OPINION N°2024-A-04 OF MAY 30, 2024

ON A DRAFT LAW OF THE COUNTRY RELATING TO SECTORAL ENERGY REGULATION

Polynesian Competition Authority,

In view of the letter dated May 3, 2024, registered on May 6, 2024, under number 24/0013 A, by which the President of French Polynesia referred to the Polynesian Competition Authority (hereinafter the "**Authority**") for an opinion on a draft law of the country relating to sectoral regulation in the field of energy;

Having regard to the Polynesian Competition Code, and in particular Article LP. 620-1 ;

Having regard to the other documents in the file;

The Deputy General Rapporteur, the General Rapporteur and representatives of the Direction Polynésienne de l'Energie (hereinafter "**DPE**") heard on the basis of the provisions of article LP. 630-5 of the French Competition Code at the meeting of May 30, 2024;

Is of the opinion to respond to the request presented in the sense of the following observations:

1. The draft country law submitted to the Authority for review aims to change the regulatory framework by transferring French Polynesia's energy sector regulatory mission from the DPE to the Authority. To this end, it amends the Energy Code and the Competition Code.

2. Following a presentation of the general framework for the electricity and gas sectors in French Polynesia and the main provisions of the draft law (I.), the effects of the new provisions on competition will be examined, and the Authority will make any proposals for improvement (II.).

I. FINDINGS

3. Before describing the draft law of the country which is the subject of this opinion and the context of the referral (**B**.), it is necessary to give a brief description of the operation of the electricity and gas sectors in French Polynesia (**A.**).

A. THE GAS SECTOR

1. THE GAS VALUE CHAIN

4. French Polynesia is supplied entirely by importing liquefied gas by sea. The territory is mainly supplied with Liquefied Petroleum Gas (hereinafter "**LPG**"), which includes butane, propane and butane/propane blends.

5. Given the absence of an integrated gas transmission or distribution network in French Polynesia, the gas value chain breaks down as follows:

   - shipping LPG to French Polynesia;
   - LPG storage in LNG terminals;
   - packaging in various containers (including 13 and 50 kg bottles) at filling centers; and
   - retail sales of cylinders via distribution networks (notably service stations and grocery stores) and delivery of "bulk" gas by tanker truck. Cylinders are transported by schooner to the most remote islands of French Polynesia.

6. Gas is widely used in Polynesian households for domestic purposes (cooking, domestic hot water). Professional applications are also developed in the hotel sector (kitchens, laundry, etc.), in the catering industry, and in certain industrial activities requiring propane.

2. THE PLAYERS

a. SOCIETE PETROPOL (GAZ DE TAHITI)

7. Société anonyme Petropol (Pétroles de Polynésie) is active in the import, marketing and distribution of liquid hydrocarbons. It is 68.21% owned by SCP PAPA ITO. The Chairman and CEO is Georges Siu.

8. Petropol obtains supplies from Singapore and South Korea through a supply contract with ExxonMobil Asia Pacific Pte Ltd, which sells petroleum products to Petropol, including diesel fuel for power generation on the other islands of French Polynesia (30,000 tonnes). These products are exclusively imported, stocked and distributed by Petropol.

9. In 1974, Petropol acquired the gas business of Ets Le Bihan, which became its subsidiary Gaz de Tahiti. It is also managed by Georges Siu, who is the company's Chairman and CEO. The company is present in the packaged gas, bulk gas distribution, LPG carburation for forklift trucks and collective gas distribution segments for private and professional customers.

b. PACIFIC ENERGY

10. Pacific Energy was founded in 1987 when Albert Moux and Shell Pacifique joined forces to create Polypétroles and Shell in French Polynesia.

11. In 2006, Shell's assets in French Polynesia, New Caledonia and Vanuatu were acquired by Albert Moux and a group of Oceanian businessmen. The group has continued to expand, and in 2010 Pacific Energy is present in 7 new countries: Fiji, American Samoa, Tonga, Tuvalu, Cook, Kiribati and Papua New Guinea, where it has acquired the assets of the BP group.

12. Albert Moux and his son Patrick Moux are now the group's two directors.

13. Pacific Gaz, the Pacific Energy group's subsidiary whose purpose is to create, operate and develop all warehouses, depots, facilities and means necessary for the storage, handling, packaging and sale of gas, gas by-products and other mineral fuels, changed its name in 2020 to Mana Ito.

14. Since December 2023, the Group has gradually resumed its gas activities through its subsidiary Mana Ito. The project, worth 4 billion Pacific francs, involves the installation of three semi-underground tanks with a storage capacity of 3,000 tonnes at Hitia'a, surrounded by storage, bottling and distribution facilities. It should be operational by the end of 2024.

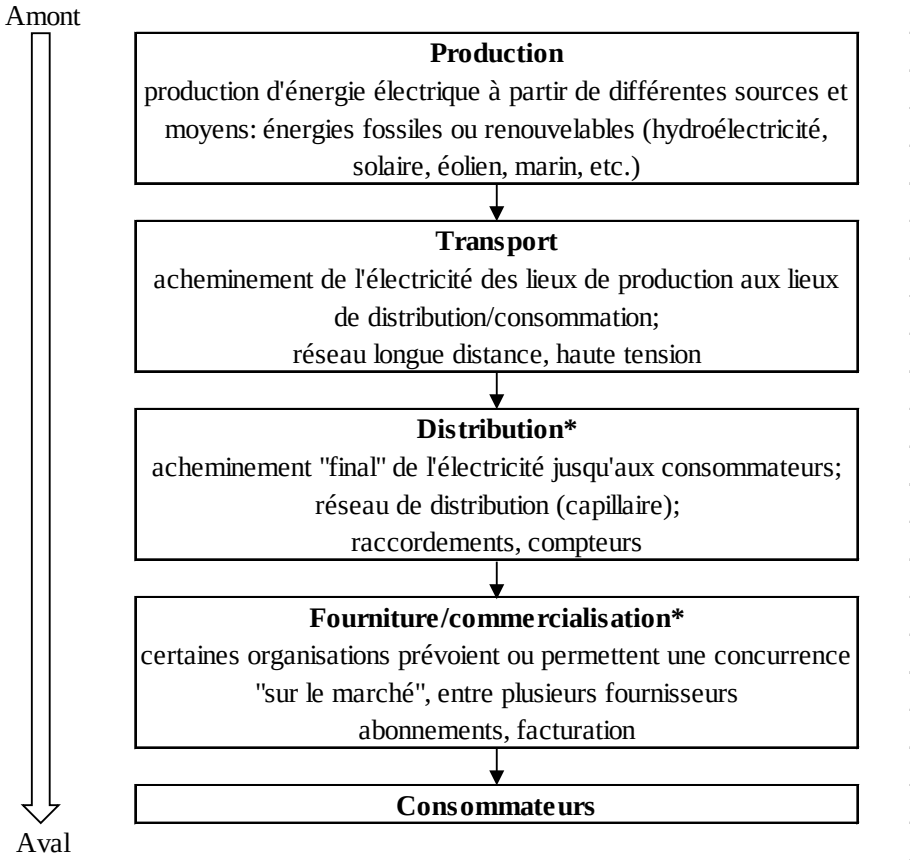
B. THE ELECTRICITY SECTOR

1. THE ELECTRICITY VALUE CHAIN

15. In the electricity supply sector, public organization schemes and the practice of regulators and competition authorities are accustomed to distinguishing different activities or business lines along the value chain (separation of activities or "unbundling").

16. This approach makes it possible to organize the various ways in which economic or public-sector players intervene in energy supply according to different degrees of openness to competition, depending in particular on the technical and economic characteristics of a given activity.

Electricity value chain

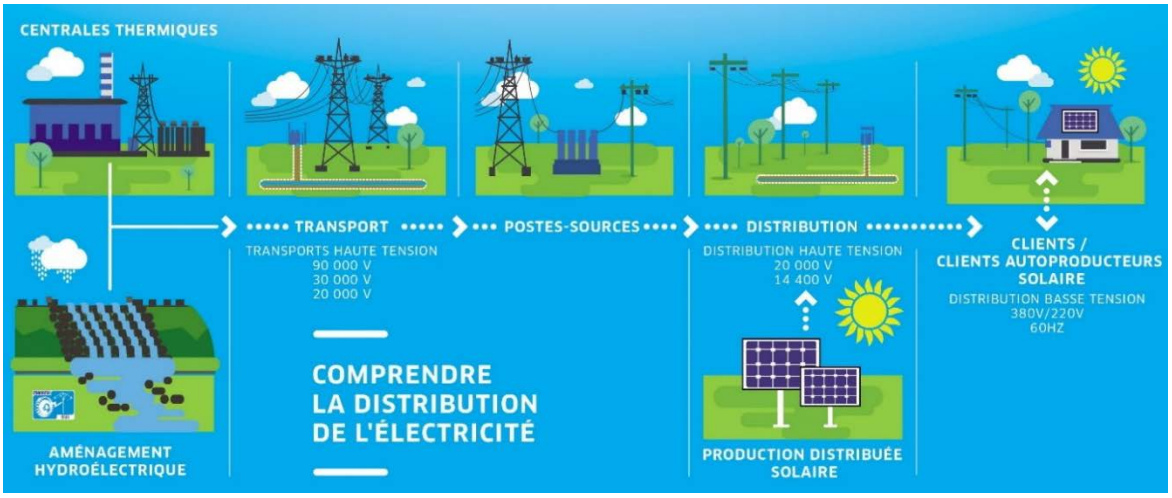


** It is possible to connect, supply and bill consumers at the distribution (if not unbundled) and transmission (industrial customers) stages.*

17. This scheme does not correspond to the organization of electricity supply in French Polynesia, and is not fully transposable.

18. On the one hand, distribution and supply activities are not separated. On the other hand, outside Tahiti, there is no transmission activity, as production units are directly connected to the distribution network.

From production to consumer



Source : EDT

19. Accordingly, we will look successively at generation (**a.**), transmission (**b.**) and distribution/supply (**c.**), and in particular at their respective main players.

a. PRODUCTION

i. *Means of production*

20. **In Tahiti**, the main means of generating electricity are[1] :

- two thermal power plants, close to consumption areas: the Punaruu power plant in Punaauia (121.1 MW) and the Vairaatoa power plant in Papeete (back-up/peaking - 21.6 MW). These thermal power plants are managed by the Electricité De Tahiti group (hereinafter "**EDT**") and form part of the North Tahiti distribution concession;
- six hydroelectric power stations on different catchment areas of the island (48 MW): Papenoo (8 MW), Faatautia (7.6 MW), Vaihiria (4.9 MW), Vaite (2.3 MW), Titaaviri (3 MW) and Papeiti-Papara (0.6 MW). These hydroelectric plants are operated by Compagnie de développement énergies renouvelables Marama Nui ("Coder Marama Nui", 56.36% owned by EDT and 35.38% by the country), with the exception of the Papeiti-Papara plant owned by Yves Conroy and associates;
- more than 2,000 photovoltaic installations (43.7 MWp). These installations are owned and operated by a multiplicity of players with a variety of profiles, as their activity is primarily aimed at satisfying their own needs (self-consumption). The top 20 producers generate almost half of all photovoltaic energy (including self-consumption). They include EDT Eco Energy, a Louis Wane Group company producing electricity using renewable energies; the Somalu/Somatech Group; the Brasserie de Tahiti Group, etc.

21. **In the other islands**, the means of production are thermal and hydroelectric power stations (1.2 MW in the Marquesas). Only 6 islands have hydroelectric dams: Hiva Oa, Nuku Hiva, Fatu Hiva, Moorea and Raiatea. and photovoltaic installations, representing 8.4 MWp by 2022. These may be "hybrid" units, combining thermal resources with intermittent or "fatal" sources such as photovoltaics and wind power.

22. By 2022, several communes have decided to take over direct management of their electricity grids. Four communes in the Leeward Islands (excluding Bora Bora, Maupiti and Uturoa) joined forces to form the SPL Te uira api no Raromatai in March, and in April the commune of Moorea-Maiao set up a public industrial and commercial establishment, Te ito rau no Moorea Maiao.

23. Electricity transmission in Tahiti is provided by Société de Transport d'Energie électrique en Polynésie (hereinafter "**TEP**"), a semi-public company financed by a fee from EDT. TEP is responsible for developing and maintaining the network, and has implemented a multi-year energy transition investment program (2017-2023) worth 12 billion CFP francs. On April 1, 2022, the Pays sold 20% of its capital to RTEi, the international subsidiary of the French electricity transmission system operator (hereafter "**RTE**"). TEP should thus benefit from RTEi's know-how.

ii. *Production figures*

24. Electricity production in French Polynesia has been stable since 2013, and will reach 680.3 GWh in 2022, according to the DPE[2] . Thermal generation accounted for 64% of the electricity

[1] Data from DPE.

[2] "Key energy figures" - 2022. This figure includes generation delivered to public distribution networks. Self-consumed production is therefore excluded.

produced, compared with 36% from renewable energies (28.6% from hydroelectricity and 7.3% from photovoltaics).

25. In Tahiti, electricity production was 515.1 GWh in 2022, according to the same source. This represented 75.7% of French Polynesia's total production. Thermal generation accounted for 54.6% of the electricity produced, compared with 45.6% from renewable energies (37.4% from hydroelectricity and 7.95% from photovoltaics).

b. TRANSPORTATION IN TAHITI

26. Electricity transmission refers to the transport of electricity from generation centers to distribution networks in Tahiti.

i. *The company Transport d'Energie électrique en Polynésie*

27. TEP was set up in 1985 at the initiative of the French Polynesian government as a public service concessionaire for the transmission of high-voltage electricity on the island of Tahiti. Since 1989, TEP has held a public service delegation agreement, giving it a monopoly in Tahiti for various services relating to the transmission of electrical energy. This delegation expires in 2027.

28. Since its creation, TEP has been a majority-owned public company. It is currently 75% owned by the French State. The remaining 25% is held by RTE international, a subsidiary of RTE, Europe's largest electricity transmission system operator, and itself a subsidiary of EDF. Until 2021, EDT held 39% of the share capital, and until 2022 OCI-Groupe Socredo[3] and Agence Française de Développement each held 5%. They have since also withdrawn from the share capital. Its operation and organization were aligned with the status of local semi-public companies (SEML) in August 2014.

ii. *TEP's electrical transmission network*

29. TEP's power transmission network comprises almost 300 km of medium (20,000 and 30,000 volts) and high-voltage (90,000 volts) lines, 89% of which are underground. These lines are mainly present in Tahiti Nui.

30. TEP is currently carrying out work to complete the network, in particular by installing a continuity line on the east coast between Papenoo and Faaone. This "northern loop" will reinforce the island's guarantees of continuity and power supply.

[3] Société Anonyme d'Economie Mixte owned by French Polynesia (50%), Agence Française de Développement (35%) and Cofibred - Groupe BRED Banques Populaires (15%).

Tahiti's transport network



Source : TEP

31. While TEP is the concession holder for the transmission system, and therefore has a monopoly on work on and under public highways, it acts on the authorization of the Minister in charge of energy to carry out transmission works[4] .

32. In addition, network operation (network access, troubleshooting, maintenance) and management are carried out by EDT. In 2012, TEP signed a subcontract for EDT to manage, operate and maintain the network on its behalf. This contract was renewed on May 29, 2019. New agreements setting out the general operating conditions between GRT (TEP) and GRD (EDT) and setting out the general operating conditions between GRT (TEP) and producer (EDT) were signed on May 29, 2020. Finally, since September 3, 2021, a partnership agreement for managing the balance of Tahiti's electricity systems between TEP and EDT has been in force.

c. DISTRIBUTION/SUPPLY

33. In French Polynesia, the distribution and supply of electrical energy is a public service, organized either through direct intervention by public bodies (the country, communes or groups of communes), or through a system of competitive bidding "for the market", by means of concessions and leases.

34. Energy distribution and supply activities are not separated in these operating modes.

35. EPIC Te Ito Rau no Moorea Maiao is responsible for electricity production and distribution in Moorea. On the following islands, electricity production and distribution are handled by

[4] Article 9 of the specifications of the concession for the transmission of electrical energy on the island of Tahiti of June 9, 1989, amended on December 23, 2017 ("*The execution of all works under the concession must be authorized in the manner provided for by decree no. 83/CM of January 20, 1986*"), and article 12 of decree no. 83/CM of January 20, 1986.

independent utilities: Manihi, Ahe, Arutua, Apataki, Kaukura, Rapa, Takaroa, Takapoto, Omoa, Hanavave, Faaite, Fakahina, Fangatau, Reao, Pukarua, Napuka, Tepoto Nord, Tatakoto, Fakarava, Niau, Raraka, Kauehi, Katiu, Raroia, Taenga, Tematangi, Tureia, Amanu, Nukutavake, Vairaatea, Vahitahi, Marokau, Hikueru, Pukapuka, Anaa, Uturoa and the islands of the Gambier archipelago.

36. EDT holds a large proportion of the distribution concessions in French Polynesia, which generally include generation facilities.

2. EDT'S PLACE IN THE VALUE CHAIN

37. As a preliminary point, it should be noted that the country is a shareholder in a number of companies involved in the value chain, with a 35.38% minority stake in Coder Marama Nui (hydroelectric power generation in Tahiti), and a 75% majority stake in TEP (transport).

a. THE EDT GROUP

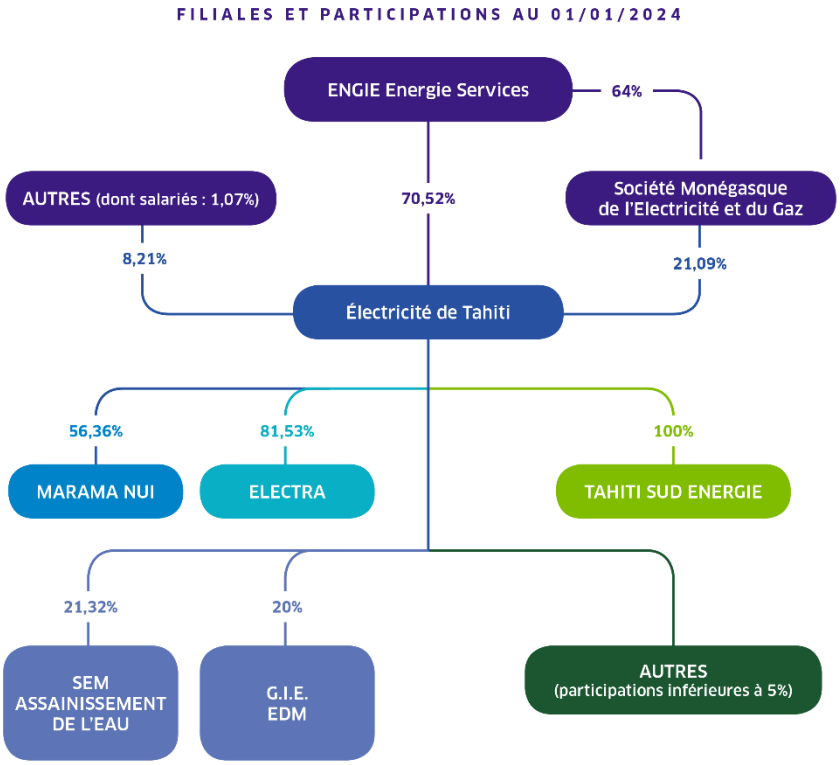
38. EDT is a private company, majority-owned by the French company Engie.

39. EDT's representatives indicated that the Group's activities in French Polynesia are organized into "poles":
- an "Electricity" division comprising EDT, Coder Marama nui, Electra and Tahiti Sud Energie (TSE)
- a "Service" division comprising Engie Services Polynésie and Polydiesel, for a range of services including civil engineering, facility management ([5]), generator sales and maintenance, lifting equipment, etc. - minority stakes in companies including SEM Assainissement de l'Eau.

40. The main entities, holdings and activities covered by the EDT Group are shown below:

[5] Facility management, also known as general services, is also defined as all the actions undertaken to ensure the smooth running of a company.

EDT Group organization chart
(main energy companies and holdings)



Source : EDT

b. EDT, A KEY PLAYER IN THE ELECTRICITY VALUE CHAIN

41. EDT is present at all stages of the electricity value chain in French Polynesia: from generation to transmission and distribution.

42. The Group operates most of the power generation units in French Polynesia and transmits this electricity to Tahiti. It also holds all distribution concessions in French Polynesia.

43. In its "*Rapport d'observations définitives à la collectivité de la Polynésie française (Politique de l'énergie)*" of October 2017, the Chambre territoriale des comptes emphasized that "*it is, in fact, undeniable that the contracts signed by the local authority have placed EDT in a dominant position. The group is responsible for 90% of electricity production, owns the main hydroelectricity producer (Marama Nui) and 39% of the company in charge of high-voltage transmission, and manages the electricity system by guaranteeing power. It is also in charge of inter-island tariff equalization and collects the electricity tax...*".

C. THE DRAFT LAW OF THE COUNTRY SUBMITTED FOR EXAMINATION

44. The draft law submitted to the Authority for review amends the Energy Code and the Competition Code, mainly to :

- transfer and strengthen French Polynesia's energy sector regulatory mission from the DPE to the Authority (**1.**) ;

- strengthen French Polynesia's energy sector regulatory role (**2.**); and

45. The draft comprises 29 articles, the most important of which are presented below.

1. CREATION OF AN INDEPENDENT SECTOR REGULATOR

46. Article LP. 1 designates the Polynesian Competition Authority as the regulatory authority for energy.

47. Article LP. 2 designates the regulator and the department in charge of energy as recipients of detailed financial statements from network operators, in order to be informed of the electricity purchase costs they incur.

48. Article LP. 3 is the main amendment to the Energy Code, entrusting the regulatory function to the Electricity and Gas Authority.

49. Article LP. 5 specifies that the administrative authority and, from now on, the regulator, under the conditions set out in the Competition Code (new article LP. 631-2, cf. article LP. 22) may request any information they consider necessary from industry players. This possibility is maintained for the administrative authority, in order to be able to fulfill its non-regulatory missions, in particular to better define public policy objectives in the energy field.

50. Article LP. 6 amends article LP. 232-1 of the Energy Code in order to require power system players to forward their agreements to the Authority, and to provide a framework for referral to the Authority by the administrative authority, for an opinion, of draft orders relating to electricity purchase tariffs between system operators, as well as to access and interconnection terms and conditions, which have an impact on system operators' charges and revenues.

51. Article LP. 7 specifies the division of powers between the Authority and the competent administrative authority, with regard to administrative penalties. The Authority is competent for breaches of the obligations referred to in article LP. 231-1, while the competent administrative authority is responsible for sanctioning the remaining breaches of titles 1 and 2.

52. Article LP. 8 obliges the transmission system operator to report any difficulties with access to the network to the competent administrative authority, and henceforth to the regulator, which is responsible for settling disputes and imposing penalties for refusing or limiting access to the network.

53. Article LP. 9 enables the competent administrative authority to refer to the Authority for an opinion on draft specifications for public service delegation in the energy sector, whose proper execution it is responsible for monitoring.

2. AMENDMENTS TO ORGANIZE THE AUTHORITY'S REGULATORY MISSION IN THE ENERGY SECTOR

54. Articles LP. 10 and LP. 11 amend articles LP 610-1 and LP 610-1-1 by including the possibility for the Authority to act as regulator, and specifying that the Energy Code defines its powers in terms of energy regulation.

55. Article LP. 12 amends article LP 610-2 by incorporating the necessary provisions concerning the appointment of college members and government commissioners for energy regulation:

- Appointment of an additional non-permanent member to the AMF College. One of the non-permanent members is appointed Vice-Chairman, in recognition of his skills and

experience in regulatory and energy matters. It is also envisaged that one of the alternate members will be appointed for his or her expertise in the field of energy and regulation;

- Appointment of an additional government commissioner, ensuring that at least one of the two is appointed for his or her energy expertise.

56. Article LP. 13 amends article LP 610-5 and takes note of the changes provided for in the previous article following the appointment of a vice-chairman, who will act as chairman of the meeting in the event of matters relating to regulatory aspects.

57. Article LP. 14 amends article LP 610-6 and lays down the necessary provisions for the organization of the instruction service:

- Creation of a second department dedicated to energy sector regulation;
- Recruitment of a general reporter to head this second investigation department;
- Recruitment of at least one rapporteur with academic and professional legal, economic and technical skills in the field of energy;
- Insertion of a paragraph V specifying that rapporteurs can handle both competition and regulatory cases. Depending on the case assigned to them, they report to the general rapporteur in charge of competition or regulation.

58. Article LP. 15 subsequently amends article LP 610-7. Firstly, the Vice-Chairman may represent the Autorité before the courts, in the event of a dispute concerning a regulatory matter. In addition, the aforementioned article states that the General Rapporteur may, by way of derogation, be a party to the proceedings concerning the Authority's decisions on business secrets. The new wording includes the general rapporteur in charge of regulation. We now refer to the general rapporteurs.

59. Article LP. 16 introduces two new paragraphs to article LP 610-9.

60. The new second paragraph requires the regulator to publish an annual report assessing the compliance of electricity and gas transmission and distribution system operators with the Energy Code.

61. This report will provide an in-depth analysis of compliance with these standards. A second part of the report will assess the independence of these network operators, including any proposals for measures to reinforce their autonomy while ensuring ongoing compliance with the Energy Code.

62. The new third paragraph specifies that the regulator is required to submit an annual report to the President of French Polynesia and the delegating authority on the monitoring of electricity utility activities.

63. In particular, this involves checking the delegatees' annual reports, as provided for in article LP. 22 of loi du Pays n° 2009-21 du 7 décembre 2009 relative au cadre réglementaire des délégations de service public de la Polynésie française et de ses établissements publics or article LP. 19 of loi du Pays n° 2009-22 du 7 décembre 2009 relative au cadre réglementaire des délégations de service public des communes, de leurs groupements et de leurs établissements publics.

64. This includes the annual reports of the delegates of the public electricity transmission, distribution and production services in Tahiti and the islands.

65. Accordingly, the Authority is carrying out a general audit of the activity report, pursuant to the regulations in force, and in particular orders no. 2299 CM of December 15, 2009 and no. 2099 CM of December 17, 2015.

66. Once this analysis has been carried out, it draws up a report on the delegatee's compliance with the aforementioned obligations, and may, where appropriate, make recommendations in the report sent to the President of French Polynesia and the concession-granting authority.

67. This transmission must be made within six months of receipt of the activity report of the delegatees who have been audited, after it has been transmitted by the regulator.

68. The report is not made public by the Authority, which does not preclude its publication by the competent administrative authority, should it see fit.

69. Article LP. 17 amends article LP 610-11 and incorporates dispute settlement procedures and sanction procedures for breaches of the Energy Code into the internal regulations.

70. Article LP. 19 inserts into the Competition Code a new chapter I[er] on the "*Regulatory powers of the Authority*", comprising four articles numbered and entitled as follows:

- Article LP 621-1 - Dispute settlement: this article states that the Authority may be seized by the competent administrative authority, or other listed parties, of disputes relating to access to public transmission or distribution networks, as well as disagreements concerning agreements for access to said networks or for the purchase of electricity or gas. The Authority may, by reasoned decision, give formal notice to the operators concerned to put an end to a breach within a period of fifteen days;
- Article LP 621-2 - Dispute settlement decision: this article specifies that, where necessary for the settlement of disputes, the Authority shall set out the terms of access to networks, works and facilities or the conditions for their use, potentially accompanied by a timetable for implementing the decision;
- Article LP 621-3 - Penalties: this article stipulates that the Authority may impose penalties for any behavior that has the purpose or effect of restricting access to the electricity or gas transmission or distribution network;
- Article LP 621-4 - Opinions on energy regulation: this article sets out the cases in which the Authority may be asked for an opinion by the competent administrative authority, i.e. to verify the correct application of article LP. 232-1 of the Energy Code and on the specifications for public service delegations for energy transmission and distribution, as provided for in article LP. 432-1 of the Energy Code. It also specifies the deadlines within which the Authority must issue these opinions, ranging from one month to five months depending on the case.

71. Article LP. 20 inserts a new chapter II on "*Sharing information and documents*", comprising a single article entitled "*Cooperation between investigating departments*". This new article LP. 622-1 sets out the conditions under which the "competition" and "regulatory" investigation departments may exchange data. It also sets out the terms and conditions under which either department may conduct investigations or carry out investigative acts at the request of the other.

72. Article LP. 22 creates, within Title III of Book VI, a Chapter I[er] on "*Procedures before the Autorité ruling on regulatory matters*", comprising five articles numbered and entitled as follows:

- Article LP 631-1 - Opinions and decisions: the article stipulates that when the regulator issues opinions and decisions, it applies the same procedural rules as the Authority acting in competition matters, except where special provisions are made in this new chapter;

- Article LP 631-2 - Transmission of information: this article sets out the conditions under which the regulator collects information, and its ability to have the information it gathers in the course of its duties inspected at the expense of companies;
- Article LP 631-3 - Dispute resolution: this article stipulates that the regulator may request any information it deems necessary, in particular to ensure non-discriminatory access to the network and compliance with investment rules. It also lays down the conditions under which the Authority may decide, at the request of the parties making the referral, that its decision will take effect on a date prior to the referral;
- Article LP 631-4 - Sanctions: in the context of self-referrals to deal with behavior that has the effect of restricting access to the electricity or gas transmission or distribution network, this article sets out the conditions for the formation of the college leading to sanctions, as well as the procedure to be followed by the Authority with regard to the perpetrator of the breach observed, in order to respect the rights of defense;
- Article LP 631-5 - Formation of the panel: this article stipulates that when the Autorité makes competition-related decisions in the energy sector, the panel hearing the case must guarantee its impartiality. In particular, it may not include any member who has issued an opinion or adopted a decision having an impact on the Authority's competition-related referral.

73. Article LP. 23 amends article LP 641-1 by incorporating the provisions of the new regulatory mission concerning precautionary measures for dispute settlement. It specifies that, in the context of dispute settlement in the energy sector, the Authority may take precautionary measures in the event of serious and immediate infringement of the rules governing access to electricity or gas transmission and distribution networks. Such measures may include the suspension of practices deemed to infringe the rules governing access to and use of networks, structures and facilities.

74. The new wording of Article LP 641-2, II, includes penalties for behavior aimed at restricting access to the electricity or gas transmission or distribution network, resulting in :
    - a temporary ban on access to the transmission or distribution networks for a period not exceeding one year, and ;
    - a financial penalty proportionate to the seriousness of the infringement, based on pre-tax sales, with a ceiling of 5% of sales, up to 17 million Pacific francs in the absence of decisive activity, and rising to 44 million in the event of a repeat offence for the same violation. In the event of previous sanctions, the total of the sanctions cannot exceed the highest possible.

75. Paragraph VIII of article LP 641-2 introduces the obligation for the Authority to give reasons for its decision, after having heard the parties involved. Its decision may be accompanied by penalty payments. This paragraph establishes the means of appeal against the regulator's dispute settlement decisions.

76. Article LP. 25 amends article LP 641-6. It extends the conditions under which the Authority may decide not to pursue proceedings to cases in which, if no practice undermining competition on the market or restricting access to the electricity transmission or distribution network is established, the Authority has the power to terminate the proceedings, or in other words, to dismiss the case.

77. Article LP. 26 specifies that the law of the country will come into force on February 1er 2025, to allow for the updating of texts with regulatory value and the appropriation of its new missions by the Authority.

78. Article LP. 27 provides, on the other hand, that the general rapporteur in charge of regulation and a new rapporteur, recruited on the basis of his or her expertise in energy matters, as provided for in article LP. 14, may be recruited as soon as this law is published in the Official Journal of French Polynesia.

79. Article LP. 28 sets the entry into force of the provision in article LP. 12, relating to the appointment of the deputy vice-chairman on the basis of his or her regulatory and energy expertise, comes into force with the next renewal of half the members of the college, as provided for by current regulations.

80. Lastly, article LP. 29 makes this law applicable to current contracts, and in particular to public service delegation contracts. From now on, administrative control of the concession will be carried out by the Authority, and technical control of the concession will be carried out by the DPE.

II. COMPETITIVE ANALYSIS

81. When it is asked to give an opinion on a draft text, the Authority endeavors to assess the extent to which the text's provisions restrict or improve the competitive operation of the sector concerned. As it has already had occasion to point out, "*a competitive market optimally allocates available resources, maximizes consumer welfare and boosts the competitiveness of the sector concerned, by encouraging innovation, lower prices, diversification of supply and higher quality goods and services. Competition is a factor of productive and allocative efficiency*". Nevertheless, competition is not an end in itself; it is a tool in the service of this economic efficiency.

82. Normative texts very often respond to concerns of general interest that go beyond competition, and involve government intervention that has an impact on the functioning of the economy. In such circumstances, the role of the Polynesian Competition Authority is to inform the government and the Assembly of French Polynesia of the effects on competition of the planned public intervention, and to recommend to them, where appropriate, the measures to be taken to reconcile the general interest objectives, of which economic public order is a component.

83. In network industries, competition is not always possible, or sometimes only in certain segments of the value chain. In the electrical power sector, for example, generation may be open to competition, but transmission and distribution activities are natural monopolies, i.e. structures in which high fixed costs relative to demand make it more efficient to have only one supplier.

84. This draft law amends the energy and competition codes, with a view to strengthening French Polynesia's energy sector regulation. The main contribution of this draft law lies in its ambition to create an independent sector regulator for gas and electricity, by transferring a certain number of powers from the Polynesian central administration to the Authority (**A.**). The planned transfer of powers is thus a first step towards the emergence of a fully independent sectoral regulator for the gas and electricity sectors in French Polynesia, which will need to be pursued in order to fully achieve the desired result (**B.**).

A. THE AMBITION TO CREATE A SECTOR REGULATOR

85. The stated ambition of the draft law of the country is to entrust "*[t]he mission of sectoral regulation in matters of energy [...] to the Polynesian Competition Authority*" (art. LP 1). This sectoral regulatory mission would cover both the gas and electricity sectors. The explanatory memorandum states that "*the aim is to reinforce and professionalize the control of operators in the energy sector, and in particular of electricity public service delegates*".

86. The amendment to article LP. 231-1 (art. LP. 3) constitutes the main advance of the text, entrusting the Authority with the activity of sector regulator for electricity and gas. In particular, article LP. 3 stipulates that the Authority's regulatory activity in the energy sector will consist of "*establishing and maintaining the economic balance between the various players in the sector, in a transparent manner, and, in particular*, :

a) participate in the implementation of the general principles set out in article LP 111-1 ;

b) participate in the pricing of energy production, transmission and distribution services;

c) ensure accounting and financial control over the various operators;

d) monitor and observe markets in the energy sector;

e) ensure that conditions of access to electricity and gas transmission and distribution networks do not hinder the development of competition;

f) arbitrate any disputes between the various players in the energy sector.

87. The Authority welcomes the ambition expressed in these two articles of the draft law to create an independent energy sector regulator.

88. The Autorité has already had occasion to note the problematic nature of the multiple, sometimes contradictory missions carried out by public authorities in the energy sector. At present, the government and the central administration define the territory's energy policy, act as the concession-granting authority for public service delegations for electricity transmission and distribution in Tahiti, and define the sector's regulations, while at the same time holding shareholder mandates in major companies in the sector.

89. In its 2018 opinion[6] , the Authority had indicated that the interests relating to each of these roles could come into contradiction and could impact the smooth running of the energy sector : "[o]*r, the diversity of the functions of the public authorities, at once regulator, regulator and operator, leads to the emergence of situations generating potential conflicts of interest. They may cast doubt in the minds of competitors and consumers alike as to the soundness of regulatory decisions taken, as well as the behavior of the operator responsible for transmission and balancing responsibilities in Tahiti, which is central to the value chain, vis-à-vis upstream or downstream players*".

90. The combination of the functions of regulator and owner of the operator by the public authorities is likely to give rise to doubts and disputes over the outcome of a dispute settlement between a producer and the electricity transmission company, when the regulator is also a shareholder in one of the companies involved in a dispute.

[6] Opinion No. 2018-AO-03 of August 10, 2018 on the draft law of the country instituting an energy code for French Polynesia, paragraph 113.

91. As the Autorité has already advocated in its opinions on the telecommunications sector ,[7] effective economic regulation requires the means to be independent of companies in the sector and of political power, in order to guarantee the impartiality and validity of its actions.

92. The Authority also welcomes the choice of entrusting energy regulation to an independent administrative authority, which offers industry players a guarantee of its independence from both companies in the sector and political power. The choice of an independent administrative authority is the form of public intervention offering the best guarantees of expertise and independence, for the organization and regulation of network industries, to the benefit of companies and consumers. In particular, this independence guarantees the impartiality and validity of the authority's actions.

93. The Authority also considers the country's decision not to create a new independent administrative authority to be reasonable from a financial and human standpoint. Given the size of French Polynesia's economy, transferring this regulatory mission to the Authority offers clear advantages in terms of economies of scale and efficiency gains (pooling of administrative and logistical resources, as well as procedural expertise, etc.).

94. In addition, energy sector regulation law provides complementary tools to those of competition law to ensure the efficient operation of markets. As the law currently stands, the Authority exercises limited control over the energy sector. As part of its contentious functions, the Authority exercises *ex post* control, with the aim of sanctioning anti-competitive practices and preserving conditions of effective competition between operators. As part of its advisory role, the Authority examines the impact that regulation is likely to have on competition and markets in the energy sector. As a result, the Authority's intervention in the energy sector has so far been optional and sporadic.

95. The aim of the present draft law is to enable the Authority to intervene *ex ante*, through sector-specific regulation, in order to promote the emergence of an efficient market structure and define the economic and legal framework within which operators will evolve. This type of regulation is particularly suited to activities relating to former public monopolies, such as network industries, typically the electricity and telecommunications sectors.

96. The choice of a single authority with responsibility for both regulation and competition has a number of advantages.

97. This reform could, for example, enable the Autorité to be more effective, with the possibility of dealing with problems in advance, thanks to the *ex-ante* control that regulation enables, whereas competition is essentially concerned with *ex-post* control. The tools available to a sector regulator are characterized by their ability to intervene more rapidly (a few months) than an antitrust decision (several years). Sectoral regulation is also characterized by its flexibility, and is typically better suited to resolving a particular problem, such as a refusal of access to a network, and to highly concentrated sectors (natural monopolies) than a financial sanction under competition law. Similarly, the Authority's existing structure should help to speed up the implementation of the reform aimed at strengthening energy sector regulation, since it relies on an entity that has already been set up.

98. In this respect, in a note for the OECD, Ergas and Fels underlined the potential for synergy between regulation and competition within the same independent administrative authority: "[t]he *advantage of* [this] *approach, at least in theory, is that it broadens the range of instruments that the authority can use. For example, it may be that the most effective solution*

[7] See, in this respect, in particular, Opinion No. 2017-A-02 of September 22, 2017 relating to the granting by the government of authorizations to provide telecommunications services to Viti and Pacific Mobile Telecom, paragraphs 137 et seq.

to a particular regulatory problem is to restructure the market in such a way as to promote competition, and then vigorously enforce the competition rules. By "internalizing" competition law and regulatory instruments in the same authority, the authority may be more inclined to mix and match problems and instruments effectively, thus avoiding the "silo mentality" that can compromise good decision-making. At the same time, there may be cases where identifying an effective regulatory solution requires a competition impact analysis, which such an integrated authority may find easier to carry out."[8] .

99. By way of example, the Australian Competition and Consumer Commission (hereinafter "**ACCC**") and the Commerce Commission of New Zealand (hereinafter "**ComCom**") already pursue a number of missions under a common structure. In particular, they have a threefold mission:

    - combating anti-competitive practices ;
    - consumer protection; and
    - regulation of network industries.

100. This model for the organization of independent administrative authorities can also be found in several EU member states, such as the Netherlands and Spain. The Dutch and Spanish Competition Authorities are also the sector regulators for energy, telecommunications, transport and postal services. The Spanish Competition Authority also regulates the audiovisual sector.

101. The Authority therefore welcomes the amendments made by articles LP 1 and 3 of the draft law of the country, aimed at creating an independent sectoral energy regulator for French Polynesia.

B. PARTIAL TRANSFER OF SKILLS

102. The draft law of the country proposes the transfer of a certain number of powers from the Polynesian central administration to the Authority. Given the major structural differences between the gas and electricity sectors, the Authority will analyze the impact of the reform on the gas sector separately (**1.**), followed by the electricity sector (**2.**).

1. REGULATION OF THE GAS SECTOR

103. The draft law of the country provides for the transfer to the Authority of a number of powers relating to the regulation of the gas sector in French Polynesia . As mentioned above, article LP. 231-1 entrusts the Authority with *the* "*regulatory activity"* of the gas sector.

104. Firstly, the Authority has been given jurisdiction *over* the settlement of disputes "*relating to access to public transmission or distribution networks, as well as disagreements concerning agreements for access to said networks or the purchase* [...] *of gas*" (art. LP 621-1). As part of a dispute settlement procedure, the Authority may, in particular, set "*the terms and conditions of access to the said networks, works and installations, or the conditions of their use*" (art. LP 621-2), or impose a penalty, where appropriate, for "*any behavior having the object or effect of restricting access to the electricity or gas transmission or distribution network*" (art. LP. 621-3). It also has the power to impose protective measures in the event of a serious and immediate

[8] Free translation of an extract from the note by Allan Fels and Henry Ergas, *Changes in Institutional Design of Competition Authorities (OECD Roundtables on Competition Policy)*, December 17-18, 2014.

breach of the rules governing "*gas transmission and distribution (...) networks (...) with a view to ensuring the continuity of network operations*" (art. LP. 641-1).

105. Secondly, the draft law provides for the publication by the Authority of an annual report on the gas network and "*on compliance with the Energy Code by gas transmission and distribution system operators (...)*" (art. LP 610-9 II**).** This report will include a section assessing the independence of network operators, including any proposals for measures to reinforce their autonomy while ensuring ongoing compliance with the Energy Code.

106. According to the DPE, the Authority's main mission will focus on "*issues relating to the security of gas supply to Polynesians*".

107. It should be noted, however, that the hydrocarbons sector, at the upstream end of the gas value chain, is excluded from the scope of the Authority's jurisdiction. Article LP 231-1 (art. LP 1) expressly states that sectoral regulation of hydrocarbons is excluded from its remit. The government of French Polynesia, supported by central government departments, will retain jurisdiction in this area.

108. The Authority therefore highlights a material legal problem between the objective of the transfer and positive law.

109. More generally, the Authority questions the exclusion of the hydrocarbons sector from its remit, as provided for in the draft law. This is a key sector, not only for gas supply in French Polynesia, but also for electricity supply. The Polynesian electricity mix is still heavily dependent on fossil fuels for power generation, with 57% of electricity generated by thermal power plants on the island of Tahiti[9] . Dependence on hydrocarbons for power generation is even greater on the other Polynesian islands.

110. In order to ensure the effectiveness of the sector regulator in the gas and electricity sectors, it would therefore be advisable to consider extending the Authority's remit to the regulation of the hydrocarbons sector in the future, even if the Authority understands the government's desire to operate in successive stages to enable the Authority to gradually build up its expertise in these areas.

111. *At the very least*, however, article LP 231-1 should be amended to specifically exclude gas from the hydrocarbons sector, in order to avoid any difficulties of interpretation as to the scope of the Authority's jurisdiction. This exclusion would clarify that the Authority's regulation of the gas sector also includes the supply of LPG to French Polynesia.

Recommendations:

The Authority makes the following recommendations:

1. amend article LP 231-1 to specifically exclude gas from the hydrocarbons sector and avoid any difficulties of interpretation as to the scope of the Authority's jurisdiction;

2. in the medium term, consider extending the Authority's remit to include regulation of the hydrocarbons sector.

[9] IEOM Annual Economic Report 2022, page 85.

2. REGULATION OF THE ELECTRICITY SECTOR

112. The new powers devolved to the Authority by the draft law of the country essentially break down into two missions: the settlement of disputes between players in the energy sector (**a.**) and the control of public electricity service activities (**b.**), which will be examined in turn. It should also be noted that a certain number of regulatory powers will continue to be exercised by the central administration and the government, making the Authority not the regulator but one of the sector's regulators (**c.**).

a. DISPUTE RESOLUTION

113. The draft law of the country stipulates that the Authority will henceforth be competent to settle disputes (art. LP 621-1) relating to access to public electricity transmission or distribution networks, as well as disagreements relating to agreements for access to said networks or agreements for the purchase of electricity .

114. Within the scope of these powers, the Authority will be able to give formal notice to the operators concerned to put an end to a breach (art. LP 621-1), or to stipulate the terms of access to networks, works and installations, or the conditions of their use (art. LP 621-2). The Authority will also have the power to take precautionary measures in the event of serious and immediate breach of the rules governing access to electricity or gas transmission and distribution networks (art. LP 641-1).

115. Finally, the Authority will be able to sanction any behavior "*having the object or effect of restricting access to the electricity transmission or distribution network"* (art. LP 621-3).

116. The Autorité welcomes these transfers of powers, which appear to be inspired by the extended powers of the CRE and the Comité de Règlement des Différends et Sanctions ("**CoRDiS**") in the area of dispute resolution. In the future, these new powers should form the core of the electricity sector regulator's function, enabling it to ensure the transparent, non-discriminatory terms and conditions of network access and use necessary for the smooth operation of the electricity sector. Disputes relating to access to the electricity transmission or distribution network could typically include disputes between network and storage facility operators on the one hand, and the users of these facilities (producers, distributors, suppliers, end consumers, etc.) on the other.

117. During the investigation of the case, the DPE, which is currently in charge of the dispute resolution mechanism, indicated that it had never been called upon to activate the dispute resolution procedure or impose sanctions to date. Disputes are fairly rare (1 or 2 per year) and are generally settled through mediation. The other people interviewed confirmed that, overall, the number of potential disputes that the Autorité would be called upon to hear in the years to come would be limited.

118. However, all those interviewed confirmed the value of such a dispute resolution mechanism. In particular, it was emphasized that entrusting these powers to an authority independent of the central administration and the Polynesian government could encourage certain players in the sector to activate this mechanism.

119. In addition, the electricity sector is set to change in the near future, with several new photovoltaic producers due to enter the market in the second half of 2024. The arrival of new players in electricity production is likely to generate a certain amount of friction between operators and encourage recourse to this dispute settlement mechanism in the years to come.

b. CONTROL OF ELECTRICITY UTILITY ACTIVITIES

120. The draft law of the country stipulates that the Authority will produce a report on the "*control of electricity public service activities*", aimed in particular at controlling the activity report of "*public service delegations of French Polynesia and its public establishments, as well as of communes, their groupings and their public establishments*" (art. LP. 610-9 III). The Authority's report will not be made public, but will be forwarded to the President of French Polynesia and to the delegating authority, within six months of receipt of the delegatee's report.

121. The aim of this transfer of powers to the Authority is to "*strengthen and professionalize*" the control of operators in the energy sector, and in particular delegated electricity service providers[10] .

122. This control of electricity utility activities requires the Authority to set up periodic accounting and financial controls on the various public service delegatees . In practice, the control consists of an "audit" of the operators' management including, in particular, an analysis of the cost accounting, in application notably of the framework defined for the "*appropriate accounting applicable to public service delegations in the Energy sector*" by Order no. 2099 CM of December 17, 2015.

123. The draft law of the country provides for the sharing of control over the management of public service delegations between the Authority and the central administration (in this case, the DPE). The Authority will be responsible for financial and accounting control of public service delegations, while technical control of the concession will continue to be carried out by the DPE (e.g. investment policy, renewal of facilities, network extensions, etc.).

124. The information gathered in the course of monitoring public service activities will provide invaluable information for the conceding authority in its relations with the concession-holder, notably with a view to making adjustments to the management conditions of public service delegations, and in particular to pricing conditions.

125. Given the importance of the missions transferred and the needs estimated during the hearings to carry them out, the Authority recommends *at the very least* increasing the number of staff dedicated to the Authority's regulatory mission to three rapporteurs, as opposed to the two currently provided for in the country's bill.

126. The Authority notes the absence of a mechanism for the transmission of information between the DPE and the Authority, as provided for in the draft law of the country, which would enable the Authority to have access to public service delegation controls at the time of the effective transfer of regulatory competence. In particular, provision should be made for the DPE to transfer relevant information relating to the control of public service delegations. To guarantee the success of the Authority's new mission, it is vital that it benefits from the experience accumulated by the department in charge of controlling public service delegations prior to the entry into force of the text.

Recommendations:

The Authority makes the following recommendations:

3. increase the number of staff dedicated to the Authority's regulatory mission to *at least* three rapporteurs;

[10] Explanatory memorandum, page 1.

4. incorporate an information exchange mechanism between the DPE and the Authority, enabling the transfer of relevant information relating to the control of public service activities at the time of the actual transfer of jurisdiction.

c. SHARING SECTOR REGULATION

127. As mentioned above, the aim of the draft law is to entrust *the Polynesian Competition Authority with "[t]he mission of sectoral regulation in energy matters [...]*" (art. LP 1). This sectoral regulatory mission would cover both the gas and electricity sectors.

128. However, it should be emphasized that, contrary to what is indicated in the explanatory memorandum and article 1er of the draft law of the country, which refers to the Authority as the "*regulator*", regulation of the energy sector is only partially transferred to the Authority. The proposed mechanism amounts to a "*shared*" regulation of the energy sector between the Authority and the central administration.

129. While the Authority will have two active areas of responsibility: monitoring the reports of public service delegates and settling disputes, the rest of regulation will remain within the remit of the DPE.

130. In addition, the central administration and the Polynesian government retain regulatory authority over the energy sector. In this context, the Authority's involvement will be limited to the possibility of making recommendations in the context of its annual public report on "*compliance with the Energy Code by electricity and gas transmission and distribution system operators, as well as an assessment of the independence of these system operators*" (art. LP. 610-9 II); and its non-public report on the monitoring of electricity utility activities (art. LP. 610-9 III).

131. The Authority's involvement in "*the pricing of energy production, transmission and distribution services*", as provided for in the draft law, will take the form of an optional referral for an opinion by the competent authority (art. LP. 621-4) on access and interconnection rules, in particular on pricing principles (art. LP. 232-1) and on the specifications for energy transmission and distribution public service delegations (art. LP. 432-1).

132. However, the Authority suggests that in the medium term, the competent administrative authority should systematically refer access and interconnection rules and pricing principles to the Authority, rather than making them optional as the text currently stands.

133. With regard to the setting of retail electricity and gas tariffs, the structure of the energy sector in French Polynesia is marked by strong public intervention, and the question of how electricity and gas tariffs are set is a central element in the regulation of these activities. In fact, the price of electricity is set by the French government in a decree issued by the Council of Ministers. It is based on two distinct tariff grids, corresponding to medium and low voltage.

134. For example, in October 2022, in response to the rise in world hydrocarbon prices, the price of electricity was increased by 6.5%, while EDT had to bear a 72% increase in the price of diesel. In this regard, the Chambre Territoriale des Comptes noted that "*the debate was disrupted by a pricing system that was too far removed from the economic reality of the concessions, and moreover, in a climate marked by virtually non-existent accounting control. (...) The economic reality of the concession was not the essential determinant of pricing. During several tariff revisions, the local authority modified tariffs without taking into account the reality of oil*

prices, its main input, subordinating this consideration to a discretionary objective of lowering prices"[11] .

135. The Authority understands the desire for a gradual build-up of skills before introducing new regulatory powers for itself. It believes that one of the next steps in its development should include the possibility of calling on its acquired expertise to assist the government and central administration in defining its energy pricing policy. As a sector regulator, the Autorité will then be in a position to make a useful contribution to the determination of regulated gas and electricity prices. Initially, this involvement could take the form of an annual opinion from the Authority on current tariffs, in particular to highlight their consistency with actual public service costs. The government would remain free to set electricity and gas tariffs, but would be informed by the Authority's analysis.

136. Secondly, the country's draft law does not provide for the possibility of consulting the Authority as part of the authorization procedure for power generation or energy storage facilities, applications for which are handled by the DPE. Consideration should be given to the possibility of involving or consulting the Authority as part of the authorization procedure for these facilities.

137. Lastly, the task of monitoring and observing markets in the energy sector assigned to the Authority by article LP. 231-1 does not appear to be reflected in the draft law.

138. The Autorité considers that it would be desirable to involve the sector regulator in this market monitoring function. This is a classic task for a sector regulator. Both the French energy regulator, CRE, and the electronic communications regulator, ARCEP, have such tools and information resources. The advantage of such a tool is that it enhances the effectiveness of sector regulation, by increasing the Authority's knowledge of the sector and its expertise.

139. The Authority therefore recommends involving it in the work of the Polynesian Energy Observatory, or considering transferring it to the sector regulator.

Recommendations:

The Authority makes the following recommendations:

5. in the medium term, systematically refer access and interconnection rules and pricing principles to the Authority;

6. consider, as a future development of the Authority's regulatory powers, the possibility of involving the Authority, or consulting it for its opinion, in the authorization procedure for power generation facilities; and

7. involve the Authority in the work of the Polynesian Energy Observatory, or consider transferring the Observatory to the sector regulator.

Summary of recommendations

The Authority makes the following recommendations:

[11] Rapport d'observations définitives de la chambre territoriale des comptes, *Examen de la gestion de la Polynésie française au titre de la politique de l'énergie*, October 6, 2017, page 19.

1. amend article LP 231-1 to specifically exclude gas from the hydrocarbons sector and avoid any difficulties of interpretation as to the Authority's scope of jurisdiction;

2. in the medium term, consider extending the Authority's remit to include regulation of the hydrocarbons sector;

3. increase the number of staff dedicated to the Authority's regulatory mission to at least three rapporteurs;

4. incorporate an information exchange mechanism between the DPE and the Authority, enabling the transfer of relevant information relating to the control of public service activities at the time of the actual transfer of jurisdiction;

5. in the medium term, systematically refer access and interconnection rules and pricing principles to the Authority;

6. consider the possibility, in a future development of the Authority's regulatory powers, of involving the Authority, or consulting it for its opinion, in the authorization procedure for power generation facilities; and

7. involve the Authority in the work of the Polynesian Energy Observatory, or consider transferring the Observatory to the sector regulator.

Deliberated on the report of Frédéric Paillusson, *Deputy General Rapporteur*, and the intervention of Sophie Bresny, *General Rapporteur*, by Johanne Peyre, *Chairman*, Ingrid Izquierdo and Enzo SIlvestro, *members*, and Béatrice Kwon, Henri Piffaut and Vivien Terrien, *alternate members*.

The President

Johanne Peyre