LEGAL RESOURCES CENTRE

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Your Ref:
Our Ref:

16 February 2012

ATT: Director General
Attention: Matthews Batsijang
Private Bag X19
Arcadia
0007
Per email :epar@energy.gov.za

The Chairperson: Honourable Mr. Sisa Njikelana
Portfolio Committee on Energy
Email: njikelana@parliament.gov.za

Dear Madam / Sir

Re: Comment on Electricity Regulation Second Amendment Bill: GN 905 of 2011

We act for Earthlife Africa Johannesburg and make the submissions hereunder on the instructions of our clients. The organisations listed in Annexure "A" hereto have requested us to indicate that they are in support of this submission.

Our client has instructed us to make the submission that the entire Electricity Regulation Second Amendment Bill should be withdrawn. The Bill proposes to create Ministerial discretion that undermines the Constitutional duty to procure electricity in a manner which is transparent, fair, equitable, efficient and cost effective and it effectively removes independent regulation of the electricity sector. The Bill proposes confidentiality clauses that will undermine the possibility of transparency in energy procurement. This Bill is contrary the post-1994 ethos of multiparty democratic government which ensures accountability, responsiveness and openness, founding values of our Constitution.1

EXECUTIVE SUMMARY

The Bill proposes sweeping powers and discretion in matters relating to the procurement and licensing of new energy plants, and the transmission and sale of energy. Whereas in the past the sole provider of electricity in South Africa to the public was Eskom and it was regulated by the National Energy Regulator, ("the Regulator") in consultation with the Minister, the Bill creates the framework for the provision of

1 Constitution section 1

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Cape Town: S Magardie (Director), A Andrews, S Kahanovitz, WR Kerfoot, C May, M Mudarikwa, HJ Smith,
Durban: MR Chetty (Director), C Penn, W Holness
Grahamstown: S Sephton (Director) C McConnachie
Johannesburg: N Gobodo (Director), S Shirinda, N Fakir, Z Sujee, N Wagiet
Constitutional Litigation Unit: T Ngcukaitobi (Director), G Bizos SC, J Brickhill, S Nindi, W Wicomb, B Sibiya.

electricity by providers outside of Eskom with almost exclusive power to regulate in the hands of the Minister, proposing to remove most of the important oversight powers of the Regulator to ensure fair, equitable, transparent, competitive and cost effective procurement of energy in accordance with sections 195 and 217 of the Constitution.
The Bill has no system of checks and balances which would ensure compliance with these requirements of the Constitution, and in fact non compliance with them is promoted by the Bill. The powers conferred on the Minister are highly discretionary, and there are wide provisions for secrecy/non disclosure of information that will reduce the accountability required for large scale procurement.

Provisions relating to licensing and the setting of tariffs unreasonably fetter the discretion of the State in the administration of energy, compromising its ability to ensure that the most cost effective option is chosen, contrary to the requirements for procurement set out in section 195 and 217 of the Constitution.

Without checks and balances, the Bill paves the way for less transparency and accountability in energy procurement, which in the coming decades will involve massive expenditure of public funds. The potential for corruption, fruitless and wasteful expenditure, maladministration and unnecessary and costly litigation against the State will be enhanced if the Bill if it is passed into law in its current form.

It is submitted that the Bill is unconstitutional, as will be set out in the paragraphs that follow.

1. The Bill undermines the administrative framework necessary for compliance with the Constitution

The Bill must be considered in the context of the supremacy of the Constitution, which founds the South African State on core values including a "multi-party system of democratic government to ensure accountability responsiveness and openness."2 Members of the Cabinet must act in accordance with the Constitution.3 Public administration must be accountable.4 Transparency must be fostered by providing the public with timely, accessible and accurate information.[5] When an organ of state contracts for goods or services it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.[6]

The Electricity Regulation Act has established a national regulatory framework for the electricity supply industry within the context of the duty of the administration set out in sections 195 and 217 of the Constitution. The preamble and objects clauses of the Bill make the Regulator the custodian and enforcer of the national electricity regulatory framework. This role is defined in more detail by the objects of the Act, which are to

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3 section 92(3) (a)

4 Section 195 (1)(f)

5 Section 195(1)(g)

6 Section 217(1)

achieve efficient, effective and sustainable development and operation of electricity while meeting and balancing the interests of customers and users, and promoting energy efficiency, competitiveness and customer end user choice.[7]
In order to empower the Regulator to carry out this custodial role, the Act allows the Regulator to issue rules designed to implement the national government's electricity policy framework[8], the Integrated Resource Plan (IRP) and the Act. In so doing, the regulator is enabled to achieve the objects of the Act and fulfil the requirements of the Constitution, to govern in a transparent and cost effective manner.

The Bill however, fundamentally undermines this oversight role. It repeals Section 3, which gives effect to this object and thus raises doubt over what the role of the Regulator now is. In addition to the repeal of Section 3, which establishes the Regulator as the custodian and enforcer of the regulatory framework, the Bill repeals its powers to make rules to implement the national government's electricity policy framework, the IRP and the Act.

The Act makes provision for the Minister to determine new generation requirements in consultation with the regulator. Thus, there is currently a degree of check and balance over the Minister's exercise of discretion, especially if regard is had to Section 34 which requires that the decision on new generation capacity is required to be subject to an overarching requirement that the tendering procedure has to be "fair, equitable, transparent and competitive and cost effective".

These are important provisions as they provide the legislative framework for decision-making that ensures compliance with the Constitutional requirement of cost effectiveness and transparency. But they are to be repealed. In their place, there will be very wide discretionary powers for the Minister without checks and balances, and there will be proposed mandatory provisions that will fetter the discretion of the state to seek the most cost effective option. The risk that this legislation contains is that massively expensive procurement decisions will be subject to wide discretion and will be conducted without the necessary levels of transparency that would ensure cost effectiveness. This Bill creates risks of corruption, abuse of discretion, bias and maladministration.

2. The Bill undermines transparency by an over broad definition of confidential information.

The Bill proposes in Section 10(3) that the applicant may request confidential information to be withheld from the public. No definition of "confidential" is given. It is submitted that this vague and over broad definition will defeat the openness and transparency requirements of administrative decision making required by the Constitution and the objects of Section 2 of the Act. The withholding of commercial information on the basis of confidentiality in large scale procurement is not desirable,

7 Section 2

8 Section 4 (iv)

given the large amounts of funds involved in electricity provision, that are borne by the public.

Confidentiality should be narrowly construed so as to foster the transparency requirements of our Constitution. The burden should rest on the applicant who seeks such non disclosure to prove not only that the information is of a commercial nature but that its disclosure would materially and adversely affect it commercially if disclosed. Any withholding of information should be taken within a framework that promotes disclosure, given that public monies are utilised to procure energy.

3. The Regulator will not be able to refuse licences and its role is unclear

The Act makes provision for the Regulator to exercise its discretion and where appropriate not issue a license (Section 13(4)). However, the Bill proposes to remove this discretion and provides that if a competitive IPP procurement process has been conducted, the Regulator *shall* grant a generation license to the successful participant notwithstanding any other provision in the Act. (draft Section 13(5)). The Constitution and the Act require not only competitiveness in procurement but also that decisions are cost effective [9] and are efficient, effective and economic use of resources.[10] The fettering of the Regulator's discretion in the proposed section 14(5) is unconstitutional. It is a highly problematic provision that may result in the State being sued and compelled to issue licenses on dubious grounds when other considerations might have entered the picture and made the procurement no longer desirable.

The words "competitive IPP procurement process" have not been defined, and it is submitted cannot be defined in a way that removes discretion to authorise large scale procurement. The State may face costly litigation defending its decisions not to award licenses on the basis that the procurement process was not competitive.

The Regulator under the proposed Bill will, in reality, have no discretion to refuse a license provided a competitive process has been undertaken, even though compelling other reasons may have entered the picture and which a responsible administrative body should take into account in making a decision. The Promotion of Administrative Justice Act 3 of 2000 requires administrative decisions to take into account all relevant information and this Bill undermines this completely.[11] This over broad provision will fetter the discretion of the Regulator to the extent that in one of its most important oversight roles it will have no independent discretion.

The Bill also provides that the Regulator shall not grant a generation license unless the Minister approves of the generation facility (Section 13A). Section 14A allows the Minister to direct the Regulator to determine license conditions. Once again the Regulator becomes subservient to the Minister and it is not clear what the role of the

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9 Constitution section 217(1)

10 Constitution section 195(1)(b)

11 PAJA section 6(2)e(iii)

Regulator is at all. Its important oversight functions are eroded to the point of being devoid of content.

4. Proposed Section 13(2): The Minister is unreasonably required to approve facilities.

The Bill provides that the Minister shall approve a facility in terms of 13A(1)(b) if she is reasonably satisfied--an ambiguous requirement having two possible mutually contradictory interpretations--having regard to the IRP that the electricity generation capacity of the facility will not result in excess generation capacity or otherwise be contrary to the national interest. It is not desirable in a statute to have provisions that compel the Minister to issue licenses as this might give rise to litigation by disgruntled applicants to the detriment of the State's independent prerogative to decide on what electricity it needs, and from what source it will acquire it.

The Minister might be of the view that a particular type of electricity source is not desirable, for a host of reasons. These might not go as far as being contrary to the national interest. There may just be better options or more desirable configurations for a variety of reasons; for example, energy efficiency, the preservation of water, climate change issues, safety and health, etc. The list is potentially endless. However, if she is reasonably satisfied that the facility will not result in excess capacity, she then is compelled to authorise the plant.

The Promotion of Administrative Justice Act requires administrative decisions to take into account all relevant information, and is, once again, undermined completely.[12] The term "national interest" is not defined, and this may also give rise to disputes and litigation over whether there has been compliance with the statute.

On the other hand, the test for the exercise of discretion in this proposed provision is also not acceptable, as it is not based on objective criteria but on the opinion of the Minister. As stated above the meaning of "reasonably satisfied" is unclear. Does she have to be satisfied on the basis of reasonable grounds or does she have to be satisfied to a reasonable extent?

Thus unnecessary, wasteful, and non-cost effective procurement of excess electricity is not prevented. This is contrary to the requirements for efficiency and cost effectiveness in the Constitution Sections 195 and 217 and the PFMA.

5. Proposed section 14A: pre approval of tariffs

This section allows the Minister to direct the Regulator to determine licence conditions and set tariffs, once again removing the oversight role of the regulator, without any checks and balances.

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12 PAJA section 6(2)e(iii)

6. Section 15: Tariff Principles.

This section now makes provision for non state actors who are providing electricity to be sure that they can recover their full costs and make a reasonable return commensurate with the risk of the licensed activity (proposed section 15(1)(aA). This formulation of the test for determining tariffs is one that favours the electricity provider, not the State or the public who will ultimately pay for the energy. The higher the risk of the activity, the higher the Regulator must set the tariff. But under this Bill, the Regulator has lost the independent function of deciding whether the facility should be licensed or not. This violates the equitability and cost effectiveness requirements of Section 217 (1) of the Constitution. It is unduly biased in favour of the interests of the private energy provider, and thus fails the requirement of fairness and the balancing and safeguarding of interests set out in Sections 2(b,)(f) and (g) of the Act.

This provision carries the risk of preventing the State from exercising its prerogative to set tariffs in a flexible way and in a manner which reflect a careful consideration of reasonable costs. The provision is cast as a mandatory provision through the use of the word "must". Yet it incorporates considerations that are indefinable such as "a reasonable return", and "risk of the licensed activity." The words, "must allow for," are ambiguous and not appropriate for legislation involving massive public expenditure. It is not clear whether these words mean that the tariffs must ensure that there is a reasonable return, or alternatively that a reasonable return is merely a relevant consideration that must be taken into account.

More precise drafting is absolutely necessary when regard is had to the scale of the public expenditure that is likely to flow from procurement of energy under this Act. Vague word and phrases such as "a reasonable return" should be avoided. One of the reasons for this is that litigation in order to determine the meaning of these words in any particular procurement could be extremely costly and technical. The provisions therefore place the State in an invidious position, apart from the economic risk to the state that is created by this degree of uncertainty. They show an unreasonable bias towards the interests of private sector providers of electricity, and against the public's interests. This cannot possibly be in accordance with what is envisaged by the requirements of sections 195 and 217 of the Constitution.

A system of procurement from the private sector which is cost effective[13] and ensures efficient, effective and economic use of resources [14] as required by the Constitution would need to rest on clear and unambiguous legislative provisions and sufficient flexibility in order to enable the State to exercise its governance functions independently and without an unnecessary risk of litigation, and unanticipated and unavoidable costs. The Bill, as it is currently drafted, creates legislative "trip wires" that may have disastrous consequences, opening the doors to litigation by electricity providers, who are often powerful and well resourced actors.

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13 Constitution section 217(1)

14 Constitution section 195(1)(b)

The State, in any event, does not need to mention considerations of reasonable return on investment in the setting of tariff, as it is required by the Promotion of Administrative Justice Act to consider all relevant information when engaging in administrative action. The amendments to Section 15 should be completely recast to remove the onus of proof of reasonableness from the State in the setting of tariffs in order not to create a massive risk of potential liability for it in the regulatory regime.

7. Section 34 removes provisions that promote transparency in the procurement process

Section 34 of the Act provides that the Minister may in consultation with the Regulator:

a) determine that new generation capacity is needed;

e) require that new generation capacity must be established through a tendering procedure which is fair equitable, transparent, competitive and cost effective.

The Bill proposes to repeal these provisions, thus reducing the role of the Regulator and removing the requirement of transparency in the process of determination of new generation capacity, which is required by Sections 195 and 217 of the Constitution, and generally in terms of the objects clause of the Act. This weakens the accountability mechanisms of the Act aimed to ensure Constitutional compliance by the Minister. There is no justification for doing so.

8. Secrecy provisions create an unacceptable burden on the state

Section 33 (4) proposes that no information of a non-generic, confidential, personal, commercially sensitive or proprietary nature may be made public without the consent of the persons to whom the information relates except in terms of an order of court. Firstly, this provision unreasonably muzzles the State who has to figure out whether information so provided falls into one of these categories. Secondly this provision runs completely counter to the requirements for transparency of the Constitution in Sections 1, 195 and 217. It is simply unconstitutional.

Further, it may give rise to costly litigation and detriment to the State. It places the State in a weak position in regard to potential litigation as it defines the classified information so widely that it could cover potentially anything and the State would run the risk of being sued for disclosure if it disclosed practically anything. This provision should be scrapped in its entirety. Its purpose has not even been set out, and it harks back to a secretive state that had no legitimacy.

9. Transparency and accountability in other administrative processes is undermined by the Bill

The Minister may deviate from the IRP when, in her opinion, it is appropriate. (proposed Section 34(5)). There is no guidance provided to the Minister nor any limitations placed on the exercise of her discretion in this regard. This provision creates an unacceptable regime where the Minister has absolute power without checks and balances and where the public funds are involved in vast amounts. This is clearly

unacceptable for a democratic state struggling to overcome poverty and facing many development challenges. The provision also means that even though the public might have spent considerable resources participating in the development of policies for the provision of electricity such as the IRP, these efforts can be bypassed by the Minister on a whim. Transparency and accountability which are required by the Constitution are undermined completely. This is also in conflict with the objects of the Act set out in Section 2.

The Minister can also prepare and conduct the procurement process. She can incur obligations on behalf of the State for the purpose of transferring rights to generators. She may acquire permits or exemptions for the purpose of transferring such authorizations to an appointed generator.

These provisions indicate that it is envisaged that the Regulator will lose its functions to the Minister and so will end the functions of the independent body responsible for determination of new generation capacity, based on a tendering procedure which is fair, equitable, transparent competitive and cost-effective as currently required under the Act.[15] Wide powers for the Minister have been introduced, which entitle her to operate if her opinion considers it appropriate and outside of the IRP policy recommendations. She will have also have wide powers to conduct procurement processes, and obtain licenses or exemptions on behalf of future generators to whom she can transfer these rights.

Considering public media statements that the State intends to spend a trillion rand (that is 1000 billion rand) on energy procurement, this Bill appears to pave the way for an opaque and unaccountable process with significant potential risks of adverse economic consequences. Procurement of electricity that is reliant to a material extent on the private sector, it is submitted, should have more checks and balances, not less, as is currently proposed in this Bill.

For the reasons set out above our client submits that the Bill is unconstitutional and requests that you withdraw it in its entirety.

Yours faithfully

LEGAL RESOURCES CENTRE

Per:

ANGELA ANDREWS

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15 Section 34(2) (v) (i)