

SUBMISSION ON THE DRAFT NATIONAL ENERGY BILL (B 52—2008)

by



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I. Intro

In 1998, the White Paper on Energy outlined a comprehensive energy policy for South Africa. Since then, several laws have been passed and implemented; however, many gaps remain. The Draft National Energy Bill seeks to fill those gaps, as well as to respond to some of the regulatory issues responsible for precipitating recent energy crisis. CALS and Earthlife agree with the overall objective of completing the implementation of the energy policy outlined in the White Paper. The objects laid out in the proposed Bill are also commendable, especially the promotions of a diversity of energy supply (2(b)), capacity for a balanced consideration of security of supply, including consideration of consumer protection and sustainable development (2(h)), provisions for safety, health, and environmental matters (2(i)), and the promotion of sustainable development for South Africa's economy (2(m)).¹

There is concern, however, that the bill does not adequately focus on the needs of South Africa's poor. The Bill does empower the Minister to implement programmes that may realize some progress the areas of affordable access, continued electrification, and the safety of electricity substitutes such as coal and paraffin. However, the Bill should recognize that these programmes are not mere political policy, but reflect entrenched constitutional rights to adequate housing and environmental protection. Furthermore, the Bill should recognize shortcomings with regard to the inclusion of externalized costs of alternative sources, such as fuel wood, coal, and paraffin; current policy ignores such costs as the increased air pollution in households and the increased risk of fires and burns.

CALS and ELA Jhb are further concerned that the bill will inadequately address the need to allow the public to access the energy statistics that will be compiled by the new National Energy Modeling and Information Agency. The information gathered by that agency will be governed by the Promotion of Access to Information Act. That Act provides that the commercially sensitive information of third parties will not be produced if it puts these third parties at a commercial disadvantage. Much of the information that the NEMIA will seek may be considered commercially sensitive, such as the usage patterns, tariffs and expected electrical needs of industry. However, this information needs to be produced to the public in order to ensure that the integrated energy masterplan, contemplated under the act, legitimately reflects the interests of all South Africans. Furthermore, independent analysis and verification of the NEMIA results would be impossible without public access to all the data acquired by NEMIA. To that end, the Bill should make adequate provision for public review of the energy masterplan and the data from which it is produced.

¹ Draft National Energy Bill, Section 2

Finally, there is a need to address several individual provisions in the proposed bill. Since the Bill deals with targeting renewable energy, it should set explicit targets for the percentage of South Africa's energy obtained by renewable sources. The bill should also address the NEMIA's ability to include environmental, health, and safety analysis for the minister to consider for the Energy Masterplan, should remove all references to "market related" compensation for employees of the new agencies, and should re-consider the conclusion of electricity and oil industry representatives on the board of the South African National Energy Development Institute.

CALS and ELA Jhb specifically suggest that:

- The NEMIA should be given a mandate to account for externalized costs of energy generation and distribution, such as paraffin fires and pollution from coal.
- The Bill should refocus its attention on the provision to and affordability of electricity to the poor.
- The Bill should acknowledge that there is a constitutional right to access affordable electricity services.
- This right is implicitly acknowledged by the government's inclusion of electricity in its free basic package, but that it should be explicitly acknowledged in the Bill.
- This right should be acknowledged in the Bill in order to keep South African law in line with international law, including the ICESR and the CEDAW.
- The Bill acknowledges that there is a constitutional right to have the environment protected, and to live in an environment that is not harmful to one's health.
- By acknowledging such a right, the bill should secure and guarantee poor households the constitutional right to a healthy, protected environment.
- The NEMIA should be given the legal power to obtain the information necessary to its functions, including from industries benefiting from DEPP electricity.
- The Bill should ensure that all information used to formulate the energy master plan is in the public domain, and thus available for public consumption.
- The Bill should explicitly set a renewable energy target of 15% of electricity supply by 2020 to come from renewable energy sources such as Wind, Solar, Wave, and Tidal, on a non-cumulative basis.

- The Bill should empower the Renewable Energy Division within the South African National Development Institute to ensure implementation of such a target.
- That specific changes should be made to Sections 8(2)(b), 9(8), and 18(1)(d-e), outlined below.

II. Socio-Economic Rights

The White Paper notes that “energy services are essential for improving quality of life through access to services...”² and that “modern development is not possible without energy.” The 1998 White paper also notes that there is a constitutional responsibility of the state to develop efficient energy sources to cater for the needs of the nation, made available to the people at an affordable cost.³ It commits the government to optimizing the operations of the energy sector in order to maximize its potential for adequate, reliable, and low cost electricity to serve the people of South Africa.⁴

Furthermore, the White Paper notes that the air pollution associated with coal and fuel-wood usage in poor households exceeds WHO standards by a considerable margin.⁵ It commits the government to “seek, as a matter of priority, to mitigate the negative environmental and health effects of air pollution from coal and wood use in household environments.”⁶ However, currently, the electricity industry does not take into account these health related costs, nor do they account for other externalized costs such as the higher risk of fires from alternative fuel sources.

The Bill does leave room to address some of these issues; for example, the Minister may establish a programme “to minimize the negative safety, health and environmental impacts of energy carriers,”⁷ and to proscribe safety standards for such energy carriers.⁸ These carriers presumably would include such products as paraffin. It also allows the minister to establish a programme that “provides for the universal access to appropriate forms of energy... at affordable prices” taking into account health, safety, sustainability, and affordability.⁹

For these reasons, CALS and Earthlife submit that the Draft National Energy Bill contain a provision acknowledging that access and affordability of energy, as well as a healthy and protected environment, are entrenched

² White Paper, Section 6.1

³ White Paper, Section 3.2.2

⁴ White Paper, Section 7.1.1

⁵ White Paper, Section 6.1.3

⁶ White Paper, Section 8.4.1

⁷ Draft National Energy Bill, Section 4(1)

⁸ Draft National Energy Bill, Sections 4(2) and 35(1)(k)

⁹ Draft National Energy Bill, Sections 5(1), 5(2)

constitutional rights, and not merely policy objectives. The inclusion of such a provision would ensure that all agencies and programmes established under the bill take adequate notice of the needs of poor South African households, as well as their constitutional rights.

There is further concern that throughout the remainder of the Bill, the objectives of affordability and the protection of the poor take a secondary role. Energy planning must take into account the need for electrification programmes, the cross-subsidization of tariffs between wealthy households and industry on one hand, and poor households on the other, and the need for a move away from unsafe and unhealthy electricity substitutes such as coal, paraffin and fuel wood. There is very little in the mandate of the new National Energy Modeling and Information Agency requiring it to do so. Chapter 4 mandates that the Integrated Energy Plan account for affordability, accessibility, social equity, the environment, and consumer protection as well as environmental, health, safety and social impacts. However, that plan is undertaken by the Minister in consultation with the NEMIA, and if NEMIA does not account for these factors in its models, they will not be seriously addressed in the integrated plan.

A. Consumption by Poor Households and Accounting for Externalized Costs

Many poor households remain unconnected to the electricity grid, or unable to afford electricity entirely, leading them to instead use fuel-wood, coal, and paraffin as their primary energy carriers. Many others suffer varying frequencies of disconnection due to their inability to afford the entire amount charged for electricity, although most are able to pay at least some on a regular basis. Poor households who are connected to the grid spend a staggering proportion of their income on electricity relative to more wealthy consumers. The poorest 20% of households spend about 5% of their average R500 a month income on electricity, when they remain connected, compared to the richest 20%, who pay about 1.6% of their average R30 000 per month income. This is despite the fact that the poorest quintile uses about 1/40th the amount of electricity as the richest quintile¹⁰. Combined with the constant threat of disconnection, affordability of access will only become a greater problem as Eskom seeks to raise tariffs to fund its new investment programme.

South Africa's poor already suffer from an epidemic of disconnection due to inability to pay tariffs prior to 2007/2008 tariff increases: Despite the Government and Eskom's repeated boasts about electrification, 30% of South Africans are still without electricity. Of the 70% who do have electricity, many poor users suffer from disconnection. David McDonald has calculated

¹⁰ Neva Makgetla, "Structure Electricity Price Hike so as not to Shock," Business Day, 16 April 2008.
Taken from a 2005 Income and Expenditure Survey.

that there were two million disconnections by 2002.¹¹ Furthermore, users of prepaid meters disconnect themselves (due to lack of funds to feed the meter), thus transferring the onus of disconnection from the state to the citizenry

Many South Africans turn to alternative energy sources (i.e. energy carriers apart from electricity) due to lack of access and/or affordability of electricity. These alternative sources include coal, firewood and paraffin, often at high costs to human health. For example, in 2000, there were 46,000 paraffin fires, 50,000 paraffin burns, and at least 4,000 children died from drinking paraffin. The total cost to economy of paraffin related incidents is R100 billion a year. Our children are being physically scarred for life or are dying because the state refuses to supply adequate electricity to its poorest and most marginalized citizens.¹²

In addressing the affordability of energy, NEMIA should account for externalized costs of energy generation and distribution, such as paraffin fires and pollution from burning coal. The issue of externalized costs has been subject to very partial interpretation; in particular the White Paper provision of Objective 3 – Stimulating economic development: "...energy prices to be as cost reflective as possible. To this end prices will increasingly include quantifiable externalities."¹³

While the Department of Minerals & Energy has three times deferred commissioning of an 'Externalities Study', prices in large-scale, long-term electricity supply contracts are being set in terms of a programme of the Department of Trade and Industry (i.e. the Developmental Electricity Pricing Programme (DEPP)), which has not been through a proper policy process and fails to ensure that even currently accounted costs are covered. The White Paper is being ignored in this context, and additional legislation is required to force compliance.

Therefore, the issue of affordability must include externalized costs in any and all modeling projects, as outlined in the Draft National Energy Bill. It is CALS and ELA Jhb's contention that there needs to be an explicit provision within the Draft National Energy Bill to account for externalized costs, in particular regarding what qualifies as affordable energy. This is in the State's best interest as it is the State that bears these costs (via health and environmental costs) and not the producers of such costs (i.e. power generators, industrial concerns and manufacturers). Further, without such a provision, the Draft National Energy Bill is not in line with the White Paper.

¹¹ David A. McDonald. 2002. "The Bell Tolls For Thee: Cost Recovery, Cutoffs, and the Affordability of Municipal Services in South Africa", Municipal Services Project, pg. 3.

¹² groundWork. 2007. "Peak Poison – The elite energy crisis and environmental justice", pg. 60. Available at <http://www.groundwork.org.za/Peak%20Poison.pdf>

¹³ White Paper, Section 5.2.3

B. Right to Access Affordable Electricity Services.¹⁴

Access to affordable electricity is necessary to the realization of the developmental goals of South Africa and to the elimination of poverty across the country. Electricity has a wide range of developmental benefits, including increased welfare and decreased health expenditures.¹⁵

The right to electricity is not explicitly spelled out in the constitution, as is the case with water. Nonetheless, it may be implied in the right of access to adequate housing, found in section 26(1) of the constitution. The constitutional court has held, albeit in *obiter dictum*, that the “state’s obligation to provide adequate housing depends on context, and may differ...” and that “some may need access to services such as water, sewage, electricity and roads.”¹⁶

This view is supported by the inclusion of Free Basic Electricity (FBE) into the governments national free basic services programme. The Local Government Municipal Systems Act of 2000 stipulates that municipalities must “ensure that all members of the local community have access to at least the minimum level of basic municipal services.”¹⁷ They must also ensure that poor households have access to at least basic services. By providing FBE alongside Free Basic Water (FBW), the government has implicitly acknowledged that they are required to provide such services. The government should step forward and explicitly acknowledge this duty.

Furthermore, the right is supported by international law, notably the Convention on Economic, Social, and Cultural Rights (ICESCR) and the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW). The CESCR, the committee that monitors compliance with the ICESCR, released general comment 4 in 1991 on the right to adequate housing, stating that “all beneficiaries of the right to adequate housing should have sustainable access” to “energy for cooking, heating and lighting.”¹⁸ The right to housing is embodied in the constitution of South Africa, and there is no reason it should not be construed as the ICESR right is construed, since the

¹⁴ For a more Comprehensive evaluation, see Jackie Dugard, “A rights-based analysis of water and electricity services in South Africa,” Annual Conference of the Norwegian Association for Development Research, 13-15 September 2006.

¹⁵ Michael Nefale & Theunis Roux. 2003. “Promoting access to affordable electricity: Comments on the Draft Electricity Distribution Industry Restructuring Bill”, *Economic & Social Rights Review* 4(4), p 2.

¹⁶ *Government of the Republic of South Africa v. Grootboom* 2000 BCLR (11) 1169 (CC), note 9 para 37.

¹⁷ Jackie Dugard, “Power to the people? A rights-based analysis of South Africa’s electricity services,” citing the Local Government and Municipal Services act of 2000.

¹⁸ General Comment 4 on the right to adequate hosing (art. 11(1) of the Covenant) 1991, para 8(b).

constitution notes that when interpreting the Bill of Rights, a court “must consider international law”.¹⁹

Further support may be found in CEDAW, a treaty to which South Africa IS party. That document notes that “States Parties shall take appropriate measures to eliminate discrimination against women in rural areas... to ensure... the right... to enjoy adequate living conditions, particularly in relations to housing, sanitation, electricity, and water supply.”²⁰

Again, this bill and others recognize the need to promote affordability and access. However, to ensure that goal will be taken seriously by the new agencies set up under the National Energy Bill, access to affordable electricity should be recognized as a constitutional right, and the Bill should mention it as such when laying out its overall objectives.

C. Right to a Healthy and Protected Environment

The constitution of South Africa also grants environmental rights, contained in section 24. It grants everyone the right “a) to an environment that is not harmful to their health or well-being; and b) to have the environment protected... through reasonable legislative and other measures that... Secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”²¹

Environment has been defined broadly, to include the surroundings within which humans exist and that are made up of the land, water, and atmosphere or the earth²², as well as to include “social, economic and cultural considerations in order to ultimately result in a balanced environment.”²³ This definition clearly encompasses the air quality of homes, as affected by the use of paraffin, coal, and fuel wood, due either to a lack of regulatory standards for those energy carriers or a lack of access to a healthy alternative, i.e. electricity. Health has also been broadly defined, and would certainly contain such effects on the human body as are produced by the use of these types of energy carriers.²⁴

Furthermore, the “ecologically sustainable development” provided for in section 24(b)(iii) places a duty on decision-makers to opt for the most

¹⁹ Jackie Dugard, “A rights-based analysis of water and electricity services in South Africa,” page 4

²⁰ Jackie Dugard, “A rights-based analysis of water and electricity services in South Africa,” page 6

²¹ Constitution, section 24

²² National Environmental Management Act, 107 of 1998, s 1.

²³ *BP Southern Africa (Pty) Ltd v. MEC for Agriculture, Conservation, Environment and Land Affairs*. See Stein “Environmental Management in Relation to Minerals” in Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* (2004) ch 17.1.

²⁴ Du Bois and Glazewski *Bill of Rights Compendium* para 2B4.1.

ecologically beneficial choice in any given situation.²⁵ The state may infringe section 24 via a direct violation by organs of the state; it may also, however, infringe that section by failing to pass reasonable legislation and regulations, which would thereby provide inadequate environmental protection.

The Bill does empower the Minister to develop programmes to promote environmental safety, the health of consumers, and the development of energy supply from renewable sources. However, again, the bill should note that its objective is not merely to realize these goals as political aspirations, but to secure and guarantee them as constitutional rights to a healthy, protected environment.

III. Access to Information

The information gathered under the proposed National Energy Bill, which would not already be a part of the public domain, will only be provided to persons outside the DME subject to the Promotion of Access to Information Act.²⁶ That act implements the constitutional right contained in section 32, which states that “everyone has the right of access to a) any information held by the state; and b) any information that is held by another person and that is required for the exercise or protection of any rights.”²⁷

The information developed by the National Energy Modeling and Information Agency will inform the implementation of the Integrated Energy Masterplan. That plan, in turn, is meant to take into account affordability, access, sustainability, and environmental health, safety and social impacts.²⁸ In other words, the plan is the primary means by which the law envisions the protection of the above mentioned constitutional rights to electricity access and a healthy and protected environment. Therefore, the information may be relevant to the exercise or protection of rights, as envisioned in the Constitution.

The problem lies in having all the data collected by the NEMIA be governed by the Promotion of Access to Information Act. The act provides that a request for information may be refused if that information contains “financial, (or) commercial... information... of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party.”²⁹ Presumably, the agency will gather information on

²⁵ Van der Linde and Basson “Environment” in Woolman *et al Constitutional Law of South Africa* 2 ed (2002) ch 50 22, with reference to the related notion of “integrated environmental management”, as discussed in *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation & Land Affairs* 2004 5 SA 124 (W) 144.

²⁶ Draft National Energy Bill, Section 3(3)

²⁷ Constitution, Section 32(1)

²⁸ Draft National Energy Bill, Section 16

²⁹ Promotion of Access to Information Act, Sections 36(b), 64(b), and 68(b)

energy usage and projected energy needs from large users, such as the mines, the large aluminum smelters, or participants in the manufacturing industry. Much of this information may be regarded as commercially sensitive, and there will be a significant risk that the information collected, although integral to the Energy Masterplan and therefore the protection of fundamental rights, will not be disclosed to the public. It will therefore be difficult to determine whether the plan reflects the true interests of the South African people, and not merely the interests of those very industries producing the protected information.

In addition, the primary source of energy statistics (Eskom) is considered a commercial enterprise under the Eskom Act, and, subsequently, Eskom views its information as commercially sensitive and has repeatedly refused to supply data. For example, ELA Jhb is currently engaged in a long-running battle with Eskom to provide a single piece of data (the price of electricity to be sold to the proposed Alcan/Rio Tinto aluminum smelter at Coega). Eskom refuses to disclose this data on the grounds of it being commercially sensitive. It is hard to see how the spirit, ethos and objectives of the Draft National Energy Bill can be accomplished if data can be refused under PAIA.

Theoretically, the commercially sensitive information will nonetheless be produced from a third party, even a private body, if "that record is required for the exercise or protection of any rights."³⁰ However, this would possibly require a court action to retrieve either each piece of information that went into the production of the energy masterplan, or at the very least a court action to produce the compilation of such information from the NEMIA. Either would be costly and time consuming, and given the nature of the rights protected, the harm would already be done to poor households living in conditions of an unhealthy environment without access to adequate energy and electricity.

Furthermore, several key energy policies and contracts have confidentiality clauses within them, which would prevent NEMIA from obtaining and then sharing that critical data. For example, the Developmental Electricity Pricing Programme (DEPP) has a "built-in" secrecy clause. The DEPP guidelines ensure that any contracts signed under the DEPP are to remain secrets. This is profoundly anti-democratic. The DEPP states (Clause 12.1 of DEPP Guidelines):

All officials, employees or members of the Department, the adjudication committee, NERSA, Eskom and non Eskom distributors shall regard as confidential all technical information, records, particularly any strategic commercial information and all knowledge that pertains to any project that applied for benefits in terms of DEPP, whether such information is recorded on paper or in an electronic manner.

³⁰ Promotion of Access to Information Act, Section 50(a)

The very next clause (12.2) in the guidelines bounds individuals with knowledge about the contracts to silence for the rest of their lives:

This clause (quoted directly above) shall be regarded as binding irrespective of whether the employee, official or member is employed by the relevant entities, or ceases employment by the relevant entities.

This clause within the DEPP (a policy that was never sent to Parliament) gives foreign corporations the right to build electricity-intensive industrial plant in South Africa, get electricity on favourable terms in relation to their expected rate of return, and not to have to tell the country at large or various organs of the State at what rate they purchased electricity. It is hard to see how the Draft National Energy Bill would be able to overcome this and similar legal hurdles in its current form.

It is recommended that instead, adequate provisions be placed into the Draft National Energy Bill itself, so that any information gathered by the NEMIA would be produced for public consumption and that NEMIA would have the legal power to do so, overriding current confidentiality agreements and bypassing the PAIA exceptions. Only then will the integrated energy masterplan be guaranteed to reflect the best interests of all South Africans.

IV. Renewable Energy

The Draft National Energy Bill provides a perfect opportunity to set and adjust targets for renewable energy, in line with the spirit of the 2003 White Paper on Renewable Energy. In particular the Draft National Energy Bill should explicitly set a renewable energy target of 15% of electricity supply by 2020 to come from renewable energy sources (wind, solar, wave, tidal) on a non-cumulative basis, and empower the Renewable Energy Division within the South African National Energy Development Institute to ensure implementation. This would ensure Government strategic direction and oversight in the transition towards renewable energy supply. Further, this would bring the environmental, social and job creation elements of the Draft National Energy Bill into line.³¹

³¹ Please see: Agama Energy, 2003. "Employment Potential of Renewable Energy", SECCP, available at <http://www.earthlife.org.za/Files/Employment%20potential%20of%20RE%20in%20SA.pdf>

V. Additional Comments

A. Section 8(2)(b)

The National Energy Modelling and Information Agency should also provide analyses (in addition to (i-iv)) to the Minister on the short-term and long-term environmental, health and safety of sources energy generation, distribution and usage. This is essential and is vital for accurate modelling, as some energy sources have implications of up to 750,000 years.

B. Section 9(8)

There is no need to legislate that “the remuneration and allowances of personnel of the National Energy Modelling and Information Agency must be market-related”. Remuneration and allowances should be in line with Government policy, not with market forces. Hence, any reference to market-related remuneration and allowances should be struck from the Draft National Energy Bill.

C. Section 18(1)(d&e)

The composition of the Board of the proposed South African National Energy Development Institute should not include representatives of the electricity industry (d) and the mineral oils industry (e), as this would give undue influence to two sections of the economy and society at the expense of other sections; for example, organized labour and the renewable industry. CALS and ELA Jhb suggest that these provisions be struck from the Draft National Energy Bill.

V. Conclusion

The goals of the new National Energy Bill seek to make progress in areas where progress is much needed. However, in order to achieve these goals, there must be several changes to the Bill in order to bring it in line with stated government policy, the constitution, and the realities facing South Africa’s poor. The Bill must refocus attention on the poor, recognizing that electrification and affordable access are rights guaranteed by the right to adequate housing and to a protected, healthy environment; the Bill must recognize these rights explicitly, rather than merely paying lip service to the idea of continued electrification as though it were merely a political aspiration. The Bill must also take the opportunity to set specific targets for the amount of energy supplied from renewable sources. Finally, the Bill must

recognize that any energy masterplan will only be guaranteed to reflect the interests of all South Africans only when all information used in its formulation is available in the public domain.

CALS and ELA Jhb respectfully request that these suggestions be taken into account as the Bill is discussed and amended. There is a duty of law makers to carry out thorough, frank discussions prior to the law's passage, in order to assure that the interests of all South Africans are best protected and advanced, and it is in this democratic and open spirit that this submission to Parliament is made.