak of epidemics and any such emergency situation;
  - (p) maintaining a public relations unit to interface with and attend to suggestions from the Users, government agencies, media and other agencies;
  - (q) complying with the Performance Benchmarks and O&M Requirements as detailed out in Schedule-J; and
  - (r) complying with the Safety Requirements in accordance with Article 17.
- 16.1.3 The Concessionaire shall maintain, in conformity with Good Industry Practice, all the infrastructure situated on the Site but not forming part of the Water Supply and Sewerage System.

## **16.2 O&M Requirements**

The Concessionaire shall procure that at all times during the Operation Period, the Water Supply and Sewerage System conforms to the operations and maintenance requirements set forth in Schedule-J (the "**O&M Requirements**").

## **16.3 Maintenance Programme**

- 16.3.1 Not later than 45 (forty five) days prior to the beginning of each Accounting Year during the Operation Period, the Concessionaire shall provide to the Authority and the Independent Engineer, its proposed annual programme of preventive, urgent and other scheduled maintenance (the "**Maintenance Programme**") to comply with the O&M Requirements, Maintenance Manual and Safety Requirements. Such Maintenance

Programme shall include:

- (a) preventive maintenance schedule;
- (b) arrangements and procedures for carrying out urgent repairs;
- (c) criteria to be adopted for deciding maintenance needs;
- (d) intervals and procedures for carrying out inspection of all elements of the Water Supply and Sewerage System;
- (e) intervals at which the Concessionaire shall carry out periodic maintenance;
- (f) arrangements and procedures for carrying out safety related measures; and
- (g) intervals for major maintenance works and the scope thereof.

16.3.2 Within 15 (fifteen) days of receipt of the Maintenance Programme, the Independent Engineer shall review the same and convey its comments to the Concessionaire with particular reference to its conformity with the O&M Requirements, Maintenance Manual and Safety Requirements.

16.3.3 The Concessionaire may modify the Maintenance Programme as may be reasonable in the circumstances, and the procedure specified in Clauses 16.3.1 and 16.3.2 shall apply mutatis mutandis to such modifications.

#### **16.4 De-commissioning due to Emergency**

16.4.1 If, in the reasonable opinion of the Concessionaire, there exists an Emergency which warrants de-commissioning and closure of the whole or any part of the Water Supply and Sewerage System, the Concessionaire shall be entitled to de-commission and close the whole or any part of the Water Supply and Sewerage System to the Users for so long as such Emergency and the consequences thereof warrant; provided that such de-commissioning and particulars thereof shall be notified by the Concessionaire to the Authority without any delay, and the Concessionaire shall diligently carry out and abide by any reasonable directions that the Authority may give for dealing with such emergency.

16.4.2 The Concessionaire shall re-commission the Water Supply and Sewerage System or the affected part thereof as quickly as practicable after the circumstances leading to its de-commissioning and closure have ceased to exist or have so abated as to enable the Concessionaire to re-commission the Water Supply and Sewerage System.

#### **16.5 System Closure**

16.5.1 The Concessionaire shall not close any part of the Water Supply and Sewerage System for undertaking maintenance or repair works except with the prior written approval of the Independent Engineer. Such approval shall be sought by the Concessionaire through a written request to be made at least 7 (seven) days before the proposed closure and shall be accompanied by particulars thereof. Within 3 (three) days of receiving such request, the Independent Engineer shall grant permission with such modifications as it may deem necessary and a copy of such permission shall be sent to the Authority.

16.5.2 The provisions of Clause 16.5.1 shall not apply to de-commissioning under Clause 16.4.1 or to closure of any part of the Water Supply and Sewerage System for a period not exceeding 2 (two) hours in a day at any time of the day and 6 (six) hours in a day at a time specified by the Independent Engineer as off-peak hours when the water demand is comparatively lower.

- 16.5.3 Upon receiving the permission pursuant to Clause 16.5.1, the Concessionaire shall be entitled to close the designated parts of the Water Supply and Sewerage System for the period specified therein.

## **16.6 Damages for breach of maintenance obligations**

- 16.6.1 In the event that the Concessionaire fails to repair or rectify any defect or deficiency set forth in the O&M Requirements within the period specified therein, it shall be deemed to be in breach of this Agreement and the Authority shall be entitled to recover Damages, to be calculated and paid for each day of delay until the breach is cured, at the higher of (a) 0.5% (zero point five per cent) of Average Monthly Tariff, and (b) 10% (ten per cent) of the cost of such repair or rectification as estimated by the Independent Engineer. Recovery of such Damages shall be without prejudice to the rights of the Authority under this Agreement, including the right of Termination thereof.
- 16.6.2 The Damages set forth in Clause 16.6.1 may be assessed and specified forthwith by the Independent Engineer; provided that the Authority may, in its discretion, demand a smaller sum as Damages, if in its opinion, the breach has been cured promptly and the Concessionaire is otherwise in compliance with its obligations hereunder. The Concessionaire shall pay such Damages forthwith and in the event that it contests such Damages, the Dispute Resolution Procedure shall apply.

## **16.7 Authority's right to take remedial measures**

- 16.7.1 In the event the Concessionaire does not maintain and/or repair the Water Supply and Sewerage System or any part thereof in conformity with the O&M Requirements, the Maintenance Manual or the Maintenance Programme, as the case may be, and fails to commence remedial works within 15 (fifteen) days of receipt of the O&M Inspection Report or a notice in this behalf from the Authority or the Independent Engineer, as the case may be, the Authority shall, without prejudice to its rights under this Agreement including Termination thereof, be entitled to undertake such remedial measures at the risk and cost of the Concessionaire, and to recover its cost from the Concessionaire. In addition to recovery of the aforesaid cost, a sum equal to 20% (twenty per cent) of such cost shall be paid by the Concessionaire to the Authority as Damages.
- 16.7.2 The Authority shall have the right, and the Concessionaire hereby expressly grants to the Authority the right, to recover the costs and Damages specified in Clause 16.7.1 directly from the Service Fee due to it for the subsequent months.

## **16.8 Overriding powers of the Authority**

- 16.8.1 If in the reasonable opinion of the Authority, the Concessionaire is in material breach of its obligations under this Agreement and, in particular, the O&M Requirements, and such breach is causing or likely to cause material hardship or danger to the Users, the Authority may, without prejudice to any of its rights under this Agreement including Termination thereof, by notice require the Concessionaire to take reasonable measures immediately for rectifying or removing such hardship or danger, as the case may be.
- 16.8.2 In the event that the Concessionaire, upon notice under Clause 17.10.1, fails to rectify or remove any hardship or danger within a reasonable period, the Authority may exercise overriding powers under this Clause 16.8.2 and take over the performance of any or all the obligations of the Concessionaire to the extent deemed necessary by it for rectifying or removing such hardship or danger; provided that the exercise of such overriding powers by the Authority shall be of no greater scope and of no longer duration than is reasonably required hereunder; provided further that any costs and expenses incurred by the Authority in discharge of its obligations hereunder shall be deemed to be O&M Expenses, and the Authority shall be entitled to recover them from the Concessionaire in accordance with the provisions of Clause 16.7 along with the Damages specified therein.
- 16.8.3 In the event of a national emergency, civil commotion or any other act specified in Clause 27.3, the Authority may take over the performance of any or all the obligations of the Concessionaire to the extent deemed necessary by it, and exercise such control over the Water Supply and Sewerage System or give such directions to the Concessionaire as may be deemed necessary; provided that the exercise of such overriding powers by the Authority shall be of no greater scope and of no longer duration than is reasonably required in the circumstances which caused the exercise of such overriding power by the Authority. For the avoidance of doubt, the consequences of such action shall be dealt in accordance with the provisions of Article 27.

#### **16.9 Restoration of loss or damage to Water Supply and Sewerage System**

Save and except as otherwise expressly provided in this Agreement, in the event that the Water Supply and Sewerage System or any part thereof suffers any loss or damage during the Concession Period from any cause whatsoever, the Concessionaire shall, at its cost and expense, rectify and remedy such loss or damage forthwith so that the Water Supply and Sewerage System conforms to the provisions of this Agreement.

#### **16.10 Modifications to the Water Supply and Sewerage System**

The Concessionaire shall not carry out any material modifications to the Water Supply and Sewerage System save and except where such modifications are necessary for the Water Supply and Sewerage System to operate in conformity with the O&M Requirements and Good Industry Practice; provided that the Concessionaire shall notify the Independent Engineer of the proposed modifications along with particulars thereof at least 15 (fifteen) days before commencing work on such modifications and shall reasonably consider any suggestions that the Independent Engineer may make within 15 (fifteen) days of receiving the Concessionaire's proposal.

#### **16.11 Excuse from performance of obligations**

The Concessionaire shall not be considered in breach of its obligations under this Agreement if any part of the Water Supply and Sewerage System is not operational on account "of any of the following for the duration thereof:

- (a) an event of Force Majeure;
- (b) measures taken to ensure the safe use of the Water Supply and Sewerage System except when unsafe conditions occurred because of failure of the Concessionaire to perform its obligations under this Agreement; or
- (c) compliance with a request from the Authority or the directions of any Government Instrumentality, the effect of which is to close all or any part of the Water Supply and Sewerage System.
- (d) Notwithstanding the above, the Concessionaire shall keep all unaffected parts of the Water Supply and Sewerage System operational provided they can be operated safely.

## **ARTICLE 17 : SAFETY REQUIREMENTS**

### **17.1 Safety Requirements**

17.1.1 The Concessionaire shall comply with the provisions of this Agreement, Applicable Laws and Applicable Permits and conform to Good Industry Practice for securing the safety of the Users. In particular, the Concessionaire shall develop, implement and administer a surveillance and safety programme for providing safe water and sewerage services in the Water Supply and Sewerage System.

### **17.2 Expenditure on Safety Requirements**

All costs and expenses arising out of or relating to Safety Requirements shall be borne by the Concessionaire to the extent such costs and expenses form part of the works and services included in the Scope of the Project, and works and services, if any, not forming part of the Scope of the Project shall be undertaken in accordance with the provisions of Article 15.



## **ARTICLE 18 : MONITORING OF OPERATION AND MAINTENANCE**

### **18.1 Monthly status reports**

During Operation Period, the Concessionaire shall, no later than 7 (seven) days after the close of each month, furnish to the Authority and the Independent Engineer a monthly report stating in reasonable detail the condition of the Water Supply and Sewerage System including its compliance or otherwise with the O&M Requirements, Maintenance Manual, Maintenance Programme and Safety Requirements, and shall promptly give such other relevant information as may be required by the Independent Engineer.

### **18.2 Inspection**

The Independent Engineer shall inspect the Water Supply and Sewerage System at least once a month. It shall make a report of such inspection (the "O&M Inspection Report") stating in reasonable detail the defects or deficiencies, if any, with particular reference to the O&M Requirements, Maintenance Manual, the Maintenance Programme and Safety Requirements, and send a copy thereof to the Authority and the Concessionaire within 7 (seven) days of such inspection.

### **18.3 Tests**

For determining that the Water Supply and Sewerage System conforms to the O&M Requirements, the Independent Engineer shall require the Concessionaire to carry out, or cause to be carried out, tests specified by it in accordance with Good Industry Practice. The Concessionaire shall, with due diligence, carry out or cause to be carried out all such tests in accordance with the instructions of the Independent Engineer and furnish the results of such tests forthwith to the Independent Engineer. One half of the costs incurred on such tests, and to the extent certified by the Independent Engineer as reasonable, shall be reimbursed by the Authority to the Concessionaire.

### **18.4 Remedial measures**

18.4.1 The Concessionaire shall repair or rectify the defects or deficiencies, if any, set forth in the O&M Inspection Report or in the test results referred to in Clause 18.3 and furnish a report in respect thereof to the Independent Engineer and the Authority within 15 (fifteen) days of receiving the O&M Inspection Report or the test results, as the case may be; provided that where the remedying of such defects or deficiencies is likely to take more than 15 (fifteen) days, the Concessionaire shall submit progress reports of the repair works once every week until such works are completed in conformity with this Agreement.

18.4.2 The Independent Engineer shall require the Concessionaire to carry out or cause to be carried out tests, at its own cost, to determine that such remedial measures have brought the Water Supply and Sewerage System into compliance with the O&M Requirements and the procedure set forth in this Clause 18.4 shall be repeated until the Water Supply and Sewerage System conforms to the O&M Requirements. In the event that remedial measures are not completed by the Concessionaire in conformity with the provisions of this Agreement, the Authority shall be entitled to recover Damages from the Concessionaire under and in accordance with the provisions of Clause 16.7.

### **18.5 Monthly Fee Statement**

During the Operation Period, the Concessionaire shall furnish to the Authority, within 7 (seven) days of completion of each month, a statement of Tariff substantially in the form set forth in Schedule-K (the "**Monthly Fee Statement**").

## **ARTICLE 19 : INDEPENDENT ENGINEER**

### **19.1 Appointment of Independent Engineer**

The Authority shall appoint a consulting engineer/ engineering firm in accordance with the selection criteria set forth in Schedule-L, to be the independent consultant under this Agreement (the "**Independent Engineer**"). The appointment shall be made no later than 90 (ninety) days from the date of this Agreement and shall be for a period of 3 (three) years. On expiry of the aforesaid period, the Authority may in its discretion renew the appointment, or appoint another firm from a fresh panel constituted pursuant to Schedule-L to be the Independent Engineer for a term of 3 (three) years, and such procedure shall be repeated after expiry of each appointment.

### **19.2 Duties and functions**

19.2.1 The Independent Engineer shall discharge its duties and functions substantially in accordance with the terms of reference set forth in Schedule-M.

19.2.2 The Independent Engineer shall submit regular periodic reports (at least once every month) to the Authority in respect of its duties and functions set forth in Schedule-M.

### **19.3 Remuneration**

The remuneration, cost and expenses of the Independent Engineer shall be paid by the Authority and subject to the limits set forth in Schedule-L, one-half of such remuneration, cost and expenses shall be reimbursed by the Concessionaire to the Authority within 15 (fifteen) days of receiving a statement of expenditure from the Authority.

### **19.4 Termination of appointment**

19.4.1 The Authority may, in its discretion, terminate the appointment of the Independent Engineer at any time, but only after appointment of another Independent Engineer in accordance with Clause 19.1.

19.4.2 If the Concessionaire has reason to believe that the Independent Engineer is not discharging its duties and functions in a fair, efficient and diligent manner, it may make a written representation to the Authority and seek termination of the appointment of the Independent Engineer. Upon receipt of such representation, the Authority shall hold a tripartite meeting with the Concessionaire and Independent Engineer for an amicable resolution of the Dispute, and if any difference or disagreement between the Authority and the Concessionaire remains unresolved, the Dispute shall be settled in accordance with the Dispute Resolution Procedure. In the event that the appointment of the Independent Engineer is terminated hereunder, the Authority shall appoint forthwith another Independent Engineer in accordance with Clause 19.1.

### **19.5 Authorised signatories**

The Authority shall require the Independent Engineer to designate and notify to the Authority and the Concessionaire up to 2 (two) persons employed in its firm to sign for and on behalf of the Independent Engineer, and any communication or document required to be signed by the Independent Engineer shall be valid and effective only if signed by any of the designated persons; provided that the Independent Engineer may, by notice in writing, substitute any of the designated persons by any of its employees.

## **19.6 Dispute resolution**

If either Party disputes any advice, instruction, decision, direction or award of the Independent Engineer, or, as the case may be, the assertion or failure to assert jurisdiction, the Dispute shall be resolved in accordance with the Dispute Resolution Procedure.

#### **Part IV: Financial Covenants**

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## **ARTICLE 21 : GRANT**

### **21.1 Grant**

21.1.1 An amount of Rs. 1,22,86,00,000 (Rupees one hundred twenty two crore and eighty six lakh) only has been sanctioned by GOI to GoHP for funding the works to be carried out w.r.t this Project under the Jawaharlal Nehru National Urban Renewal Mission (the “JNNURM”). The amount shall be made available by the Authority to the Concessionaire as cash support by way of an outright grant (the “Grant”) in accordance with the provisions of this Article 21.

21.1.2 The Grant shall be disbursed to the Concessionaire by way of cash support in accordance with the provisions of Clause 21.2.

### **21.2 Grant Disbursement**

21.2.1 Subject to the conditions specified in this Clause 21.2, the Grant shall be applied by the Concessionaire for meeting the Total Project Cost.

21.2.2 The Grant shall be available subject to the disbursement of the amount to GoHP by GoI. It shall be the responsibility of the Concessionaire to adhere to the terms and conditions set forth by GOI for the release of the sanctioned amount under JNNURM. The Concessionaire has to make best efforts, along with Authority, to obtain the grants under JNNURM.

21.2.3 *The Grant shall be due and payable to the Concessionaire after it has expended the Equity, and shall be disbursed proportionately along with the loan funds thereafter remaining to be disbursed by the Senior Lenders under the Financing Agreements. The Authority shall disburse each tranche of the grant as and when due, but not later than 15 (fifteen) days of receiving a request from the Concessionaire along with necessary particulars.*

21.2.4 However, it is being clarified here that the rates as has been specified against each item of the Mandatory Works detailed out in Schedule-B have been fixed and approved by JNNURM. No request w.r.t the escalation/ deviation in the rates on higher side shall be permissible by the Authority.

21.2.5 In the event of occurrence of a Concessionaire Default, disbursement of Grant shall be suspended till such Concessionaire Default has been cured by the Concessionaire.

## ARTICLE 22 : SERVICE FEE

### 22.1 Service Fee

In consideration of the services provided by the Concessionaire as per the terms of this Agreement, the Authority shall pay to the Concessionaire by way of a monthly fee (the "Service Fee") a sum equal to the product of the volume of Water Billed and Collected (VBC) during a calendar month and the Volumetric Rate ( $R_{(0)}$ ). By the term "Volumetric Rate" we shall mean the price, as quoted by the Successful Bidder in its Financial Proposal, expressed in Indian Rupees per kilo litre of water that is chargeable by the Concessionaire to the Authority for the Water Billed and Collected (including the sewerage charges). However, for avoidance of doubt, at no stage the Volumetric Rate shall not include the Energy Charges.

Expressed in terms of a formula, the Service Fee is defined as follows:

$$\text{Service Fee (during a month)} = (V_{BC} * R_{(0)})$$

Where,

$V_{BC}$  = volume of Water Billed and Collected in kilolitre during the month

$R_{(0)}$  = Applicable Volumetric Rate in rupees per kilolitre, as quoted by the Concessionaire

It is being clarified here that the Service Fee shall be due and payable to the Concessionaire from the Appointed Date.

### 22.2 Intentionally Left Blank

### 22.3 Energy Charges

The cost of electricity used for the purpose of lifting water from the water sources to the water supply reservoirs and booster pumps within the Service Area (the "Energy Charges") shall be paid by the Authority/Government directly to the electricity supplier. It is clarified however, that the Energy Charges shall not constitute a part of the Volumetric Rate quoted by the Consortium in its Bid.

### 22.4 Calculation of Service Fee in Nth Year

The Service Fee due and payable, in the Nth year, to the Concessionaire by the Authority shall be as follows:

$$R_N = R_{(0)} * (0.4 + 0.6 * WPI_{(N)} / WPI_{(0)}) + (E_{(0)} / V_{bco} - E_n / V_{bcn} * T_0 / T_n) * 0.5$$

If $(E_{(0)} / V_{bco} - E_n / V_{bcn} * T_0 / T_n)$ is less than 0 (zero) then
---

$$R_N = R_{(0)} * (0.4 + 0.6 * WPI_{(N)} / WPI_{(0)}) + (E_{(0)} / V_{bco} - E_n / V_{bcn} * T_0 / T_n)$$

The Service Fee shall be payable as under

$$\text{Service Fee (in Nth year)} = R_n * V_{bcn}$$

where,

$R_N$  = Volumetric Rate in Rupees per kilo litre of water billed and collected of Nth year

$R_0$  = Volumetric Rate in Rupees per kilo litre of water billed and collected, as quoted by the Concessionaire

$V_{bco}$  = Water Billed and Collected per month during the base year (i.e. the time period during the Conditions Precedent Period) in kilolitres.

$V_{bcn}$  = Water Billed and Collected per month during the Nth year in kilolitres.

$E_o$  = Energy Charges paid on account of energy consumed per month during the base year (i.e. the time period during the Conditions Precedent Period) in rupees.

$E_n$  = Energy charges on account of energy consumed per month and paid by the Authority during the Nth year in rupees.

$T_o$  = Electricity weighted average tariff rate in rupees per unit applicable for pumping the water for drinking purposes if during the year tariff is changed then waited tariff shall be accounted for.

$T_n$  = Electricity weighted average tariff rate in rupees per unit for pumping the water for drinking purposes during the Nth year

$WPI_N$  = Whole sale Price Index during the Nth year.

$WPI_o$  = Whole sale Price Index during the base year.

## **22.5 Verification of Service Fee**

22.5.1 The Authority may, in order to satisfy itself that the Concessionaire is reporting its Service Fee honestly and faithfully, depute its representatives to the offices of the Concessionaire, and undertake such other measures and actions as it may deem necessary, to ascertain the actual Service Fee payable.

22.5.2 In the event of any Dispute relating to the actual Service Fee, the Dispute Resolution Procedure shall apply.

## **ARTICLE 23 : TARIFF**

### **23.1 Collection and appropriation of Tariff**

23.1.1 On and from the Appointed Date till the Transfer Date, the Concessionaire shall have the sole and exclusive right to demand and collect Tariff from the Users in accordance with this Agreement and the Tariff Notification (the "Tariff Notification") set forth in Schedule N. However, it is being clarified here that the security charges deposit, as provided by the Users w.r.t the new connections, shall be directly given to the Authority with the detailed information of the Users;

The Concessionaire acknowledges and agrees that upon payment of Tariff and subject to conditions stipulated by the Authority, any User residing within the Service Area shall be entitled to the Services and the Concessionaire on its own shall not place, or cause to be placed, any restriction on such use, except to the extent specified in any Applicable Law, Applicable Permit or the provisions of this Agreement.

### **23.2 Revision of Tariff**

23.2.1 The Parties hereto acknowledge and agree that in accordance with the Tariff Notification, the Tariff specified therein as applicable on the Appointed Date (the "Base Tariff") shall be revised annually in accordance with the provisions of the Tariff Notification.

23.2.2 The Concessionaire hereby acknowledges and agrees that it is not entitled to any revision of Tariff or other relief



from the Authority or any Government Instrumentality, except in accordance with the express provisions of this Agreement.

## **ARTICLE 24 : ESCROW ACCOUNT**

### **24.1 Escrow Account**

- 24.1.1 The Concessionaire shall, prior to the Appointed Date, open and establish an Escrow Account with a Bank (the "**Escrow Bank**") in accordance with this Agreement read with the Escrow Agreement.
- 24.1.2 The nature and scope of the Escrow Account are fully described in the agreement (the "**Escrow Agreement**") to be entered into amongst the Concessionaire, the Authority and the Escrow Bank which shall be substantially in the form set forth in Schedule-S.

### **24.2 Deposits into Escrow Account**

The Concessionaire shall deposit or cause to be deposited into the Escrow Account all Tariff and any other revenues from or in respect of the Water Supply and Sewerage System.

### **24.3 Withdrawals during Concession Period**

- 24.3.1 The Concessionaire shall, at the time of opening the Escrow Account, give irrevocable instructions, by way of an Escrow Agreement, to the Escrow Bank instructing, inter alia, that deposits in the Escrow Account shall be appropriated in the following order every month, or at shorter intervals as necessary, and if not due in a month then appropriated proportionately in such month and retained in the Escrow Account and paid out there from in the month when due:
- (a) all withdrawals by the Authority, such that the minimum balance in the Escrow Account is maintained at a minimum balance as per the requirements of the Escrow Bank; and
  - (b) in the event that the Service Fee has been due to the Concessionaire for a period exceeding 30 (thirty) days from the day such invoice has been raised by the Concessionaire; the Concessionaire shall be allowed to withdraw such amount from the Escrow Account.
- 24.3.2 The Concessionaire shall not in any manner modify the order of payment specified in Clause 24.3.1, except with the prior written approval of the Authority.

### **24.4 Withdrawals upon Termination**

- 24.4.1 Notwithstanding anything to the contrary contained in this Agreement, all amounts standing to the credit of the Escrow Account shall, upon Termination, be appropriated by the Authority.
- 24.4.2 The provisions of this Article 24 and the instructions contained in the Escrow Agreement shall remain in full force and effect until the obligations set forth in Clause 24.4.1 have been discharged.

## **ARTICLE 25 : INSURANCE**

### **25.1 Insurance during Concession Period**

The Concessionaire shall effect and maintain at its own cost, during the Concession Period, such insurances for such maximum sums as may be required under the Financing Agreements, and the Applicable Laws, and such

insurances as may be necessary or prudent in accordance with Good Industry Practice (the "Insurance Cover"). The Concessionaire shall also effect and maintain such insurances as may be necessary for mitigating the risks that may devolve on the Authority as a consequence of any act or omission of the Concessionaire during the Construction Period. For the avoidance of doubt, the level of insurance to be maintained by the Concessionaire after repayment of Senior Lenders' dues in full shall be determined on the same principles as applicable for determining the level of insurance prior to such repayment of Senior Lenders' dues.

#### **25.2 Notice to the Authority**

Not later than 45 (forty five) days prior to commencement of the Concession Period, the Concessionaire shall by notice furnish to the Authority, in reasonable detail, information in respect of the insurances that it proposes to effect and maintain in accordance with this Article 25. Within 30 (thirty) days of receipt of such notice, the Authority may require the Concessionaire to effect and maintain such other insurances as may be necessary pursuant hereto, and in the event of any difference or disagreement relating to any such insurance, the Dispute Resolution Procedure shall apply.

#### **25.3 Evidence of Insurance Cover**

All insurances obtained by the Concessionaire in accordance with this Article 25 shall be maintained with insurers on terms consistent with Good Industry Practice. Within 15 (fifteen) days of obtaining any insurance cover, the Concessionaire shall furnish to the Authority, notarised true copies of the certificate(s) of insurance, copies of insurance policies and premia payment receipts in respect of such insurance, and no such insurance shall be cancelled, modified, or allowed to expire or lapse until the expiration of at least 45 (forty five) days after notice of such proposed cancellation, modification or non-renewal has been delivered by the Concessionaire to the Authority.

#### **25.4 Remedy for failure to insure**

If the Concessionaire shall fail to effect and keep in force all insurances for which it is responsible pursuant hereto, the Authority shall have the option to either keep in force any such insurances, and pay such premia and recover the costs thereof from the Concessionaire, or in the event of computation of a Termination Payment, treat an amount equal to the Insurance Cover as deemed to have been received by the Concessionaire.

#### **25.5 Waiver of subrogation**

All insurance policies in respect of the insurance obtained by the Concessionaire pursuant to this Article 25 shall include a waiver of any and all rights of subrogation or recovery of the insurers thereunder against, inter alia, the Authority, and its assigns, successors, undertakings and their subsidiaries, affiliates, employees, insurers and underwriters, and of any right of the insurers to any set-off or counterclaim or any other deduction, whether by attachment or otherwise, in respect of any liability of any such person insured under any such policy or in any way connected with any loss, liability or obligation covered by such policies of insurance.

#### **25.6 Concessionaire's waiver**

The Concessionaire hereby further releases, assigns and waives any and all rights of subrogation or recovery against, inter alia, the Authority and its assigns, undertakings and their subsidiaries, affiliates, employees, successors, insurers and underwriters, which the Concessionaire may otherwise have or acquire in or from or in any way connected with any loss, liability or obligation covered by policies of insurance maintained or required to be maintained by the Concessionaire pursuant to this Agreement (other than third party liability insurance policies) or because of deductible clauses in or inadequacy of limits of any such policies of insurance.

#### **25.7 Application of insurance proceeds**

The proceeds from all insurance claims, except life and injury: shall be paid to the Concessionaire and it shall, notwithstanding anything to the contrary contained in Clause 24.3, apply such proceeds for any necessary repair, reconstruction, reinstatement, replacement, improvement, delivery or installation of the Water Supply and Sewerage System, and the balance remaining, if any, shall be applied in accordance with the provisions contained in this behalf in the Financing Agreements.

## **ARTICLE 26 : ACCOUNTS AND AUDIT**

### **26.1 Audited accounts**

- 26.1.1 The Concessionaire shall maintain books of accounts recording all its receipts (including all Tariffs and other revenues derived/collected by it from or on account of the Water Supply and Sewerage System and/or its use), income, expenditure, payments (including payments from the Escrow Account), assets and liabilities, in accordance with this Agreement, Good Industry Practice, Applicable Laws and Applicable Permits. The Concessionaire shall provide 2 (two) copies of its Balance Sheet, Cash Flow Statement and Profit and Loss Account, along with a report thereon by its Statutory Auditors, within 90 (ninety) days of the close of the Accounting Year to which they pertain and such audited accounts shall form the basis of payments by either Party under this Agreement. The Authority shall have the right to inspect the records of the Concessionaire during office hours and require copies of relevant extracts of books of accounts, duly certified by the Auditors, to be provided to the Authority for verification of basis of payments, and in the event of any discrepancy or error being found, the same shall be rectified and such rectified account shall form the basis of payments by either Party under this Agreement.
- 26.1.2 The Concessionaire shall, within 30 (thirty) days of the close of each quarter of an Accounting Year, furnish to the Authority its unaudited financial results in respect of the preceding quarter, in the manner and form prescribed by the Securities and Exchange Board of India for publication of quarterly results by the companies listed on a stock exchange.
- 26.1.3 On or before the thirty-first day of May each Year, the Concessionaire shall provide to the Authority, for the preceding Accounting Year, a statement duly audited by its Statutory Auditors giving summarized information on (a) the water supplied to each category of Users and liability for payment of Tariff therefor, (b) Tariff charged and received and other revenues derived from the Water Supply and Sewerage System, and (c) such other information as the Authority may reasonably require.

### **26.2 Appointment of auditors**

- 26.2.1 The Concessionaire shall appoint, and have during the subsistence of this Agreement as its Statutory Auditors, a firm chosen by it from the mutually agreed list of 10 (ten) reputable firms of chartered accountants (the "**Panel of Chartered Accountants**"), such list to be prepared substantially in accordance with the criteria set forth in Schedule-P. All fees and expenses of the Statutory Auditors shall be borne by the Concessionaire.
- 26.2.2 The Concessionaire may terminate the appointment of its Statutory Auditors after a notice of 45 (forty five) days to the Authority, subject to the replacement Statutory Auditors being appointed from the Panel of Chartered Accountants.
- 26.2.3 Notwithstanding anything to the contrary contained in this Agreement, the Authority shall have the right, but not the obligation, to appoint at its cost from time to time and at anytime, another firm (the "**Additional Auditors**") from the Panel of Chartered Accountants to audit and verify all those matters, expenses, costs, realisations and things which the Statutory Auditors are required to do, undertake or certify pursuant to this Agreement.
- 26.2.4 The Authority shall have the right, but not the obligation, to appoint at its cost, for the duration of the Construction Period, another firm (the "**Concurrent Auditors**") from the Panel of Chartered Accountants to undertake concurrent audit of the Concessionaire's accounts.

### **26.3 Certification of claims by Statutory Auditors**

Any claim or document provided by the Concessionaire to the Authority in connection with or relating to receipts, income, payments, costs, expenses, accounts or audit, and any matter incidental thereto shall be valid and effective only if certified by its Statutory Auditors. For the avoidance of doubt, such certification shall not be required for exchange of information in the normal course of business including the submission of Monthly Fee Statements under Clause 18.5.

### **26.4 Dispute resolution**

In the event of there being any difference between the findings of the Additional Auditors or the Concurrent Auditors, as the case may be, and the certification provided by the Statutory Auditors, such Auditors shall meet to resolve the differences and if they are unable to resolve the same, such Dispute shall be resolved by the Authority by recourse to the Dispute Resolution Procedure.

**Part V : Force Majeure and Termination**

## **ARTICLE 27 : FORCE MAJEURE**

### **27.1 Force Majeure**

As used in this Agreement, the expression "**Force Majeure**" or "**Force Majeure Event**" shall mean occurrence in India of any or all of Non-Political Event, Indirect Political Event and Political Event, as defined in Clauses 27.2, 27.3 and 27.4 respectively, if it affects the performance by the Party claiming the benefit of Force Majeure (the "**Affected Party**") of its obligations under this Agreement and which act or event (i) is beyond the reasonable control of the Affected Party, and (ii) the Affected Party could not have prevented or overcome by exercise of due diligence and following Good Industry Practice, and (iii) has Material Adverse Effect on the Affected Party.

### **27.2 Non-Political Event**

A Non-Political Event shall mean one or more of the following acts or events:

- (a) act of God, epidemic, extremely adverse weather conditions, lightning, earthquake, landslide, cyclone, flood, volcanic eruption, chemical or radioactive contamination or ionising radiation, fire or explosion (to the extent of contamination or radiation or fire or explosion originating from a source external to the Site);
- (b) strikes or boycotts (other than those involving the Concessionaire, Contractors or their respective employees/representatives, or attributable to any act or omission of any of them) interrupting supplies and services to the Water Supply and Sewerage System for a continuous period of 24 (twenty four) hours and an aggregate period exceeding 7 (seven) days in an Accounting Year, and not being an Indirect Political Event set forth in Clause 27.3;
- (c) any failure or delay of a Contractor but only to the extent caused by another Non-Political Event and which does not result in any offsetting compensation being payable to the Concessionaire by or on behalf of such Contractor;
- (d) any judgement or order of any court of competent jurisdiction or statutory authority made against the Concessionaire in any proceedings for reasons other than (i) failure of the Concessionaire to comply with any Applicable Law or Applicable Permit, or (ii) on account of breach of any Applicable Law or Applicable Permit or of any contract, or (iii) enforcement of this Agreement, or (iv) exercise of any of its rights under this Agreement by the Authority;
- (e) the discovery of geological conditions, toxic contamination or archaeological remains on the Site that could not reasonably have been expected to be discovered through a site inspection; or
- (f) any event or circumstances of a nature analogous to any of the foregoing.

### **27.3 Indirect Political Event**

An Indirect Political Event shall mean one or more of the following acts or events:

- (a) an act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, riot, insurrection, terrorist or military action, civil commotion or politically motivated sabotage;
- (b) industry-wide or State-wide strikes or industrial action for a continuous period of 24 (twenty four)

hours and exceeding an aggregate period of 7 (seven) days in an Accounting Year;

- (c) any civil commotion, boycott or political agitation which prevents collection of Tariff by the Concessionaire for an aggregate period exceeding 7 (seven) days in an Accounting Year;
- (d) any failure or delay of a Contractor to the extent caused by any Indirect Political Event and which does not result in any offsetting compensation being payable to the Concessionaire by or on behalf of such Contractor;
- (e) any Indirect Political Event that causes a Non-Political Event; or
- (f) any event or circumstances of a nature analogous to any of the foregoing.

#### **27.4 Political Event**

A Political Event shall mean one or more of the following acts or events by or on account of any Authority Instrumentality:

- (a) Change in Law, only if consequences thereof cannot be dealt with under and in accordance with the provisions of Article 41 and its effect, in financial terms, exceeds the sum specified in Clause 41.1;
- (b) compulsory acquisition in national interest or expropriation of any Project Assets or rights of the Concessionaire or of the Contractors;
- (c) unlawful or unauthorised or without jurisdiction revocation of, or refusal to renew or grant without valid cause, any clearance, licence, permit, authorisation, no objection certificate, consent, approval or exemption required by the Concessionaire or any of the Contractors to perform their respective obligations under this Agreement and the Project Agreements; provided that such delay, modification, denial, refusal or revocation did not result from the Concessionaire's or any Contractor's inability or failure to comply with any condition relating to grant, maintenance or renewal of such clearance, licence, authorisation, no objection certificate, exemption, consent, approval or permit;
- (d) any failure or delay of a Contractor but only to the extent caused by another Political Event and which does not result in any offsetting compensation being payable to the Concessionaire by or on behalf of such Contractor; or
- (e) any event or circumstance of a nature analogous to any of the foregoing.

#### **27.5 Duty to report Force Majeure Event**

27.5.1 Upon occurrence of a Force Majeure Event, the Affected Party shall by notice report such occurrence to the other Party forthwith. Any notice pursuant hereto shall include full particulars of:

- (a) the nature and extent of each Force Majeure Event which is the subject of any claim for relief under this Article 34 with evidence in support thereof;
- (b) the estimated duration and the effect or probable effect which such Force Majeure Event is having or will have on the Affected Party's performance of its obligations under this Agreement;
- (c) the measures which the Affected Party is taking or proposes to take for alleviating the impact of such Force Majeure Event; and



(d) any other information relevant to the Affected Party's claim.

27.5.2 The Affected Party shall not be entitled to any relief for or in respect of a Force Majeure Event unless it shall have notified the other Party of the occurrence of the Force Majeure Event as soon as reasonably practicable, and in any event not later than 7 (seven) days after the Affected Party knew, or ought reasonably to have known, of its occurrence, and shall have given particulars of the probable material effect that the Force Majeure Event is likely to have on the performance of its obligations under this Agreement.

27.5.3 For so long as the Affected Party continues to claim to be materially affected by such Force Majeure Event, it shall provide the other Party with regular (and not less than weekly) reports containing information as required by Clause 27.5.1, and such other information as the other Party may reasonably request the Affected Party to provide.

## **27.6 Effect of Force Majeure Event on the Concession**

27.6.1 Upon the occurrence of any Force Majeure Event prior to the Appointed Date, the period set forth in Clause 20.1.1 for achieving Financial Close shall be extended by a period equal in length to the duration of the Force Majeure Event.

27.6.2 At any time after the Appointed Date, if any Force Majeure Event occurs:

(a) before Full Operations Date, the Concession Period and the dates set forth in the Project Completion Schedule shall be extended by a period equal in length to the duration for which such Force Majeure Event subsists; or

(b) after Full Operations Date, whereupon the Concessionaire is unable to collect Tariff despite making best efforts or it is directed by the Authority to suspend the collection thereof during the subsistence of such Force Majeure Event, the Concession Period shall be extended by a period, equal in length to the period during which the Concessionaire was prevented from collection of Tariff on account thereof.

## **27.7 Allocation of costs arising out of Force Majeure**

27.7.1 Upon occurrence of any Force Majeure Event prior to the Appointed Date, the Parties shall bear their respective costs and no Party shall be required to pay to the other Party any costs thereof.

27.7.2 Upon occurrence of a Force Majeure Event after the Appointed Date, the costs incurred and attributable to such event and directly relating to the Project (the "Force Majeure Costs") shall be allocated and paid as follows:

(a) upon occurrence of a Non-Political Event, the Parties shall bear their respective Force Majeure Costs and neither Party shall be required to pay to the other Party any costs thereof;

(b) upon occurrence of an Indirect Political Event, all Force Majeure Costs attributable to such Indirect Political Event, and not exceeding the Insurance Cover for such Indirect Political Event, shall be borne by the Concessionaire, and to the extent Force Majeure Costs exceed such Insurance Cover, one half of such excess amount shall be reimbursed by the Authority to the Concessionaire; and

(c) upon occurrence of a Political Event, all Force Majeure Costs attributable to such Political Event shall be reimbursed by the Authority to the Concessionaire.

For the avoidance of doubt, Force Majeure Costs may include interest payments on debt, O&M Expenses, any increase in the cost of Construction Works on account of inflation and all other costs directly attributable to the Force Majeure Event, but shall not include loss of Tariff revenues or debt repayment obligations, and for determining such costs, information contained in the Financial Package may be relied upon to the extent that

such information is relevant.

- 27.7.3 Save and except as expressly provided in this Article 27, neither Party shall be liable in any manner whatsoever to the other Party in respect of any loss, damage, cost, expense, claims, demands and proceedings relating to or arising out of occurrence or existence of any Force Majeure Event or exercise of any right pursuant hereto.

#### **27.8 Termination Notice for Force Majeure Event**

If a Force Majeure Event subsists for a period of 180 (one hundred and eighty) days or more within a continuous period of 365 (three hundred and sixty five) days, either Party may in its discretion terminate this Agreement by issuing a Termination Notice to the other Party without being liable in any manner whatsoever, save as provided in this Article 27, and upon issue of such Termination Notice, this Agreement shall, notwithstanding anything to the contrary contained herein, stand terminated forthwith; provided that before issuing such Termination Notice, the Party intending to issue the Termination Notice shall inform the other Party of such intention and grant 15 (fifteen) days time to make a representation, and may after the expiry of such 15 (fifteen) days period, whether or not it is in receipt of such representation, in its sole discretion issue the Termination Notice.

#### **27.9 Termination Payment for Force Majeure Event**

- 27.9.1 If Termination is on account of a Non-Political Event, the Authority shall make a Termination Payment to the Concessionaire in an amount equal to twice the average of the previous 6 (six) months' Service Fee .
- 27.9.2 If Termination is on account of an Indirect Political Event, the Authority shall make a Termination Payment to the Concessionaire in an amount equal to the total of the previous 6 (six) months' Service Fee.
- 27.9.3 If Termination is on account of a Political Event, the Authority shall make a Termination Payment to the Concessionaire in an amount that would be payable under Clause 37.3.2 as if it were a Authority Default.

#### **27.10 Dispute resolution**

In the event that the Parties are unable to agree in good faith about the occurrence or existence of a Force Majeure Event, such Dispute shall be finally settled in accordance with the Dispute Resolution Procedure; provided that the burden of proof as to the occurrence or existence of such Force Majeure Event shall be upon the Party claiming relief and/or excuse on account of such Force Majeure Event.

#### **27.11 Excuse from performance of obligations**

If the Affected Party is rendered wholly or partially unable to perform its obligations under this Agreement because of a Force Majeure Event, it shall be excused from performance of such of its obligations to the extent it is unable to perform on account of such Force Majeure Event; provided that:

- (a) the suspension of performance shall be of no greater scope and of no longer duration than is reasonably required by the Force Majeure Event;
- (b) the Affected Party shall make all reasonable efforts to mitigate or limit damage to the other Party arising out of or as a result of the existence or occurrence of such Force Majeure Event and to cure the same with due diligence; and
- (c) when the Affected Party is able to resume performance of its obligations under this Agreement, it shall give to the other Party notice to that effect and shall promptly resume performance of its obligations hereunder.

## **ARTICLE 28 :   COMPENSATION FOR BREACH OF AGREEMENT**

### **28.1    Compensation for default by the Concessionaire**

In the event of the Concessionaire being in material default or breach of this Agreement, it shall pay to the Authority by way of compensation, all direct costs suffered or incurred by the Authority as a consequence of such material default, within 30 (thirty) days of receipt of the demand supported by necessary particulars thereof; provided that no compensation shall be payable under this Clause 28.1 for any breach or default in respect of which Damages are expressly specified and payable under this Agreement.

### **28.2    Compensation for default by the Authority**

In the event of the Authority being in material default or breach of this Agreement at any time after the Appointed Date, it shall pay to the Concessionaire by way of compensation, all direct costs suffered or incurred by the Concessionaire as a consequence of such material default within 30 (thirty) days of receipt of the demand supported by necessary particulars thereof; provided that no such compensation shall be payable for any breach or default in respect of which Damages have been expressly specified in this Agreement. For the avoidance of doubt, compensation payable may include interest payments on debt, O&M Expenses, any increase in capital costs on account of inflation and all other costs directly attributable to such material default but shall not include loss of Tariff revenues or debt repayment obligations, and for determining such compensation, information contained in the Financial Package and the Financial Model may be relied upon to the extent it is relevant.

### **28.3    Extension of Concession Period**

In the event that a material default or breach of this Agreement set forth in Clause 28.2 causes delay in achieving Full Operations Date or leads to suspension of or reduction in collection of Tariff, as the case may be, the Authority shall, in addition to payment of compensation under Clause 28.2, extend the Concession Period, such extension being equal in duration to the period by which Full Operations Date was delayed or the collection of Tariff remained suspended on account thereof, as the case may be.

### **28.4    Compensation to be in addition**

Compensation payable under this Article 28 shall be in addition to, and not in substitution for, or derogation of, Termination Payment, if any.

## **ARTICLE 29 :   SUSPENSION OF CONCESSIONAIRE'S RIGHTS**

### **29.1   Suspension upon Concessionaire Default**

Upon occurrence of a Concessionaire Default, the Authority shall be entitled, without prejudice to its other rights and remedies under this Agreement including its rights of Termination hereunder, to (i) suspend all rights of the Concessionaire under this Agreement including the Concessionaire's right to collect Tariff, and other revenues pursuant hereto, and (ii) exercise such rights itself or authorise any other person to exercise the same on its behalf during such suspension (the "**Suspension**"). Suspension hereunder shall be effective forthwith upon issue of notice by the Authority to the Concessionaire and may extend up to a period not exceeding 180 (one hundred and eighty) days from the date of issue of such notice; provided that upon written request from the Concessionaire, the Authority shall extend the aforesaid period of 180 (one hundred and eighty) days by a further period not exceeding 90 (ninety) days.

### **29.2   Authority to act on behalf of Concessionaire**

29.2.1 During the period of Suspension, the Authority shall, on behalf of the Concessionaire, collect all Tariff and revenues under and in accordance with this Agreement and deposit the same in the Escrow Account. The Authority shall be entitled to make withdrawals from the Escrow Account for meeting the costs incurred by it for remedying and rectifying the cause of Suspension, and thereafter for defraying the expenses specified in Clause 24.3.

29.2.2 During the period of Suspension hereunder, all assets and liabilities in relation to the Water Supply and Sewerage System shall continue to vest in the Concessionaire and all things done or actions taken, including expenditure incurred by the Authority for discharging the obligations of the Concessionaire under and in accordance with this Agreement and the Project Agreements, shall be deemed to have been done or taken for and on behalf of the Concessionaire and the Concessionaire undertakes to indemnify the Authority for all costs incurred during such period.

### **29.3   Revocation of Suspension**

29.3.1 In the event that the Authority shall have rectified or removed the cause of Suspension within a period not exceeding 90 (ninety) days from the date of Suspension, it shall revoke the Suspension forthwith and restore all rights of the Concessionaire under this Agreement.

29.3.2 Upon the Concessionaire having cured the Concessionaire Default within a period not exceeding 90 (ninety) days from the date of Suspension, the Authority shall revoke the Suspension forthwith and restore all rights of the Concessionaire under this Agreement.

### **29.4   Termination**

29.4.1 At any time during the period of Suspension under this Article 29, the Concessionaire may by notice require the Authority to revoke the Suspension and issue a Termination Notice. The Authority shall within 15 (fifteen) days of receipt of such notice, terminate this Agreement under and in accordance with Article 29.

29.4.2 Notwithstanding anything to the contrary contained in this Agreement, in the event that Suspension is not revoked within 180 (one hundred and eighty) days from the date of Suspension hereunder or within the extended period, if any, set forth in Clause 29.1, the Concession Agreement shall, upon expiry of the aforesaid period, be deemed to have been terminated by mutual agreement of the Parties and all the provisions of this Agreement shall apply, mutatis mutandis, to such Termination as if a Termination Notice had been issued by the Authority upon occurrence of a Concessionaire Default.

## ARTICLE 30 : TERMINATION

### 30.1 Termination for Concessionaire Default

30.1.1 Save as otherwise provided in this Agreement, in the event that any of the defaults specified below shall have occurred, and the Concessionaire fails to cure the default within the Cure Period set forth below, or where no Cure Period is specified, then within a Cure Period of 60 (sixty) days, the Concessionaire shall be deemed to be in default of this Agreement (a "**Concessionaire Default**"), unless the default has occurred solely as a result of any breach of this Agreement by the Authority or due to Force Majeure. The defaults referred to herein shall include:

- (a) the Performance Security has been encashed and appropriated by the Authority in accordance with Clause 9.2 and the Concessionaire fails to replenish or provide fresh Performance Security within a Cure Period of 30 (thirty) days;
- (b) subsequent to the replenishment or furnishing of fresh Performance Security in accordance with Clause 9.2, the Concessionaire fails to cure, within a Cure Period of 90 (ninety) days, the Concessionaire Default for which whole or part of the Performance Security was appropriated;
- (c) the Concessionaire does not achieve the latest outstanding Project Milestone due in accordance with the provisions of Schedule-G and continues to be in default for 90 (ninety) days;
- (d) the Concessionaire abandons or manifests intention to abandon the construction of the Water Supply and Sewerage System without the prior written consent of the Authority for a continuous period of 30 days and such default is not rectified within thirty (30) days from the receipt of first notice from the Authority in this regard, or
- (e) the Concessionaire, for reasons solely attributable to an act or omission of itself, abandons or relinquishes the Supply of Water Services to Consumers to such an extent that there is significant widespread danger to the health of the public, which will be presumed to be the case where the Concessionaire fails to Supply any Water Services for a continuous period of 5 (five) days or 15 (fifteen) discontinuous days per calendar year.
- (f) subject to Article 27, the Concessionaire consistently breaches a material provision of the conditions of the Supply of Water Services and Consumer Rules to the extent that there is significant widespread danger to the health of the public in the Concession Area and in such a manner as to reasonably justify the Authority in holding that the Concessionaire's conduct is inconsistent with its intention or ability to carry out the terms and conditions of the Contract.
- (g) Project Completion Date does not occur within the period specified in Clause 12.3.3;
- (h) the Punch List items have not been completed within the period set forth in Clause 14.4.1;
- (i) the Concessionaire is in breach of the O&M Requirements and Performance Benchmarks;
- (j) the Concessionaire has failed to make any payment to the Authority within the period specified in this Agreement;
- (k) an Escrow Default has occurred and the Concessionaire fails to cure the default within a Cure Period of 15 (fifteen) days;

- (l) a breach of any of the Project Agreements by the Concessionaire has caused a Material Adverse Effect;
- (m) the Concessionaire creates any Encumbrance in breach of this Agreement;
- (n) the Concessionaire repudiates this Agreement or otherwise takes any action or evidences or conveys an intention not to be bound by the Agreement;
- (o) a Change in Ownership has occurred in breach of the provisions of Clause 5.3;
- (p) there is a transfer, pursuant to law either of (i) the rights and/or obligations of the Concessionaire under any of the Project Agreements, or of (ii) all part of the assets or undertaking of the Concessionaire, and such transfer causes a Material Adverse Effect;
- (q) an execution levied on any of the assets of the Concessionaire has caused a Material Adverse Effect;
- (r) the Concessionaire is adjudged bankrupt or insolvent, or if a trustee or receiver is appointed for the Concessionaire or for the whole or material part of its assets that has a material bearing on the Project;
- (s) the Concessionaire has been, or is in the process of being liquidated, dissolved, wound-up, amalgamated or reconstituted in a manner that would cause, in the reasonable opinion of the Authority, a Material Adverse Effect;
- (t) a resolution for winding up of the Concessionaire is passed, or any petition for winding up of the Concessionaire is admitted by a court of competent jurisdiction and a provisional liquidator or receiver is appointed and such order has not been set aside within 90 (ninety) days of the date thereof or the Concessionaire is ordered to be wound up by Court except for the purpose of amalgamation or reconstruction; provided that, as part of such amalgamation or reconstruction, the entire property, assets and undertaking of the Concessionaire are transferred to the amalgamated or reconstructed entity and that the amalgamated or reconstructed entity has unconditionally assumed the obligations of the Concessionaire under this Agreement and the Project Agreements; and provided that:
  - (i) the amalgamated or reconstructed entity has the capability and operating experience necessary for the performance of its obligations under this Agreement and the Project Agreements;
  - (ii) the amalgamated or reconstructed entity has the financial standing to perform its obligations under this Agreement and the Project Agreements and has a credit worthiness at least as good as that of the Concessionaire as at the Appointed Date; and
  - (iii) each of the Project Agreements remains in full force and effect;
- (s) any representation or warranty of the Concessionaire herein contained which is, as of the date hereof, found to be materially false or the Concessionaire is at any time hereafter found to be in breach thereof;
- (t) the Concessionaire submits to the Authority any statement which has a material effect on the Authority's rights, obligations or interests and which is false in material particulars;
- (u) the Concessionaire has failed to fulfil any obligation, for which failure Termination has been specified in this Agreement; or
- (v) the Concessionaire commits a default in complying with any other provision of this Agreement if such

default causes a Material Adverse Effect on the Authority.

30.1.2 Without prejudice to any other rights or remedies which the Authority may have under this Agreement, upon occurrence of a Concessionaire Default, the Authority shall be entitled to terminate this Agreement by issuing a Termination Notice to the Concessionaire; provided that before issuing the Termination Notice, the Authority shall by a notice inform the Concessionaire of its intention to issue such Termination Notice and grant 15 (fifteen) days to the Concessionaire to make a representation, and may after the expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice, subject to the provisions of clause.

### **30.2 Termination for Authority Default**

30.2.1 In the event that any of the defaults specified below shall have occurred, and the Authority fails to cure such default within a Cure Period of 90 (ninety) days or such longer period as has been expressly provided in this Agreement, the Authority shall be deemed to be in default of this Agreement (the "Authority Default") unless the default has occurred as a result of any breach of this Agreement by the Concessionaire or due to Force Majeure. The defaults referred to herein shall include:

- (a) The Authority commits a material default in complying with any of the provisions of this Agreement and such default has a Material Adverse Effect on the Concessionaire;
- (b) the Authority has failed to make any payment to the Concessionaire within the period specified in this Agreement; or
- (c) the Authority repudiates this Agreement or otherwise takes any action that amounts to or manifests an irrevocable intention not to be bound by this Agreement.

30.2.2 Without prejudice to any other right or remedy which the Concessionaire may have under this Agreement, upon occurrence of an Authority Default, the Concessionaire shall, subject to the provisions of the Substitution Agreement, be entitled to terminate this Agreement by issuing a Termination Notice to the Authority; provided that before issuing the Termination Notice, the Concessionaire shall by a notice inform the Authority of its intention to issue the Termination Notice and grant 15 (fifteen) days to the Authority to make a representation, and may after the expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice.

### **30.3 Termination Payment**

30.3.1 Upon Termination on account of a Concessionaire Default during the Concession Period, no Termination Payment shall be due or payable to the Concessionaire by the Authority and the applicable Performance Security and any other amount (as available in the Escrow Account) shall be forfeited by the Authority.

30.3.2 Upon Termination on account of a Authority Default, the Authority shall refund back the applicable Performance Security and any other amount (as available in the Escrow Account) and pay to the Concessionaire, by way of Termination Payment, an amount equal to:

- (a) a sum total of the previous 6 (six) months' Service Fee; and
- (b) 150% (one hundred and fifty per cent) of the Adjusted Equity.

30.3.3 Termination Payment shall become due and payable to the Concessionaire within 15 (fifteen) days of a demand being made by the Concessionaire to the Authority with the necessary particulars, and in the event of any delay, the Authority shall pay interest at a rate equal to 3% (three per cent) above the Bank Base Rate on the amount of Termination Payment remaining unpaid; provided that such delay shall not exceed 90 (ninety) days. For the

avoidance of doubt, it is expressly agreed that Termination Payment shall constitute full discharge by the Authority of its payment obligations in respect thereof hereunder.

#### **30.4 Other rights and obligations of the Authority**

Upon Termination for any reason whatsoever, the Authority shall:

- (a) be deemed to have taken possession and control of the Water Supply and Sewerage System forthwith;
- (b) take possession and control of all materials, stores, implements, construction plants and equipment on or about the Site;
- (c) be entitled to restrain the Concessionaire and any person claiming through or under the Concessionaire from entering upon the Site or any part of the Project;
- (d) require the Concessionaire to comply with the Divestment Requirements set forth in Clause 38.1; and
- (e) succeed upon election by the Authority, without the necessity of any further action by the Concessionaire, to the interests of the Concessionaire under such of the Project Agreements as the Authority may in its discretion deem appropriate, and shall upon such election be liable to the Contractors only for compensation accruing and becoming due and payable to them under the terms of their respective Project Agreements from and after the date the Authority elects to succeed to the interests of the Concessionaire. For the avoidance of doubt, it is hereby agreed, and the Concessionaire hereby acknowledges, that all sums claimed by such Contractors as being due and owing for works and services performed or accruing on account of any act, omission or event prior to such date shall constitute debt between the Concessionaire and such Contractors, and the Authority shall not in any manner be liable for such sums. It is further agreed that in the event the Authority elects to cure any outstanding defaults under such Project Agreements, the amount expended by the Authority for this purpose shall be deducted from the Termination Payment.

#### **30.5 Survival of rights**

Notwithstanding anything to the contrary contained in this Agreement, any Termination pursuant to the provisions of this Agreement shall be without prejudice to the accrued rights of either Party including its right to claim and recover money damages, insurance proceeds, security deposits, and other rights and remedies, which it may have in law or contract. All rights and obligations of either Party under this Agreement, including Termination Payments and Divestment Requirements, shall survive the Termination to the extent such survival is necessary for giving effect to such rights and obligations.



## **ARTICLE 31 : DIVESTMENT OF RIGHTS AND INTEREST**

### **31.1 Divestment Requirements**

Upon Termination, the Concessionaire shall comply with and conform to the following Divestment Requirements:

- (a) notify to the Authority forthwith the location and particulars of all Project Assets;
- (b) deliver forthwith the actual or constructive possession of the Water Supply and Sewerage System, free and clear of all Encumbrances;
- (c) cure all Project Assets of all defects and deficiencies so that the Water Supply and Sewerage System is compliant with the O&M Requirements; provided that in the event of Termination during the Construction Period, all Project Assets shall be handed over on 'as is where is' basis after bringing them to a safe condition;
- (d) deliver relevant records and reports pertaining to the Water Supply and Sewerage System and its design, engineering, construction, operation and maintenance, including all programmes and manuals pertaining thereto, and complete 'as built' Drawings as on the Transfer Date;
- (e) transfer and/or deliver all Applicable Permits to the extent permissible under Applicable Laws;
- (f) execute such deeds of conveyance, documents and other writings as the Authority may reasonably require for conveying, divesting and assigning all the rights, title and interest of the Concessionaire in the Water Supply and Sewerage System, including the right to receive outstanding insurance claims to the extent due and payable to the Authority, absolutely unto the Authority or its nominee; and
- (g) comply with all other requirements as may be prescribed or required under Applicable Laws for completing the divestment and assignment of all rights, title and interest of the Concessionaire in the Water Supply and Sewerage System, free from all Encumbrances, absolutely unto the Authority or to its nominee.

### **31.2 Inspection and cure**

Not earlier than 90 (ninety) days before Termination but not later than 15 (fifteen) days before the effective date of such Termination, the Independent Engineer shall verify, after giving due notice to the Concessionaire specifying the time, date and venue of such verification and/or inspection, compliance by the Concessionaire with the O&M Requirements, and if required, cause appropriate tests to be carried out at the Concessionaire's cost for this purpose. Defaults, if any, in the O&M Requirements shall be cured by the Concessionaire at its cost and the provisions of Article 32 shall apply, mutatis mutandis, in relation to curing of defects or deficiencies under this Article 31.

### **31.3 Vesting Certificate**

The divestment of all rights, title and interest in the Water Supply and Sewerage System shall be deemed to be complete on the date when all of the Divestment Requirements have been fulfilled, and the Authority shall, without unreasonable delay, thereupon issue a certificate substantially in the form set forth in Schedule-Q (the "**Vesting Certificate**"), which will have the effect of constituting evidence of divestment by the Concessionaire of all of its rights, title and interest in the Water Supply and Sewerage System, and their vesting in the Authority pursuant hereto. It is expressly agreed that any defect or deficiency in the Divestment Requirements shall not in

any manner be construed or interpreted as restricting the exercise of any rights by the Authority or its nominee on, or in respect of, the Water Supply and Sewerage System on the footing that all Divestment Requirements have been complied with by the Concessionaire.

**31.4 Additional Facilities**

Notwithstanding anything to the contrary contained in this Agreement, all Additional Facilities shall continue to vest in the Concessionaire upon and after Termination.

**31.5 Divestment costs etc.**

31.5.1 The Concessionaire shall bear and pay all costs incidental to divestment of all of the rights, title and interest of the Concessionaire in the Water Supply and Sewerage System in favour of the Authority upon Termination, save and except that all stamp duties payable on any deeds or Documents executed by the Concessionaire in connection with such divestment shall be borne by the Authority.

31.5.2 In the event of any dispute relating to matters covered by and under this Article 38, the Dispute Resolution Procedure shall apply.

## **ARTICLE 32 : DEFECTS LIABILITY AFTER TERMINATION**

### **32.1 Liability for defects after Termination**

The Concessionaire shall be responsible for all defects and deficiencies in the Water Supply and Sewerage System for a period of 120 (One hundred and twenty) days after Termination, and it shall have the obligation to repair or rectify, at its own cost, all defects and deficiencies observed by the Independent Engineer in the Water Supply and Sewerage System during the aforesaid period. In the event that the Concessionaire fails to repair or rectify such defect or deficiency within a period of 15 (fifteen) days from the date of notice issued by the Authority in this behalf, the Authority shall be entitled to get the same repaired or rectified at the Concessionaire's risk and cost so as to make the Water Supply and Sewerage System conform to the O&M Requirements. All costs incurred by the Authority hereunder shall be reimbursed by the Concessionaire to the Authority within 15 (fifteen) days of receipt of demand thereof, and in the event of default in reimbursing such costs, the Authority shall be entitled to recover the same by deducting the required amount from the Service Fee payable to the Concessionaire.

**Part VI : Other Provisions**

## **ARTICLE 33 : ASSIGNMENT AND CHARGES**

### **33.1 Restrictions on assignment and charges**

33.1.1 Subject to Clauses 33.2 and 33.3, this Agreement shall not be assigned by the Concessionaire to any person, save and except with the prior consent in writing of the Authority, which consent the Authority shall be entitled to decline without assigning any reason.

33.1.2 Subject to the provisions of Clause 33.2, the Concessionaire shall not create nor permit to subsist any Encumbrance, or otherwise transfer or dispose of all or any of its rights and benefits under this Agreement or any Project Agreement to which the Concessionaire is a party except with prior consent in writing of the Authority, which consent the Authority shall be entitled to decline without assigning any reason.

### **33.2 Permitted assignment and charges**

The restraints set forth in Clause 33.1 shall not apply to:

- (a) liens arising by operation of law (or by an agreement evidencing the same) in the ordinary course of business of the Water Supply and Sewerage System;
- (b) mortgages/pledges/hypothecation of goods/assets other than Project Assets, and their related documents of title, arising or created in the ordinary course of business of the Water Supply and Sewerage System, and as security only for working capital arrangements for the Water Supply and Sewerage System; and
- (c) liens or encumbrances required by any Applicable Law.

### **33.3 Substitution Agreement**

33.3.1 The Lenders' Representative, on behalf of Senior Lenders, may exercise the right to substitute the Concessionaire in accordance with the agreement for substitution of the Concessionaire (the "**Substitution Agreement**") to be entered into amongst the Concessionaire, the Authority and the Lenders' Representative, on behalf of Senior Lenders, substantially in the form set forth in Schedule-R.

33.3.2 Upon substitution of the Concessionaire under and in accordance with the Substitution Agreement, the Nominated Company substituting the Concessionaire shall be deemed to be the Concessionaire under this Agreement and shall enjoy all rights and be responsible for all obligations of the Concessionaire under this Agreement as if it were the Concessionaire; provided that where the Concessionaire is in breach of this Agreement on the date of such substitution, the Authority shall by notice grant a Cure Period of 120 (one hundred and twenty) days to the Concessionaire for curing such breach.

### **33.4 Assignment by the Authority**

Notwithstanding anything to the contrary contained in this Agreement, the Authority may, after giving 60 (sixty) days' notice to the Concessionaire, assign any of its rights and benefits and/or obligations under this Agreement; to an assignee who is, in the reasonable opinion of the Authority, capable of fulfilling all of the Authority's then outstanding obligations under this Agreement.

## **ARTICLE 34 : LIABILITY AND INDEMNITY**

### **34.1 General indemnity**

- 34.1.1 The Concessionaire will indemnify, defend, save and hold harmless the Authority and its officers, servants, agents, Authority Instrumentalities and Authority owned and/or controlled entities/enterprises, (the **"Authority Indemnified Persons"**) against any and all suits, proceedings, actions, demands and third party claims for any loss, damage, cost and expense of whatever kind and nature arising out of any breach by the Concessionaire of any of its obligations under this Agreement or any related agreement or on account of any defect or deficiency in the provision of services by the Concessionaire to any User, except to the extent that any such suits, proceedings, actions, demands and claims have arisen due to any negligent act or omission, or breach of this Agreement on the part of the Authority Indemnified Persons.
- 34.1.2 The Authority will indemnify, defend, save and hold harmless the Concessionaire against any and all suits, proceedings, actions, demands and third party claims, for any loss, damage, cost and expense of whatever kind and nature arising out of (i) defect in title and/or the rights of the Authority in the land comprised in the Site, and/or (ii) breach by the Authority of any of its obligations under this Agreement or any related agreement, which materially and adversely affect the performance by the Concessionaire of its obligations under this Agreement, save and except that where any such claim, suit, proceeding, action, and/or demand has arisen due to a negligent act or omission, or breach of any of its obligations under any provision of this Agreement or any related agreement and/or breach of its statutory duty on the part of the Concessionaire, its subsidiaries, affiliates, contractors, servants or agents, the same shall be the liability of the Concessionaire.

### **34.2 Indemnity by the Concessionaire**

- 34.2.1 Without limiting the generality of Clause 34.1, the Concessionaire shall fully indemnify, hold harmless and defend the Authority and the Authority Indemnified Persons from and against any and all loss and/or damages arising out of or with respect to:
- (a) failure of the Concessionaire to comply with Applicable Laws and Applicable Permits;
  - (b) payment of taxes required to be made by the Concessionaire in respect of the income or other taxes of the Concessionaire's contractors, suppliers and representatives; or
  - (c) non-payment of amounts due as a result of materials or services furnished to the Concessionaire or any of its contractors which are payable by the Concessionaire or any of its contractors.
- 34.2.2 Without limiting the generality of the provisions of this Article 34, the Concessionaire shall fully indemnify, hold harmless and defend the Authority Indemnified Persons from and against any and all suits, proceedings, actions, claims, demands, liabilities and damages which the Authority Indemnified Persons may hereafter suffer, or pay by reason of any demands, claims, suits or proceedings arising out of claims of infringement of any domestic or foreign patent rights, copyrights or other intellectual property, proprietary or confidentiality rights with respect to any materials, information, design or process used by the Concessionaire or by the Concessionaire's Contractors in performing the Concessionaire's obligations or in any way incorporated in or related to the Project. If in any such suit, action, claim or proceedings, a temporary restraint order or preliminary injunction is granted, the Concessionaire shall make every reasonable effort, by giving a satisfactory bond or otherwise, to secure the revocation or suspension of the injunction or restraint order. If, in any such suit, action, claim or proceedings, the Water Supply and Sewerage System, or any part thereof or comprised therein, is held to constitute an infringement and its use is permanently enjoined, the Concessionaire shall promptly make every reasonable effort to secure for the Authority a licence, at no cost to the Authority, authorising continued use of the infringing work. If the Concessionaire is unable to secure such licence within a reasonable time, the Concessionaire shall, at its own expense, and without impairing the Specifications and Standards, either replace

the affected work, or part, or process thereof with non-infringing work or part or process, or modify the same so that it becomes non-infringing.

### **34.3 Notice and contest of claims**

In the event that either Party receives a claim or demand from a third party in respect of which it is entitled to the benefit of an indemnity under this Article 34 (the "**Indemnified Party**") it shall notify the other Party (the "**Indemnifying Party**") within 15 (fifteen) days of receipt of the claim or demand and shall not settle or pay the claim without the prior approval of the Indemnifying Party, which approval shall not be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or dispute the claim or demand, it may conduct the proceedings in the name of the Indemnified Party, subject to the Indemnified Party being secured against any costs involved, to its reasonable satisfaction.

### **34.4 Defence of claims**

34.4.1 The Indemnified Party shall have the right, but not the obligation, to contest, defend and litigate any claim, action, suit or proceeding by any third party alleged or asserted against such Party in respect of, resulting from, related to or arising out of any matter for which it is entitled to be indemnified hereunder, and reasonable costs and expenses thereof shall be indemnified by the Indemnifying Party. If the Indemnifying Party acknowledges in writing its obligation to indemnify the Indemnified Party in respect of loss to the full extent provided by this Article 34, the Indemnifying Party shall be entitled, at its option, to assume and control the defence of such claim, action, suit or proceeding, liabilities, payments and obligations at its expense and through the counsel of its choice; provided it gives prompt notice of its intention to do so to the Indemnified Party and reimburses the Indemnified Party for the reasonable cost and expenses incurred by the Indemnified Party prior to the assumption by the Indemnifying Party of such defence. The Indemnifying Party shall not be entitled to settle or compromise any claim, demand, action, suit or proceeding without the prior written consent of the Indemnified Party, unless the Indemnifying Party provides such security to the Indemnified Party as shall be reasonably required by the Indemnified Party to secure the loss to be indemnified hereunder to the extent so compromised or settled.

34.4.2 If the Indemnifying Party has exercised its rights under Clause 42.3, the Indemnified Party shall not be entitled to settle or compromise any claim, action, suit or proceeding without the prior written consent of the Indemnifying Party (which consent shall not be unreasonably withheld or delayed).

34.4.3 If the Indemnifying Party exercises its rights under Clause 34.3, the Indemnified Party shall nevertheless have the right to employ its own counsel, and such counsel may participate in such action, but the fees and expenses of such counsel shall be at the expense of the Indemnified Party, when and as incurred, unless:

- (a) the employment of counsel by such party has been authorised in writing by the Indemnifying Party; or
- (b) the Indemnified Party shall have reasonably concluded that there may be a conflict of interest between the Indemnifying Party and the Indemnified Party in the conduct of the defence of such action; or
- (c) the Indemnifying Party shall not, in fact, have employed independent counsel reasonably satisfactory to the Indemnified Party, to assume the defence of such action and shall have been so notified by the Indemnified Party; or
- (d) the Indemnified Party shall have reasonably concluded and specifically notified the Indemnifying Party either:
  - (i) that there may be specific defences available to it which are different from or additional to those available to the Indemnifying Party; or
  - (ii) that such claim, action, suit or proceeding involves or could have a material adverse effect upon it beyond the scope of this Agreement:

Provided that if Sub-clauses (b), (c) or (d) of this Clause 34.4.3 shall be applicable, the counsel for the Indemnified Party shall have the right to direct the defence of such claim, demand, action, suit or proceeding on behalf of the Indemnified Party, and the reasonable fees and disbursements of such counsel shall constitute legal or other expenses hereunder.

**34.5 No consequential claims**

Notwithstanding anything to the contrary contained in this Article 34, the indemnities herein provided shall not include any claim or recovery in respect of any cost, expense, loss or damage of an indirect, incidental or consequential nature, including loss of profit, except as expressly provided in this Agreement.

**34.6 Survival on Termination**

The provisions of this Article 34 shall survive Termination.



## **ARTICLE 35 : RIGHTS AND TITLE OVER THE SITE**

### **35.1 Licensee rights**

For the purpose of this Agreement, the Concessionaire shall have rights to the use of the Site as sole licensee subject to and in accordance with this Agreement, and to this end, it may regulate the use of the Water Supply and Sewerage System by third parties in accordance with and subject to the provisions of this Agreement.

### **35.2 Access rights of the Authority and others**

35.2.1 The Concessionaire shall allow free access to the Site at all times for the authorised representatives and vehicles of the Authority and the Independent Engineer, and for the persons and vehicles duly authorised by any Authority Instrumentality to inspect the Water Supply and Sewerage System and to investigate any matter within their authority, and upon reasonable notice, the Concessionaire shall provide to such persons reasonable assistance necessary to carry out their respective duties and functions.

35.2.2 The Concessionaire shall, for the purpose of operation and maintenance of any utility or road specified in Article 11, allow free access to the Site at all times for the authorised persons and vehicles of the controlling body of such utility or road.

### **35.3 Property taxes**

The Concessionaire shall not be liable to pay any property taxes for the Site. However, the Concessionaire shall be required to pay, at its own cost, all applicable existing and future taxes/ charges/ fees/ levies including service tax, stamp duty, registration charges and any other charges payable/ leviable in respect of the said Project.

### **35.4 Restriction on sub-letting**

The Concessionaire shall not sublicense or sublet the whole or any part of the Site, save and except as may be expressly set forth in this Agreement; provided that nothing contained herein shall be construed or interpreted as restricting the right of the Concessionaire to appoint Contractors for the performance of its obligations hereunder including for operation and maintenance of all or any part of the Water Supply and Sewerage System.

## **ARTICLE 36 : DISPUTE RESOLUTION**

### **36.1 Dispute resolution**

- 36.1.1 Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the "Dispute") shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 36.2.
- 36.1.2 The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.

### **36.2 Conciliation**

In the event of any Dispute between the Parties, either Party may call upon the Independent Engineer to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Independent Engineer or without the intervention of the Independent Engineer, either Party may require such Dispute to be referred to the Principal Secretary, Urban Development Department to the Government of Himachal Pradesh and the Chairman of the Board of Directors of the Concessionaire for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 7 (seven) day period or the Dispute is not amicably settled within 15 (fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 36.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 36.3.

### **36.3 Arbitration**

- 36.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 44.2, shall be finally decided by reference to arbitration by a Board of Arbitrators appointed in accordance with Clause 36.3.2. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the "Rules"), or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration Act. The venue of such arbitration shall be Shimla, and the language of arbitration proceedings shall be English.
- 36.3.2 There shall be a Board of three arbitrators, of whom each Party shall select one, and the third arbitrator shall be appointed by the two arbitrators so selected, and in the event of disagreement between the two arbitrators, the appointment shall be made in accordance with the Rules.
- 36.3.3 The arbitrators shall make a reasoned award (the "Award"). Any Award made in any arbitration held pursuant to this Article 36 shall be final and binding on the Parties as from the date it is made, and the Concessionaire and the Authority agree and undertake to carry out such Award without delay.
- 36.3.4 The Concessionaire and the Authority agree that an Award may be enforced against the Concessionaire and/or the Authority, as the case may be, and their respective assets wherever situated.
- 36.3.5 This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder.

#### **36.4 Adjudication by Regulatory Authority or Commission**

In the event of constitution of a statutory Regulatory Authority or Commission with powers to adjudicate upon disputes between the Concessionaire and the Authority, all Disputes arising after such constitution shall, instead of reference to arbitration under Clause 44.3, be adjudicated upon by such Regulatory Authority or Commission in accordance with the Applicable Law and all references to Dispute Resolution Procedure shall be construed accordingly. For the avoidance of doubt, the Parties hereto agree that the adjudication hereunder shall not be final and binding until an appeal against such adjudication has been decided by an appellate tribunal or High Court, as the case may be, or no such appeal has been preferred within the time specified in the Applicable Law.

## **ARTICLE 37 : DISCLOSURE**

### **37.1 Disclosure of Specified Documents**

The Concessionaire shall make available for inspection by any person, copies of this Concession Agreement, the Maintenance Manual, the Maintenance Programme and the O&M Requirements (hereinafter collectively referred to as the "**Specified Documents**"), free of charge, during normal business hours on all working days at the Bill Collection Centres and Concessionaire's Registered Office. The Concessionaire shall prominently display at each of the Bill Collection Centres , public notices stating the availability of the Specified Documents for such inspection, and shall make copies of the same available to any person upon payment of copying charges on a 'no profit no loss' basis.

### **37.2 Disclosure of Documents relating to safety**

The Concessionaire shall make available for inspection by any person copies of all Documents and data relating to safety of Water Supply and Sewerage System, free of charge, during normal business hours on all working days, at the Concessionaire's Registered Office. The Concessionaire shall make copies of the same available to any person upon payment of copying charges on a 'no profit no loss' basis.

## **ARTICLE 38 : REDRESSAL OF PUBLIC GRIEVANCES**

### **38.1 Complaints Register**

- 38.1.1 The Concessionaire shall maintain a public relations office at each of the bill collection centres where it shall keep a register (the "**Complaint Register**") open to public access at all times for recording of complaints by any person (the "**Complainant**"). Information relating to the availability of and access to the Complaint Register shall be prominently displayed by the Concessionaire at each Bill Collection Centres so as to bring it to the attention of all Users.
- 38.1.2 The Complaint Register shall be securely bound and each page thereof shall be duly numbered. It shall have appropriate columns including the complaint number, date, name and address of the Complainant, substance of the complaint and the action taken by the Concessionaire. Immediately after a complaint is registered, the Concessionaire shall give a receipt to the Complainant stating the "date and complaint number.
- 38.1.3 Without prejudice to the provisions of Clauses 38.1.1 and 38.1.2, the Authority may, in consultation with the Concessionaire, specify the procedure for making complaints in electronic form and for responses thereto.

### **38.2 Redressal of complaints**

- 38.2.1 The Concessionaire shall inspect the Complaint Register every day and take prompt and reasonable action for redressal of each complaint. The action taken shall be briefly noted in the Complaint Register and a reply stating the particulars thereof shall be sent by the Concessionaire to the Complainant under a certificate of posting.
- 38.2.2 Within 7 (seven) days of the close of each month, the Concessionaire shall send to the Authority and to the Independent Engineer a true photocopy each of all the pages of the Complaint Register on which any entry has been recorded during the course of such month, and upon perusal thereof, the Authority may, in its discretion, advise the Concessionaire to take such further action as the Authority may deem appropriate for a fair and just redressal of any grievance. The Concessionaire shall consider such advice and inform the Authority of its decision thereon, and if the Authority is of the opinion that the Complainant is entitled to further relief, it may refer the matter to the competent forum for its disposal under the Consumer Protection Act, 1986, HP Public Service Guarantee Act, 2011 and advise the Complainant to pursue the complaint at his own risk and cost.

## **ARTICLE 39 : MISCELLANEOUS**

### **39.1 Governing law and jurisdiction**

This Agreement shall be construed and interpreted in accordance with and governed by the laws of India, and the courts at Shimla shall have jurisdiction over matters arising out of or relating to this Agreement.

### **39.2 Waiver of immunity**

Each Party unconditionally and irrevocably:

- (a) agrees that the execution, delivery and performance by it of this Agreement constitute commercial acts done and performed for commercial purpose;
- (b) agrees that, should any proceedings be brought against it or its assets, property or revenues in any jurisdiction in relation to this Agreement or any transaction contemplated by this Agreement, no immunity (whether by reason of sovereignty or otherwise) from such proceedings shall be claimed by or on behalf of the Party with respect to its assets;
- (c) waives any right of immunity which it or its assets, property or revenues now has, may acquire in the future or which may be attributed to it in any jurisdiction; and
- (d) consents generally in respect of the enforcement of any judgement or award against it in any such proceedings to the giving of any relief or the issue of any process in any jurisdiction in connection with such proceedings (including the making, enforcement or execution against it or in respect of any assets, property or revenues whatsoever irrespective of their use or intended use of any order or judgement that may be made or given in connection therewith).

### **39.3 Depreciation**

For the purposes of depreciation under the Applicable Laws, the property representing the capital investment made by the Concessionaire in the Project shall be deemed to be acquired and owned by the Concessionaire. For the avoidance of doubt, the Authority shall not in any manner be liable in respect of any claims for depreciation to be made by the Concessionaire under the Applicable Laws.

### **39.4 Delayed payments**

The Parties hereto agree that payments due from one Party to the other Party under the provisions of this Agreement shall be made within the period set forth therein, and if no such period is specified, within 15 (fifteen) days of receiving a demand along with the necessary particulars. In the event of delay beyond such period, the defaulting Party shall pay interest for the period of delay calculated at a rate equal to 5% (five per cent) above the Bank Rate, and recovery thereof shall be without prejudice to the rights of the Parties under this Agreement including Termination thereof.

### **39.5 Waiver**

39.5.1 Waiver, including partial or conditional waiver, by either Party of any default by the other Party in the observance and performance of any provision of or obligations under this Agreement:

- (a) shall not operate or be construed as a waiver of any other or subsequent default hereof or of other

provisions of or obligations under this Agreement;

- (b) shall not be effective unless it is in writing and executed by a duly authorised representative of the Party; and
- (c) shall not affect the validity or enforceability of this Agreement in any manner.

39.5.2 Neither the failure by either Party to insist on any occasion upon the performance of the terms, conditions and provisions of this Agreement or any obligation thereunder nor time or other indulgence granted by a Party to the other Party shall be treated or deemed as waiver of such breach or acceptance of any variation or the relinquishment of any such right hereunder.

### **39.6 Liability for review of Documents and Drawings**

Except to the extent expressly provided in this Agreement:

- (a) no review, comment or approval by the Authority or the Independent Engineer of any Project Agreement, Document or Drawing submitted by the Concessionaire nor any observation or inspection of the construction, operation or maintenance of the Water Supply and Sewerage System nor the failure to review, approve, comment, observe or inspect hereunder shall relieve or absolve the Concessionaire from its obligations, duties and liabilities under this Agreement, the Applicable Laws and Applicable Permits; and
- (b) the Authority shall not be liable to the Concessionaire by reason of any review, comment, approval, observation or inspection referred to in Sub-clause (a) above.

### **39.7 Exclusion of implied warranties etc.**

This Agreement expressly excludes any warranty, condition or other undertaking implied at law or by custom or otherwise arising out of any other agreement between the Parties or any representation by either Party not contained in a binding legal agreement executed by both Parties.

### **39.8 Survival**

39.8.1 Termination shall:

- (a) not relieve the Concessionaire or the Authority, as the case may be, of any obligations hereunder which expressly or by implication survive Termination hereof; and
- (b) except as otherwise provided in any provision of this Agreement expressly limiting the liability of either Party, not relieve either Party of any obligations or liabilities for loss or damage to the other Party arising out of, or caused by, acts or omissions of such Party prior to the effectiveness of such Termination or arising out of such Termination.

39.8.2 All obligations surviving Termination shall only survive for a period of 3 (three) years following the date of such Termination.

### **39.9 Entire Agreement**

This Agreement and the Schedules together constitute a complete and exclusive statement of the terms of the agreement between the Parties on the subject hereof, and no amendment or modification hereto shall be valid and effective unless such modification or amendment is agreed to in writing by the Parties and duly executed by persons especially empowered in this behalf by the respective Parties. All prior written or oral understandings,

offers or other communications of every kind pertaining to this Agreement are abrogated and withdrawn.

#### **39.10 Severability**

If for any reason whatever, any provision of this Agreement is or becomes invalid, illegal or unenforceable or is declared by any court of competent jurisdiction or any other instrumentality to be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not be affected in any manner, and the Parties will negotiate in good faith with a view to agreeing to one or more provisions which may be substituted for such invalid, unenforceable or illegal provisions, as nearly as is practicable to such invalid, illegal or unenforceable provision. Failure to agree upon any such provisions shall not be subject to the Dispute Resolution Procedure set forth under this Agreement or otherwise.

#### **39.11 No partnership**

This Agreement shall not be interpreted or construed to create an association, joint venture or partnership between the Parties, or to impose any partnership obligation or liability upon either Party, and neither Party shall have any right, power or authority to enter into any agreement or undertaking for, or act on behalf of, or to act as or be an agent or representative of, or to otherwise bind, the other Party.

#### **39.12 Third Parties**

This Agreement is intended solely for the benefit of the Parties, and their respective successors and permitted assigns, and nothing in this Agreement shall be construed to create any duty to, standard of care with reference to, or any liability to, any person not a Party to this Agreement.

#### **39.13 Successors and Assigns**

This Agreement shall be binding upon, and inure to the benefit of the Parties and their respective successors and permitted assigns.

#### **39.14 Notices**

Any notice or other communication to be given by any Party to the other Party under or in connection with the matters contemplated by this Agreement shall be in writing and shall:

- (a) in the case of the Concessionaire, be given by facsimile and by letter delivered by hand to the address given and marked for attention of the person set out below or to such other person as the Concessionaire may from time to time designate by notice to the Authority; provided that notices or other communications to be given to an address outside Shimla may, if they are subsequently confirmed by sending a copy thereof by registered acknowledgement due, air mail or by courier, be sent by facsimile to the number as the Concessionaire may from time to time designate by notice to the Authority;
- (b) in the case of the Authority, be given by facsimile and by letter delivered by hand and be addressed to the Commissioner, Municipal Corporation, Shimla with a copy delivered to the Authority Representative or such other person as the Authority may from time to time designate by notice to the Concessionaire; provided that if the Concessionaire does not have an office in Shimla it may send such notice by facsimile and by registered acknowledgement due, air mail or by courier; and
- (c) any notice or communication by a Party to the other Party, given in accordance herewith, shall be deemed to have been delivered when in the normal course of post it ought to have been delivered.

#### **39.15 Language**

All notices required to be given by one Party to the other Party and all other communications, Documentation and proceedings which are in any way relevant to this Agreement shall be in writing and in English language.



**39.16 Counterparts**

This Agreement may be executed in two counterparts, each of which, when executed and delivered, shall constitute an original of this Agreement.

## ARTICLE 40 : DEFINITIONS

### 40.1 Definitions

In this Agreement, the following words and expressions shall, unless repugnant to the context or meaning thereof, have the meaning hereinafter respectively assigned to them:

**"24X7"** shall mean the provisioning of non-stop water supply at each connection within the Service Area 24 (twenty four) hours a day, 7 (seven) days a week throughout the year;

**"Accounting Year"** means the financial year commencing from the first day of April of any calendar year and ending on the thirty-first day of March of the next calendar year;

**"Additional Facilities"** means the facilities such as Bill Collection Centres and customer care centres which the Concessionaire may, in its discretion and subject to Applicable Laws, provide or procure for the benefit of the Users, and which are in addition to the Project Facilities, and not situated on the Site;

**"Affected Party"** shall have the meaning set forth in Clause 27.1;

**"Agreement"** or **"Concession Agreement"** means this Agreement, its Recitals, the Schedules hereto and any amendments thereto made in accordance with the provisions contained in this Agreement;

**"Applicable Laws"** means all laws, brought into force and effect by GOI or the State Government including rules, regulations and notifications made thereunder, and judgements, decrees, injunctions, writs and orders of any court of record, applicable to this Agreement and the exercise, performance and discharge of the respective rights and obligations of the Parties hereunder, as may be in force and effect during the subsistence of this Agreement;

**"Applicable Permits"** means all clearances, licences, permits, authorizations, no objection certificates, consents, approvals and exemptions required to be obtained or maintained under Applicable Laws in connection with the construction, operation and maintenance of the Water Supply and Sewerage System during the subsistence of this Agreement;

**"Appointed Date"** means the date on which the Conditions Precedent is achieved by both the parties or an earlier date that the Parties may by mutual consent determine, and shall be deemed to be the date of commencement of the Concession Period;

**"Arbitration Act"** means the Arbitration and Conciliation Act, 1996 and shall include modifications to or any re-enactment thereof, as in force from time to time;

**"Associate"** or **"Affiliate"** means, in relation to either Party and/or Consortium Members, a person who controls, is controlled by, or is under the common control with such Party or Consortium Member (as used in this definition, the expression "control" means, with respect to a person which is a company or corporation, the ownership, directly or indirectly, of more than 50% (fifty per cent) of the voting shares of such person, and with respect to a person which is not a company or corporation, the power to direct the management and policies of such person, whether by operation of law or by contract or otherwise);

**"Average Monthly Tariff"** means the amount arrived at after dividing the total Realisable Tariff of the immediately preceding Accounting Year by 12 (twelve), and increasing the product thereof by 5% (five per cent);

provided that the Average Monthly Tariff for any period prior to completion of the first Accounting Year following Full Operations Date shall be a simple average of the Tariff collected every month during the period between Full Operations Date and the last day of the month preceding the date on which the event requiring calculation hereof occurred;

**"Bank"** means a bank incorporated in India and having a minimum net worth of Rs.1,000 crore (Rupees one thousand crore);

**"Bank Rate"** means the rate of interest specified by the Reserve Bank of India from time to time in pursuance of section

49 of the Reserve Bank of India Act, 1934 or any replacement of such Bank Rate for the time being in effect;

**"Bid"** means the documents in their entirety comprised in the bid submitted by the Concessionaire/Consortium] in response to the Tender Notice in accordance with the provisions thereof;

**"Bid Security"** means the security provided by the Concessionaire/Consortium to the Authority along with the Bid in a sum of Rs. \*\*\*\*\* crore (Rupees \*\*\*\*\* crore), in accordance with the Tender Notice, and which is to remain in force until substituted by the Performance Security;

**"Change in Law"** means the occurrence of any of the following after the date of Bid:

- (a) the enactment of any new Indian law as applicable to the State;
- (b) the repeal, modification or re-enactment of any existing Indian law as applicable to the State;
- (c) the commencement of any Indian law, as applicable to the State, which has not entered into effect until the date of Bid;
- (d) a change in the interpretation or application of any Indian law, as applicable to the State, by a judgement of a court of record which has become final, conclusive and binding, as compared to such interpretation or application by a court of record prior to the date of Bid; or
- (e) any change in the rates of any of the Taxes that have a direct effect on the Project;

**"Change in Ownership"** means a transfer of the direct and/or indirect legal or beneficial ownership of any shares, or securities convertible into shares, that causes the aggregate holding of the existing promoters/Consortium Members together with their Associates in the total Equity to decline below (i) 91% (ninety one per cent) thereof during Construction Period, (ii) 33% (thirty three per cent) thereof during a period of 3 (three) years following Full Operations Date, and (iii) 26% (twenty six per cent) thereof, or such lower proportion as may be permitted by the Authority during the remaining Concession Period; provided that any material variation (as compared to the representations made by the Concessionaire during the bidding process) in the proportion of the equity holding of any Consortium Member to the total Equity, if it occurs prior to Full Operations Date, shall constitute Change in Ownership provided that any transfer of the direct and/or indirect legal or beneficial ownership leading to acquisition of more than 15% (fifteen per cent) of the total Equity by any person and/ or his Associate at any time during the Concession Period shall constitute a Change in Ownership. For the avoidance of doubt, indirect, legal or beneficial ownership of any shares, or securities convertible into shares shall include transfer of the direct or indirect beneficial ownership or control of any company or companies whether in India or abroad which results in any person acquiring control over the Equity or voting rights of the shares of the Concessionaire;

**"Change of Scope"** shall have the meaning set forth in Clause 15.1;

**"Company"** means the Company acting as the Concessionaire under this Agreement;

**"Completion Certificate"** shall have the meaning set forth in Clause 14.2;

**"Concession"** shall have the meaning set forth in Clause 3.1.1;

**"Concessionaire"** shall have the meaning attributed thereto in the array of Parties hereinabove as set forth in the Recitals;

**"Concession Period"** means the period starting on and from the Appointed Date and ending on the Transfer Date;

**"Concessionaire Default"** shall have the meaning set forth in Clause 30.1.1; "Conditions Precedent" shall have the meaning set forth in Clause 4.1.1; "Consortium" shall have the meaning set forth in Recital (B);

**"Consortium Member"** means a company specified in Recital (B) as a member of the Consortium;]

**"Construction Period"** means the period beginning from the Appointed Date and ending on Full Operations Date;

**"Construction Works"** means all works and things necessary to complete the Water Supply and Sewerage System in accordance with this Agreement;

**"Contractor"** means the person or persons, as the case may be, with whom the Concessionaire has entered into any of the EPC Contract, the O&M Contract, the Bill Collection Contract or any other agreement or contract for construction, operation and/or maintenance of the Water Supply and Sewerage System or matters incidental thereto, but does not include a person who has entered into an agreement for providing financial assistance to the Concessionaire;

**"Cure Period"** means the period specified in this Agreement for curing any breach or default of any provision of this Agreement by the Party responsible for such breach or default and shall:

- (a) commence from the date on which a notice is delivered by one Party to the other Party asking the latter to cure the breach or default specified in such notice;
- (b) not relieve any Party from liability to pay Damages or compensation under the provisions of this Agreement; and
- (c) not in any way be extended by any period of Suspension under this Agreement;

provided that if the cure of any breach by the Concessionaire requires any reasonable action by the Concessionaire that must be approved by the Authority or the Independent Engineer hereunder, the applicable Cure Period shall be extended by the period taken by the Authority or the Independent Engineer to accord their approval;

**"Damages"** shall have the meaning set forth in Sub-clause (v) of Clause 1.2.1;

**"Development Period"** means the period from the date of this Agreement until the Appointed Date;

**"Disposal Areas"** shall mean areas identified by the Authority, and detailed in Schedule A, for the purpose of disposal of treated wastewater/sewage collected from the Service Area;

**"Dispute"** shall have the meaning set forth in Clause 36.1.1;

**"Dispute Resolution Procedure"** means the procedure for resolution of Disputes set forth in Article 36;

**"Divestment Requirements"** means the obligations of the Concessionaire for and in respect of Termination as set forth in Clause 31.1;

**"Document"** or **"Documentation"** means documentation in printed or written form, or in tapes, discs, drawings, computer programmes, writings, reports, photographs, films, cassettes, or expressed in any other written, electronic, audio or visual form;

**"Drawings"** means all of the drawings, calculations and documents pertaining to the Water Supply and Sewerage System as set forth in Schedule-H, and shall include 'as built' drawings of the Water Supply and Sewerage System;

**"EPC Contract"** means the engineering, procurement and construction contract or contracts entered into by the Concessionaire with one or more Contractors for, inter alia, engineering and construction of the Water Supply and Sewerage System in accordance with the provisions of this Agreement;

**"EPC Contractor"** means the person with whom the Concessionaire has entered into an EPC Contract;

**"Emergency"** means a condition or situation that is likely to endanger the safety of Users or which poses an immediate threat of material damage to any of the Project Assets;

**"Encumbrances"** means, in relation to the Water Supply and Sewerage System, any encumbrances such as mortgage, charge, pledge, lien, hypothecation, security interest, assignment, privilege or priority of any kind having the effect of security or other such obligations, and shall include any designation of loss payees or beneficiaries or any similar arrangement under any insurance policy pertaining to the Water Supply and Sewerage System, where applicable herein but excluding utilities referred to in Clause 11.1;

**"Escrow Account"** means an Account which the Concessionaire shall open and maintain with a Bank in which all inflows of revenue receipts from User Tariff shall be credited in accordance with the provisions of this Agreement, and includes the Sub-Accounts of such Escrow Account;

**"Escrow Agreement"** shall have the meaning set forth in Clause 24.1.2; "Escrow Bank" shall have the meaning set forth in Clause 24.1.1;

**"Escrow Default"** shall have the meaning set forth in Schedule-S;

**"Existing Assets"** shall mean the existing facilities such as overhead tanks, pipelines, service mains, pumps and other such facilities forming part of the Water Supply and Sewerage System and further detailed in Schedule A, that have been handed over to the Concessionaire by the Authority on the Appointed Date.

**"Financial Close"** means the fulfillment of all conditions precedent to the initial availability of funds under the Financing

Agreements;

**"Financial Default"** shall have the meaning set forth in Schedule-R;

**"Financial Model"** means the financial model adopted by Senior Lenders, setting forth the capital and operating costs of the Project and revenues therefrom on the basis of which financial viability of the Project has been determined by the Senior Lenders, and includes a description of the assumptions and parameters used for making calculations and projections therein;

**"Financial Package"** means the financing package indicating the total capital cost of System Upgradation and the means of financing thereof, as set forth in the Financial Model and approved by the Senior Lenders, and includes Equity, all financial assistance specified in the Financing Agreements, Subordinated Debt and Equity Support, if any;

**"Financing Agreements"** means the agreements executed by the Concessionaire in respect of financial assistance to be provided by the Senior Lenders by way of loans, guarantees, subscription to non-convertible debentures and other debt instruments including loan agreements, guarantees, notes, debentures, bonds and other debt instruments, security agreements, and other documents relating to the financing (including refinancing) of the Total Project Cost, and includes amendments or modifications made in accordance with Clause 5.2.2;

**"Force Majeure"** or **"Force Majeure Event"** shall have the meaning ascribed to it in Clause 34.1;

**"Full Operations Date"** shall mean the date on which the System Upgradation is completed and Completion Certificate is issued by the Independent Engineer.

**"GOI"** means the Government of India;

**"Good Industry Practice"** means the practices, methods, techniques, designs, standards, skills, diligence, efficiency, reliability and prudence which are generally and reasonably expected from a reasonably skilled and experienced operator engaged in the same type of undertaking as envisaged under this Agreement and which would be expected to result in the performance of its obligations by the Concessionaire in accordance with this Agreement, Applicable Laws and Applicable Permits in reliable, safe, economical and efficient manner;

**"Government"** means the Government of Himachal Pradesh;

**"Authority Default"** shall have the meaning set forth in Clause 30.2.1;

**"Government Instrumentality"** means any department, division or sub-division of the Government of India or the State Government and includes any commission board, authority, agency or municipal and other local authority or statutory body including Panchayat under the control of the Government of India or the State Government, as the case may be, and having jurisdiction over all or any part of the Service Area or the performance of all or any of the services or obligations of the Concessionaire under or pursuant to this Agreement;

**"Authority Representative"** means such person or persons as may be authorised in writing by the Authority to act on its behalf under this Agreement and shall include any person or persons having authority to exercise any rights or perform and fulfill any obligations of the Authority under this Agreement;

**"Grant"** shall have the meaning set forth in Clause 21.1.1;

**"Indemnified Party"** means the Party entitled to the benefit of an indemnity pursuant to Article 42;

**"Indemnifying Party"** means the Party obligated to indemnify the other Party pursuant to Article 34;

**"Independent Engineer"** shall have the meaning set forth in Clause 19.1;

**"Indirect Political Event"** shall have the meaning set forth in Clause 27.3;

**"Insurance Cover"** means the aggregate of the maximum sums insured under the insurances taken out by the Concessionaire pursuant to Article 25, and when used in the context of any act or event, it shall mean the aggregate of the maximum sums insured and payable in relation to such act or event;

**"LOA"** or **"Letter of Acceptance"** means the letter of acceptance referred to in Recital (E);

**"Maintenance Manual"** shall have the meaning ascribed to it in Clause 16.1.1(a);

**"Maintenance Programme"** shall have the meaning ascribed to it in Clause 16.3;

**"O&M Requirements"** shall have the meaning set forth in Clause 16.2;

**"Material Adverse Effect"** means a material adverse effect of any act or event on the ability of either Party to perform any of its obligations under and in accordance with the provisions of this Agreement and which act or event causes a material financial burden or loss to either Party;

**"Nominated Company"** means a company selected by the Lenders' Representative and proposed to the Authority for substituting the Concessionaire in accordance with the provisions of the Substitution Agreement;

**"Non-Political Event"** shall have the meaning set forth in Clause 27.2;

**"O&M"** means the operation and maintenance of the Water Supply and Sewerage System and includes all matters connected with or incidental to such operation and maintenance, provision of services and facilities, and collection of Tariff in accordance with the provisions of this Agreement;

**"O&M Contract"** means the operation and maintenance contract that may be entered into between the Concessionaire and the O&M Contractor for performance of all or any of the O&M obligations;

**"O&M Contractor"** means the person, if any, with whom the Concessionaire has entered into an O&M Contract for discharging O&M obligations for and on behalf of the Concessionaire;

**"O&M Expenses"** means expenses incurred by or on behalf of the Concessionaire or by the Authority, as the case may be, for all O&M including (a) cost of salaries and other compensation to employees, (b) cost of materials, supplies, utilities and other services, (c) premia for insurance, (d) all taxes, duties, cess and fees due and payable for O&M, (e) all repair, replacement, reconstruction, reinstatement, improvement and maintenance costs, (f) payments required to be made under the O&M Contract, billing and/or collection contract or any other contract in connection with or incidental to O&M, and (g) all other expenditure required to be incurred under Applicable Laws, Applicable Permits or this Agreement;

**"O&M Inspection Report"** shall have the meaning set forth in Clause 18.2;

**"Operation Period"** means the period commencing from Appointed Date and ending on the Transfer Date. For the avoidance of doubt, the Operations Period shall coincide with the Concession Period;

**"Panel of Chartered Accountants"** shall have the meaning set forth in Clause 26.2.1;

**"Parties"** means the parties to this Agreement collectively and "Party" shall mean any of the parties to this Agreement individually;

**"Performance Security"** shall have the meaning set forth in Clause 9.1;

**"Political Event"** shall have the meaning set forth in Clause 27.4;

**"Project"** means the construction, refurbishment, operation and maintenance of the Water Supply and Sewerage System in accordance with the provisions of this Agreement, and includes all works, services and equipment relating to or in respect of the Scope of the Project;

**"Project Agreements"** means this Agreement, the Financing Agreements, EPC Contract, O&M Contract and any other agreements or contracts that may be entered into by the Concessionaire with any person in connection with matters relating to, arising out of or incidental to the Project, but does not include the Escrow Agreement and the Substitution Agreement;

**"Project Assets"** means all physical and other assets relating to and forming part of the Water Supply and Sewerage System including (a) rights over the Site in the form of licence, Right of Way or otherwise; (b) tangible assets such as civil works and equipment including foundations, structures, overhead tanks, pipelines, service mains, drainage works, electrical systems, communication systems, workshops and administrative offices; (c) Project Facilities situated on the Site; (d) all rights of the Concessionaire under the Project Agreements; (e) financial assets, such as receivables, security deposits etc.; (f) insurance proceeds; and (g) Applicable Permits and authorizations relating to or in respect of the Water Supply and Sewerage System, but does not include Additional Facilities;

**"Project Completion Date"** means the date on which the Completion Certificate or the Provisional Certificate, as the case may be, is issued under the provisions of Article 14;

**"Project Completion Schedule"** means the progressive Project Milestones set forth in Schedule-G for completion of the Water Supply and Sewerage System on or before the Scheduled Completion Date;

**"Project Facilities"** means all the amenities and facilities situated on the Site, including Existing Assets, as described in Schedule-C;

**"Project Milestones"** means the project milestones set forth in Schedule-G;

**"Provisional Certificate"** shall have the meaning set forth in Clause 14.3;

**"Punch List"** shall have the meaning ascribed to it in Clause 14.3;

**"RBI"** means the Reserve Bank of India, as constituted and existing under the Reserve Bank of India Act, 1934, including any statutory modification or replacement thereof, and its successors;

**"Reference Exchange Rate"** means, in respect of any one currency that is to be converted into another currency in accordance with the provisions of this Agreement, the exchange rate as of 12.00 (twelve) noon on the relevant date quoted in Delhi by the State Bank of India, and in the absence of such rate, the average of similar rates quoted in Delhi by the Bank of India and the Bank of Baroda;

**"Re.", "Rs." or "Rupees" or "Indian Rupees"** means the lawful currency of the Republic of India;

**"Right of Way"** means the constructive possession of the Site, together with all way leaves, easements, unrestricted access and other rights of way, howsoever described, necessary for construction, operation and maintenance of the Water Supply and Sewerage System in accordance with this Agreement;

**"Safety Consultant"** shall have the meaning set forth in Clause 17.1.2;

**"Safety Requirements"** shall have the meaning set forth in Clause 17.1.1;

**"Scheduled Completion Date"** shall have the meaning set forth in Clause 12.3.1;

**"Scope of the Project"** shall have the meaning set forth in Clause 2.1;

**"Senior Lenders"** means the financial institutions, banks, multilateral lending agencies, trusts, funds and agents or trustees of debenture holders, including their successors and assignees, who have agreed to guarantee or provide finance to the Concessionaire under any of the Financing Agreements for meeting all or any part of the Total Project Cost and who hold parri passu charge on the assets, rights, title and interests of the Concessionaire;

**"Service Area"** shall mean the municipal limits of Shimla as demarcated in the map forming part of the Schedule A and in which water supply services have to be extended (if not already present) by the Concessionaire on a 24X7 basis as per the terms of this Agreement;

**"Service Fee"** shall have the meaning set forth in Clause 22.1.

**"Services"** shall mean, as the context may require, water supply and sewerage services (wherever applicable), including all services incidental to the provisioning of these services, that are to be provided by the Concessionaire for implementation of the Project to meet the Performance Standards in accordance with the provisions of this Agreement;

**"Sewerage Service Area"** shall mean those areas within the Service Area where sewerage services (in addition to water supply services) have to be extended (if not already present) by the Concessionaire as per the terms of this Agreement. For avoidance of doubt, it is clarified that the Sewerage Service Area is a part of the Service Area;

**"Site"** shall have the meaning set forth in Clause 10.1;

**"Specifications and Standards"** means the specifications and standards relating to the quality, quantity, capacity and other requirements for the Water Supply and Sewerage System, as set forth in Schedule-D, and any modifications thereof, or additions thereto, as included in the design and engineering for the Water Supply and Sewerage System submitted by

the Concessionaire to, and expressly approved by, the Authority;

**"State"** means the State of Himachal Pradesh and **"State Government"** means the government of that State;

**"Statutory Auditors"** means a reputable firm of chartered accountants acting as the statutory auditors of the Concessionaire under the provisions of the Companies Act, 1956 including any statutory modification or re-enactment thereof, for the time being in force, and appointed in accordance with Clause 26.2.1;

**"Suspension"** shall have the meaning set forth in Clause 29.1;

**"System Upgradation"** means the construction, rehabilitation, installation and completion of all works and equipment included in or constituting the Water Supply and Sewerage System, as specified in Article 2 read with Schedule-B;

**"Tariff"** means the charges levied on and payable for availing Services, in accordance with the Tariff Notification and this Agreement;

**"Tariff Notification"** means the Notification No. \*\*\* dated \*\*\* issued by the Authority in exercise of the powers conferred by Section [\*\* of the \*\*\*\*\* Act] in respect of the levy and collection of Tariff during the Concession Period, and a copy of which is at Schedule-R, and includes any subsequent notifications issued from time to time for levy and collection of the Tariff contemplated by the provisions of this Agreement;

**"Taxes"** means any Indian taxes including excise duties, customs duties, value added tax, sales tax, local taxes, cess and any impost or surcharge of like nature (whether Central, State or local) on the goods, materials, equipment and services incorporated in and forming part of the Water Supply and Sewerage System charged, levied or imposed by any Authority Instrumentality, but excluding any interest, penalties and other sums in relation thereto imposed in any account whatsoever. For the avoidance of doubt, Taxes shall not include taxes on corporate income;

**"Tender Notice"** shall have the meaning set forth in Recital 'C';

**"Termination"** means the expiry or termination of this Agreement and the Concession hereunder;

**"Termination Notice"** means the communication issued in accordance with this Agreement by one Party to the other Party terminating this Agreement;

**"Termination Payment"** means the amount payable by the Authority to the Concessionaire upon Termination.;

**"Tests"** means the tests set forth in Schedule-I to determine the completion of Upgradation in accordance with the provisions of this Agreement;

**"Total Project Cost"** means the lowest of:

- (a) the capital cost of the Project, less Grant as set forth in the Financial Package;
- (b) the actual capital cost of the Project upon completion of Upgradation of the Water Supply and Sewerage System less Grant; and
- (c) a sum of Rs. \*\*\*\*\* crore (Rupees \*\*\*\*\* crore), less Cash Support;
- (d) provided that in the event of Termination, the Total Project Cost shall be deemed to be modified to the extent of variation in WPI or Reference Exchange Rate occurring in respect of Adjusted Equity and Debt Due, as the case may be, in accordance with the provisions of this Agreement;

**"Transfer Date"** means the date on which this Agreement and the Concession hereunder expires pursuant to the provisions of this Agreement or is terminated by a Termination Notice;

**"User"** means a person who avails Services of the Water Supply and Sewerage System or any part thereof through a valid and authorised water and sewerage connection;

**"Vesting Certificate"** shall have the meaning set forth in Clause 31.3;

**"Water Sources"** shall mean the sources of water that have been identified by the Authority, as detailed in Schedule A, from which water shall be extracted for the purpose of treatment and distribution within the Service Area by the Concessionaire as per the terms of the Agreement;

**"Water Supply and Sewerage System"** shall mean the entire system consisting of Existing Assets, pipelines, tanks, reservoirs, service mains, wastewater collection & disposal system, water meters, sensors, valves, electrical & electronic



equipment, computer systems, pumps & other mechanical equipment, Site and any other asset that is used to deliver Services to the Service Area; and

**"WPI"** means the Wholesale Price Index for all commodities as published by the Ministry of Industry, GOI and shall include any index which substitutes the WPI, and any reference to WPI shall, unless the context otherwise requires, be construed as a reference to the WPI published for the period ending with the preceding month.

IN WITNESS WHEREOF THE PARTIES HAVE EXECUTED AND DELIVERED THIS AGREEMENT AS OF THE DAY, MONTH AND YEAR FIRST ABOVE WRITTEN.

SIGNED, SEALED AND SIGNED, SEALED AND

DELIVERED DELIVERED

For and on behalf of For and on behalf of

THE AUTHORITY OF [\*\*\*] by: CONCESSIONAIRE by:

(Signature) (Signature)

(Name) (Name)

(Designation) (Designation)

In the presence of:

1. 2.

Schedules