

Department of Mineral Resources & Energy

Attention: Mr Matthews Bantsijang

By Email: era@dmre.gov.za**Introduction:**

SAFCEI's Comment on the Electricity Regulation Amendment Bill in Government Gazette Vol 680 No. 45898 of 10 February 2022.

INTRODUCTION:

SAFCEI (Southern African Faith Communities' Environment Institute) is a multi-faith organisation committed to supporting faith leaders and their communities in Southern Africa to increase awareness, understanding and action on eco-justice, sustainable living and climate change. Challenging the government to provide affordable, safe, clean energy which does not damage our environment nor place a burden to clean-up on future generations is one of SAFCEI's core actions. With this in mind, our comments on the Energy Regulation Amendment Bill follow.

The Energy Regulation Amendment Bill refers to the original ERA which is a separate document rather than making the changes in the original ERA. This has made it hard to track the proposed changes. The Bill refers to a number of regulatory 'persons' fulfilling various and overlapping responsibilities. A flow diagramme indicating the hierarchy of decision making with various responsibilities would be a valuable aid to understanding the different roles and responsibilities. The bill refers to the Minister, The Regulator, a Transmission System Operator, an advisory forum (Section 5), a central purchasing agency, a consumer tribunal / tribunals, etc.

The general objectives of the bill are supported. - *to establish a national regulatory framework for the electricity supply industry; to make the National Energy Regulator of South Africa the custodian and enforcer of the national electricity regulatory framework; to provide for the establishment of the Transmission System Operator, to provide a competitive multi market structure for the electricity industry, to regulate the reticulation of electricity by municipalities; and to provide for matters connected therewith.* This will involve investment to provide more competent officials within NERSA to effectively cope with an additional work load.

In reading the ERA Amendment Bill, SAFCEI gained the distinct impression that decision- making power is being centralised around the Minister. This is specifically the case regarding strategic matters such as the revision of the IRP and the issuing of new generation determinations. We believe this to be inconsistent with a Just Energy Transition which requires active citizen participation in matters regarding the type of new generation as well as the pricing structures that will impact tariffs. It is also potentially inconsistent with the need for more direct involvement by the DFFE and Presidential Climate Committee to ensure that future energy generation does not have significant negative environmental impacts. Democratic participation and rights are enshrined in our constitution and the proposed amendments signify a move away from good governance processes. SAFCEI therefore endorses the submission of The Green Connection dated 12 March addressed to Mr Matthews Bantsijang of the DMRE by email: era@dmre.gov.za which raises concerns regarding the centralisation of decision -making power with the Minister. SAFCEI supports the recommendations made by the Green Connection that the Minister's powers be balanced with the need for public participation regarding the review of the IRP as well as with new Section 34 Determinations, including public access to the information submitted by prospective IPPs to the DMRE via the PIA process.

1. Issues of concern regarding the Integrated Resource Plan and the issuing of new determinations.

1.1 The Minister shall, after consultation with the Regulator.....(b) *revise the integrated resource plan at least every three years. The IRP is now due for revision.*

RECOMMENDATION: What penalties are there for the Minister if the IRP review it is delayed? If such key responsibilities are not duly preformed, the Minister should be relieved of their post. The IRP is an important policy instrument in energy decision making.

1.2 *The Minister shall, with the assistance of the **system operator**, engage in electricity supply and demand scenario planning and prepare a document setting out various scenarios in respect of electricity supply and demand and the estimated costs of those scenarios, which the Minister shall publish for public comment in the Gazette;* This begs three questions.

a) There is no reference to the least cost option being a driving principle of the scenario planning for new generation?

b) It is not clear who the system operator is in a multi-market system with different owners of generation. Is it the TOS?

c) In an energy transition, South Africa's Climate Change commitments and with restructuring of ESKOM, more stakeholders need to be directly involved in the revision of the IRP. These should include the CSIR, SALGA and the Presidential Climate Commission. Inputs should also be invited from organisations representing RE generation. The weakness of the process for inclusion of public comment on the draft IRP was demonstrated in the 2019 IRP which capped RE in spite of the policy principle of least cost generation. Reports by the CSIR and Meridian recommending higher percentages of RE were disregarded. The DMRE's current push for costly gas Karpowerships, for costly new nuclear, as well as unproven and expensive clean coal raises significant concerns about future affordability of electricity and South Africa's energy path.

RECOMMENDATION: The ERA Amendment Bill needs to identify a mechanism to ensure a balance in the determination of the amounts and types of energy generation allocated in future IRPs based on the principles of Least Cost for efficient generation. This can be achieved with a wider responsibility for the IRP than the DMRE, such as including direct representation by intergovernmental organisations such as the CSIR, SALGA, the Presidential Climate Commission and National Treasury.

1.3 Section 24 of the Constitution is also binding on the DMRE

Section 24 of the constitution states that Everyone has the right to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. The responsibility to uphold this constitutional right is the responsibility of ALL government departments and as such binding on the DMRE.

RECOMMENDATION: Include in the ERA Amendment Bill that: revising the IRP and issuing new determinations needs to be done with acknowledgement that the DMRE is also bound by Section 24 of the Constitution. That is to make decisions and take actions that protect the environment for the benefit of present and future generations and prevent pollution and ecological degradation while securing

ecologically sustainable development. This due consideration of Section 24 of the Constitution is to include planning and approval of new generation in keeping with South Africa's GHG emission commitments as well as protection of water resources and adherence to air pollution legislation.

2. In Making a Determination:

2.1 In a case where the Minister wishes to deviate from the IRP or the transmission development plan "*as envisaged in subsection (7)(b), the Minister must publish a notice in the Gazette, inviting the public to comment on the proposed deviation. (9) If it is reasonable and justifiable in the circumstances, the Minister may depart from the provisions of subsection (8).* **Who decides what is reasonable and justifiable?**

RECOMMENDATION: (a) The ERA Amendment Bill needs to define what is reasonable and justifiable and which parties, not just the Minister, are required to make these decisions. (b) NERSA, Treasury, DFFE and the Presidential Climate Commission must be co decision- makers in the case of a proposed deviation from the IRP.

2.2 Regarding: *The Minister has such powers as may be necessary or incidental to giving effect to the determination referred to in subsection (1) or (3), including the power to: (b) purchase, hire or let anything or acquire or grant any right or incur obligations for or on behalf of the State or prospective [tenderers] participant in any relevant procurement process for the purpose of transferring such thing or right to a successful [tenderer] participant;"* **The power of the Minister to purchase or hire anything on behalf of prospective [tenderers] participant is inappropriate.** With respect, this creates an opportunity for corruption in a country where corruption is still a real risk, in spite of current actions to expose and deal with corruption. Furthermore, a successful tenderer needs to be financially viable to procure their own 'anything'.

RECOMMENDATION: A successful tenderer needs to be financially viable to procure their own 'anything'. This section giving the Minister the power to *purchase or hire anything on behalf of prospective [tenderers] participant* should be deleted from the ERA Amendment Bill.

2.3 Regarding (e) below: Extreme caution is required regarding long term contracts with IPPs which bind the State to indemnify IPPs against rising fuel costs or issue guarantees for continuance of purchase for imported oil or gas fuels. As the economically extractable global gas and oil reserves are depleted so international competition for these resources will increase resulting in high prices. The conflict between Russia and Ukraine has plunged Europe into a gas price and supply crisis. **South African needs to avoid contracts with IPPs using foreign fuel reserves in foreign currencies.** (e) *subject to the Public Finance Management Act, 1999 (Act 1 of 1999), issue any guarantee, indemnity or security or enter into any other transaction that binds the State to any future financial commitment that is necessary or expedient for the development, construction, commissioning or effective operation of [a] public or privately owned generation facilities or electricity [generation business] infrastructure."*

RECOMMENDATION: Neither the Minister nor NERSA should approve new generation licences that involve *any guarantee, indemnity or security* with IPPs using foreign fuel reserves in foreign currencies.

3. Concerns about challenges to NERSA's independence.

The Regulator, in [issuing a generation licence—] exercising its powers and performing its functions under this Act [(a)] is bound by any determination made by the Minister in terms of subsection (1) or (3);" This

appears to be an unacceptable challenge to NERSA's independence as a regulator and a reinforcement of a 'unilateral' decision-making power of the DMRE.

RECOMMENDATION:

The Minister may not issue a determination without the full involvement of NERSA with an appropriate Public Participation Process regarding the amount, type of generation and guideline tariff relevant to the determination.

4. SAFCEI supports NERSA in setting and publicising a guideline tariff and a maximum tariff for new generation.

The tariff guideline should follow the principle of Least Cost for efficient supply that also addresses environmental protection legislation and South Africa's GHG emission commitments. However, pre-approval of tariffs, while DMRE and NERSA are in the process of issuing a determination for new generation is inconsistent with seeking a least cost technology and tariff. Least cost generation options can best be obtained by competition between competent and efficient generation.

RECOMMENDATION: The clause calling for pre- approval of tariffs by NERSA pursuant to an IPP procurement process needs to be removed.

5. Need for clear guidelines regarding what is a reasonable margin of return for Power Producers.

In determining the tariff NERSA is to be guided by: (a) *must enable an efficient licensee to recover the full cost of [its] the licensed [activities] [, including a reasonable margin or return];* What is a reasonable margin of return? What is efficient generation? Efficient generation has historically been an elastic consideration when reviewing ESKOM's costs of supply which is fraught with costs from mismanagement and corruption.

RECOMMENDATION: The ERA Amendment Bill needs to provide a clear definition of *reasonable margin of return as well as a clear definition for an efficient licensee.*

6. Why a 15 year licence validity?

Amendment of section 20 of Act 4 of 2006, as amended by section 16(b) of Act 28 of 2007

"(1) Any generation, [or] transmission or system operation licence issued in terms of this Act is valid for a period of 15 years or such [longer] period as the Regulator may determine. 15 years seems arbitrary.

RECOMMENDATION: The licence should be valid for the planned lifetime of generation plant, subject to the lifetime being stated in the generation licence and subject to the licensee fulfilling the conditions of the license?

7. Expropriation of land for generation, transmission or distribution!

Section 26 of the principal Act is hereby amended— (a) by the substitution for subsection (1) of the following subsection: "(1) *The [State] Minister may, on application from a licensee.....permanently or temporarily expropriate land, or any right in, over or in respect of land, on behalf of a licensee in accordance with section 25 of the Constitution.This applies to land that: is reasonably required by [a] the licensee for facilities which will enhance the electricity infrastructure in the national interest.*

SAFCEI is critically aware that both lack of access to land and expropriation of land are hugely sensitive issues. Expropriation for energy security should only happen under exceptional circumstances and this needs to be made clear in the ERAB. Options such as lease or servitude rights need to be considered before expropriation. The opportunity cost of the existing land use (food security) vs electricity also needs to be considered. Presumably in a case of expropriation the owner who is forced to 'sell' would be paid by the licensee. Is there an appeal mechanism? In the case where a licensee does not take up the use of land that has been expropriated; it needs to be offered back to the previous owner from whom the land was expropriated.

RECOMMENDATION: Expropriation for energy security of the nation should only happen under exceptional circumstances and this needs to be made clear in the ERA Amendment Bill. In addition, options such as lease of land or negotiating servitude rights need to be considered before expropriation. The opportunity cost of the existing land use (food security) vs electricity also needs to be considered.

8. Identify transmission corridors

To reduce conflict with landowners and the national needs for generation and transmission, the DMRE should commission a study to identify transmission corridors and publish these. These corridors need to look at the existing land use values in terms of food security and environmental impacts when considering optimal transmission corridors. This ties in with the requirement that: *The system operator must, with the approval of the Minister, develop, and annually revise, a transmission development plan setting out the manner in which the national transmission power system shall be developed, strengthened, upgraded and refurbished.* Of concern is the proposal on pg 56 that: *if the Minister refuses to approve the proposed transmission development plan, the system operator shall revise the proposed plan.* Does this imply that the Minister is concerned about the competency of the TSO to design a national transmission plan?

RECOMMENDATION: While the Minister can call for a review of aspects of the TSO and for an independent assessment, the Minister must not have the power to block the plan.

9. Registration fee to NERSA for new generation.

Reference is made of the need to register new generation that does not require a generating license with NERSA including paying a registration fee. This registration fee needs to reflect the administration cost of registering and should not be a form of tax. In instances where local authorities are registering SSEG owners and IPPs under 100MW, it should not be necessary to also pay a fee to NERSA. The registered power generators need to be on a National Data Base.

10. The establishment and management of a national information system is supported.

11. TSO should ringfence funds for maintenance and grid expansion.

One of the duties of the TSO is to (p) maintain a complete and accurate set of accounts for all the power system transactions. Considering the strategic importance of maintaining and upgrading the transmission system, funds need to be ringfenced for this purpose.

RECOMMENDATION: Funds need to be allocated and ringfenced to maintain and upgrade the transmission system.

12. General provisions

RECOMMENDATION: Add to the general provisions that anyone found guilty of vandalising or stealing electrical generation, transmission or distribution infrastructure should be charged with treason as this is a crime that impacts energy security and all citizens.

13. Conclusion

Affordable clean energy along with clean water and a healthy environment is the life line of economic and social wellbeing in South Africa and a constitutional right. The technology transition enabling a shift from non- renewable and polluting energy sources such as fossil fuels and nuclear requires new pro-active relationships across the entire energy service sector and an approach by government that inculcates good governance through public participation and transparent procurement processes. It also requires informed consumer behaviour and behaviour changes to optimise efficient use of electricity generation. To facilitate an optimal mix of affordable and environmentally sustainable private, local government and ESKOM energy services, clear legislation with defined responsibilities and intergovernmental co-operation is required, not a centralisation of decision making by the Minister of DMRE. (See our reference and support of The Green Connection's comments on the ERA Amendment Bill).

With Regards,

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