Centre for Environmental Rights
Advancing Environmental Rights in South Africa

NATURAL JUSTICE

Att: Arico Kotze
Portfolio Committee on Energy
By Email: akotze@parliament.gov.za

13 October 2023

Dear Mr. Arico Kotze

COMMENT ON THE ELECTRICITY REGULATION AMENDMENT BILL [B23 – 2023]

1. Natural Justice ("**NJ**") and the Centre for Environmental Rights ("**CER**") make this joint submission on the above proposed Electricity Regulation Amendment Bill (hereinafter referred to as the "**ERAB**" or "**the Bill**") which was published by the Parliamentary Monitoring Group on 19 September 2023. This submission is supported by groundWork.

2. In the face of the climate emergency, our organisations demand a just transition away from coal and other fossil fuels, to a society based on clean, accessible renewable energy and social justice. More specifically, we call for a sustainable and just energy system that promotes sufficient affordable electricity and services for everyone. We therefore oppose any aspect of the ERAB which may be contrary to these ideals.

3. Our submissions are set out below under the following headings and address the following issues in turn:

GENERAL COMMENTS
- Climate change and energy access
- Lack of regulation to promote storage as a clean energy solution
- Weak provisions for SSEG and community/shared solar
- Privatisation of the grid through commercial wheeling agreements
- Concerns over the public participation process of the Bill

SPECIFIC COMMENTS
- Application of the Act
- Integrated Resource Plan
- S34 Determination and Procurement
- Tariff Determinations
- Transmission System Operator
- Confidential Information, publication and public participation

GENERAL COMMENTS

4. Overall, while the ERAB[1] contains advances such as the establishment of a Transmission System Operator and competitive electricity trading, in focusing on these areas, it falls short in several important areas including: the promotion of distributed generation (i.e., SSEG, small scale embedded generation), energy storage (including the

[1]The Bill states the following key objectives:
1. **Expansion of Electricity Generation and Infrastructure** to facilitate the addition of new electricity generation capacity and infrastructure to meet increasing energy demands and support economic growth.
2. **Establishment of a Transmission System Operator (TSO)** responsible for managing and operating the transmission system to ensure reliability and the integration of new generation capacity.
3. **Introduction of Competitive Electricity Trading** to establish an open market platform for competitive electricity trading.
4. **Promotion of Non-Discrimination** via provisions aiming to prevent discrimination against third parties and ensure access to the transmission and distribution grids.
5. **Enhanced Regulatory Oversight** granting expanded powers to the National Energy Regulator of South Africa (NERSA).

recognition of provision of ancillary services), and transparency and disclosure requirements for energy planning and procurement processes, among other elements discussed below.

5. Insofar as the Bill seeks to facilitate "competitive electricity trading,'' we are fundamentally opposed to any mechanisms which enables, or have the effect of enabling, the effective privatisation of the electricity delivery system as a whole, or portions thereof. This system is viewed as a publicly owned asset which should be deployed in service of alleviating energy poverty and protecting, as far as possible, the constitutional rights of people in South Africa. Having elements or portions of this system in private hands with commercial intentions leads to the very real risk that decisions are made, and activities are undertaken, which could exacerbate the existing threats to climate, health, socio-economic wellbeing, water security and ecological protection. These threats characterise the historical injustices and much of the existing system and the Bill should promote the advancement of a clean, safe, affordable and healthier electricity system which affords opportunities to the millions of economically and otherwise vulnerable people of South Africa, and is in alignment with a Just Transition.

6. A stronger Bill would further help advance South Africa's clean energy transition to improve the provision of reliable, clean, and affordable energy to ameliorate the country's energy crisis, and help alleviate the disproportionate social and economic burdens borne by vulnerable communities during load-shedding, as well as meet climate goals

7. The ERAB introduces regulatory streamlining but omits several key measures that would accelerate the integration of renewable energy via incentives for clean energy investment, enhancing grid integration for renewables, and promoting democratisation and decentralisation of the system. These measures would significantly strengthen the Bill's impact and better align it with South Africa's clean energy transition goals.

<u>The Climate Crisis and Energy Access</u>

8. On 28 February 2022, the Intergovernmental Panel, on Climate Change (IPCC) released the report, "Climate Change 2022, Impacts, Adaptation and Vulnerability"[2], confirming that the world faces "*unavoidable multiple climate hazards over the next two decades with global warming of 1.5°C (2.7°F)*". Exceeding 1.5°C means dire consequences for humankind and the economy, some of which will be irreversible. The Report confirms that already, human induced climate change is disrupting nature and negatively impacting billions of lives. UN Secretary General Antonio Guterres described the report as an "*atlas of human suffering and a damning indictment of failed climate leadership*." In addition, the report confirms that with our current commitments, global emissions are likely to increase 14%, over the current decade, instead of decreasing by 45% by 2030 as is necessary to keep global warming below 1.5°C.

9. It is unequivocal that urgent greenhouse gas emission (including both carbon and methane) reductions are needed globally. Since the ERAB regulates the types, kinds and operation of the electricity sector, in this context, it is vital that the ERAB is amended to reflect this current need for global decarbonisation, whilst recognising the need for energy security. This is particularly the case as the electricity sector is the major contributor to South Africa's GHG emissions. This should be reflected throughout the document, in the objectives of the Act (s2), as well as the sections pertaining to Licensing (s10); the powers of the Minister and NERSA; the Integrated Resource Plan for Electricity ("**IRP**"); section 34 Determinations; the electricity procurement process; as well as dispatchability of capacity.

10. For the ERAB to not reflect the imperatives of designing a modern electricity system with a strong clean energy transition component, especially the enablement of renewable power escalation, is a missed opportunity and will certainly need to be revisited in this regard to ensure alignment with the incoming Climate Change Act. Further, the granting of powers and discretions in the Bill should come with a clear obligation on decision-makers – the Minister, NERSA, the newly established TSO – to promote and make decisions in line with the transition away from fossil fuels and government's just transition and decarbonisation imperatives.

[2] UNIPCC 2020, "Climate Change 2022, Impacts, Adaptation and Vulnerability" https://www.ipcc.ch/2022/02/28/pr-wgii-ar6/

11. As South Africa battles load shedding, which continues to have significant impacts on poor and marginalised communities who have no ability to self-fund alternatives,[3] It is also imperative that energy access and energy stability is prioritised, not as competing goals but as part of the same outcome.

Lack of regulation to promote storage as a clean energy solution

12. The ERAB lacks certain key definitions and regulatory clarity regarding new clean energy technologies, such as energy storage, and its potential services at the utility scale and residential scale, including the provision of ancillary services. This lack of precision raises concerns about regulatory uncertainty, hindering the development and deployment of storage technologies as a clean energy solution integral to a reliable and sustainable energy system.

Weak provisions for SSEG and community/shared solar

13. The Bill gives short shrift to the concept of energy decentralisation, a significant avenue for local empowerment, rural energy access, and increased renewables deployment. Some regulatory systems like South Africa's have introduced a partial decentralisation of decision-making authority, mainly oriented to large corporate users, who coordinate and provide various electrical services to partners and other businesses affiliated with their own models. However, it is the embedded systems that represent the most significant transformation. In this model, every consumer becomes an active agent, fully integrated into the electricity system, commonly called prosumers.

14. We therefore submit that the Bill misses a valuable opportunity to provide more opportunities for municipalities to play a role in their own electricity planning and for explicit provision for municipalities to play a role in the development and revision of the IRP. The Bill must support and encourage small-scale generation by communities. It should be a priority and a goal to have residential areas feed in electricity to the grid as a way of ensuring that the benefits of an energy transition are fairly distributed, and that benefits accrue to communities, especially impoverished communities that cannot afford to install renewable energy technologies. To achieve this, effective regulatory mechanisms and government incentives are essential, allowing these communities to access and participate in the advantages of transitioning to cleaner and more cost-effective energy technologies. Energy trends are moving towards decentralisation, and municipalities should take advantage of this, and to ensure that smaller, under-resourced municipalities and communities are not left behind.

15. To effectively respond to the transformative changes mentioned in paragraph 12 above, the Bill should incorporate provisions that explicitly support the decentralisation of the electricity industry. A strong focus should be placed on empowering consumers and communities, including through policies promoting:

    15.1. Rapid development of embedded generation. Embedded generation policies enable users' ownership of generation facilities, allowing on-site users to self-supply but also to feed surplus energy directly to the distribution grid. Additionally, regarding generation limits, including clean energy generators of equal or less than 1 MW of capacity (according to best international practices), encourages broader participation and sets the foundations for community models. Moreover, embedded generation policies should incorporate technical regulations for providing agile processes for grid interconnection, ensuring integration of DG into the existing grid infrastructure.

    15.2. Net metering compensation incentives. The most efficient compensation policy to incentivise the installation of embedded generation capacity with surplus is the process of net metering. Under this compensation model, the kWh injected into the grid is valued at the full utility supply rate, so that the kWh delivered to the grid offsets the kWh provided by the electric utility. The net metering model is easy to administer, provides a cost recovery source, and boosts investment in clean and environmentally friendly small scale renewable energy.

[3] Arwen Kozak, *Shedding the Load: Power Shortages Widen Divides in South Africa*, Kleinman Cent. for Energy Pol'y (July 28, 2023): https://kleinmanenergy.upenn.edu/news-insights/shedding-the-load-power-shortages-widen-divides-in-south-africa/#:~:text=Load%20shedding%20is%20a%20series,energy%20demand%20exceeds%20energy%20production.

15.3. Community solar programs. Community solar policies allow small consumers to collectively invest in shared solar systems designed to serve the whole community, vesting the users with the right to have access to the distribution grid. These initiatives remove common barriers like limited sunlight or the absence of rooftop ownership. Participants can access solar projects located nearby, or on shared rooftops, making solar energy more accessible to consumers and reducing installation costs per watt.

16. These measures have a proven track record of increasing renewable energy adoption and promoting access to clean energy resources. By inserting provisions that would expressly recognise and provide proper legal foundations for the deployment of regulations to foster the pivotal role of consumers and communities in driving the clean energy transition, the Bill can pave the way for a more sustainable, resilient, and inclusive energy future. While the Bill does not need to develop these mechanisms in detail, it is imperative to provide express legislative foundations to ensure their deployment.

Privatisation of the Grid through commercial wheeling agreements

17. We submit that reducing energy poverty and increasing access to energy is a core component of South Africa's just transition and is encompassed in the objectives of the ERA. The current ERAB overlooks this.

18. Wheeling is being used as a clandestine form of privatisation in which commercial landlords are using the grid, a public good, in order to ensure energy security for their properties and commercial tenants with little to no social return. As the ERAB makes provision for private bilateral contracts, whereby the price of the energy is then set between the parties and not by the City, Eskom or NERSA, it is likely that large commercial and industrial customers are benefiting from reduced rates. This raises concerns about whether these private transactions are placing undue systemic costs on the electricity grid or if these customers are not contributing their fair share, which would mean that the South African public would be subsidising the reduced energy costs of large commercial and industrial customers.

19. There is emerging evidence of this in the City of Cape Town, where Growthpoint, a commercial landlord, with multiple commercial interests across the country has been wheeling electricity across the grid. This has been generated from rooftop solar and has been used to generate power for another one of Growthpoint's commercial buildings in another location. While it is commendable that commercial enterprises are looking at renewable sources of energy to lessen the demand on Eskom, they are also occupying grid space to wheel this electricity for their own commercial interest. As there is no publicly accessible information on this, it is presumed that Growthpoint is selling this at a cheaper tariff than they would pay to Eskom.[4] As explained above, this then outsources the costs to the South African public as the City is not generating any revenue from the wheeling but will have to spend money from the public purse to ensure that its infrastructure is maintained in order to make wheeling possible.[5]

20. We reiterate that the grid is a public good and are against privatisation of the grid in any form. The IPP procurement process insofar as it relates to own use, direct supply agreements and facilities for export are largely unregulated. This may be problematic since private producers producing large scale electricity production (for example as much as 6800MW for an industrial hub), may not need a determination or be subject to the electricity planning process. Clarity should be provided on the regulations to apply to these unregulated sectors. This may be disruptive to the whole IRP, and may have negative climate change implications, since large energy producers may be out of kilter with the South African energy plan, and be unregulated. Such a scenario is further exacerbated by a lack of information, an opaque planning processes, and a legal framework that fails to empower small consumers and communities, preventing them from participating in the same opportunities available to large private energy corporations.

Concerns over the Public Participation Process of this Bill

[4] Cape Town's wheeling project can power business, but what about residential? (dailymaverick.co.za)
[5] Ibid.

21. Whilst we commend Parliament for publishing the timetable for the public hearings on the ERAB, it appears as if the consultations are being fast-tracked as a 'check-box' exercise rather than to ensure meaningful participation.

22. We wish to reiterate that the Constitutional Court has held that: "Public participation acts as a safeguard to prevent the interests of the marginalised being ignored or misrepresented. The significance of public participation for the advancement of South Africa's democratic project is underscored by the colonial and apartheid governments' complete disregard of the views of the people in legislating their lives."[6]

23. Consultation and participation are important steps in our participatory democracy and law making process. The persistent issues with the parliamentary public participation process has been consistently raised by civil society organisations and social movements.

24. Despite the above, the proposed public consultation timetable and its advertisement is far from adequate. This inadequacy will have dire consequences for communities who reside outside of the geographical hearing location, despite the ERAB impacting them significantly.

SPECIFIC COMMENTS

Application of the Act

25. Through the insertion of section 2A, the Bill excludes the application of the Act to any generation capacity of 100 kW or less. While this threshold forms the basis for embedded generation, it is notably low when compared to international standards. This low threshold limits the growth of distributed energy resources and community-based renewable energy initiatives and would slow the clean energy transition. International good practice indicates that 1 MW of capacity is the common limit for embedded generation.

26. In various provisions - in particular, sections 9 (registration), 10 (application for licence) and 11 (advertising for licensing application) - the wording indicates that adherence with the ERA is deemed necessary. However, instead of compliance with the provisions of the ERA, the proposed amendment indicates that compliance with "technical codes that may be applicable from time to time" and "regulatory requirements" is necessary. For legal certainty purposes any codes and regulatory requirements should either be published simultaneously with this amendment, or condition their effectiveness upon the enactment of such codes and requirements, in order for the public to meaningfully engage with the changes accordingly.

Integrated Resource Plan

27. We note that the ERAB introduces a new definition of the IRP, however, it no longer proposes the addition of a new section to deal with its revision and development.[7] This is concerning because, without this regulated instruction in terms of the considerations to be contained in the IRP, the Minister has seemingly unfettered discretion as to its content.

28. We make a number of recommendations in respect of the proposed provisions in the Bill.

    28.1. First and foremost it is vital that the development of an IRP is informed by independent and appropriately qualified experts, including making use of credible and transparent modelling and methodologies.

    28.2. Further the IRP, as an electricity planning document, should fall within and be aligned with South Africa's Integrated Energy Plan (IEP), as provided for in the National Energy Act, 2008 (NEA) - although to date no IEP exists. We note that section 6 of the NEA has been promulgated (and is in effect as of 01 April 2024), and thus call for this overarching document to be developed prior to the development of the revised IRP.

[6] *Mogale and Others v Speaker of the National Assembly and Others (CCT 73/22) [2023] ZACC 14 (30 May 2023)* At para 3.
[7] As was proposed in the 2nd Amendment Bill of the Electricity Regulation Act, 2006 of February 2022.

28.3. We recommend that there should be legislated necessary additional considerations for the IRP, and that this be inserted into the ERA (in the IRP definition and the new section 70) and that, at a minimum, this should include:

28.3.1. the consideration of climate change obligations including the nationally determined contribution and the national greenhouse gas emission trajectory and sectoral emission target for the electricity sector;
28.3.2. the need for a just transition from fossil fuels towards a decarbonised electricity system that prioritises affordable and accessible clean electricity;
28.3.3. the health impacts and external costs (for water, greenhouse gas emissions, environmental footprint and other impacts) of various electricity technologies;
28.3.4. consideration of value for money and least-cost electricity planning incorporating full lifecycle costs;
28.3.5. consideration of the public interest;
28.3.6. unconstrained modelling results in terms of least lifecycle cost when considering energy security; and
28.3.7. Disclosure and publication of modelling outputs and input assumptions, as well as the modelling and methodologies used to develop the IRP and various scenarios;
28.3.8. declaration of, and detailed reasons for, any artificial limitations and policy adjustments imposed in the various modelling scenarios.

29. In terms of the current wording of s34, the power to compile the IRP is now proposed to rest with the Minister, after consultation with NERSA. The lack of necessary checks and balances in this process is worrying. This wide power granted to the Minister needs to have the necessary checks and balances, by specifying in this section: that the IRP should be developed concurrently "in consultation" with NERSA and the Amendment should specify what should be included in the IRP, how it should be compiled, and what methodologies and modelling should be used to develop the IRP.

<u>S34 Determinations and Procurement</u>

30. The current wording of s34(1) pertaining to New Generation Capacity, allows for s34 determinations to be made <u>in consultation with</u> NERSA, to determine the new generation capacity that is needed. The practical effect is a Ministerial determination currently requires concurrence from NERSA. This has the impact of depoliticising electricity requirements and keeping Ministerial powers in check.

30.1. However, section 34(1) is proposed to be amended as follows: ***"****(1) The Minister may,* *<u>in the event of the failure of a market, or in the event of an emergency, or for the purposes of ensuring security of energy supply in the national interest</u>,* ***[in]*** *<u>after</u> consultation with the Regulator <u>and the Minister of Finance</u>, <u>by notice in the Gazette, make a determination</u>—* ***[(a) determine]*** *that <u>additional electricity</u> or new generation capacity is needed to ensure the* ***[continued uninterrupted]*** *<u>optimal</u> supply of electricity*".

30.2. Now the Minister has final and exclusive say over a determination, whereas before, it was a decision to be made jointly by the Minister and NERSA. We strongly object to this and emphasise that decisions over new generation capacity should be overseen by NERSA as the "custodian and enforcer of the national electricity regulatory framework". We therefore suggest the word "after" be deleted, and "in consultation with" be retained.

30.3. This amendment introduces the Minister's authority to determine additional electricity generation capacity, including who can sell this electricity for the long term. This authority must be exercised transparently, with full public access to the modeling and assumptions that determine the capacity allocations to different generation technologies in the Integrated Resource Plan.

30.4. This amendment also refers to optimal supply of electricity, replacing "continued uninterrupted" with the term "optimal" without explaining what "optimal" entails. In the context of SA's energy crisis and

climate pledges, we should propose that "optimal" means the cleanest energy mix that is reliable and least-cost. The Minister should also be required to prioritise renewable energy in making determinations.

30.5. Finally, the Minister should have to publish the reasons for deviating from the Integrated Resource Plan so that the public can provide comments and should be required to consider those comments and publish a record of how the comments were considered in the final determination. There should be no exemption from public comment.

31. The current section 34(1)(e) states that the Minister may, in consultation with the NERSA require that "*new generation capacity must i) be established through a tendering procedure which is fair, equitable, transparent, competitive and cost- effective; and ii) provide for private sector participation*." The proposed amendment suggests a deletion of this section. We recommend that explicit provision for a "procedure that is fair, equitable and transparent" be retained – even if this is not exclusively a tendering procedure.

32. Any electricity procurement should be transparent, fair and equitable, and thus we propose that current section 34(1)(e) be retained. We also suggest adding a requirement to follow international good practice disclosure requirements -- and be subject to comments or legal challenges, and be aligned with the Integrated Resource Planning.

33. Again the unfettered discretionary power of the Minister is concerning. We suggest that this power rests with NERSA, and in order for the Minister to exercise any function outlined in s34 should be kept in check through concurrence from NERSA. Wherever the Minister is required to consult NERSA in this regard, it should be worded "in consultation with" and not "after consultation".

33.1. We also recommend that public participation in the s34 determination be made explicit and strengthened, since electricity determination affects all South Africans.

33.2. We also recommend that during the s34 determination process related to electricity generation and infrastructure development, that consideration must be given to South Africa's climate change obligations and requirements.

33.3. The proposed insertion of section 34(5) to (15) allows the Minister to deviate from the IRP in the instances where there is an emergency or if it is in the national interest. However, neither of these concepts are clearly defined. We suggest that subsection (6)(b) be taken out in its entirety, since it can be open to abuse. We should, as much as possible, avoid such unfettered discretion, which allows the Minister to procure expensive energy, under the guise of emergency, for 20 years, such as we have seen in the case of the controversial Karpowership procurement process recently. If this section is to be kept, the terms 'emergency' and 'national interest' should be clearly defined.

33.4. We further take issue with the addition of subsection (8) which allows the Minister to dispense with the requirement for public consultation in terms of subsection (7) when it is 'reasonable and justifiable in the circumstances.' Not only is this vague and open to abuse, but there should be no circumstances that arise that would justify dispensing with public notice and consultation.

33.5. Insofar as procurement of infrastructure is concerned, it should be made clear that necessary environmental and other authorisations are necessary.

Tariff Determinations

34. In terms of section 15 related to tariffs, when NERSA in terms of section 14 or s14A is requested to consider tariffs by the Minister, the following new considerations are required: "*s15(1)(a) The Regulator, when subjecting a licence to the conditions relating to the setting and approval of tariffs charged by licensees as contemplated in section 14(1)(d)— (f) may have regard to the need to ensure security of supply, the diversity of supply and to promote renewable energy.*"

34.1. In this regard, as indicated above, ERA needs to take into account climate change obligations and implications, and the section should be amended accordingly. Under a climate policy agenda, the promotion of renewable energy should be a much broader responsibility of the regulator, which should not only promote it, but actively foster it and contemplate it on all its responsibilities and not only tariff setting.

34.2. The "may" should be changed to a "must". Some countries like Kenya have provisions in their energy acts specifically on renewable feed-in-tariffs.[8]

Transmission System Operator

35. The Bill inserts sections 34A and 34B which deal with powers and functions of the Transmission System Operator SOC Limited, as well as the transmitter, system operator, market operator and central purchasing agency.

36. The Bill establishes that a system operator must "operate the integrated power system in a safe, secure, efficient and sustainable way". Since the term "sustainable" shows up several times throughout the Bill, it may be helpful to add a definition that includes promotion of renewable energy, minimising greenhouse gas emissions, and minimising environmental and health impacts.[9]

37. The requirement that the system operator must "operate the integrated power system in a safe, secure, efficient and sustainable way" should be construed to exclude nuclear energy.

38. The establishment of a Transmission System Operator is covered by the Bill. This operator would oversee transmission expansion, system operation, and market operations. The transparent, non-discriminatory trading platform established by the Bill will provide opportunities for increased cost-competitive renewable energy integration. However, we suggest that the Bill explicitly include clean energy penetration and system flexibility as goals of the new transmissIon operator, to further advance clean energy deployment.

39. The Bill proposes an amendment to Section 21 to introduce nondiscriminatory open access obligations, to allow third parties to use the grid's services in an equal, transparent, and efficient manner. However, international good practice would also introduce proactive policies to grant preferential grid access to renewable energy generation. These policies can include lower transmission or interconnection tariffs for renewable energy as well as preferential access when transmission capacity is constrained. This addition would promote greater deployment of renewable energy sources, which is a positive step toward decarbonisation.

Confidential Information, publication and public participation

40. The proposed amendment to section 10, recommends insertion of the following subsection (3), dealing with licence application requirements: *"(3) The applicant may request the confidential treatment of commercially sensitive information contained in an application for a licence and, subject to the concurrence of the Regulator, such information may be withheld from publicly available copies of the application."*

41. In addition, a new section is also proposed to be inserted under s33 pertaining to information gathering by NERSA, as follows: "(*4) No information obtained by the Regulator in terms of this Act which is of a non-generic, confidential, personal, commercially sensitive or proprietary nature may be made public or otherwise disclosed to any person without the consent, in writing, of the person to whom that information relates, except in terms of an order of the High Court*.".

42. We vehemently object to the insertion of s(10)(3), and section 33(4) for the following reasons:

[8] See: https://communications.bowmanslaw.com/REACTION/emsdocuments/fitPolicy.pdf

[9] For example, Morocco's Law 13-09 on renewable energy lists these components among its main aims.

42.1. Insertion of these provisions does not indicate what exactly is considered as a commercially sensitive information or confidential information or non-generic information, and does not provide any indication as to when, how or under which conditions, NERSA may determine the nature of such information. These vague provisions are open to abuse, and give wide powers to NERSA, in contravention of the Promotion of Access to Information Act, 2 of 2000 (PAIA) and Promotion of Administrative Justice Act 5 of 2000 (PAJA).

42.2. According to s3(2)(b) of PAJA, in order for an administrative action to be procedurally fair, the relevant organ of state must provide a reasonable opportunity to make representations. In this regard, it is our experience that generation licence applications advertised for public comment have been consistently, and unnecessarily heavily redacted, including information which would not ordinarily be considered as commercially sensitive (trade secrets for example). Redactions typically include information such as tariffs, rates, import and export pricing, for instance.

42.3. Currently in practice, the matter of pricing, tariffs and other information have been repeatedly redacted, without any explanation being provided for such redactions. Matters of electricity tariffs and pricing or of crucial public interest. It is estimated that average household net-adjusted disposable income per capita is USD 9 338 a year, which is considerably less than the OECD average of USD 30 490 a year. This disparity indicates that people are unable to afford basic necessities which include the cost of electricity which has increased significantly in the last five years.[10] This affects the public and this and other information should be made publicly available, and should not be considered confidential.

42.4. According to PAIA, mandatory protection of commercial information of a third party only applies to "trade secrets",[11] "*financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party*"[12]; or "*information supplied in confidence by a third party the disclosure of which could reasonably be expected to put that third party at a disadvantage in contractual or other negotiations; or to prejudice that third party in commercial competition*."[13] However, PAIA section 48 further curtails such confidential information protection if the disclosure would reveal evidence of substantial contravention of law or imminent and serious public safety or environmental risk and the public interest, and public interest clearly outweigh the harms of protecting the information.

42.5. As such, the information that is currently and in practice being redacted in NERSA licence applications does not fall within the provisions of PAIA which warrant protection. The current proposed insertion of s10(3) and s33(4) would solidify and exacerbate the current untenable situation, where the public's right to fair administrative action and to make reasonable representation are unfairly curtailed.

42.6. We therefore strongly object to the insertion of s10(3) and s33(4) of ERA in its current form. Should the insertion still go ahead, it is submitted that "commercially confidential information" and other wording related to confidentiality should be adequately and clearly defined. Further, NERSA's powers as to when and how it may agree that such information may be considered as confidential, should be clearly defined in line with PAIA and PAJA objectives.

43. In relation to provisions related to publication of licence applications, and public participation, the following amendments in section 11 are proposed:

> *"(1) When application is made for a licence the Regulator* ***[may require that]*** *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.*
> *(2) the advertisement must state –*

[10] OEDC Better Life Index: https://www.oecdbetterlifeindex.org/countries/south-africa/
[11] PAIA, s36(1)(a).
[12] PAIA, s36(1)(b).
[13] PAIA, s36(1)(c).

(a) the name of the applicant;
*(b) the **[objectives]** object of the **[applicant]** application;*
(c) the place where the application will be available for inspection by any member of the public;
(d) the period within which any objection to the issue of the licence may be lodged with the Regulator;
(e) the address of the Regulator where any objection may be lodged;
(f) that objections must be substantiated by way of an affidavit or solemn declaration; and
*(g) such other particulars as may be **[prescribed]** specified in the direction referred to in subsection (1); and*

*(3) The advertisement contemplated in section (1) must be published for such period or in such manner of issues of a newspaper as the Regulator may **[be prescribed]** specify in the direction referred to in that subsection."*

44. As can be seen from the proposed amendment above, section 11 of the current ERA provides that the applicant is under obligation to publish the application in the local newspapers. However, section 9 of the Amendment shifts the onus of the publication requirement on NERSA, by stating that NERSA must direct the applicant to make the publication. No remedy exists against NERSA if it fails to provide such a direction, or against the applicant if it does not abide by such a direction. This is problematic. Moreover, the period of publication and the required languages are inconsistent with the provisions of PAJA and PAJA regulations. This lack of specificity is currently leading to practices by NERSA and the applicant which are inconsistent with PAJA and PAIA Regulations – as described in more detail below.

45. The provisions in section 4 of PAJA pertaining to the administrative action affecting the public, and the ancillary PAJA regulations[14] require that notices for administrative action which affect the South African public (for both the public enquiry and notice and comment procedures) must be published in the Government Gazette and in the newspapers which collectively are distributed throughout the Republic. Only if the administrative action affects the rights of public members in a province, should they be published in provincial papers, and similarly, local publication is only allowed if it impacts the public in a local area. Furthermore, a minimum of 30 days[15] is required for the publication, and it must be in at least two official languages (taking into account the usage in the area concerned).[16] Moreover, the PAJA Regulations provide additional measures for the administrator such as communication through printed or electronic media, press releases, press conferences, internet radio or television broadcasts, or leaflets, to ensure that suitable notification is brought to the attention of the public.

46. Despite the matter of electricity generation and pricing generally affecting the people of South Africa as a whole, and the publication requirements under PAJA as outlined above, the current practice by the applicants and NERSA, is to: 1) only publish in local areas where the construction of a project occurs, and often not taking into account the local preferred languages; 2) provide insufficient time (often less than 30 days) before notice and comment or public hearing; and 3) provide access to a generic homepage of the applicant or NERSA, instead of providing specific links on where the application can be found. Webpages are often hard to navigate, and inaccessible to communities who are looking for access to the licence applications. In reality, more often than not, the public only becomes aware of the notification a few days before the time, and the websites posted in the notification are hard to navigate, and it is sometimes impossible to find the relevant documents. Moreover, due to the highly technical nature of the documents, a 30-day period is often insufficient to comment on the document at hand. The current practice, the current provisions of ERA and the proposed amendments are not in line with the PAJA and PAJA regulations. We therefore suggest section 11 to be amended as follows, to bring the ERA in line with PAIA and PAJA in order for meaningful engagement on the NERSA application to take place:

*"(1) When application is made for a licence the Regulator **[may require that]** must, in writing, direct the applicant to publish a notice of the application in **[appropriate]** national newspapers **[or]** and other*

[14] PAJA Regulation, 3 and 18.
[15] PAJA Regulation 3(3)(b) and Regulation 18(2)(a).
[16] PAJA Regulation 19.

appropriate media circulating in the area of the proposed activity in at least two official languages, for a minimum period of 60 days.

(2)the advertisement must be placed in the national newspaper, in at least two languages for a period of no less than 60 days and it must state –

(a) the name of the applicant;

*(b) the objectives of the **[applicant]** application;*

(c) the place where the application will be available for inspection by any member of the public, and if it is on the internet, the exact link to the document must be specified;

(d) the period within which any objection to the issue of the licence may be lodged with the Regulator, which may not be less than 60 days;

(e) the address of the Regulator where any objection may be lodged;

(f) that objections must be substantiated by way of an affidavit or solemn declaration; and

*(g) such other particulars as may be **[prescribed]** specified in the direction referred to in subsection (1);*

*(3) Failure to publish the application may result in the application being refused by the Regulator [**The advertisement contemplated in section (1) must be published for such period or in such manner of issues of a newspaper as the Regulator may [be prescribed] specify in the direction referred to in that subsection**]*

Conclusion

47. We appreciate the opportunity to comment on the proposed Bill.

Yours faithfully

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