



31 July 2020

The Chairperson
Portfolio Committee on Transport
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Dear Mr. M.J. Zwane

**THE MINERALS COUNCIL COMMENT ON THE ECONOMIC REGULATION OF
TRANSPORT BILL**

The Minerals Council welcomes the opportunity to comment on the Economic Regulation for Transport which has been long awaited.

The Minerals Council of South Africa is a voluntary membership, private sector mining industry employers' organisation founded in 1889. The Minerals Council facilitates interaction among mine employers to examine policy issues and other matters of mutual concern to define desirable industry-level stances, in this case the Economic Regulation of Transport Bill.

Find below the comment, requests for clarity can be addressed to the undersigned.

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THE COMMENT

CHAPTER 2

ACCESS TO RAIL INFRASTRUCTURE

Types of access requests and access fees

6.(1).Requests to make investments in order to increase the capacity of infrastructure that has been determined in terms of section 4, where the owner of the said infrastructure has declined to make the requested investment to the requested specifications.

Comment:

This clause will enable customers of old branch-lines which have been left in a condition of deterioration to be able to negotiate with the infrastructure owner to rehabilitate these facilities in return for offtake capacity. It also allows for new capacity or extension which is supported by the Minerals Council

Requests for and consideration of access approval by Regulator

8. (1) Before approaching the Regulator, an access seeker must first try to negotiate the terms of the access agreement with an infrastructure owner in good faith.

(2) If the parties fail to reach an agreement, either party can refer the matter to the Regulator for resolution.

(3) When considering the matter referred to the Regulator in terms of subsection (2), the Regulator must invite the infrastructure owner and the access seeker to make written representations to the Regulator, within such period as the Regulator may determine.

Comment

This enables a fair resolution in case the access seeker does not agree with some of the contract conditions set by the infrastructure owner. This will greatly assist in ensuring that contracts are competitive and enable South African companies to deliver products that can compete globally and locally. The Minerals Council supports this clause.

(5) When determining whether there is available capacity in the infrastructure or facility, the Regulator must—

(a) request written representations from all entities that are currently using the infrastructure or facility—

(i) detailing the recent history of utilisation of the infrastructure or facility,

and the projected volumes for the ensuing year, and
(ii) substantiating the said projections, where possible, with written evidence.

Comment

There might be infrastructure that has not been used for some time but might offer competitiveness to sectors including farming and mining. The hope is that this clause does not exclude this infrastructure from being approved for use (due to requests of recent use), rehabilitated and used sustainably. It is thus requested that a sentence/bullet allowing for the use/approval of such infrastructure to be added. What comes to mind is the branch-lines that have not been used and might be used economically also supporting government strategies of moving some cargo away from roads and onto rail.

8.(6) The infrastructure owner must provide the Regulator with an updated report of capacity, including—

- (a) maintenance downtime requirements;
- (b) technical specifications;
- (c) route schematics;
- (d) investment plans on the route; and
- (e) any other information that the Regulator may need to assess capacity.

Comment

Is the regulator going to have an overseeing capacity to ensure that the above maintenance and investments are carried out? This has been a major downfall for our State-Owned Enterprises over the past 10 years. The Regulator should be able to hold the infrastructure owner accountable for the above clause requirements being carried out. This might also necessitate the collaboration with the Safety Regulator.

8.(7) The Regulator may reassign unused capacity if there is no reasonable prospect of the current user needing that capacity, and if doing so will improve system efficiency.

Comment

There have been instances where rail capacity has been taken away from mining companies for the benefit of newcomers/smaller companies. Enablement of new entrants and smaller

companies is supported by the Minerals Council but should not be at the peril of existing companies that are contributing positively to SA. Instead we should aim at increasing the capacity to empower all customers and grow the economy.

Decision on access approval

9(2) The Regulator may grant access approval, even if the requirements of section 8(4)(a) are not met: Provided that the access seeker has given a written undertaking to the Regulator, to fund the required investment in infrastructure.

(3) If the Regulator grants access approval in terms of subsection (2), the terms of the access agreement must reasonably allow for the access seeker to realise the value of its investment.

(4) The Regulator may grant access to the access seeker contemplated in subsection (2), only once the new infrastructure or facility is built.

Comment:

In terms of point 8.(4) This might cause unintended consequences as the financing of the infrastructure might depend on it first being licensed or approved by the Regulator. The banks would be hesitant to finance infrastructure that has not been approved or licensed yet.

**CHAPTER 3 ECONOMIC REGULATION OF TRANSPORT FACILITIES AND SERVICES
PART A PRICE REGULATION**

11.(1)(2)(3)(4) When considering a proposal submitted in terms of this section, the Regulator must—

(a) consult with interested parties and the public in the prescribed manner;

(b) determine whether the proposal is fair and reasonable, after considering all relevant circumstances, including—

(i) the regulated entity's operating efficiency and effectiveness;

(ii) the need for investment and security of supply in the regulated market;

(iii) the opportunity cost of capital including the average rate of return on other domestic or international facilities or services having similar or comparable risk;

(iv) the actual or forecast cost of debt;

Comment

Our SOEs are ridden with high employee costs, high capital costs, fraudulent activities and generally inefficiencies as has been exposed in the past 2 years. It is thus of high importance to ensure that the regulator has got teeth with regards to dealing with regulation 11(4). A simple example is the issue of Eskom where capital projects (Medupi and Kusile Power Station) prices moved from R60 billion at inception to more than R 200 billion actual per power station resulting in excessive debt which has to be financed by the customers. Various research reports have also shown that the same state-owned enterprise is overstaffed by more than 30%. Such results in efficiencies being removed and customers use other means resulting in a death spiral for the service provider. For electricity we have the multi-year price determination which has not worked in any efficiencies into calculation of revenues which has resulted in price escalation of over 500% in the past years and currently Eskom have outstanding RCA collections of over R110 billion from its customers which if implemented will add an additional 50% to the cost of electricity. The Multi Year Price Determination Methodology formula allows for the above as indicated by success with courts to ever-turn regulator decisions. the regulator thus has an important function to ensure that methodology used to calculate revenues for the service providers are properly investigated and are suitable for our market. The regulator should also ensure that they receive relevant data from the service providers, the regulator should also be properly staffed to decipher the information supplied and be able to take decisions that will be implemented by the service provider. The cost of transport and its efficiency can lead to our companies being able to compete with international companies which are mostly close to their customers. It is thus critical for the South African transport industry to be as efficient as possible to keep their current contracts and grow their market share as we are heavily endowed with products that come out of the earth.

Part B

Economic Oversight of Regulated Entities

Information from regulated entities

13. (1) Each regulated entity must submit to the Regulator, in the prescribed manner and form—

Comment

It is of high importance for the regulator to have periodic reports from regulated service providers to ensure that the Regulator is aware of any changes to the approved revenue streams or capacities that are supposed to be moved for that year. It is also of high

importance to ensure that the regulator is properly staffed to decipher such information. The regulator should be able to implement fines if the information is not forwarded by the regulated entities. An addition of periodic reports and imposing fines if such information is not supplied should be added to this clause to ensure that the Regulator has some power with regards to the supply of information.

Regulatory accounting and disclosure requirements

14(1)(2)(3)(4)

It is of high importance for the regulator to have periodic reports from regulated service providers to ensure that the Regulator is aware of any changes to the approved revenue streams or capacities that are supposed to be moved for that year. It is also of high importance to ensure that the regulator is properly staffed to decipher such information. The regulator should be able to implement fines if the information is not forwarded by the regulated entities. An addition of periodic reports and imposing fines if such information is not supplied should be added to this clause to ensure that the Regulator has some power with regards to the supply of information.

Comment

It is of high importance for the regulator to have periodic financial reports from regulated service providers to ensure that the Regulator is aware of any changes to the approved revenue streams for that year and to make any other related decisions or to conduct studies. It is also of high importance to ensure that the regulator is properly staffed to decipher such information. The regulator should be able to implement fines if the information is not forwarded by the regulated entities. An addition of imposing fines if such information is not supplied should be added to this clause to ensure that the Regulator has some power with regards to the supply of information.

15. Complaints against regulated entities and 16. Direct referrals to Council

Comment

The Minerals Council supports these regulations as they offer dispute resolution

29(1)(2)(3)(4) Establishment of Transport Economic Regulator

Comment

The importance of an independent Regulator that is also impartial cannot be overstated to ensure that the decisions taken are based on sound technical information and policies that have been set and approved by government. This clause empowers the Board to make decisions which is supported by the Minerals Council.

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