

REPUBLIC OF SOUTH AFRICA

ENERGY REGULATOR BILL

*(As introduced in the National Assembly as a section 75 Bill; explanatory summary of Bill
published in Government Gazette No. 25994 of 6 February 2004)
(The English text is the official text of the Bill)*

(MINISTER OF MINERALS AND ENERGY)

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BILL

To establish a single regulator to regulate the electricity, piped-gas and petroleum pipeline industries; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

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CHAPTER I

DEFINITIONS AND OBJECT

Definitions

1. In this Act, unless the context indicates otherwise—
 - “**chief executive officer**” means the chief executive officer contemplated in section 11; 5
 - “**Department**” means the Department of Minerals and Energy;
 - “**Electricity Act**” means the Electricity Act, 1987 (Act No. 41 of 1987);
 - “**Energy Regulator**” means the National Energy Regulator established by section 3; 10
 - “**Gas Act**” means the Gas Act, 2001 (Act No. 48 of 2001);
 - “**Gas Regulator Levies Act**” means the Gas Regulator Levies Act, 2002 (Act No. 75 of 2002);
 - “**Minister**” means the Minister of Minerals and Energy;
 - “**Petroleum Pipelines Act**” means the Petroleum Pipelines Act, 2003 (Act No. 60 of 2003); 15
 - “**prescribe**” means prescribe by regulation or by rules;
 - “**this Act**” includes the regulations.

Object of Act

2. The object of this Act is to establish a National Energy Regulator for the regulation of the electricity, piped-gas and petroleum pipelines industries. 20

CHAPTER II

NATIONAL ENERGY REGULATOR

Establishment of Energy Regulator

3. The National Energy Regulator is hereby established as a juristic person. 25

Functions of Energy Regulator

4. The Energy Regulator must—
 - (a) after 1 June 2005 undertake the functions of the National Electricity Regulator as set out in section 4 of the Electricity Act;
 - (b) undertake the functions of the Gas Regulator as set out in section 4 of the Gas Act and any other function assigned to the Gas Regulator by any government agreement; and 30
 - (c) undertake the functions of the Petroleum Pipelines Regulatory Authority as set out in section 4 of the Petroleum Pipelines Act.

Composition of Energy Regulator 35

5. (1) The Energy Regulator consists of three full-time and five part-time members appointed by the Minister.
- (2) The Minister must designate one of the part-time members as chairperson of the Energy Regulator.
- (3) The Minister must designate one of the full-time members to be primarily responsible for electricity regulation, another for piped-gas regulation and another for petroleum pipeline regulation. 40
- (4) If the chairperson is for any reason unable to perform his or her duties, the other members must choose another person from among themselves to act as chairperson until the chairperson can resume his or her duties or until another chairperson is designated by the Minister. 45
- (5) (a) A part-time or full-time member of the Energy Regulator holds office for a period of four years, unless for reasons of continuity or synchronisation during the Regulator’s first period of office the Minister appoints members of the Energy Regulator for shorter periods. 50

(b) The Minister may reappoint a member.

(c) If a part-time or full-time member of the Energy Regulator ceases to hold office for any reason, the Minister may appoint another person in his or her place for a period of up to 12 months without complying with section 6(7).

(6) Members of the Energy Regulator must be paid for their services such remuneration and allowances as the Minister may determine with the concurrence of the Minister of Finance. 5

Disqualifications and requirements for membership of Energy Regulator

6. (1) No person may be appointed as or remain a member of the Energy Regulator if that person— 10

(a) is not a South African citizen or the holder of a permit as a permanent resident in the Republic;

(b) is an unrehabilitated insolvent; or

(c) has been convicted of an offence involving dishonesty.

(2) The Minister must appoint, as members of the Energy Regulator, persons who— 15

(a) collectively have adequate legal, technical, business, economic or other experience relevant to the electricity, piped-gas and petroleum pipelines industries;

(b) are collectively broadly representative of South African society as a whole;

(c) are committed and available to fulfil their role as members of the Energy Regulator; and 20

(d) demonstrate impartiality and objectivity,

in such a manner that a fair balance between continuity and capacity building is achieved.

(3) Upon appointment— 25

(a) every full-time member must terminate any employment or consulting relationship he or she has with any person, firm, association or company engaged in the electricity, piped-gas and petroleum pipelines industries and may not take up any such employment or consulting arrangement during his or her period of membership of the Energy Regulator; 30

(b) every full-time and part-time member must disclose to the Minister and the Energy Regulator his or her pecuniary interest in any person, firm, association or company engaged in the electricity, piped-gas and petroleum pipeline industries; and

(c) every full-time and part-time member must disclose to the Minister and the Energy Regulator if his or her spouse, life partner or child is in the employ of or acts as a consultant to, or has any relationship with, any person, firm, association or company engaged in the electricity, piped-gas and petroleum pipelines industries, or has any pecuniary interest in any such person, firm, association or company. 40

(4) A member may not at any time be present during the discussion of or the making of a decision on, or take part in, any matter before the Energy Regulator in which that member or his or her spouse, life partner, child or associate has a direct or indirect pecuniary interest.

(5) If a member acquires an interest contemplated in subsection (3)(b), such member must immediately in writing declare that fact to the Minister and the Energy Regulator. 45

(6) If the spouse, life partner or child of a member acquires an interest contemplated in subsection (3)(c), such member must immediately in writing declare that fact to the Minister and the Energy Regulator.

(7) Before appointing members to the Energy Regulator, the Minister must by notice in the *Gazette* call for nominations from members of the public. 50

(8) The notice published before the commencement of this Act calling for nominations for the first appointments to the Energy Regulator must be regarded as having been validly published in terms of subsection (7).

Vacation of office and termination of appointment of members of Energy Regulator 55

7. (1) A part-time or full-time member of the Energy Regulator must vacate his or her office if that member—

(a) becomes of unsound mind;

- (b) has been absent from more than two consecutive meetings without leave of the chairperson for each absence;
- (c) resigns by written notification to the Minister;
- (d) materially fails to perform any duty imposed on him or her in terms of this Act, the Electricity Act, the Gas Act or the Petroleum Pipelines Act; or 5
- (e) becomes disqualified from being a member on any of the grounds referred to in section 6(1).

(2) The Minister may terminate the appointment of a member of the Energy Regulator if such member contravenes section 9.

Meetings of Energy Regulator 10

8. (1) (a) The Energy Regulator must meet at such times and places as may be determined by the chairperson.

(b) The chairperson must convene such meetings of the Energy Regulator as are necessary for the proper performance of its functions.

(2) The chairperson must, upon a written request of the chief executive officer or two other members, convene a special meeting to be held within two weeks after the date of receipt of such request. 15

(3) Unless other procedures are prescribed, the chairperson of any meeting of the Energy Regulator must determine the procedures to be followed at such meeting.

(4) The quorum for any meeting of the Energy Regulator is a majority of its serving members or four members, whichever is the greater. 20

(5) (a) A decision of the majority of the members present at a meeting constitutes a decision of the Energy Regulator.

(b) In the event of an equality of votes on any matter the person presiding at the meeting has a casting vote in addition to his or her deliberative vote. 25

(6) No decision taken by the Energy Regulator is invalid merely because of a vacancy on the Energy Regulator or because any person not entitled to sit as a member sat as such at the time when the decision was taken if the rest of the members present at the meeting and entitled to sit as members at the meeting constituted a quorum and the decision was taken by a majority of those members present and entitled to vote. 30

(7) The chief executive officer, or if unavailable an employee of the Energy Regulator designated by the chief executive officer, must *ex officio* attend all meetings of the Energy Regulator and has the right to speak and receive all documentation relating thereto including documentation contemplated in subsection (8)(b) and (c) but may not vote at such meetings. 35

(8) (a) Any meeting of the Energy Regulator must be open to the public unless the quorate meeting passes a resolution to the effect that matters to be discussed include confidential, proprietary or commercially sensitive information which would detrimentally affect a particular business or industry if disclosed to the public.

(b) If the Energy Regulator takes a decision in any other manner than at a formal meeting, such decision comes into effect after it has been reduced to writing and signed by a majority of the members and it must be submitted for noting at the first formal meeting of the Energy Regulator following the decision. 40

(c) The Energy Regulator must cause a record of all of its proceedings to be kept.

Duties of members of Energy Regulator 45

9. Members of the Energy Regulator must—

- (a) act in a justifiable and transparent manner whenever the exercise of their discretion is required;
- (b) at all times act in the interests of the Energy Regulator and not in their own or sectoral interests; 50
- (c) act independently of any undue influence or instruction;
- (d) recuse themselves from and refrain from voting on or discussing any matter, pending before the Energy Regulator and in which they have a direct or indirect pecuniary interest; and
- (e) act in a manner that is required and expected from the holder of a public office. 55

Decisions of Energy Regulator

10. (1) Every decision of the Energy Regulator must be in writing and be—

- (a) consistent with the Constitution and all applicable laws;
 - (b) in the public interest;
 - (c) within the powers of the Energy Regulator, as set out in this Act, the Electricity Act, the Gas Act and the Petroleum Pipelines Act;
 - (d) taken within a procedurally fair process in which affected persons have the opportunity to submit their views and present relevant facts and evidence at their own expense to the Energy Regulator; 5
 - (e) based on reasons, facts and evidence that must be summarised and recorded; and
 - (f) explained clearly as to its factual and legal basis and the reasons therefor. 10
- (2) Any decision of the Energy Regulator and the reasons therefor must be available to the public except information that the Energy Regulator resolves is confidential, proprietary or commercially sensitive.
- (3) Any person adversely affected by a decision of the Energy Regulator may bring such decision under review by the High Court. 15

Personnel of Energy Regulator

- 11.** (1) The Energy Regulator must appoint a chief executive officer.
- (2) Subject to the directions of the Energy Regulator, the chief executive officer is responsible for—
- (a) the day-to-day management of the affairs of the Energy Regulator; 20
 - (b) the appointment of other employees and contracting with persons to assist the Energy Regulator in the performance of its functions; and
 - (c) administrative control over the employees of the Energy Regulator.
- (3) The chief executive officer and other employees of the Energy Regulator must be paid such remuneration, allowances, subsidies and other benefits as the Energy Regulator may determine with the approval of the Minister and the Minister of Finance. 25
- (4) Notwithstanding subsections (1) and (2)(b), the Minister may instruct the Energy Regulator to appoint or make use of persons employed or contracted by another licensing or regulatory authority falling under the Minister's jurisdiction.
- (5) Section 9 applies to every member of the personnel of the Energy Regulator, with the changes required by the context. 30

Funds of Energy Regulator

- 12.** (1) For the purpose of regulation of the piped-gas and petroleum pipelines industries, the funds of the Energy Regulator consist of—
- (a) money appropriated by Parliament; 35
 - (b) levies imposed by or under separate legislation;
 - (c) charges for dispute resolution and other services rendered; and
 - (d) licence fees.
- (2) For the purpose of regulation of the electricity industry, the funds of the Energy Regulator consist of— 40
- (a) money appropriated by Parliament;
 - (b) funds collected under section 5B of the Electricity Act; and
 - (c) levies imposed by or under separate legislation.

Accounting by Energy Regulator

- 13.** (1) The Energy Regulator must perform its functions in accordance with the Public Finance Management Act, 1999 (Act No. 1 of 1999). 45
- (2) The Energy Regulator must keep separate accounts for the electricity, piped-gas and petroleum pipelines regulatory functions.
- (3) In so far as the money received by the Energy Regulator in terms of section 12 consists of money other than money appropriated by Parliament, the costs of the Energy Regulator must be shared between the electricity, piped-gas and petroleum pipeline industries in proportion to the costs incurred by the Energy Regulator in respect of each of those industries. 50
- (4) The Energy Regulator must open one or more accounts in its name with one or more financial institutions and deposit therein all money received from the sources contemplated in section 12. 55

(5) The financial records of the Energy Regulator must be audited by the Auditor-General.

(6) The financial year of the Energy Regulator starts on 1 April of one year and ends on 31 March of the following year.

Reporting by Energy Regulator 5

14. The annual report required of public entities in terms of the Public Finance Management Act, 1999 (Act No. 1 of 1999), may include any matter that the Energy Regulator deems necessary but must, in respect of electricity, piped-gas and petroleum pipeline matters, include information on—

- (a) licences granted, amended or withdrawn; 10
- (b) regulations made and directives issued by the Minister;
- (c) the envisaged strategies of the Energy Regulator;
- (d) the existing position and envisaged commercial developments with respect to the electricity, piped-gas and petroleum pipeline industries; and
- (e) the position regarding health, safety and environmental matters. 15

CHAPTER III

GENERAL PROVISIONS

Repeal of laws

15. The laws mentioned in the Schedule are hereby repealed or amended to the extent indicated in the third column of the Schedule. 20

Transitional provisions

- 16.** As from the date of commencement of this Act—
- (a) the person who immediately before the commencement of this Act held the office of chief executive officer of the National Electricity Regulator is deemed to be the chief executive officer of the Energy Regulator; 25
 - (b) the persons who constituted the other personnel of the National Electricity Regulator immediately before the commencement of this Act are deemed to be the personnel of the Energy Regulator;
 - (c) the assets of the National Electricity Regulator vest in the Energy Regulator and the Energy Regulator takes over the liabilities of the National Electricity Regulator. 30

Short title and commencement

17. This Act is called the Energy Regulator Act, 2004, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

SCHEDULE

No. and year of Act	Short title	Extent of repeal or amendment
Act No. 41 of 1987	Electricity Act, 1987	<p>1. The repeal, with effect from 1 June 2005 of sections 2, 2A, 5, 5A, 5C and 5D.</p> <p>2. The amendment, with effect from 1 June 2005, of section 1 by the substitution for the definition of “regulator” of the following definition: “‘regulator’ means the National Energy Regulator established by section 3 of the Energy Regulator Act, 2004;”.</p>
Act No. 48 of 2001	Gas Act, 2001	<p>1. The repeal of sections 3, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14.</p> <p>2. The amendment of section 1 by the substitution for the definitions of “Gas Regulator” and “distribution” of the following definitions, respectively: “‘Gas Regulator’ means the National Energy Regulator established by section 3 of the Energy Regulator Act, 2004; ‘distribution’ means the distribution of bulk gas supplies and the transportation thereof by pipelines with a general operating pressure of more than 2 bar gauge and less than 15 bar gauge or by pipelines with such other operating pressure as the [Gas Operator] National Energy Regulator may permit according to criteria prescribed by regulation to points of ultimate consumption or to reticulation systems, or to both points of ultimate consumption and to reticulation systems, and any other activity incidental thereto, and ‘distribute’ and ‘distributing’ have corresponding meanings;”.</p>
Act No. 75 of 2002	Gas Regulator Levies Act, 2002	<p>The amendment of section 1 by the substitution for the definition of “Gas Regulator” of the following definition: “‘Gas Regulator’ means the National Energy Regulator established by section 3 of the Energy Regulator Act, 2004;”.</p>
Act No. 60 of 2003	Petroleum Pipelines Act, 2003	<p>1. The repeal of sections 3, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14.</p> <p>2. The amendment of section 1 by the substitution for the definition of “Authority” of the following definition: “‘Authority’ means the National Energy Regulator established by section 3 of the Energy Regulator Act, 2004;”.</p>

MEMORANDUM ON THE OBJECTS OF THE ENERGY REGULATOR BILL, 2004

1. BACKGROUND TO AND OBJECTS OF BILL

The electricity industry is currently regulated by the Electricity Act, 1987. The piped-gas industry is scheduled to be regulated by the Gas Act, 2001, when it is put into operation. The Gas Regulator as defined in the Gas Act has also been given the authority to administer the Government — Sasol Agreements regarding the importation of gas from Mozambique. The petroleum pipeline industry is scheduled to be regulated by the Petroleum Pipelines Act, 2003, once it is in operation.

During April 2002, Cabinet decided that for reasons of efficiency the electricity, piped-gas and petroleum pipeline regulators should be encompassed within a single energy regulator.

The current Electricity Regulator's term expires at the end of May 2005. The gas transmission pipeline from Mozambique has been completed and the Government — Sasol Agreements (section 36 of the Gas Act) need to be administered by a "gas regulator". Because of the shortness of time, and in order to fulfill Cabinet's decision requiring a single regulator, this Bill seeks to create one regulatory body for the electricity, piped-gas and petroleum pipeline industries.

This Bill establishes a single energy regulator for the electricity, piped-gas and petroleum pipeline industries, and repeals only those sections of the Electricity Act, the Gas Act and the Petroleum Pipelines Act that pertain to the establishment of the associated regulators or authorities. This Bill also amends the Electricity Act, the Gas Act and the Petroleum Pipelines Act to redefine the associated regulators or authorities to mean the Energy Regulator established by this Bill. Other sections of the Electricity Act, the Gas Act and the Petroleum Pipelines Act remain unchanged.

The Energy Regulator will use the infrastructure created for the National Electricity Regulator, and will expand that infrastructure to undertake the gas and petroleum pipeline regulation as appropriate.

It is anticipated that the Energy Regulator as defined in this Act will take on the functions of regulating the petroleum products industry at an appropriate time. At that time it is expected that a new Bill will be drafted to encompass the regulation of the electricity, piped-gas, petroleum pipelines and petroleum products industries under a single regulator, and that the Acts that pertain to these regulatory functions will be repealed in their entirety.

2. CONSULTATION

The proposed Bill is of a technical nature and does not require consultation. However, explanatory summary of the Bill was published in the *Gazette* in the ordinary course of public notification.

3. FINANCIAL IMPLICATIONS FOR STATE

None.

4. PARLIAMENTARY PROCEDURE

The State Law Advisers and the Department of Minerals and Energy are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

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