
THE SECOND ELECTRICITY CONCESSION CONTRACT

I

The AGREEMENT

The First Electricity Concession Contract came into force on 25th July 2008. This Second Electricity Concession Contract which replaces it will come into force on 1st September 2015.

TABLE OF CONTENTS

PARTIES AND BACKGROUND	4
1 SCOPE OF CONCESSION	5
1.1 Concession	
1.2 Back up generation	
1.3 Self generation	
1.4 Distributed Generation	
1.5 Concession Contract	
2 COMING INTO FORCE	6
3 SUBSIDY BY KINGDOM	6
4 DISPUTES	6
5 TERMINATION	6
5.1 Termination by the Concessionaire	
5.2 Termination by the Kingdom	
5.3 Commission cannot terminate	
5.4 Obligations upon receipt of a Termination Notice	
5.5 Termination of Agreement upon transfer	
5.6 No waiver of rights	
5.7 Survival	
6 FORCE MAJEURE	8
6.1 Force Majeure	
6.2 Obligations upon Force Majeure Event	
7 PUBLIC DISCLOSURE	9
7.1 Concession Contracts to be Publicly Available	
7.2 Commission to make other information Publicly Available	
7.3 Grounds for withholding information	

8	MISCELLANEOUS TERMS	10
8.1	Amendments	
8.2	Governing Law	
8.3	Severability	
8.4	Counterparts	
8.5	No Waiver	
8.6	Schedules	
8.7	Notices	
8.8	Remedies	
8.9	Assignment	
8.10	Language of Agreement	
8.11	Costs	
8.12	Further Assurances	
	SCHEDULE 1 : OPERATION OF ELECTRICITY BUSINESS ON TERMINATION	15
	SCHEDULE 2 : EXIT SALE PROCESS	17
	SCHEDULE 3 : DETERMINATION OF TERMINATION VALUE	20
	SCHEDULE 4 : DEFINITIONS AND CONSTRUCTION	24
	SCHEDULE 5 : DISPUTES	39

Effective Date : 1st September 2015

PARTIES

1. TONGA POWER LIMITED *(the Concessionaire)*

and

2. THE ELECTRICITY COMMISSION *(the Commission)*

and

3. THE KINGDOM OF TONGA *(the Kingdom)*

INASMUCH AS

- A.** The Electricity Act 2007 (the Act) regulates the Generation, Distribution and Supply of electricity in the Kingdom of Tonga :
- B.** Section 20(1) of the Act enables the Commission to enter into a Concession Contract (*Contract*) permitting the Concessionaire to Generate, Distribute and Supply electricity in the Kingdom :
- C.** Section 20(2) of the Act enables the Minister of Finance on behalf of the Kingdom to be a party to the Contract to the extent only that it confers rights or imposes obligations upon the Kingdom; and
- D.** The Parties hereto are desirous of entering into this Contract pursuant to Section 20 of the Act and to record herein the nature and extent of their agreement.

NOW THEREFORE the Parties hereto have agreed and do hereby agree as follows, namely : -

1. SCOPE OF CONCESSION

1.1 Concession

- (a) Pursuant to Section 20(1) of the Act the Commission grants to the Concessionaire without limit of time a concession to generate, distribute and supply for sale to their customers electricity on each of the Island Groups of the Kingdom subject always to the terms of the Contract.
- (b) Subject to Clauses 1.2 and 1.3 hereof the Commission shall not permit any other person to generate, distribute and supply for sale to customers of the Concessionaire electricity on each of the Island Groups of the Kingdom without the prior consent in writing of the Concessionaire.
- (c) This Contract does not prevent the Concessionaire from purchasing, nor require the Concessionaire to purchase, electricity from any third party.

1.2 Back up Generation

The Concessionaire acknowledges that third parties may provide for their own use Back Up Generation of Electricity.

1.3 Self Generation

The Concessionaire acknowledges that third parties may Generate electricity for their own use.

1.4 Distributed Generation

With the agreement in writing of the Commission, the Concessionaire may acquire electricity generated by third parties.

1.5 Concession Contract

This Concession Contract (*Contract*) comprises two separate documents : -

- (a) a document entitled the Agreement which incorporates *inter alia* all the matters encompassed by Section 20(2) of the Electricity Act 2007 (*the Act*) and which Agreement shall remain in force from 1st September 2015 and thereafter without limit of time at least for so long as the Concessionaire remains an enterprise wholly or partially owned by the Kingdom of Tonga; and

- (b) a separate document entitled the Regulatory Addendum (*the Addendum*) which encompasses the regulatory arrangements entered into between the Concessionaire and the Commission and which Addendum shall remain in full force and effect from 1st September 2015 until 30th June 2020 when it shall be replaced by a new Addendum as provided for in the Reset provisions of this Addendum.

2. COMING INTO FORCE

The Effective date for the coming into force of this Contract (being its component two documents) is 1st September 2015. This Contract replaces the First Electricity Concession Contract dated 25th July 2008.

3 SUBSIDY BY KINGDOM

If the Kingdom, having consulted with the Concessionaire, determines that the Kingdom is to subsidise the Regulated Tariff payable by any Customer or Customer Class, or by Customers generally:

- 3.1 the Concessionaire will deduct, from the amount payable on the relevant Customer invoices, the amount of the agreed subsidy (and will, to the extent to which this is reasonably possible, show this deduction as a “Government Subsidy” on the Customer Invoices); and
- 3.2 the Kingdom will pay to the Concessionaire the amount deducted under Clause 3.1, on or before the due date for payment by the relevant Customer(s) of each invoice from which the deduction is made, or within 20 Business Days after receipt by the Kingdom from the Concessionaire of a statement showing the amount payable by the Kingdom (whichever is the later).

4. DISPUTES

Any dispute between the parties to this Agreement arising therefrom shall be resolved in accordance with Schedule 5 hereof.

5. TERMINATION

5.1 Termination by the Concessionaire

Subject to this Clause 5, the Concessionaire may terminate the Concession by notice in writing (*a Termination Notice*) if the Kingdom or the Commission commits an Event of Default.

5.2 Termination by the Kingdom

Subject to this Clause 5, the Kingdom may terminate the Concession by notice in writing (*a Termination Notice*):

- (a) at any time, if the Concessionaire is Insolvent;
- (b) at any time, if the Concessionaire commits an Event of Default and:
 - (i) the Kingdom has given a notice to the Concessionaire (a Default Notice) specifying the Event of Default and requiring that it be remedied within such period as may be specified in the Default Notice (which period must be not less than 20 Business Days following the date of receipt by the Concessionaire of the Default Notice), and the Concessionaire has failed to remedy the Event of Default in accordance with the terms of the Default Notice; and
 - (ii) a Termination Notice given under this Clause 5.2 is given within 3 months after the deadline for remedy specified in a Default Notice has ended; or
- (c) at any time, within 3 months of the occurrence of a Sustained Material Breach by the Concessionaire; and
- (d) if a Force Majeure Event has occurred and resulted in non-performance of the obligations of the Concessionaire under this Current for a period of six months, and a Termination Notice given under this Clause 5.2 is given within 10 Business Days after the end of the six month period.

5.3 Commission cannot terminate

The Commission has no right to terminate the Concession, notwithstanding any rule of law to the contrary.

5.4 Termination by Consent of all Parties

Subject to this Clause 5, the Concession may be terminated by the consent in writing of all the parties hereto. The Kingdom shall thereupon issue a Termination Notice.

5.5 Obligations upon receipt of a Termination Notice

- (a) During the period following receipt of a Termination Notice, given in accordance with Clause 5.1 or 5.2, or 5.4 until Exit Settlement:

- (i) This Agreement shall remain in effect in all respects, except that no further Termination Notice may be given during this period;
 - (ii) The Concessionaire shall operate the Electricity Business in accordance with Schedule 1 until the Agreement is terminated under Clause 5.6;
 - (iii) Subject to Clause 5.5(b), the provisions of Schedule 2 shall apply.
- (b) For so long as the Concessionaire is a public enterprise under the Public Enterprises Act 2002:
- (a) The provisions of Schedule 2 shall not apply and shall be of no effect; and
 - (b) In the event a Termination Notice is given in accordance with this Clause 5, the Concessionaire and the Kingdom shall negotiate in good faith arrangements for the transfer of the Electricity Business to a third party.

5.6 Termination of Agreement upon transfer

This Agreement shall terminate upon the completion of the Exit Settlement.

5.7 No waiver of rights

Notwithstanding the termination of this Agreement, each of the parties shall remain liable to one another for all obligations incurred prior to the date of termination, including any right pursuant to an arbitrator's decision made in accordance with Clause 4.3 either before or after termination but which relates to a Dispute referred to arbitration before termination of this Agreement.

5.8 Survival

On termination of this Agreement, Clauses 4, 5.7, 5.8 and any other clauses that, on their proper construction, are intended to survive termination, will continue in full force and effect notwithstanding termination of this Agreement.

6 FORCE MAJEURE

6.1 Force Majeure

Notwithstanding any other provision of this Agreement non-performance by any party of an obligation under this Agreement shall be excused, without liability for non-performance, during the time and to the extent that such performance of the particular obligation is prevented, wholly or substantially, by a Force Majeure Event. For the avoidance of doubt, the Concessionaire shall continue to perform and shall not be excused for non-performance of, any obligation that is not prevented, or that part of the obligation that is not prevented, by the Force Majeure Event.

6.2 **Obligations upon Force Majeure Event**

If the Concessionaire claims a Force Majeure Event under Clause 6.1, it will:

- (a) Give notice and full details of the relevant cause to the Commission as soon as practicable after it occurs;
- (b) Use all best endeavours to limit the effects of the Force Majeure Event on the performance by the Concessionaire of its obligations under this Contract;
- (c) If the Force Majeure Event prevents the provision of Standard Services, use reasonable endeavours to advise affected Customers of the fact of the cause, and the likely impact of the cause, on the provision of Standard Service; and
- (d) Strive to resume, as soon as reasonably possible after the Force Majeure Event has ended, performance by the Concessionaire of its obligations under this Agreement.

7 **PUBLIC DISCLOSURE**

7.1 **Concession Contracts to be Publicly Available**

The Commission shall make this Contract (including any amendments thereto) Publicly Available on receipt of a written demand therefor. For the avoidance of doubt, this Contract (including any amendments thereto) shall not be withheld under Clause 7.3.

7.2 **Commission to make other information Publicly Available**

Subject to Clause 7.3, the Commission shall make Publicly Available on receipt of a written demand therefor any information, documents and evidence received

under or in connection with this Contract, not later than 10 Business Days after receipt thereof.

7.3 **Grounds for withholding information**

The Commission shall not make Publicly Available any information, document or evidence received under, or in connection with, this Contract if the Commission (acting reasonably) considers that the withholding of such information, document or evidence (as the case may be) is necessary to :

- (a) Protect the privacy of natural persons, including that of deceased natural persons; or
- (b) Protect information where the making available of the information:
 - (i) Would disclose a trade secret; or
 - (ii) Would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information; or
- (c) Protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information:
 - (i) Would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied; or
 - (ii) Would be likely otherwise to damage the public interest.

MISCELLANEOUS TERMS

8.1 **Amendments**

Subject to any other clause in this Agreement, no amendment to this Agreement will be effective unless it is in writing and signed by a duly authorised representative of each party.

8.2 **Governing law**

This Agreement is to be governed by and construed in accordance with the laws of the Kingdom of Tonga.

8.3 Severability

If any provision of this Agreement is held to be invalid, illegal or unenforceable, the invalidity, illegality or unenforceability of that provision is not to affect the operation, construction or interpretation of any other provision of the Agreement with the intent that the invalid, illegal or unenforceable provision is to be treated for all purposes as severed from this Agreement.

8.4 Counterparts

This Agreement and any amendment to this Agreement may be executed in two or more counterparts (including facsimile copies) each of which will be deemed an original, but all of which together will constitute one and the same instrument. A party may enter into this Agreement by signing any counterpart.

8.5 No Waiver

A waiver of any provision of this Agreement shall not be effective unless given in writing, and then it shall be effective only to the extent that it is expressly stated to be given. A failure, delay or indulgence by either party in exercising any power or right shall not operate as a waiver of that power or right. A single exercise or partial exercise of any power or right shall not preclude further exercises of that power or right or the exercise of any other power or right.

8.6 Schedules

The Schedules hereto form part of this Agreement.

8.7 Notices

- (a) Any notice or communication, which a party gives to any other party concerning any thing relating to this Agreement, must be in writing. Notices to a party are to be delivered by hand to the designated address of that party or sent by post with postage prepaid or by facsimile to that party. A designated address of party shall be deemed to be the designated address of that party.
- (b) A notice or other communication delivered by hand will be deemed to have been received at the time of delivery. However, if the delivery is not made on a Business Day or is made after 5:00 p.m. on a Business Day,

then the notice or other communication will be deemed to have been delivered on the next Business Day.

- (c) A notice or other communication delivered by pre-paid post will be deemed to have been received on the 3rd Business Day after posting.
- (d) A notice or other communication sent by facsimile will be deemed to have been received on the day of transmission. However, if the date of transmission is not a Business Day or the transmission is sent after 5:00 p.m. on a Business Day then the notice or other communication will be deemed to have been given on the next Business Day after the date of transmission.
- (e) A designated address for the purpose of this Agreement is that specifically designated in this clause or such other address specifically designated by a party by notice given to the other parties to this Agreement. The addresses designated pursuant to this clause are:

The Concessionaire

Tonga Power Limited

Address PO Box 87, Taufa'ahau Road, Nuku'alofa, Kingdom of
Tonga
Telephone +676 28.714
+676 28/145
Contact Person(s) The Chief Executive

The Electricity Commission

Address Tu'atakilangi
P.O. Box 47, Nuku'alofa, Kingdom of Tonga
Telephone +676 23.632
Contact Person The Chief Executive

The Kingdom of Tonga

Address PO Box 87, Vuna Road, Nuku'alofa, Tonga
Address +676 28.714
+676 28.145
Contact Person The Minister of Finance

8.8 Remedies

The rights, powers and remedies provided in this Agreement are cumulative and are not exclusive of any rights, powers or remedies provided by law.

8.9 Assignment

Except as provided in Schedule 2, no party may assign or otherwise transfer any of its rights or obligations under this Agreement to any other person, without the prior written consent of each other party.

8.10 Language of Contract

If there is any inconsistency between this English language version of the Agreement, or any translation (into any other language) of this Agreement, this English language version will have precedence. All amendments to and all communications and notices under this Agreement must, in order to be effective, be in English.

8.11 Costs

Unless otherwise stated in this Agreement, each party will bear its own costs and expenses incurred in connection with the negotiation, preparation and implementation of this Agreement.

8.12 Further Assurances

Each party will do all things and execute all documents reasonably required to give effect to the provisions and intent of this Agreement.

EXECUTED as The Agreement at Nuku'alofa on the day of August 2015.

Signed on behalf of **The Kingdom of Tonga** by the Minister of Finance, Hon. 'Aisake Valu Eke
in the presence of as Witness.

(Minister)

(Witness)

Signed for **Tonga Power Limited** by their Company Chairman, Mr. Carl Sanft in the presence of
Mr. Robert Matthews as Witness.

(Chairman)

(Witness)

Signed for the **Electricity Commission** by Rt. Hon. Lord Dalgety Q.C., the Commission's Chief
Executive in the presence of Ms. Meleseini Vea Folau as witness.

(Commissioner)

(Witness)

SCHEDULE – 1 : **OPERATION OF ELECTRICITY**
BUSINESS ON TERMINATION

SCHEDULE 1 : OPERATION OF ELECTRICITY BUSINESS ON TERMINATION

1 Covenants in relation to operation of the Electricity Business

During the period from the date a Termination Notice is given in accordance with this Agreement, until such time as this Agreement is terminated in accordance with Clause 5.6, the Concessionaire will :

- (a) *Compliance with this Agreement*: continue to comply in all respects with the terms and conditions of this Agreement;
- (b) *Conduct of Business*: operate and conduct the Electricity Business in the normal course of business and in substantially the same manner as it has done so to date;
- (c) *Sale of Assets*: not dispose of any of the assets employed in the Electricity Business, other than in the normal course of business;
- (d) *Maintenance of Electricity Business assets*: maintain the assets employed in the Electricity Business in as good a state of operating condition and repair as they are in at the date of the Termination Notice except for fair wear and tear arising in the course of normal and proper use;
- (e) *Capital Assets*: not acquire, dispose of or enter into any transaction in connection with any capital assets of the Electricity Business which would commit the Concessionaire to expenditure of more of more than TOP\$20,000 without first obtaining the Kingdom's written consent;
- (f) *New Contracts*: not enter into any new contracts or arrangements in respect of the Electricity Business (other than in the ordinary course of business) without first obtaining the Kingdom's written consent;
- (g) *Claims*: promptly notify the Kingdom of any lawsuits, claims, proceedings, investigations or adverse events which may occur, be threatened, brought, asserted or commenced against it, or any of its officers or employees involving the assets employed in the Electricity Business or the Electricity Business in any way or which may adversely affect the assets or the Electricity Business; and not admit, settle, compromise or

otherwise deal with any such matter, except in consultation with the Kingdom and with the Kingdom's prior written consent;

- (h) *Adverse Events*: promptly notify the Kingdom of any events or change in circumstances likely to be adverse to the Assets or the Business or likely to be material to the Kingdom in its intended carrying on of the Business.

SCHEDULE – 2 : EXIT SALE PROCESS

SCHEDULE 2 : EXIT SALE PROCESS

1. Application

Subject to Clause 5.5 (b), this Schedule 2 provides for a market sale process in relation to the Electricity Business in event of a Termination Notice is given in accordance with clause 5.

2. Process for market sale in event of termination

If the Concessionaire or the Kingdom gives a Termination Notice in accordance with Clause 5, then :

- (a) The Concessionaire shall in good faith use all reasonable endeavours to sell the Electricity Business, by way of a competitive (if possible) sale process conducted on normal commercial terms in the circumstances (*a Market Sale Process*).
- (b) The parties shall establish, and ensure the adequate maintenance and resourcing of, a physical dataroom or electronic dataspace which will contain all information available to the parties that is, or is likely to be material to a potential purchaser of the Electricity Business or its financiers in determining the value of the Electricity Business. The parties shall allow potential purchasers of the Electricity Business or its financiers access to the physical data room or electronic data space on reasonable terms and conditions.
- (c) Any sale by the Concessionaire must be conditional on the consent of the Kingdom in writing. The Kingdom must give its consent as soon as reasonably possible after being requested in writing by the Concessionaire to do so unless the Kingdom (acting reasonably) either :
 - (i) Considers that the relevant purchaser is not capable of performing the obligations of the Concessionaire under this Agreement (as assigned or novated under paragraph 2(d) of this Schedule 2); or
 - (iii) requests further information to enable it to consider this matter, and such consent, once given, is irrevocable, unless Exit Settlement does not occur.
- (d) Once the Kingdom's consent is given under paragraph 2(c) of this Schedule 2, the Commission and the Kingdom will be deemed to have given their consent (which will be irrevocable, unless Exit Settlement does not occur) to either an

assignment or a novation (at the discretion of the Concessionaire) in each case as described below:

- (i) The assignment and transfer by the Concessionaire of all its rights and obligations under this Contract to the purchaser, with effect from the Exit Settlement (on the basis that, following the assignment, the Concessionaire will have no further liability to the Commission or the Kingdom under this Agreement, other than in respect of any obligation of the Concessionaire which remains undischarged at the time of the assignment); or
- (ii) The novation of this Agreement by the Concessionaire in favour of the purchaser, on the basis that this Agreement, as novated, will constitute a new Agreement between the purchaser, the Kingdom and the Commission, on the same terms as this Agreement, except:
 - (A) The commencement date of the new Agreement will be the date of the Exit Settlement;
 - (B) The Term of the new Agreement will be the period from the time of the Exit Settlement until the Termination Time;
 - (C) For any incidental changes required in order to give effect to this paragraph,

and the Concessionaire will have no liability to the Commission or the Kingdom in relation to the new Agreement. The Concessionaire will remain liable to the Commission and the Kingdom for any obligation of the Concessionaire which remains undischarged at the Termination Time.

3. Put option in event of unsuccessful market sale process

- 3.1 If, having in good faith used all reasonable endeavours, the Concessionaire is unable to sell the Concessionaire's Electricity Business to a third party within nine calendar months after the Terminating Party gives a Termination Notice in accordance with Clause 5, then the Market Sale Process shall terminate and:
 - (a) The Termination Value of the Electricity Business shall be determined in accordance with Schedule 3; and

- (b) As soon as practicable, following delivery of the Valuation Notice delivered pursuant to paragraph 4(b) of Schedule 3, the Kingdom (or its nominee) shall purchase all assets and liabilities of, and settle the purchase of, the Electricity Business from the Concessionaire:
 - (j) in the case of termination of this Agreement by the Concessionaire under Clause 5.1, or by consent of the Parties under Clause 5.4 at 100% of the Termination Value stated in the Valuation Notice; or
 - (ii) in the case of termination under any other provision of this Agreement at 80% of the Termination Value stated in the Valuation Notice; and
- (c) On the basis set out in paragraph 3.2 of this Schedule.

3.2 Any sale of the Electricity Business by the Concessionaire to the Kingdom (or its nominee) shall be on the following basis:

- (a) This Agreement will terminate at the time of the Exit Settlement, but the Concessionaire will remain liable to the Commission and the Kingdom for any obligation of the Concessionaire which remains undischarged at the Termination Time.
- (b) The Concessionaire shall warrant to the Kingdom (or its nominee), on a full indemnity basis for any loss or damage suffered by the Kingdom in event of breach of warranty, that:
 - (i) Upon transfer of the Electricity Business, clean and unencumbered legal title shall transfer to the Kingdom (or its nominee);
 - (ii) Following notification of a Termination Notice, the Concessionaire has operated the Electricity Business in accordance with the provisions of Schedule 1.
- (c) Any Agreements between the Concessionaire and third parties which form part of the Electricity Business will be assigned to, or novated in favour of, the Kingdom.

SCHEDULE – 3 : DETERMINATION OF TERMINATION VALUE

SCHEDULE 3 : DETERMINATION OF TERMINATION VALUE

1 Application

The provisions of this Schedule 3 shall apply where the Kingdom (or its nominee) is required to purchase the Electricity Business from the Concessionaire if the Concessionaire's Electricity Business is not sold to a third party within nine calendar months after the Terminating Party gives a Termination Notice in accordance with Clause 5.

2 Process for appointing Independent Valuer

2.1 The Concessionaire and the Kingdom must, within 5 Business Days of the termination of the Market Sale Process, consult in good faith to agree on and appoint a suitably qualified and experienced Independent Valuer (*Independent Valuer*) (such person to be suitably qualified and experienced in valuing businesses of a similar nature to the Electricity Business) to undertake an independent valuation in accordance with this Schedule 3.

2.2 If the Kingdom and the Concessionaire fail to appoint an Independent Valuer within 10 Business Days of commencing consultation under paragraph 2(s) of this Schedule, then the Independent Valuer shall be a person appointed by the Commission.

3 Independent Valuer to be expert not arbitrator

If carrying out its valuation work under this Agreement, the Independent Valuer shall act as an expert and not an arbitrator, and any determination of value by the Independent Valuer shall be final and binding on the parties (save for manifest error or fraud). The parties shall be deemed to agree to the price fixed by the Independent Valuer in respect of any independent valuation required under this Agreement. Other than in respect of manifest error or fraud, no party shall be entitled to challenge a valuation made by an Independent Valuer under this Agreement.

4 Process for determining valuation

4.1 The parties and the Independent Valuer shall adhere to the following process when determining the Termination Value for the purposes of this Agreement:

(a) No later than 30 Business Days following appointment of the Independent Valuer:

- (i) Both of the Concessionaire and the Kingdom shall deliver to the Independent Valuer and to the other party a valuation of what it considers to be the Termination Value for the Electricity Business, together with such supporting analysis and documentation as it considers appropriate;
 - (ii) The Concessionaire shall deliver the current RAV calculated pursuant to paragraph 7.5 of the Addendum and information on all approved and non-approved capital expenditure that has occurred since the date of the RAV was last updated.
- (b) No later than 10 Business Days after the expiry of the period referred to in paragraph 4.1(a)(i) of this Schedule 3, each party may deliver to the Independent Valuer, comments on the valuations received by the Independent Valuer from the other party.
- (c) The Independent Valuer shall independently determine the Termination Value of the Electricity Business in accordance with paragraph 6 of this Schedule 3 and having regard to the valuations presented to the Independent Valuer in accordance with paragraph 4.1(a)(i) of this Schedule 3.
- (d) The Independent Valuer must be instructed to make a determination as soon as practicable after the expiry of the period referred to in paragraph 4.1(a)(i) of this Schedule B, and in any event within 20 Business Days from the expiry of that period (but any failure by the Independent Valuer to deliver a determination within this period shall not in any way invalidate that determination when subsequently delivered).
- (e) In making its determination in accordance with paragraph 4.1(c) of this Schedule 3, the Independent Valuer may:
 - (i) Obtain or refer to any documents, information or material and undertake any inspections or enquiries as he or she determines appropriate; and
 - (ii) Engage any assistance which he or she reasonably believes is appropriate.

- (f) Immediately upon making its determination in accordance with paragraph 4.1 (c) of this Schedule 3 the Independent Valuer must notify the parties in writing of its determination of the Termination Value (*Valuation Notice*). The Independent Valuer shall not be required to provide the parties with reasons for his or her determination under paragraph 4.1(c) of this Schedule.
- (g) The Independent Valuer's determination in accordance with paragraph 4.1(c) of this Schedule 3 shall be final and binding on the parties (save for manifest error or fraud), and, unless otherwise specified in this Schedule, the parties shall share equally all costs and expenses of the Independent Valuer incurred in respect of the independent valuation.

5 Termination Value Principles

The Independent Valuer shall have regard to the following principles in determining the Termination Value of the Electricity Business:

- (a) It shall be assumed that the regulatory regime as provided by the Act, any regulation made pursuant to the Act, and Addendum will continue;
- (b) This Agreement shall be novated, with the effect that the purchaser becomes the "Concessionaire", and assumes all rights and obligations as "Concessionaire", under this Agreement; and
- (c) The Concessionaire's Electricity Business will continue as going concern,

6 Termination Value

For the purpose of this Agreement, Termination Value shall be calculated as follows:

Termination Value = RAV,

Where

RAV, = the updated RAV from the most recent Annual Report in which the Concessionaire's auditor stated the updated RAV was calculated consistent with the requirements of the Addendum updated to :

- (i) include capital expenditure that occurred since the date the current RAV was calculated and that is consistent with the Approved Capital

Expenditure Plan or in the opinion of the Independent Valuer is consistent with the Approved Capex Criteria; and

(iii) account for depreciation since the date the current RAV was circulated.

7 Electricity Business Information available

Upon appointing an Independent Valuer to undertake a valuation under this Schedule 3, the parties shall make available all information to each other that is, or is likely to be, material in determining the Termination Value of the Electricity Business.

8 Warranty

The Parties shall represent and warrant to the Independent Valuer and to each other parties that they are not aware of any document or any information that contains or will contain any untrue statement of a material fact or omits to state a material fact necessary to make the information or data contained therein, in light of the circumstances in which they are made, misleading.

SCHEDULE – 4 : DEFINITIONS AND CONSTRUCTION

SCHEDULE 4 : DEFINITIONS AND CONSTRUCTION

1 DEFINITIONS AND CONSTRUCTION

1.1 Defined Terms

In this Concession Contract, unless the context requires otherwise:

Act means the Electricity Act 2007 (as amended);

Addendum (Regulatory Addendum) has the meaning ascribed to that term in paragraph 1.5 (b) of the Agreement;

Agreement has the meaning ascribed to that term in paragraph 1.5 (a) of the Agreement;

Allowed Rate of Return means an 8.50% post tax real rate of return, or such other post tax real rate of return as may be determined at each Reset;

Annual Capex Proposal has the meaning given to it in Schedule 9 of the Addendum;

Annual Report means the Concessionaire's Annual Report to Shareholders;

Approved Capital Expenditure Plan means the approved capital expenditure plan for the Electricity Business that comprises solely Capex Items as approved by the Commission at each Reset and in accordance with Schedule 9 of the Addendum.

Back Up Generation has the meaning given to it in the Act;

Business Day means a day on which trading banks are open for business in Nuku'alofa, Kingdom of Tonga;

Capex Item means an item of capital expenditure;

Commencement Date means the effective date of this Contract, or such other date as the parties may agree in writing;

Commission means the Electricity Commission;

Comparable Island Nation means an island nation which is reasonably comparable to the Kingdom with respect to climatic conditions, population, average income per capita, level of electricity consumption (*per capita and in aggregate*), gross domestic product and viable

methods of electricity generation, and includes Fiji, New Caledonia, Vanuatu and Samoa;

Cost of Service means the cost to the Concessionaire of providing Standard Service in terms of the Addendum sufficient to meet the Service Standards;

CPI means the all items index of the consumer price index series as published by the Tonga Statistics Department or its successor (or, if that index ceases to be published or otherwise ceases to be available to the parties, such other index that measure inflation or deflation in Tonga, in a manner which most closely resembles the manner in which the all items index of the consumer price index series measures inflation or deflation in Tonga immediately prior to becoming unavailable to the parties or ceasing to be published);

Customer means a purchaser of electricity from the Concessionaire (or as the context requires, a person wishing to purchase electricity from the Concessionaire);

Customer Class means any group of Customers that share one or more given characteristics, including geographical location, electricity consumption patterns or residential/business designation, and which, in the circumstances, ought reasonably to be considered to be a distinguishable class of Customers;

Customer Complaint has the meaning given to it in the Addendum;

Customer Contract means any written, oral or implied agreement, arrangement or understanding between the Concessionaire and a Customer for the supply of electricity to that Customer;

Customer-Specific Measure has the meaning given to it in the Addendum;

Customer-Specific Standards means those Service Standards described as customer-specific standards in Schedule 2 of the Addendum;

Dispute means a dispute between the parties hereto, or any of them arising out of, or in connection with, this Agreement or the Addendum including any allegation of breach of this Agreement or the Addendum or a dispute in relation to a decision by the Commission or the Concessionaire under this Agreement or the Addendum;

Distribution Network means the Concessionaire's electricity distribution network, located on each of the Island Groups, including all cables, electrical equipment, poles, ducts, service lines and other items which are owned by the Concessionaire and which are connected to or which form an integral part of such networks (but excluding any generation equipment);

Efficiency Standards means the Fuel Efficiency Rate targets and/or System Losses targets as determined in accordance with the Addendum, including any efficiency standards determined as part of a Reset;

Electricity Businesses means the Concessionaire's business generating, distributing and selling electricity in the Kingdom of Tonga to their customers;

Event of Default means either:

- (a) The Concessionaire, the Kingdom or the Commission (as applicable) refusing to comply to a material extent, with its obligations under the dispute resolution process, including any failure by the Concessionaire or the Kingdom to pay any amount when required to do so, or refusing to accept the decision of an arbitral award other than if the award is appealed; or
- (b) When an arbitral award is appealed, the Concessionaire, the Kingdom or the Commission (as applicable) refusing to accept the outcome of the judicial proceedings;

Exit Settlement means the settlement of the unconditional transfer of clean and unencumbered legal title to the Electricity Business to either a third party, or to the Kingdom (or its nominee), pursuant to this Agreement;

Extraordinary Event has the meaning given to it in clause 4.2 of the Addendum;

Extraordinary Tariff Adjustment means an adjustment to the Regulated Tariff during any Regulatory Period pursuant to, and in accordance with Schedule 8 of the Addendum;

Extraordinary Event Notice has the meaning given to it in Schedule 8 of the Addendum;

Financial Year means the financial year of the Concessionaire from time to time;

First Notice has the meaning given to it in the Addendum

Force Majeure Event means an exceptional event or circumstance:

- (a) Which is beyond a party's control;
- (b) Which such party could not reasonably have provided against before entering into this Agreement or the Addendum;
- (c) Which, having arisen such party could not reasonably have avoided or overcome; and
- (d) Which is not substantially attributable to the other party, and may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as conditions (a) to (d) above are satisfied:
 - (e) War, hostilities (whether war be declared or not), invasion, act of foreign enemies;
 - (f) Rebellion, terrorism, sabotage by persons other than the party's employees, contractors or subcontractors, revolution, insurrection, military or usurped power, or civil war;
 - (g) Riot, commotion, disorder, strike or lockout by persons other than the party's employees, contractors or subcontractors;
 - (h) Munitions of war, explosive materials, ionizing radiation or contamination by radio-activity, except as may be attributable to the party's use of such munitions, explosives, radiation or radio-activity; and
 - (i) Natural catastrophes such as earthquake, tsunami, typhoon or volcanic activity;

Fuel Efficiency Rate means the kWh of gross generation by a diesel genset divided by the litres of fuel consumed in the production of generation;

Good Industry practice means the degree of care, skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a

skilled, reasonable and experienced generator, distributor and retailer of electricity, with reference to standards in Comparable Island Nations;

Half-Yearly Performance Report means the report prepared in accordance with and containing the information required by Schedule 13 of the Addendum.

Independent Expert means a person independent of the parties and of good reputation and standing in the discipline appropriate for the task instructed under this Contract.

Initial RAV means the RAV as at 25th July 2008, being 30,123,378 million Pa'anga;

Initial Regulated Asset is any fixed asset which is owned by the Concessionaire and used by it solely or predominantly in the Electricity Business, and which was purchased by the Concessionaire on or about the 25th July 2008;

Insolvency in relation to any *persona*, includes:

- (a) Being declared bankrupt or insolvent; or
- (b) Having a liquidator or interim liquidator appointed; or
- (c) Having a receiver, manager or trustee appointed over all or any part of the person's assets or under the Rules of the Supreme Court in respect of a judgment debt; or,
- (d) Entering into a composition for the benefit of creditors;

Island Groups means Tongatapu, Vava'u, Ha'apai and 'Eua;

Kingdom means the Kingdom of Tonga;

Market Sale Process means the sale process undertaken in accordance with Schedule 2 of the Agreement;

Material Capex Item means each item of capital expenditure in excess of 50,000 Pa'anga;

Materiality Threshold has the meaning given to it in Schedule 8 of the Addendum;

Metering Reporting Standards means the metering reporting standards set out in the Addendum;

Non-Regulatory Revenue means any revenue, income or funds received by the Concessionaire that does not relate to their Electricity Business;

Non-Supply Revenue means any revenue, income or funds received by the Concessionaire that relates to the Supply of electricity via the Distribution Network and is:

- (a) Fees charged to Customers by the Concessionaire for an Optional Service (regardless of whether these are treated by the Concessionaire as fees for service, capital contributions or otherwise);
- (b) Fees charged to Customers by the Concessionaire for connection or reconnection to the Distribution Network (where the Customer's premises have previously been disconnected from the Distribution Network in accordance with the relevant Customer) or for disconnection from the Distribution Network (in accordance with the relevant Customer Contract);
- (c) Fees charged for the purpose of securing payment from a Customer;
- (d) any other non-tariff charge which the Concessionaire is entitled under the Regulatory Addendum to recover from their customers;
- (e) Revenue received by the Concessionaire for the supply of anything via the Distribution Network other than electricity; or
- (f) Capital contributions.

Optional Services has the meaning given to it in the Addendum;

Optional Tariff has the meaning given to it the Addendum

Period One Net Capex means the capital expenditure on the Electricity Business during the period from 25th July 2008 until 31st August 2015 under deduction of a charge for depreciation and in respect of disposal of assets;

Publicly Available means available to any member of the public upon request,

subject to payment of such fee (if any) as the Commission may reasonably determine appropriate in the circumstances;

Regulatory Annual Report means the report prepared in accordance with, and containing the information required, by Schedule 13 of the Addendum;

Regulated Asset means a fixed asset which is owned by the Concessionaire and used by it solely or predominantly in the Electricity Business and which either:

- (a) is an Initial Regulated Asset; or
- (b) is subsequently acquired by the Concessionaire (provided that an asset of the type described in this paragraph (b) will not become a Regulated Asset until the time at which the Concessionaire begins using that asset solely or predominantly in the Electricity Business, or the time at which it is contemplated by the Approved Capital Expenditure Plan that asset will begin to be used in this manner, whichever is the later);

Regulatory Asset Value or RAV means notional value of all Regulated Assets of the Electricity Business, being the amount provided for under this Agreement as the Initial RAV and subsequently calculated in accordance with the Addendum.

Regulatory Fee has the meaning given to it in Clause 15.2 of the Addendum;

Regulatory Revenue means the revenue earned or (as the context requires) to be earned by the Concessionaire from the Electricity Business, including Non-Supply Revenue;

Regulatory Period means the duration between Resets;

Regulated Tariff means the tariff for the provision of Standard Service to a Customer, as set out in the Addendum and adjusted from time to time in accordance with the provisions thereof;

Reporting Standards means those Reporting Standards described in the Schedules to the Addendum;

Reset means the review conducted by the Commission in accordance with the provisions of the Addendum;

Reset Date has the meaning given to it in Schedule 12 of the Addendum;

Reset Decision means the final decision by the Commission on matters required to be determined at each Reset;

Reset Rules means the reset rules set forth in the Addendum;

Self-Generate has the meaning given to it in the Act;

Service Standards means the Customer Specific Standards set out in the Schedules to the Addendum (excluding, for the avoidance of doubt, the Metering Reporting Standards), as amended from time to time in accordance with the provisions of the Addendum;

Standard Service means the connection of a Customer's premises to the Concessionaire's electricity distribution network, energisation and the supply of electricity to the Customer;

Supply means in relation to electricity, the generation, distribution and retail of electricity;

Sustained Material Breach means any circumstance where, following regular breaches by the Concessionaire of any obligation under the Addendum (including failure to comply with the Service Standards), the Kingdom, acting reasonably and after consulting (within a reasonable period) with the Concessionaire, is not satisfied at the Concessionaire is taking action that is expected to result in sustained compliance with the Addendum (including sustained compliance with the Service Standards);

System Losses means the difference between gross generation (measured as output from the Concessionaire's generators before own energy use) and generation billed to customers, divided by gross generation and expressed as a percentage;

Termination Value means the valuation of the Electricity Business determined in accordance with Schedule 3 of the Agreement;

Tariff Adjustment means the adjustment of the Regulated Tariff at the commencement of each Tariff Period pursuant to in accordance with the provisions of the Addendum;

Tariff Period means, in respect of the fuel component of the Electricity Tariff :

- (a) A three-calendar month period commencing 1 September 2015 and ending 30 November 2015; and
- (b) Thereafter, each successive three-calendar month period commencing on the first day of each three-calendar month period; or

such other period as may be agreed between the Commission and the Concessionaire;

Tariff Structure means the categories of tariffs charged by the Concessionaire for the provision of Standard Service, as determined in accordance with the terms of the Addendum;

Tariff Structure Criteria has the meaning set out in the Addendum;

Valuation Notice has the meaning given to it in Schedule 3 of the Agreement.

1.2 Definitions in Schedule 2 of the Addendum

In Schedule 2 of the Addendum:

- (a) Working days are defined as Monday to Friday, 8:30am to 4:30pm
- (b) Urban areas are defined as the areas within 4 kilometres of Nuku'alofa Post Office and within 2 kilometres of the Post Office on other islands. Rural areas are all other areas in the islands where Standard Service is provided by the Concessionaire
- (c) Payments overdue by three months or more shall be treated as new connections, not a reconnection
- (d) SAIDI means the System Average Interruption Duration Index.

1.3 Construction

In the construction of this Contract, unless the context requires otherwise:

Business Days: anything required by this Contract to be done on a day which is not a Business Day may be done effectually on the next Business Day;

Clauses and Schedules: a reference to a clause or a schedule is to a clause or schedule of this Agreement or the Addendum as the case may be;

Currency: a reference to any monetary amount is to Tonga Pa'anga, unless otherwise specified;

Defined Terms: words or phrases appearing in this Contract with capitalized initial letters are defined terms and have the meanings given to them in this Contract.

Documents: a reference to any document, including this Contract, includes a reference to that document as amended or replaced from time to time;

Headings: headings appear as a matter of convenience and do not affect the construction of this Contract;

Joint and Several Liability: any provision of this Contract to be performed or observed by two or more persons binds those persons jointly and severally;

Negative Obligations: a reference to a prohibition against doing any thing includes a reference to not permitting, suffering or causing that thing to be done;

No Contra Proferentem Construction: the rule of construction known as the contra proferentem rule does not apply to this Contract;

Person: a reference to a person includes a corporation sole; any body of persons, whether corporate or unincorporated; or anyone else recognised by Tongan Law as having a legal *persona*;

Related Terms: where a word or expression is defined in this Contract, other parts of speech and grammatical forms of that word or expression have corresponding meanings;

Singular, Plural and Gender: the singular includes the plural and vice versa, and words importing one gender include the other gender;

Statutes and Regulations: a reference to an enactment or any regulations is a reference to that enactment or those regulations as amended, or to any enactment or regulations substituted for that enactment or those regulations;

Time: a reference to time is to Tongan time;

Writing: a reference to “written” or “in writing” includes all modes of presenting or reproducing words, figures and symbols in a tangible and permanently visible form;

Forecasts, Projections and Estimates: any forecast projection or estimate which are required to be made for the purposes of this Contract must be made on reasonable grounds, using all relevant available data, and presented in a format which is easy to understand;

Volumes/Prices: for the purposes of this Contract, all volumes of electricity Supplied or to be Supplied under this Contract must be stated in kWh, all volumes of diesel to be used in Supplying electricity must be stated in litres, and the price of any kWh of electricity or litre of diesel must be stated in seniti;

Control: references to one person (*First Person*) being controlled by another person shall mean that the other person (whether directly or indirectly and whether by the ownership of share capital, the possession of voting power, contract or otherwise) has the power:

- (a) To appoint and/or remove the majority of the members of the governing body of the First Person;
- (b) To appoint a member or members of the governing body of the First Person, with the power to exercise, or control the exercise of, more than 50% of the maximum number of votes that might be cast at a meeting of the governing body or the members of the First Person; or
- (c) To control, by any other means whatsoever, the affairs and policies of the First Person,

and control and change in control have corresponding meanings;

Rounding: For all calculations under this Agreement or the Addendum only the Regulated Tariff (once calculated) shall be rounded, such rounding to be to two decimal points of seniti.

SCHEDULE - 5 : DISPUTES

SCHEDULE – 5 : DISPUTES

1 Negotiation

- (a) Subject to this Agreement, if a Dispute arises between any of the parties thereto, which cannot expeditiously be resolved by Consultation between the parties to the Dispute, then any one party may notify the other parties in writing giving details of the Dispute. Each party shall appoint a senior representative to attend to resolution of the Dispute and such representative shall have authority to settle the Dispute.
- (b) The parties shall, through their senior representatives, in good faith negotiate with a view to a prompt resolution of the Dispute.
- (c) If a Dispute is not resolved in accordance with Clause 1(b) within 20 Business Days of written notice of the Dispute being given in accordance with Clause 1(a), then either any party to the Dispute by Notice in writing to the other parties may refer the Dispute for determination by Arbitration pursuant to Clause 2.

2 Arbitration

Any Dispute referred to Arbitration in terms of Clause 1(c) shall be determined by a sole arbitrator to be determined in accordance with the general civil law to be applied in the Kingdom under Sections 2 and 3 of the Civil Law Act Provided Always that :

- (a) the sole arbitrator shall be a suitably qualified person as agreed by the parties, or if they do not agree on the identity of the arbitrator within 10 Business Days, then the arbitrator shall be appointed by a Judge of the Supreme Court of Tonga upon the application of any of the parties.
- (b) the place of the arbitration will be in Nuku'alofa, Tonga, or elsewhere as the parties and the arbitrator agree, and if the parties and the arbitrator do not agree within such time as the arbitrator may specify, the place of the arbitration will be in Nuku'alofa, Tonga or elsewhere at such location as determined by the arbitrator;
- (c) the arbitration's decision shall be Publicly Available;
- (d) all procedural matters shall be determined by the arbitrator;

- (e) the Courts of Tonga will have exclusive jurisdiction in relation to any matters referred by any party or the arbitrator to the Courts;
- (f) the costs of the arbitration, as determined by the arbitrator, shall be allocated in such manner as the arbitrator sees fit in all the circumstances;
- (g) subject to Clause 3, the arbitrator's decision is final and binding upon the parties to the arbitration and shall be enforceable in a Tongan Court.

3 Appeals

- (a) A party may appeal to the Lord Chief Justice of Tonga (*the Court*) against the award of an arbitrator given under Clause 2, only on the grounds set out in Clause 3(c).
- (b) When determining an appeal pursuant to Clause 3(a), the parties agree that the Court may set aside a decision or an award only on the grounds set out in Clause 3(c).
- (c) The ground on which a party may appeal to the Court against the award of an arbitrator given under Clause 14.2 are as follows :
 - (i) A question of law arises out of a decision or an award, provided that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or other of the parties.
 - (ii) The decision or the award contains a manifest error, provided that, having regard to all the circumstances, the error substantially affected the rights of one or other of the parties.
 - (i) The decision or the award deals with a dispute not contemplated by, or not falling within, the arbitrator's terms of reference or contains decisions on matters beyond the scope of the terms of reference, provided that, if the decisions on matters in the terms of reference can be separated from those not within the terms of reference, only that part of the decision or award which contains

decisions on matters not within the terms of reference may be set aside.

(ii) The making of the decision or award was induced or affected by fraud or corruption.

(iii) A breach of natural justice occurred, either during the proceedings, or in connection with the making of the decision or the award.

(d) The decision of the Lord Chief Justice of Tonga in respect of any Appeal under this Clause is final and binding.