

[Energy company letterhead]

The Governor and Company of the Bank of England  
Threadneedle Street  
London  
EC2R 8AH

[Date]

By email: [EMFS-applications@bankofengland.co.uk](mailto:EMFS-applications@bankofengland.co.uk)

## **ENERGY MARKETS FINANCING SCHEME: CONFIDENTIALITY AND UNDERTAKING AGREEMENT**

### **1. INTRODUCTION**

- 1.1 We, [ ] (the *Borrower*), have entered into, or propose to enter into, an Eligible EMFS Financing and wish to request The Governor and Company of the Bank of England (the *Bank*) to provide an EMFS Guarantee in respect of that Eligible EMFS Financing.
- 1.2 The defined terms used in this letter (the *Confidentiality and Undertaking Agreement*) are set out in schedule 1.
- 1.3 Except where the context otherwise requires:
  - (a) any reference to an agreement or document or any enactment or statutory provision or international convention or any other legislative provision (whether primary or secondary) is a reference to it as it may have been, or may from time to time be amended, supplemented, modified, replaced, extended, consolidated or re-enacted; and
  - (b) any reference to time is to London time.

### **2. DOCUMENTS**

- 2.1 We enclose a duly completed Application Form.

### **3. FINANCING REPRESENTATIONS**

- 3.1 The Borrower represents and warrants to the Bank that none of the following events has occurred and is continuing:
  - (a) the court making a winding-up order in respect of the Borrower under Chapter VI of Part W or Part V of the Insolvency Act 1986;
  - (b) the appointment of a liquidator in respect of the Borrower or over all or any material part of the Borrower's property;
  - (c) the Borrower admitting its inability to, or its intention not to, perform any of its obligations under the Documentation or the Covered EMFS Financing;

- (d) the Borrower ceasing or threatening to cease to carry on its business or any substantial part thereof or compounding, or making a general assignment for the benefit of, or entering into any reorganisation or other special arrangement with, its creditors or any class thereof or being deemed unable, or admitting in writing its inability, to pay its debts within the meaning of section 123(1) of the Insolvency Act 1986 or otherwise becoming insolvent;
- (e) the filing or presentation or making of a petition or application or the commencement of any other proceeding in respect of the Borrower (other than by the Bank in respect of any obligation under this Confidentiality and Undertaking Agreement) in any court or before any agency or out of court or otherwise alleging or for the bankruptcy, winding-up or other insolvency of the Borrower or seeking any reorganisation, arrangement, moratorium, composition, readjustment, administration, liquidation, dissolution or similar relief under any present or future statute, law or regulation, such petition, application or proceeding not having been stayed or dismissed within 30 days of its filing or commencement (other than a petition, application or proceeding for the winding up of the Borrower or the appointment of an administrator, whether out of court or otherwise in relation to the Borrower or any analogous proceeding in which case no such 30 day period shall apply);
- (f) the giving of notice of a proposal to appoint, or the taking of any step with a view to appointing, or the appointment of a receiver or trustee or administrator (whether out of court or otherwise) or analogous officer in respect of the Borrower or over all or any material part of the Borrower's property;
- (g) the convening of any meeting of creditors of the Borrower for the purposes of considering a voluntary arrangement as referred to in section 3 of the Insolvency Act 1986;
- (h) the occurrence of any event analogous to any of the foregoing in any jurisdiction in relation to the Borrower;
- (i) the Borrower ceasing to meet the applicable Eligibility Criteria; or
- (j) the occurrence in relation to a Parent of the Borrower of:
  - (i) any event described in sub-paragraphs (a) to (h) above (as if it related to that Parent, not the Borrower); or
  - (ii) any event of default, default termination, acceleration event or termination event, howsoever described.

3.2 The Borrower shall immediately notify the Bank if any of the events described in Clause 3.1 above occurs.

#### **4. REPRESENTATIONS, WARRANTIES, UNDERTAKINGS AND ACKNOWLEDGEMENTS**

4.1 The Borrower represents and warrants to the Bank that:

- (a) any certifications or statements made or factual information provided to the Bank in connection with participation in the EMFS including without limitation in the Application Form and any such certifications or statements or factual information relating to the Covered EMFS Financing by the Borrower are in all material respects accurate and complete;
- (b) any financial statements relating to the Borrower or its Group provided to the Bank in connection with participation in the EMFS fairly present the Borrower's or the Group's, as the case may be, financial condition for the period to which they relate;
- (c) any financial projection or forecast relating to the Borrower or its Group provided to the Bank in connection with participation in the EMFS has been prepared on the basis of recent historical information and on the basis of reasonable assumptions (as at the date of the relevant projection or forecast);
- (d) it is a body corporate duly incorporated and validly existing under the laws of the United Kingdom or such other jurisdiction in which it is incorporated;
- (e) it has the power and is duly authorised to enter into, perform and deliver the Documentation and to enter into and perform all obligations thereunder;
- (f) it reasonably believes it complies with the applicable Eligibility Criteria;
- (g) it has obtained all authorisations of any governmental authority or regulatory body required by it in connection with the Documentation and such authorisations remain in full force and effect;
- (h) the execution, delivery and performance of the Documentation does not and will not conflict with or violate:
  - (i) any law, regulation, by-law or rule applicable to the Borrower;
  - (ii) its constitutional documents; or
  - (iii) any agreement or instrument binding upon it or any of its assets;
- (i) the obligations expressed to be assumed by it in the Documentation are legal, valid, binding and enforceable obligations;
- (j) no withholding or deduction for or on account of tax will be required to be made by the Borrower from any payment made to the Bank in connection with the EMFS Guarantee (save where agreed by the Bank in the Agreement Supplement); and
- (k) the Borrower's payment obligations under the Covered EMFS Financing rank (or will rank) at least equally with all its other present unsecured, unsubordinated obligations, except for obligations mandatorily preferred by law applying to companies generally and where the Covered EMFS Financing is a tranche, facility or other addition or extension of another credit or loan facility, such payment

obligations are expected to rank at least equally with the remainder of such other credit or loan facility (including sharing in any security or guarantee package).

- 4.2 All representations and warranties made and given under this Confidentiality and Undertaking Agreement shall be deemed to be made by the Borrower to the Bank upon this signing of this Confidentiality and Undertaking Agreement and repeated on each occasion on which a draw down is made under the Covered EMFS Financing.
- 4.3 The Borrower undertakes to the Bank that:
- (a) it will, to the extent permitted by applicable law, inform the Bank in advance of any proposed change relating to it that may result in the applicable Eligibility Criteria no longer being complied with;
  - (b) it will promptly take all such steps and execute all such documents (and in such form as the Bank may require) required to give effect to any provision of the Documentation;
  - (c) if requested by the Bank, it shall procure: (i) a Parent Guarantee; and (ii) where such primary entity is incorporated in a jurisdiction other than England and Wales, a Primary Entity Guarantee Legal Opinion;
  - (d) on request from the Bank, it will promptly provide any and all information that may help the Bank to assess the ability of the Borrower to fulfil its obligations under the Documentation;
  - (e) it will notify the Bank if it creates or grants any mortgage, lien, pledge or other security interest (other than by operation of law) (a ***Security Interest***) over any of its assets to secure any of its obligations under any financial indebtedness, save to the extent that the rights of the Bank under the EMFS Guarantee benefit equally and ratably from such Security Interest; and
  - (f) it will notify the Bank if any member of its Group incurs or allows to remain outstanding any guarantee in respect of the Borrower's financial indebtedness, save to the extent that the rights of the Bank under the EMFS Guarantee benefit equally and ratably from such guarantee.

## 5. NO WAIVERS

No waiver, indulgence or concession granted by the Bank shall operate as a waiver or variation in any other instance or of any other rights and no omission or delay on the part of the Bank in exercising any right, power or privilege under the Documentation shall act as a waiver thereof, nor shall any single or partial exercise of any such right, power or privilege preclude any further exercise thereof or the exercise of any other right, power or privilege. The rights and remedies of each of the Bank provided in this Confidentiality and Undertaking Agreement, the remainder of the Documentation are cumulative with and not exclusive of any rights of lien, sale, set-off or retention or other rights or remedies which the Bank may have at common law, by statute or otherwise howsoever.

## **6. ENTIRE AGREEMENT; ASSIGNMENT**

- 6.1 The Documentation sets out the entire terms and conditions and understanding between the Parties in respect of the subject matter thereof. It is agreed that:
- (a) the Borrower has not entered into the Documentation in reliance upon any representation, warranty or undertaking of the Bank which is not expressly set out or referred to in the Documentation;
  - (b) the Borrower shall not have any remedy in respect of misrepresentation or untrue statement made by the Bank which is not contained in the Documentation nor for any breach of warranty which is not contained in the Documentation; and
  - (c) this Clause 6.1 shall not exclude any liability for, or remedy in respect of, fraudulent misrepresentation.
- 6.2 The provisions of the Documentation shall be binding upon and inure to the benefit of the Parties hereto and their respective successors in title and permitted assigns.
- 6.3 The rights and obligations of the Borrower under the Documentation shall not be capable of assignment (or any other type of transfer) by the Borrower without the prior written consent of the Bank.

## **7. COSTS AND EXPENSES**

- 7.1 The Borrower agrees to pay and bear its own costs and expenses incurred in connection with the preparation and execution of the Documentation.
- 7.2 The Borrower indemnifies and agrees on demand to pay or reimburse the Bank all of its costs and expenses (including legal expenses) together with any value added tax thereon, incurred in connection with the enforcement of any of its rights under the Documentation.

## **8. EMFS PROCEDURES AND MARKET NOTICE**

- 8.1 This Confidentiality and Undertaking Agreement may be supplemented by EMFS Procedures and may also be supplemented by Market Notices.
- 8.2 In the event of any conflict between the terms of this Confidentiality and Undertaking Agreement and the terms of any EMFS Procedures, this Confidentiality and Undertaking Agreement shall prevail.
- 8.3 Market Notices relating to the EMFS form part of, and should be read alongside, the Documentation and in the event of any conflict between such a Market Notice and this Confidentiality and Undertaking Agreement, the Market Notice shall prevail.

## **9. AMENDMENTS**

The Bank may amend this Confidentiality and Undertaking Agreement either generally or in particular circumstances, from time to time. Any such amendment shall apply with effect from such time as may be specified by the Bank. The Bank will endeavour to

give reasonable notice of any amendment but reserves the right to introduce any amendment with immediate effect, if the Bank considers it necessary to do so.

## 10. CONFIDENTIALITY

10.1 Each Party (the *Recipient*) undertakes to keep confidential all information given to it by the other Party (the *Disclosing Party*) or otherwise in the possession of the Recipient relating to or otherwise concerning the Disclosing Party or the EMFS (which shall include, without limitation, access to and participation in the EMFS and details of any Covered EMFS Financing).

10.2 The undertakings in Clause 10.1 above will not apply to information which:

- (a) is disclosed with the prior written consent of the Disclosing Party;
- (b) at the time of supply is in the public domain;
- (c) subsequently comes into the public domain, except through breach of the undertakings set out in Clause 10.1;
- (d) is already in the lawful possession of the Recipient;
- (e) subsequently comes lawfully into the possession of the Recipient from a third party who does not owe the Disclosing Party an obligation of confidence in relation to it;
- (f) is disclosed in confidence to the Recipient's professional advisers, financial advisers or auditors where such disclosure is considered necessary by the Recipient, acting reasonably;
- (g) is disclosed in confidence to a member of the same Group as the Recipient;
- (h) is required to be disclosed by law, regulation or any governmental or competent regulatory authority, whether in the United Kingdom or elsewhere, provided that, save in the case of a disclosure made by the Bank which falls within Clause 10.3, the Recipient making such disclosure has promptly notified the Disclosing Party in advance of the proposed form, timing, nature and purpose of the disclosure. The Recipient shall not be required to make such a notification to the Disclosing Party where such notification would cause the Recipient to be in breach of applicable law or regulation, provided that the Recipient makes a notification to the Disclosing Party as soon as such notification would no longer result in a breach of law or regulation;
- (i) is disclosed to any third party service provider which the Recipient has engaged to provide storage, recovery and back up services in relation to data and systems, provided that (i) the disclosure is for the sole purpose of that third party service provider providing such storage, recovery and back up services; (ii) each such third party service provider agrees to maintain the confidentiality of such information; and (iii) the Recipient remains liable to the Disclosing Party for the confidentiality of all such information in accordance with this Confidentiality and Undertaking Agreement; or

- (j) is disclosed to any third party service provider which the Bank has engaged to assist with the operation and administration of the EMFS Guarantees, provided that (i) the disclosure is for the sole purpose of that third party service provider providing such services; (ii) each such third party service provider agrees to maintain the confidentiality of such information; and (iii) the Recipient remains liable to the Disclosing Party for the confidentiality of all such information in accordance with this Confidentiality and Undertaking Agreement.
- 10.3 Nothing in this Clause 10 shall preclude any Party or any of its officers or employees from disclosing information to a Lender provided that such disclosure relates solely to the potential provision of an Eligible EMFS Financing by that Lender.
- 10.4 Nothing in this Clause 10 shall preclude the disclosure of information in any case in which disclosure is made by the Bank or any of its officers or employees:
- (a) to the UK Parliament (including any Committee of the House of Commons or the House of Lords) or to the European Commission;
  - (b) for the purpose of reporting on the establishment, performance or operation of, or compliance with, the EMFS Guarantee;
  - (c) in the course of any public disclosure relating to the EMFS in accordance with Clause 10.5;
  - (d) to the Bank, His Majesty's Treasury, any minister of the Crown, any UK government department, agency or authority (including the Prudential Regulation Authority), the Financial Conduct Authority, Financial Policy Committee, HM Revenue & Customs or any other governmental department, public body, monetary authority, competent regulatory or resolution authority, governmental, banking, taxation or regulatory agency or authority or the operator of any deposit guarantee or investor protection scheme, whether in the United Kingdom or elsewhere;
  - (e) for the purposes of any criminal investigation whatever which is being or may be carried out or of any criminal proceedings whatever which have been or may be initiated, in either case whether in the United Kingdom or elsewhere;
  - (f) for the purpose of enabling or assisting the Bank to discharge its functions as a monetary authority; or
  - (g) for the purposes set out in any Market Notice.
- 10.5 The Bank shall be permitted to make public disclosures of the following information:
- (a) drawdown and other statistics;
  - (b) the identity of the Borrower (provided that, if such publication is the first one pursuant to which the Guarantor identifies the Borrower, the Guarantor shall give the Lender at least one week's notice prior to such publication);

- (c) in other circumstances which may be provided for in a Market Notice; and
- (d) otherwise in accordance with the details set out in a Market Notice covering disclosure of any aspects of the EMFS,

in each case with the disclosure of such details as described in any Market Notice.

- 10.6 The Borrower shall be permitted to make public disclosures about their participation in the EMFS at their own discretion after an EMFS Guarantee has been executed.
- 10.7 The Parties agree that damages may not be an adequate remedy for any breach of this Clause 10 by any Party or any of its directors, officers, employees, agents, sub-contractors, affiliates, professional advisers or auditors and the Parties shall be entitled to seek any legal or equitable relief, including injunction, in the event of any breach of the provisions of this Clause 10.

## **11. PAYMENTS**

- 11.1 Save as otherwise provided in the Documentation, all payments under or in connection with this Confidentiality and Undertaking Agreement shall be in immediately available freely convertible funds and made in sterling and, save as otherwise provided or specified by the Bank, all payments shall be made on the due date for payment thereof free from set-off or counterclaim and without deduction or withholding for or on account of any taxes of whatsoever nature imposed, levied collected, withheld or assessed, unless such a deduction or withholding is required by law.
- 11.2 In the event of such a deduction or withholding, the amount of any payment due from the Borrower shall be increased to an amount which (after making any such deduction or withholding) leaves the Bank with a net amount equal to the amount which would have been due if no such deduction or withholding had been required to be made.
- 11.3 The Borrower shall (within three Business Days of demand by the Bank) indemnify the Bank against any Loss which the Bank (in its absolute discretion) determines will be or has been (directly or indirectly) suffered by the Bank for or on account of tax in relation to a payment received or receivable (or any payment deemed to be received or receivable) under or in connection with the Documentation, except to the extent that the Loss has been compensated for by an increased payment under Clause 11.2.

## **12. THE BANK'S DISCRETIONS**

Subject to the express terms thereof, any liberty or power which may be exercised or any determination which may be made under the Documentation by the Bank (including without limitation, any act, matter or thing as agreed, specified, determined, decided or notified by the Bank to the Borrower) may be exercised or made generally or in relation



to one or more Counterparties and in the absolute and unfettered discretion of the Bank from time to time, which shall not be under any obligation to give reasons therefor.

### **13. CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999**

A person who is not a party to the Documentation shall have no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any of its terms.

### **14. NOTICES**

All notices, requests, demands or other communications required to be given to or served upon the Parties under the provisions of the Documentation will be given in writing and will be deemed to be duly given (i) when delivered (if given by personal delivery) or (ii) five Business Days after posting (if given by first class letter post) or (iii) when actually received (or made available) in readable form and only if it is addressed to the email addresses set out below (if sent by email) and will be addressed as follows:

- (a) if to the Bank, at Bank of England, Threadneedle Street, London EC2R 8AH; and
- (b) if to the Borrower, to the notice details contained in the attached Application Form,

or at such other address and/or to such other person as the relevant addressee may specify by at least five Business Days' notice.

### **15. GOVERNING LAW**

The Documentation and any non-contractual obligations arising out of or in relation to the Documentation shall be governed by and construed in accordance with English law.

### **16. JURISDICTION**

16.1 Each Party irrevocably agrees that the courts of England are to have exclusive jurisdiction to settle any dispute which may arise out of or in connection with the Documentation and the documents entered into pursuant to it and that accordingly any proceedings arising out of or in connection with the Documentation and such documents will be brought in such courts. The Parties irrevocably submit to the jurisdiction of such courts and waive any objection to proceedings in any such court on the ground or venue or on the ground that the proceedings have been brought in an inconvenient forum.

16.2 This Clause 16 is drafted for the benefit of the Bank and will not limit its rights to take proceedings in any other court with jurisdiction.

### **17. AGENT FOR SERVICE OF PROCESS**

If the Borrower has no registered office or place of business in England, it shall appoint and maintain to act as its agent for service of process a person with an address for service in England and shall notify the Bank of the name and address of such person. If the agent at any time ceases to act as such, the Borrower shall appoint a replacement agent having an address for service in England and shall notify the Bank of the name

and address of the replacement agent. In the absence of such appointment and notification, the Bank shall be entitled by notice to the Borrower to appoint a replacement agent on the Borrower's behalf and at the Borrower's expense and shall, thereafter, notify the Borrower of such appointment.

Yours faithfully

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For and on behalf of [            ]

*We agree to the above*

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**For and on behalf of The Governor and Company of the Bank of England**

*Dated* \_\_\_\_\_

## Schedule 1

In this Confidentiality and Undertaking Agreement, the following terms have the following meanings:

**Agreement Supplement** has the meaning give to such term in the EMFS Guarantee;

**Application Form** means an application form for applicants wishing to participate in the EMFS;

**Borrower** means the entity identified as such in Clause 1.1;

**Business Day** means a day (other than a Saturday or a Sunday) on which banks are open for business in London;

**Covered EMFS Financing** has the meaning given in the definition of “EMFS Guarantee” but where this Confidentiality and Undertaking Agreement is executed in advance of the Agreement Supplement, the Covered EMFS Financing means the Eligible EMFS Financing to which the Application Form submitted with this Confidentiality and Undertaking Agreement relates;

**Documentation** means this Confidentiality and Undertaking Agreement, the EMFS Guarantee, any Market Notice, any EMFS Procedures, the Application Form and any other documentation or procedures issued by the Bank in connection with the EMFS, each as supplemented and amended from time to time;

**Eligible EMFS Financing** means a financing that is eligible for the EMFS;

**Eligibility Criteria** means the criteria specified by the Bank from time to time for participation in the EMFS, including in a Market Notice;

**EMFS** means the Energy Markets Financing Scheme;

**EMFS Guarantee** means the guarantee to be provided by the Bank to the lender to the Borrower (the **Lender**) to cover the credit risk of the Lender relating to the Eligible EMFS Financing provided to the Borrower which is the subject of the Application Form, such financing being **Covered EMFS Financing**;

**EMFS Procedures** means any procedures published by the Bank relating to the EMFS from time to time, including in a Market Notice;

**Group** means a group as defined in section 421 of the Financial Services and Markets Act 2000 provided that, the Bank may determine from time to time: (i) whether or not an Borrower and another person (“**P**”) are members of the same Group under section 421; and (ii) that the Borrower and P are not in the same Group notwithstanding that they may be persons who would otherwise be in the same group under section 421;

**Lender** has the meaning given in the definition of “EMFS Guarantee”;

**Loss** means any liability, loss, damage, claim, cost, charge or expense of any nature whatsoever, whether direct or indirect;

**Market Notice** means a notice or notices published by the Bank from time to time relating to the EMFS;

**Maximum Amount** has the meaning give to such term in the EMFS Guarantee;

***Outstanding Guarantee Balance*** has the meaning give to such term in the EMFS Guarantee;

***Parent*** in relation to the Borrower means a parent undertaking as defined in section 1162 of the Companies Act 2006;

***Parent Guarantee*** means, if requested by the Bank, any guarantee from the primary entity in the Borrower's Group to guarantee the Borrower's obligations under the Covered EMFS Financing;

***Party*** means each of the Bank and the Borrower; and

***Primary Entity Guarantee Legal Opinion*** means one or more legal opinions confirming under the laws of the jurisdiction or jurisdictions in which the primary entity is incorporated or organised and has its head or main office:

- (a) such primary entity's power and authority to enter into and to execute the Parent Guarantee and the performance of its obligations thereunder; and
- (b) that the terms and conditions set out in the Parent Guarantee constitute valid and legally binding obligations of such parent company enforceable in accordance with their terms.