



Final Consultative Document

Document Title:

Amendment to Decision Ref: 2009/001//D

**“Regulatory Policy and Procedure - Licensing
Procedures”**

*Procedures to secure continuity and security of the public
electricity supply on the expiration of the Term of the
DOMLEC Licence*

Document Ref: 2012/001/CD-05

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CONSULTATION PROCESS

Persons who wish to participate in this consultation and to express opinions on this Document are invited to submit comments in writing to the IRC. Responses/Comments should be sent to:

Executive Director
Independent Regulatory Commission
P.O. Box 1687
42 Cork Street,
Roseau
Commonwealth of Dominica

Responses, clearly showing the Document Reference identification, may be sent by mail or fax to the address or fax number above or by e mail to: ircdominica@gmail.com. Confidential information provided with responses should be submitted as a separate document and clearly identified as such.

In order to stimulate debate, the IRC will place any responses received on its website at www.ircdominica.org immediately following the last date for receipt of responses. Comments on the responses will also be entertained by the IRC which should, likewise, be submitted by the date indicated.

The references and proposed time table for this consultation are:

Document Ref No: 2012/001/CD-05

Document Title: *Amendment to Decision 2009/001/D - "Regulatory Policy and Procedure - Licensing Procedures" - Procedures to secure continuity and security of the public electricity supply on the expiration of the Term of the DOMLEC Licence*
(Comments on Responses)

Event	Proposed Date
Publication of Document	May 25, 2012
Responses close	May 30, 2012 @ 12 Noon
Decision by Commission	May 30, 2012

INDEPENEDENT REGULATORY COMMISSION

Document Ref: 2012/001/CD-05

“Amendment to Decision 2009/001/D – Regulatory Policy and Procedure – Licensing Procedures - Procedures to secure continuity and security of the public electricity supply on the expiration of the Term of the DOMLEC Licence”

1.0 Introduction

The Commission issued an Consultative Document, Document Ref. 2012/001/CD-02 entitled “Amendment to Decision 2009/001/D – Regulatory Policy and Procedure – Licensing Procedures - *Procedures to secure continuity and security of the public electricity supply on the expiration of the Term of the DOMLEC Licence*” setting out proposals to amend the licensing framework to specifically introduce procedures for addressing the arrangements for the end of the term of DOMLEC’s Licence. The Commission has considered it necessary to formalize these arrangements into the established licensing procedure as the relevant Act, The Electricity Supply Act 10 of 2006, makes no provisions for or provides guidance as to the procedure to be adopted to secure continuity and security of the public electricity supply to the Commonwealth of Dominica on the expiration of the Term of the Licence.

The Consultative Document was issued on April 15th 2012 with the consultation period scheduled to end on April 30th following which the Commission issued its comments, Document Ref: 2012/001/CD – 03, responding to the responses received, on May 11th 2012. As there was only one substantive respondent, most of whose comments were accepted, the Commission felt justified in allowing a short period for receiving further comments on the matter and therefore scheduled the end of that consultative period to end on May 17th 2012.

Further comments were received from DOMLEC on the later Consultation Document Ref: 2012/001/CD – 03. The Commission has noted the latter responses and has taken these into account in arriving at its Decision. Where appropriate these comments are addressed in the Statement of Reasons appended to the Decision.

The Commission wishes to thank DOMLEC for its contributions to this proceeding.

The Commission now sets out its Decision on this matter which will become effective on the date of issue.

2.0 Decision

The public electricity supply is considered by the Commission to be of the highest priority to the well being and economic security of the Commonwealth of Dominica and its citizens and any uncertainty as to the continuity and security of supply is inimical to the public interest. Pursuant to its duty under the Electricity Act 10 of 2006, take such actions as it deems “*necessary to fulfill its duties and functions under this Act or as are otherwise necessary to serve the public interest*”, the Commission therefore deems it necessary to take such action as may be necessary to ensure the adequacy, continuity and security of supply in the period leading up to the end of the term of the current Licence held by DOMLEC and to implement such measures as are necessary to secure arrangements for the adequacy, continuity and security of supply immediately on the expiration of the term.

Accordingly the Commission hereby makes the following amendments to its Decision **2009/001/D – “Regulatory Policy and Procedure – Licensing Procedures”** which became effective on October 29, 2009.

Insert new clause 2.1 (6)

Special conditions - As licences will be conditioned by the nature of the services being offered; where technology, investor requirements, exclusivity and others issues may affect the provisions made for renewal, amendment and/or revocation, the Commission reserves its authority to provide for any such special conditions for renewal, amendment and/or revocation into the individual Licences, which would supersede the related conditions in these Rules.

These provisions will be written into the licences issued to any generator who has a significant share of the generation capacity connected to the national public supply system. Any generator that operates under a Power Purchase Agreement with DOMLEC, with a capacity of ten percent 10% or more of the installed generation capacity shall be deemed to have a significant share of the generation capacity.

Insert a new Section 2.11

Procedures on the expiration of the Term of the DOMLEC Licence

Subject to the provisions herein, negotiations for new license(s) shall commence not later than the beginning of the Forty Second Month before the end of the Term. The negotiations shall be initiated and conducted in accordance with the following time table:

Time table for managing negotiations with DOMLEC for renewal or issuance of ne Licences

Months before end of Term	Target objective (1)	Target objective (2)
42	Licencee to advise the Commission, in writing, as to its intention to renegotiate the licence or surrender it. This will be acknowledged by the Commission within seven (7) working days of receipt.	
39	If Licencee demonstrates its intention to renegotiate the Licence, the Commission to respond to the Licencee providing broad frame work and draft of proposed new Licence and setting out a proposed time table for meeting the objective contained herein.	If Licencee demonstrates its intention to surrender the licence, the Commission to respond to the Licencee proposing the broad framework and procedure for managing the Investor's disengagement from the business of the Licencee
39 - 36	Preliminary negotiation of new licence terms	New investors identified and new Licence negotiated concomitantly with sale/disposal of the asset by the investor
36 - 33	Public consultation on proposed new Licence	
33 – 30	Final round of negotiations	
27	Commission issues new Licence	
24	<p>If the Commission and the Licensee fail to reach agreement on a new Licence or if the Investor fails to identify a purchaser satisfactory to the Commission, the Commission will recommend to the Minister that the Government embarks on the process of “acquisition” of the assets of the investor at the Fair Market Value* - payment of which will be effected on the expiration date of the Term or such other date as the parties may mutually agree.</p> <p><u>New Licence to become effective on the date of acquisition of the asset.</u></p>	

*Fair Market Value means the market value of the Licensee when evaluated as an ongoing business concern including this Licence and all lands, buildings, works, materials, plant and property of all kinds whatsoever suitable to or intended for the purposes of the undertaking and shall be determined in a manner than complies with the term Fair Market Value as defined by the American Society of Appraisers, that is the price, expressed in cash equivalents, at which the assets would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open unrestricted market when neither is

under any compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.

Fair market value shall be the average value as determined by a panel of three (3) independent valuation experts, one to be selected by the Commission, one by the Licensee and one, who shall be Chairman of the panel, to be selected by the two other members. In the event that the nominees cannot agree on the selection, the Chairman shall be appointed in accordance with the provisions of Part II of the Arbitration Act of the Commonwealth of Dominica,

Upon giving notice of acquisition the Commission shall:

- (a) have the right for the valuers to inspect all the Licensee's property and its books of account and records;
- (b) no later than 12 calendar months before the expiration of the Licence or extension thereof the Panel of independent valuation experts shall issue its report and the certification of the average value of the Fair Market Value of the assets, which shall be the sum to be paid upon acquisition. The report shall be issued simultaneously to the Commission, the Government and the Company. Arrangements will then be concluded as to amount and the manner of payment by the Government and/or the designee of the Government.
- (c) on the date of acquisition the Government/or the designee of the Government shall pay to the Licensee such sum as may be agreed in accordance with the arrangements concluded under (b) above.

3.0 Reasons

Introduction

The Electricity Supply Act 2006, (ESA, the Act) provides a framework for the Independent Regulatory Commission (the Commission, IRC) to issue licences for the generation, transmission, distribution and supply of electricity. The Act sets out a procedure for the grant of licences where, in so doing, the Commission has duties, among others, “*to encourage the expansion of electricity supply in Dominica where this is economic and cost effective and in the public interest*” and “*to facilitate the promotion of sustainable and fair competition in the electricity sector where it is efficient to do so*”.

The Commission is of the view that the size of Dominica and, more specifically, the size of its public electricity supply system do not lend themselves easily for economies of scale and, as effective competition requires many sellers and many buyers, it is impractical to create a competitive environment in the transmission, distribution and supply of electricity but that it may be possible to attract multiple players to the generation market. The Commission is of the view that the stability and security of the Transmission, Distribution and supply systems, to enable efficient delivery of the energy generated, is critical and that this has to be facilitated through an enabling environment which assures the confidence off the Licencee to invest in the system infrastructure.

The ESA provided among other things for the grant of a Licence to DOMLEC¹ to generate, transmit, distribute and supply electricity until December 31, 2015. Neither this Act nor the repealed Act make provisions for or provide guidance as to the procedure to be adopted to secure continuity and security of the public electricity supply to the Commonwealth of Dominica on the expiration of the Term of the Licence. Specifically, there are no procedures to guide the process for renegotiation/reissue or even the continuation of the DOMLEC Licence at the end of the term.

In the absence of such provisions, the Commission has a duty to take such actions as it deems “*necessary to fulfill its duties and functions under this Act or as are otherwise necessary to serve the public interest*”. The public electricity supply is considered by the Commission to be of the highest priority to the well being and economic security of the Commonwealth of Dominica and its citizens and any uncertainty as to the continuity and security of supply is inimical to the public interest. The Commission therefore deems it necessary to take such action as may be necessary to ensure the adequacy, continuity and security of supply in the period leading up to the end of the term of the current Licence held by DOMLEC and to implement such measures as are necessary to secure arrangements for the adequacy, continuity and security of supply immediately on the expiration of the term.

¹ In this document references to DOMLEC is a reference to DOMLEC as presently organised or to its successor, however organised.

The Commission’s Decision **2009/001/D – “Regulatory Policy and Procedure – Licensing Procedures”** which became effective on October 29, 2009 sets out the Commission’s Policies and Procedures for Licensing but it does not specifically address the procedure for addressing the arrangements for the end of the term of DOMLEC’s Licence.

The Commission had set out its views on and its proposals to remedy this lacuna in its **“Regulatory Policy and Procedure – Licensing Procedures”** in its Consultative Document Ref. 2012/001/CD-02 entitled “Amendment to Decision 2009/001/D – Regulatory Policy and Procedure – Licensing Procedures - *Procedures to secure continuity and security of the public electricity supply on the expiration of the Term of the DOMLEC Licence*”. It also issued subsequently, Consultative Document Ref 2012/001/CD-03, where it discussed the comments received. The outcome of these discussions is reflected in the arguments which follow and in the final Decision.

Legal Framework

The ESA provides for certain powers duties and functions of the Commission all of which are intended to provide a frame work for the Commission to act in the public interest by taking independent action as it deems fit to secure the continuity, adequacy and security of electric service to the Commonwealth of Dominica.

The relevant sections of the ESA are recited below:

18. The Commission shall be independent in the performance of its functions and duties under this Act and shall not be subject to the direction and control of the Government or of any person, corporation or authority, except that the Commission shall have due regard to the public interest and overall Government policy, as embodied in legislation.

20. (1) The Commission shall, without limiting the generality of this section, have a duty to perform and exercise its functions and powers under this Act in the manner which it considers best calculated to:

(a) encourage the expansion of electricity supply in Dominica where this is economic and cost effective and in the public interest;

(b) encourage the operation and development of a safe, efficient and economic electricity sector in Dominica;

(c) ensure the security and efficiency of the supply of electricity in Dominica through the conduct of an efficient long-term supply planning process with due regard for future potential generation sources such as geothermal and wind energy;

.....

21. (1) The Commission shall

.....

(b) issue, monitor, and amend licences.

(k) advise the Minister on the generation, transmission, distribution and supply of electricity;

(q) take such other actions as the Commission deems necessary to fulfill its duties and functions under this Act or as are otherwise necessary to serve the public interest or to fulfill the objectives of other legislation or treaties relating to the electricity sector of the Commonwealth of Dominica.

29. (1) Subject to section 30, no person, unless authorized to do so by licence under this Act, shall engage in the operation of facilities or systems in order to carry out any of the functions of :-

(a) generating electricity, except in cases where such licencing requirement has been excluded or exempted pursuant to Section 31 (4) of this Act;

(b) transmitting electricity;

(c) distributing and supplying electricity.

In carrying out its functions the Commission has a duty to establish and facilitate an environment of certainty for the Licencees to plan for and finance their businesses as provided in S 22:

22. In carrying out its functions under this Act, the Commission shall -

(c) take into account the need for licencees to finance and plan their businesses with a reasonable degree of assurance;

The ESA clearly establishes the regulatory jurisdiction over DOMLEC, which was granted a licence to December 31 2015, where S86 provides:

86. (1) The Electricity Supply Act 1996 is hereby repealed.

(2) Notwithstanding subsection (1) and any other law -

(a) the Company shall be licensed to generate, transmit, distribute and supply electricity up to December 31, 2015 subject to the regulations imposed by the Independent Regulatory Commission.

(b) if the Company fails to conform to the regulations imposed by the Commission, the Company's licence shall be revoked by the Commission if in the opinion of the Commission the revocation of such Licence will serve the public interest.

While the rule making powers of the Commission, for the purpose of granting licences, are provided for at S41:

41. The Commission shall, by notice published, in the Gazette, issue such other administrative orders and rules as are necessary for exercising its powers and performing its duties in the implementation of policies under this Act.

.....

Regulatory Policy

“The public electricity supply is considered by the Commission to be of the highest priority to the well being and economic security of the Commonwealth of Dominica and its citizens and any uncertainty as to the continuity and security of supply is inimical to the public interest.”

The Commission therefore deems it necessary establish policies and procedures to ensure the adequacy, continuity and security of supply in the period leading up to the end of the term of the current and any future Licences held by DOMLEC and to implement such measures as are necessary to secure arrangements for the adequacy continuity and security of supply immediately on the expiration of the term.

The Commission sets out its general policy objectives regarding Licensing in its Decision **2009/001/D – “Regulatory Policy and Procedure – Licensing Procedures”** which became effective on October 29, 2009 as follows:

- (1) DOMLEC will retain its exclusive right to develop the transmission network for the “on island” public electricity supply system.
- (2) Developers of generating facilities that will interconnect with the public electricity supply on the basis of power purchase agreements (PPA) with DOMLEC, will as a general rule be required to provide interconnection to the DOMLEC system at the high voltage (hv) side of the generator step up transformer. If, however, circumstances dictate that it would be prudent for the developer to construct and own the transmission interconnector to the DOMLEC system, a transmission licence will be issued to the developer. In these circumstances, the Commission’s approval will follow from analysis of the options to achieve the interconnection, including any proposals submitted by DOMLEC, which will provide the most advantageous long term benefit to the consumer.
- (3) Developers of energy resources that are primarily intended for cross border sale of electricity will be allowed to develop the associated transmission system infrastructure and will be granted the required transmission licences. Any interconnection of these facilities to the Dominica public supply system operated by DOMLEC will be at the appropriate transmission voltage for the DOMLEC system. If circumstances require, the developer will be eligible for a transmission licence to build and operate the transmission system to interconnect with the DOMLEC system.
- (4) The Act, in various places, makes reference to “transmission system operator” and “system operator”. As the expression is not explicitly defined, the Commission now assigns that function as well as the functions of “distribution system operator” to the entity that has responsibility for “system operation”. For the avoidance of doubt those functions reside with DOMLEC.
- (5) A Distribution licence will be issued to DOMLEC and DOMLEC (or its successor) will continue to have the exclusive right to supply, for sale, electricity to third parties.

In addition and notwithstanding the provisions of clause 5 above, DOMLEC has been advised that “the Commission will allow third party supply to any development areas where it is demonstrated that it would be uneconomical for DOMLEC, or DOMLEC is unwilling to extend its electricity supply system to any such area.”

While the Regulatory Policy may suggest an intent that DOMLEC's current Licence, should be construed as a monopoly licence for transmission, distribution and supply as well as a generation licence, for all practical purposes the company currently exercises a monopoly position in the generation market.

The need for policies and procedures to ensure the adequacy, continuity and security of supply in the period leading up to the end of the term of the current and any future Licences have particular application, in addition to DOMLEC, to any generator who has a significant share of the generation capacity connected to the national public supply system and which for this purpose is deemed as any generator that operates under a Power Purchase Agreement with DOMLEC with a capacity of ten percent 10% of the installed generation capacity. These provisions will be written into the specific licences.

Comments on Consultative Document Ref 2012/001/CD-03

The full text of DOMLEC's comments is available on the Commission's web site www.ircdominica.org. The Commission now responds to the issues raised.

1. Can some clarification be given on the statement that “these provisions will be specially codified and treated outside of the norm of general licensing procedures”? This statement seems to conflict with the earlier statement that the procedures would be codified and inserted as a new section 2.11.

Additionally, the references in that section to DOMLEC licences should be corrected to licence as DOMLEC currently has one integrated licence.

Commission response

If there is ambiguity arising from the two statements, this is regretted. The substantive point is that the procedure will be codified and inserted as a new section 2.11.

While the second point questions the use of the plural “licences” it should be noted that this procedure is not a “one off” condition and is intended to have application in subsequent periods, when DOMLEC will have more than one licence.

2 (c) The Commission's proposal requires valuations to be conducted by parties other than the panel of valuers. DOMLEC's proposal seeks to correct this and to have the valuation conducted only by the panel of valuers and incorporated into the timetable. DOMLEC's proposal removes the vague term “probable estimates” and replaces it with the precise term “average”. This addresses both substance and form.

Commission response

Domlecs suggestion has merit and the affected sections will be amended appropriately.

2 (d) The ESA empowers the Commission to issue single as well as integrated licences. It is both unfair and unreasonable for the Commission to set out a policy statement making a determination on the type of licence it will issue to DOMLEC even before DOMLEC has

applied for a licence or had the opportunity to negotiate the terms of the new licence it requires.

Commission response

The Commission regrets DOMLEC's expressed view that "unfair and unreasonable" positions have been taken by the Commission. The Commission is of the view that it arrived at the policy positions in question after due process and, consistent with the provisions of the ESA, after having provided all stake holders (including DOMLEC) with the opportunity to be heard. In this regard, the Commission reminds DOMLEC that these policy positions were adopted after consultation in accordance with the procedures established by the Commission and directs DOMLEC's attention to the proceedings associated with Consultation Document Ref: 2008/002/NPRM-001 "Regulatory Policy and Procedure – Adding Capacity to the Public Electricity Supply System" dated November 26, 2008. Although DOMLEC participated in that proceeding, it did not raise concerns or question the policy positions articulated by the Commission.

DOMLEC also had a second opportunity to raise concerns about the Commission policy positions in a subsequent proceeding associated with Consultation Document Ref No: 2009/001/CD "Regulatory Policy and Procedure – Licensing Procedures" issued April 1, 2009, to which DOMLEC made no contribution.

B2. The substantive legislation does not permit the Commission to write special conditions into the individual licenses which supersede the provisions in its published rules unless the rules and/or the substantive legislation have been amended to provide for these special conditions.

Commission response

The Commission is of the view that the substantive legislation does not expressly forbid the procedure proposed but in any event the outcome of the current proceeding is to amend the substantive rules to allow such a procedure. This would appear to address DOMLEC's proviso "**unless the rules and/or the substantive legislation have been amended to provide for these special conditions**"

Procedure

Subject to the provisions herein contained negotiations for a new license shall be commenced not later than the beginning of the Forty Second Month before the end of the Term. The negotiations shall be initiated and conducted in accordance with the following time table

Months before end of Term	Target objective (1)	Target objective (2)
42	Licencee to advise the Commission, in writing, as to its intention to renegotiate the licence or surrender it. This will be acknowledged by the Commission within seven (7) working days of receipt.	
39	If Licencee demonstrates its intention to renegotiate the Licence, the Commission to respond to the Licencee providing broad frame work and draft of proposed new Licence and setting out a proposed time table for meeting the objective contained herein	If Licencee demonstrates its intention to surrender the licence, the Commission to respond to the Licencee proposing the broad framework and procedure for managing the Investor's disengagement from the business of the Licencee
39 - 36	Preliminary negotiation of new licence terms	New investors identified and new Licence negotiated concomitantly with sale/disposal of the asset by the investor
36 - 33	Public consultation on proposed new Licence	
33 - 30	Final round of negotiations	
27	Commission issues new Licence	
24	If the Commission and the Licensee fail to reach agreement on a new Licence or if the Investor fails to identify a purchaser satisfactory to the Commission, the Commission will recommend to the Minister that the Government embarks on the process of "acquisition" of the assets of the investor at the Fair Market Value* - payment of which will be effected on the expiration date of the Term or such other date as the parties may mutually agree. <u>New Licence to become effective on the date of acquisition of the asset.</u>	

*Fair Market Value means the market value of the Licensee when evaluated as an ongoing business concern including this Licence and all lands, buildings, works, materials, plant and property of all kinds whatsoever suitable to or intended for the purposes of the undertaking and shall be determined in a manner than complies with the term Fair Market Value as defined by the American Society of Appraisers, that is the price, expressed in cash equivalents, at which the assets would change hands between a hypothetical willing and able buyer and a hypothetical

willing and able buyer, acting at arm's length in an open unrestricted market when neither is under any compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.

Fair market value shall be the average value as determined by a panel of three (3) independent valuation experts, one to be selected by the Commission, one by the Licensee and one, who shall be Chairman of the panel, to be selected by the two other members. In the event that the nominees cannot agree on the selection, the Chairman shall be appointed in accordance with the provisions of Part II of the Arbitration Act of the Commonwealth of Dominica,

Upon giving notice of acquisition the Commission shall:

- (a) have the right for the valuers to inspect all the Licensee's property and its books of account and records;
- (b) no later than 12 calendar months before the expiration of the Licence or extension thereof the Panel of independent valuation experts shall issue its report and the certification of the average value of the Fair Market Value of the assets, which shall be the sum to be paid upon acquisition. The report shall be issued simultaneously to the Commission, the Government and the Company. Arrangements will then be concluded as to amount and the manner of payment by the Government and/or the designee of the Government.
- (c) on the date of acquisition the Government/or the designee of the Government shall pay to the Licensee such sum as may be agreed in accordance with the arrangements concluded under (b) above.

Other considerations

For the avoidance of doubt and to provide an environment of certainty, the Commission may opt to write specific provisions into licences, to govern the process for renewal, extension amendment and termination of Licences, including those of Generators which control a significant share of the generation capacity.