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KSK Energy Limited
St. James Court, Suite 308
St. Denis Street, Port-Louis
Republic of Mauritius,
Tel: (230) 211 6242
Fax: (230) 211 7489

2nd December 2009

भारतीय प्रतिभूति और विनिमय बोर्ड,
Securities and Exchange Board of India,
सेबी भवन / SEBI Bhavan
03 DEC 2009
अंतर्वस्तु सत्यापित नहीं की/Contents Not Verified
हस्ताक्षर/Signature:......................
समय/Time..............................

The General Manager,
Corporate Finance Department
Division of Corporate restructuring,
M/s. Securities and Exchange Board of India,
SEBI Bhavan, Plot No. C4-A,
"G" Block, Bandra Kurla Complex,
Bandra (E), Mumbai- 400 051.

Dear Sirs,

Sub: Application seeking "Interpretive Letter" under the SEBI (Informal Guidance) Scheme, 2003 seeking Interpretation of:

(a) Regulation 14(2) read with Regulation 11(1) of SEBI (Substantial Acquisition of Shares & Takeovers) Regulations, 1997;

(b) Regulation 13(3) of the SEBI (Prohibition of Insider Trading) Regulations, 1992;

The Applicant is the promoter of KSK Energy Ventures Limited ("Target Company"). The Target Company is incorporated in India and its equity shares are listed on the Bombay and National Stock Exchanges of India. The Applicant is a fully owned subsidiary of KSK Power Ventur Plc and is a person acting in concert with the Applicant as regards the Target Company.

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St. Denis Street, Port-Louis
Republic of Mauritius,
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Fax: (230) 211 7489

On the date of this application, the Applicant holds 191,222,031 equity shares equivalent to 51.32% of the voting rights in the Target Company. The Applicant is proposing to enter into Supplementary Development Agreement with certain member companies of the Lehman Brothers Group ("LB Group") providing for, amongst other things, the Applicant's holding company's entitlement to Right of First Refusal ("ROFR") with respect to the equity shares of a Mauritius company that is a member company of the LB Group ("Mauritian Holding Company") that holds voting rights in the Target Company, at a fixed price, upon exercise of such Right and Completion. It is in this context that this Application is being filed seeking interpretation on when the Applicant and Persons acting in concert with the Applicant are deemed to acquire shares/voting rights within the SEBI Regulations-specifically (a) when the Supplementary Development agreement is being entered into and the initial Deposit is made in pursuance thereof or (b) when the Right is exercised in entirety resulting in actual acquisition of shares/voting rights directly or indirectly. The background, the material facts and circumstances and the applicable legal provisions are set out below:

I. **Background to the Application**:

1. As principal shareholders of the Target Company, on 20.1.2008, the Applicant entered into a Voting Rights Agreement with LB Group. Subsequently, in June 2008, the Target Company made an Initial Public Offer of shares and listed its shares on the Indian stock exchanges. The equity shares of the Target Company are presently listed in the National Stock Exchange and Bombay Stock Exchange. On the date of this Application, LB Group holds approximately around 20% of the voting rights of the Target Company. The subsisting Voting Rights Agreement provides for Right of First

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Offer in favour of the Applicant in the event LB Group seeks to divest its shares in the Target Company

2. The ultimate parent company of the LB Group i.e. Lehman Brothers Holdings Inc. is currently in bankruptcy proceedings in United States of America. In order to enable an orderly liquidation of LB Group's holding in the Target Company shares and to ensure that such disposal of the shares does not (i) result in any abnormal fluctuations in the share price of the Target Company on the stock exchanges on which it is listed in India and (ii) affect any further capital raising program of the Target Company, the Applicant and LB Group have been discussing of methods to redefine their relationship.

3. LB Group have recently agreed for a contractual non-statutory lock up in respect of 45,580,537 equity shares equivalent to 12.23% of Voting Rights and this has been disclosed to the stock exchanges by the Target Company. The lock up is for 24 months and would lapse on 28th October 2011.

4. As part of such arrangement, the Applicant and LB Group are contemplating amending a section of the Voting Rights Agreement and are now proposing to enter into a Supplementary Development Agreement, which grants the Applicant a Right of First Refusal (as against an earlier granted Right of First Offer) to acquire interest, wholly or in multiple parts, 100% of a Mauritius Holding Company that is a member of the LB Group that would have interest in 24,227,330 equity shares of the Target Company at a fixed price. Thus, if and when the completion occurs under the Supplementary Development Agreement, the Applicant or Applicant's Holding Company would have undertaken an indirect acquisition of 24,227,330 equity shares

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in the Target Company equivalent to 6.50% of the Voting Rights, which would be held by such holding company.

5. The Target Company has ongoing capital requirements and the members of the Target Company have recently passed multiple resolutions under Sec. 81(1A) of the Companies Act to issue and allot further equity shares to persons other than its shareholders either by way of GDR/ADR/ FCCBs. Further, the Target Company has also been authorized by a special resolution of the members by way of postal ballot to allot further equity shares to QIBs under Qualified Institutional Placement in terms of the applicable resolutions. The resolutions are subsisting and would enable the Target Company, in addition to recent allotments, to make further allotment of equity shares resulting in dilution of its equity shareholders and associated Voting rights.

II. **Proposed Agreement and Transaction**:

6. The major terms of the proposed Supplementary Development Agreement are as under:

   (a) The Voting Rights Agreement between the parties shall stand amended in accordance with the Supplementary Development Agreement;

   (b) The Applicant's Holding company would be granted a ROFR, which it may exercise in whole or part, or may nominate an Affiliate or nominee to acquire the equity shares of Mauritian Holding Company or the underlying Shares of the Target Company, as may be applicable;

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(c) The Applicant's Holding Company would have the Right and not an obligation to compulsorily acquire the entire equity shares of Mauritian Holding Company, which would own 24,227,330 shares equivalent to 6.50% of the outstanding shares in the Target Company at a fixed price. The Right is to be exercised on or before 31st January 2011.

(d) Under the Supplementary Development Agreement, the ROFR would become effective on payment of an initial deposit of approx USD 9 million.

(e) When the Applicant's Holding Company exercises the Right in entirety, the transaction would be completed by acquisition of the entire equity capital of the Mauritian Holding Company and consequently indirectly acquiring interest in 24,227,330 shares of the Target Company.

(f) In the event of the Applicant's Holding Company not exercising the Right on or before 31st January 2011, LB Group shall have the right to cause the Mauritian Holding Company to sell the underlying 24,227,330 shares of the Target Company. In such an event, the Applicant's Holding Company shall be liable to pay damages, if any suffered by the LB Group which would be a liquidated sum equivalent to the difference between the amount realized on sale of the underlying equity shares of the Target Company and the total purchase consideration as per the proposed Supplementary Development Arrangement in the event the Right is exercised. Thus as consequence, if the LB Group does not suffer any damage the agreement would come to an end with no consequence to both the parties.

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(g) During the subsistence of the Supplementary Development Agreement, LB Group would cause the Mauritian Holding Company to keep the underlying shares of the Target Company in an Escrow Account and the LB Group would not be entitled to deal with the same. However, the Voting rights on the shares of the Target Company would remain with LB Group.

(h) The Parties to the Agreement are off shore Companies and the Supplementary Development Agreement, which is in respect of acquiring the shares of the certain LB Group Mauritian company situated in the Republic of Mauritius and are typically governed by the laws of England with respect to various contracts.

III. **Interpretation Sought**:

7. At the time of entering into the Supplementary Development Agreement, there is uncertainty on the acquisition of shares/voting rights as there is no legal obligation on the Applicant's Holding Company to complete the acquisition of shares/voting rights. In this light, the question that arises (for which the Interpretive Letter is sought) is when the acquisition of the shares/voting rights or the agreement to acquire shares/voting rights is deemed to be complete and consequently trigger the provisions of the SEBI (Substantial Acquisition of Shares & Takeovers) Regulations, 1997 ("Takeover Code") relating to disclosure and Public Announcement and the provisions of the SEBI (Prohibition of Insider Trading) Regulations, 1992 ("SEBI Insider Trading Regulations") relating to disclosure. The Applicant seeks the Interpretive Letter on the following issues:

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(a) Whether execution of the proposed Supplementary Development Agreement or the payment of an initial Deposit in pursuance of the Supplementary Development Agreement by the Applicant's Holding Company to secure a ROFR right could be construed as acquisition of shares/voting rights (or) the acquisition is completed only upon payment of the consideration on Completion and the consequent indirect acquisition of shares/voting rights of the company

(b) Whether the Applicant would be obliged to comply with the provisions relating to disclosure and Public Announcement under the Takeover Code in the light of Reg. 11(1) read with Reg. 14(2) at the time of execution of the Supplementary Development Agreement when there is uncertainty on the final acquisition of shares/voting rights (**or**) the compliance of the said provisions are triggered only when the Right is exercised by the Applicant resulting in actual acquisition of shares/voting rights;

(c) Similarly, whether the Applicant is bound to make disclosure in terms of Reg. 13(3) of the SEBI Insider Trading Regulations at the time of execution of the Supplementary Development Agreement when there is uncertainty on the final acquisition of shares/voting rights (**or**) the provisions are triggered only when the Right is exercised by the Applicant resulting in actual acquisition of shares/voting rights;

8. It is required to be stated that in case the Target Company allots further equity shares during the period between the entering of the Supplementary Development

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St. James Court, Suite 308
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Agreement and the exercise of the Right under the said agreement, the percentage of shares proposed to be acquired by the Applicant as per the Supplementary Development Agreement could be less than the prescribed percentage and the disclosure requirements as well the Public Announcement requirements under the Takeover Code as well as the SEBI Insider Trading Regulations may not be applicable.

IV. **Applicable legal provisions**

Takeover Code:

9. Regulation 11(1) states as follows:

*"No acquirer who together with persons acting in concert with him has acquired, in accordance with the provisions of law, 15% or more but less than 55% of the shares or voting rights in a company, shall acquire, either by himself or through or with persons acting in concert with him, **additional shares or voting rights entitling him to exercise more than 5% of the voting rights**, in any financial year ending on 31st March, unless such acquirer makes a public announcement to acquire shares in accordance with the Regulations"*

Further "acquirer" has been defined by these regulations to mean any person who, directly or indirectly, acquires or agrees to acquire shares or voting rights in the target company, or acquires or agrees to acquire control over the target company, either by himself or with any person acting in concert with the acquirer

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10. Regulation 14(1) and Reg. 14(2) of the Takeover Code:

> *"(1) The public announcement referred to in Regulation 10 or Regulation 11 shall be made by the merchant banker not later than four working days of entering into an agreement for acquisition of shares or voting rights or deciding to acquire shares or voting rights exceeding the respective percentage specified therein:"*
>
> *"(2) In case of an acquirer acquiring securities, including Global Depositories Receipts or American Depository Receipts which, when taken together with the voting rights, if any already held by him or persons acting in concert with him, would entitle him to voting rights, exceeding the percentage specified in Regulation 10 or Regulation 11, the public announcement referred to in sub-regulation (1) shall be made not later than four working days **before he acquires voting rights on such securities upon conversion, or exercise of option, as the case may be.**"*

SEBI Insider Trading Regulations:

11. Regulation 13(3) of the SEBI Insider Trading Regulations:

> *"Any person who holds more than 5 per cent shares or voting rights in any listed company shall disclose to the company in Form C the number of shares or voting rights held and change in shareholding or voting rights, even if such change results in shareholding falling below 5 per cent, if there has been change in such holdings from the last disclosure made under sub-regulation (1) or under this*

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sub-regulation and such change exceeds 2 per cent of total shareholding or voting rights in the company."

V. **Analysis of the Applicable Provisions:**

12. A plain reading of the Regulation 11(1) of the Takeover Code makes it clear that the provision gets triggered when the Acquirer acquires "*additional shares or voting rights entitling him to exercise more than 5% of the voting rights*". At the time of entering into the Supplementary Development Agreement, the Applicant merely gets the Right which if and when exercised would enable it to acquire shares/voting rights. Prior to exercising the Right, the Supplementary Development Agreement does not confer on the Applicant any voting rights or any rights as a shareholder in respect of the equity shares of the Target Company held by LB group. The Applicant would indirectly acquire the additional shares/voting rights only when it exercises the Right under the Supplementary Development Agreement and pays the applicable consideration.

13. Under Reg. 14(1) of the Takeover Code, Public Announcement is to be made "*not later than four working days of entering into an Agreement for acquisition of shares or voting rights or deciding to acquire shares or voting rights exceeding the respective percentage specified*". Under Reg. 14(2) of the Takeover Code, Public Announcement is to be made not later than four working days before the Applicant "*acquires voting rights on such conversion or exercise of option, as the case may be*".

14. A combined reading of Reg. 11(1) with Reg. 14(1) or Reg. 14(2) would show that the Acquirer would be obliged and the said provisions get triggered only when the

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Acquirer acquired additional shares/voting rights or enters into an agreement to acquire shares/voting rights. In the case of the proposed Supplementary Development Agreement, there is no acquisition of additional shares/voting rights at the time of execution of the Supplementary Development Agreement. Only the exercise of the Right results in indirect acquisition of the shares/voting rights in the Target Company. Similarly, only when the Right is exercised, the Applicant decides to acquire shares/voting rights. So long as the Supplementary Development Agreement subsists, the Applicant is enabled to decide to acquire shares/voting rights.

15. The failure to exercise the Right may result in a liability of damages to the Applicant. However, the LB Group is not legally entitled to compel the Applicant to exercise the Right or to acquire the shares/voting rights. In the event, the LB Group does not suffer damages, the agreement comes to an end with no consequence to the parties. This Supplementary Development Agreement is merely an extension of the Right of first offer available under the Voting Rights Agreement. The only addition is that it enables the Applicant to seek to acquire the shares at a fixed price and LB Group could choose to sell the shares only upon lapse of the ROFR Right and expiry of the period of ROFR i.e after 31st January 2011.

16. It would be relevant to refer to the judgment of the Honourable Securities Appellate Tribunal in the case of Sohel Malik v. SEBI (SAT – Mum) reported in 90 SEBI & Corp Laws 238 and Arun Kumar V. SEBI (SAT- Mum) reported in 91 SEBI & Corp Laws 340. In both the cases, the issues were of warrants issued by the Companies concerned to the promoter and the question was when does the provisions of the Takeover Code gets triggered. The SAT came to the conclusion that the Takeover Code would get triggered only at the time of exercise of the rights under the warrants

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and not when the warrants were allotted in the first place. The relevant portion of the judgment in Sohel Malik case is extracted hereunder:

"We have already taken the view that the Regulations are triggered only with the acquisition of voting rights which did not take place when the warrants were issued. Voting rights were acquired only when shares were actually allotted. It is true that information about issue of warrants became public with the holding of the BoD meeting of 16-12-2006 but that cannot be taken as information about issue of shares. The issue of shares was contingent on the warrant holder exercising the option to convert the warrants and cannot be taken as a mere formality. It was, in fact, an event quite distinct from the issue of warrants."

Even though, in the present case it is an Supplementary Development Agreement amongst the shareholders and not an option or warrant issued by the Target Company, the rationale applicable to the warrants would apply to the options under the Supplementary Development Agreement.

17. Another aspect that needs to brought to the attention is the offer price for the public announcement under the Takeover Code. Being an indirect acquisition through acquisition of the Mauritian Holding Company, the determination of the price paid by the Acquirer for the underlying listed shares of the Target Company would have to take into account the other assets and liabilities of the Mauritian Holding Company, which are also acquired by the Acquirer. The other assets and liabilities that would be assumed by the Acquirer would be the assets and liabilities of the Mauritian Holding Company on completion. Hence, the other assets and liabilities of the Mauritian Holding Company can be reckoned only on the date of completion of the acquisition

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of the shares of Mauritian Holding Company and not at the time of entering into the Supplementary Development Agreement. The determination of the price paid by the acquirer for the underlying shares of the target Company is essential to determine the minimum price payable for the public offer, if any, under the Takeover code in terms of Regulation 20 (4) and (5). Therefore the applicant humbly submits that the negotiated price can be determined only if and when the right is exercised and acquisition is completed and definitely not at the time of the execution of the Supplementary development Agreement.

18. Hence, the Applicant submits that the compliance, if any of the Takeover Code would arise only when the Applicant seeks to exercise the Rights under the Supplementary Development Agreement and not at the time of execution of the Supplementary Development Agreement.

19. However the Applicant is approaching the Department of SEBI concerned as it is not in a position to face the consequences of an alternate view. The Applicant is not in a position to comply with the provisions relating to Public Announcement and make a public offer to acquire 20% of the outstanding shares of the Target Company. In the event the opinion of the Department is contrary to its view, the Applicant would choose to acquire such number of shares or such percentage holding in the Mauritius Holding Company that would not trigger the Takeover Code and approach an unconnected third party to acquire the balance by nominating them.

20. As regards Reg. 13(3) of the SEBI Insider Trading Regulations, the disclosure requirement would arise only when there is a change in shareholding or voting rights exceeding 2% of the total shareholding or voting rights as regards a person who

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Republic of Mauritius,
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Fax: (230) 211 7489

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already holds more than 5% of the voting rights. No doubt, the Applicant holds more than 5%. However, the execution of the Supplementary Development Agreement does not result in change in shareholding or voting rights. The change would occur only when the Right is exercised. Hence, the Applicant submits that the compliance, if any of Reg. 13(3) of the SEBI Insider Trading Regulations would arise only when the Applicant seeks to exercise the Right under the Supplementary Development Agreement and not at the time of execution of the Supplementary Development Agreement or payment of the initial Deposit thereto.

VI. **Request for confidentiality:**

21. The Applicant requests that in terms of Para 11 of the SEBI (Informal Guidance) Scheme the application may be given confidentiality. Since, the proposed transaction is in respect of listed shares and since it involves a significant percentage of the outstanding shares and that too relating to acquisition by promoters, it is likely to affect the price and volume of trading. Further, the proposed transaction is contingent on the informal guidance that is being sought. Hence, the Applicant requests that this request as well as your response be kept confidential in terms of the Scheme and not made available to the public.

VII. **Prayer**:

In the facts and circumstances and in the light of the analysis of the applicable legal provisions set out above, the Applicant prays that the Department of SEBI may be pleased to issue an Interpretive Letter confirming that the compliance, if any of the

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Takeover Code and the SEBI Insider Trading Regulations would arise only at the time of exercise of the Right under the Supplementary Development Agreement.

We hereby enclose a Demand Draft for an amount of Rs 25,000/- in favour of Securities Exchange Board of India towards the prescribed fee.

We request you to kindly provide us the guidance on the aforesaid at the earliest. The Applicant would be pleased to submit any further information or clarification that may be required and / or nominate its Indian counsel to meet with you in person, as maybe required

Thanking you,
Yours sincerely,
For KSK Energy Limited,

Director
Fung Kong Yune Kim
Tel: +230-2116242
Fax: +230-2117489
Email: fitco@intnet.mu