



Tonga

ELECTRICITY ACT

Chapter 32.12

2016 Revised Edition



ELECTRICITY ACT

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Tonga

ELECTRICITY ACT

AN ACT TO REFORM THE REGULATION OF THE ELECTRICITY SECTOR THROUGHOUT THE KINGDOM AND MATTERS RELATED THERETO¹

Commencement [2]

PART I - PRELIMINARY

1 Short title and commencement

- (1) This Act may be cited as the Electricity Act.
- (2) This Act shall come into force on a day to be proclaimed by his Majesty in Council.

2 Interpretation

In this Act, unless the context otherwise requires —

“**assets**” means any real or personal property of any kind, and includes —

- (a) any estate or interest in any land, including all rights of occupation of and access to land or buildings;
- (b) all physical assets, and any rights therein; and
- (c) all rights of any kind, including a right under an Act, deed, agreement or licence;

“**back up generation**” means the generating of electricity by any person for use in or on that person’s property during a temporary stoppage of electricity supply from a concessionaire;

“**Board**” means the Tonga Electric Power Board, established under the Electric Power Board Act;³

“**Board property**” means —

- (a) each asset and liability of the Board; and
- (b) each contract, agreement, conveyance, deed, lease, licence, or other instrument or undertaking to which the Board is a party;

“**body corporate**” means an entity having perpetual succession which is recognised in the jurisdiction of its incorporation as having legal personality distinct and separate from its members;

“**Chairman**” means the Chairman of the Commission appointed in accordance with section 6;

“**Commission**” means the Electricity Commission established under section 3(1);

“**concession contract**” means a contract entered into under section 20;

“**concessionaire**” means the party contracting with the Commission on the terms of a concession contract entered into under section 20;

“**electricity**” means all electricity except electricity generated from a renewable energy source which has not been converted to alternate current;⁴

“**electricity business**” means the generation, distribution and supply of electricity in the Kingdom;

“**group company**” for the purposes of section 24 of the Act means, in relation to a concessionaire, a wholly owned subsidiary of that concessionaire, and for the purposes of section 27(4) of this Act means, in relation to a public enterprise, a wholly owned subsidiary of that public enterprise;

“**island group**” means any one of Tongatapu, Vava’u, Ha’apai, ‘Eua, Niuatoputapu and Niuafo’ou;⁵

“**liabilities**” includes liabilities and obligations under any Act, deed, agreement, or licence;

“**Minister**” means the Minister of Finance, or any other Minister appointed to perform the functions of Minister under this Act;⁶

“**physical assets**” means the electricity network and all fittings related thereto (including all generators), buildings, vehicles, plant, equipment and machinery;

“**public enterprise**” means a company incorporated under the Companies Act, which is wholly owned by the Kingdom and has been established as a public enterprise under the Public Enterprises Act;⁷

“**renewable energy**” means any form of energy that is not derived from fossil fuels and specifically excludes energy from petroleum products and energy from coal products;⁸

“**self-generate**” means generating a supply of electricity to meet the needs of the party responsible for the generation on any on-going basis; and “self-generation” has a corresponding meaning;

“**value**” means, for the purposes of section 23(1)(b), the sum that would be charged by the concessionaire to the body corporate for the supply by the concessionaire to the body corporate of the quantity of electricity generated by the body corporate.

PART II - THE ELECTRICITY COMMISSION

3 Electricity Commission

- (1) The Electricity Commission is hereby established.
- (2) The Commission shall be a body corporate with perpetual succession and a common seal.
- (3) The Commission shall be capable of suing and being sued, and, in the exercise of its functions and powers under this Act, it may acquire, hold and dispose of real and personal property and do and suffer all such acts and things as bodies corporate may do and suffer.
- (4) Except as expressly provided otherwise in this Act, the Commission shall act independently in performing its statutory functions and duties under this Act.

4 Functions

The Commission shall have the following functions, to —

- (a) take enforcement actions under this Act or any regulations made under this Act;
- (b) carry out all activities required by the terms of a concession contract;
- (c) carry out all activities necessary or desirable for the licensing of electricians;
- (d) develop and recommend regulations establishing standards for electrical safety;
- (e) develop and recommend regulations establishing powers for a concessionaire (in addition to those set out in the concession contract) for the purpose of performing any obligation under a concession contract or undertaking any work pursuant to a concession contract;

- (f) develop and recommend regulations establishing requirements for major electrical work, including maintenance or protection of submarine cables;
- (g) do all things necessary for the performance of its functions and the exercise of its powers under this Act or otherwise as it is entitled to do under, or as required by, this Act.

5 Powers

- (1) Subject to subsection (2), the Commission shall have the following powers, to —
 - (a) take enforcement action for any breach of a concession contract or permit;
 - (b) enforce its rights under a concession contract;
 - (c) do all things necessary to enforce any regulations made under this Act;
 - (d) do all things necessary to enforce any offences provided for in this Act; and
 - (e) do all the things it is entitled to do under this Act, any concession contract and any regulations made under section 21.
- (2) The Commission shall not exercise any power or take any action where to do so would be inconsistent with the terms of a concession contract.

6 Membership of Commission⁹

- (1) The Commission shall consist of not less than 3 and not more than 5 members.
- (2) The members of the Commission shall be appointed by Cabinet on the recommendation of the Minister.
- (3) One member shall be appointed as Chairman of the Commission.
- (4) No person shall be recommended for appointment as a member of the Commission unless, in the opinion of the Minister, that person is qualified for appointment, having regard to the functions and powers of the Commission, by virtue of that person's knowledge of or experience in industry, commerce, economics, law, accountancy, public administration, or consumer affairs.
- (5) Members of the Commission may be appointed on a part-time or full-time basis.
- (6) The powers of the Commission shall not be affected by any vacancy in its membership, or by any deficiency in the appointment of any member.
- (7) Subject to section 9, every member of the Commission shall hold office for such term, not exceeding 3 years as Cabinet shall specify in that member's instrument of appointment, but may from time to time be reappointed.

7 Remuneration¹⁰

There shall be paid to the members of the Commission such remuneration by way of fees, salary, wages, or allowances as may from time to time be fixed, either generally or in respect of any particular member or members, by the Minister with the consent of the Cabinet.

8 Acting Chairman

- (1) Where the Chairman becomes incapable of acting by reason of illness, absence, or other sufficient cause or during any vacancy in the office of Chairman, or if the Chairman considers it not proper or desirable to adjudicate personally on any specified matter, the members of the Commission shall, by resolution, appoint one of their number to act for the Chairman for the period or purpose stated in the appointment.
- (2) Any member of the Commission appointed to act for the Chairman shall, while acting as such, be deemed to be the Chairman, and shall have and may exercise all the powers, functions, and duties of that office for the period or for the purpose stated in the appointment.
- (3) No appointment of a member of the Commission to the office of Chairman and no act done by that member as such, and no act done by the Commission while any member is acting as such, shall in any proceedings be questioned on the ground that the occasion for the appointment had not arisen or had ceased.

9 Termination of membership

- (1) The Minister may only terminate the appointment of a member of the Commission for inability to perform the functions of the office, bankruptcy, neglect of duty, misconduct, or failure to comply with any disclosure of interests requirements under this Act.
- (2) Any member may resign his office by notice in writing to the Minister.
- (3) Notwithstanding that the term of office of a member has expired or that a member has resigned that office, that person shall be deemed to continue as a member for the purpose of completing the determination of any matter before that person, as a member, which was commenced before the expiration of the term of office or before the resignation took effect, as the case may be.

10 Disclosure of interests

- (1) If the Chairman is taking part, or is to take part, in the consideration or determination by the Commission of a matter that relates to or affects a business or body corporate in which the Chairman has an interest that, in accordance with the rules of natural justice, disqualifies, or would disqualify,

the Chairman from taking part in the consideration or determination of that matter —

- (a) the Chairman shall disclose that interest to the Minister in writing; and
 - (b) the Chairman shall not continue to take part, or take part, in the consideration or determination of the matter.
- (2) If a member of the Commission is taking part, or is to take part, in the consideration or determination by the Commission of a matter that relates to or affects a business or body corporate in which that member has an interest that, in accordance with the rules of natural justice, disqualifies, or would disqualify, the member from taking part in the consideration or determination of that matter —
- (a) the member shall disclose that interest to the Chairman; and
 - (b) the member shall not continue to take part, or take part, in the consideration or determination of the matter.

11 Meetings

- (1) Subject to this section, the Chairman shall convene such meetings of the Commission as the Chairman thinks necessary for the efficient performance of the powers of the Commission under this Act.
- (2) Meetings of the Commission shall be held at the places, dates, and times, and by the methods, that the Chairman determines.
- (3) A meeting of the Commission may be held either —
 - (a) by a quorum of members being assembled together at the place, date, and time appointed for the meeting; or
 - (b) by means of audio, or audio and visual, communication by which a quorum of members can simultaneously hear each other throughout the meeting.
- (4) The Chairman shall preside at every meeting of the Commission, unless absent from that meeting.
- (5) At any meeting of the Commission the quorum shall be 3 members. If a quorum is not present within 30 minutes after the time appointed for the meeting then —
 - (a) the meeting is adjourned to the next working day at the same place and time;
 - (b) at any such reconvened meeting of the Commission the quorum shall be 2 members; and
 - (c) if a quorum is not present within 30 minutes after the time appointed for the reconvened meeting, the meeting is dissolved.
- (6) All questions arising at any meeting of the Commission shall be determined by a majority of votes of the members present and voting.

- (7) The Chairman shall have a deliberative vote and, in the event of an equality of votes, shall also have a casting vote.
- (8) Subject to the provisions of this Act, the Chairman may give directions regarding the procedure to be followed at or in connection with any meeting of the Commission.

12 Determinations

A determination in writing signed, or assented to in writing, by all the members of the Commission necessary to constitute a quorum shall be as valid and effectual as if it had been made at a meeting of the Commission duly called and constituted by those members.

13 Employees

- (1) The Commission may from time to time appoint such employees as it thinks necessary for the efficient performance and exercise of its functions and powers, and, subject to subsection (2), may at any time remove any employee from office or employment.
- (2) Employees appointed under subsection (1) shall be employed on such terms and conditions of employment and shall be paid such salaries and allowances as the Commission from time to time determines.

14 Bank accounts

- (1) The Commission shall open at any bank or banks such accounts as are necessary for the exercise of its functions and powers.
- (2) All money received by the Commission, or by any officer or employee of the Commission on behalf of the Commission, shall, as soon as practicable after it has been received, be paid into such bank account of the Commission as the Commission from time to time determines.
- (3) The withdrawal or payment of money from any such account shall be authorised by a prior resolution of the Commission, or shall be submitted to the Commission for confirmation at its first ordinary meeting after the date of payment.
- (4) The withdrawal or payment of money from any such account shall be by cheque signed by such person or persons as the Commission may from time to time authorise.

15 Accounts and audit

- (1) The Commission shall keep full and correct accounts of all its financial transactions, assets, liabilities, and funds.

- (2) The financial year of the Commission shall end with the 30th day of June.
- (3) At the end of each financial year, the Commission shall prepare an income and expenditure account showing its financial transactions for that year, together with a balance sheet as at the last day of the financial year.
- (4) The Commission shall, no later than 4 months after the end of each financial year, submit its income and expenditure account and balance sheet to the Audit Office for audit.
- (5) The Commission shall, no later than 6 months after the end of the financial year, lay a copy of the audited accounts of the Commission, together with the report of the Audit Office thereon, before the Legislative Assembly.
- (6) The Commission may incorporate a copy of the audited accounts of the Commission, together with the report of the Audit Office thereon, in the annual report of the Commission prepared under section 16.

16 Annual report

- (1) The Commission shall, no later than 6 months after the end of each financial year, furnish to the Minister a report of its operations during that year.
- (2) A copy of the Report shall be laid before the Legislative Assembly.

17 Regulatory fees and other levies

- (1) Every concessionaire shall pay to the Commission any regulatory fees imposed under, and in accordance with, the terms of the concession contract.
- (2) Any failure by a concessionaire to pay regulatory fees in accordance with the concession contract shall be recoverable in any court as a debt due to the Commission.
- (3) The amount of any unpaid fee, charge or levy is recoverable in any court as a debt due to the Commission.

18 Transfer of property

- (1) At the commencement of this Act but subject to subsections (2), (3) and (4), all of the Board property shall transfer to the Commission.
- (2) Notwithstanding subsection (1), the Commission may, by notice in writing to the Minister not later than 28 days after the date of commencement of this Act, disclaim any Board property (or any category thereof) transferred to the Commission under subsection (1) and —
 - (a) the transfer under subsection (1) of any Board property so disclaimed shall be of no effect ; and

- (b) the Board property so disclaimed shall be deemed never to have transferred from the Board to the Commission.
- (3) Notwithstanding subsection (1), any Board property which is cash (including any cash reserves of the Board) shall transfer to the Kingdom.
- (4) The provisions of subsection (1) shall not apply to any lease of land where the Board is the lessee and the lease relates to land used by the assets operator and which the asset operator intends to transfer its rights in relation to that land, to the public enterprise pursuant to section 26.
- (5) The provisions of the Second Schedule and any regulations made under section 21 shall apply to any Board property transferred under subsection (1) that has not been disclaimed under subsection (2).

PART III - ELECTRICITY CONCESSIONS

19 Prohibition on generating or selling electricity

- (1) Subject to subsection (2), no person may generate, distribute or supply electricity except under the authority, and subject to the provisions, of a concession contract entered into under section 20.
- (2) This Part III and, in particular but without limitation, the prohibition in subsection (1), shall not apply to —
 - (a) back up generation;
 - (b) self generation; or
 - (c) any generation, distribution or supply of electricity for the purpose of supplying electricity to a concessionaire.¹¹

20 Concession contracts

- (1) The Commission may enter into a concession contract permitting a concessionaire to generate, distribute and supply electricity.
- (2) Without limiting subsection (1), the Minister may, on behalf of the Kingdom, be a party to any concession contract under subsection (1) or (3) which confers rights or imposes obligations on the Kingdom.
- (3) Notwithstanding subsection (1), the Minister may after the date of commencement of this Act, direct the Commission to enter into a concession contract for the supply of electricity in Tongatapu, Vava’u, Ha’apai and ‘Eua. If any such direction is given, then —
 - (a) the direction shall specify the terms of the concession contract;

- (b) the Commission shall offer to the concessionaire specified in the direction the right to enter into the concession contract on the terms specified in the direction;
 - (c) the Commission shall, if the concessionaire specified in the direction accepts the offer made under subsection (3)(b), enter into the concession contract on the terms specified in the direction; and
 - (d) the concession contract entered into pursuant to the direction is binding on the Commission, and is enforceable as if it were a contract that was freely and voluntarily entered into by the Commission.
- (4) The Minister may only exercise the power under section 20(3) in relation to the first concession contract entered into after the date of commencement of this Act.
 - (5) A concession contract entered into under either subsection (1) or (3) shall conform to the requirements of the First Schedule.
 - (6) Other than in relation to back up generation and self generation, a concession contract may grant a concessionaire exclusive rights to generate electricity, distribute electricity and supply electricity, or any combination of the three.
 - (7) Any penalties provided in a concession contract will be enforceable according to the terms of the concession contract.
 - (8) Every concession contract shall be made publicly available by the Commission in a manner prescribed by regulation.

PART IV - REGULATIONS

21 Regulations

- (1) Subject to subsection (2), the Minister may, with the consent of Cabinet, make regulations for —
 - (a) licensing of electricians, including the establishment of offences and penalties;
 - (b) electrical safety, including in relation to back up generation and self generation, and including the establishment of offences and penalties;
 - (c) powers of the Commission, including for the purpose of carrying out any of the functions of the Commission;
 - (d) powers and rights of a concessionaire, including creation of easements and rights of access in favour of a concessionaire for the purpose of performing any obligation under a concession contract or any regulations, or undertaking any work pursuant to a concession contract or any regulations, and any entitlement to, and the method for

- determining, any compensation payable to any person in respect of any such easement or rights of access in favour of a concessionaire;
- (e) requirements for major electrical work, including maintenance or protection of submarine cables, provided any such electrical work is not inconsistent with a concession contract;
 - (f) fees, charges or levies payable by any person (other than a concessionaire) to the Commission which reflect the actual or estimated costs of the performance or exercise by the Commission of any of the Commission's functions, powers and duties under this Act or any regulations made under this Act that do not relate to the performance of the Commission's functions, powers and duties under a concession contract;
 - (g) levies payable by any person (other than a concessionaire) to the Commission which reflect the actual or estimated costs of the performance or exercise by the Commission of any of the Commission's functions, powers or duties under a concession contract and, without limiting the foregoing, any such regulations —
 - (i) may authorise and require a concessionaire to collect on behalf of the Commission any such levies;
 - (ii) may prescribe the manner in which such levies are to be calculated, collected and paid to the Commission; and
 - (iii) shall, if those regulations authorise and require a concessionaire to collect such levies on behalf of the Commission —
 - A require the concessionaire to set out the details of any such levies (including the amount thereof and a statement that they are payable to the Commission) in any invoice by a concessionaire to any person by whom such levies are payable to the extent that it is reasonably practical for the concessionaire to do so, having regard to the functionality of the concessionaire's invoicing systems; and
 - B exclude any liability for the concessionaire if any person by whom such levies are payable fails to pay any such levies;
 - (h) the manner in which every concession contract is to be made publicly available under section 20(8);
 - (i) the transfer of Board property to the Commission under section 18;
 - (j) any transfer of the asset operator's electricity business or Board property under section 26; or
 - (k) the demarcation point between a concessionaire's electricity network and the electrical works, fittings and other installations for which a purchaser of electricity from a concessionaire is responsible;
 - (l) requiring any person carrying on, or proposing to carry on, back up generation or self generation to provide to the Commission, at such

- times as required by the Commission, information relating to the method of generation, use and amount of electricity generated, or any other information relating to back up generation or self generation as the Commission may reasonably require;
- (m) the right of the Commission, or its nominees, to enter on the property of any person carrying on, or proposing to carry on, back up generation or self generation, for the purpose of assessing whether the person is in compliance with this Act and any regulations made under it.
- (2) The Minister shall not make any regulation which would be inconsistent with the terms of a concession contract.

22 Existing rights preserved

Notwithstanding any other provision of this Act and the repeal under this Act of the Electric Power Board Act but subject to any regulations made under section 21 of this Act —

- (a) any easements or rights of access existing under the Electric Power Board Act prior to the date of commencement of this Act;
- (b) any tunnels constructed under, or aqueducts or flumes constructed over, any land pursuant to the Electric Power Board Act prior to the date of commencement of this Act;
- (c) any poles erected on, and any wires carried over, any land pursuant to the Electric Power Board Act prior to the date of commencement of this Act; and
- (d) any machinery and materials used in the construction or repair of any such electric works stored on any land pursuant to the Electric Power Board Act prior to the date of commencement of this Act,

shall be deemed to be authorised for the purposes of, and to the extent required by, this Act and a concessionaire shall continue to enjoy such access rights and easements, to be entitled to have constructed or erected such electric works and to store such machinery and materials as if granted, constructed, erected or stored pursuant to regulations made under section 21 of this Act.

PART V - OFFENCES

23 Offences

- (1) Any person who contravenes section 19 of this Act commits an offence and shall be liable upon conviction —
- (a) in the case of a person other than a body corporate, for each offence to a fine not exceeding \$1,000;

- (b) in the case of a body corporate, to a fine not exceeding three times the value of the electricity generated in contravention of section 19 (such quantum of electricity generated to be reasonably estimated by the Commission).
- (2) An information for an offence against this section may be laid at any time within two years from the time when the subject matter of the information arose.
- (3) If the Commission becomes aware (whether by notification by a concessionaire or otherwise) that there are reasonable grounds to suspect a person has committed an offence under subsection (1), then —
- (a) the Commission shall promptly investigate the alleged offence; and
- (b) if the Commission is satisfied on reasonable grounds that there is a case to answer, the Commission shall promptly take such action as is appropriate to prevent a continued contravention of section 19.
- (4) Without limiting the rights and obligations of the Commission under this section 23, if —
- (a) a concessionaire has reasonable grounds to suspect a person has committed an offence under subsection (1); and
- (b) that concessionaire is adversely affected by the suspected contravention of section 19 by that person,
- that concessionaire shall be entitled to seek injunctive relief to prevent a continued suspected contravention of section 19.

PART VI - SECURITY OF SUPPLY

24 Security of supply

- (1) The physical assets owned by a concessionaire that are used for the generation or supply of electricity may not be removed from the Kingdom without the permission of the Minister if such removal would, either individually or cumulatively with any other removals, cause a concessionaire to be unable to meet any service obligations under a concession contract.
- (2) Subject to subsection (3), the physical assets owned by a person other than a concessionaire that are used for the generation or supply of electricity may be removed from the Kingdom without the permission of the Minister unless such removal would have a material detrimental effect on the security of supply for an island group.¹²
- (3) The physical assets owned by Meridian Energy Limited or any subsidiary (as that term is defined in the Companies Act 1993 (New Zealand), but includes any body corporate of any jurisdiction) of Meridian Energy Limited that are used for the generation or supply of electricity may be removed from the

Kingdom without the permission of the Minister unless those assets generated 10 per cent or more of the total electricity generated in an island group in the most recent calendar year.¹³

- (4) Ownership of the physical assets owned by a concessionaire that are used for the generation or supply of electricity in the Kingdom may not be transferred unless —
- (a) the transferee is a party to, or is a group company of a party to, a concession contract entered into under this Act;
 - (b) the transferee is the Kingdom or a nominee of the Kingdom; or
 - (c) the particular asset or assets being transferred are not material to the continuity or security of electricity supply in the Kingdom.¹⁴

PART VII - TRANSITIONAL MATTERS

25 Interpretation

In this Part VII “asset operator” means Shoreline Property Limited and its subsidiaries.

26 Title in electricity business assets

- (1) If at any time a public enterprise accepts a transfer of the electricity business operated by the asset operator from the asset operator, then subject to the terms of that transfer the public enterprise shall have title to the assets of the asset operator’s electricity business, and the title of the public enterprise in those assets may not be challenged.
- (2) If at any time a public enterprise accepts a transfer of any Board property that is a lease of property to the Board and which is intended to transfer to a public enterprise in accordance with the terms of any agreement between the public enterprise and the asset operator, then subject to the terms of that transfer, the public enterprise shall acquire the property in accordance with the provisions of this Act.
- (3) The Second Schedule and any regulations made under section 21 shall apply to a transfer under subsection (1) or subsection (2).

27 Kingdom’s power to enter into arrangements and assume liabilities and undertakings

- (1) The Kingdom may, for the purpose of facilitating either or both of the following —

- (a) the transfer of the electricity business operated by the asset operator from the asset operator to a public enterprise;
- (b) the entry by the Minister, on behalf of the Kingdom, into a concession contract permitting a concessionaire to generate, distribute and supply electricity,

enter into any such arrangements, make any such payments and assume any such liabilities and undertakings as the Kingdom deems necessary or desirable for the purposes of facilitating the matters referred to above.

- (2) Subject only to subsection (3), to the extent (if any) that any arrangement entered into, any payment made or any liability or undertaking assumed, pursuant to subsection (1) would require authorisation or approval under the Public Finance Management Act,¹⁵ such arrangement, liability or undertaking shall be deemed to be authorised or approved for the purposes of, and to the extent required by, the Public Finance Management Act.
- (3) The Minister shall report any arrangement entered into, any payment made or any liability or undertaking assumed, pursuant to subsection (1) to the Legislative Assembly—
 - (a) within 28 days from the date that the arrangement was entered into, or the date on which the liability or undertaking was assumed; or
 - (b) if the Legislative Assembly is not in session, at the commencement of the next session.
- (4) Nothing in this Act shall preclude a public enterprise that takes a transfer of the electricity business operated by the asset operator, from issuing shares or other security interests in the public enterprise, or any group company of that public enterprise, to members of the public.

28 Stamp duty, consumption tax

No stamp duty nor consumption tax shall be payable on the transfer of the electricity business operated by the asset operator from the asset operator to a public enterprise.

PART VIII – CUSTOMS DUTIES¹⁶

29 Customs duties

All plant, machinery, mechanical appliances, iron and steel works, cement, concrete, engines, boilers, dynamos, motors, generator sets, conductor cable, transformers, poles, insulators, inverters, photovoltaic modules, metering equipment and all materials, apparatus and equipment (including related parts) of any kind whatsoever imported into the Kingdom by, or on behalf of, a concessionaire or a person carrying on an activity referred to in section 19(2)(c), and in either case imported into the

Kingdom for the purpose of generating, distributing or supplying electricity in the Kingdom, shall be free of all customs duties, excise duties and any other taxes imposed by any Act in relation to the importation of those goods.

FIRST SCHEDULE**REQUIREMENTS FOR CONCESSION CONTRACTS****1 Interpretation**

In this Schedule, “tariff” means the sum that is charged to electricity consumers for supply of electricity.

2 First period

A concession contract shall provide for —

- (a) an opening tariff that, at the commencement of a concession contract, is expected to allow a concessionaire to recover not more than the expected reasonable costs (including an allowance for agreed return on capital and any efficiency gains on an agreed basis) of providing the service required by the service standards during the period prior to the first periodic review under a concession contract;
- (b) an adjustment mechanism that will allow for the tariff to be adjusted between periodic reviews to reflect —
 - (i) changes in fuel costs; and
 - (ii) inflation in the Kingdom;
- (c) service standards for the period prior to the first periodic review under a concession contract that reflect —
 - (i) the standards of a reasonably efficient operator; and
 - (ii) the tariff allowed under the concession contract;
- (d) penalties that are to be imposed on a concessionaire for breaches of service standards under a concession contract.

3 Periodic review

- (1) A concession contract shall include provisions that provide for a review, after a number of years to be identified in the concession contract, of the tariff, the appropriateness of the methodology of the adjustment mechanism, service standards and penalties.
- (2) The provisions under subparagraph (1) shall require the Commission —
 - (a) to procure expert advice on the appropriate tariff, adjustment mechanism, service standards and penalties for the next review period; and

- (b) to undertake public consultation on the appropriate tariff, adjustment mechanism, service standards and penalties.
- (3) The provisions under subparagraph (1) shall require —
 - (a) that the tariff and adjustment mechanism set at each review reflect the likely reasonable costs of service (and, if appropriate, provide a mechanism for pass through of certain costs); and
 - (b) that the service standards for the next review period reflect —
 - (i) the standards of a reasonably efficient operator; and
 - (ii) the tariff allowed for that review period under the concession contract.

4 Extraordinary circumstances

A concession contract shall include provisions allowing for an adjustment of the tariff in the event of extraordinary circumstances.

5 Termination

A concession contract shall provide for the circumstances in which the Kingdom or a concessionaire can terminate the concession contract, and an adequate protection of the interests of the Kingdom and a concessionaire on termination.

6 Other terms

A concession contract may provide for any other reasonable terms.

SECOND SCHEDULE**TRANSFER OF ASSETS AND LIABILITIES**

The following shall apply to any transfer under section 18 or section 26 of this Act —

PART I - TRANSFER OF ASSETS AND LIABILITIES TO THE COMMISSION**1 Interpretation**

In this Schedule, “asset operator” has the same meaning as in Part VII of this Act.

2 Commission substituted for the Board

Subject to clause 3 of this Schedule, upon transfer to the Commission of any contract, agreement, conveyance, deed, lease, licence, or other instrument or undertaking to which the Board is a party, then, to the extent appropriate to the thing transferred —

- (a) the Commission, instead of the Board, is to be treated as the person by whom the contract, agreement, conveyance, deed, instrument, or undertaking was entered into or made or given; and
- (b) to the extent that the relevant contract, agreement, conveyance, deed, lease, instrument, or undertaking was previously binding on and enforceable by, against, or in favour of, the Board, it becomes binding on and enforceable by, against, or in favour of the Commission.

3 Effect of transfer

Nothing effected or authorised by a transfer under section 18(1) of the Act —

- (a) may be regarded as placing the Board or the Commission, or any other person, in breach of contract, deed or confidence or as otherwise making any of them liable of a civil wrong;
- (b) may be regarded as giving rise to a right for any person to terminate or cancel a contract, deed or arrangement, or to accelerate the performance of any obligation;
- (c) may be regarded as placing the Board or the Commission, or any other person, in breach of an enactment, rule of law, or contractual provision

- prohibiting, restricting, or regulating the assignment or transfer of property or the disclosure of information;
- (d) releases a surety wholly or in part from any obligation; or
 - (e) invalidates or discharges any contract, agreement, conveyance, deed, lease, instrument, or undertaking.

PART II - TRANSFER OF ELECTRICITY BUSINESS TO A PUBLIC ENTERPRISE

4 Public enterprise substituted

- (1) Where the asset operator transfers to a public enterprise under section 26(1) of this Act any contract, agreement, conveyance, deed, lease, licence, or other instrument or undertaking to which the asset operator is a party, then, to the extent provided for under the agreement between the asset operator and the public enterprise relating to such transfer and to the extent appropriate to the thing transferred —
 - (a) the public enterprise, instead of the asset operator, is to be treated as the person by whom the contract, agreement, conveyance, deed, instrument, or undertaking was entered into or made or given; and
 - (b) to the extent that the relevant contract, agreement, conveyance, deed, lease, instrument, or undertaking was previously binding on and enforceable by, against, or in favour of, the asset operator, it becomes binding on and enforceable by, against, or in favour of, the public enterprise.
- (2) Where the Board transfers to a public enterprise under section 26(2) of this Act Board property that is a lease of property to the Board, then, to the extent provided for under the agreement between the asset operator and the public enterprise relating to such transfer and to the extent appropriate to the thing transferred —
 - (a) the public enterprise, instead of the Board, is to be treated as lessee of the property and the person by whom the lease was entered into; and
 - (b) to the extent that the relevant lease was previously binding on and enforceable by, against, or in favour of, the Board, it becomes binding on and enforceable by, against, or in favour of, the public enterprise.

5 Effect of transfer

Nothing effected or authorised by a transfer under sections 26(1) or 26(2) of this Act —

- (a) may be regarded as placing the asset operator or the public enterprise, or any other person, in breach of contract, deed or confidence or as otherwise making any of them liable of a civil wrong;
- (b) may be regarded as giving rise to a right for any person to terminate or cancel a contract, deed or arrangement, or to accelerate the performance of any obligation;
- (c) may be regarded as placing the asset operator or the public enterprise, or any other person, in breach of an enactment, rule of law, or contractual provision prohibiting, restricting, or regulating the assignment or transfer of property or the disclosure of information;
- (d) releases a surety wholly or in part from any obligation;
- (e) invalidates or discharges any contract, agreement, conveyance, deed, lease, instrument, or undertaking.

PART III - MISCELLANEOUS

6 Registration of transfers

Where the transfer of any asset or liability under this Act (including under this Schedule) is registrable, the person responsible for keeping the register shall register the transfer forthwith after written notice of the transfer is received by him or her from any person authorised for this purpose.

7 Interests in land

For the avoidance of doubt, assets that are transferred under this Act (including under this Schedule) that are fixed to, or under or over, any land may be transferred whether or not any interest in the land is also transferred. Where such asset is so transferred, the asset and the land shall be regarded as separate assets each capable of separate ownership.

ENDNOTES

¹ **Act 11 of 2007**, See GS 30/2008

Amending Acts	Commencement
Act 9 of 2008	2 June 2009
Act 37 of 2010	30 September 2010
Act 42 of 2010	24 November 2010

² No commencement proclamation found at the date of the preparation of this revised edition

³ former Cap. 93 of the 1988 Edition – repealed by Act 12 of 2007

⁴ Inserted by Act 9 of 2008

⁵ Inserted by Act 37 of 2010

⁶ Amended by Act 42 of 2010

⁷ Cap. 32.09

⁸ Inserted by Act 9 of 2008

⁹ Amended by Act 42 of 2010

¹⁰ Amended by Act 42 of 2010

¹¹ Inserted by Act 37 of 2010

¹² Inserted by Act 37 of 2010

¹³ Inserted by Act 37 of 2010

¹⁴ Amended by Act 37 of 2010

¹⁵ Cap. 04.32

¹⁶ Inserted by Act 37 of 2010