

Template Capacity Agreement

TEMPLATE CAPACITY AGREEMENT

This Template Capacity Agreement shall apply to capacity agreements entered into as a result of capacity auctions (main auctions and additional auctions) and capacity agreements entered into as a result of transactions made between capacity providers as part of secondary market trading in the capacity obligation.

The parties to the Capacity Agreement are:

1. **TSO** – the Operator within the meaning of Article 2(27) of the Act

and

2. **Capacity Provider** – the entity (person) named in a certificate issued for the capacity market unit through which the Capacity Obligation is performed in a given delivery period under the Capacity Agreement concluded

and

3. **Settlement Body** – the entity referred to in Article 61(2) of the Act

– hereinafter jointly referred to as “**Parties**”, and individually as “**Party**”.

§ 1

Preliminary provisions

1. The objective of the Capacity Agreement is to specify the scope and terms for the performance of the Capacity Obligation by the **Capacity Provider** for the benefit of the **TSO**, including the price and terms of payment by the **Settlement Body** of the remuneration for the performance of the Capacity Obligation.
2. Unless otherwise defined in this Template Capacity Agreement, the terms used herein shall have the meaning defined in the Capacity Market Rules (hereinafter: the “**Rules**”), whether capitalised or not.
3. “**Capacity market unit covered by the Capacity Agreement**” means a capacity market unit created on the request of the **Capacity Provider** in the main certification for which the **Capacity Provider** has obtained a certificate for a given delivery period, through which the **Capacity Provider** performs the Capacity Obligation arising from the Capacity Agreement concluded (§ 4 of the Template Capacity Agreement).
4. The following shall provide a basis for defining the terms of the concluded Capacity Agreement:
 - 1) the Act, together with implementing regulations to the Act;
 - 2) the Energy Law Act, together with implementing regulations to that Act;
 - 3) the current Rules, including the Template Capacity Agreement forming an appendix to the Rules, approved by decision of the President of ERO;
 - 4) the Register, with regard to entries relating to a capacity market unit covered by the Capacity Agreement.
5. The obligations of the Parties under the concluded Capacity Agreement shall arise from:
 - 1) the provisions the currently applicable Template Capacity Agreement forming an integral part of the Rules;
 - 2) the relevant provisions of the currently applicable Rules approved by decision of the President of ERO;
 - 3) entries in the Register relevant or pertaining to the capacity market unit covered by the Capacity Agreement, including those relating to the content of a certificate issued, results of a capacity auction and transactions made in the secondary market.
6. The Parties shall be required, to the extent relating to the performance of the Capacity Agreement, to comply with the provisions of the legal acts and documents referenced in paragraph 4.

Template Capacity Agreement

7. Any amendments to the Rules, including the Template Capacity Agreement, made after the conclusion of the Capacity Agreement, as well as new Rules, shall apply with no need for an annex to the Capacity Agreement.
8. The **Capacity Provider** shall be required to ensure that the physical unit forming part of the capacity market unit covered by the Capacity Agreement is covered throughout the duration of the Capacity Obligation by a transmission service agreement or an agreement governing the rules for the provision of distribution services.
9. The **Capacity Provider** shall be required to ensure that none of the circumstances referred to in Article 16(2) of the Act arises in relation to any physical unit forming part of the capacity market unit covered by the Capacity Agreement. When assessing the obligation referred to in the preceding sentence, the list of services referred to in Article 16(3) of the Act shall be taken into account, both as applicable in the main certification process for the capacity auction as a result of which the Capacity Agreement was concluded, and as applicable in the Delivery Period.

§ 2

Subject matter of the Capacity Agreement and basic commitments

1. The Capacity Agreement concerns the provision of the Capacity Obligation by the **Capacity Provider** to the **TSO** in the delivery period to which the Capacity Agreement relates, through a capacity market unit established at the request of the **Capacity Provider** in the main certification, for the capacity auction for which the **Capacity Provider** has obtained a certificate, within the scope and on the terms set forth in the Capacity Agreement.
2. The Capacity Obligation shall include:
 - 1) the **Capacity Provider** remaining ready, during the delivery period to which the Capacity Agreement relates, to deliver electrical capacity to the power system through the capacity market unit covered by the Capacity Agreement as specified in the Register on the basis of the results of the capacity auction or entries of transactions made as part of secondary trading in the capacity obligation in the secondary market, and
 - 2) the **Capacity Provider** delivering, during system stress events announced by the **TSO**, electrical capacity to the power system with the use of the capacity market unit covered by the Capacity Agreement, on the terms and in volumes specified in accordance with the Rules.
3. Where the Capacity Obligation arises from the Capacity Agreement concluded as a result of a transaction made as part of secondary trading in the capacity obligation in the secondary market, the Capacity Agreement may concern the performance of the Capacity Obligation in the whole or part of the delivery period, depending on the scope of the Capacity Obligation (defined in terms of time and capacity volume) acquired by the **Capacity Provider** through such transaction.
4. As a result of a transaction made as part of secondary trading in the capacity obligation in the secondary market, the scope of the Capacity Agreement already in force, concluded before such transaction is made, may cover the performance of an additional Capacity Obligation in the whole or part of the delivery period, depending on the scope of the Capacity Obligation (defined in terms of time and capacity volume) acquired by the **Capacity Provider** through such transaction.
5. As a result of a transaction made as part of secondary trading in the capacity obligation in the secondary market, the scope of the Capacity Agreement already in force, concluded before such transaction is made, may cover the performance of the Capacity Obligation in part of the delivery period, depending on the scope of the Capacity Obligation (defined in terms of time and capacity volume) disposed of by the **Capacity Provider** through such transaction.
6. Where and insofar as specified in the Rules, the performance of the Capacity Obligation may relate to more than one delivery period.
7. The Capacity Agreement shall represent:
 - 1) the **Capacity Provider** commitment to perform the Capacity Obligation through the capacity market unit covered by the Capacity Agreement;
 - 2) the **TSO's** commitment to:

Template Capacity Agreement

- a) verify the performance of the Capacity Obligation,
 - b) provide information necessary for the **Capacity Provider** to issue accounting documents providing a basis for payment of remuneration for the performance of the Capacity Obligation,
 - c) set the amount of penalties imposed on the **Capacity Provider** for non-performance of the Capacity Obligation;
- 3) obligation for the **Settlement Body** to pay the **Capacity Provider** remuneration for the performance of the capacity obligation under the concluded Capacity Agreement.

§ 3

Conclusion of the Capacity Agreement

1. The Capacity Agreement shall be concluded upon:
 - 1) announcement by the **TSO** of preliminary results of the auction, under a condition precedent, until the final auction results are announced, referred to in paragraph 3, as set forth in the Act, or
 - 2) the **TSO** entering into the Register a transaction made by the **Capacity Provider** as part of secondary trading in the capacity obligation in the secondary market.
2. The Capacity Agreement shall be effective only if concluded in electronic form.
3. The final results of the capacity auction, setting forth the terms of the capacity agreements concluded, shall be announced by the President of ERO in accordance with Article 39(3) of Act.

§ 4

Designation of the capacity market unit covered by the Capacity Agreement

1. The **Capacity Provider** shall perform the Capacity Obligation through a capacity market unit created in main certification for the capacity auction for which the **Capacity Provider** has obtained a certificate for a given delivery period, and which:
 - 1) has been indicated as a result of the capacity auction in accordance with Article 38(1) and Article 39(3) of the Act, or
 - 2) has been included in the Register entry of a transaction made as part of secondary trading in the capacity obligation in the secondary market.
2. Identification data of the capacity market unit covered by the Capacity Agreement shall be entered in the Register.
3. Identification data of the capacity market unit covered by the Capacity Agreement shall be stated in the Confirmation of Conclusion of Capacity Agreement (§ 15 of the Template Capacity Agreement).

§ 5

Duration of the Capacity Obligation

1. The duration of the Capacity Obligation shall cover one or more delivery periods assigned to the capacity market unit covered by the Capacity Agreement, specified:
 - 1) as a result of the capacity auction in accordance with Article 38(1) and Article 39(3) of the Act, as a result of which the Capacity Agreement has been concluded, or
 - 2) in the Register entry of a transaction made as part of secondary trading in the capacity obligation in the secondary market – subject to the provisions of § 2(3)-(5) of the Template Capacity Agreement.
2. The duration of the Capacity Obligation shall be reduced to one delivery year in the cases referred to in Article 46(2) and (3) of the Act.
3. The duration of the Capacity Obligation shall also be reduced in the case referred to in Article 46(4) of the Act.

Template Capacity Agreement

4. Reduction of the duration of the Capacity Obligation in the cases referred to in paragraphs 2 and 3 shall take place by operation of law, with no need for the **TSO** to give an additional notice. Reduction of the Capacity Obligation shall be entered by the **TSO** into the register.
5. The duration of the Capacity Obligation covered by the Capacity Agreement concluded shall be stated in the Confirmation of Conclusion of Capacity Agreement (§ 15 of the Template Capacity Agreement).

§ 6

Manner of performing the Capacity Obligation

The manner of performing the Capacity Obligation is defined by the provisions of the Rules, taking into account the content of the certificate and the content of the entries in the Register relating to the capacity market unit covered by the Capacity Agreement.

§ 7

Remuneration for the performance of the Capacity Obligation

1. The net price providing a basis for calculation of the remuneration due to the **Capacity Provider** for the performance of the Capacity Obligation in a given delivery period shall be set forth in the results of the capacity auction that has covered the Capacity Obligation being performed under the Capacity Agreement concluded, subject to Article 60(4) and Article 62(2) of the Act.
2. The net price providing a basis for calculation of the remuneration due to the **Capacity Provider**, referred to in paragraph 1, shall be stated in the Confirmation of Conclusion of Capacity Agreement (§ 15 of the Template Capacity Agreement).
3. Remuneration due to the **Capacity Provider** for the performance of the Capacity Obligation for a given settlement period shall be set on the terms and in the manner set forth in the Rules.
4. The terms of payment of remuneration and circulation of accounting documents related to the determination of remuneration due are set forth in the Rules.
5. Payment of remuneration due to the **Capacity Provider** for the performance of the Capacity Obligation shall be the responsibility of the **Settlement Body**.
6. Payment of a specific remuneration amount to the **Capacity Provider** by the **Settlement Body** for the performance of the Capacity Obligation shall be made on the basis of a written payment order delivered by the **TSO** to the **Settlement Body**, for a specific amount of remuneration for the performance of the Capacity Obligation (the payment order should contain a summary of gross amounts due to the **Capacity Provider** for a given settlement period). The payment order shall take into account deductions from remuneration which the **TSO** is authorised to make.
7. Under the Act, the **Capacity Provider** shall be eligible for a bonus in the amount determined as set forth in the Act.

§ 8

Penalty for non-performance of the Capacity Obligation

1. The **Capacity Provider** who has failed to performed the Capacity Obligation in a system stress event, or in a test system stress event, shall pay penalty to the **TSO**.
2. The **Capacity Provider** shall pay penalty to the **TSO** also in the case the Substantial Completion Milestone (SCM) is not achieved before the commencement of the delivery period.
3. The method of calculating the amount of penalties for the non-performance of the Capacity Obligation and for failure to achieve the Substantial Completion Milestone (SCM) prior to the commencement of the delivery period, as well as the manner and procedure for payment of the penalties, including the terms of payment and circulation of related accounting documents, are set forth in the Rules.

Template Capacity Agreement

§ 9

Collateral retention rules

Retention by the **TSO** of collateral established by the **Capacity Provider** who has obtained a provisory certificate shall take place in the cases and in the manner set forth in the Rules and the Act.

§ 10

Rules for monitoring the progress of investment for a capacity market unit covered by the Capacity Agreement

The monitoring of the progress of investment for a capacity market unit covered by the Capacity Agreement or its refurbishment, including the achievement of the Financial Commitment Milestone or Substantial Completion Milestone, shall be as set forth in the Rules.

§ 11

Carrying out the demand side response performance test

1. **The Capacity Provider** shall be required to carry out, for an unproven demand side response capacity market unit covered by the Capacity Agreement, the demand side response performance test, no later than one month before the commencement of the delivery period.
2. The detailed conditions and manner of carrying out the demand side response performance test are set forth in the Rules.

§ 12

Conditions for termination of the Capacity Agreement

1. The **TSO** shall have the right to terminate the Agreement by immediate notice in the following cases:
 - 1) final revocation by the President of ERO of the licence granted to the **TSO**, necessary for the conclusion and performance of the Capacity Agreement, or the expiry of the period for which the licence has been granted, or the loss of the **TSO's** status of electricity transmission system operator, unless the **TSO** has acquired the status of interconnected electricity transmission system operator;
 - 2) the imposition of penalties on the **Capacity Provider** for the non-performance of the Capacity Obligation, referred to in § 8(1) of the Model Capacity Agreement, up to their maximum amount determined in accordance with Article 59(4) of the Act, where, in a system stress event or a test system stress event following the imposition of the maximum amount of the penalties in a given delivery year, the **Capacity Provider** has again: (i) performed the Capacity Obligation representing less than 70% of the Adjusted Capacity Obligation of a given capacity market unit covered by the Capacity Agreement, taking into account any reallocation of volume, or (ii) completed the test system stress event with a negative result, as the case may be;
 - 3) the **Capacity Provider's** failure to establish new collateral (collateral for a subsequent period) within the time limit stipulated by the regulation issued under Article 51(1) of the Act, and where such time limit has not been specified in the regulation – within the time limit set forth in the Rules;
 - 4) the **TSO** finding the **Capacity Provider** to have breached the obligation referred to in § 1(9) of the Template Capacity Agreement.
2. The **Capacity Provider** shall have the right to terminate the Capacity Agreement by immediate notice if the **Capacity Provider** does not receive remuneration from the **Settlement Body** for the performance of the Capacity Obligation for at least three full settlement periods, having previously requested the **Settlement Body** to pay the amount due and having allowed the **Settlement Body** a fourteen-day period within which to do so, to no avail. A copy of the request for payment served on the **Settlement Body** shall be immediately transmitted by the **Capacity Provider** to the **TSO** through the Register.

Template Capacity Agreement

3. The **Capacity Provider** shall have the right to terminate the Capacity Agreement by notice on the terms set forth in the Rules (Section 2.3.4 of the Rules) in the case of an amendment to the Rules relating to the manner and conditions for the performance of the Capacity Agreement or adoption of new Rules if this results in a change in the manner or conditions for the performance of the Capacity Agreement.
4. Notwithstanding the provisions of the preceding paragraphs, the **TSO** and the **Capacity Provider** shall have the right to terminate the Capacity Agreement by immediate notice in the event of default under the Capacity Agreement by the other Party, which default has not been remedied by the defaulting Party within 21 calendar days of the date of receipt of a written notice from the other Party seeking to exercise its right to terminate the Capacity Agreement, containing:
 - 1) identification of the cause of termination of the Capacity Agreement;
 - 2) description of significant details of the default;
 - 3) a demand to remedy such defaults.
5. The Capacity Agreement shall be terminated without either Party having to give a notice of termination of the Capacity Agreement in the event the Capacity Obligation covered by the Capacity Agreement is transferred by the **Capacity Provider** to another capacity provider, on the basis of a transaction entered into the Register, made as part of secondary trading in the capacity obligation in the secondary market, in its entirety and for the whole remaining delivery period under the Capacity Agreement.
6. Notwithstanding the provisions of the Capacity Agreement, including the Rules, the Capacity Agreement shall be terminated by operation of law in the cases specified in the Act, without either Party having to give a notice of termination of the Capacity Agreement.
7. Despite termination of the Capacity Agreement, settlement obligations arising both from the Capacity Agreement and from the Act, relating to the performance of the Capacity Obligation during the period prior to the date of termination of the Capacity Agreement, shall remain in effect.
8. Notices by the **TSO** and the **Capacity Provider** arising from this Section shall be effective only if made in writing, in accordance with general rules of representation, and such notices shall be deemed given when delivered to the other Parties. The effect in the form of termination of the Agreement shall arise upon delivery of the notice of termination of the Agreement to the last of the Parties.

§ 13

Liability of the Parties for non-performance or incorrect performance of the Capacity Agreement

1. Liability of the Parties for non-performance or incorrect performance of the Capacity Agreement shall be based on the general rules of the Civil Code, save that:
 - 1) liability for lost profits is excluded, which means that each of the Parties may seek remedy only to the extent of actual loss;
 - 2) the liability limit for each Party corresponds to the amount of three times the highest gross monthly remuneration of the **Capacity Provider** in a given delivery year.
2. If the Capacity Agreement covers more than one delivery year, the liability limit referred to in paragraph 1(2) above shall be increased each year of performance of the Capacity Obligation by the amount determined in accordance with paragraph 1(2) for each subsequent delivery year in which the **Capacity Provider** performed the Capacity Obligation, up to the maximum of the amount representing 25% of the total gross remuneration due to the **Capacity Provider** for the performance of the Capacity Obligation.
3. The provisions of paragraphs 1 and 2 shall not limit the **Capacity Provider's** liability in respect of statutory penalties for failure to perform the Capacity Obligation; in particular any penalties imposed shall not be included in the limit referred to in paragraph 1(2) and paragraph 2, and consequently the limit referred to in paragraph 1(2) and paragraph 2 shall not be included in the penalty limit.

Template Capacity Agreement

4. The provisions of paragraph 1 and 2 shall not limit the **Settlement Body's** liability for payment of remuneration for the performance of the Capacity Obligation.
5. The exclusion and limitation of liability referred to in paragraphs 1 and 2 shall not apply to liability for damage caused through wilful misconduct, liability for damage that may not be excluded or limited by a legal transaction, and liability for damage resulting from an act in tort.
6. The **TSO** shall not be liable for non-performance or incorrect performance of its obligations in a situation where it demonstrates that this was caused by a sudden, unforeseeable event beyond the **TSO's** control, the effects of which could not have been prevented or counteracted with the exercise of due care.
7. The **Settlement Body** shall not be liable for non-performance or incorrect performance of its obligations in a situation where it demonstrates that this was caused by a sudden, unforeseeable event beyond the **Settlement Body's** control, the effects of which could not have been prevented or counteracted with the exercise of due care.
8. An event of force majeure shall provide a basis for exclusion of the **Capacity Provider's** liability for non-performance of the Capacity Obligation only in the case referred to in Article 58(4)(2) of the Act.
9. In the case there are multiple entities (persons) on the **Capacity Provider's** side, their liability under the Capacity Agreement shall be joint and several.

§ 14

Extraordinary change in circumstances

The Parties preclude the possibility of applying Article 357¹ of the Civil Code to the extent to which that provision allows for the possibility of specifying the manner of performance of an obligation or the amount of performance.

§ 15

Confirmation of Conclusion of Capacity Agreement

1. Confirmation of Conclusion of Capacity Agreement (hereinafter: "**CCCA**") shall specify the scope and content of commitments under the Capacity Agreement, taking into account changes taking part after its conclusion.
2. The CCCA shall not be of itself a source of any rights and obligations between the Parties, nor shall it establish any legal relationship with third parties.
3. If any discrepancies are found between the content of the CCCA and relevant entries in the Register, the entries in the Register shall prevail.
4. Each Party to the Capacity Agreement may independently generate (download) the CCCA in electronic form from the CCCA Register from the moment the Capacity Agreement is concluded.

§ 16

Amendment of the Agreement

1. Subject to the provision of paragraph 3, any amendment to the provisions of the Capacity Agreement may be made only through amendment of the Rules, including the amendment of the Template Capacity Agreement forming an integral part of the Rules, and through the adoption of new Rules, without having to execute an annex. Any amendments to the Rules shall be made as set forth in the Rules. Amendments to the Rules, as well as the adoption of new Rules, may not cause a change in the net price of the Capacity Obligation, a change in the duration of the Capacity Obligation, a change in the Capacity Obligation volume set forth in the Capacity Obligation, and they may not introduce any contractual penalties for the non-performance or incorrect performance of the Capacity Agreement, which are not provided for at the date of entering into the Capacity Agreement.
2. The date of entry into force of amendments to the Capacity Agreement resulting from amendment of the Rules or adoption of new Rules shall result from the date of entry into force of an amendment to the Rules or new Rules. An amendment to the Capacity Agreement resulting from an amendment to the Rules or the adoption of new Rules shall be binding upon the Parties insofar as the **Capacity**

Template Capacity Agreement

Provider has not given a notice of termination of the Capacity Agreement in accordance with § 12(3) of the Template Capacity Agreement.

3. A change in the volume of the Capacity Obligation covered by the Capacity Agreement may result from transactions made by the **Capacity Provider** as part of secondary trading in the capacity obligation in the secondary market and in the case referred to in Article 53(5) of the Act. Transactions made by the **Capacity Provider** as part of secondary trading in the capacity obligation in the secondary market may also result in a change in the duration of the Capacity Obligation under the Capacity Agreement.
4. No individual arrangements between the Parties concerning an amendment to a concluded Capacity Agreement shall be allowed.

§ 17

Restriction of the permissibility of transferring the Capacity Obligation

To the exclusion of transactions made by **Capacity Provider** as part of secondary trading in the capacity obligation in the secondary market, described in the Act and the Rules, any transfer of the Capacity Obligation by the **Capacity Provider** to third parties shall be excluded.

§ 18

Final provisions

1. Information provided in connection with the performance of the Capacity Agreement shall be subject to protection in accordance with the provisions of the Act and the provisions of the Rules.
2. Should any disputes arise in connection with the performance or application of the Capacity Agreement, the disputing Parties shall seek to clarify the same through *bona fide* negotiations.
3. If negotiations of the disputing Parties fail to lead to resolution of the dispute within 30 calendar days of notification of the dispute to the other Party, each of the disputing Parties may, after the expiry of the period, refer the case to a common court having jurisdiction over the registered office of the **TSO**.
4. The provisions of paragraph 2 and 3 shall not apply to disputes resolved by the President of ERO.
5. The arising or existence of a dispute concerning the performance of the Capacity Agreement shall not relieve the Parties of the obligation to perform the Capacity Agreement.
6. The Capacity Agreement is drawn up in Polish.
7. The Capacity Agreement shall be governed by the laws of Poland.
8. Failure by either Party to exercise any rights under the Capacity Agreement shall not be construed as waiver of such rights in the future.
9. This Capacity Agreement is concluded for a fixed term running from its execution and shall apply until the last day of the delivery period covered by the Capacity Agreement, and where the Capacity Obligation established as a result of a transaction made as part of secondary trading in the capacity obligation in the secondary market expires before the end of the delivery period – until that date, with the proviso that in spite of the expiry of the term hereof, obligations arising both from the Capacity Obligation and from the Act with regard to settlements in respect of the performance of the Capacity Obligation for the period ending at the date of expiry of the term of the Capacity Agreement.
10. No change of the capacity provider for the capacity market unit covered by the Capacity Agreement shall be possible.