

Flexibility Services Agreement

Flexibility Services Standard Agreement V1
- Contract Summary to the Product 4 Team

General points to note

- *This summary is based on Flexibility Services Standard Agreement V1 as published by the ENA in March 2020*
- Some content in square brackets
 - e.g. definitions and certain timings which can be adapted for a particular Provider and Flexibility Services.
- Template of key information and content in the Schedules which can be adapted by each Network Operator (i.e. the Company) depending on the Provider and Flexibility Services.



The “front end” of the Agreement



Recitals

- Sets out the background and purpose of the Agreement.
- For Recital (2), we have made this editable to cover aggregators.

Part 1

- Provide the key details of the Flexibility Provider.
- Nominated Person: responsible for monitoring performance, receives invoices and other notices under the Agreement.
- Special Conditions: to set out anything specific to a Flexibility Provider here that may not fall within scope of the Conditions or Schedule.

The “front end” of the Agreement

Part 2

- Commencement Date: can be the date of signature of the Agreement or another time in the future.
- Expiry Date: set out in Schedule 1 in order to link to extension provisions.

E&W execution blocks

- To be used if the Agreement is to be governed by English and Welsh law.

Scots execution blocks

- Different formalities in Scotland.
- Scottish signature blocks on page 23.
- Scots law execution blocks must have text from the body of the contract on the same page as execution blocks.
- Do not move execution blocks to a separate page.

Clause 1: Definitions and Interpretation

Definitions

- Delete or remove square brackets as appropriate.

Interpretation

- Priority in the event of conflicts: the “front end” of the Agreement, the Schedules and then the Conditions.



Clause 2: Duration and Term

- Term: The Agreement commences on the Commencement Date and continues until the Expiry Date.
- The Agreement automatically terminates on the Expiry Date.
- Extensions of the Term: the Company must give reasonable notice. Further provisions relating to extensions are set out in Schedule 1.



Clause 3: Scope of Flexibility Services

Availability and Unavailability

- The Provider must make the DER Available in accordance with Schedule 1 and in a manner agreed to by the parties provide written notice of any Unavailability.
- The Provider to notify the Company as soon as reasonably practicable of any unplanned or emergency Unavailability.

Exclusivity

- The Agreement is not a guarantee of Utilisation Instructions
- It does not constitute a contract for exclusive provision of Flexibility Services.

Clause 3: Scope of Flexibility Services

Utilisation Instructions

The Company requests the provision of Flexibility Services, subject to the Provider's Availability, via Utilisation Instructions.

Full procedure for Utilisation Instructions set out in Schedule 4. The Company may withdraw any Utilisation Instruction before the Provider has provided a response.

The Provider must respond (whether it chooses to accept or not) to the instruction.

Clause 3: Scope of Flexibility Services

Provision of Flexibility Services

- The Provider must provide the Flexibility Services with the agreed DER and in accordance with Accepted Start Time, Accepted End Time and Accepted MW/MVAR.
- No Utilisation Fees due to the Provider for any Flexibility Services delivered in excess of Utilisation Instructions.
- If Provider fails to deliver Flexibility Services, the Charges shall be reduced in accordance with the performance factor table set out in Schedule 2.

Clause 4: Variation

- Variations must be in writing and signed by the Parties.
- Provider, with approval of the Company, may change the DER by providing notice.

Variation to Service Windows

- Can be done with prior written agreement with the Provider on no more than 2 occasions per year and no more than 4 times in any contractual term.
 - Additional changes are subject of a Discretionary Service or a new service.
- Service Window can be changed by up to 1 hour inclusive of extension, early instruction or delayed instruction.
- A power requirement (demand reduction, power injection or other) may be increased or lowered no more than 10% of contracted requirement.

Clause 5: Discretionary Flexibility Services

Requesting Discretionary Flexibility Services

- Discretionary Flexibility Services via a Discretionary Utilisation Request
 - The Company may request at its discretion
 - subject to the Provider's Availability
- Full procedure for issuing and accepting Discretionary Utilisation Requests set out in Schedule 4.
- If Provider fails to respond, deemed to have declined the Discretionary Utilisation Request.



Clause 6: Monitoring and Equipment

The Company's monitoring rights

- A discretionary right to monitor and use such data collection and systems as the Company deems appropriate.
- Includes but is not limited to metering data analysis.
- The Provider to submit Performance Reports if requested by the Company.
- If Provider deemed by Company to failed to provide Flexibility Services, the Provider may undertake a Proving Test if required by the Company.

Clause 7: Records and Audit



- The Provider must keep accurate records of all matters relating to the Agreement.



- The records shall be suitable for audit purposes and retained for the period required by any statute or in any event, during the Term and a minimum of 7 years after termination of the agreement.



- The Company or any auditor nominated by it may inspect and review the records to verify the Provider's compliance with Clause 7.

Clause 8: Insurance

- The Provider shall, and any subcontractor it appoints, appropriate insurances.
- Where possible, the Provider shall add the Company as a named party on insurance policies.
- Provider's insurance shall include an indemnity to the Company as principal up to its liability under the Agreement.
- The Provider shall give immediate notice to the Company where any claim under the Provider or subcontractor's policies may impact the Company.
- The Provider shall permit the Company to take proceedings in its name, recover compensation or secure an indemnity so long as this does not put the Provider in breach of its insurance.
- If Provider's insurers also have the same right, Provider shall use best endeavours to facilitate agreement between the insurers and Company on conduct of those proceedings.

Clause 9: Provider's Obligations

- Key Provider obligations include:
 - Owning and/or managing the DER during the Term
 - Providing the Flexibility Services in accordance with all UK health, safety and environment legislation and approved codes of practice
 - Disclosing the existence of any agreement the Provider may have in respect of the DER that could impact Availability of the DER of the Provider's ability to perform its obligations under the Agreement
 - Making available to the Company information in relation to the meter at the DER.



Clause 10: Representations and Warranties (Each Party)

- Each Party will make the representations and warranties to the other set out in Clause 10.1.
- These include, but are not limited to:

Due incorporation;

Power and capacity to perform obligations under the Agreement;

No material breach of any other agreement by virtue of performance of the Agreement;

Accuracy of information provided;

No insolvency event is continuing or anticipated; and

No litigation or other proceedings is taking place or pending that may have a Material Adverse Effect.

Clause 10: Representations and Warranties (Provider)

– Key Provider representations and warranties include:

Having in place connection to the Company's electricity distribution network or a connection offer;

Maintaining in force all licences, permissions and authorisations etc needed to supply the Flexibility Services;

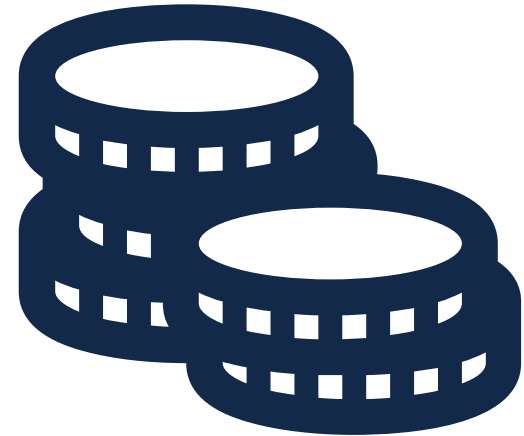
Neither fixing nor adjusting any Charge under or in accordance with any agreement with any other person;

Disclosing any change of circumstances which shall affect delivery of the Flexibility Services; and

In respect of DER development projects, having in place a defined schedule of design, build and commissioning.

Clause 11: Charges and Payment

- Standardised mechanics – further details can be added to Schedule 2
- The Charges are to be calculated by the Provider in accordance with Schedule 2.
- Sets out process for invoicing.
- Sets out provisions for disputing invoices.



Clause 12: Termination

- Either Party may terminate the Agreement with immediate effect in a limited number of circumstances, e.g. Provider is in material or persistent breach or insolvency
- Otherwise, either Party may terminate the Agreement by providing 90 days written notice.
- Consequences of termination: each Party to return other Party's equipment, delete Confidential Information and the Provider to submit a final invoice.



Clause 13: Service Failure and Material Breach

The Provider must notify the Company as soon as reasonably practicable if it is unable to provide the Flexibility Services in all or any part of any Service Window.

In the event of a Service Failure, the Provider may be required to:

- provide the Company with a written explanation, a rectification plan, a proposed variation to the Service Requirements or
- take any other action specified by the Company.

If the Provider fails to take these steps at the direction of the Company and does not improve performance, this will be deemed a material breach of the Agreement.

Clause 13.4, where the Company terminates the Agreement as a result of a material breach, it will be entitled to recover additional cost, Loss and expense incurred.

This is subject to the liability cap at Clause 15.4.

Clause 14: Force Majeure

- A Party will not be in breach of the Agreement where its performance is affected by a Force Majeure Event.
- In such event, a Party must notify the other Party as soon as reasonably possible, providing full details of the Force Majeure Event.
- The affected Party must use reasonable endeavours to mitigate the impact of the Force Majeure on its performance of obligations under the Agreement.
- A Force Majeure Event that continues for at least 8 weeks will allow either Party to terminate the Agreement on 30 days written notice.



Clause 15: Indemnity and liability (capped)

- Capped to the aggregate total charges payable or paid to the Provider under the Agreement.
- The Provider's indemnities include:
 - Breach of Agreement;
 - Loss or damage to any property (incl. Company property); and
 - All actions caused by the Provider's negligence in connection with the Agreement.
- Company shall be responsible for the Provider for personal injury or death caused by negligence only.



Clause 15: Indemnity (uncapped)

Either Party's liability will not be limited in the case of:

Fraud, misrepresentation or wilful misconduct;

Death or personal injury;

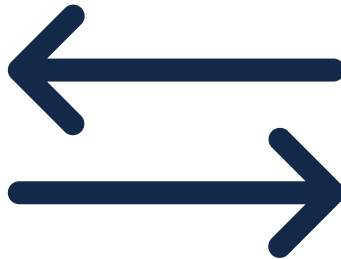
Breach of statutory duty;

Any infringement or alleged infringement of IPR; or

Invalidation of insurance.

Clause 16: [Assignment]/[Assignment], Sub-Contracting and Change in Ownership

- Neither Party shall assign, transfer or sub-contract any of its rights and obligations under the Agreement without prior written consent of the other Party (not to be unreasonably withheld).
- The Provider shall immediately notify the Company of any Change in Ownership.
- The Company has the right to terminate the Agreement if a Change in Ownership of the Provider and may treat a Change of Ownership as a material breach.



Clause 17: Confidentiality

- Each Party agrees to treat all information disclosed to it by the other Party in connection with the Agreement as Confidential information. Such information must not be disclosed to third parties and shall be restricted to matters and people relevant to performance of the Agreement.
- Neither Party shall use the name, brands and logos of the other without written approval.
- The Provider agrees that the Company may share information for industry initiatives relating to the Flexibility Services and shall be entitled to make publicity releases and announcements regarding the Agreement.



Clause 18: Intellectual Property Rights

- No transfer of any interest in Intellectual Property Rights under the Agreement.
- All Intellectual Property Rights belong to the Party providing it.
- Neither Party shall make use of the other Party's Intellectual Property other than to the extent reasonably necessary in performing its obligations under the Agreement.

Clause 19: Company Property

- Each Party retains the rights in its own physical property used for the purposes of the Agreement.
- Any property supplied by the Company to the Provider will remain the exclusive property of the Company and will be held in safe custody by the Provider at its own risk.



Clause 20: Data Protection

- The Parties acknowledge that at the date of the Agreement, neither Party acts as a processor on behalf of the other.



Clause 21: Modern Slavery, Anti-Bribery and Living Wage

- The Provider agrees that they have not:
 - committed an offence under the Modern Slavery Act 2015;
 - been notified that they are subject to an investigation; or
 - been made aware of any circumstances that could give rise to such an investigation.

- The Provider agrees that they shall:
 - comply with all applicable anti slavery and human trafficking laws;
 - notify the Company if they become aware of a breach; and
 - include in their contracts anti slavery and human trafficking provisions.

Clause 21: Modern Slavery, Anti-Bribery and Living Wage

- **Indemnity:** from the Provider to the Company. Subject to the indemnity cap.
- Any breach of Clause 21 will be deemed a material breach of the Agreement
- The Provider shall not engage in any activity that constitutes bribery
- The Provider agrees to
 - Pay all personnel who are directly employed
 - Ensure all employees of contractors and sub contractors are paid not less than the living wage



Clause 22: Notices

- The processes for **operational notices** are set out in Schedule 5

- **Non-Operational Notices.**
 - Shall be given in writing and delivered to the addresses in Part 1.
 - Sets out how Non-Operational Notices shall be delivered and when deemed received.
 - Clause 22 does not apply to the service of legal proceedings.

Clause 23: Dispute Resolution

Clause 24: Severance

Clause 23: Dispute Resolution

Sets out the process of escalating disputes.



Clause 24: Severance

If any provision of the Agreement is declared enforceable, the other provisions in the Agreement remain in full force and effect.



Clause 25: Third Party Rights

Clause 26: No Agency or Partnership

Clause 25: Third Party Rights

The Agreement does not give any third party any right to enforce any of the provisions.

The Provider agrees that it shall not enter into any arrangement with third parties that conflict with the provision of the Flexibility Services without Company consent.

Clause 26: No Agency or Partnership

Neither Party is held or deemed to be an agent of the other and the Agreement itself does not constitute any form of joint venture, partnership or contract of employment.

Clause 27: Waiver

Clause 28: Entire Agreement

Clause 27: Waiver

Where a Party fails to exercise a right or claim a remedy arising under the Agreement, this does not constitute a waiver of that right.

Any waiver is only effective when written and signed by the Party giving it.

Clause 28: Entire Agreement

The entirety of this agreement and all documents form the whole Agreement and previous drafts and documents cease to have any effect.



Clause 29: Counterparts

Clause 30: Governing Law and Jurisdiction

Clause 29: Counterparts

If the Agreement is executed in Counterparts then the Agreement is not effective until delivered on the agreed date. Where not executed in counterparts, the Agreement takes effect on the date agreed evidence by the date inserted at the start of the Agreement.

Clause 30: Governing Law and Jurisdiction

- Governing law to be English law if the Company is incorporated in England and Wales.
- If the Company is incorporated in Scotland, governing law to be Scots law.



Schedules

Populate and delete sections as appropriate.

Schedule 1: Service Description

Schedule 2: Flexibility Service Charges

Schedule 3: Sites/DER

Schedule 4: Communications

Schedule 5: Performance Monitoring

Schedule 6: Special Requirements

Contact details



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