

MEMORANDUM OF UNDERSTANDING

entered into between

ESWATINI ENERGY REGULATORY AUTHORITY

(Authority)

and

ESWATINI COMPETITION COMMISSION

(Commission)



M.B.R.
T.P.D.
S.V.
M.B.R. P.M.N. 16/10

PREAMBLE

WHEREAS the Commission and the Authority entered into a Memorandum of Understanding (MOU) on 16 November 2017 for mutual exchange and sharing of information concerning co-operation in matters of mutual interest.

WHEREAS the signed MOU was to remain in force for a period of three years from the date of signature with the option to renew or extend it further, by agreement between the Parties.

WHEREAS the Commission and the Authority herein jointly referred to as the “the parties” are desirous to renew the MOU for a further period of three (3) years.

AND WHEREAS the Commission and the Authority are desirous to continue to co-ordinate and harmonize the exercise of their jurisdiction over matters of mutual interest and to secure the consistent application of their respective laws governing anti-competitive behavior, unfair trading on the basis of the procedures outlined in this Memorandum of Understanding.

NOW THEREFORE the parties hereby enter into the MoU under the following terms and conditions:



This **MEMORANDUM OF UNDERSTANDING** is entered into on this 18 day of March , 2021

BETWEEN

The **ESWATINI ENERGY REGULATORY AUTHORITY**, an organization established by The Energy Regulatory Act No. 2 of 2007. Herein represented by Mr .Vusumuzi Mkhumane in his capacity as Chief Executive Officer, duly authorised hereto.

AND

The **ESWATINI COMPETITION COMMISSION**, an organisation established in terms of the The Competition Act No.8 of 2007. Herein represented by Mr. Muzi Dlamini in his capacity as Chief Executive Officer, duly authorised hereto.



Eswatini
Competition Commission

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WHEREBY IT IS AGREED AS FOLLOWS:

1. INTERPRETATION AND PRELIMINARY

- 1.1. The headings of the clauses in this MOU are for the purpose of convenience and reference only and shall not be used in the interpretation of nor modify nor amplify the terms of this MOU nor any clause hereof;
- 1.2. The following terms shall have the following meanings assigned to them hereunder and cognate expressions shall have corresponding meaning, namely: -
- 1.2.1. “Anti-competitive trade practices” means the trade practices as defined in the Competition Act;
- 1.2.2. “Authority” means **ESWANTINI ENERGY REGULATORY AUTHORITY;**
- 1.2.3. “Commission” means **ESWATINI COMPETITION COMMISSION;**
- 1.2.4. “Competition Act” means **The Competition Act No.8 of 2007;**
- 1.2.5. “Competition Commission Regulations” means the regulations issued in terms of Section 43 of the Competition Act;
- 1.2.6. “Effective date” means the date on which this MOU shall come into effect which is the date of signature;
- 1.2.7. “Energy laws” means laws governing the Energy sector existing or to be promulgated;
- 1.2.8. “Mergers and acquisitions” shall have the same meaning as defined in the Competition Act and Competition Commission Regulations;
- 1.2.9. “MOU” means this **Memorandum of Understanding;**



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- 1.2.10. "Parties" means the Authority and the Commission and "Party" means anyone of them;
- 1.2.11. "The Energy Regulatory Act" means the Energy Regulatory Act No.2 of 2007;
- 1.3. any reference to an enactment is to that enactment as at the date of signature hereof and as amended or re-enacted from time to time;
- 1.4. if any provision in a definition is a substantive provision conferring rights or imposing obligations on any party, notwithstanding that it is only in the definition clause, effect shall be given to it as if it were a substantive provision in the body of the MOU;
- 1.5. when any number of days is prescribed in this MOU, same shall be reckoned exclusively of the first and inclusively of the last day unless the last day falls on a Saturday, Sunday or public holiday, in which case the last day shall be the next succeeding day which is not a Saturday, Sunday or public holiday. This also excludes the period during the month of December of the current year and January in the following year during which period the offices of the Commission will be officially closed as determined by the Commission for the end of year;
- 1.6. where figures are referred to in numerals and in words, if there is any conflict between the two, the words shall prevail;
- 1.7. expressions defined in this MOU shall bear the same meanings in schedules or annexures to this MOU which do not themselves contain their own conflicting definitions;
- 1.8. reference to day/s, month/s or year/s shall be construed as Gregorian calendar day/s, month/s or year/s;
- 1.9. the use of any expression in this MOU covering a process available under laws of Eswatini such as a winding-up (without limitation *eiusdem generis*) shall, if any of the parties to



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this MOU is subject to the law of any other jurisdiction, be construed as including any equivalent or analogous proceedings under the law of such defined jurisdiction;

- 1.10. where any term is defined within the context of any particular clause in this MOU, the term so defined, unless it is clear from the clause in question that the term so defined has limited application to the relevant clause, shall bear the meaning ascribed to it for all purposes in terms of this MOU, notwithstanding that that term has not been defined in this interpretation clause;
- 1.11. the expiration or termination of this MOU shall not affect such of the provisions of this MOU as expressly provided that they will operate after any such expiration or termination or which of necessity must continue to have effect after such expiration or termination, notwithstanding that the clauses themselves do not expressly provide for this;
- 1.12. the rule of construction that a contract shall be interpreted against the party responsible for the drafting or preparation of the contract, shall not apply;
- 1.13. the words “include”, “including” and “in particular” shall be construed as being by way of example or emphasis only and shall not be construed as, nor shall they take effect as, limiting the generality of any preceding word/s;
- 1.14. the words “other” and “otherwise” shall not be construed *ejusdem generis* (of the same kind) with any preceding words where a wider construction is possible.

2. NATURE AND STATUS OF THIS MEMORANDUM OF UNDERSTANDING

- 2.1. This MOU serves to set out the arrangements for co-operation and co-ordination between the Authority and the Commission in performing their respective regulatory functions in terms of the Energy Regulatory Act and the Competition Act.



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- 2.2. This MOU's objective is to facilitate and provide a framework for co-operation and co-ordination between the Authority and the Commission and it sets out:
- 2.2.1. The areas of co-operation and co-ordination; and
 - 2.2.2. The respective regulatory responsibilities.
- 2.3. The arrangements in this MOU are subject to what is permitted and required by law (including the obligation of each party to have regard to its objectives when considering each case to which the arrangements apply).
- 2.4. The Authority and Commission have complementary regulatory responsibilities in respect of the promotion and maintenance of competition. The Authority is tasked with establishing controls to ensure legitimate competition in energy production and distribution with the aim of securing the interest of all licensees and as well as consumers. The Commission's primary mandate is the promotion and maintenance of competition in the economy by controlling anti-competitive trade practices, mergers and acquisitions, protecting consumer welfare.
- 2.5. The co-operation and co-ordination between the Authority and the Commission shall be on areas of mutual interest. This will help ensure that:
- 2.5.1. Each party is effective in achieving its statutory objectives;
 - 2.5.2. The respective roles and responsibilities of the two parties are clear to interested parties, in particular in terms of the different aspects of competition regulation;
 - 2.5.3. There is better understanding of the impact of each party's legislation on electricity supply and completion;
- 2.6. The application of each party's governing legislation and the carrying out of their duties will, so far as possible, be complementary and transparent.



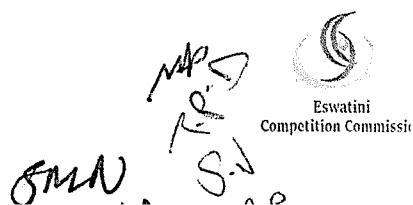
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- 2.7. The Authority and the Commission's public communications on issues of common interest may be appropriately co-ordinated.

3. **THE REGULATORY FUNCTIONS OF THE PARTIES**

The Authority

- 3.1. The functions of the authority in terms of the Energy Regulatory Authority Act of 2007, the Electricity Act or other Energy laws are:
- 3.1.1. To issue licenses for undertakings in the energy sector;
 - 3.1.2. To receive and process applications for licenses from undertakings in the energy sector;
 - 3.1.3. To prescribe conditions and terms of licenses issued in terms of this Act;
 - 3.1.4. To modify licenses and authorizations issued in terms of this Act;
 - 3.1.5. To make and enforce directions to ensure compliance with licenses issued in terms of this Act;
 - 3.1.6. To regulate and approve tariffs, charges and conditions of services provided by licensed entities, according to the requirements and terms established in their licenses;
 - 3.1.7. To receive, investigate and adjudicate complaints from customers on price adjustments made, or services provided, by any regulated undertaking;
 - 3.1.8. To regulate the inclusion of appropriate conditions to licences held by regulated undertakings;
 - 3.1.9. To revoke any licence in the energy sector for good cause;



- 3.1.10. To investigate tariff charges, whether or not a specific complaint has been made for a tariff adjustment;
- 3.1.11. To encourage the development of uniform industry standards and codes of conduct;
- 3.1.12. In conjunction with h other Government agencies, monitor the levels and structures of competition within the regulated sub-sectors in order that competition and accessibility to the regulated sectors in the Kingdom of Eswatini is promoted;
- 3.1.13. To review the organisation of companies engaged in licensed activities to the extent that the organization affects or is likely to affect the operation of the sector and the efficient supply of goods and services that are provided by licensed undertakings;
- 3.1.14. To develop and enforce performance standards for licensed activities;
- 3.1.15. To encourage the development of uniform industry standards and codes of conduct;
- 3.1.16. In conjunction with other Government agencies, design standards with regard to quality, safety and reliability of supply of goods and services of regulated undertakings;
- 3.1.17. To establish a uniform system of accounts for licensees in the same category;
- 3.1.18. To prepare industry reports and gather information from licensed companies;
- 3.1.19. To prescribe and collect license fees in the energy sector;
- 3.1.20. To approve codes of conduct in respect of operation of licensed activities;
- 3.1.21. To acquire information and carry out investigations relating to any of its functions;



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- 3.1.22. To promote consumer awareness and education in the energy sector;
- 3.1.23. To perform any other function that is incidental or consequential to its functions under this section, or as may be conferred on it by any other law;
- 3.1.24. To facilitate increasing access to the goods and services supplied by the regulated entities;
- 3.1.25. To recommend to the pertinent Ministers such reforms to this Act and the relevant sector laws as the Authority may deem desirable;
- 3.1.26. To verify periodic plans of energy consumption, production, transmission and distribution activities with the aim of securing the interests of all licensees as well as consumers;
- 3.1.27. To establish the controls to ensure legitimate competition in energy production and distribution, including the associated investments, in order to ensure their adequacy and timely allocation;
- 3.1.28. To review and approve the operational rules of the National Control Centre to ascertain the application of optimal criteria of operation and technical performance levels in co-ordination with the utilities; and
- 3.1.29. To do anything or exercise any other power or function that the Authority may lawfully do or exercise under this or any other energy law.
- 3.2. In addition to the powers, functions and duties assigned to it in terms of the Act and other Energy laws, the Authority shall: -
- 3.2.1. Exercise any power and function and perform any duty incidental to the exercise of the powers or functions or the performance of its duties;



- 3.2.2. Exercise such powers or functions and perform such duties as may be assigned to it under the Energy laws conferring power to the authority or other act of parliament.

The Commission

- 3.3. The functions of the Commission in terms of the Competition Act are to -

- 3.3.1. Carry out investigations in relation to the conduct of business, including the abuse of a dominant position, so as to determine whether any enterprise is carrying out an anti-competitive trade practices and the extent of such practices and issue orders or directives as it deems necessary to ensure compliance with the Act;
- 3.3.2. Carry out investigations in the case of mergers and issue appropriate orders;
- 3.3.3. Regulate the creation of a merger and/or prevent and provide re-dress to the abuse of a dominant position;
- 3.3.4. Provide persons engaged in business with information regarding their rights under the Act;
- 3.3.5. Provide information for the guidance of consumers regarding their rights under the Act;
- 3.3.6. Undertake studies and make available to the public reports regarding the operation of the Act;
- 3.3.7. Co-operate with and assist any association or body of persons to develop and promote the observance of the standards of conduct for the purpose of ensuring compliance with the provisions of the Act;
- 3.3.8. Advise the Minister on such matters relating to the operation of the Act;
- 3.3.9. Review the Act and any other legislation which inhibit fair competition;



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- 3.3.10. Co-operate with regional and international bodies engaged in the enforcement of competition law and the promotion of a competition culture;
- 3.3.11. Enter into discussions on contentious issues with any regulatory authority in order to harmonise and ensure consistent application of the competition principles.

4. **POLICY AND RULE-MAKING**

- 4.1. Each party will make regulations, rules, and guidelines and/or policies in pursuit of its separate objective(s). The parties shall seek to co-ordinate work on their respective policies that have a material effect on the other's objectives.
- 4.2. The Authority and the Commission shall liaise closely to ensure that their separate awareness activities are complementary. In matters of common interest, the parties shall share communication and publication plans to facilitate co-sponsored messages and effective resource planning, where appropriate.

5. **AREAS OF COMMON INTEREST**

- 5.1. The Authority and the Commission share a number of areas of interest including, but not limited to, the areas outlined below. Areas of interest and the regulatory priorities of each organisation may change, and the parties shall seek to co-ordinate and co-operate in relation to these matters where appropriate, the areas of common interest are as follows:
 - 5.1.1. The development of uniform industry standards and codes of conduct;
 - 5.1.2. Monitoring the levels and structures of competition within the regulated sub-sectors in order that competition and accessibility to the regulated sectors in Eswatini is promoted;
 - 5.1.3. Establishing controls to ensure legitimate competition in energy production with the aim of securing the interests of all licences and as well as consumers;



- 5.1.4. Establishing controls to ensure legitimate competition in distribution activities with the aim of securing the interests of all licences and as well as consumers;
- 5.1.5. Control of mergers and acquisitions in the energy sector;
- 5.1.6. Generally, controlling anti-competitive trade practices in the energy sector;
- 5.1.7. Distinguish in the level of intervention and imposed reporting requirements between the regulation of natural monopolies and entities operating in competitive sectors, in the energy sector;
- 5.1.8. Promoting competition culture;
- 5.1.9. Promoting the interests of consumers of goods and services provided by regulated entities in the energy sector with respect to prices and charges and the continuity and quality of supply;
- 5.1.10. Promotion of consumer awareness and education in the energy sector;
- 5.1.11. Protection of consumer welfare;
- 5.1.12. Provision of information for the guidance for consumers regarding their rights under the Energy Authority Regulatory Act, the Competition Act and Fair Trading Act;
- 5.1.13. Undertake studies and make available to the public reports regarding the operation of the Act Energy Authority Regulatory Act, Competition Act and Fair Trading Act;
- 5.1.14. Development and promotion of the observance of the standards of conduct for the purpose of ensuring compliance with the provisions of The Energy Authority Regulatory Act, Competition Act and Fair Trading Act;
- 5.1.15. Harmonising and ensuring consistent application of the competition principles.



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6. **GOVERNANCE AND ADMINISTRATION**

The Authority and the Commission share an interest in achieving good governance and administration in relation to energy and competition regulation in order to achieve the best outcome for each party. This interest includes, but is not limited to, issues around systems and controls.

7. **FRAUD**

The parties share an interest in the prevention of fraudulent activities in their respective regulated spheres and will co-ordinate efforts to prevent such activities and in issuing warnings to consumers.

8. **INFORMATION SHARING**

8.1. The Authority and Commission agree to exchange information on relevant issues of interest to the extent permitted by law. No party shall be required to communicate information to the other party if such communication is prohibited by the laws or regulations of the party possessing the information, or if it would be incompatible with the interests of that party in the application of its laws. The exchange of information will be on a broad range of issues, as appropriate and relevant to their respective objectives. This may include, but not limited to:

8.1.1. Information about investigations and notifying the other about any relevant action taken against a person or firm by one party which may be relevant to the functions of the other. This may include for example notification of prohibition orders, the Authority's withdrawal of an approval; the Commission notices, the Commission's third party notices, etc.


8.1.2. Information or intelligence held by the Authority which indicates serious risks to any decision by the Commission that has a material impact on a company's finances in relation to its liabilities;



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- 8.1.3. Information held by either party about fraud / criminal or any other activity that might cast doubt on the fitness and propriety of an Authority-authorized firm; and
- 8.1.4. Information or intelligence held by the Commission which indicates that there may be a failure of an Authority-authorized firm's systems and controls.
- 8.2. The Authority and the Commission may request information from each other and will include the details of the information sought and the legal gateways it considers are available to permit sharing. Each may suggest a reasonable deadline for response, including an explanation of any urgency.
- 8.3. The Authority and the Commission may consult and co-ordinate in respect of reviews, call for evidence and recommendations directed towards both parties, where appropriate.
- 8.4. In accordance with relevant legislation, the Authority and the Commission shall protect the confidentiality and sensitivity of all unpublished regulatory and other confidential information received from the other party.
- 8.5. Where one party has received information from the other, it will consult with, and where required by statute obtain the consent of the other before:
- 8.5.1. Passing the information to a third party or; and
- 8.5.2. Using the information in an enforcement proceeding or court case.
- 8.6. The Authority and the Commission will liaise where relevant, to the extent permitted by law and having regard to their respective objectives, on responding to enquiries from the public, including freedom of information requests and will consult each other before releasing information originally belonging to the other.



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9. **INVESTIGATION AND ENFORCEMENT**

9.1. The Authority and the Commission recognise that there are areas in which they have complementary functions and powers. The parties shall endeavour to ensure that in these cases, the most appropriate party will commence and lead investigations. To the extent permitted by law and having regard to their respective powers, expertise and resources, they will seek to ensure that:

9.1.1. In case of investigations, the Authority and the Commission will notify each other of significant developments where the other is likely to have an interest and discuss where appropriate the steps they propose to take; and

9.1.2. Co-ordination takes place in a timely manner, where possible, allowing for a proper exchange of views.

9.2. The Authority and the Commission may refer a matter for action to the other party if the that party is considered more appropriate to deal with the matter. Any such referral will include the action sought and the legal powers it considers are available to the other. Where the other party determines not to proceed, an explanation will be provided, where possible.

9.3. The relevant staff of the Authority and the Commission shall, where appropriate, seek to maintain general awareness and understanding of each other's functions and needs and will liaise with each other to ensure that issues are appropriately identified.

10. **CO-ORDINATION WITH OTHER AUTHORITIES**

10.1. The Authority and the Commission will liaise with each other and co-ordinate their activities as appropriate with other regulatory bodies.



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10.2. Where relevant to their respective objectives, co-ordination in relation to other regulatory bodies will include, in particular:

10.2.1. Designating individuals who act as points of contact for the exchange of information;

10.2.2. Consulting each other in respect of areas of common interest to come to an understanding of each other's views; and

10.2.3. Engaging in a timely manner, ensuring both parties have the opportunity to provide input in advance of decisions being made.

11. **REVIEW OF MOU**

11.1. The Authority and the Commission will review, each year, the operation of the MOU and the effectiveness of co-operation and co-ordination between the two parties.

11.2. This MOU may be revised or amended in writing by agreement between the parties.

12. **OBLIGATION TO ACT IN GOOD FAITH**

The parties shall act in good faith in their dealings with each other. Furthermore, the parties will use their best endeavours to work together with a view to implement this MOU. The MOU does not preclude the Commission and the Authority from carrying out their independent functions.

13. **PUBLICITY**

Save as may be agreed, neither party may publish or otherwise make any statement to any third party regarding the fact of or any information concerning the conclusion of this MOU or the terms hereof, or conduct any interview with any third party in relation thereto, without the consent of the other party save as required by law or to implement this MOU.



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14. **NOTICES AND COMMUNICATIONS BETWEEN THE PARTIES**

All notices, requests and communications required or permitted by this MOU shall be directed to the Chief Executive Officers' of the parties or any other officer as may be from time to time be designated.

15. **FINANCIAL OBLIGATIONS**

The parties shall, with regard to the implementation of this MOU and any activities arising from it, bear its own expenses, unless otherwise agreed upon by the parties.

16. **SETTLEMENT OF DISPUTES**

Any difference or dispute arising from the interpretation, application or implementation of this MOU shall be resolved amicably through consultation or negotiations between the parties.

17. **ENTRY INTO FORCE, DURATION AND TERMINATION**

17.1 This MOU shall take effect on the date of signature.

17.2 This MOU shall remain in force for a period of three years from the date of signature with the option to renew or extend it further, by agreement between the Parties.

17.3 This MOU may be terminated by either Party by giving two (2) months' written notice in advance to the other Party of its intention to terminate it.

17.4 The termination of this MOU shall not affect any activities, programs and projects undertaken by the Parties prior to the termination thereof, or the full execution of any cooperative activity that has not been fully executed at the time of termination, unless otherwise agreed upon in writing by the Parties.


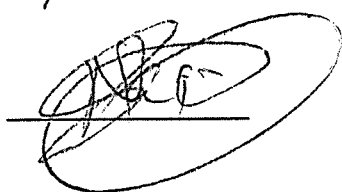


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Competition Commission

THUS DATED AND SIGNED BY THE PARTIES AND WITNESSED AT MBABANE ON THIS THE
...18...DAY OF...March..., 2021.

AS WITNESSES:

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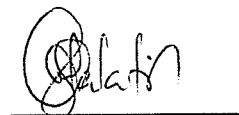
**MR. VUSUMUZI MKHUMANE
CHIEF EXECUTIVE OFFICER**

for and on behalf of:

ESWATINI ENERGY REGULATORY AUTHORITY

THUS DATED AND SIGNED BY THE PARTIES AND WITNESSED AT MBABANE ON THIS THE
...18...DAY OF...March..., 2021.

AS WITNESSES:

1. 
2. 



**MR. MUZI DLAMINI
CHIEF EXECUTIVE OFFICER**

for and on behalf of

ESWATINI COMPETITION COMMISSION



