SHAREHOLDER AGREEMENT

between

THE CITY OF EDINBURGH COUNCIL

and

ENERGY FOR EDINBURGH LIMITED

APPROVED [Day] [Month] 2016
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SHAREHOLDER AGREEMENT

BETWEEN

1) THE CITY OF EDINBURGH COUNCIL, established by the Local Government etc. (Scotland) Act 1994 and having its principal office at Waverley Court, 4 East Market Street, Edinburgh EH8 8BG (the “Council”); and

2) ENERGY FOR EDINBURGH LIMITED a company incorporated in Scotland (company number: [ ] ) and having its registered office at Waverley Court, 4 East Market Street, Edinburgh EH8 8BG (the "Company").

BACKGROUND

(A) This Agreement sets out the terms on which the Parties have agreed that the Company will operate.

(B) The Company has agreed with the Council that it will comply with the terms and conditions of this Agreement insofar as they relate to the Company and insofar as it can lawfully do so.

AGREED TERMS

1 Definitions and interpretation

1.1 In this Agreement the following expressions have the following meanings:

"Acceleration Notice" means a notice given by the Company to the Council in accordance with clause 6.3;

"Adequate Procedures" means adequate procedures, as referred to in section 7(2) of the Bribery Act 2010 and any guidance issued by the Secretary of State under section 9 of the Bribery Act 2010;

"Agreement" means this agreement and the Schedule;

"Annual Budget" means the annual budget prepared for each Financial Year in accordance with clause 5.4 and adopted by the Company in accordance with this Agreement;

"Articles" means the articles of association of the Company as set out in Part 4 of the Schedule, as the same may be amended from time to time, and references to an Article shall mean a specific article in the Articles as amended from time to time;
"Board" means the Directors, or such of those Directors present at a duly convened meeting of the Directors at which a quorum is present in accordance with the Articles (and where the context so admits means a duly convened meeting of the directors of an EFE Group Company at which a quorum is present in accordance with the articles of association of the relevant company);

"Board Meeting" means in respect of the Company or any EFE Group Company a duly convened meeting of the relevant Board;

"Business" means the business as described in clause 2.1 and such other business as the Council and the Company may agree in writing from time to time in accordance with this Agreement;

"Business Day" any day, other than a Saturday or a Sunday, on which banks are open in Edinburgh for normal banking business;

"Business Plan" means the business plan prepared in accordance with clause 5 and adopted by the Company in accordance with this Agreement;

"Commercially Sensitive" means any matter or information the disclosure of which outside of the Company is reasonably likely to be materially detrimental to the Business;

"Confidential Information" means all confidential information of whatever nature and in whatever form, disclosed or made available, directly or indirectly, by one Party to the other Party, or to such other Party’s officers, employees, professional advisers or agents, whether or not such information is labelled or designated as confidential, including but not limited to:

(a) any information relating to the other Party’s business, finances, operations, products and services, marketing affairs and opportunities, customers, and suppliers, plans, inventions, processes, trade secrets, know how, design rights, software
and Intellectual Property Rights or any other information of a confidential or proprietary nature;

(b) any information designated as confidential information by the other whether belonging to that Party or a third party;

(c) the subject matter and provisions of this Agreement and all other documents entered into pursuant to this Agreement; and

(d) any information obtained by a Party as a result of negotiations and entering into or performing this Agreement;

and “Confidential Information” shall include confidential information of any EFE Group Company;

“Director” means any duly appointed director of the Company for the time being or a duly appointed alternate of any director;

“EFE Group Company” means any Subsidiary or Subsidiary Undertaking of the Company;

“Encumbrance” means any interest or equity of any person (including any right to acquire, option or right of pre-emption) or any mortgage, charge, pledge, lien, assignation, hypothecation, security interest, title retention or any other security agreement or arrangement having similar effect;

“Energy Services” has the meaning given in clause 2.3;

“External Director” means a Director appointed under Article 6;

“Financial Year” means any accounting reference period of the Company, of whatever duration;

“Intellectual Property Rights” means any and all intellectual property or industrial rights of any description anywhere in the world including but not limited to any patents and supplementary protection certificates, trademarks,
domain names, registered designs, copyright (including but not limited to rights in computer software, object and source code), rights in the nature of copyright, database rights, semi-conductor topography rights, unregistered design rights, any rights in plant varieties, rights in and to trade names, business names, product names and logos, inventions, databases, discoveries, specifications, formulae, processes, know how, trade secrets, confidential information and any analogous or similar right in any jurisdiction (whether any such rights referred to in this definition are registered, unregistered, registerable or not and any applications or rights to apply for registration of any of them, any and all divisions and continuations of said applications and the right to claim priority from any of the applications together with any registered rights resulting from any such applications or rights to apply for registration);

"Material Developments" means any development, issue or matter that has or is reasonably likely to have a significant effect on financial, reputational or operational risk and/or a significant impact on service delivery or performance;

"Observer" means the individual appointed pursuant to clause 4.1 or an individual appointed pursuant to Article 19;

"Parties" means each of the parties to this Agreement;

"Reserved Matter" means each of the matters set out in Part 1 of the Schedule;

"Project Board" means the project board established by the Council to provide oversight of the Company's activities;

"Schedule" means the schedule, in four parts, to this Agreement;

"Subsidiary" has the meaning given in section 1159 of the Companies Act 2006 provided that for the purpose of that section a company shall be deemed to be a member of another when its shares in the other company are registered in the name of another person either in connection with the taking of security
or as a nominee, and wholly-owned subsidiary shall have the meaning given in that section; and

"Subsidiary Undertaking" has the meaning given in section 1162 of the Companies Act 2006.

1.2 References to any statute or statutory provision include, unless the context otherwise requires, a reference to the statute or statutory provision as modified, replaced, re-enacted or consolidated and in force from time to time and any subordinate legislation made under the relevant statute or statutory provision (as so modified, replaced, re-enacted or consolidated) in force prior to the date of this Agreement.

1.3 References to any gender include references to each other gender (including neuter) and references to the singular include the plural and vice versa.

1.4 References to a person include references to any individual (including that individual's legal personal representatives), firm, company, corporation or other body corporate, government, state, agency of a state, local authority or any unincorporated association, joint venture or partnership (whether or not having a separate legal personality).

1.5 The clause and schedule headings in this Agreement do not affect its interpretation.

1.6 References to clauses and the Schedule are to clauses and to the Schedule to this Agreement and references to paragraphs are to paragraphs in the Schedule in which such references appear.

1.7 The Schedule forms part of this Agreement and has the same force and effect as if set out in the body of this Agreement.

1.8 Any phrase introduced by the term “include”, “including”, “in particular”, “other”, or any similar general term is not limited by any particular examples preceding or following those general terms.

1.9 Where any obligation in this Agreement is expressed to be undertaken or assumed by any Party, that obligation shall be interpreted to require the Party concerned to exercise all rights and powers of control over the affairs of any other person which it is able to exercise (whether directly or indirectly) in order to secure performance of the obligation.

1.10 In construing this Agreement the contraproferentem rule shall not apply and accordingly wording shall not be given a restricted meaning by operation of such rule.

1.11 In deciding whether and, if so, how to exercise any right or discretion conferred upon it by this Agreement, the Council may act in its complete discretion.

1.12 A reference to a "notice" is to a notice in writing signed by or on behalf of the person sending it and given in accordance with clause 13.
Unless otherwise expressly provided, all covenants, agreements, undertakings, indemnities, representations and warranties in this Agreement by more than one person are entered into, given or made by such persons severally.

2 Business of the Company

2.1 Subject to the Reserved Matters referred to in clauses 6.1.7 and 6.2 and set out in Part 1 of the Schedule, the Business of the Company (carried out itself and through any EFE Group Companies) shall be as specified in Article 3.

2.2 The Company undertakes to the Council that for so long as this Agreement remains in effect it will:

2.2.1 co-operate and use its reasonable endeavours to promote and develop the Business to the best advantage in accordance with good business practice and the highest ethical standards;

2.2.2 conduct the Business on the basis of, and in accordance with, the Annual Budget and the Business Plan;

2.2.3 generally do, or cause to be done, all acts necessary or desirable to give effect to the terms of this Agreement; and

2.2.4 observe the provisions of the Articles.

2.3 The Council and the Company agree that the Company has been established by the Council, among other things, as the vehicle to consider, develop and implement, and revise and update from time to time, a strategy or strategies for delivering energy and resource efficiency, energy savings, reductions in carbon and other emissions, the production of renewable or sustainable energy, district heating, and/or sustainable transport ("Energy Services"), and/or income and revenue generation from Energy Services, as set out in Article 3.1.1.

2.4 In light of clause 2.3, the Council undertakes to the Company that it shall provide the Company with information about any projects relating to Energy Services that are being considered or discussed by or within the Council and that it shall use all reasonable endeavours to procure that such information is provided in respect of projects relating to Energy Services being considered or discussed by or within arm’s length entities established by the Council.

2.5 The Council undertakes to the Company that it will provide information about and access to assets of the Council so as to enable the Company to promote and develop the Business. Reference to assets of the Council includes land, buildings, and operational and non-operational property. The Council also undertakes to the Company that it shall use all reasonable endeavours to procure information about and access to such assets as are in the ownership or otherwise under the control of any arm’s length entities established by the Council.
2.6 The Council shall notify the Company of its policies relating to Energy Services from time to time, and of any amendments to these policies. The Company undertakes to the Council that it will, in carrying on the Business, have regard to these policies and to any amendments to them or replacements of them.

2.7 The Council may provide the Company, on request by the Company, with:

2.7.1 access to financial support and advice;
2.7.2 access to legal assistance and advice;
2.7.3 access to procurement assistance and advice;
2.7.4 access to the Council’s communications and public relations services;
2.7.5 access to IT and telecoms facilities;
2.7.6 access to meeting rooms and office facilities;
2.7.7 access to and use of personnel.

2.8 If despite the exercise of all rights and powers of control available to them the parties to this Agreement cannot fully implement the provisions of this Agreement in relation to any particular EFE Group Company, the parties shall implement the provisions of this Agreement in relation to that company to the extent possible, and shall not be in breach of this Agreement in respect of the obligations which cannot be so implemented.

3 Directors

3.1 The Company shall procure that:

3.1.1 it uses all reasonable endeavours to ensure that each Director completes, signs and delivers to the Company and the Council as soon as reasonably practicable following the date of their appointment to the Board, an undertaking in the form set out in Part 3 of the Schedule;

3.1.2 subject to the Reserved Matters referred to in clauses 6.1.7 and 6.2 all material decisions relating to the Company will be taken at Board Meetings;

3.1.3 Board Meetings will be held at least quarterly in any Financial Year; and

3.1.4 each such meeting will be held in Scotland.

3.2 The Company shall give to the Observer:

3.2.1 not less than 5 Business Days advance notice of each Board Meeting and of each meeting of any committee of the Board, such notice to be accompanied by a written
agenda specifying the business to be transacted at such meeting together with all papers to be circulated or presented to the same, provided that where a Board Meeting is required to be held on short notice, the Company shall use reasonable endeavours to give advance notice to the Observer; and

3.2.2 as soon as practicable after each such meeting a copy of the minutes of that meeting redacted to the extent required to comply with the terms of the Data Protection Act 1998,

provided that where the subject matter of any paper could reasonably be considered to be Commercially Sensitive the provisions of clause 7.6 shall apply.

3.3 Each Director shall be responsible for dealing with conflicts of interest in accordance with his/her statutory duties and the Articles.

4 Observer rights

4.1 The Council, by its signature of this Agreement, appoints a Senior Manager as an Observer in terms of Article 19 and the Company, by its signature of this Agreement, accepts said appointment as being made in terms of Article 19.

4.2 The Parties agree that the person appointed as an Observer pursuant to clause 4.1, or any other person appointed as an Observer pursuant to Article 19, shall:

4.2.1 subject to clause 7.6, be at liberty from time to time to discuss the proceedings of Board meetings or of meetings of any committees of the Board with other officers and elected members of the Council; and

4.2.2 subject to clause 7.6, in addition to the information to be provided under clause 3.2, be entitled to receive all information, other than sensitive personal information (as defined in the Data Protection Act 1998), provided by the Company or made generally available by the Company to Directors and the Company shall send such information or make such information available to such Observer.

4.3 References to Boards and Board Meetings in clause 4.2 includes Boards and Board Meetings of any EFE Group Companies.

5 Business Plan, accounts, financial and other information

5.1 The Company shall, at all times, maintain accurate and complete accounting and other financial records in accordance with the requirements of all applicable laws and generally accepted accounting principles applicable to the Company.

5.2 The Company shall prepare:
5.2.1 quarterly management accounts of the Company and any EFE Group Companies including a profit and loss account, balance sheet and cash flow statement and such other trading and financial information as the Council may reasonably require as well as a comparison against the previous year's information for the relevant quarter and against the Annual Budget, together with an explanation for any material variances to forecasts and shall send a copy to the Council no later than 10 Business Days after the end of each relevant quarter and the Board shall consider such accounts at its following meeting; and

5.2.2 audited accounts of the Company and any EFE Group Companies and shall send a copy to the Council within 6 months of the end of the accounting period to which they relate.

5.3 The Company shall prepare an Annual Budget for the Company and any EFE Group Companies in respect of each Financial Year and a Business Plan of the Company and any EFE Group Companies annually in each case on an individual and consolidated basis.

5.4 Each Annual Budget shall be consistent with the Business Plan and shall include:

5.4.1 a forecast profit and loss;

5.4.2 a forecast revenue projection;

5.4.3 a balance sheet and cash-flow statement on a phased monthly basis;

5.4.4 an operating budget including estimated capital expenditure and working capital on a phased monthly basis;

5.4.5 an analysis of the results of the Company and any EFE Group Companies for the previous Financial Year compared with the Annual Budget for that Financial Year, identifying material variations in revenues and costs;

5.4.6 a summary of the Company's and any EFE Group Companies' business objectives for the forthcoming Financial Year together with financial and non-financial KPIs and appropriate measures of achievement against which the performance of the Company and any EFE Group Companies will be assessed.

5.5 Each Business Plan shall include:

5.5.1 a forecast profit and loss;

5.5.2 a forecast revenue projection;

5.5.3 a dividend policy (for the avoidance of doubt, that policy may be that no dividend is expected or anticipated to be payable);
5.5.4 a balance sheet and cash-flow statement on an annual basis;

5.5.5 a review of projected business activities and capital investment; and

5.5.6 a summary of the Company's and any EFE Group Companies' business objectives for at least 3 Financial Years following the reference year of the Business Plan.

5.6 Each Annual Budget and Business Plan shall be approved by the Board prior to the commencement of the Financial Year to which it relates and the Company shall consult with the Council in a reasonable and proper manner in drawing up the Annual Budget and Business Plan before approval.

5.7 Each Annual Budget and Business Plan shall be submitted to the Board in draft and thereafter shall be circulated to the Council not later than 90 days prior to the commencement of the first Financial Year to which it relates; with the intention that each Annual Budget and Business Plan shall then be presented at an appropriate meeting of the Council (or relevant Council committee, or the Project Board, as the Council shall direct) for approval.

5.8 If any Annual Budget and/or Business Plan has not been approved pursuant to clause 5.7 by the start of the relevant Financial Year, the Company shall continue to trade in the ordinary course without material interruption but in a manner which is most likely to continue the status quo without materially deviating from the previous Annual Budget and/or Business Plan until such time as a new Annual Budget and/or Business Plan is so approved.

5.9 If the Company wishes to amend a Business Plan during the course of any Financial Year it shall present its proposals to the Council (or relevant Council committee, or the Project Board, as the Council shall direct) which, acting reasonably, shall approve or reject such changes.

5.10 The Company and the Board shall:

5.10.1 upon receipt by the Company of a request in writing by or on behalf of the Council, grant the Council such access to the accounts, books, records, senior employees (if any) and Directors and such other information relating to the business affairs and financial position of the Company and any EFE Group Companies as such request may reasonably require (which shall include all information that the Council requires in order to comply with law and/or regulations);

5.10.2 keep the Council informed of any Material Developments in the Business; and

5.10.3 supply the Council with a copy of a report prepared by the Company in respect of each Financial Year, demonstrating the implementation by the Company and any EFE Group Companies of Adequate Procedures, such report to be provided within 30 Business Days of the end of the Financial Year to which it relates;
5.11 The Company acknowledges that the Council is subject to certain external audit requirements and, subject to the provisions of clause 7, shall give any auditors appointed in relation to the Council access to the necessary information and records reasonably requested by them for such purpose from time to time.

6 Undertakings of the Company

6.1 The Company undertakes to the Council (to the extent it is legally able to do so and subject to clause 2.8) that it shall:

6.1.1 comply with the terms of this Agreement and the Articles;

6.1.2 conduct the Business and procure that it and each EFE Group Company conducts its business in accordance with all applicable legal and administrative requirements, the Annual Budget, the Business Plan, good business practice and in the ordinary course so as to seek to maintain its business as a going concern;

6.1.3 ensure that it files all statutory returns of the Company and any EFE Group Companies on a timely basis;

6.1.4 take out and maintain insurances appropriate to the Business and, on request, to supply the Council with a schedule of such insurances;

6.1.5 if so requested by the Council acting reasonably, enforce, or procure to be enforced, to their full extent all rights and remedies available to the Company under this Agreement and the Articles;

6.1.6 if so requested by the Council acting reasonably, enforce, or procure to be enforced, to their full extent, the obligations of Directors and senior executives (if any) of the Company and any EFE Group Companies under their service or employment agreements (if any);

6.1.7 subject to clause 6.2, ensure that, save with the prior written consent of the Council, it shall not carry out any of the Reserved Matters;

6.1.8 as soon as reasonably possible after becoming aware of the same, notify the Council in writing of any litigation by or against the Company or any EFE Group Company which materially affects or is reasonably likely to materially affect the Business or any dispute or other circumstances which may give rise to any such litigation;

6.1.9 adopt, implement and review annually policies (which policies will have regard to the equivalent policies of the Council in force from time to time) regarding:

6.1.9.1 risk management and maintenance of a risk register;

6.1.9.2 whistle blowing;
6.1.9.3 bribery, anti-corruption, fraud and irregularity;
6.1.9.4 formal recruitment and selection;
6.1.9.5 health and safety;
6.1.9.6 equalities;
6.1.9.7 living wage; and
6.1.9.8 such other matters as may be reasonably required by the Council from time to time;

6.1.10 follow and comply with the Council's procedures and rules in respect of the procurement of goods, services and works as in force from time to time;

6.1.11 maintain a Schedule of Notifiable Interests for the Directors in the form set out in Part 2 of the Schedule; and

6.1.12 comply with all applicable laws.

6.2 The Company shall procure that no EFE Group Company shall carry out any of the Reserved Matters, with each reference in Part 1 of the Schedule (express or implied) to the Company being construed as a reference to each EFE Group Company, and each such reference to the Business being construed as a reference to the business of the relevant EFE Group Company.

6.3 Where consent to a Reserved Matter is required under clause 6.1.7 or 6.2 and the Company reasonably considers that waiting for the next meeting of Council or relevant Council committee or the Project Board before any decision concerning consent can be given would result in a material adverse effect on the trading of the Company (or any EFE Group Company), it shall, by giving notice in writing to the Council, invoke an accelerated procedure for the consent process, whereby:

6.3.1 approval or rejection of any Reserved Matter may be given by the Council following consultation on the Reserved Matter with the Council's appointed Senior Manager, the Chief Executive or Executive Director of Resources of the Council, on behalf of the Council; and

6.3.2 if such approval or rejection is not given or withheld within five Business Days of receipt of the Acceleration Notice or any accompanying documentation that the Council may reasonably require, the request for consent will be automatically be deemed to be withheld.

6.4 If, for the purposes of promoting and developing the Business, the Company considers that it requires to procure goods, services and/or works above a threshold of £500,000 in respect of goods and services, and works, it shall seek the approval of the Council (or relevant Council committee, or the Project Board, as the Council shall direct). The Company shall supply to the
Council such information as the Council shall reasonably require in order to consider whether to grant approval, which shall include a detailed business case relating to the proposed procurement.

6.5 If the Council approves a procurement in terms of clause 6.4, the Company shall proceed with that procurement in accordance with the Council's procurement procedures and rules as in force from time to time.

7 Confidentiality

7.1 Each Party undertakes:

7.1.1 to treat and keep the Confidential Information as secret and confidential and not, without the prior written consent of the other Party, which may be given on such terms as they consider appropriate, directly or indirectly communicate or disclose, or allow to be communicated or disclosed (whether in writing or orally or in any other manner), such Confidential Information to any other person other than to its officers, employees, professional advisers and agents who need to know it strictly for the purposes of considering, evaluating or performing this Agreement; and

7.1.2 not to use the Confidential Information for any purpose other than solely in connection with the performance of this Agreement (including conducting the Business in the ordinary course) and in particular not to use the Confidential Information for any competitive or commercial purpose.

7.2 Each Party shall ensure that each of its officers, employees, professional advisers, auditors and agents to whom the Confidential Information is to be made available are made fully aware of the confidentiality obligations set out in this Agreement and each such Party shall procure that such persons will observe the terms of this clause.

7.3 Each Party shall keep the Confidential Information safe and secure and shall take the same care to protect and secure the Confidential Information of the other Party as the receiving Party takes with information of its own of similar significance, but on no account less than reasonable care.

7.4 Each Party shall take all reasonable and appropriate steps to enforce any duty of confidence owed to it by any person to whom any Confidential Information is made available insofar as such enforcement appears to be necessary for the protection of the confidentiality of the Confidential Information.

7.5 The provisions of clause 7.1 shall not apply to Confidential Information to the extent that such Confidential Information:

7.5.1 was lawfully known to the recipient (without obligation to keep the same confidential) at the date of its disclosure;
7.5.2 is required to be disclosed by the laws of any relevant jurisdiction, or any governmental or regulatory organisation including, without limitation, the provisions of the Local Government (Access to Information) Act 1985, the Environmental Information (Scotland) Regulations 2004 and the Freedom of Information (Scotland) Act 2002 and other obligations, guidance and provisions concerning access to information by which the Council and/or the Company are bound, but only to the extent and for the purpose of such a disclosure, in which event the recipient shall to the extent it is reasonably able to do so, take all reasonable steps to consult and take into account the reasonable requirements of the other Party in relation to, and prior to, such disclosure;

7.5.3 is required to be disclosed in order to complete tax returns or to obtain any relevant tax clearances, but only to the extent and for the purpose of such a disclosure, in which event the recipient shall to the extent it is reasonably able to do so, take all reasonable steps to consult and take into account the reasonable requirements of the other Party in relation to, and prior to, such disclosure; or

7.5.4 is in or has come into the public domain otherwise than by reason of the recipient's fault, neglect or breach of the restrictions set out in this Agreement or any other agreement.

7.6 Notwithstanding the terms of clause 7.1 but subject to any other restrictions determined pursuant to this clause 7.6:

7.6.1 the Observer shall be at liberty from time to time to disclose Confidential Information relating to the Company and any EFE Group Company to the Leader of the Council, to the Chief Executive of the Council, to the Convenor of any committee of the Council which, having regard to its remit, can reasonably be considered to have an interest in such information on matters, or to the Project Board;

7.6.2 in relation to information or documentation to be provided to the Council or any official and/or member of the Council:

7.6.2.1 if any information or documentation may be reasonably considered to be Commercially Sensitive the following shall apply:

7.6.2.1.1 the Chair and/or the Chief Executive of the Company shall (if any) as soon as reasonably practicable (and in any case within 5 Business Days of becoming aware that the information or documentation may be reasonably considered to be Commercially Sensitive) consult with the Chief Executive of the Council to agree whether such information is Commercially Sensitive (pending such consultation the Company shall be
entitled to withhold or restrict access to such information or documentation);  

7.6.2.1.2 if, following the consultation in clause 7.6.2.1.1, the Chair and/or the Chief Executive of the Company (if any) and the Chief Executive of the Council resolve that such information is Commercially Sensitive, they shall consider whether it is appropriate to restrict access to such information or documentation; and  

7.6.2.1.3 if, following the consideration in clause 7.6.2.1.2, the Chair and/or the Chief Executive of the Company (if any) and the Chief Executive of the Council resolve that it is appropriate to restrict such access, they shall agree appropriate conditions to the supply of such Commercially Sensitive information to the Council and/or transmission of such Commercially Sensitive information within the Council (which may include closed room access to the Commercially Sensitive information at the Council’s premises and/or the giving of confidentiality undertakings) (the “Access Conditions”); and  

7.6.2.2 the Parties shall implement the Access Conditions in respect of the supply of such Commercially Sensitive information to the Council and/or transmission of such Commercially Sensitive information within the Council; and  

7.6.3 without prejudice to the provisions of clause 7.6.2, the Company and the Council shall use reasonable endeavours to agree a set of protocols to set out the processes by which it shall be determined that information or documentation is Commercially Sensitive, how such consultation between the Company and the Council shall be conducted and how resolutions of the consultations will be implemented.  

8 Disputes  

8.1 If there is any dispute between the Parties in relation to this Agreement or any provision of it, the Parties shall first seek to resolve that dispute by discussion at officer level within the Council and at External Director level within the Company.  

8.2 If the dispute cannot be resolved as set out in clause 8.1 within 20 Business Days, then it shall be escalated to the Chief Executive of the Council and the Chair and one External Director of the Company, who shall seek to resolve that dispute by discussion.
9 Breach/Termination

9.1 If either Party commits a material breach of any provision of this Agreement, the other Party may notify the Party in breach in writing and either require the breach to be remedied within a period of 15 Business Days from the date of such notice, or require that a credible plan be presented within that 15 Business Day period setting out a timescale for remedying the breach.

9.2 If a breach of this Agreement notified in terms of clause 9.1 is not remedied within the time period specified in that clause or if a credible plan for remedying the breach is not presented within that time period or if that plan is not implemented within the timescale specified in it, then the Party not in breach may terminate this Agreement by giving not less than 20 Business Days’ notice in writing to the other Party.

9.3 Any termination of this Agreement is entirely without prejudice to the Council's rights as a shareholder in the Company.

10 Review of Agreement

10.1 The Parties shall meet in good faith to discuss and review the operation of this Agreement every three years, the first such review to take place not later than December 2018. The Parties may agree to carry out an interim review of the operation of this Agreement at any time after December 2016. Any such review shall be without prejudice to the three-yearly timetable for scheduled reviews, unless the Parties agree otherwise.

10.2 Following any review in terms of clause 10.1, the Parties shall make such amendments to this Agreement as they consider appropriate in light of the review and shall document these either in a variation to this Agreement or in a replacement agreement.

11 Assignation

Neither Party shall be entitled to assign or otherwise transfer the benefit or burden of this Agreement nor all or any of its rights or obligations under it without the prior written consent of the other Party.

12 Waiver

12.1 Any waiver of any breach of, or default under, this Agreement shall only be effective if made in writing and shall not be deemed to be a waiver of any subsequent breach or default of this Agreement.

12.2 Any failure or delay on the part of either Party to exercise any right or remedy conferred under this Agreement or otherwise shall not in any circumstance operate as a waiver, nor shall any single or partial exercise of any right or remedy preclude or restrict the further exercise of any such right or remedy.
13 **Notices**

13.1 Subject to any specific provisions elsewhere in this Agreement, any notice, demand or communication in connection with this Agreement shall be in writing and (i) delivered personally or (ii) sent by pre-paid first class post to the recipient's address as set out at the beginning of this Agreement or (iii) sent by email to [address] in the case of the Council, or to [address] in the case of the Company, or to any other address, or email address, which the recipient has notified in writing to the sender not less than 7 Business Days before the notice is despatched.

13.2 The notice, demand or communication is deemed given:

13.2.1 if delivered personally, at the time of delivery to the address provided for in this Agreement;

13.2.2 if sent by pre-paid first class post, on the second Business Day after posting it, or

13.2.3 if sent by email, upon receipt by the sender of a read receipt,

provided that, if it is delivered personally or sent by email on a day which is not a Business Day or after 4pm on any Business Day, it shall instead be deemed to have been given or made on the next Business Day, and further provided that no notice under clause 9 may be given by email.

14 **Conflict with the Articles**

Where any provisions of the Articles conflict with any provisions of this Agreement, the provisions of this Agreement shall prevail.

15 **Unlawful fetter on the Company's statutory powers**

15.1 Notwithstanding any other provision contained in this Agreement the Company shall not be bound by any provision of this Agreement to the extent that it would constitute an unlawful fetter on any statutory power of the Company.

15.2 Nothing in this Agreement shall be construed to be a resolution of all the members of the Company in the absence of a properly passed resolution in accordance with the Articles.

16 **Exercise of powers**

16.1 Words denoting an obligation on a Party to do any act, matter or thing include, except as otherwise specified, an obligation to use all reasonable endeavours to procure that it be done and words placing a Party under a restriction include an obligation not to permit or allow, so far as the same is possible, infringement of that restriction.

16.2 Nothing in this Agreement will prejudice the statutory rights that the Council has as a shareholder in the Company.
17  General

17.1 The Parties do not intend that any of the terms of this Agreement shall be enforceable as a third party right by any person not a party to this Agreement.

17.2 Unless otherwise agreed in writing, each Party shall pay its own costs and expenses in connection with the negotiation, preparation or execution of this Agreement.

17.3 Nothing contained in this Agreement, and no action taken by the Parties pursuant to this Agreement, is intended or shall be deemed to constitute a relationship between the Parties of partnership, principal and agent or employer and employee. No Party has, nor may it represent that it has, any authority to act or make any commitments on behalf of the other Party, or otherwise bind the other Party in any way.

17.4 If any clause or part of this Agreement is found by any court, tribunal, administrative body or authority of competent jurisdiction to be illegal, invalid or unenforceable then that provision shall, to the extent required, be severed from this Agreement and shall be ineffective without, as far as is possible, modifying any other clause or part of this Agreement and this shall not affect any of the other provisions of this Agreement which shall remain in full force and effect.

17.5 Save as otherwise set out in this Agreement, no announcement, circular, advertisement or other publicity in connection with this Agreement or its subject matter shall be made or issued by or on behalf of either Party (save as required by law or any other governmental or regulatory organisation) without the prior written consent of the other Party (such consent not to be unreasonably withheld or delayed).

17.6 This Agreement may only be varied by an agreement in writing signed by or on behalf of each Party to this Agreement.

17.7 Each Party shall do, or procure the doing of, at its own cost, all such further acts and things and execute, or procure the execution of, all such further documents as any other party reasonably considers necessary to give full effect to the terms of this Agreement.

17.8 This Agreement constitutes the entire agreement between the Parties and supersedes and replaces any previous agreement, understanding, undertaking or arrangement of any nature between the Parties relating to the subject matter of this Agreement, save that nothing in this Agreement shall limit or exclude any liability for fraud.

17.9 For the avoidance of doubt, nothing herein contained or implied or done in terms of this Agreement shall prejudice or affect the powers, rights, duties and obligations of the Council or its statutory successors as local authority, planning authority, building control authority, roads authority or similar such authority under or by virtue of any public or local Act, order, statutory instrument, regulation or byelaw or relieve the Company or any EFE Group Company of the necessity of obtaining from the Council or its statutory successors in said capacity all consents, permissions,
warrants or approvals as may be requisite under or by virtue of any such public or local Act or others;

17.10 In the event that the Council receives a request under the Freedom of Information (Scotland) Act 2002 or the Environmental Information (Scotland) Regulations 2004 which relates to the Business it shall notify the Company of that request as soon as reasonably practicable and shall consider and take account of any representations made by the Company in respect of the disclosure of information so requested prior to making a decision on whether to disclose the information. The Council shall not be bound by any representations made by the Company and shall have full discretion to disclose information.

18 Governing Law and Jurisdiction

18.1 The formation, existence, construction, performance, validity and all aspects whatsoever of this Agreement or any term of it (including non-contractual disputes or claims) shall be governed by the law of Scotland.
18.2 The courts of Scotland shall have exclusive jurisdiction to settle any disputes (including non-contractual disputes or claims), which may arise out of or in connection with this Agreement. The parties irrevocably agree to submit to that jurisdiction.

**IN WITNESS WHEREOF** these presents consisting of this agreement and the Schedule consisting of four parts have been subscribed as follows:

For and on behalf of

**ENERGY FOR EDINBURGH LIMITED** acting by:

at ......................................................
on ........................................................

before the following witness:

(Signature) ............................................
(Full Name) ...........................................
(Address) ............................................

Witness .............................................

For and on behalf of

**CITY OF EDINBURGH COUNCIL** acting by:

at ......................................................
on ........................................................

before the following witness:

(Signature) ............................................
(Full Name) ...........................................
(Address) ............................................

Witness .............................................
PART 1 - RESERVED MATTERS

The following are the Reserved Matters referred to in clause 6.1.7 and 6.2:

The Business

1. do anything which shall or is likely to bring the name of the Company or the Council into disrepute.

Property

2. purchase, sell, lease or otherwise deal in heritable property;

Finance

3. make any loan (otherwise than by way of deposit with a bank or other institution the normal business of which includes the acceptance of deposits) or grant any credit (other than in the normal course of trading) or give any guarantee (other than in the normal course of trading) or indemnity other than to any EFE Group Company and only then on the condition that any such loan or credit becomes immediately and automatically repayable on that EFE Group Company ceasing to be an EFE Group Company;

4. borrow any money or other funds other than an overdraft facility in the normal course of business and not exceeding £[  ];

5. grant any Encumbrance over any property, right, interest or asset of the Company;

6. factor or assign any of the book debts of the Company;

Corporate

7. create, allot, issue, grant or agree to grant any option over, acquire, repay or redeem any class of share or loan capital or vary, or agree to vary, the rights of any class of share or loan capital or issue any security convertible into shares or loan capital of the Company;

8. permit the registration of any person as a member of the Company;

9. pass any resolution to wind up the Company (whether solvent or otherwise), the taking of any corporate action, legal proceedings or other procedure or step in relation to the dissolution of the Company, the appointment of a liquidator, receive, administrator, administrative receiver, compulsory manager or similar officer in relation to the Company or any of its assets (in each case, whether out of court or otherwise), save where the Board is advised to do so by a licensed insolvency practitioner;

10. amalgamate or merge with any other company or undertaking;

11. vary or waive in any respect the Articles;

12. change the Company’s accounting reference date from [31 December] in each year;

13. make or permit to be made any material change in the accounting policies and principles adopted by the Company in the preparation of its audited accounts save as may be required to ensure compliance with relevant accounting standards under the Act or any other generally accepted accounting principles in the United Kingdom;
form or establish any company, undertaking, corporate entity (whether a Subsidiary, a Subsidiary Undertaking or otherwise), partnership or joint venture entity, or participate (whether by way of membership or equity) in any of the foregoing;

Contracts

15 enter into any transaction or arrangement of any nature whatsoever (including service agreements) with any of the Directors or any person who is connected (within the meaning of Section 839 of the Income and Corporation Taxes Act 1988) to any of the Directors whether or not any other person shall be party to such transaction or arrangement;

16 enter into any arrangement, contract or transaction outside the normal course of its business or otherwise than on arm’s length terms, with the exception of entering into any arrangement, contract or transaction with any EFE Group Company on the condition that any such arrangement, contract or transaction is immediately and automatically terminated in the event that the counterparty EFE Group Company ceases to be an EFE Group Company;

Pensions

17 establish any pension scheme as an alternative to becoming an admitted body within the Local Government Pension Scheme; and

18 grant any pension rights to any employee, former employee, or any member of any such person’s family.
### PART 2 - SCHEDULE OF NOTIFIABLE INTERESTS

**Clause 6.1.11**

<table>
<thead>
<tr>
<th>Notifiable Interest</th>
<th>Description of Interest</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Remunerated Positions</strong></td>
<td>A description of remunerated positions (but not the remuneration itself) by virtue of being:</td>
</tr>
<tr>
<td>1) employed or self employed</td>
<td></td>
</tr>
<tr>
<td>2) the holder of an office</td>
<td></td>
</tr>
<tr>
<td>3) a director of an undertaking</td>
<td></td>
</tr>
<tr>
<td>4) a partner in a firm; and</td>
<td></td>
</tr>
<tr>
<td>5) involved in undertaking a trade, profession, vocation or any other work</td>
<td></td>
</tr>
<tr>
<td><strong>Non-remunerated Positions</strong></td>
<td>A description of such interests as may be significant to, of relevance to or bear upon, the work or operation of the Company, including, membership of or office in:</td>
</tr>
<tr>
<td>a. public bodies;</td>
<td></td>
</tr>
<tr>
<td>b. clubs, societies and organisations;</td>
<td></td>
</tr>
<tr>
<td>c. trade unions; and</td>
<td></td>
</tr>
<tr>
<td>d. Voluntary organisations</td>
<td></td>
</tr>
<tr>
<td><strong>Contracts</strong></td>
<td>Disclosure of interests (direct, indirect or proposed) in contracts with the Company at a meeting of the directors in accordance with section 182 of the Companies Act 2006</td>
</tr>
<tr>
<td><strong>Houses, land and buildings</strong></td>
<td>A description of any rights of ownership or other interests that may be significant to, of relevance to, or bear upon, the work or operation of the Company</td>
</tr>
<tr>
<td><strong>Shares and securities</strong></td>
<td>Disclosure of interest in shares or debentures of the Company</td>
</tr>
<tr>
<td></td>
<td>Disclosure of interest in shares or securities of any company, undertaking or organisation that may be significant to, or relevance to, or bear upon, the work or operation of the Company</td>
</tr>
<tr>
<td><strong>Third party gifts/hospitality</strong></td>
<td>Disclosure of third party gifts/hospitality in excess of £100 in value.</td>
</tr>
</tbody>
</table>

[Note: In the table above “Company” includes the Company and any EFE Group Company and other terms shall be construed accordingly.]
PART 3 - DIRECTOR’S UNDERTAKING

Clause 3.1.1

To: THE CITY OF EDINBURGH COUNCIL
    Waverley Court
    4 East Market Street
    Edinburgh EH8 8BG;
and ENERGY FOR EDINBURGH LIMITED
    Waverley Court
    4 East Market Street
    Edinburgh EH8 8BG

[DATE]

Dear Sirs

Agreement dated [ ] 2015 between The City of Edinburgh Council (the “Council”) and Energy for Edinburgh Limited (the “Company”) (the “Agreement”)

I confirm that I have been supplied with a copy of the Agreement and the articles of association of the Company (the "Articles") and undertake to the Company and the Council that I will, so far as may be permitted by law and for so long as I remain a director of the Company [and its subsidiaries]:

1. be bound by and comply with the terms and conditions of the Agreement and the Articles [(and the relevant articles of the subsidiaries)];
2. comply with the directors’ duties which apply as a matter of law;
3. do all within my power as a director to ensure that the Company complies with its obligations under the Agreement and the Articles [(and each subsidiary complies with its articles)];
4. make every reasonable effort to attend (whether in person or by telephone or conference facilities) not less than 75% of all Board Meetings every calendar year; and
5. submit all relevant details to the Company for inclusion in the Company’s Schedule of Notifiable Interests.

[In addition, I undertake to the Company that I will attend an induction process and complete any training required by the Company in relation to my role as a Director of the Company [and its subsidiaries] and my fiduciary duties in respect thereof.]

Yours faithfully
Signature
Print Full name

[Note: If, at the time of signing this undertaking, the Company has no subsidiaries, the square bracketed references to subsidiaries should be deleted or scored out.]
PART 4 – ARTICLES

Clause 1.1