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**NATIONAL ENERGY BILL**

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**COMMENTS BY ESKOM**

**21 JULY 2008**

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## COMMENTS BY ESKOM ON THE BILL

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### PUBLISHED FOR GENERAL COMMENT IN THE GOVERNMENT GAZETTE – NOTICE 31124 OF 3 JUNE 2008 (“BILL”)

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#### 1. INTRODUCTION

As set out in the covering letter to which these comments are attached, I must reiterate that Eskom Holdings Limited (Eskom) is grateful for an opportunity to comment on the abovementioned National Energy Bill as part of the consultation process being driven by the Portfolio Committee on Minerals and Energy.

At the outset, I must advise that Eskom's comments are in a format that encapsulates three sections. The first section is made up of general questions which questions are meant to solicit clarification from the Portfolio Committee on Minerals and Energy during the public hearings.

The second and third sections should in actual fact be viewed or read as a single section. They are a marked up copy of the Bill (the second section) and a Memorandum (third section) explaining the markup to the Bill.

There may be important sections that we may have missed and to this end, we will continue to interrogate the Bill. Should we in the interim come up with new comments, we will during the public hearings bring these to the attention of the Portfolio Committee.

2. **SECTION 1 – GENERAL COMMENTS (questions)**

2.1 **Chapter 2. Energy Supply, optimisation and utilisation.**

2.1.1 **Ad Section 3(4)**

Should the Minister be regulating issues around the collection of information, particularly the collection of confidential information when there is already in existence the Promotion of Access to information Act, 2000 (Act No. 2 of 2000)?

2.2 **Chapter 3. National Energy Modelling and Information Agency.**

2.2.1 **Ad Section 12(9) c and d.**

Considering that there may not be a lot of people that are broadly representative of the people of South Africa that may be appointed to the National Energy Modelling and Information Agency, is it not a contradiction in terms to have both c and d in the same clause? Also, should the Department not be taking responsibility of the functions to be performed by this structure rather than creating another entity?

2.2.2 **Ad Section 18(1)**

Considering that we already make mention of the Public Finance Management Act, 1999 (Act No 1 of 1999 – aka – PFMA) in 18(1), should we not delete 18(3) and make the keeping and auditing of financial records also subject to the PFMA?

2.3 **Chapter 5. South African National Energy Development Institute.**

2.3.1 **Ad Sections 20 and 21**

Is this entity also going to be under the umbrella of the Department of Minerals and Energy. Considering that Coal is a major energy resource in South Africa and with Eskom building more coal powered power - stations,

should the institute not include a representative from the Coal Mining Industry?

**2.3.2 As Section 24(4)**

Will this five year term be renewable as it is not clear in the provisions of the section.

**2.3.3 Ad Section 25(3)**

Can the words "placed at the disposal" be read to mean the official may be seconded to the institute from any state owned entities?

**2.3.4 Ad Section 28(3)**

Has the DME decided as to which schedule in the PFMA will this Institute be classified under?

**3 SECTION 2 and 3.**

- 3.1 The Electricity Regulation Act 4 of 2006 (ERA) does not contemplate nor deals with a situation such as presently exists, namely a crisis in which the demand for electricity at times exceed the capacity to supply. It is envisaged that the balance in supply and demand of electricity will deteriorate over the next 5 years. The ERA assumes an ideal in the realm of supply and demand. It seems to envisage that there will always be sufficient electricity generated to ensure that the demands of customers are met, however high such demands may be. Section 21(5) of ERA provides that a licensee may not reduce or terminate the supply of electricity to customers unless they are insolvent, they have failed to honour or refused to enter into an agreement for the supply of electricity or they have contravened the payment conditions of the licensee. The

essence of section 21 of ERA is that it requires a licensee to provide non-discriminatory and continuous access to electricity to customers. However, Eskom's obligation to supply cannot be divorced from its ability to do so.

- 3.2 At times when the demand for electricity exceeds the capacity to supply, Eskom has to enforce load shedding to protect the integrity of the interconnected power system. Failure to do so could lead to disastrous consequences such as a total blackout. Recovery from a total black out may take 2 weeks or longer. The ERA does not provide a clear legal basis for Eskom to do load shedding and as a result Eskom has to rely in this regard on its contractual provisions. It is proposed that ERA be amended to allow for termination or reduction of supply under such circumstances.
- 3.3 To address the electricity shortages the Government has adopted a National Emergency Response Plan which inter alia includes a Power Conservation Programme (PCP). In terms of PCP, customers will be required to reduce their electricity consumption in order to either eliminate load shedding entirely or at the very least to reduce it substantially. In this regard not only is load shedding the measure of last resort, but it is also inefficient, costly and has enormous negative ramifications for the development of South Africa's economy.
- 3.4 To ensure that the necessary savings in electricity consumption is achieved, the participation of customers in PCP will not be voluntary. The plan is to charge higher rates should a customer exceed its allocated quota. These higher rates will be punitive rates to discourage customers from using more electricity than the quota allocated to the customer. These rates will thus not be revenue driven but will rather be driven by the need to achieve the reduced electricity consumption. However, PCP will not work if customers simply adopt the attitude that they will pay higher



prices. There is thus a need to ensure that such attitude by customers is dealt with so as to make the programme meaningful. It is therefore proposed by Eskom, where necessary to ensure that the required reduction in electricity consumption is achieved, that repeated offenders should have their supply of electricity terminated or reduced. This would not be a permanent termination but would rather force customers to reduce their electricity consumption. It is therefore proposed that ERA be amended to allow for termination or reduction of supply under such circumstances.

- 3.5 Eskom on a continuous basis is receiving applications for supply to new connections or increases in existing supplies. A narrow reading of the obligations in Eskom's licences and ERA, suggests that irrespective of the circumstances, Eskom must quote for and must supply electricity, without further ado. This would place Eskom in an invidious position. If customers are continuously added without the required reduction in the consumption of electricity in terms of PCP, the risk of load shedding and a total blackout will increase.
- 3.6 There is insufficient capacity to supply electricity for an average electricity growth rate of 4% until 2014. If South Africa is not able to achieve the required national savings target of 10%, there will be limited space for new connections if the risk of load shedding and total blackout is not to increase. In order to continue with the country's growth trajectory and meet the targets of the Accelerated and Shared Growth Initiative of South Africa, it is imperative that new connections and electricity growth continues. As part of PCP, Eskom is proposing an Electricity Growth Management Strategy, the objectives of which include:

- 3.6.1 to establish a mechanism to permit electricity consumption growth and new connections within the constraints of the available generation capacity;
- 3.6.2 to prioritise and allocate electrical power to applicants in an objective and economically efficient way;
- 3.6.3 to prescribe minimum conservation and energy efficiency obligations on consumers applying for additional / new capacity.
- 3.7 It is therefore proposed that the Minister should be empowered to prescribe the circumstances under which a licensee may refuse or delay the supply of electricity for new connections or increases in supply or alternatively that the ERA be amended to allow a licensee to refuse or delay the supply of electricity for new connections or increases in supply under such circumstances.
- 3.8 Furthermore to reduce the high level of electricity non-technical losses in the country we propose that the illegal use of electricity be criminalised. The Occupational Health and Safety Act 85 of 1993 only provides for summary disconnection in certain circumstances while Eskom would want the right to immediately disconnect any illegal connection. Accordingly it is proposed that:
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- 3.8.1 theft of electricity be made a statutory crime with a deterring penalty;
- 3.8.2 illegally connecting electricity be made a statutory crime with a deterring penalty;

- 3.9 any electricity licensee who finds a connection which it reasonably suspects of being an illegal connection be empowered to immediately disconnect such connection;
- 3.9.1 tampering with any of the licensee's equipment be made a statutory crime with a deterring penalty; and
- 3.9.2 a presumption be included that if the tampering is carried out on a property on which a customer resides that such tampering shall be deemed to be the action of the customer.
- 3.9.3 the provisions proposed in this regard are restating the position as it was legislated in the Section 27 of the Electricity Act, 41 of 1987, which has been repealed by the ERA.
- 3.10 Thus through the comments in both Annexures B and C, we intend to influence the amendment of the Electricity Regulation Act so as to enable a licensee to refuse, reduce and/or terminate the Supply of Electricity to ensure the security of supply of electricity and also to criminalise the illegal usage of Electricity.

**CONCLUSION**

Eskom would like to extend its appreciation to the Department for the opportunity to influence the provisions of the Bill. We trust that our comments have been constructive and that they are of assistance in finalising the Bill. In the event that further clarification or information is required, Eskom would be more than happy to provide same and as indicated earlier in the document, Eskom is looking forward to participating in the Public Hearings.



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**EXPLANATORY MEMORANDUM****PROPOSED AMENDMENTS TO THE ENERGY BILL  
SET OUT IN DRAFT 6 OF THE ENERGY BILL DATED 17 JULY 2008**

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**1 AD SECTION 1 (DEFINITIONS)**

- 1.1 The term "*energy Masterplan*" has been substituted for the term "*Integrated Energy Master Plan*" as the latter term is used in the body of the Energy Bill ("Bill").
- 1.2 The term "*National Savings Target*" has been defined in the Bill as it has been introduced into the Bill in the proposed amendments discussed below.
- 1.3 The term "Power Conservation Programme" has been inserted as it has been introduced into the Bill in the proposed amendments discussed below.

**2 AD SECTION 19 (INTERGRATED ENERGY PLANNING)**

- 2.1 As the Integrated Energy Master Plan will be developed as an overarching framework to govern national energy planning and related matters, energy savings initiatives should be included in the Integrated Energy Master Plan as they will form an integral component of energy supply and planning once implemented. Section 19(1) of the Bill has consequently been amended to include energy savings initiatives in the Integrated Energy Master Plan.
- 2.2 As the proposed Energy Conservation Scheme ("ECS") will measure a customer's future electricity savings against their electricity consumption during the period October 2006 to September 2007, section 19(3) has been amended to ensure that the Integrated Energy Master Plan is informed not only by energy modeling activities but also by historical energy data, in order to identify energy savings.

- 2.3 Sections 19(3)(d) and 19(4)(e) have be included in the Bill to ensure that the Integrated Energy Master Plan facilitates the achievement of the National Savings Target as prescribed by the Minister. Further, the National Savings Target should always be taken into account when developing and fulfilling any of the other objectives of the Integrated Energy Master Plan, including the affordability of electricity, the accessibility of electricity and international commitments.

### 3 AD SECTION 31 (NATIONAL ENERGY EFFICIENCY DIVISION)

- 3.1 The Energy Efficiency Division of the South African National Energy Development Institute, established in terms of the Bill, appears to be the most appropriate body to develop, implement and monitor energy savings initiatives such as a power conservation programme/policy
- 3.2 Sections 31(2)(b) and (c) have thus been included in the Bill to prescribe that the development, implementation and monitoring of energy savings initiatives shall be a function of the Energy Efficiency Division.
- 3.3 In addition, the Energy Efficiency Division should be obliged to support the National Energy Regulator who will give effect to the power conservation programme/policy.

### 4 AD SECTION 35(SEcurity OF SUPPLY)

#### 4.1 Incentives and penalties

- 4.1.1 The Electricity Regulation Act 2006 ("Act") makes NERSA the custodian and enforcer of the regulatory framework provided therein. The Act also places an obligation on NERSA, in terms of section 4(a)(ii), to regulate prices and tariffs.

conditions relating to, *inter alia*, the setting and approval of prices, charges, rates and tariffs charged by licencees and further permits NERSA to vary, suspend or remove any licence condition at any time (which would include any licence condition relating to prices). NERSA's power in relation to prices which may be charged by a licencee is further emphasised by section 15(2) of the Act which prohibits any licencee from charging a customer any tariff other than a tariff approved by NERSA as part of its licence conditions.

4.1.3 The question regarding the increase of tariffs (as a penalty) or the reduction of tariffs (as an incentive) as part of the power conservation programme is, in essence, a pricing issue.

4.1.4 At the heart of pricing, in terms of the Act, is the power given to NERSA. NERSA has the power to increase, reduce or in any other way vary prices to be charged by a licencee and this power cannot be taken away from NERSA by any contracts concluded between a licencee and any customer.

4.1.5 The suggested amendment is to empower the Minister to prescribe the circumstances under which the Regulator may impose an incentive or penalty. It is appreciated that there is an argument to be leveled that the Minister has this power by virtue of the Act. However, that power is not clearly defined. This amendment is therefore to expressly empower the Minister to prescribe the circumstances.

#### 4.2 Termination or Reduction of Electricity Supply

4.2.1 Section 21(5) of the Act provides that a licensee may not reduce or terminate the supply of electricity to a customer unless,

- the customer is insolvent;

- the customer has failed to honour, or refuses to enter into, an agreement for the supply of electricity; or
- the customer has contravened the payment conditions of the licensee's licence.

4.2.2 The problem with this provision is that it does not allow a licensee to reduce or terminate the supply of electricity to a customer for purposes of load-shedding or if there is a threat to the integrity of the electricity network.

4.2.3 The powers of the Minister and the Regulator to make regulations, rules, guidelines, directives and codes of conduct and impose licence conditions are powers they derive from the Act and can only be exercised within the four corners of the Act. They do not have the power to override the Act or legislate in any manner inconsistent with it.

4.2.4 One of the core components of any Energy Conservation Scheme is the ability of a licensee to terminate and/or reduce the supply of electricity. Accordingly, it is suggested that the Act be amended by virtue of the Energy Bill so that a licensee may reduce or terminate the supply of electricity under certain defined criteria.

#### 4.3 Access to Electricity

4.3.1 Section 21(2) to (4) of the Act lays down a number of rules designed to ensure that a licensee gives all customers access to its system without discrimination:

*"(2) A licensee may not discriminate between customers or classes of customers regarding access, tariffs, prices and conditions of service, except for objectively justifiable and identifiable differences approved by the Regulator.*

- (3) *A transmission or distribution licensee must, to the extent provided for in the licence, provide non-discriminatory access to the transmission and distribution power systems to third parties.*
- (4) *Access in terms of subsection (3) must be provided on the conditions set out in the licence of such transmitter or distributor, that may relate to –*
- (a) *the circumstances under which access must be allowed;*
- (b) *the circumstances under which access may be refused;”*

4.3.2 Insofar as these provisions relate to access, they may be reduced to two cardinal rules:

4.3.2.1 The first is that a licensee may not differentiate between customers at all unless its licence conditions specifically permit it to do so.

4.3.2.2 The second is that the Regulator may only approve licence conditions which permit differentiation on the basis of *“objectively justifiable and identifiable differences”*.

4.3.3 It is suggested that the Minister in consultation with NERSA determine the circumstances under which a licensee may refuse or reduce the supply of electricity rather than NERSA on its own. Accordingly, the proposed amendment will amend the Act.

## 5 ALTERNATIVE WORDING: AD SECTION 35(SEcurity OF SUPPLY)

5.1 We suggested alternative wording to section 35. The alternative wording prescribes the circumstances under which a licensee may refuse, reduce or



terminate the supply of electricity.

- 5.2 Accordingly, as opposed to waiting for the Minister to set out the circumstances the Bill enumerates it.

**6 AD SECTION 39 (OFFENCES AND PENALTIES)**

- 6.1 On the repeal of the Electricity Act 41 of 1987 ("Electricity Act") by the Electricity Regulation Act 4 of 2006 ("Electricity Regulation Act") various provisions contained in the repealed Electricity Act were incorporated into and mirrored the Electricity Regulation Act. Section 27 (*Penalties and Offences*) of the Electricity Act was, however, not included in the Electricity Regulation Act and as such various unlawful activities, which have a severe impact on electricity savings, the theft of electricity and the inability to accurately monitor electricity consumption, may be carried out without threat of a penalty. It has, therefore, been proposed that the penalties and offences set out in section 27 of the repealed Electricity Act, and various additional penalties, be included in section 39 of the Energy Bill.
- 6.2 As illegal connections and damage to electrical equipment and apparatus is prevalent in South Africa and causes great losses and expense, section 39 has been amended to exclude negligence as a defense to such activities.