



# **Response to Notice of Grievance**

**Case U-0018-14**

**Commission Order establishing the Utilities (Restriction on Provision of Financial Support) Rules 2014**

**September 2014**

# 1. Introduction

## Notice of Grievance information

Table 1: Notice of Grievance information

Case number	U-0018-14
In the matter of	Commission Order establishing the Utilities (Restriction on Provision of Financial Support) Rules 2014
Date of Order	22 <sup>nd</sup> July 2014
Date of Notice of Grievance	22 <sup>nd</sup> August 2014

### Purpose of this document

The Utilities Regulatory Authority (URA) has received from UNELCO a “Notice of Grievance and Notice of Litigation under Section 17 of the Convention dated 15 August 1986 of the Concession Agreement between the Government of Vanuatu and UNELCO” dated 22<sup>nd</sup> August 2014 (referred to as ‘Grievance’). Grievance is filed in response to Commission Order dated July 22, 2014 Utilities (Restriction on Provision of Financial Support) Rules 2014 (**Rules**) (URA Case U-0018-14).

The Commission has reviewed the objections raised and arguments supporting the Grievance, and sets out its responses in the following sections.

The Grievance is attached as **Annex A**.

### Background

URA’s review of recent financial statements provided by the regulated utilities indicated that some utilities are engaged in providing substantial financial assistance to third parties in the form of loans and other support. No details of the financial transactions or documents were provided despite repeated requests, making it impossible for URA to determine if the financial support provided is necessary, prudent and related to the utility business. Commission is concerned that unrestricted and unchecked financial activities can pose unacceptable risk to the financial viability of a utility and its ability to provide regulated services. The Commission adopted the Rules to ensure that utility services are not jeopardized by inappropriate use of utility funds. The URA has the duty to ensure that revenue collected from consumers for services provided by utilities are utilized prudently so as to assure the provision of safe, reliable and affordable regulated services and promote the long-term interests of consumers. The proper use of revenue collected by utilities plays a key role in setting maximum tariff level, ability to make necessary investment and maintain system in good condition at all times.

## Legal context

Pursuant to Section 27 of the Utilities Regulatory Authority Act (**URA Act**), a utility aggrieved by any action of the URA taken pursuant to Part 3 of the URA Act may within 30 days of action being taken, give notice of grievance to the URA. The URA is required to review all evidence supporting the grievance and may

- (a) revoke the action complained of in the notice of grievance; or
- (b) amend or vary the action complained of in the notice of grievance; or
- (c) take no further action.

The URA is required to inform the aggrieved person of the outcome of the review within 30 days of the date of notification and, in the event that the URA takes the action described in subsections (b) or (c) above, the URA must provide written reasons.

This Response is issued pursuant to Section 27 of the URA Act.

## 2. Response to Grievance

### Paragraphs 3, 4 and 31 of Grievance

Upon careful review of all the allegations, objections and arguments raised by UNELCO, the Commission is satisfied that the finding in the Order is correct, legal, valid and binding. The Commission is within its powers under the URA Act to issue and implement the provisions in the Order. Therefore the position of UNELCO is rejected and no further action is required. Reasons for this conclusion are set forth below.

### Paragraphs 6 - 19 of Grievance

At the outset it should be noted that the concessionaires are not owners of the utility system or its assets. Rather they are managers, investors and operators. For these services they are entitled to receive a fair compensation for their investment, management and operations. It is incumbent upon them to operate and manage operations prudently at all times. At the end of the concession, all assets must be returned to the Grantor in good working condition.

First it is important to clarify that the restriction set out in the Rules is not a blanket restriction. Attention is drawn to the last paragraph of Rule 2.1 which states:

*“It is clarified that Restricted Financial Support does not include distribution by the Concessionaire of proceeds from its net income generated from regulated service(s). Advance payment for goods and services sought by the Concessionaire in the ordinary course of business in respect of the regulated service(s) are not regulated by the Rules.”*

Moreover UNELCO is entitled to give loans in excess of 100,000 VUV as long as the distribution is from UNELCO's net income generated from regulated services. Further, in exceptional circumstances UNELCO may approach the URA and request for approval to provide a Restricted Financial Support to a person (Rule 2.3)(if, for example UNELCO decides to finance homeowners to install solar systems). The Commission observes that when summarizing the Rules, UNELCO has left out key portions of the Rules. We advise UNELCO to read Rules in their entirety.

In its Grievance, UNELCO primarily claims that the reference to Section 12(1)(a) by URA is incorrect as “Section 12(1)(a) of the URA Act does not of itself grant the URA statutory functions beyond those otherwise set out by legislation – rather, it specifically provides that the URA's function is to exercise the functions and powers conferred on it by the URA Act or by any other Act.” (paragraph 15 of Grievance). We observe paragraph 15 while referring to the language of Section 12(1)(a) omits the remainder of the language “... in furtherance of the purposes of this Act.” The URA is mandated to exercise the functions and powers conferred by the URA Act to further the purposes of the URA Act. The purpose of the URA Act is set out in Section 2 of the URA Act and provides as follows:

*“The purpose of this Act is to:*

- (a) ensure the provision of safe, reliable and affordable regulated services; and*
- (b) maximize access to regulated services throughout Vanuatu; and*

(c) *promote the long term interests of consumers.*”

The URA is mandated to ensure that the purposes of the URA Act are fulfilled.

We note that in paragraph 17 of the Grievance, UNELCO has stated “*In this regard, the URA has not purported to rely on any other function ...*” This is not correct for URA’s functions under Section 12(1)(e) has specifically been referred to on page 1 of the Order. Pursuant to Section 12(1)(e) another core function of the URA is “*to investigate and act upon offences under this Act*”. As previously stated, limited information provided to URA by regulated utilities indicates that utilities are engaged in providing substantial financial assistance to third parties. Further certain utilities who were requested for additional information have refused to provide details of such transactions, e.g. terms, repayment, interest rate, etc. that can enable URA to ascertain the purpose, size, risks involved and propriety of the transactions. It is the responsibility of URA to ensure that such financial transactions do not amount to inappropriate and reckless use of utility funds. It is crucial that URA timely receive requisite information so that it can ensure that utilities are not engaged in conduct which is misleading or deceptive or likely to mislead or deceive a consumer (Section 21(7) of Act). To fulfil its role, Section 13(2)(a) of the URA Act specifically empowers the URA to require a utility to furnish information in respect of its accounts or finances. Further, under Section 13(2)(b) URA may require a utility to confer with it as to the manner in which it carries on any activity in relation to a regulated service. Also, Section 13(1A) authorizes the URA to require a utility to do those things expressly required by the provisions of the URA Act. All the aforementioned functions and powers of the URA have been stated in the Commission Order on pages 1 and 2.

Commission affirms that it has the power under the URA Act to issue and implement the Order. Therefore position of UNELCO above is without merit and rejected.

## Paragraph 20 of Grievance

UNELCO has claimed that “*Further, the URA has no power under the URA Act to arbitrarily make rules*”. UNELCO has not given reasons why it believes that the Rules have been issued arbitrarily or what it believes the URA has unjustly deprived UNELCO of. Still, for the benefit of UNELCO and the consumers, the Commission would like to emphasize that the Rules are not arbitrary or unjust. The discretion to issue the Rules has been exercised judiciously and not in a capricious manner detached from the prevailing realities. On observing that utilities are engaged in certain financial transactions with third parties, which may not be related to the utility business, and may pose serious risk to provision of safe, reliable utility services, the Rules have been issued in the interest of consumers. Rules are intended to further the purposes of the URA Act, specifically, to preserve the integrity of the supply of regulated services and ensure that the funds collected from consumers and concession assets are not wasted and are utilized to maximum customer benefit. The Order sets out the Commission’s reasons for issuing the Rules (pages 1 to 3). However, to fully satisfy the concerns of UNELCO we elaborate further.

1. **Rule 2.1(a)**: The utility is free to spend or utilize its net income as it wishes. But all other monies provided by the consumers must be prudently applied, and only to the utility system, so that the regulated services continue to remain safe, reliable and do not become expensive for consumers. The purpose of restriction under Rule 2.1(a) is to ensure that the utility does not indiscriminately and arbitrarily hand out money that is meant for reinvestment into the system, to support non-

business activities. A threshold of 100,000 VUV has been specified so that small payments e.g. loans to employees, are not stopped. Provision is also made for exceptions to this limit.

2. **Rule 2.1(b):** Restricts the utility from giving/assuming guarantees, collateral, or pledge on behalf of a financial obligation of a third person. If this is permitted, and if the third party defaults on its obligation, the utility would have to honour it and this may impact the solvency of the utility or may require that concession assets be sold, transferred, etc. All this could ultimately result in unreliable, unsafe and higher cost services.
3. **Rule 2.1(c):** Restricts the utility from creating encumbrance on concession assets on behalf of the third party which encumbrance is not required for provision of the regulated service. If this is permitted and utility encumbers concession assets, then in case of a default the concession assets may need to be sold/transferred (depending on the terms of the third party arrangement) detrimentally impacting the regulated services.
4. **Rule 2.1(d):** The cost of assets purchased, maintenance of assets, depreciation, interest on debts, etc. are all included in the tariff determination i.e. the price that consumers pay for the regulated service. It would be unfair to the consumers if the assets that consumers have paid for are used by third parties, particularly where appropriate compensation for such usage is not paid. For example a utility may loan money to a third party and then borrow in the market for utility purposes at higher cost. As a small utility UNELCO has limited access to capital.

Therefore, the Commission has rightfully issued the Rules prohibiting utilities from engaging in any such activities, without first obtaining the approval of the URA which may be granted in exceptional circumstances after analyzing its purpose, necessity and long and short term impact on the regulated services. UNELCO's argument that Commission has acted arbitrarily is rejected.

## Paragraph 21 of Grievance

The reference to Section 40 of the URA Act by UNELCO is incorrect. Section 40 is an empowering section, giving the relevant Minister and the Minister responsible for finance the power to make regulations regarding mode of URA operations, not about its regulatory actions. It does not limit the powers or rights of URA as provided under the URA Act. The Order and Rules are not issued under Section 40 of the URA Act. The contention of UNELCO is rejected.

## Paragraphs 22 - 30 of Grievance

The objections and arguments of UNELCO are legally incorrect as explained below, and the Commission reaffirms the Order as it is not inconsistent with the terms of the Concession contract for the Generation and Public Supply of Electric Power in Port Vila with UNELCO dated 15 August 1986, as amended (**Port Vila Electricity Contract**).

UNELCO's argument as raised in reference to Section 8.2 of the 1997 Amendment<sup>1</sup> to the Port Vila Electricity Contract is incorrect. The Government of Vanuatu and the URA are separate legal entities. URA is neither the Government nor a 'department of the Government'. Hence Section 8.2 does not apply to actions and powers of the URA. The URA was established by the Parliament as a body corporate under the URA Act (Section 4 of the URA Act). The URA is an independent regulatory body. Section 4(3) of the URA Act specifically states that "*The Authority is to act independently but must have regard to such policies as may be issued pursuant to section 35*". URA is not aware of any Government policy allowing any use of utility funds by the concessionaires outside of the utility purpose.

URA has issued and is implementing the Order and Rules pursuant to its powers under the URA Act as detailed in the Order (Section titled '*Powers and Functions of URA*'). This is not an exercise of power on behalf of the Government of Vanuatu assigned under Section 20 of the URA Act. The Port Vila Electricity Contract has been entered into by the Government of Vanuatu and not the URA. Therefore, these actions of the URA cannot amount to breach under the Port Vila Electricity Contract. The Commission is not persuaded by the arguments put forth by UNELCO that its Order and Rules are inconsistent with the Port Vila Electricity Contract.

Without limiting the arguments set out above, it is clarified that the Rules do not impact in any way, nor cancel consents or authorizations obtained by UNELCO for operating its business i.e. supplying regulated services within the concession area and do not prohibit any of the actions set out in Section 8.2 in respect of remittances inside and outside of Vanuatu i.e. "*repayment of loans, retirement of capital and the payment of dividends, Management fees or distributions and to import or export plant, machinery, apparatus or equipment as the Concessionaire considers necessary*".

Rule 3.2 does not say that UNELCO cannot continue with financial assistance already given, even those unrelated to business, before the date of the Rules. However it says that the URA may review the instrument and if necessary, require acceleration of existing loans taking into consideration the severity of impact of such acceleration on the utility. Contrary to assertion by UNELCO, Section 8.2 of the 1997 Amendment does not give UNELCO the authority to give loans, guarantee, collaterals, pledge or create encumbrances, etc. Therefore, the Rules are not inconsistent with Section 8.2.

Further, we are concerned by UNELCO's interpretation of Section 8.2 of the 1997 Amendment as set out in paragraph 26, 27(a) and 30 of the Grievance. UNELCO erroneously claims that Government has given it a blanket permission to "*effect remittances inside and outside the Republic for any purpose whatsoever including the repayment of loans...*". UNELCO has stretched this to suggest that the Government has given it unrestricted right to "*spend utility funds in order inside and outside the Republic for any purpose whatsoever*". The words '*for any purpose whatsoever*' in Section 8.2 are not without limitations. The Section 8.2 is to be read in its entirety; the term '*for any purpose whatsoever*' is limited by the preceding language i.e. '*in order for the Concessionaire to carry on its business*'. Hence the '*purpose*' for remittances inside and outside Vanuatu (as mentioned therein) must be such that is necessary for the utility to carry on the regulated services business. The Section 8.2 is reproduced below for ease of reference:

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<sup>1</sup> Agreement dated 25 September 1997 varying Concession between the Government of the Republic of Vanuatu and the Honourable Minister of Lands, Geology, Mines, Energy and Rural Water Supply and Union Electrique du Vanuatu Ltd.

*“The Government shall apply its best endeavours to ensure that all consents and authorizations required to be given by it or any department of the Government, **in order for the Concessionaire to carry on its business** is granted and remains in full force and effect throughout the period of this Agreement **and in particular so that the Concessionaire has the full right and power to effect remittances inside and outside the Republic for any purpose whatsoever** including the repayment of loans, the retirement of capital and the payment of dividends, Management fees or distributions and to import or export plant, machinery, apparatus or equipment as the Concessionaire considers necessary.”*

It is important to note that Sec. 8.2 defines rather exhaustive list of permissible financial transactions that UNELCO is authorized to engage in. “Lending money to anyone unrelated to business” is not included in this list and for good reason.

Therefore, Section 8.2 does not give UNELCO the right to lend or remit funds generated from regulated services, with no legitimate business purpose. The Commission draws attention particularly to the Sections titled ‘Funds generated by Utilities’ and ‘Necessity of proper use of funds by Utilities’ in the Order. Further, in light of the arguments by UNELCO and its insistence that it is entitled to use the funds ‘for any purposes whatsoever’ the Commission expresses concern about the manner in which funds collected from consumers and concession assets may be utilized by UNELCO. Hence the necessity of the Rules.

Last, in paragraph 26 of the Grievance, in reference to Section 8.2 UNELCO has stated that “... *the Government of Vanuatu is contractually bound to ensure that UNELCO has all consents and authorisations ...*”. Although not central to the issue, it is clarified that Section 8.2 requires the Government only to ‘***apply its best endeavour***’. ‘Best endeavour’ is not an ‘absolute’ obligation as UNELCO may claim.

## Paragraphs 32 and 33 of Grievance

For the reasons set out herein, UNELCO’s demand that URA withdraw its Order is rejected.

The Order as affirmed in this Response Order is binding, unless stayed or set aside by a competent court. If aggrieved by the decision of the Commission UNELCO is entitled to approach the courts having appropriate jurisdiction as provided in the URA Act.

## Paragraphs 34 to 37 of Grievance

UNELCO claims that if the Order is not withdrawn, implementation shall amount to breach of the Port Vila Electricity Contract and UNELCO shall commence arbitration proceedings (pursuant to Section 17 of the Convention) against the Government of Vanuatu.

The URA has issued and is implementing the Order pursuant to its powers under the URA Act as detailed in the Order. This is not an exercise of power on behalf of the Government of Vanuatu under Section 20 of the URA Act or any other provision. The Government of Vanuatu and the URA are two separate legal entities. The UNELCO Electricity Contracts<sup>2</sup> were entered into by the Government of Vanuatu as concession

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<sup>2</sup> The Government of Vanuatu has entered into the following contracts with UNELCO for electricity related services:

- (a) the Concession contract for the Generation and Public Supply of Electric Power in Port Vila with UNELCO dated 15 August 1986, as amended till date,
- (b) the Concession contract for the Generation and Public Supply of Electric Power in Malekula Island with UNELCO dated 14 July 2000, as amended till date, and



grantor. The exercise of powers by the URA in this instance is not on behalf of the Government. The Commission cannot see how the issuance and implementation of the Order by URA can be considered a breach of the Port Vila Electricity Contract (or any of the other UNELCO Electricity Contracts) by the Government. Grievance of UNELCO to the Order and this Response Order cannot be subject to arbitration. Section 28 of the URA Act specifically provides for judicial review of URA actions undertaken pursuant to Part 3 or Section 37 of the URA Act by the Supreme Court in addition to other rights available to an aggrieved utility under applicable law. UNELCO's demand that the Grievance be also treated as a notice of litigation triggering arbitration under the Port Vila Electricity Contract (or any of the other UNELCO Electricity Contracts) does not apply.

For the aforementioned reasons, UNELCO should not be entitled to take the Government of Vanuatu as concession grantor, to arbitration for its grievances arising from the Order or this Response Order. The Order and this Response Order are actions of the URA and not the Government of Vanuatu. Therefore, it is the opinion of the Commission that in respect of the Order or the Response Order there exists no dispute between the parties to the UNELCO Electricity Contracts. Hence the dispute resolution mechanism of the UNELCO Electricity Contracts is not applicable and cannot be invoked.

## URA clarifications and reasoning

It is clarified that the reasons set out in this Response are in conjunction with those set out in the Order.

## Findings

Accordingly, the Commission reaffirms that:

1. the finding in the Order is correct, legal and valid. The Commission is within its powers under the URA Act to issue and implement the provisions in the Order;
2. the Order is not inconsistent with the terms of the Port Vila Electricity Contract;
3. the Order as affirmed in this Response Order is binding, unless stayed or set aside by a competent court. If aggrieved by the decision of the Commission UNELCO is entitled to approach the courts having appropriate jurisdiction in accordance with the provisions of the URA Act;
4. adoption and implementation of the Rules is necessary and beneficial to the consumers of regulated services; and
5. the Order or the Response Order does not give rise to any dispute between the parties to the Port Vila Electricity Contract. Hence the dispute resolution mechanism of the Port Vila Electricity Contract is not applicable and cannot be invoked.

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(c) the Concession contract for the Generation and Public Supply of Electric Power in Tanna Island with UNELCO dated 14 July 2000, as amended till date.

### 3. Commission Order

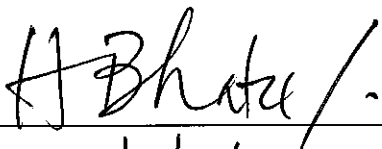
The Commission therefore orders that:

1. The Commission has reviewed all the objections raised by UNELCO in its Grievance. For the reasons set out above in Section 2, the Commission decides that no further action or revisions are required to the Order dated July 22, 2014.
2. UNELCO is instructed to comply with the Rules.
3. If UNELCO is aggrieved by this decision of the Commission, UNELCO is entitled to approach the Vanuatu courts having appropriate jurisdiction in accordance with the provisions of the URA Act.
4. Effective Date: This Response Order comes into effect immediately.

## 4. Execution Page

**CEO and Commissioner**

Hasso C. Bhatia, PhD



Date 16/9/14

**Chairman**

Johnson Naviti Matarulapa Marakipule

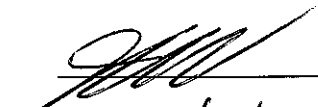


Date 16/09/2014

**Executive Commissioner**

John Obed Alilee



  
Date 16/9/2014

Seal of the Utilities Regulatory Authority

Annex A  
UNELCO's Grievance

PORT VILA, 22<sup>nd</sup> August 2014

Mr Hasso Bhatia, PhD  
Chief Executive Officer  
Utilities Regulatory Authority  
PMB 9093  
Port Vila  
Republic of Vanuatu

Our ref. 1768/14/U/PEM/aw

Dear Hasso,

**NOTICE OF GRIEVANCE and  
NOTICE OF LITIGATION under Section 17 of the Convention dated 15 August 1986  
of the Concession Agreement between the Government of Vanuatu and UNELCO**

**Commission Order 0018-14**

1. We refer to the purported Commission Order (Case Reference Number U-0018-14) (**Commission Order 0018-14**) purporting to establish the Utilities (Restriction on Provision of Financial Support) Rules 2014 dated 22 July 2014 issued by the Utilities Regulatory Authority (**URA**).
2. Subject to paragraph 3 below, this letter constitutes a notice of grievance under section 27(1) of the *Utilities Regulatory Authority Act No. 11 of 2007 (URA Act)*.
3. Despite the issuance of this notice, UNELCO expressly denies that the URA has taken any valid action pursuant to Part 3 of the URA Act which could be the subject of a notice of grievance and reserves its rights in this regard.
4. The Commission Order 0018-14 is plainly '*ultra vires*' and beyond URA's powers as conferred on it by the URA Act.
5. The reasons underpinning UNELCO's submission are set out below.

**The URA does not have the power to implement or issue Commission Order 0018-14**

6. By the purported Commission Order 0018-14 (by paragraph 2.1) the URA purports to institute rules which purport to prohibit UNELCO from:
  - (a) making any loans or providing financial assistance exceeding the value of 100,000 VUV in one or more transactions;
  - (b) providing guarantees, collateral, pledges;
  - (c) providing an encumbrance over assets forming part of the concession; and
  - (d) using the concession assets for any business or activities other than in respect of the regulated services;

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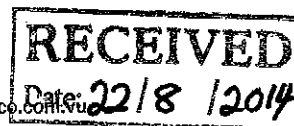
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7. By the purported Commission Order 0018-14 (by paragraphs 3.1 – 3.3) the URA purports to institute rules which purport to:
- (a) require UNELCO to inform the URA and submit documents concerning 'an outstanding balance or encumbrance' in relation to financial support provided to UNELCO in the past, in apparent furtherance of the objectives of the power referred to in subparagraph 7(b);
  - (b) provide the URA with power to require UNELCO to accelerate the repayment or cancel obligations assumed by UNELCO prior to the Commission Order 0018-14; and
  - (c) require UNELCO to seek approval prior to any change in the terms or conditions of the 'Restricted Financial Support'.
8. By the purported Commission Order 0018-14 (by paragraphs 4.1 and 4.2) the URA purports to institute rules which purport to require UNELCO to:
- (a) inform the URA of any change in financial support; and
  - (b) provide additional information or documents,
- in furtherance of the objectives of the prohibition referred to in paragraph 6.
9. At page 1 of the Commission Order 0018-14 the URA purports to describe its powers and functions under the URA Act asserting that:
- 'In order for URA to effectively fulfil its functions, Section 13(1) of the URA Act empowers the URA to do all things that are necessary or convenient to be done for or in connection with the performance of its functions.'*
10. Importantly, section 13(1) of the URA Act makes it abundantly clear that the URA's power to 'do all things' is expressly limited to things **'that are necessary or convenient to be done for or in connection with the performance of its functions'** (our emphasis added).
11. The URA's functions are stipulated at section 12(1) of the URA Act which provides: *'(1) The Authority has the following functions:*
- (a) to exercise the functions and powers conferred by this Act or by any other Act in furtherance of the purposes of this Act;*
  - (b) to provide advice, reports and recommendations to the Government relating to utilities;*
  - (c) to inform the public of matters relating to utilities;*
  - (d) to assist consumers to resolve grievances; and*
  - (e) to investigate and act upon offences under this Act.'*
12. In order to validly exercise its powers under section 13 of the URA Act, the URA must be able to identify the express statutory function pursuant to which it says the exercise of power is necessary, convenient or connected with.

13. The URA has failed to identify any express statutory function pursuant which it is necessary or convenient to implement the purported Commission Order 0018-14 and, in any event, UNELCO says that no such function is available to the URA to do so.
14. The purported Commission Order 0018-14 refers only to sub-section (a) of the functions described at section 12(1) of the URA Act and states that 'one of the primary functions of the URA is to exercise the functions and powers conferred by the URA Act or by any other Act in furtherance of the purposes of the URA Act'.
15. Section 12(1)(a) of the URA Act does not of itself grant the URA statutory functions beyond those otherwise set out by legislation – rather, it specifically provides that the URA's function is to exercise the functions and powers conferred on it by the URA Act or by any other Act.
16. Accordingly, the implementation of the prohibition referred on in paragraph 6 cannot be necessary or convenient to the function described at section 12(1)(a) alone.
17. In this regard, the URA has not purported to rely on any other function and it is not able to do so in any event – the implementation of the prohibition referred on in paragraph 6 is neither necessary nor convenient to be done for or in connection with:
  - (a) the provision of advice, reports and recommendations to the Government (section 12(1)(b) of the URA Act);
  - (b) the informing of the public of matters relating to utilities (section 12(1)(c) of the URA Act);
  - (c) the assisting of consumers to resolve grievances (section 12(1)(d) of the URA Act); or
  - (d) the investigation of offences under the URA Act (section 12(1)(d) of the URA Act).
18. On this basis, the purported prohibition referred on in paragraph 6 sought to be implemented by Commission Order 0018-14 is invalid, '*ultra vires*' and beyond the powers of the URA as conferred on it under the URA Act.
19. Further, the purported rules:
  - (a) in paragraphs 3.1 – 3.3 are in furtherance of objectives and functions that are '*ultra vires*', and
  - (b) in paragraphs 4.1 and 4.2 are reporting requirements in furtherance of an '*ultra vires*' prohibition.
20. Further, the URA has no power under the URA Act to arbitrarily make rules.
21. Whilst section 40 of the URA Act empowers the Minister to make regulations, the purported rules have not been made in accordance with section 40, and in any event the substance of the purported rules would also be *ultra vires* the regulation making power of section 40 even if they had been properly made as regulations.

**The Final Decision is inconsistent and conflicts with the express terms of the Concession Agreement**

22. Further and in the alternative, Commission Order 0018-14 is invalid and '*ultra vires*' because it is inconsistent with the provisions of the Port Vila concession agreement

entered into by the Government of Vanuatu and UNELCO Vanuatu comprising the Convention dated 15 August 1986 (**Convention**), the Specifications dated 15 August 1986 (**Specifications**) and all amendments and addendums entered into from time to time (together, the **Concession Agreement**).

23. Section 3 of the URA Act provides that the URA Act:

*'applies to a regulated service **to the extent that is not inconsistent with a provision in any concession agreement** under the Electricity Supply Act [CAP 65] existing on or before the commencement of this Act or a provision of any other Act.'*

(our emphasis added)

24. The Specifications (as amended by Section 8.2 of Amendment 1 (as per Agreement Varying Concession dated 25 September 1997) provides as follows:

**'8.2 Consents and authorisations (New Condition)**

*The Government shall apply its best endeavours **to ensure that, all consents and authorizations required to be given by it or any department of the Government, in order for the Concessionaire to carry on its business is granted and remains in full force and effect throughout the period of this Agreement and in particular so that the Concessionaire has the full right and power to effect remittances inside and outside the Republic for any purpose whatsoever**' including the repayment of loans, the retirement of capital and the payment of dividends, **Management fees or distributions** and to import or export plant, machinery, apparatus or equipment as the Concessionaire considers necessary.'*

25. The Convention (as amended by Section 8.2 of Amendment 1 (as per Agreement Varying Concession dated 25 September 1997) similarly provides:

**'8.2 Consents and authorisations (New Condition)**

*The Government shall apply its best endeavours **to ensure that, all consents and authorizations required to be given by it or any department of the Government, in order for the Concessionaire to carry on its business is granted and remains in full force and effect throughout the period of this Agreement and in particular so that the Concessionaire has the full right and power to effect remittances inside and outside the Republic for any purpose whatsoever** including the repayment of loans, the retirement of capital and the payment of dividends, **Management fees or distributions** and to import or export plant, machinery, apparatus or equipment as the Concessionaire considers necessary.'*

26. That is, the Government of Vanuatu is contractually bound to ensure that UNELCO has all consents and authorisations required to be given by any department of the Government in order for UNELCO so that UNELCO has the full right and power to effect remittances inside and outside the Republic **for any purpose whatsoever** including the repayment of loans.
27. The prohibition referred to in paragraph 6 sought to be implemented by Commission Order 0018-14:



- (a) is inconsistent and directly contrary to UNELCO having all authorisations and full right and power to effect remittances inside and outside the Republic for any purpose whatsoever' including the repayment of loans or the payment of management fees or distributions;
  - (b) by operation of section 3 of the URA Act has no application; and
  - (c) constitutes a clear breach of the quoted provisions of both the Specification and Convention of Concession Agreement by the Government of Vanuatu.
28. In Commission Order 0018-14 the URA makes such statements as:

*'A utility cannot spend on non-utility business without showing a compelling business necessity. Nor can the utility advance its utility funds to another entity – related or unrelated.'*

29. These statements are wholly inconsistent with the terms of the Concession Agreement referred to above.
30. Indeed, as referenced, by the Concession Agreement the Government of Vanuatu is bound to ensure that UNELCO has all consents and authorisations required to be given by any department of the Government to spend utility funds in order inside and outside the Republic **for any purpose whatsoever.**

#### **UNELCO's position**

31. As expressed at the outset of this notice, UNELCO expressly denies the validity of the Commission Order 0018-14 and denies that the URA has taken any valid action pursuant to Part 3 of the URA Act given that the Final Decision is *ultra vires*.
32. Accordingly, UNELCO hereby demands that the URA to withdraw Commission Order 0018-14 within 21 days of the date of this notice and to cease any action in furtherance of Commission Order 0018-14 or the matters set out therein.
33. Should the URA fail to withdraw Commission Order 0018-14, or otherwise seek to implement Commission Order 0018-14, such actions shall be "*ultra vires*" and UNELCO expressly reserves its rights to rely on this notice and seek:
- (a) judicial review of Commission Order 0018-14;
  - (b) judicial review of any outcome of the URA's internal review of Commission Order 0018-14 should the URA fail to comply with its obligation under section 27(4) of the URA Act and revoke Commission Order 0018-14 having regard to the errors of law described in this notice; and
  - (c) ~~any interlocutory or final injunctive relief required to prevent the URA from unlawfully implementing Commission Order 0018-14.~~
34. Further and in the alternative, should the URA continue to purport to implement Commission Order 0018-14, such actions shall constitute a breach of the terms of the Concession Agreement (including the Specifications (as amended by Section 8.2 of Amendment 1 (as per Agreement Varying Concession dated 25 September 1997) and the Convention (as amended by Section 8.2 of Amendment 1 (as per Agreement Varying Concession dated 25 September 1997)).

35. In this regard, UNELCO shall commence arbitration proceedings (pursuant to section 17 of the Convention) against the Government of Vanuatu and expressly reserves its rights to rely on this notice and seek:
- (a) a declaration that Commission Order 0018-14 and the matters proposed in Commission Order 0018-14 amount to a breach of the Concession Contract by the Government of Vanuatu;
  - (b) damages from the Government of Vanuatu; and
  - (c) any interlocutory or final injunctive relief required to prevent the URA from unlawfully implementing Commission Order 0018-14.
36. For the purpose of the application of the time limit in Section 17 paragraph 71 of the Convention, this notice should be treated as a 'notice of litigation'.
37. Unless the URA on behalf of the Government of Vanuatu confirms within 21 days of the date of this notice that:
- (a) Commission Order 0018-14 is withdrawn; and
  - (b) the Government of Vanuatu will not proceed with the matters the subject of the Commission Order 0018-14,

UNELCO will proceed under Section 17 of the Convention and shall advise the name of its arbitrator.

38. All of UNELCO's rights are reserved.

We look forward to your prompt attention to the matters set out in this notice.

Kind regards,



**Philippe MEHRENBARGER**  
Managing Director

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**Utilities Regulatory Authority**

**Vanuatu**

You can access the U-0018-14 Order, July 2014 and the Response to Grievance, September 2014 on our website [www.ura.gov.vu](http://www.ura.gov.vu), or by contacting us by telephone (+678) 23335, email: [breuben@ura.gov.vu](mailto:breuben@ura.gov.vu) or regular mail at U-0018-14, Utilities Regulatory Authority, PMB 9093, Port Vila, Vanuatu.

