Eskom

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Enquiries:
Neo Tsholanku
Tel: (011) 800 2560
Fax: (011) 800 5503 / 3487

The Select Committee on Economic and Foreign Affairs
Secretary of Parliament

Our reference: COM0001

Per Facsimile: (021) 403 2808
Email: jramrock@parliament.gov.za

Dear Mr. Ramrock

ESKOM'S COMMENTARY ON THE CONSUMER PROTECTION BILL [B19-2008].

We thank you for granting us an opportunity to comment on the abovementioned Consumer Protection Bill [B19-2008] as part of the consultation process being driven by the Select Committee on Economic and Foreign Affairs.

Herewith please find our comments.

Yours Faithfully

PP

Neo Tsholanku
Legal Team Manager

CONSUMER PROTECTION BILL

COMMENTS BY ESKOM

05 JUNE 2008

COMMENTS BY ESKOM ON THE BILL

PUBLISHED FOR GENERAL COMMENT IN THE GOVERNMENT GAZETTE 31027 NOTICE OF 05 MAY 2008 ("BILL")

1. Introduction

1.1 Eskom Holdings Limited (hereafter Eskom) appreciates the opportunity to provide comments concerning the Customer Protection Bill (hereafter the Bill) to parliament. Eskom, generally, welcomes the introduction of customer legislation that will comprehensively regulate customer protection in the country. In particular, we welcome the effort to harmonise the present fragmented legislations that regulate these transactions.

1.2 The Bill does, however, present various challenges for the utility which we hope will be given due consideration before its finalisation.

2. Background

2.1 Eskom is a state owned public company incorporated in terms of the Eskom Conversion Act. No 13 of 2001 and the Companies Act No. 61 of 1973.

2.2 The primary business of the company is the generation, transmission and distribution of electricity in South Africa. Eskom presently generates, transmits, and distributes 95% of electricity that is consumed in the country. This is 60% of electricity that is generated in Africa. Eskom is a sizeable utility, with a presence in most towns in the country. It is the eleventh largest electricity utility in the world.

2.3 It is clear that the Bill will regulate customer matters related to the provision of electricity.

3. General comments

3.1 Our general view with regard to customer protection in the generation, transmission and distribution of electricity is that it is already adequately dealt with in legislation that regulate the electricity industry. For instance, the Electricity Regulation Act No. 4 of 2006 already deals with most of the rights that are stipulated in this Bill. The National Energy Regulator Act No. 40 of 2004 provides a comprehensive and well suited dispute resolution mechanism on these types of issues. This includes the resolution of complaints by the Regulator and a Tribunal, which can be constituted by the Regulator. We believe that the Electricity Regulation Act and the National Energy Regulator Act provide more suitable customer protection solutions to customers of electricity than the Bill. The ideal position would be to completely exclude the generation, transmission and distribution of electricity from the application of the Bill, without leaving the customer out in the cold.

3.2 The Bill could potentially create confusion in the electricity industry. Presently, all electricity related complaints are referred to the National Energy Regulator. The present system seems to be working well. The Bill creates various dispute resolution forums, most of which will not have the competence to deal with electricity matters. This will frustrate efforts to create industry norms and precedents that are ideally suited to protect customers.

3.3 These forums, in our view, will not benefit electricity customers. The approach will also encourage "forum shopping" amongst customers, which will delay the resolution of disputes. Our view is that, regardless of

whether or not the electricity industry is exempted from the application of the Bill, the Bill must provide, at least, a system of referral of disputes that ensures that electricity related complaints are dealt with by the National Energy Regulator. This will create uniformity in the resolution of disputes.

3.4 One point to be borne in mind is that the infrastructure that is erected to provide supply to a customer does, in terms of existing legislation, not become the property of the customer, even though the customer pays for it. It is not clear from the Bill whether such scenarios will be covered under this Bill and we suggest it should not.

4. Specific comments

4.1 The definition of an agreement in the Bill is broader than what is considered a contract in South African law. It includes any arrangements or understandings that "purport" to establish a legal relationship. This definition may create uncertainty concerning the conclusion of contracts. The law of contract requires parties to have the necessary intention to conclude a contract *(animus contrahendi).* There must be an unambiguous offer which is unequivocally accepted.

4.2 The definition of "goods" in section 1 of the Bill includes a "legal interest in land or any other immovable property. . .". It would appear as if a real right like a *servitude* will be treated as "goods" and the acquisition of servitudes would fall under this act. It would seem that owners of land will have to comply with the Bill, when selling servitudes to Eskom. This, in our view, is not necessary. It will cause unnecessary delay in the acquisition of land or rights in land, which is a significant component of the business of the entity. Again, we submit that the acquisition of land is sufficiently regulated in terms of existing legislation.

4.3 We believe the Bill, unnecessarily, protects entities that are capable of protecting themselves (section 5). We recommend that legal entities (whether natural or juristic) that have an asset value or an annual turnover of R 1 million or more per annum should be excluded from the application of the Act. This is in line with the exclusions that are stated in section 4 of the National Credit Act No.34 of 2005.

4.4 Whilst the exclusion of large transactions is welcome, it is not enough. Large entities have to be excluded. Eskom offers continuous services to these entities on a monthly basis. The services are paid for on a monthly basis (in the same manner as revolving credit) – which means the amount owed will unlikely constitute a large agreement. Eskom cannot know upfront (when entering into the transaction), whether the consumption of the entity will constitute a large agreement. This means the transactions that are concluded with these large entities will not be classified as large agreements and therefore they will be protected by the Bill.

4.5 With regard to the right of customers to be protected from unfair discrimination (section 8 and 9 of the Bill), we recommend that the Bill should expressly exempt measures that are intended to redress historical imbalances between the various race groups and certain classes of individuals, especially if the differentiation is done in terms of national legislation. The Electricity Regulation Act (section 22) also prohibits discrimination but it allows differentiation that is "objectively justifiable" and which is permitted by the energy regulator. The Act allows the use of different electricity tariffs for different groups. It also permits cross subsidisation of different groups. This differentiation was considered by the constitutional court in *City Council of Pretoria v Walker 1998 (2) SA 363* and it was found to be constitutional.

4.6 Section 13 of the Bill stipulates the customer's right to select suppliers. It provides that a supplier cannot, as a condition of entering into a contract, require a customer to purchase other goods from the supplier or enter into another contract with the supplier, unless he can show that the packaging of the goods outweighs the customer's right of choice. This section will present challenges for Eskom. Eskom is often the only supplier of electricity in most parts of the country. Clients therefore have very limited or no choices with regard to contracts that they can conclude with other suppliers. As part to the budget quoting process, the client will be required to conclude an electricity supply agreement, since Eskom cannot take the risk that the infrastructure for supply is made available without there being a contract in place that would regulate the supply itself.. It would be impossible for Eskom to show that the packaging of the agreements outweigh the customer's right to choose, because there is no choice. Entities like Eskom should be exempted from this requirement.

4.7 Section 14 of the Bill stipulates that the Minister will determine the maximum periods for fixed terms agreements or a category of fixed term agreements. This will affect many agreements that are concluded by Eskom. For instance, Eskom sometimes constructs infrastructure for the benefit of customers e.g. for the supply of electricity in remote areas. The customers are required to pay for this infrastructure, even though they do not become the owners of it. Often, they cannot afford to pay cash for this, so they enter into credit contracts, in terms of which they agree to pay the money owed over a period that is determined by Eskom and the customer considering the circumstances of the customer – up to twenty five years. The stipulation of a maximum time-period for customer agreements will compromise the ability of the parties to determine the duration of time based on the individual circumstances of the customer - including affordability. This in our view will be onerous to the customer. He or she may not be able to repay an amount within the stipulated period. The

Minister cannot be expected to regulate the timeframe of all categories of fixed agreements. Our view is that the duration must be determined by the individual facts and circumstances of the particular case. We suggest that it is incorrect to subject all agreements to a prescribed period.

4.8 If the timeframe will be regulated, it should be preceded by a proper consultation with industry players. The industry would generally be more informed concerning the reasonable time it takes customers to meet their obligations in certain categories of contracts. Suppliers must be given enough time to prepare for this. There should also be a way of extending the regulated period, if the circumstances justify it.

4.9 Section 14 of the Bill allows the customer to terminate a contract and to pay the amount owing in terms of the agreement "up to the date of cancellation". This does give the impression that if infrastructure was erected for the benefit of a customer, and cost, for example and amount of R 50 000.00, that the customer can cancel the agreement halfway through and only be liable for half of the capital costs. We cannot recover those costs from anyone else if no-one takes over the point and it should be clear that if a fixed contract is cancelled, that the balance due becomes immediately payable in the case where the supplier had expended fixed capital costs. This could mean that Eskom cannot recoup its capital expenditure and could be in breach of its obligations in terms of the public finance management act.

4.10 Section 14 undermines the principle of sanctity of contracts and allows customers to deliberately terminate contracts that are for a fixed period – even if the other party is not in breach of contract. This will create uncertainty in the market. There are often sound commercial reasons for compelling a person to sign a fixed term agreement, for instance, the supplier might be trying to create security for himself/herself. When a

person terminates a fixed term agreement, he causes the other party a lot of inconvenience and this is often very costly for the supplier. (This could lead to suppliers having to unnaturally inflate their prices to make sure the get a decent return on investment.) Normally this would constitute a breach of contract (based on the failure to perform) that entitles the aggrieved party to claim specific performance or damages. It seems the section deprives suppliers the right to have secure contracts, it also deprives them the right to claim specific performance. This will seriously undermine economic engagements. It encourages people to not honour their obligations. We recommend that this clause should be reconsidered.

4.11 It seems section 14 anticipates simple goods and service agreements, where a party to the agreement can easily terminate and pay a small penalty fee. Some contracts, like long term contracts for the supply of goods and services can be complicated and, depending on the threshold for large agreements (for purposes of exemption) a lot can be at stake. In most contracts the parties will require more than just a penalty, they may require damages which will place them in the same position as if the unilateral termination had not occurred.

4.12 Section 19 of the Bill requires a supplier of goods and services to provide the goods and services to customers within a specified time or within a reasonable time (if the time is not specified). Suppliers are prohibited from compelling customers from accepting performance after an unreasonable time. Whilst Eskom agrees that any goods and services should be provided to customers within a stipulated time or reasonable time, this might cause unreasonable expectations on the part the customers. Often, delays in the provision of electricity to customers are as a result of matters that Eskom has little control over. For instance, performance might be delayed by disputes concerning property or the registration of servitudes, expropriation, environmental impact assessments, etc. The customer may not fully comprehend the reasons for delay. This can cause a

misunderstanding that Eskom is not delivering within a reasonable time. We recommend that Eskom should be exempted from this clause.

4.13 Section 19 (5) requires supplies of goods to allow a customer to inspect any goods that have been delivered to him to ensure that they are of the quality that is anticipated in the agreement. This is then read with section 20 of the Bill.

4.14 Section 20 of the Bill allows a customer to return the goods to the supplier if he was not given time to inspect them. This can have significant consequences for Eskom. Often, the goods that are delivered for the supply for electricity are standard and are determined, solely, by Eskom. It is inconceivable that customers can determine the type of installations that are needed for the supply or connection of electricity and reject installations that they are unhappy with. This section allows customers to challenge the nature of equipment that is used by Eskom – even if they are not the owners of the equipment. This, in our view, will cause a lot of confusion and will frustrate Eskom's ability to deliver on its mandate. We recommend that Eskom should be exempted from this section.

4.15 Section 21 (b) (ii) of the Bill deems the continuous supply of goods after the termination of a contract as "unsolicited goods". This classification of goods has serious consequences for suppliers. In terms of section 20(7) a customer has no obligation to pay a supplier for unsolicited goods. Eskom's electricity supply agreements will be seriously affected by this section. Whilst great efforts are taken by the company to ensure that electricity is not supplied after the termination of an agreement, the size of the entity and the huge numbers of its customers makes it impossible to ensure that electricity is not supplied. This section will therefore cause significant losses for the entity. Eskom can presently claim compensation on the basis of enrichment i.e. if there is no supply agreement with a

customer. Section 21 (1) (e) also classifies as unsolicited goods, any goods that are delivered to a customer, where there is no express or implied agreement. Another problem that often arises is where an owner vacates premises and the electricity is left switched on (it is not always viable to switch each point off or the notification to switch off did not come to Eskom's attention) or the owner merely gets in a tenant. This tenant proceeds to use electricity and can in terms of this intended section claim that the goods were unsolicited. We recommend that Eskom should be exempted from these sections.

4.16 Section 48 prohibits the conclusion of contracts that are unfair, unjust, and unreasonable. The clause is to some extent a codification of the common law. The courts have in recent years moved away from the strict enforcement of contracts (*pacta sunt servanda)* to embrace principles that relate to unfairness and unreasonableness. Recently, the constitutional court decided that contracts are subject to public convictions, which are expressed in the constitution (*Barkhuizen v Napier 2007 (5) SA 323(CC)*, which is in line with the principle that a contract cannot be *contra boni mores*, the *boni mores* being informed by the constitution. There is doubt, however, that this approach compromises the sanctity of contracts (*R H Christie* ***The Law of Contract in South Africa*** *5th ed 12-13).* Whilst we accept this development of the law, we are worried about the classification of "excessively one sided contracts" as unreasonable contracts. Sometimes such contracts have important and essential commercial benefits (which are also of benefit to the customer) which seem to have been overlooked by the drafters of the Bill. Considering the dangers affiliated with electricity, it is important that electricity supply contracts are carefully drafted and the supply carefully regulated. Sometimes it becomes necessary to draft them in a manner that might seem to favour the supplier but is in fact drafted to protect the supplier and the customer. Furthermore, in line with the foreseen national power conservation

program, certain clauses contained in the electricity supply contracts will be regulated by legislation.

4.17 Section 55 requires suppliers of goods to provide goods that are safe and which are of good quality. Whilst, the company always intends to provide electricity that is of good quality, it cannot and does not guarantee the quality of the product. There are various issues that may compromise the quality of electricity that is given to customers. Most of these issues are often beyond the control of the entity. For instance, demand may outstrip the supply of electricity. As a result, the entity has to develop alternatives to supplying the limited electricity in order to avoid 'blackouts". This may affect the quality of electricity that is supplied to customers. We recommend that entities like Eskom should not be required to comply with this section. Section 55 (6), which exempts goods that are offered under "specific conditions", does not seem to address the issue. This section seems to apply to *voetstoots* transactions or defective goods.

4.18 We note that in terms of section 5 (3), the Minister can exempt the application of the Bill to certain industries, following an application by the relevant regulatory authority. Unfortunately, the Bill states that the exemption cannot be extended to product liability issues stated in section 60 and 61 (section 5(5)). The effect of the product liability clauses on the business of Eskom is discussed above in detail. We are of the view that the product liability clauses are very onerous for Eskom, considering the business of the utility. They create strict liability for suppliers of goods and services. This, in our view, will open a floodgate of claims against the entity, which will undermine the fulfilment of its mandate. Section 26 of the Electricity Regulation Act already regulates this issue in a manner that benefits the customer. The section creates a presumption of negligence on the part of the supplier in civil matters related to induction and electrolysis – unless the contrary is proved. This section shifts the burden

of proof to the supplier of electricity, which is contrary to the general approach in civil matters, where the plaintiff always carries the onus of proof.