



COX YEATS ATTORNEYS:

Liberalisation of the Energy Sector

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LIBERALISATION OF THE ENERGY SECTOR

The last leg to the liberalisation of the Energy Sector so as to allow for private sector participation, is contained in the Electricity Regulation Amendment Bill (the **Bill**) which has been published by the Portfolio Committee on Mineral Resources and Energy, and on which written comments need to be submitted by 13 October 2023. Submissions need to be emailed to Arico Kotze at akotze@parliament.gov.za

The Electricity Regulation Act of 2006 (the **Electricity Act**) states that a person may not operate any generation, transmission, or distribution facility, import or export electricity, or be involved in the trading of electricity, without a licence, unless the activity is exempt from a licence in accordance with Schedule 2. This provision entrenched the status of Eskom as the monopoly supplier of electricity.

In 2021, the licensing threshold in Schedule 2 was increased to 100 MW. Following the success of this reform, and the enthusiasm shown by the private sector, the President announced, in July 2022, that he would be removing the licensing threshold for embedded generation, completely. All new generation projects would not require licences but would have to be registered with the Regulator and comply with the technical requirements for grid connection and environmental legislation.

Schedule 2 was amended in terms of Regulations published in the Government Gazette dated 17 January 2023. What these regulations stipulated was that, provided the activities complied with the distribution code and were registered with the Regulator, at a point of connection on the grid, and the supply of electricity was to a customer by wheeling, they did not require a licence.

The Bill amplifies these provisions. Sections 7 and 9 are to be amended and a new Section 8 inserted. The Schedule 2 exemption presented a regulatory gap in that the Regulator had no powers to set technical and regulatory requirements for facilities, subject to registration. The Bill now provides that applications for registration must comply with technical codes and regulatory requirements necessary for the sustained operation of the transmission power system and interconnected distribution power systems as well as payment of fees imposed by licensees for granting the registrants access to the network.

One of the main problems encountered with the Schedule 2 exemption was the wheeling of power through electricity transmission systems operated by a municipality. Whilst a generating licence was no longer required, the generator was still required to be registered with NERSA and acquire permission from the power distributor who will wheel the electricity from one site to another.

These distributors could be municipalities or Eskom itself. It also could be a combination of the two.

Most municipalities do not have a separate tariff for distribution. Municipalities are tasked in terms of the constitution, with the provision of services to communities in a sustainable manner. A municipal service is defined in the Local Government: Municipal Services Act as being *“a service that a municipality, in terms of its powers and functions, provides or may provide to or for the benefit of the local community”*

If Eskom wheeled the power, then matters were not too complex to deal with. Eskom has, on its website, provided guidance as to what needs to be done and what agreements need to be concluded about the wheeling of electricity through the Eskom grid. The position, however, was different for municipalities. It was often practically impossible to obtain the necessary permissions to wheel electricity through a municipal grid. On this basis, many private-sector electricity projects failed.

The Bill now confers upon the Regulator, or NERSA, the power to set and approve tariffs. This should now resolve the impasse in obtaining municipal approval. Municipalities will be bound by the NERSA-imposed tariff. Insertions to Section 15 of the Act are contained in the Bill so as to enable a competitive market to function and to promote energy security and renewable energy. Section 15 of the Act is to be amended to allow the Regulator, when setting tariffs, to allow for a reasonable return proportional to the risk of the licensed activity and to have regard to the need to ensure security of supply, the diversity of supply and to promote renewable energy.

An exception to this is set out in the proposed new Section 15(4) which provides that a licensee may charge a customer a tariff, which has not been set or approved by the Regulator, where such tariff is charged pursuant to a direct supply agreement and arises as an outcome of a competitive market.

With the proposed migration from a monopolistic electricity supply industry model to a competitive model, the Bill seeks to provide measures that will ensure that third parties are not discriminated against.

A new subsection 4 has been added to Section 21. It states that third-party access to the transmission and distribution power system must be based on published tariffs, applicable to all eligible customers, and applied objectively and without discrimination between system users. Transmission or distribution licensees may refuse access only where it lacks the necessary capacity, with written reasons given for such refusal. Transmission and distribution licensees shall procure that the energy they use to cover energy losses and reserve capacity in their system is dealt with according to transparent, non-discriminatory and market-based procedures. The rules adopted by the Transmission System Operator Soc Limited (the arm of Eskom which will be responsible for transmission) for balancing the national transmission power system and the inter-connected distribution power systems, including the rules for charging system users of their networks for energy and balance, shall be objective, transparent and non-discriminatory.

In the President's State of the Nation Address, 2022, it was stated that a competitive market for electricity generation would be established. The Eskom roadmap, articulated in the Department of Public Enterprises Roadmap for Eskom in a Reformed Electricity Supply Industry, 2019, outlines that Eskom is to be unbundled, by splitting it into three separate companies, each responsible for generation, transmission and distribution, starting with the creation of a transmission entity. The Energy Policy White Paper of 1998, stated that Eskom was to be restructured into separate generation and transmission companies and that independent distributors would be established.

This intent is included in Section 28 of the Bill which inserts a new Section 34 to the Act.

The Bill is clearly critical for South Africa's energy transition and is essential for the transition from a centralised electricity market to a more open competitive model.

The wide-ranging reforms announced by the President in July 2022 have been slow in implementation and it is clearly in the interests of all concerned that the Bill be adopted by Parliament, at least before the 2024 elections.

The Bill should be supported.

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