

TEMPLATE WHOLESALE SERVICES AGREEMENT

ESCROW/GUARANTEE VERSION

This is the template wholesale services agreement (WSA) for the provision of wholesale services by Scottish Water to a licensed provider who is required to use an escrow account or wishes to use an alternative to prepayment such as the use of a guarantee. The WSA is the contract under which Scottish Water agrees to provide those services for which the licensed provider pays wholesale charges.

This version of the WSA incorporates optional wording regarding an escrow account. The escrow account will be required by the Commission if the licensed provider chooses to prepay wholesale charges and does not have a demonstrable business track record¹.

This version of the WSA also incorporates optional wording regarding a guarantee. Applicants may choose to negotiate with Scottish Water to use alternatives to prepayment such as the use of a guarantee. If an applicant wishes to use a guarantee it must be from a company with a defined investment grade credit rating.

It is important to note that the terms of each WSA will be a matter for negotiation between Scottish Water and the relevant licensed provider. However, the Commission has published this template WSA to be the basis of such negotiations.

More information on the WSA is available in the market entry guidance for licensed providers and potential licensed providers, which is published on the Commission's website: www.watercommission.co.uk.

June 2009

¹ A demonstrable business track record could include showing that they have accounts filed with Companies House although the Commission may ask for further information.

**WHOLESALE SERVICES AGREEMENT
[ESCROW/GUARANTEE VERSION]**

between

Scottish Water

and

[insert name of Licensee]

Dated: [] 2009

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THIS AGREEMENT is made

BETWEEN:

SCOTTISH WATER, a body corporate established under section 20 of the Water Industry (Scotland) Act 2002 and having its principal office at Castle House, 6 Castle Drive, Carnegie Campus, Dunfermline KY11 8GG ("**SW**");

and

[Insert name of Licensee] (company registered number []) whose registered office is at **[Insert registered office address]** ("**Licensee**")

WHEREAS:

- A. SW is the public water and sewerage authority for Scotland established by Part 3 of the 2002 Act.
- B. The Licensee proposes to carry on business as a Water Services Provider and/or a Sewerage Services Provider.
- C. The Licensee has requested SW pursuant to section 16 of the 2005 Act and/or such other Direction(s) issued by the Commission to provide the Services. This Agreement sets out the terms and conditions that are to apply in relation to the provision of such Services, as required by the said section 16 and/or the Direction(s).
- D. The Parties enter into this Agreement with the approval of the Commission.

NOW IT IS AGREED as follows:

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Agreement (including the Recitals and the Schedules), unless the context otherwise requires, the words and expressions defined in Schedule 1 shall have the meanings respectively given to them in that Schedule.

1.2 Interpretation

In this Agreement, except where the context otherwise requires:

1.2.1 **number:** the singular includes the plural and vice versa;

- 1.2.2 **provisions of the Agreement:** a reference to any Clause or Schedule is, except where it is expressly stated to the contrary, a reference to such clause of, or schedule to, this Agreement. A reference in a Schedule to any paragraph is, except where it is expressly stated to the contrary, a reference to a paragraph in that Schedule;
- 1.2.3 **amendments:** any reference to this Agreement or to any other document shall include reference to this Agreement or such document as duly amended, supplemented, substituted, novated or assigned from time to time but, where applicable, subject to the provisions of this Agreement;
- 1.2.4 **statutory provisions:** any reference to any enactment (including any subordinate legislation or byelaws) shall be construed as a reference to the enactment as amended, replaced, consolidated or re-enacted, and as including any orders, regulations, byelaws, directions, codes of practice or other delegated or subordinated legislation made under that enactment;
- 1.2.5 **person:** any reference to a person includes partnerships, unincorporated associations, corporations, governments, governmental agencies and departments, statutory bodies and other entities;
- 1.2.6 **Parties:** references to a "Party" mean a party to this Agreement, and reference to SW shall be deemed to include a reference to any organisation or entity which has taken over the functions or responsibilities of SW;
- 1.2.7 **gender:** each gender includes all genders;
- 1.2.8 **headings:** the Clause, Sub-Clause, Schedule and (where provided) paragraph headings in the body of this Agreement are not be taken into account in its interpretation; and
- 1.2.9 **including:** words preceding "include", "includes", "including", "including but not limited to" and "included" shall be construed without limitation by the words which follow those words.

1.3 **Schedules**

The Schedules form part of this Agreement.

1.4 **Order of Precedence**

If there is any conflict between the following, the order of precedence shall be:

- 1.4.1 any Law;

- 1.4.2 the Codes;
- 1.4.3 the Wholesale Charges Scheme; and
- 1.4.4 this Agreement.

2. COMMENCEMENT AND DURATION OF AGREEMENT

This Agreement shall come into effect when it has been signed by both Parties (subject to Clause 3) and shall continue until terminated in accordance with this Agreement.

3. COMMENCEMENT OF SERVICES

The commencement of the provision of the Services by SW shall begin on or after the Go Live Date and be conditional on the fulfilment of the following suspensive conditions:

- 3.1 the Licensee holds a Water Services Licence and/or a Sewerage Services Licence and such Licence has not been the subject of any successful appeal notified within 14 days of the date of its grant;
- 3.2 the Licensee has provided the information specified in Schedule 2 to SW;
- 3.3 [the Provisional Monthly Charge in respect of the first Month (or portion thereof, as the case may be) in which SW is to provide the Services has been duly paid by the Licensee in accordance with Clause 8;] **[to be deleted in guarantee version]**
- 3.4 the Licensee is entitled to Register Supply Points under the Market Code[]; and
- 3.5 the Escrow Agreement in the form or substantially in the form set out in Schedule 5 having been fully executed by all parties thereto and the Licensee having made payment of the Initial Deposit in accordance with such Escrow Agreement.] **[to be used in escrow version]**

OR

- [3.5 the Guarantee in the form or substantially in the form set out in Schedule 5 having been fully executed by the Guarantor, SW and the Licensee]. **[to be used in guarantee version]**

4. SUPPLY OF SERVICES BY SW

4.1 Provision of Services

During the Supply Period, SW shall provide the Services in accordance with and subject to the terms of this Agreement.

4.2 The Services

For the purposes of this Agreement, the Services in relation to each Supply Point comprise the service or services specified below which are relevant and applicable in respect of that Supply Point:

A. Water Services

1. the supply of water through the Public Water Supply System where the supply is Metered (including provision of the SW Metering Operations and Services specified in Clause 6.2);
2. the supply of water through the Public Water Supply System to a Supply Point where the supply is Unmeasurable;
3. the supply of water through the Public Water Supply System where the supply is Measurable but is not Metered;

B. Sewerage Services

1. all Foul Sewerage Services which are provided to any Eligible Premises;
2. all Surface Water Drainage Services (including roads drainage) which are provided to any Eligible Premises; and
3. all Trade Effluent Services which are provided to any Eligible Premises.

4.3 SW will not, at any time, provide Sewerage Services to more than one Sewerage Services Provider in relation to the same Supply Point.

5. SUPPLY OF WATER SERVICES

5.1 Quality of Water

In supplying water under this Agreement, SW shall comply with the duties in relation to the quality of such water imposed on it by, under, or by virtue of:

- 5.1.1 Part VIA of the Water (Scotland) Act 1980;
- 5.1.2 the 2002 Act; and
- 5.1.3 any other enactment.

5.2 Connection Point

Water to be supplied under this Agreement shall be made available at the Connection Point. Title to, and risk in, the water supplied shall pass to the Licensee on behalf of its Customer at the Connection Point.

6. SW METERING OPERATIONS AND SERVICES

6.1 This Clause 6 applies where the supply of Water Services for a Supply Point under this Agreement is, or is to be, measured by meter(s).

6.2 SW shall:

6.2.1 provide, maintain, repair, routinely test for accuracy and, either routinely or where faulty, replace the meter(s); and

6.2.2 where requested by the Licensee:

- (a) install a meter or meters for any Supply Point where the supply is not measured by meter;
- (b) remove a meter or meters installed for any Supply Point;
- (c) replace a meter or meters installed for any Supply Point which is no longer appropriately sized; or
- (d) undertake a meter accuracy test,

in accordance with the provisions of this Clause 6 and in accordance with the Operational Code. In the Wholesale Charges Scheme any charges shown for metering services are in respect of the SW metering operations and services referred to in this Clause 6.2.2.

6.3 The meter shall:

6.3.1 be appropriately sized, as determined by the water usage or anticipated water usage from time to time (including water for firefighting);

6.3.2 be in conformity to British Standard 5728 or international standard ISO 4064 or any standard replacing the same;

6.3.3 be provided, installed, tested, repaired and replaced in accordance with good industry practice;

6.3.4 if installed after the date of this Agreement, be installed as near as reasonably practicable to the relevant Connection Point; and

6.3.5 remain the property of SW.

- 6.4 Each Party shall report to the other, as soon as reasonably practicable, any evidence coming to its attention (whether in the course of meter reading or otherwise) of:
- 6.4.1 a water meter installed for a Supply Point failing to record accurately the volume of water supplied within the tolerance permitted under section 54(3) of the Water (Scotland) Act 1980; or
 - 6.4.2 any person improperly tampering or interfering with, or damaging, any water meter installed for a Supply Point (including breaking any seal affixed to the meter).
 - 6.4.3 The Licensee shall be responsible for the due care of any meter installed within the boundary of Eligible Premises. Where such a meter is damaged (not resulting from Force Majeure) by the Licensee or its employees or agents, SW may recover from the Licensee the total cost of the actual work involved in repairing or replacing the meter. The Licensee shall also be liable for Charges lost during the period of damage in accordance with the Market Code.
- 6.5 The Licensee shall take all reasonable steps to ensure that SW or its authorised employees or agents obtains safe and unobstructed access, at all reasonable times, to the water meter installed for a Supply Point for the purpose of carrying out SW metering operations and services. Where the authority, agreement or consent of the owner and/or Occupier of any Eligible Premises is required by Law for the carrying out of any physical works in connection with SW metering operations and services, the Licensee shall seek to obtain such authority, agreement or consent (at its own cost), and shall, when requested and where it is practicable to do so, produce to SW documentary evidence that it has been obtained.
- 6.6 SW hereby gives its permission to meters installed for a Supply Point and owned by SW being read, in accordance with the Market Code, by the Licensee or its authorised employees or agents, or by any other person permitted to do so under the Market Code.
- 6.7 References in this Clause 6 to a meter installed for a Supply Point shall be construed as including any meter installed outside the boundary of the Eligible Premises in question (including under a public road) which is used in determining the quantity of water supplied for a Supply Point.

7. CHARGES

7.1 Wholesale Charges Scheme

Subject to the provisions of this Clause 7 and section 29E of the 2002 Act, the Charges shall be determined in accordance with the Wholesale Charges Scheme and the Licensee shall pay such Charges in relation to each Supply Point for which they are Registered.

7.2 Non-tariff agreements

In any case where paragraph 2(5) of Schedule 3 to the 2005 Act for the time being applies in respect of a relevant agreement (within the meaning of that Schedule), the Charges shall be determined by SW but shall not exceed the amount determined by the Commission under paragraph 2(2)(b) of that Schedule.

7.3 Application for Departure from Wholesale Charges Scheme

7.3.1 If the Licensee believes that, as a consequence of action taken, or proposed to be taken, by a Customer, a departure from the Wholesale Charges Scheme is justified pursuant to section 29E of the 2002 Act in relation to this Agreement, the Licensee may request SW in writing to apply to the Commission for its consent to depart from the Wholesale Charges Scheme pursuant to the said section.

7.3.2 If SW receives a request pursuant to Clause 7.3.1, it shall, subject to Clause 7.3.3 below, comply with the request and apply to the Commission.

7.3.3 SW must apply to the Commission on the request of the Licensee unless:

- (a) it is satisfied, acting reasonably, that the Licensee's request is unfounded and that any application to the Commission for consent would have no reasonable prospect of success; or
- (b) the Licensee fails, without reasonable excuse, to provide information required by SW under Clause 7.3.6.

7.3.4 If SW refuses under Clause 7.3.3 to apply to the Commission, it must intimate that fact forthwith to the Licensee and the Commission (together with its reasons for the refusal) and the Licensee may raise the refusal by SW as a Dispute. For the purposes of this Clause 7.3.4, the Expert determination provisions under Clause 25.4.1.1 shall be amended to the effect that an Expert shall not be appointed by the Commission, but by the President for the time being of the Law Society of Scotland.

7.3.5 Where, following a request under Clause 7.3.1, SW applies to the Commission for its consent to depart from the Wholesale Charges Scheme, it may make such representations to the Commission regarding the application as it thinks fit, including representations to the effect that consent should be withheld.

7.3.6 If the Licensee makes a request under Clause 7.3.1, it must provide SW with such information as it reasonably requires for the purpose of considering the request and (unless the request is refused under Clause 7.3.3) applying to the Commission. The

Parties shall make all reasonable efforts to ensure that all information which SW may require for the foregoing purpose has been requested and provided within 20 Business Days of the date of the Licensee's request under Clause 7.3.1. The Licensee shall also discuss its request with SW if SW so requests.

7.3.7 Any application to the Commission under Clause 7.3.2, or any decision to refuse to apply, must (unless otherwise agreed between the Parties) be made no later than 30 Business Days after receipt of the request from the Licensee (or no later than 10 Business Days after receipt by SW of all information required under Clause 7.3.6, if later). The application may be made on the basis that further information will be provided to the Commission following the making of the application.

7.3.8 SW shall furnish the Licensee with a copy of any application under Clause 7.3.2 and any representations under Clause 7.3.5 at the same time as it makes such application or representations (as the case may be).

7.3.9 Where a departure from the Wholesale Charges Scheme is consented to by the Commission under section 29E of the 2002 Act, SW and the Licensee shall, from the date set out in the consent granted by the Commission, apply the revised charge to the relevant Services provided under this Agreement and comply with any conditions set out in the consented departure.

7.3.10 In accordance with Clause 7.3.9, the Licensee shall pay such revised charges in relation to each Supply Point to which the departure relates.

8. TERMS OF PAYMENT

8.1 Provisional Monthly Charge

For each Month during the Supply Period ("Month X"), an amount (the "Provisional Monthly Charge") shall be established in accordance with the following provisions:

8.1.1 the Provisional Monthly Charge shall be an amount payable by the Licensee as set out in the Settlement Report sent by the Central Market Agency to SW and the Licensee, in respect of the provision of Services during Month X;

8.1.2 SW shall invoice the Licensee for the amount of the Provisional Monthly Charge not later than 14 Business Days prior to the start of Month X.

Nothing in this Agreement will prevent the Supply Period commencing on any Business Day during a Month.

8.2 Payment of Provisional Monthly Charge

[Subject at all times to the Escrow Agreement, the Provisional Monthly Charge in respect of Month X shall be paid by the Licensee from the account created under the Escrow Agreement by the tenth Business Day prior to the start of Month X.]

OR

[Subject at all times to the Guarantee, the Provisional Monthly Charge in respect of Month X shall be paid by the Licensee by **[insert date agreed between the Parties].**]

8.3 Reconciliation

- 8.3.1 When any further Settlement Report is sent to SW and the Licensee by the Central Market Agency after carrying out any Settlement Run in respect of Month X, SW shall render to the Licensee a statement showing a reconciliation between:
- (a) the Provisional Monthly Charge or any previous Reconciled Primary Charge paid in respect of Month X (the "Provisional Amount"); and
 - (b) the Central Market Agency's calculation of the Reconciled Primary Charges in respect of Month X as set out in the Settlement Report.
- 8.3.2 The reconciliation amount shown in the statement referred to in Clause 8.3.1, together with interest thereon calculated in accordance with Clause 8.3.3 below shall, if the Provisional Amount is less than the Reconciled Primary Charges, be paid by the Licensee and, if the Provisional Amount is greater than the Reconciled Primary Charges, be paid by SW, in each case in accordance with Clause 8.5.
- 8.3.3 The reconciliation amount payable by the Licensee or SW in terms of Clause 8.3.2 in respect of Month X shall bear interest at the base lending rate from time to time of the Bank of Scotland, such interest to be calculated from the date of payment of the Provisional Monthly Charge for Month X in terms of Clause 8.2 above up to and including the due date for payment of the reconciliation amount in terms of Clause 8.5 below calculated on a daily basis.

8.4 **Payment of other sums**

If any Charge (not being a Primary Charge or a Provisional Monthly Charge) is due to SW, or any payment is due to the Licensee under this Agreement, the Party entitled to payment shall submit an invoice to the Party liable to make payment for the total amount properly payable, and provide such documentation as is necessary to verify the same. Where such payment is due by the Licensee, the invoice submitted by SW shall be separate from any statement rendered pursuant to Clause 8.3.1.

8.5 **Method of Payment**

Payment of any amount due under this Agreement and shown as payable in an invoice or statement pursuant to this Clause 8 shall be made:

8.5.1 in the case of the Provisional Monthly Charge, in accordance with Clause 8.2, and in any other case not later than ten Business Days from receipt of the invoice or statement; and

8.5.2 [by debit by SW of the account created under the Escrow Agreement (in the case of the amount payable by the Licensee) or by credit by SW of the account created under the Escrow Agreement (in the case of an amount payable by SW)] **[to be used in escrow version]**

OR

[by a Clearing House Automatic Payments System transfer of funds to such bank in the United Kingdom as may from time to time be notified by SW to the Licensee (in the case of an amount payable by the Licensee) or by the Licensee to SW (in the case of an amount payable by SW)]. **[to be used in guarantee version]**

8.6 **No deduction or withholding**

8.6.1 All payments by a Party under this Agreement shall be made without any deduction, withholding or set-off (except to the extent permitted by Clause 8.6.2, Clause 14.2 or required by Law).

8.6.2 If any item or part of an item in an invoice or statement rendered by a Party under this Clause 8 is disputed or subject to question, payment of the remainder of the invoice or statement shall not be withheld on those grounds, and the provisions of Clause 8.8.1 shall apply to the disputed or questioned item to the extent that it shall subsequently be agreed or determined to have been properly payable. Where a Party wishes to dispute or question an item or part of an item in an invoice or

statement, it may only do so in good faith and on grounds which are not vexatious or frivolous.

8.6.3 Any dispute or question properly raised under Clause 8.6.2 shall not be considered a breach of this Agreement.

8.7 **Value Added Tax**

8.7.1 All sums payable under this Agreement are exclusive of any applicable Value Added Tax ("VAT", which includes any tax in substitution therefor), and accordingly all VAT from time to time properly payable in respect of such sums shall be payable in addition to those sums at the rate from time to time in force against delivery of a valid VAT invoice.

8.7.2 The Licensee shall promptly provide SW with all information reasonably necessary to determine the appropriate amount of VAT (if any) payable on Charges (in particular to determine whether the provision of any Service is a zero rated supply under the applicable legislation relating to VAT).

8.8 **Interest**

8.8.1 If any sum payable under this Agreement is not paid at the expiry of the period for payment specified in Clause 8.2 or 8.5.1 (as the case may be) (save as contemplated by clause 8.6.2), then the Party who has failed to make payment shall pay interest on the amount outstanding (both before and after judgment or decree) at the rate of 4% per annum over the published base lending rate from time to time of Bank of Scotland, such interest to be calculated from (but excluding) the date of expiry of such period until payment thereof, calculated on a daily basis and compounded annually.

8.8.2 [Subject to the approval of the Scottish Ministers (if required) under the 2002 Act, SW shall pay interest to the Licensee on the Provisional Monthly Charge at the published base lending rate from time to time of Bank of Scotland. For the purpose of calculating such interest, the Provisional Monthly Charge during Month X shall be treated as due in equal daily instalments as Services are provided during Month X to which the Provisional Monthly Charge relates. From the date when the Provisional Monthly Charge is due, interest shall be calculated on the full amount due. Thereafter interest will be calculated on the reducing balance where the balance

reduction reflects the payment of the daily instalment on each day.] **[to be used in escrow version]**

OR

8.8.2 [Subject to the approval of the Scottish Ministers (if required) under the 2002 Act, SW may pay interest to the Licensee and the Licensee may pay interest to SW on the Provisional Monthly Charge at the published base lending rate from time to time of Bank of Scotland, where due under this Clause 8.2.2.

For the purpose of calculating such interest, the Provisional Monthly Charge during Month X shall be treated as due in equal daily instalments as Services are provided during Month X to which the Provisional Monthly Charge relates.

If the Provisional Monthly Charge is paid before the commencement of Month X, SW will pay the Licensee interest on the full amount from the date of payment to the beginning of Month X. Thereafter interest will be calculated on the reducing balance where the balance reduction reflects the payment of the daily instalment on each day.

If the Provisional Monthly Charge is paid after the commencement of Month X, SW and the Licensee will pay interest to each other based on the balance owed to SW on the date of payment, where the balance reduction reflects the payment of the daily instalment. Accordingly, if the date of payment is after the end of Month X, the Licensee will pay interest on the full amount from the end of Month X until the date of payment.] **[to be used in guarantee version]**

8.9 Expiry of Claims

Each Party shall cease to be entitled to any additional payment or refund in respect of the Provisional Monthly Charge or Reconciled Primary Charges relating to any Month on the expiry of twenty-four Months from the end of the Month in respect of the Month first mentioned, except insofar as such additional payment or refund:

- 8.9.1 Where properly due, has not been paid within that twenty-four Month period;
- 8.9.2 has been the subject of a referral for resolution in accordance with Clause 25 (Dispute Resolution); or
- 8.9.3 arises as a result of alterations to data or factual items required to calculate such Provisional Monthly Charge or Reconciled Primary Charges, provided that this subparagraph 8.9.3 shall not exclude an additional payment or refund arising as a result of incorrect reading of a meter or incorrect meter registration to which section 54(3) of the Water (Scotland) Act 1980 applies.

Notwithstanding termination of this Agreement, this Agreement shall remain in force for the purpose of enforcing this Clause 8.9.

8.10 Supplementary

SW shall report to the Commission and the Central Market Agency any failure by the Licensee [(or where applicable, the Guarantor)] to pay any sum due under this Agreement (other than a sum disputed in accordance with Clause 8.6.2) either by:

- 8.10.1 the Due Date (as defined in paragraph 1 of schedule 3 to this Agreement); or
- 8.10.2 the end of the relevant period of notice as specified in paragraphs 1(a) and 1(b) of schedule 3 of this Agreement,

in both cases within two Business Days of SW becoming aware of such failure.

[8.11 Guarantee

If there is a Licensee Default occurring under Clause 1 (Non-payment) or Clause 2 (Persistent non-payment) of Schedule 3 (Licensee Default), then SW shall be entitled to exercise its rights for payment under the Guarantee. These rights will be in addition to any other rights given to SW under this Agreement.]

9. INSURANCE

Each Party shall, at all times during the Supply Period, effect and maintain with insurers authorised and regulated by the Financial Services Authority under the Financial Services and Markets Act 2000 public liability insurance of not less than £5,000,000 for any one incident and unlimited as to the number of incidents, and shall, upon request, produce to the other Party documentary evidence that the above insurance is and remains in place. Either Party may propose an amendment to this figure. If such a proposal is made by one of the Parties and agreement cannot be reached on the revised figure, it will not be treated as a Dispute in accordance with Clause 25 (Dispute Resolution).

10. COMPLIANCE WITH LAWS

10.1 Statutory Obligations

10.1.1 Each Party undertakes that, in the performance of its obligations and exercise of its discretions under this Agreement, it will comply with:

- (i) the Codes and all other Laws applicable to it; and
- (ii) all applicable Consents, including, in the case of the Licensee, the Licences held by it.

10.1.2 The Licensee shall be obliged to inform its Customers that they are responsible for compliance with the Water Byelaws.

10.2 Sewerage Legislation

10.2.1 The agreement of SW to provide Sewerage Services under this Agreement does not authorise the passing or discharge of any matter or substance (including Trade Effluent) into the Public Sewerage System in respect of a Supply Point in contravention of any enactment (including any byelaws or orders), authorisation, consent or agreement, including (in the case of Trade Effluent) any consent granted, or agreement entered into, pursuant to Part II of the Sewerage (Scotland) Act 1968.

10.2.2 The Licensee shall report to SW as soon as practicable any evidence coming to its attention of a contravention referred to in Clause 10.2.1.

11. SAVING FOR STATUTORY RIGHTS ETC

Without prejudice to Clause 1.4, nothing in this Agreement shall affect the application of any enactment (including byelaws or orders) for the time being in force relating to the provision of public water or sewerage services in Scotland, and nothing in this Agreement shall prejudice or affect the rights, remedies, powers, liabilities, functions, duties or obligations of either Party under such provisions.

12. INFORMATION REGARDING PUBLIC HEALTH

If SW supplies the Licensee with information regarding public health matters for onwards transmission to Customers, the Licensee shall communicate such information to Customers, and SW shall not be liable for any delay or error in communication on the part of the Licensee. If the Licensee receives information regarding public health matters from any Customer, and the Licensee knows, or ought reasonably to know, that such information is relevant, to a material extent, to the provision of the Services or the exercise of the Core Functions by SW, the Licensee shall communicate such information to SW forthwith.

13. FORCE MAJEURE

13.1 Definition of Force Majeure

For the purposes of this Agreement, "Force Majeure" means, in relation to any Party, any event or circumstances (or combination of events or circumstances) not reasonably foreseeable by such Party which is beyond the reasonable control of the Party and which results in or causes the failure of that Party to perform any of its obligations under this Agreement, but:

13.1.1 a strike, lockout or other industrial action by a Party's own employees (unless forming part of a United Kingdom or Scotland-wide strike) shall not be Force Majeure; and

13.1.2 the act or omission of any agent or contractor of a Party shall not be Force Majeure unless such act or omission is caused by or results from events and/or circumstances which would be Force Majeure within the meaning of this Clause 13.1 if such person were the affected Party.

13.2 Relief from liability

13.2.1 Subject to Clauses 13.2.2 and 13.2.3, the affected Party shall be relieved from liability for any delay or failure in the performance of any obligation under this Agreement which is caused by or results from Force Majeure.

13.2.2 The affected Party shall be relieved from liability under Clause 13.2.1 only for so long as and to the extent that the occurrence of Force Majeure and/or the effects of such occurrence could not be overcome by measures which the affected Party might reasonably be expected to take with a view to resuming performance of its obligations.

13.2.3 The provisions of this Clause 13 shall not excuse a failure to pay money when due hereunder.

13.3 Notice

Following any occurrence of Force Majeure the affected Party shall:

13.3.1 as soon as reasonably practicable notify the other Party of the occurrence and nature of the Force Majeure, the expected duration thereof (insofar as the same can reasonably be assessed) and the obligations of the affected Party the performance of which is affected thereby; and

13.3.2 from time to time thereafter provide to the other Party reasonable details of:

- (a) developments in the matters notified under Clause 13.3.1; and
- (b) the steps being taken by the affected Party to overcome the Force Majeure occurrence or its effects and to resume performance of its relevant obligations.

14. SERVICE STANDARDS

14.1 Service Standards

The provisions of the Services by SW shall meet the Service Standards.

14.2 Payment for non-compliance

14.2.1 In respect of any failure to comply with a Service Standard, SW shall pay the Licensee the sum specified in the Service Standards as payable in respect of such failure. Payment shall be made or credited to the Licensee within 30 days of the occurrence of such failure otherwise interest will be due in accordance with Clause 8.8.1. The provisions of Clauses 8.6.2 and 8.6.3 shall apply to such payments.

14.2.2 The liability of SW to the Licensee for any failure to comply with a Service Standard shall be limited to payment of the sum referred to in Clause 14.2.1.

15. LIABILITY

15.1 Limitations and Exclusions

15.1.1 Neither Party shall be liable to the other Party, as a result of breach of this Agreement, in respect of loss of revenue, loss of profit, loss of contract, business interruption, or any consequential or indirect loss of any nature whatsoever, howsoever caused, even if it was reasonably foreseeable, and irrespective of whether it is caused by the first-mentioned Party's negligence.

15.1.2 Neither Party shall be liable to the other Party in respect of any loss or damage resulting from breach of this Agreement (including, in the case of SW, lack of, or deficiency in the quality of, water) except in the case of negligence or wilful

misconduct by the first-mentioned Party or any person for whose acts it is in turn responsible.

15.1.3 Nothing in this Agreement shall exclude or limit the liability of either Party for death or personal injury resulting from the negligence of that Party or any of its officers, employees or agents.

15.2 **Supplemental**

15.2.1 For the avoidance of doubt, nothing in Clause 15.1 shall prevent or restrict either Party from enforcing any obligation (including suing for a debt) owed to it under or pursuant to this Agreement. Nothing in Clause 15.1 shall affect the operation of Clause 14.2.

15.2.2 Nothing in this Agreement shall be construed as imposing upon SW any obligation or duty to, or enforceable by, any Customer.

15.2.3 Each of the sub-clauses of this Clause 15 shall be construed as a separate and severable contract term, and if one or more of such sub-clauses is held to be invalid, unlawful or otherwise unenforceable the other or others of such sub-clauses shall remain in full force and effect and shall continue to bind the Parties.

15.2.4 Each Party acknowledges and agrees that the other Party holds the benefit of Clause 15.1 for itself and as trustee and agent for its officers, employees and agents.

15.2.5 The provisions of this Clause 15 shall survive termination of this Agreement.

16. **TEMPORARY INTERRUPTIONS OF SUPPLY**

16.1 **Planned Events**

16.1.1 SW shall notify the Licensee, in accordance with the Operational Code, of any anticipated reduction in the supply of water in respect of a Supply Point as a consequence of SW's maintenance, repair, replacement and inspection programmes for the Public Water Supply System.

16.1.2 The notification shall, so far as reasonably practicable, include an estimate by SW of the quantities of water, if any, which SW expects to be able to supply during the period when the maintenance, repair, replacement or inspection works are planned.

16.1.3 SW shall use all reasonable endeavours to minimise interruptions in the supply of water for a Supply Point as a consequence of planned maintenance, repair, replacement and inspection works.

16.2 **Unplanned Events**

16.2.1 The supply of water to a Supply Point may be interrupted or suspended, where SW's ability to provide the supply is affected by:

- (a) breakdown, defect, fault or failure of plant, equipment, apparatus, pipes, structures or facilities forming part of the Public Water Supply System;
- (b) shortage of, or limitation on the use of, water arising from weather or environmental conditions;
- (c) deficiency in the quality of water available for supply; or
- (d) any event or circumstance which, in the absence of steps to interrupt or suspend the supply to the Supply Point, would put at risk the ability of SW to maintain the supply of water for domestic purposes (as defined in the Water (Scotland) Act 1980).

16.2.2 In the case of any interruption or suspension of water supplies under Clause 16.2.1, SW shall notify the Licensee of the expected duration of the interruption or suspension, and the steps being taken by SW in accordance with the Operational Code to restore the supplies.

16.3 **Supplementary**

16.3.1 Subject to 16.3.2, SW shall not be liable for any consequences arising from the non-availability of water during any period of interruption or suspension arising under this Clause 16.

16.3.2 The liability of SW for any failure to comply with Clause 16.1.2 or 16.2.2 shall be limited to payment of any sum specified in the Service Standards as payable in relation to such failure.

16.3.3 If the Licensee becomes aware of any significant change (as hereinafter defined) in the anticipated demand for water for any Supply Point, it shall provide reasonable details thereof to SW as soon as reasonably practicable. For the purposes of this Clause 16.3.3, a change in anticipated demand is significant if the Licensee knows, or ought reasonably to know, that the change may put at risk SW's ability to supply sufficient water to meet the demand in the area in which the Supply Point is located.

17. **INTELLECTUAL PROPERTY RIGHTS**

17.1 **Software licence**

17.1.1 Where software is provided by SW to enable the Licensee to use the Services, SW grants the Licensee, for the duration of this Agreement, a non-exclusive, royalty-free,

non-transferable licence to use the software for that purpose (and for no other purpose) and to sub-licence such software with SW's prior written consent.

17.1.2 Except as permitted by applicable law, the Licensee must not, without SW's prior written consent, copy, de-compile or modify the software, nor copy the manuals or documentation, nor knowingly allow any other person to do so.

17.1.3 Where software is provided by the Licensee to enable SW to provide the Services, the Licensee grants SW, for the duration of this Agreement, a non-exclusive, royalty-free, non-transferable licence to use the software for that purpose (and for no other purpose) and to sub-license such software with the Licensee's prior written consent.

17.1.4 Except as permitted by applicable law, SW must not, without the Licensee's prior written consent, copy, de-compile or modify the software, nor copy the manuals or documentation, nor knowingly allow any other person to do so.

17.2 Use of other Party's name

17.2.1 The Licensee shall not make use of or permit anyone else to make use of the registered or unregistered trade marks and service marks, trading names, brand names, devices, styles, emblems or other manifestations associated with SW (or any Affiliated Company of SW), or any element thereof, either alone or in combination with another word or device mark, where such use constitutes an infringement of SW's (or such Affiliated Company's) registered trade mark or common law rights.

17.2.2 SW shall not make use of or permit anyone else to make use of the registered or unregistered trade marks and service marks, trading names, brand names, devices, styles, emblems or other manifestations associated with the Licensee, or any element thereof, either alone or in combination with another word or device mark, where such use constitutes an infringement of the Licensee's registered trade mark or common law rights.

17.2.3 Nothing in this Agreement shall be deemed to constitute the relationship of principal and agent between the Parties, and neither Party shall have any authority to bind the other Party in any way or for any purposes. Neither Party, nor its employees, agents or representatives, shall engage in any acts which may lead any person to believe that such Party is an employee, agent or representative of the other Party.

18. FREEDOM OF INFORMATION

18.1 The Licensee acknowledges that:

18.1.1 SW is subject to the requirements of the FOISA and the EISR; and

18.1.2 SW may, acting in accordance with guidance or codes of practice issued by Scottish Ministers or the Scottish Information Commissioner, be obliged under the FOISA or the EISR to disclose Information:

- (a) without consulting with the Licensee; or
- (b) following consultation with the Licensee and having taken its views into account.

In this Clause 18 and Clause 19:

"EISR" means the Environmental Information (Scotland) Regulations 2004 and any subordinate legislation made under those Regulations from time to time together with any guidance and/or codes of practice issued by Scottish Ministers or the Scottish Information Commissioner in relation to such legislation;

"FOISA" means the Freedom of Information (Scotland) Act 2002 and any subordinate legislation made under that Act from time to time together with any guidance and/or codes of practice issued by Scottish Ministers or the Scottish Information Commissioner in relation to such legislation; and

"Information" has the meaning given under section 73 of the FOISA, and shall also include environmental information as defined in regulation 2(1) of the EISR.

19. CONFIDENTIALITY

19.1 Confidentiality obligation

The Licensee and SW shall each procure that all confidential information which comes into its ownership, possession or control, or the ownership, possession and control of an Affiliated Company, pursuant to or in the course of the negotiation, implementation or performance of this Agreement relating to the affairs of the other or its operation or management, or otherwise in connection with or in anticipation of the performance of this Agreement (hereinafter referred to as "Confidential Information") shall not be disclosed during the continuance of this Agreement to any third party except insofar as this may be required for the proper operation of this Agreement or except where disclosure is otherwise expressly permitted by the provisions of this Agreement. [The Parties agree and consent to the disclosure of any part of this Agreement to any Guarantor.]

19.2 Return of documents

Upon termination of this Agreement, each Party shall procure that all documents and other written material (including material on disks and tape) containing Confidential Information

relating to the other Party shall be returned (together with all copies thereof) to the other Party.

19.3 **Third parties**

Where Confidential Information is disclosed by either Party as permitted under Clause 19.1, the receiving Party shall (without prejudice to its obligations under this Clause 19) take all reasonable steps to secure that the person to whom the information is disclosed:

19.3.1 is aware of the receiving Party's obligations under this Clause 19 in relation thereto;
and

19.3.2 does not use or disclose the information other than as is permitted of such Party in accordance with this Clause 19.

19.4 **Exceptions**

Nothing in Clause 19.1 shall apply:

19.4.1 to the disclosure or use by the receiving Party of Confidential Information to which the other Party has consented in writing;

19.4.2 to any Confidential Information which:

- (a) before it is obtained by the receiving Party is in the public domain; or
- (b) after it is obtained by the receiving Party enters the public domain, in either case otherwise than as a result of a breach by the receiving Party of its obligations under this Clause 19;

19.4.3 to the disclosure of any Confidential Information to any person if and to the extent that the receiving Party is required to make such disclosure to such person, or such disclosure relates to a Dispute, and such disclosure is made in good faith:

- (i) in compliance with the duties of the receiving Party under the Acts or any other requirement of a Relevant Authority; or
- (ii) in compliance with the conditions of the Licences or any document referred to in the Licences with which the Licensee is required by virtue of the Acts or the Licences to comply; or
- (iii) in compliance with any other Law (other than the FOISA or the EISR, disclosure of which Confidential Information is governed by Clause 18); or
- (iv) in response to a requirement of any stock exchange or regulatory authority or the Panel on Take-overs and Mergers; or

- (v) pursuant to any judicial or arbitral process or tribunal having jurisdiction in relation to the receiving Party;

19.4.4 to the disclosure of any Confidential Information lawfully in the possession of the receiving Party before the disclosure to it under or in connection with this Agreement;

19.4.5 to the disclosure of any Confidential Information to the Commission, where the receiving Party considers in good faith that the other Party may be in breach of (in the case of the Licensee) any Licence or (in the case of SW) any direction to it under section 11 of the 2005 Act, to the extent reasonably necessary to draw such possible breach to the attention of the Commission.

19.5 **Survival**

The provisions of Clauses 19.2 to 19.4 shall continue, for a period of two years after the termination of this Agreement, to bind the Licensee and SW, irrespective of the reason for such termination.

20. **TERMINATION**

20.1 **Termination on application by Licensee**

The Licensee may, at any time, by giving notice to SW, apply to terminate this Agreement, and the following provisions shall apply:

20.1.1 this Agreement shall not be allowed to terminate under this Clause 20.1 until:

- (a) all of the Licensee's Supply Points have been transferred to one or more Licensed Provider in accordance with the Market Code;
- (b) all amounts payable or which may become payable by the Licensee to SW pursuant to any provision of this Agreement (other than amounts which are being contested in good faith) have been paid in full; and
- (c) any outstanding material breach by the Licensee of any provision of this Agreement, being a breach capable of remedy and of which SW has given notice to the Licensee, shall have been remedied;

20.1.2 where the Licensee has given notice under this Clause 20.1 the Licensee and SW shall remain bound by this Agreement until the requirements of Clause 20.1.1 are satisfied; and

20.1.3 where the Licensee has given notice under this Clause 20.1, after the satisfaction of the last of the requirements of Clause 20.1.1 to be satisfied, this Agreement shall

(unless otherwise agreed between the Parties) terminate with effect from the fifth Business Day following such satisfaction.

20.2 Termination for Licensee Default

Upon the occurrence of a Licensee Default, and at any time after such occurrence and while the Licensee Default is continuing, SW may give notice to the Licensee terminating this Agreement with immediate effect or with effect from the date which is specified in the notice. SW shall provide the Commission and the Central Market Agency with a copy of the termination notice as soon as practicable after the notice has been issued to the Licensee.

20.3 No other right to determine

Neither SW nor the Licensee shall be entitled to terminate this Agreement other than with the consent of the other Party or pursuant to the terms of this Agreement.

20.4 Disclosure to Commission and CMA

The Licensee acknowledges that it may be necessary for SW, without prejudice to Clause 8.10, to report a Licensee Default to the Commission and the Central Market Agency where it considers that the Licensee may be in breach of a term or condition of any Licence by virtue of such Licensee Default.

21. CONSEQUENCES OF TERMINATION

Except where expressly stated to the contrary, the rights and obligations of the Parties under this Agreement shall cease immediately upon termination of this Agreement, but such termination shall be without prejudice to any accrued rights and obligations under this Agreement as at the date of termination, and shall not affect the operation or continued operation of any provisions of this Agreement which are expressed to operate after termination or which are required to give effect to such termination or the consequences of such termination.

22. NOTICES

22.1 References in this Clause 22 to a notice are to a notice or communication to be given by one Party to the other under this Agreement.

22.2 Any notice shall be in writing and shall be sent as follows:

If to Scottish Water:

Castle House

6 Castle Drive

Carnegie Campus

Dunfermline

KY11 8GG

Fax Number: 01383 848286

Marked for the attention of: Corp. Secretary and Head of Legal

If to [Insert Licensee name and contact details]:

[Fax Number]:Marked for the attention of: []

or to such other United Kingdom address or facsimile number and/or marked for such other attention as the recipient Party may from time to time specify by notice given in accordance with this Clause 22 to the other giving the notice.

22.3 Any notice given by delivery shall be given by letter delivered by hand, and any notice given by post shall be sent by first class recorded delivery post.

22.4 Any notice shall be deemed to have been received:

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

22.4.2 in the case of first class recorded delivery post, on the second day following the day of posting; or

22.4.3 in the case of facsimile, on acknowledgement by the recipient Party 's facsimile receiving equipment.

22.5 Where a notice is sent by facsimile:

22.5.1 the Party giving the notice shall (but without prejudice to Clause 22.4.3), if requested by the recipient Party, re-send as soon as reasonably practicable the notice by post; and

22.5.2 in the case of a termination notice under Clause 20, SW shall in any event, within two days following the sending of such facsimile, send to the Licensee a copy of the notice by first class prepaid post.

22.6 A Party may specify different addresses or facsimile numbers and representatives pursuant to Clause 22.2 for the purposes of notices of different kinds or relating to different matters.

23. ASSIGNATION

Neither Party may assign or transfer (whether outright or in security) any or all of its rights under this Agreement without the prior written agreement of the other Party.

24. MODIFICATION OF THE AGREEMENT

24.1 SW is responsible for preparing this Agreement under Section 16 of the 2005 Act.

- 24.2 Subject to this Clause 24, no modification may be made by or on behalf of either Party otherwise than in accordance with the provisions of this Clause 24.
- 24.3 Either Party shall be entitled at any time to submit a Modification Notice to the other Party for information and to the Commission for approval or rejection by the Commission within thirty Business Days of its submission. If no objections have been received by either Party from the Commission within that period, the Modification Notice shall be deemed approved by the Commission. If a Change to the Market Code or the Operational Code is approved or determined that affects the content of this Agreement, the Parties agree that this Agreement shall be modified to give effect to that Change. The Parties will submit a Modification Notice as above as soon as practicable after the Change is approved or determined under the Market Code or Operational Code. If no objections are received by either Party from the Commission within 30 Business Days of receipt of the Modification Notice, it shall be deemed approved by the Commission.
- 24.4 The Commission may veto the Modification Notice if it considers that the Modification Notice is not consistent with the WSA Principles
- 24.5 Separately, if at any time and to the extent that the Commission on its own considers that a modification of this Agreement would be consistent with WSA Principles, then the Commission may provide the Parties with a Modification Notice which will take effect fourteen Business Days from the date of such notice.
- 24.6 Any modifications proposed by either of the Parties or the Commission shall be recorded in a written agreement, in a form to be specified by the Commission and signed by the Parties.
- 24.7 This Clause 24 shall not be subject to the provisions of any Modification Notice by the Parties.
- 24.8 The Commission shall have no obligation to compensate the Parties for the cost and expense of any modifications proposed under this Clause 24 and each Party will be responsible for their own costs and expenses for any such modification.
- 24.9 Nothing in this Agreement shall restrict the right of SW to propose and make revisions to the Wholesale Charges Scheme at any time and from time to time pursuant to the 2002 Act.

25. DISPUTE RESOLUTION

25.1 Introductory

Subject to any contrary provision of the Acts, the Codes or any Licence, and to the rights, powers, duties and obligations of the Commission under the Acts, the Codes or any Licence,

if any disagreement between the Parties concerning this Agreement (a "Dispute") shall arise between the Parties, such Dispute shall be resolved only in accordance with this Clause 25.

A Party involved in a Dispute is referred to as a "Disputing Party".

25.2 **Negotiation and escalation**

25.2.1 The Disputing Parties shall, within ten Business Days of a written request by one of the Disputing Parties to the other, meet and negotiate in good faith and shall use their respective reasonable endeavours to resolve such Dispute.

25.2.2 Any Dispute that cannot be resolved by the Disputing Parties within ten Business Days of the written request referred to in Clause 25.2.1 shall within a further five Business Days be referred by either Disputing Party to a representative of the Licensee and a representative of SW who have authority to bind the Disputing Party they respectively represent, and such representatives shall meet and negotiate in good faith and shall use their reasonable respective endeavours to solve amicably the Dispute. The Disputing Parties hereby agree to provide the relevant representatives with all such information as they reasonably require in order to enable them to determine the Dispute.

25.3 **Reference for determination**

If the Dispute or any part of the Dispute cannot be resolved within ten Business Days of the Dispute being referred in accordance with Clause 25.2.2 above, then either Disputing Party may require that the Dispute be referred to an Expert for determination in accordance with Clause 25.4.

25.4 Expert Determination

25.4.1 Appointment of the Expert

25.4.1.1 A Disputing Party wishing to refer a Dispute to an Expert for determination under Clause 25.3 shall provide the other Disputing Party(ies) (and where it is not a Disputing Party the CMA) with: (i) notice of its intention to refer the Dispute to an Expert and (ii) notice of a proposed Expert. The Disputing Parties shall endeavour within five (5) Business Days of such notice to agree upon the selection of an Expert and may meet for this purpose. In the event of failure to reach such agreement, the Expert shall be appointed by the Commission on the application of any Disputing Party.

25.4.1.2 On selection of a suitable Expert under Clause 25.4.1.1, the Disputing Party which instigated the referral shall forthwith provide the Expert with an "Expert Notification".

25.4.1.3 An Expert Notification shall include the following:

- (a) the names of the Disputing Parties and a summary of the Dispute (the terms of such summary to be agreed by the Disputing Parties);
- (b) a request that the Expert confirm within five (5) Business Days whether or not he is willing and able to accept the appointment;
- (c) a request for certification of the Expert's scale of fees and expenses;
- (d) a statement that the Expert's fees and expenses will be paid as provided in Clause 25.4.4;
- (e) a statement that the information disclosed in the Expert Notification (and any information subsequently disclosed to the Expert relating to the Dispute) is confidential and should be treated in accordance with Clause 19 as if the Expert were a Party and that it should not be disclosed, copied or revealed whether the appointment is accepted or not;

- (f) a copy of this Clause 25.4 and a request for confirmation that the Expert is able and willing to act in accordance with the procedure set out herein; and
- (g) a request for confirmation that the Expert does not hold any interest or duty which would or potentially would conflict with the performance of his duties under his contract with the Disputing Parties, and that he will inform the Disputing Parties immediately in the event of any such conflict arising.

25.4.2 **Determination by the Expert**

- 25.4.2.1 Where a Dispute has been referred to an Expert by a Disputing Party, the Disputing Parties shall promptly provide to the Expert all information reasonably requested by such Expert relating to the Dispute.
- 25.4.2.2 The CMA may be asked to provide all reasonable assistance to any Expert appointed under this Clause 25.4 in order to seek to resolve a Dispute.
- 25.4.2.3 The Expert shall be required by the Disputing Parties to use all reasonable endeavours to render his determination, with full reasons, within twenty five (25) Business Days following his receipt of the information requested, or if this is not possible as soon thereafter as may be reasonably practicable, and the Disputing Parties shall cooperate fully with the Expert to achieve this objective.
- 25.4.2.4 The Expert shall determine any Dispute referred to him as an Expert and not as an arbiter or mediator.
- 25.4.2.5 The Expert shall determine any Dispute referred to him in accordance with the provisions of the Market Code to which the Dispute relates and shall in making such determination have regard to the WSA Principles.

25.4.3 **Effect of Expert Determination**

- 25.4.3.1 The determination of the Expert shall be final and binding upon the Disputing Parties.
- 25.4.3.2 No Disputing Party shall commence proceedings in respect of or refer to any court any finding by the Expert, whether made at any

time after his appointment or in his determination, as to the Dispute or the construction of or otherwise in respect of this Agreement.

25.4.4 **Costs**

25.4.4.1 The Expert shall provide the Disputing Parties with a breakdown of:-

- (a) his/her fees; and
- (b) his/her reasonable expenses, including without limitation to the generality of the foregoing, the fees of and reasonable expenses incurred by any technical or professional advisers.

25.4.4.2 The Disputing Parties shall share equally the fees and expenses of the Expert unless the Expert directs that they should be borne by the Disputing Parties in some other proportion. In the event that the Expert determines that one of the Disputing Parties ("Party A") is liable to pay a sum to another of the parties of the Disputing Parties ("Party B"), including, but not limited to, fees and expenses, Party A will, subject to whatever the Expert's determination may state, pay to Party B an amount equal to such sum together with interest thereon from such date as the Expert's determination may specify. Such interest will accrue from day to day at the rate of 4% over the published base-lending rate from time to time of the Bank of Scotland.

25.5 **Conjoined Disputes**

25.5.1 If a Dispute arising under, out of or in connection with this Agreement which the disputing Parties agree relates to a dispute or difference under the Operational Code or a dispute or difference under the Market Code ("Related Dispute") and where the Related Dispute has been referred to an Expert for determination (the "Related Procedure") any Disputing Party shall, or procure that any party to the Operational Code or any party to the Market Code (as appropriate) shall, as soon as practicable, give to the Expert the following information:

- (a) a copy of the Operational Code and/or the Market Code (as appropriate);
- (b) the basis and grounds for consolidation of the Dispute hereunder and any Related Dispute;
- (c) the cases of the parties to the Related Dispute; and

(d) any relief sought by the parties to the Related Dispute.

25.5.2 On receiving the information set out above and within ten days of the referral of the Dispute to the Expert in accordance with Clause 25.4 the Expert may, at the request of all the Parties to all of the Related Disputes immediately order consolidation of the Dispute and the Related Dispute and shall in such circumstances have the authority and power referred to in Clause 25.5.3 below.

25.5.3 The Expert shall have the authority and power to direct that all matters arising in both the Dispute and the Related Dispute are consolidated in whatever manner the Expert determines and the Disputing Parties shall thereafter abide by and implement such consolidation and any such direction.

25.5.4 In the event that the Dispute is consolidated with the Related Dispute the Expert shall reach a decision on and the Disputing Parties shall attempt to resolve the Dispute and the Related Dispute at the same time.

26. GENERAL

26.1 Entire agreement

This Agreement [and the Escrow Agreement] [and the Guarantee] sets out the entire agreement between the Parties in respect of the subject matter hereof, and supersedes all prior representations, arrangements, understandings and agreements between the Parties (other than fraudulent misrepresentation) relating to such subject matter. Neither Party has relied on any representation, arrangement, understanding or agreement (whether written or oral) not expressly set out or referred to in this Agreement [or in the Escrow Agreement] [or in the Guarantee].

[26.2 In the case of a conflict between the interpretation of the Escrow Agreement and the interpretation of this Agreement, the latter shall prevail.]

OR

[26.2 In the case of a conflict between the interpretation of the Guarantee and the interpretation of this Agreement, the latter shall prevail.]

26.3 Waiver

No failure to exercise, nor any delay in exercising, on the part of a Party of any right, power or remedy under this Agreement shall operate as a waiver thereof, nor shall any single or partial exercise of any such right, power or remedy prevent any further or other exercise thereof or the exercise of any other right, power or remedy. Except as otherwise expressly provided in

this Agreement, the rights and remedies provided herein are cumulative and not exclusive or any rights or remedies provided by Law.

26.4 No partnership

Nothing herein contained shall be construed as giving rise to the relationship of partnership or joint venture.

26.5 Illegality

The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of the remaining provisions of this Agreement.

26.6 Announcements

Subject as provided below, no public announcement or statement regarding this Agreement shall be issued or made by either Party unless, prior thereto, the other Party has been furnished with a copy thereof and has approved the same (such approval not to be unreasonably withheld). Neither Party shall be prohibited from issuing or making any public announcement or statement if it is required to do so in order to comply with any applicable Law or the obligations of any recognised stock exchange.

26.7 Jurisdiction

Subject and without prejudice to the provisions of Clause 25, the Parties submit to the exclusive jurisdiction of the Scottish courts.

26.8 **Governing Law**

The construction, validity and performance of this Agreement shall be governed in all respects by Scots law.

IN WITNESS WHEREOF this Agreement consisting of this and the preceding [] pages, together with the Schedules annexed, is executed in duplicate as follows:

Subscribed on behalf of
SCOTTISH WATER by
one of its directors,
at
on.....200[]
before this witness
Signature:

Name:

Address:
.....
.....

Subscribed on behalf of
[Insert Licensee] by,
one of its directors,
at
on.....200[]
before this witness
Signature:

Name:

Address:
.....
.....

These are the Schedules referred to in the Wholesale Services Agreement between Scottish Water and [Insert name of Licensee]

SCHEDULE 1

DEFINITIONS

Any words or expressions used in the 2002 Act or the 2005 Act shall, unless the contrary intention appears, have the same meaning when used in this Wholesale Service Agreement.

the 2002 Act means the Water Industry (Scotland) Act 2002;

the 2005 Act means the Water Services etc (Scotland) Act 2005;

Acts means the Sewerage (Scotland) Act 1968, the Water (Scotland) Act 1980, the 2002 Act and the 2005 Act;

Affiliated Company means, in relation to a Party, a subsidiary or holding company of that Party, or another subsidiary of such holding company (**subsidiary** and **holding company** having the meanings specified in section 736 of the Companies Act 1985);

Business Day means any day other than a Saturday or Sunday or a bank holiday in Scotland under the Banking and Financial Dealings Act 1971;

Central Market Agency means any body established by or under any directions made by the Commission relating inter alia to the central market agency to exercise certain central market functions in relation to the participation of Licensed Providers in the provision of Water Services and Sewerage Services, the first such body being Central Market Agency Limited, a company limited by guarantee with registered number SC328635 and having its registered office at Ochil House, Springkerse Business Park, Stirling, FK7 7XE;

Change has the meaning given in the Market Code;

Charges means (a) the charges payable to SW under this Agreement for the Services, and (b) any other sum payable to SW by the Licensee, as a Licensed Provider, under the Wholesale Charges Scheme;

Codes means the Operational Code, the Disconnections Code, and the Market Code;

Commission means the body established under section 1 of the 2002 Act;

Confidential Information has the meaning specified in Clause 19.1;

Connection Point means, in relation to any Supply Point(s), the point at which the private pipework supplying water for the Supply Point(s) connects to the Public Water Supply System;

Consent means all permissions, consents, approvals, certificates, permits, licences and authorisations of a Relevant Authority required for the performance of any of a Party's obligations under this Agreement;

Core Functions has the meaning specified in section 70(2) of the 2002 Act;

Customer means, at any time, any Occupier of Eligible Premises for whom one or more Supply Points are Registered, in accordance with the Market Code and who is entitled to receive one or more Services;

Direction(s) means the Water Services (Codes and Services) Directions 2007 (or any other direction which amends, replaces or supplements, or is made in respect of substantially the same subject matter as that direction);

Disconnections Code means the code made by the Commission pursuant to section 19 of the 2005 Act, as in force from time to time and supplemented by any disconnections guidance published by the Commission from time to time;

Dispute has the meaning specified in Clause 25.1;

Disputing Party has the meaning specified in Clause 25.1;

Due Date has the meaning specified in Schedule 3;

[Escrow Agreement means the agreement to be entered into on even date with this Agreement, between each of SW, the Licensee and [insert details of bank] in relation to the establishment and operation of an escrow account as set out in Schedule 5;]

Eligible Premises has the meaning specified in section 27(1) of the 2005 Act;

Expert means a person with appropriate qualifications and experience to resolve a Dispute, appointed under Clause 25.4.1;

Expert Notification has the meaning specified in Clause 25.4.1.2;

Force Majeure has the meaning specified in Clause 13.1;

Foul Sewerage Services has the meaning set out in the Market Code;

Go Live Date means 1 April 2008 or such other date as may be determined by or under a direction given by the Commission;

[Guarantee means the guarantee to be entered into on even date with this Agreement between the Guarantor, the Licensee and SW in relation to the Guaranteed Obligations, as set out in Schedule 5;]

[Guaranteed Obligations means the payment obligations of the Licensee under the market framework arrangements and in particular those payment obligations under Clauses 8 and 20.1.1(b);]

[Guarantor means [insert name of guarantor] (company registered number []) whose registered office is at [insert registered office address];]

[Initial Deposit means the sum of £50,000;]

Law means any Act of Parliament or of the Scottish Parliament, any statutory instrument or other subordinate legislation of either parliament, any exercise of the Royal Prerogative, any enforceable community right within the meaning of Section 2 of the European Communities Act 1972, any applicable guidance direction or determination with which a Party is bound to comply and any applicable judgement or decree of a relevant court of law which creates binding precedent in Scotland;

Licence means a Water Services Licence or a Sewerage Services Licence;

Licensee Default means an event or circumstance specified in Schedule 3;

Licensed Provider means a Water Services Provider or a Sewerage Services Provider;

Market Code means the code designated as such by or under the Water Services (Codes and Services) Directions 2007 (or any other direction which amends, replaces or supplements, or is made in respect of substantially the same subject matter as that direction);

Measurable has the same meaning as Measurable Supply Point as defined in the Market Code;

Metered has the meaning set out in the Market Code;

Modification Notice means the notice specifying the changes to be made to this Agreement which will include:

- (i) the name of the person proposing the modification;
- (ii) a description (in reasonable but not excessive detail) of the issue or defect which the modification seeks to address;
- (iii) a description (in reasonable but not excessive detail) of the modification and of its nature and purpose including confirmation of how the modification is consistent with the WSA Principles;
- (iv) where possible, an indication of those parts of this Agreement which would require change or would otherwise be affected by the

modification, together with proposed drafting of those changes or effects;

- (v) where the person proposing the modification considers that it is urgent, a statement of that fact and an indication of why they consider this to be the case; and
- (vi) where possible, an indication of the impact of the modification on the Operational Code, the Market Code, any Licence or any other industry code, agreement or document;

Month means a calendar month, and (where the context requires) includes a part of a calendar month;

Occupier shall be construed in accordance with section 6 of the 2005 Act;

Operational Code means the code designated as such by or under the Direction;

Primary Charge means the charges appearing from time to time in the Wholesale Charges Scheme as Primary Charges for Water or Primary Charges for Sewerage;

Public Sewerage System means any and all of the sewers (and junctions therewith), drains, SUD systems, sewage treatment works and other similar infrastructure which are (either or both): (a) vested in Scottish Water; or (b) used by Scottish Water (or a person acting on its behalf under its authority) in connection with the exercise of Scottish Water's core functions as respects the provision of sewerage or the disposal of sewage;

Public Water Supply System has the meaning specified in section 28 of the 2005 Act;

Provisional Amount has the meaning specified in Clause 8.3.1;

Provisional Monthly Charge, in respect of a Month, has the meaning specified in Clause 8.1;

Reconciled Primary Charge means the amount of the Primary Charges in respect of any Month as set out in the Settlement Report issued by the Central Market Agency after carrying out any Settlement Run in respect of that Month;

Registered has the meaning set out in the Market Code;

Related Dispute has the meaning specified in Clause 25.5.1;

Related Procedure has the meaning specified in Clause 25.5.1;

Relevant Authority means any local, national or supranational agency, inspectorate, minister, ministry, official or public or statutory person of the government of the United Kingdom or any part of the United Kingdom, or of the European Union, and includes the Commission;

Service Standards means the standards specified in Schedule 4;

Services means any Water Services, Foul Sewerage Services, Surface Water Drainage Services or Trade Effluent Services;

Settlement Report has the meaning set out in the Market Code;

Settlement Run has the meaning set out in the Market Code;

Sewerage Services means the services described in Clause 4.2 under Category B (Sewerage Services);

Sewerage Services Licence means a licence granted under section 6(3) of the 2005 Act ;

Sewerage Services Provider has the meaning specified in section 6(4) of the 2005 Act;

Supply Period means a period;

(a) commencing at 00.01 hours on the date that the last of the suspensive conditions in Clause 3 have been fulfilled (or, if that date is not a Business Day, 00.01 hours on the first Business Day after such date). or such other day as may be agreed between the Parties; and

(b) ending on termination of this Agreement;

Supply Point has the meaning set out in the Market Code;

Surface Water Drainage Services means making arrangements for or in relation to drainage from or in relation to any Eligible Premises to the Public Sewerage System (comprising property and roads drainage as appropriate);

Trade Effluent has the meaning specified in section 59(1) of the Sewerage (Scotland) Act 1968;

Trade Effluent Services means making arrangements for or in relation to the provision of sewerage, or disposal of sewage, in respect of trade effluent discharged from any Eligible Premises where the sewage and/or the related water supply is either Metered, Unmeasurable or Measurable but is not Metered;

Unmeasurable has the meaning set out in the Market Code;

VAT means Value Added Tax;

Water Byelaws has the meaning set out in the Operational Code;

Water Services means the services described in Clause 4.2 under Category A (Water Services);

Water Services Licence means a license granted under section 6(1) of the 2005 Act ;

Water Services Provider has the meaning specified in section 6(2) of the 2005 Act;

Wholesale Charges Scheme means SW's charges scheme setting out its charges for Water Services and Sewerage Services approved by the Commission under section 29A of the 2002 Act, from time to time; and

WSA Principles mean the principles set out in paragraph 3 of the Schedule of the Direction as amended from time to time.

SCHEDULE 2
INFORMATION ON LICENSEE

1. contact details (individual names, postal address, telephone number, mobile number, e-mail address) and authorised signatories (but without prejudice to Clause 22);
2. bank account and account number;
3. postal address for sending invoices;
4. Licence reference number(s);
5. Business SIC code under the United Kingdom Standard Industrial Classification of Economic Activities, and corresponding VAT status.

SCHEDULE 3
LICENSEE DEFAULT

For the purposes of Clause 20, there shall have occurred a Licensee Default in any of the following events or circumstances:

1. **Non-payment:** where the Licensee fails to pay any sum due to SW under this Agreement (other than a sum disputed in accordance with Clause 8.6.2) by the final date for payment thereof specified in Clause 8 (the "**Due Date**"), and:
 - (a) where the sum is, or is part of, a Provisional Monthly Charge, SW gives notice of non-payment to the Licensee not less than five Business Days after the Due Date and the Licensee fails to make payment in full within a period of five Business Days from receipt of such notice; or
 - (b) in any other case, SW gives notice of non-payment to the Licensee not less than ten Business Days after the Due Date and the Licensee fails to make payment in full within a period of ten Business Days from receipt of such notice.
2. **Persistent non-payment:** where the Licensee defaults in the payment of a sum due under this Agreement (excluding where pursuant to Clause 8.6.2) on three or more occasions in a twelve Month period and fails to remedy such default upon the first two occasions within the following periods from the date of notice thereof from SW, namely ten Business Days in the first instance and five Business Days in the second instance;
3. **Material breach capable of remedy:** where:
 - (a) the Licensee is in material breach of any provision (other than a payment obligation) of this Agreement; and
 - (b) the breach is capable of remedy by the Licensee; and
 - (c) SW has given notice (making reference to Clause 20 and this paragraph 3) of such breach to the Licensee; and
 - (d) within ten Business Days after SW's notice under sub-paragraph (c), the Licensee does not either:
 - (i) remedy the breach in all material respects, where the breach is capable of remedy within such period of ten Business Days; or

- (ii) where the breach is not so capable of remedy, provide to SW a programme (setting out the steps to be taken by the Licensee and the timetable for taking such steps) for the remedy of the breach as soon as is reasonably practicable; and
- (e) in the case in sub-paragraph (d)(ii), the Licensee does not:
 - (i) remedy the breach in all material respects with all reasonable diligence and so far as reasonably practicable in accordance with the programme provided under that sub-paragraph or a revised programme pursuant to sub-paragraph (e)(ii); and
 - (ii) where, notwithstanding the reasonable diligence of the Licensee, it is not reasonably practicable for the Licensee to remedy the breach in accordance with that programme, provide to SW a revised such programme; and
- (f) the breach remains unremedied in any material respect after the expiry of five Business Days after a further notice by SW to the Licensee to the effect that the Licensee has not complied with sub-paragraph (d) or (e);

4. **Material breach incapable of remedy:** where:

- (a) the Licensee is in material breach (other than a payment obligation) of this Agreement; and
- (b) the breach is not capable of remedy; and
- (c) SW has given notice (making reference to Clause 20 and this paragraph 4) of the breach to the Licensee; and
- (d) at any time within the period of twelve Months following SW's notice under sub-paragraph (c), there occurs a further material breach by the Licensee of the same provision of this Agreement; and
- (e) SW has given a notice of such further breach to the Licensee and a period of ten Business Days has expired following such notice;

5. **Insolvency:** where:

- (a) the Licensee is unable or is deemed unable to pay its debts (within the meaning of section 123 of the Insolvency Act 1986) or admits an inability to pay its debts as they fall due, suspends making payments on any of its

debts or, by reason of actual or anticipated financial difficulties, commences negotiations with one or more of its creditors with a view to rescheduling any of its indebtedness;

- (b) the value of the assets of the Licensee are less than its liabilities (taking into account contingent and prospective liabilities);
- (c) a moratorium is declared in respect of any indebtedness of the Licensee under Part I of the Insolvency Act 1986;
- (d) the Licensee is insolvent or is deemed to be insolvent for the purposes of the law;
- (e) any corporate action, legal proceedings or other procedure or step is taken in relation to or with a view to:-
 - (1) the suspension of payments, a moratorium of any indebtedness, winding-up, dissolution, administration or re-organisation (by way of voluntary arrangement, scheme of arrangement or otherwise) of the Licensee other than a solvent liquidation or reorganisation of any Licensee;
 - (2) a composition, compromise, assignment or arrangement with any creditor of the Licensee;
 - (3) the appointment of a liquidator (other than in respect of a solvent liquidation of the Licensee), receiver, administrative receiver, administrator (whether appointed out of court or otherwise), compulsory manager, trustee in bankruptcy, judicial custodian or factor, or other similar officer in respect of any Licensee or any of its assets; or
 - (4) enforcement of any security over any assets of any member of the Licensee, or any analogous procedure or step is taken in any jurisdiction; or
- (f) any expropriation, attachment, sequestration, distress or execution affects any asset or assets of the Licensee.

6. **Loss of Consent:** where any Licence or other any material Consent required by the Licensee to enable it to observe or perform any of its obligations under this Agreement ceases to be in full force and effect so that it becomes unlawful for the Licensee to observe or perform any of its obligations hereunder;

7. **Prolonged Force Majeure:** where a Force Majeure event affecting the Licensee continues for a period of six Months.[; or]

[8. **Escrow Agreement:** breach by the Licensee of the terms of the Escrow Agreement at any time.]

OR

[8. **Breach of Guarantee:** where the Guarantor or Licensee has breached the terms of the Guarantee, including the loss of the Guarantor's minimum investment grade credit rating as defined in the Guarantee.]

SCHEDULE 4**THE SERVICE STANDARDS**

[Subject to discussion between SW and Licensee]

1. Complaints from Customers

If the Licensee passes to SW a complaint by a Customer regarding the provision of the Services by SW, SW will respond to the complaint within five Business Days after receipt. If SW fails to send a written response within that period in cases where it received a written complaint, or a complaint by telephone in which the Licensee asked for a written response, SW will pay the Licensee £20. If the complaint is passed to SW after 14.00 on any day, it will be treated for the purposes of calculating the period of five Business Days as received on the next day.

2. Keeping appointments with Customers

If SW arranges, through the Licensee, an appointment to meet with a Customer, it will offer a morning or afternoon appointment or a two-hour time-band. Provided the appointment is arranged more than 24 hours in advance, SW will pay £20 to the Licensee if it fails to turn up on the scheduled morning or afternoon or within the agreed two-hour time band, unless it gave at least 12 hours notice to the Licensee cancelling or changing the appointment.

3. Planned Interruptions to Water Supply

SW will give the Licensee notice of any planned interruption (including notifying the time when the supply is planned to be restored) to water supplies to Customers in accordance with the Operational Code. If SW fails to give said notice, or fails to restore the supply by the notified time, it will pay the Licensee £50 per affected Supply Point. If the supply is turned off, SW will pay the Licensee £25 per affected Supply Point for each 12-hour period without water after the notified time for restoration of supply.

4. Unplanned Interruptions to Water Supply

If the water supply to Supply Points is disrupted because of a fault or breakdown in plant, equipment, apparatus or pipes forming part of the "Public Water Supply System", SW will restore the supply within 12 hours from the time SW finds out about the interruption, unless the burst affects a strategic main (that is to say, a main with a diameter equal to or greater than 300mm), in which case the supply will be restored within 48 hours from the time SW finds out. If SW fails to do this, it will pay the Licensee £50 per affected Supply Point. If the supply remains interrupted beyond the applicable 12-hour or 48-hour time period, SW will pay £25 per affected Supply Point for each additional 12-hour period without water.

5. **Water getting into gas system**

SW will return any telephone call from the Licensee to its emergency helpline regarding water entering the gas system of a Customer with a Supply Point within two hours of the initial contact being received from the Licensee, to provide practical advice and explain what happens next. If it fails to do this, it will pay £20 to the Licensee.

6. **Flooding from sewers**

If waste water from SW's sewers floods the inside of a Customer's premises occupied by a Customer, SW will refund to the Licensee the annual waste water charges payable to SW in relation to the relevant Supply Point (up to maximum of £1,000 per flooding incident), provided the flooding is not due to general surface flooding of the area, a defect in the Customer's private drains or the Customer's own actions. SW will clear up as quickly as possible any mess within the affected Customer's premises which is directly caused by the overflow of waste water from SW's sewer.

7. **Meter Installation Applications**

If the Licensee requests SW to fit a meter, SW will carry out a survey to establish if a meter can be fitted and what costs, if any, are involved, and will then report the outcome to the Licensee. SW will do this within eight Business Days of receiving the request, and if it fails to do so, it will pay the Licensee £20.

8. **Water Pressure**

SW will supply water to Supply Points under this Agreement at a minimum pressure of 1bar. If the Licensee suspects that the water supply is below this pressure, it must contact SW who will investigate the complaint and report the findings to the Licensee within three Business Days. If SW fails to do this, SW will pay £20 to the Licensee. If, following the investigation, SW determines:

- that the water supply to the Supply Points is less than 1bar of pressure measured on the Customer's side of the boundary stopcock/stop valve; and
- that the low pressure is caused by SW's supply system,

SW will pay the Licensee £20.

Payments made under this Service Standard will be restricted to one per affected Supply Point within any 6-Month period.

The Licensee will not be entitled to claim against this Service Standard where the Supply Point concerned is:

- above the level of water leaving SW's storage tank; or
- between the level of water leaving SW's storage tank and a level of 10.5 metres below the tank.

9. **Response in Emergencies**

An "Emergency" has the same meaning here as in the Operational Code. The Service Standards during an Emergency are:

- SW will announce information updates at least every 48 hours;
- SW will provide alternative drinking water supplies to sensitive premises (hospitals, nursing homes etc) in accordance with the water emergency plans;
- SW will give as much advance notice as possible of any necessary restrictions on supplies to a Supply Point for Eligible Premises.

If SW fails to meet any of these standards, and any of the Licensee's Customers are directly affected by the Emergency, the Licensee will be entitled to claim at least 5% of the annual water or wastewater charge attributable to those Customer's affected Supply Points (subject to a maximum of £5,000 per Customer) and can claim up to 15% of the said annual water or wastewater charges if it can show that the loss suffered by its Customer had a value greater than 5% of the said annual water or wastewater charges (subject to a maximum of £5,000 per Customer).

**[SCHEDULE 5
ESCROW AGREEMENT**

KEY TERMS

1. The account would be opened and operated by SW.
2. Upon opening of the account an initial balance of £50,000 is to be paid into the account by or on behalf of the Licensee.
3. Throughout the term of the Escrow Agreement, the Licensee will agree and undertake to transfer to the escrow account such amounts as may be notified to it by SW in accordance with Clause 8.1 of the Agreement and at all times to maintain a balance in the escrow account equal to the greater of (i) £50,000 or (ii) the amount of the monthly wholesale charge notified by SW as being due to it by the Licensee in accordance with Clause 8.
4. The Licensee agrees that all payments calculated as falling due to SW by the Licensee for the duration of this Agreement shall be automatically paid from the escrow account on the due date set out in Clause 8.2 in accordance with the terms of the Escrow Agreement. SW likewise agree that all repayments that may be due pursuant to this Agreement from SW to the Licensee shall be credited to the escrow account.
5. The escrow account would be interest bearing and all interest on the balance of the account is to be returned to the Licensee or at its option, rolled into the account.
6. Modifications shall not be permitted to the Escrow Agreement without the consent of the Commission following the procedure set out in Clause 24 of the WSA adapted to ensure compliance by the escrow bank.]

**[SCHEDULE 5
GUARANTEE**

KEY TERMS

1. Guarantee to be entered into by Guarantor, Licensee and SW (or as otherwise agreed).
2. The Guarantee must cover the payment obligations on the Licensee under the market framework arrangements, in particular those payment obligations contained in Clauses 8 and 20.1.1(b), and must also cover the cost to SW of any recovery of unpaid wholesale charges.
3. The Guarantee should define the minimum investment grade credit rating for the Guarantor, and the Commission shall be able from time to time to review and amend the minimum investment grade credit rating.]