

PRESENTATION TO THE PCMRE ON THE GAS AMENDMENT BILL [B9-2021]



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- ❖ **Introduction**
- ❖ **Key policy imperatives and objectives necessitating amendment**
- ❖ **Key amendments to strengthen the regulatory mandate**
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About NERSA

❖ The National Energy Regulator of South Africa (NERSA), a Schedule 3A Public Finance Management Act, 1999 (Act No. 1 of 1999) Public Entity was established on 1 October 2005 in terms of the National Energy Regulator Act, 2004 (Act No. 40 of 2004) to regulate:

- Electricity industry (Electricity Regulation Act, 2006 (Act No. 4 of 2006));
- Piped-Gas industry (Gas Act, 2001 (Act No. 48 of 2001));
- Petroleum Pipelines industry (Petroleum Pipelines Act, 2003 (Act No. 60 of 2003)).

Piped-Gas Scope and Mandate

❖ Key responsibilities include:

- Implementing the Gas Act, 2001 and the associated Piped Gas Regulations;
- Developing the Gas Act Rules, pricing methodology and tariff guidelines;
- Facilitating investment; promoting orderly development; promoting competition; Monitoring industry developments.

❖ Functions include:

- Licensing gas infrastructure and gas trading activity;
- Approval and monitoring of gas prices ([for molecule](#)) and tariffs ([for infrastructure](#));
- Compliance monitoring and enforcement;
- Registration of gas activities;
- Investigations and dispute resolution.

❖ Regulatory mandate excludes:

- Gas exploration and production (PASA function);
- LPG Regulation (prices by DMRE; storage facilities by NERSA under the Petroleum Pipelines Act);
- Gas/LPG reticulation (responsibility of local authorities).

❖ **NERSA welcomes and support the proposed amendment of the Gas Act which is necessary to:**

- ❖ Strengthen the regulatory mandate in respect of gas prices and tariffs, third party access to gas facilities, compliance enforcement;
- ❖ Stimulate gas infrastructure investments and gas market development, and resolve the anchor customer dilemma through integrated energy projects;
- ❖ Accommodate new industry developments and technological changes not envisaged in the current Act;
- ❖ Increase competition in the gas market;
- ❖ Remove potential barriers to market entry and increase the economic participation of black companies in all segments of the gas value chain;
- ❖ Increase the competitiveness of gas as an alternative energy source and its role in the country's energy mix.

(I) Powers to regulate maximum gas prices and tariffs

❖ Maximum prices

- Current Act limits the powers of NERSA to approving not setting maximum prices. This results in the lack of uniformity in basis of formulating gas prices by different licensees that potentially expose customers to higher and inconsistent prices.
- Further, the approval of maximum prices is subject to the determination of inadequate competition. Inadequate competition is not defined in the Act, and is therefore open to different interpretations that could lead to legal action and prolonged process in approving maximum prices.

❖ Tariffs

- Limited powers in respect of transmission and storage tariffs - only monitoring and approval, and no setting.
- No statutory powers at all in respect of distribution tariffs.

❖ **The powers to regulate maximum gas prices and tariffs provided in the Bill would –**

- Allow NERSA to exercise its sole discretion **to approve or to set a maximum price/tariff** when processing applications from licensees.
- Eliminate any possible confusion about what the regulator is expected to do when it regulates vs just approving a maximum gas price/tariff.

(II) Powers to regulate tariffs for gas distribution and LNG facilities

- ❖ This would:
 - Close the current regulatory gap where certain parts of the infrastructure in the gas value chain are not completely regulated – NERSA currently license the infrastructure but cannot set/approve the tariffs; and
 - Enable the Regulator to incentivise the development of new gas distribution and LNG re-gasification and liquefaction facilities while protecting customers utilising that infrastructure.
- ❖ Unregulated tariffs leave the industry exposed to higher gas prices – end-users endure the negative economic impact of this regulatory gap as tariffs are a passed-through cost to the final charge invoiced to customers.
 - ✓ **For example** – the unregulated distribution tariffs have averaged between R10.98/GJ in 2014 to about R16.50 in 2020. This is too high compared to the regulated transmission tariffs regularly approved by NERSA which are currently sitting at R6/GJ for Sasol Gas.
- ❖ Moreover, unregulated tariffs that are the prerogative of monopolies create uncertainties that may create distortions and disincentive investments elsewhere in the value chain.

(III) Mandatory third party access to gas distribution and LNG facilities

- ❖ Third party access (TPA) is a widely utilised tool to ensure non-discriminatory and equitable access to gas infrastructure and markets. Typically, gas infrastructure cannot be easily duplicated due to high upfront capital costs and the need for efficiency and scale.
- ❖ Mandatory TPA somewhat reduces the barriers to market entry and facilitates new entrants to the markets.
- ❖ For example, black owned companies without adequate financial resources to develop their own gas infrastructure can get access to existing pipeline facilities to transport and sell their own gas directly to customers.
- ❖ TPA should not be viewed as discouraging investment – In both the current Gas Act and the Bill, TPA is subject to the availability of ‘uncommitted capacity’ in the gas facilities. This is sufficient to safeguard the initial infrastructure investment while promoting new entry and competition in the various segments of the industry.
- ❖ TPA in LNG re-gasification facilities would increase the opportunity for SA to diversify LNG supply sources, and the flexibility to acquire LNG at competitive prices from the global market.

(IV) Powers to enforce compliance (increased scope)

- ❖ Powers to impose a fine and the discretion to suspend a licence for a specified period if a licensee fails to comply with a compliance notice issued by the regulator.
- ❖ Proposed new insertions on offences (section 34A) and consent orders (section 34B) would close the existing regulatory gap, assist the Regulator to enforce compliance in an effective manner and ensure that customers are sufficiently protected.
- ❖ The provisions are necessary to improve licensee compliance and to prevent repetitive contraventions that can go unpunished for prolonged periods.

(V) Powers to regulate all hydrocarbon gases and related activities irrespective of the mode of transportation or technology involved

- ❖ This would accommodate new developments and technological advancement in the gas industry; Clarify the regulatory scope and remove the challenges relating to the varying interpretations concerning the regulation of hydrocarbon gases transported by other means than pipelines.
- ❖ This is in line with the increasing trend of new gas technologies (CNG virtual pipeline technology, LNG ISO-tankers, small-scale LNG operations) slowly penetrating the SA gas market.

(VI) Limited exclusivity for gas distribution

- ❖ The combination of limited exclusivity and mandatory third party access in gas distribution infrastructure would promote new entry and competition in the gas distribution market, and limit uncertainties and potential distortions associated with TPA being the prerogative of a monopoly.
- ❖ The requirement for an infrastructure or market development plan for the area of exclusivity would prevent market sterilization. However, the review of the market development plan by the Regulator should be prescribed in the Bill to happen periodically than annually in the primary legislation in order to lessen the administrative burden for the Regulator and to provide certainty to potential investors.
- ❖ Linking distribution exclusivity to the period of recouping the initial investments would also boost investor confidence.

Section 1(zL)

Issue

The proposed new definition of **‘trading’** in section 1(zL) of the Bill suggests that the sale of gas will only qualify as trading if gas is sold only by a transmission or distribution company and only to a reticulator or an end consumer.

Challenge/Impact

The definition completely excludes the sale of gas by a transmission company to a distributor as trading, or by a transmission company or distribution company to any other trader, or by any other trader to an end consumer or reticulator. **This would create a regulatory gap and encourage the use of different standards for gas consumers in the industry.**

Proposed solution

It is proposed that the definition of trading should only be amended as follows –

“‘trading’ means the [purchase and] sale of gas as a commodity by any person and any activity incidental thereto, including the construction and operation of trading infrastructure, but excluding the construction and operation of liquefaction, re-gasification, transmission, storage and distribution facilities, and “trade” or “trader” have corresponding meanings;”

This will avoid the risk of discrimination by ensuring that all gas consumers in SA are treated fairly and enjoy some form of protection from the Regulator in terms of the Act.

Section 1(g)

Issue

Section 1(g) proposes a new definition of “distribution” which excludes eligible customers. It is unclear what informed this proposed exclusion and what problem in the law this proposal seeks to address.

Challenge/Impact

From practical experience, not all eligible customers offtake gas directly from a transmission pipeline. Some eligible customers are served through distribution pipelines therefore the proposed exclusion implies that the pipelines supplying eligible customers below the defined threshold for transmission pipelines in terms of operating pressures would be left unregulated. **This creates a regulatory gap and uncertainty and may have unintended consequences as the said eligible customers may be subjected to exploitation by suppliers as the pipeline directly servicing them would be unregulated.**

Proposed solution

Delete the phrase (excluding eligible customers) in the new definition of “distribution”.

This will ensure that eligible customers tapping directly from distribution pipelines enjoy regulatory protection in terms of the Act.

Section 4(1)(i)

Issue

Enhancement of the proposed new section 4(1)(i) of the Bill to adequately provide NERSA with powers to conduct market inquiries to investigate the general state of competition in industries.

Impact

Market inquiries are a proactive tool to uncover industry-wide practices that may be leading to market failures in the various relevant markets within that industry; they provide information and insights into the dynamics and workings of particular industries without evidence of wrongdoing by any particular firm; and the information gleaned through an inquiry may be used to determine appropriate enforcement action and policy intervention. **No provision for market inquiries would lead to missed opportunities to proactively identify and address market failures.**

Proposed solution

The proposed new section 4(1)(i) of the Bill should be enhanced and a new separate section be added to deal with market inquiries only as follows:

“(i) receive complaints, undertake investigations, or conduct inspections and inquiries into the activities of licensees and activities that are required to be licensed or are regulated under this Act, and take appropriate action;”

“(iA) conduct market inquiries for the gas market in line with the principles laid down in Chapter 4A of the Competition Act, 1998 (Act No. 89 of 1998) (as amended); and take appropriate action;”

This will furnish NERSA with a proactive tool to identify and address market failures in the gas industry.

Section 4(1)(i)

Proposed solution...

NERSA also proposes the insertion of a new paragraph (jA) after paragraph (j) in section 34(3) as follows –

“(jA) the procedure to be followed and issues to be explored when conducting market inquiries referred to in section 4(1)(iA);”

Proposal of new section after 4(1)(u)

Issue

Lack of clear provision empowering NERSA to make policy proposal or recommendations to the Minister on any matter contemplated in the Act.

Impact

NERSA as the authority closer to the market would from time to time in administering the Act and performing its functions realise that some provisions in the legislation are not yielding the expected outcomes in the gas market and are inhibiting progress that would require policy intervention from the Minister. Therefore, NERSA should have the responsibility to advise and guide the Minister of any negative impact resulting from the implementation of the Act and of other new developments occurring in the market (such as emerging gas technologies) that would require policy support and appropriate regulatory interventions to advance effectively in the industry.

Proposed solution

A new section should be added after section 4(1)(u) as follows:

“(v) make policy proposal or recommendations to the Minister regarding any matter contemplated in this Act.”

Section 16(5)

Issue

The proposed new section 16(5) requires NERSA to furnish an applicant for a licence with such information as may facilitate the lodging of a licence application.

Challenge/Impact

The challenge with this proposed new provision is that it appears under the section which deals with what is supposed to be expected from applicants when they apply for a licence, as opposed to the support that should be expected from NERSA before a person decides to apply for a licence. NERSA considers the proposed new section 16(5) a repeat of what should happen under section 15(4). **This duplication may cause unnecessary confusion and ambiguity.**

Proposed solution

It is proposed that the proposed new section 16(5) be removed as the purpose intended to be served by it is adequately provided for under section 15(4).

This would remove any possible ambiguity.

Section 21(1)(p)

Issue

Section 43A of the Competition Act sets out in detail features of a market that would serve to impede, restrict or distort competition in that market, and should therefore also be referenced in section 21(1)(p) of the Gas Act to give meaning and context to the term inadequate competition.

Challenge/Impact

Section 43A of the Competition Act should be referenced in section 21(1)(p) to give meaning and context to the term inadequate competition.

If Section 43A of the Competition Act is not referenced, then this will lead to a missed opportunity to clarify and provide certainty regarding the features of a market that would serve to impede, restrict or distort competition in that market.

Proposed solution

It is recommended that reference to section 43A of the Competition Act be included in section 21(1)(p).

This will provide certainty and clarification regarding the exact features of a market that would serve to impede, restrict or distort competition in that market.

**Sections
21(1)(j) &
31(1)(b)**

Issue

The newly proposed section 21(1)(j) in Clause 14(b) of the Bill relates to the imposition of a licence condition prohibiting a trader from charging unreasonable or excessive prices. Complementary to this, section 31(1)(b) in Clause 27 of the Bill enjoins NERSA to conduct investigations into unreasonable or excessive prices or tariffs in excess of the regulated price or tariff imposed by a licensee upon its customer(s).

Challenge/Impact

The Bill does not provide a definition for unreasonable or excessive prices. **The absence of such definitions may create uncertainty as to how these provisions of Bill would be applied or interpreted.**

Proposed solution

Definitions for excessive and unreasonable prices should be inserted in section 1 of the Bill. **See NERSA written submission for the detailed proposed definitions.**

The insertion of these definitions will provide certainty as to how these provisions of the Bill would be applied or interpreted. Thus, creating regulatory certainty and promoting competition through NERSA's effective investigation of unreasonable or excessive prices or tariffs.

Section 22(2)

Issue

The proposed section 22(2) of the Bill states that:

The prohibition of discrimination referred to in subsection (1) applies to actions by licensees in favour of their related undertakings, including a company that is in a group of companies, in particular.

Challenge/Impact

This aforementioned provision limits the application of the discrimination provisions in section 22(1) of the Bill to firms that are vertically integrated in the gas industry, and therefore does not extend to unjustified discriminatory conduct by firms that are not vertically integrated in the industry.

This results in a regulatory gap, which will serve to promote anticompetitive discriminatory conduct by some firms in the industry, particularly those firms that are not regulated.

Proposed solution

It is recommended that section 22(2) of the Gas Amendment Bill be removed in its entirety.

The removal of this section will avoid a regulatory gap that may lead to anticompetitive discriminatory conduct by some firms in the industry.

Section 22A(6)

Issue

Section 22A(6) of the Bill empowers the Energy Regulator to undertake annual review of the plan contemplated in in subsection (5).

Challenge/Impact

NERSA welcomes the proposal for the provision of conditional exclusivity in distribution areas as outlined in section 22A. However, the proposal to have the annual review of the development plan is too prescriptive to be included in a primary legislation and may result to regulatory uncertainty, as it does not provide long-term guarantee of the exclusive distribution rights granted by the Energy Regulator at the licensing stage. **The prescribed period is too short and may discourage further investments in the distribution areas as investors would not know what would happen when the Energy Regulator undertakes the annual reviews.**

Proposed solution

It is recommended that “annual review” be changed to “Periodic review” in section 22A(6) of the Bill.

This will provide regulatory certainty and ensure proper implementation of long-term investment plans and growth in the distribution areas.

**Section
34(3)(c) and
(f)**

Issue

The new proposal in clause 31(k) and (l) of the Bill is that the rules made by NERSA under section 34(3)(c) and (f) must also include the form, manner and contents of applications for exemptions from complying with the Act, as well as the procedure to be followed in considering exemption applications. **This is misplaced and creates confusion as the powers for exemptions are vested with the Minister as described below.**

Challenge/Impact

In terms of the last part of clause 32 of the Bill which deals with the proposed new section 34C, the power to issue and publish exemptions is vested with the Minister. Nothing in the Bill suggests that such exemptions will have to be applied for on an individual basis. Instead, the proposed new section 34C lists three grounds which may serve as basis for the Minister to issue and publish a blanket call to exempt everyone from compliance with the Act.

Proposed solution

It is proposed that the specific parts in section 34(3)(c) and (f), dealing with exemption applications, need not be legislated for at all since the issuing and publishing of blanket exemptions is envisaged to be a Ministerial initiative. Alternatively, if there is a need to legislate for these, NERSA proposes that they be moved from section 34(3) to section 34(1) dealing with the making of ministerial regulations **to ensure proper delineation of the responsibilities and avert potential confusion.**

Clause 34(b)

Issue

Clause 34(b) proposes to add two items at the end of Schedule 1. One of these two newly proposed additions is item 6, which we reckon should actually be item 5 and the item before it should be item 4, which seeks to exempt the trading in gas by a person where the quantity of gas sold is less than a quantity as prescribed by the Minister in a year from the licensing requirements of the Act.

Challenge/Impact

- Exemptions on trading may have unintended consequences as traders may not want to grow beyond the threshold to avoid regulation. It will impede small traders from expanding and growing the gas market.
- Leaving some trading activities unregulated would have detrimental harm to customers as the affected traders may charge higher prices that cannot be controlled by the Regulator and such customers would not enjoy any form of protection from the Regulator in terms of the Act.

Proposed solution

It is proposed that the new item 6 sought to be added to Schedule 1 by clause 34(b) of the Bill should be deleted. If retained, the exemption must be based on competitive prices in line with the Act. There must be annual reports to assess this outcome.

Proposed new insertions on Registration conditions (new section 21A)

Issue

Lack of provisions for imposition of registration conditions. Registrants are required to submit annual information concerning their registered activities in terms of Regulation 9 of the Piped Gas Regulations of 2007, yet NERSA has no powers to enforce and monitor compliance on this.

Challenge/Impact

The current gap regarding the imposition of registration conditions yields some level of uncertainty as to the legal status and enforceability of any conditions that NERSA imposes under no express authority in the Act. **This exposes NERSA to potential legal challenges and promotes non-compliance by registrants.**

Proposed solution

Insert a new section 21A after section 21 to provide for imposition of registration conditions as follows:

“Registration conditions

21A. (1) For any activity registered in terms of this Act, the Energy Regulator may impose any condition that it is demonstrably consistent with the nature and extent of the activity concerned and the fulfilment of one or more of the objects of this Act.

(2) The provisions of section 21(2) shall apply with changes necessitated by context in respect of persons aggrieved by any registration condition imposed under subsection (1).”

This will provide NERSA the mandate to impose conditions and improve regulatory compliance.

Proposed new insertions on Registration term and non-transferability (new section 23A)

Issue

Unlike the licensing regime, the Bill does not make provisions regarding the term of registration and non-transferability of the registration status.

Challenge/Impact

- For consistency and alignment in the permits/authorisations issued in terms of the Act, registrants should be provided the flexibility to choose the registration period and to terminate unwanted registrations when the activities are no longer required. **Uncertainty on the validity of the registration status even when the registered operation is no longer required or in use.**
- Further, registrants should not be allowed to transfer their registration status to others in the event that they relinquish ownership of the registered operations **as this may result to lack of accountability and non-compliance.**
- Non-transferability of the registration status would assist NERSA to maintain a credible registration database and ensure that the correct parties are held liable for compliance in respect of their registered operations.

Proposed solution

Insert a new section 23A after section 23 to provide for registration term and non-transferability

“Registration term and non-transferability

23A. (1) Registrations made under this Act are valid for the period stated in the registration certificate and no registrant may assign, cede or transfer its registration to another person.”

This would ensure consistency with the licensing framework, improve compliance by registrants and the reliability of registration information maintained by NERSA.

Proposed new insertions on Registration cancellations (new section 25A & new paragraph (iA) after section 34(3)(i))

Issue

Lack of provisions for the cancellation of registrations, specifically when the registered operations no longer exist or the activities are no longer carried out.

Challenge/Impact

The absence of statutory provisions in the Act regarding the cancellation of unwanted registrations only leaves NERSA with the option to go about it by way of judicial review under the principle of legality when the need arises. The disadvantage of this is that it may sometimes take much longer to finalize and it could come at a cost that may be circumvented if done internally; **Also NERSA keeps records of dormant registered activities thus rendering its registration database and information unreliable.**

Proposed solution

- Insert a new section 25A after section 25 to provide for cancellation of registrations **as detailed in the NERSA Submission to the PCMRE (pages 11 & 12).**
- Insert a new paragraph (iA) after section 34(3)(i) under clause 31 of the Bill to provide NERSA with powers to make rules regarding the form, manner and procedure to be followed for cancelling registrations as follows –
“(iA) the procedure to be followed in effecting registration cancellations;”
This will improve efficiency for cancellations and reliability of the registration information maintained by NERSA.

**Proposed new
insertion
regarding price
discrimination
(New section
22(1A))**

Issue

New developments resulting from the insertion of section 9(1)(a)(ii) to the Competition Act, 1998 (Act No.89 of 1998) by the Competition Amendment Act, 2018 (Act No. 18 of 2018) assented to in February 2019, which may result in issues of alignment between section 22(1) of the Gas Act and the Competition Act, as amended.

Challenge/Impact

The changes effected in section 9(1)(a)(ii) to the Competition Act, 1998 (Act No.89 of 1998) by the Competition Amendment Act, 2018 (Act No. 18 of 2018) may have impact on the future enforcement of Section 22 of the Gas Act. **This may lead to regulatory uncertainty regarding the application of Section 22 of the Gas Act and may result in regulatory “forum shopping” by some firms.**

Proposed solution

To overcome issues of alignment with the amendments to the Competition Act, NERSA proposes the insertion of a new provision under the current section 22(1) as follows:

“22 (1A) Nothing in this subsection shall be construed as promoting non-adherence to the provisions of section 9(1)(a)(ii) of the Competition Act, 1998 (as amended).”

This will enhance regulatory certainty and avoid the risk of regulatory “forum shopping.”

**Proposed new
insertion
regarding
mandatory TPA
to LNG facilities
(section 34(3)(g))**

Issue

The new section 34(3)(g) in the Bill, which relates to the making of Rules by the Energy Regulator regarding the methodology for determining uncommitted capacity and the publishing of related information only talks about transmission, distribution and storage licensees which effectively excludes LNG licensees.

Challenge/Impact

LNG regasification and storage facilities are essential facilities in the LNG import value chain and have the potential to contribute to security of supply and the development and growth of transformed and competitive gas markets in SA. **Lack of third party access to such facilities would hamper the development and growth of transformed and competitive gas markets and disadvantage new players seeking to enter and/or expand their gas businesses.** It is therefore critical that regulated mandatory TPA is applied to such facilities.

Proposed solution

It is therefore recommended that LNG licensees also be included in the newly proposed section 34(3)(g) of the GAB, as follows:

"34(3)(g) the methodology for determining uncommitted capacity and the publishing of information relating to uncommitted capacity by the holders of liquefaction, regasification, transmission, distribution or storage licences and the publishing of prices for gas supplied to customers other than eligible customers by the holders of [distribution] trading licences;"

This will ensure that mandatory TPA applies to LNG facilities and will facilitate the development and growth of transformed and competitive gas markets.

- ❖ NERSA supports the Bill and is of the view that it could bring the following changes in gas industry:
 - Facilitate gas infrastructure development and investment;
 - Facilitate the development of a modernized gas industry characterised by advanced gas technologies;
 - Increase competition in the market;
 - Reduce barriers to market entry while safeguarding much needed investments;
 - Close existing regulatory gaps, strengthen the role of the Regulator and improve regulatory compliance in the industry.
- ❖ In summary, the new proposed insertions in the NERSA submission are:
 - **Registration** – necessary to close the existing regulatory gap by providing NERSA with the authority to impose registration conditions; to reduce administrative and financial burden in the event of cancellation of unwanted registrations; and to improve the reliability of the registration information and database.
 - **Price discrimination** – necessary to overcome issues of alignment with the amendments to the Competition Act, and to avoid regulatory “forum shopping” by some firms.
 - **Third party access** – necessary to ensure that the Rules concerning the methodology for determining uncommitted capacity as envisioned in section 34(3)(g) in the Bill extend to LNG regasification and liquefaction licensees.

Thank you

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