



NATIONAL ECONOMIC DEVELOPMENT AND LABOUR COUNCIL

DRAFT NEDLAC REPORT ON THE ELECTRICITY REGULATION AMENDMENT BILL

21 OCTOBER 2022

1. BACKGROUND

- 1.1. President Cyril Ramaphosa, in his State of the Nation Address of 2019, proposed the unbundling of Eskom into three separate entities. In order to do this, the Department of Public Enterprises developed and published the Roadmap for Eskom in a Reformed Electricity Sector.
- 1.2. An Inter-governmental Steering Committee was set up to oversee this work. As part of the implementation of the Road Map, the Cabinet agreed to amend the second Electricity Regulation Amendment (ERA) Bill.
- 1.3. The Electricity Regulation Act (No. 4 of 2006) 2nd Amendment Bill, was Gazetted by the Minister of Mineral Resources and Energy on 10 February 2022.
- 1.4. As part of Government's consultation on the Bill, Government expressed its intention to table the Electricity Regulation Amendment (ERA) Bill at Nedlac for engagement by social partners, at the Energy Workstream meeting held on 07 September 2021. The Bill seeks to establish a regulatory framework for the evolving Electricity Supply Industry (ESI) and will result in the creation of a market for electricity trading, to co-exist with regulated trade via State-Owned Entities responsible for the legacy electricity supply contracts.
- 1.5. The Bill was subsequently tabled by Government for engagement at Nedlac on 06 May 2022.
- 1.6. The Energy Workstream established a task team which comprised of Government, Business, Labour and Community constituencies to engage on the Bill. The task team was subsequently converted into a Manco task team on 18 May 2022.

- 1.7. The task team developed this Nedlac Report which provides a summary of the process and outlines the areas of agreement and disagreement reached during engagements.

2. OBJECTIVES OF THE ELECTRICITY REGULATIONS AMENDMENT BILL:

- 2.1. The objectives of the ERA Bill are to:
 - 2.1.1. Establish a national regulatory framework for the electricity supply industry;
 - 2.1.2. Make the National Energy Regulator of South Africa (NERSA) the custodian and enforcer of the national electricity regulatory framework;
 - 2.1.3. Provide for licences and registration as the manner in which generation, transmission, distribution, system operation, reticulation, trading and the import and export of electricity are regulated; and
 - 2.1.4. Regulate the reticulation of electricity by municipalities.

3. PROCESS AT NEDLAC

- 3.1. The Department of Energy and Mineral Resources tabled the ERA Bill for engagement at Nedlac on 06 May 2022.
- 3.2. The task team was established to engage and consider amendments on the Bill.
- 3.3. The initial draft of the ERA Bill was tabled on 06 May 2022. However, the task team at this meeting raised concerns that given the Bill's complexity the design of the institutional arrangements and envisaged end state of the Electricity Supply Industry should have preceded informed the ERA Bill. It was concerned that one of the most significant changes in the Bill was the removal of the sections that dealt with the unbundling of Eskom and the establishment of a Transmission System Operator as a subsidiary of Eskom Holdings SOC Ltd.
- 3.4. Labour further raised concerns that the ERA Bill model in relation to the unbundling of Eskom did not include the participation of Labour, as a result labour favoured the German co-determination model. This model allows the participation of labour in the boards of entities such as Eskom.
- 3.5. Government indicated that the change was necessitated by the legislative requirement that changes to Eskom Holdings SOC Ltd as a juristic entity which must be effected by means of an amendment to the Eskom Conversion Act (Act No. 13 of 2001).
- 3.6. The meeting of 06 May 2022 was of the view that the separation of the institutional and regulatory issues into an Eskom Conversion Amendment Bill and an ERA Bill would require substantial cross-referencing and harmonisation between the two Bills to ensure consistent outcomes conducive to the attaining the objectives of the legislative amendments.

- 3.7. In this regard, the task team requested the Department of Public Enterprise (DPE) to provide updates on the progress and envisaged timelines of the Eskom Conversion Act Amendment Bill. The engagements were paused in order to allow DPE to provide such updates.
- 3.8. In order to address the above concerns, Nedlac wrote to the DPE requesting engagement with Nedlac to address this.
- 3.9. The DMRE requested an opportunity to address the concerns raised by the task team and to table a revised Bill once finalised. The revised ERA Bill was subsequently tabled on 15 July 2022, and engagements on the Bill commenced at this meeting.

4. INPUTS MADE BY SOCIAL PARTNERS

- 4.1. **Business** made the following inputs, emphasizing the importance of the Bill and its view that the Bill will fundamentally transform the South African energy landscape. It highlighted the following key points in which the transformation will occur:
 - 4.1.1. Creation of a Central Purchasing Agency (CPA).
 - 4.1.2. Creation of the Transmission System Operator (TSO), trading platform, and competitive multi-market.
 - 4.1.3. Introduction of the day-ahead market.
 - 4.1.4. Integrated resource plan which needs to be updated at least after every three years.
 - 4.1.5. TSO assumes responsibility for transmission planning.
- 4.2. Business indicated that the amendments to the Eskom Conversion Act, which would cover the institutional changes required to accommodate the regulatory and market design changes would need to be clarified prior to or at least in tandem with the ERA Amendment Bill.
- 4.3. It was of the view that a central theme of the amendments in the Bill was a move away from a predominantly single-buyer electricity market to a competitive multi-market structure. The proposed amendments in the Bill will therefore promote a competitive market for electricity generation and the establishment of an independent state-owned transmission entity. However, Business was of the view that the Bill required a balance with some of the conceptually contradictory amendments that foster command and control, the effect of which will be the maintenance of a vertically integrated electricity sector and its associated political economy.
- 4.4. Business further raised concerns and sought clarification on the following proposed amendments:
 - i. The Minister of Mineral Resources and Energy (“Minister”) had far-reaching powers of discretion considering that the Bill was developed with the view to operationalising a liberalised electricity market.

- ii. The National Energy Regulator of South Africa's ("NERSA's") widened powers which relate to arbitration, tariff methodology, penalties, and licensing.
- iii. The Bill empowers the Minister and, under delegation, the TSO to expropriate land for certain purposes, when, in practice, other measures exist to achieve the same goals.
- iv. The relationship between the Minister's powers to update the Integrated Resource Plan (IRP) and issue determinations on the one hand and the ability of the TSO to procure power as may be necessary to balance the grid.

4.5. Business further made inputs on:

4.5.1. Competitive multi market

- a. It was of the view that the proposed multi-market structure in the Bill was significant as it illustrates how the shift from the long-standing vertically integrated electricity model will be structured.
- b. In this regard, it was of the that roles and responsibilities of the CPA should be clarified in the Bill as this was important to in ensuring an efficient power market.
- c. Furthermore, the envisaged end-state of the Electricity Supply Industry ("ESI") was unclear as the distinction between regulated and unregulated parts of the market was not defined.

4.5.2. Ministerial Powers

- a. Business was concerned that the Bill granted far-reaching discretion to the Minister which serves to contradict the objective of a liberalised electricity market and creates uncertainty.
- b. It was of the view that the level of involvement of the Minister in some instances negates the objective of the Bill to open the electricity supply industry to private sector investment and competition. It proposed that the Bill must only provide clarity on the level of approval required, the process, and conditions to support a fair and open process towards a reformed sector.

4.5.3. Regulator mandate

- a. Business was of the view that the powers of the Minister as per the Bill were extended to encroach on the functions of the Regulator. Additionally, the powers of the Regulator have been extended significantly to create overregulation in certain aspects. It noted the intention of the provisions; however, it was of the view that there was a need for a balance that needs to be struck in creating an enabling environment for the creation and participation in a competitive electricity market.
- b. It was concerned regarding the following regulatory powers:
 - i. **Tariff methodology:** Section 14(d) empowers the Regulator to set or approve tariffs charged by licensees, but the Bill has removed the Regulator's obligation in Section 14(e) to include the methodology to be used to determine rates and tariffs in the

licence conditions. *Business therefore insisted on the reinstatement of the provision in section 14(e).*

- ii. **Penalties:** Section 14(y) of the Bill empowers the Regulator to impose penalties on generation facilities for own use or supply to customers under direct supply agreements if the facilities do not become operational within the requisite period. The imposition of such penalties on own generation facilities to the exclusion of other types of facilities appeared to be arbitrary and the justification for this amendment was not clear.
- iii. **Licensing:** Section 4(a)(i) of the Bill introduced 7 activities that the Regulator can issue licenses for. The Regulator is required to license according to the determination made by the Minister per the IRP. Business noted that generation licensees did not need to apply for trading licences, which was a useful practical amendment that is in keeping with current practice. However, the construction of transmission and distribution power systems will now require a licence, which is likely to increase the administrative burden on Independent Power Producer (IPPs) opting for self-build of connection infrastructure. The consent of the Regulator will also need to be sought where there is a change in construction or operations contractor, which was likely to hinder the expeditious completion of projects.

4.5.4. Expropriation

- a. Business welcomed the proposed expropriation provisions in the Bill as it promotes the expansion of South Africa's transmission grid by limiting unnecessary delays. It however raised concerns about whether expropriation of land is appropriate when land servitudes would be sufficient. In this regard, it proposed that there should be a broadening of provisions of the Bill to account for the construction of substations and other ancillary transmission infrastructure, as required or determined by the transmitter.

4.6. Labour welcomed several amendments proposed by the ERA Bill, however Labour remains opposed to the Bill in principle due its provisions unbundling and restructuring Eskom. Labour was of the view that some of these amendment needed to be revised in order to address issues raised by both Business and Labour. Labour was particularly concerned that:

- 4.6.1. The unbundling of Eskom sought to privatize Eskom and this would have negative impact on its employees.
- 4.6.2. Labour therefore opposes unbundling, based on the impact on Eskom jobs and Eskom's sustainability;
- 4.6.3. After the proposed restructuring Eskom's ability to plan generation, transmission and distribution will be impaired and electricity prices will be affected. In essence, Eskom will not serve any purpose as major roles will be transferred to the TSO.

4.6.4. There was no clarity on the relationship between Eskom and the newly established TSO.

4.6.5. There was no clear indication on what will happen to the Eskom Board of Directors.

4.6.6. There was no clear plan to address issues relating to conflict of interest.

5. AREAS OF AGREEMENT

5.1. This section outlines the areas of agreements reached by social partners during the engagements.

Section as per the ERA Bill	Amended Sections as a result of the Nedlac Input
Amendment of section 1 of Act 4 of 2006, as amended by section 1 of Act 28 of 2007	<p>The following definitions were amended to read as follows:</p> <ul style="list-style-type: none"> i. Market transactions means a transaction that occurs in a competitive environment, either on a competitive trading platform or bilaterally in an environment with limited or no market power. ii. Generation licensee means a holder of a licence to operate a generation facility in terms of section 4(a)(i)(aa). iii. Person includes any organ of state as defined in section 239 of the Constitution iv. Trading licensee means a holder of a licence to trade in terms of section 4(a)(i)(gg).
Amendment of section 2 of Act 4 of 2006 and insertion of 2A	No changes.
Substitution of section 3 of Act 4 of 2006	<p>A new clause 2 was added as follows:</p> <p>“The Regulator has the regulatory authority over persons undertaking activities, and activities, which are subject to this Act and has the powers to issue, amend, withdraw, suspend and revoke licenses and determine the registration, revocation and deregistration of persons or activities in accordance with this Act.”</p>
Amendment of section 4 of Act 4 of 2006, as amended by section 2 of Act 28 of 2007	<p>A new clause 5(g) was added as follows:</p> <p>“at its own instance or following an investigation of a complaint—(aa) determine whether any person is engaged in an activity requiring a licence in terms of section 7 without that person holding a licence in respect of that activity; and (bb) direct any person engaged in an activity requiring a licence in terms of section 7 who is not in possession of the necessary licence, to cease such activity</p>
Amendment of section 6 of Act 4 of 2006.	No changes.

Amendment of section 7 of Act 4 of 2006, as amended by section 16 of Act 28 of 2007	No changes
Amendment of section 8 of Act 4 of 2006, as amended by section 16 of Act 28 of 2007	No changes
Amendment of section 9 of Act 4 of 2006, as amended by section 4 of Act 28 of 2007	Clause 9(b) was amended as follows: "Any person who operates a generation facility contemplated in item 2 of Schedule 2 must register that facility with the Regulator in terms of this section."
Amendment of section 10 of Act 4 of 2006, as amended by section 16 of Act 28 of 2007	No changes
1Amendment of section 11 of Act 4 of 2006, as amended by section 16 of Act 28 of 2007	Clause 11(1) was amended as follows: "When application is made for a licence the Regulator must, in writing, direct the applicant to publish a notice of the application in appropriate newspapers or other appropriate media circulating in the area of the proposed activity in at least two official languages, for a specific period in newspapers or appropriate media as the Regulator may specify"
Amendment of section 13 of Act 4 of 2006, as amended by section 16 of Act 28 of 2007	No changes
Amendment of section 14 of Act 4 of 2006, as amended by section 7 of Act 28 of 2007	The following clauses were deleted: i. "14(1)(g) the period within which licensed facilities must become operational and, in the case of a generation facility for own use or a generation facility intended to supply electricity to customers pursuant to direct supply agreements, the penalties that shall apply or may be imposed by the Regulator in the event that the facility does not become operational within the requisite period; and" ii. "14(y) the period within which licensed facilities must become operational and, in the case of a generation facility for own use or a generation facility intended to supply electricity to customers pursuant to direct supply agreements, the penalties that shall apply or may be imposed by the Regulator in the event that

	the facility does not become operational within the requisite period”
Amendment of section 15 of Act 4 of 2006, as amended by section 7 of Act 28 of 2007	<p>The following clause was deleted:</p> <p>“15(d) “licensee or registrant may not discriminate between customers regarding access, tariffs, prices, conditions or service except for objectively justifiable and identifiable differences regarding such matters as quantity, transmission distance, take or pay provision, length of contract, load profile, interruptible supply or other distinguishing feature approved, in writing by the Regulator. (6) Nothing in this subsection shall be construed as promoting the non-adherence to the provisions of section 9(1)(a)(ii) of the Competition Act. b(7) The Regulator may impose conditions prohibiting a trader from charging unreasonable or excessive prices; (8) For the purpose of section 7—(a) 'excessive price' means a price in excess of the maximum price determined by the Regulator, or a price that is higher than a competitive price and where such difference is unreasonable, determined by taking into account all relevant factors, which may include, but not limited to factors contemplated in section 8(3) of the Competition Act; and (b) 'unreasonable price' means a price that is discriminatory, predatory, or exclusionary in nature.”.</p>
Amendment of section 16 of Act 4 of 2006, as amended by section 16 of Act 28 of 2007	No changes
Amendment of section 17 of Act 4 of 2006, as amended by section 16 of Act 28 of 2007	<p>A new clause 17A was added as follows:</p> <p>“The Regulator may vary, suspend or remove any registration on receipt of an application by a registrant or on application by a third party or upon violation of the applicable regulatory requirements. (2) The Regulator may revoke a registration under the following circumstances – (a) on application by a registrant; or (b) the facility is no longer required; or (c) when the conditions of registration are not met. (3) A registrant must, in the circumstances contemplated in subsection (2)(a) give the Regulator at least 6 months written notice of his or her intention to cease activities, unless the Regulator determines otherwise.’</p>
Amendment of section 20 of Act 4 of 2006, as amended by section 16 of Act 28 of 2007	<p>The following new clauses were added:</p> <ul style="list-style-type: none"> i. Clause 19(A) “Subject to a licence condition imposed in terms of section 14(1)(t), a licence issued in terms of this Act empowers and obliges a licensee to exercise the powers and perform the duties set out in such licence and this Act, and no licensee may cede, transfer or assign any such power or duty to any other person without the prior written consent of the Regulator.”

	<p>ii. Clause 19 (4C)(D)(E) “Third party access to the transmission and distribution system must be based on published tariffs, applicable to all eligible customers and applied objectively and without discrimination between system users. (4D) A transmission or distribution licensee may refuse access only where it lacks the necessary capacity, with written reasons given for such refusal, and that any party requesting information on network capacity and measures that would be necessary to reinforce the network may be charged a reasonable fee reflecting the cost of providing such information. (4E) Transmission and distribution licensees shall procure the energy they use to cover energy losses and reserve capacity in their system according to transparent, non-discriminatory and market-based procedures, and that rules adopted by the Transmission System Operator for balancing the electricity system shall be objective, transparent and non-discriminatory, including rules for the charging of system users of their networks for energy imbalance.”.</p>
Amendment of section 22 - 28 of Act 4 of 2006, as amended by section 16 of Act 28 of 2007	No changes
Amendment of section 29 of Act 4 of 2006, as amended by section 16 of Act 28 of 2007	<p>Clause 29(1) was amended to read as follows:</p> <p>“The Regulator must, after consultation with the Minister, prescribe general key performance indicators in respect of the technical operational issues pertaining to reticulation systems for municipalities.”</p>
Amendment of section 30, 32 and 33 of Act 4 of 2006, as amended by section 16 of Act 28 of 2007	No changes
Amendment of section 34 of Act 4 of 2006, as amended by section 16 of Act 28 of 2007	<p>The following clauses were amended to read as follows:</p> <p>i. 34 “Additional electricity, new generation capacity and electricity infrastructure”;</p> <p>ii. 34(b) “that new electricity infrastructure is needed to ensure the optimal supply of electricity”;</p> <p>iii. 34(2)(b) “the types of energy sources or technologies from which the electricity may be generated and an indication as to the amount of electricity that may be generated from each of such sources or technologies”;</p> <p>iv. 34(2)(e) “whether the electricity thus produced, or a stated portion thereof, may only be sold to the buyer referred to in paragraph d”;</p>

	<p>v. 34(2) (f) “where applicable, the conducting of the procurement process for the acquisition of the electricity thus produced”.</p> <p>The following new clauses were added.</p> <p>i. 34(C) “Establishment of Transmission System Operator SOC Ltd and transitional measures”.</p> <p>ii. 34(C) (2) “From the date the Electricity Regulation Amendment Act, 2022 comes into effect until the date that Transmission System Operator SOC Ltd mentioned in subsection (1) is established, which period shall not last longer than five (5) years, the “National Transmission Company of South Africa SOC Limited”— (a) is for all purposes deemed to be the Transmission System Operator SOC Ltd; and (b) must perform the duties, powers and functions of the Transmission System Operator SOC Ltd. (3) The duties, powers and functions of the Transmission System Operator SOC Ltd include the following—(a) transmission planning; (b) system operation; (c) transmitter operation (d) market operator, and (e) central purchasing agency. (4) In relation to transmission planning, the Transmission System Operator SOC Ltd must—(a) model scenarios at regular intervals and provide the results of the modelling to the Minister for the purpose of developing the integrated resource plan and any other activity incidental thereto; and (b) develop the transmission expansion plan in accordance with anticipated electricity demand as per the integrated resource plan”.</p> <p>iii. 5(c)(b) (b) “conclude and enter into transaction agreements as may be necessary for the procurement of electricity, including sufficient capacity and energy supply; (c) conclude transaction agreements as may be necessary for the procurement of ancillary services, interruptible load, load shifting or other demand-side options necessary for efficient and secure operation of the system; (d) in line with the Republic’s international obligations, agreements and undertakings— (i) conclude electricity import agreements that ensure a reliable and stable supply of electricity for customers within the Republic; and (ii) conclude electricity export agreements, having regard to the interests of the Republic over the long term; (e) procure sufficient energy and capacity to be able to meet the projected load on the transmission power system; (f) procure sufficient flexible resources to support its real time function of balancing load to generation, including sufficient ramping capability (MW range and ramp rate) and automatic generation control</p>
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	<p>capability (“AGC”) to meet the projected hour to hour and minute to minute system balancing requirements; (h) enter into power sales agreements with its customers”.</p> <p>iv. 34C(3)(e), “shall— (a) be the buyer for existing independent power producer power purchase agreements as well as the new independent power producer power purchase agreements as required by Ministerial determination; (b) conclude power purchase agreements with each Eskom generator to cover capacity payments and ancillary services for remaining life of plant; (c) conclude sales agreements with Eskom distribution; (d) trade all energy purchased under the legacy independent power producer contracts into day ahead markets and act as the Balance Responsible Party on behalf of the legacy independent power producer contracts.”.</p>
Amendment of section 35 of Act 4 of 2006	No changes
Insertion of section 35A in Act 4 of 2006	<p>A new clause 35(A) was added as follows:</p> <p>“The Minister may, subject to such conditions he or she may impose, in writing delegate any power conferred on him or her under this Act, except a power to make regulations, and may assign any duty so imposed on him or her, to the Director-General or any other officer in the Department. (2) The Minister is not divested of any power or exempted from any duty delegated or assigned in terms of subsection (1). (3) The Minister may at any time—(a) amend or withdraw a delegation or assignment made in terms of subsection (1); or (b) subject to subsection (4), withdraw or amend any decision made by a person exercising a power or performing a duty delegated or assigned in terms of subsection (1). (4) A decision made by a delegatee or assignee may not be withdrawn in terms of subsection (3)(b) where it confers a right or entitlement on any third party.”.</p>
Amendment of long title of Act 4 of 2006, as amended by section 13 of Act 28 of 2007	<p>A new clause 34 was added as follows:</p> <p>“The following long title is hereby substituted for the long title of the principal Act: “To establish a national regulatory framework for the electricity supply industry; to make the National Energy Regulator of South Africa the custodian and enforcer of the national electricity regulatory framework; to provide for licences and registration as the manner in which generation, transmission, distribution, reticulation, trading and the import and export of electricity are regulated; to provide for revocation and deregistration of licences; to regulate the reticulation of electricity by municipalities; to provide for additional electricity, new generation capacity and electricity infrastructure; to provide for the compilation and implementation of the integrated</p>

	<p>resource plan; to provide for transmission planning; to provide for the establishment, duties, powers and functions of the Transmission System Operator SOC Ltd and transitional measures and to make the Transmission System Operator SOC Ltd the custodian of the national system operator, transmission network, central purchasing agency and market operator; to provide for delegation and assignment; to provide for offences and penalties and to provide for matters connected therewith.”.</p>
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6. AREAS OF DISAGREEMENT

6.1. This section outlines the areas of disagreements by social partners during the engagements.

6.1.1. **Business** disagreed with the sequencing of the Bill and the forthcoming Eskom Conversion Act Bill, stressing that the institutional arrangements in the Conversion Act Bill should precede or at least be developed in tandem with the ERA Amendment Bill.

6.1.2. Business also indicated its concern that many of the roles of the various institutions (such as the CPA) were not clarified and that as such, the envisaged end state of the ESI was not clear, which would cause unnecessary confusion and delays and reduce regulatory certainty.

The move to expand the Minister’s discretion over many areas of the ESI and the clarification of fundamental issues through future regulations was not supported. It was of the view that the design of the market should be clearly posited in the statute.

6.1.3. **Labour’s disagreed with** the unbundling of Eskom. It viewed this proposal as an attempt to privatize Eskom. This would have negative impact on its employees. Labour therefore opposed unbundling, based on the impact on Eskom jobs and Eskom’s sustainability;

After the proposed restructuring Eskom’s ability to plan generation, transmission and distribution will be impaired and electricity prices will be affected. In essence, Eskom will not serve any purpose as major roles will be transferred to the TSO. There was no clarity on: the relationship between Eskom and the newly established TSO; and what will happen to the Eskom Board of Directors as well as the measures to address conflict of interest issues.

7. CONCLUSION

7.1. This report therefore concludes considerations at Nedlac on the ERA Bill. The Report is submitted to the Portfolio Committee on Mineral Resources and Energy, the Minister

of Mineral Resources and Energy, and the Minister of Employment and Labour in terms of Section 8 of the NEDLAC Act No 35 of 1994

ANNEXURE 1

ERA BILL TASK TEAM MEMBERS - 2022

BUSINESS	COMMUNITY	GOVERNMENT	LABOUR	NEDLAC
H. Khambule	T. Radebe	G. Nhlapho	M. Parks	E. Teljeur (chairperson)
N. Mphahlele (alternate)	N. Ndlovu (alternate)	(Alternates) V. Nemaxwi L. Mazibuko J. Maraba	L. Mulaisi (alternate)	