Centre *for* Environmental Rights
Advancing Environmental Rights in South Africa

Att: Matthews Bantsijang
Director of Energy
Department of Mineral Resources and Energy
By Email: Era@dmre.gov.za

25 March 2022

Dear Mr Bantsijang

COMMENT ON THE SECOND AMENDMENT BILL OF THE ELECTRICITY REGULATION ACT 94 OF 2006 (GN1746 of 10 February 2022)

1. We address you on behalf of the Life After Coal Campaign (LAC)[1], and submit our comments in respect of the Second Amendment Bill of the Electricity Regulation Act (ERA) 94 of 2006 ("the Amendment"), which was published by the Department of Mineral Resources and Energy (DMRE) on 10 February 2022.

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

   2.1. General
   2.2. Climate Change and Energy
   2.3. Unregulated Sectors
   2.4. Licensing issues
   2.5. Application of the Act
   2.6. IRP
   2.7. S34 Determination and Procurement
   2.8. Confidential Information, publication and public participation
   2.9. Increasing and Unregulated Powers by the Minister
   2.10. Legal Review and Revocation

3. General

3.1. We understand that the current extensive amendment to the ERA, is a first step towards the restructuring of our current energy system to separate generation and transmission, and create a market system for the electricity sector.

3.2. In the face of climate emergency, as the LAC, we 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, the LAC calls for a sustainable and just energy system, which includes among others: 'rigorous energy conservation in industry and buildings, particularly through the provision of thermally efficient housing

[1] Life After Coal is a joint campaign by organisations Earthlife Africa, groundWork, and the Centre for Environmental Rights, which aims to: discourage the development of new coal-fired power stations and mines; reduce emissions from existing coal infrastructure and encourage a coal phase-out; and enable a just transition to sustainable energy systems for the people. See https://lifeaftercoal.org.za/.

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for people; sufficient, affordable electricity and services for everyone; zero fossil fuels in the electricity sector and a coal power phase-out by at least 2040, and a zero fossil fuel economy by 2050; a socially owned electricity generation system, mini-grids which can feed into the grid, or can be supplemented from the grid; as well as the supporting of the emergence of community-generated electricity. We therefore oppose any aspect of the ERA amendment which may be contrary to these ideals.

3.3. To this end, as the amendments are extensive and the practical implications for the proposed restructuring is not well understood, we believe that the ERA amendments discussion should go beyond this notice and comment process. The practical implications of the ERA amendment and restructuring of the energy system should not be held in isolation, and need to be discussed with civil society as a whole, in the context of a just transition.

3.4. In addition, we oppose any aspect of the ERA which seeks to pave the way for the privatisation of the grid and power system, and, support a socially-owned energy system with ownership at different levels: national, municipal and community.

3.5. We submit that the Amendment 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 Amendment 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 not only the private sector benefits, but also communities, especially impoverished communities that cannot afford to install renewable 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. We have already made these submissions in favour of electricity planning and regulation that supports municipalities and communities, in our 2020 comments2 on the Draft Regulations Amending the Electricity Regulations on New Generation Capacity, published on 5 May 2020 (GN 500, GG 43277), in these comments we also pointed out that the law, namely ERA and the Regulations for New Generation Capacity, 2011 as amended, do not specifically require prior approval of the Minister in order for municipalities to be able to establish their own electricity capacity.

4. Climate Change and Energy

4.1. On 28 February 2022, the Intergovernmental Panel on Climate Change (IPCC) released its latest report, "Climate Change 2022, Impacts, Adaptation and Vulnerability" [3], 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 on 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% as is necessary, to keep global warming below 1.5°C

4.2. In the era of the climate crisis the design of a modern electricity system should have a strong clean energy transition component. Yet the incentives for renewable penetration are not provided for in the ERA or the Amendment. From this angle the Amendment loses a valuable opportunity.

[2] Available at https://cer.org.za/wp-content/uploads/2020/06/Life-After-Coal-Campaigns-comments-to-the-Department-of-Mineral-Resources-and-Energy.pdf

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

4.3. The granting of powers in ERA and the Amendment 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.

4.4. To this end, UNEP's May 2021 Global Methane assessment indicates that the development of large-scale gas infrastructure is also not in line with global climate commitments. Moreover, according to the 2021 ClimateTracker report,[4] gas energy is already uncompetitive in a number of countries around the world in comparison to renewables, and resulting in stranded assets. Further, an IISD 2021 report[5] indicates that the notion of gas being necessary as a bridge fuel, is a flawed concept, and not applicable to current realities around electricity planning and security.

4.5. It is unequivocal that urgent carbon emission, as well as methane, reductions are needed globally. Since the ERA regulates the types, kinds and operation of the electricity sector, in this context, it is vital that the ERA is amended, to reflect this current need for global decarbonisation, whilst recognizing the need for energy security. 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.

4.6. For instance, in relation to the powers and duties of a licencee under section 21, the following is proposed to be inserted: "(*3A) The system operator shall not discriminate between different generators or customers in relation to dispatching, except for objectively justifiable and identifiable reasons*." Taking into account climate change, and the need to reach zero emissions in the electricity sector (where it is cheapest and easiest to decarbonise compared to other sectors), it may be necessary to discriminate against dispatching power from fossil fuels, in favour of renewables, or in accordance with cheapest form of electricity supply. Thus this section in relation to dispatchability, needs to speak to the current context in relation to climate change obligations and commitments.

5. Unregulated Sectors

5.1. According to section 1 of the Amendment, the newly inserted definition of "new generation capacity" is defined as follows: "*additional electricity capacity, including capacity derived from new generation facilities, an expansion of existing facilities or existing facilities not previously connected to the national transmission power system or an interconnected distribution power system, other than— (a) the capacity of generation facilities for own use; (b) the capacity of generation facilities that supply electricity to end users pursuant to direct supply agreements; (c) the capacity of generation facilities referred to in item 1 of Schedule II; and (d) the capacity of generation facilities for export, which have been approved by the Minister in accordance with section 13A(1)(c)*". In other words, generation for own use, direct supply agreements, facilities for export are not included.

5.2. The subsequent definitions (which are also newly inserted) of Independent Power Producer (IPP), IPP procurement process, as well as provisions related to Pre-Approval of tariff and licence conditions (s14A), Ministerial Determination (s34) only apply to "new generation facilities", it means that own use, direct supply agreements, and facilities for export are largely unregulated.

5.3. 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. This is

[4] ClimateTracker (Oct 2021) Put gas on standby

[5] IISD (2021) Step off the gas: International public finance, natural gas, and clean alternatives in the Global South

especially so if such large scale production is damaging from a climate change point of view such as gas and coal.

6. Licensing issues

6.1. Although the purpose of ERA is electricity generation, the following amendments have been proposed to now include and make provision for licensing pre-construction of the electricity generation facilities:

6.1.1. At Section 4 pertaining to powers and duties of the National Energy Regulator of South Africa (NERSA): NERSA *"(a) must— (i) consider applications for [**licenses]** licences and may issue licences for— (aa) the **construction** and operation of a generation facility; (bb) the **construction** and management of a transmission power system; (cc) system operation; (dd) the **construction** and operation of a distribution power system…"*;

6.1.2. At Section 7 pertaining to activities requiring licensing: *"(a) Nothing in this Act precludes a potential licensee from discussing the contemplated **construction** or operation of generation, transmission and distribution facilities, the import or export of electricity, trading, or any other activity relating thereto, prior to filing a licence application with the Regulator*.";

6.1.3. At section 10(2) pertaining to application for a licence, and what should be included in the application: "*a description of the applicant, including its vertical and horizontal relationships with other persons engaged in the **construction** or operation of generation facilities, the **construction**, management or operation of transmission [**and]** or distribution **[facilities]** power systems, the import or export of electricity, trading, system operation or any other prescribed activity relating thereto*;"; and

6.1.4. At section 14(1)(f) pertaining to the conditions which NERSA may make in any licence: *"**[compliance with any regulation, rule or code made under this Act]** allowing the licensee to sub-contract the performance of the licensed functions, including allowing for the licensee to sub-contract the **construction**, maintenance and operation of the generation facility, transmission power system or distribution power system*;"

6.2. Whilst NERSA may have the power to issue licences for construction, it should be made clear and unequivocal in the ERA that such licences do not exempt the applicant from also applying for necessary licences under National Environmental Management Act 107 of 1998 (NEMA), National Water Act 36 of 1998 (NWA), National Environmental Management: Quality Act, 39 0f 2004 (AQA), and any other environmental or other authorisations which may be required prior to the granting of a licence by NERSA for construction and operation of such facilities. There should be no confusion to the applicants that NERSA licences are not substitutes for the principal licences governed by relevant environmental laws. This is particularly so in relation to the most recent decisions by NERSA on the Karpowership generation licence applications as an example. NERSA's decision seemed to indicate that obtaining relevant licences under the various environmental laws is not a prerequisite for issuing generation licences.

6.3. In the most recent decision taken in respect of the Karpowership generation licence applications, NERSA took the view that the meaning of s10(2)(e) of the ERA[6], is that the applicant must provide plans to comply with the law only, and that this means that even if a specific authorisation is refused, the ability to comply with it will be sufficient to grant a generation licence. The justification for this reasoning was that there are legal mechanisms in the ERA to revoke a licence that has already been granted in circumstances where, for example, the requisite environmental approvals do not materialise. This is despite the fact

[6] The application must include "*the plans and the ability of the applicant to comply with applicable labour, health safety and environmental legislation, subordinate legislation and such other requirements as may be applicable*"

that according to NERSA's own website in the Frequently Asked Question (FAQ)[7], NERSA interprets s10(2)(e) as requiring a valid environmental authorisation being issued. This is also despite the fact that the current revocation measures are only available to NERSA by approaching the High Court, which can be lengthy and expensive process, taking over two years. there would be little sense in granting a generation licence in circumstances where other necessary approvals (which are not a foregone conclusions) have not yet been granted.

6.4. Given that the current interpretation of section 10 of the ERA has given rise to an inconsistent interpretive approach and decision-making by NERSA, we suggest that the section be tightened in line with NERSA's own FAQ, which provides a clearer meaning to the requirement in terms of section 10.

6.5. In the circumstances, we suggest that section 10(2)(b) be strengthened and amended in line with NERSA's own FAQ as follows:

6.5.1.1. "10(2)(b) such documentary evidence of the administrative, financial and technical abilities of the applicant as may be required by the Regulator, <u>including:</u>

6.5.1.1.1. <u>(i) technical information of the project such as the technology used, technical feasibility studies, connection to the grid arrangements, single line diagrams of the network connection as well as single diagrams of the general station, fuel to be used and the concluded fuel supply/wheeling agreements where applicable;</u>

6.5.1.1.2. <u>(ii) Financial formation including financial model showing the project financial feasibility' all assumption made in coming up with the financial model; and any other financial information required including the capital cost, operational and fixed costs, internal rate of return, project financing (equity and debt) cost of debt and debt period</u>

6.5.1.1.3. <u>(iii) where applicable, a *signed Power purchase Agreement (PPA) showing the agreed tariffs; and*</u>

6.5.1.1.4. <u>Economic information including benefits of the project to the local community and South Africa as a whole; jobs created during construction and operation, the jobs skill level, an indication of whether the jobs are direct or indirect, and specification of whether the jobs are quantifiable."</u>

6.6. We also suggest that section 10(2)(e) be amended in line with NERSA's own FAQ as follows:

6.6.1.1. "S10(2)(e) *the plans and the ability of the applicant to comply with applicable labour, health safety and environmental legislation, subordinate legislation and such other requirements as may be applicable, <u>which include, among others Record of Decisions (RoD) for Environmental Authorisation and any other permits received from any authority which has jurisdiction over the operation of the construction and operation of the facility"</u>*

6.7. Other issues related to the section 10 of the ERA proposed amendments related to licence applications are as follows:

6.7.1. Section 10(1)(a) is proposed to be substituted as follows: *"(1)(a) A person who has to hold a licence in terms of section **[7]**4 must apply to the Regulator for such a licence in the form and in accordance with the **[prescribed]** procedure <u>prescribed by rule</u>."* A person who has to hold a licence is governed by section 7 and not section 4, since section 4 deals with powers and duties of NERSA. Thus the current wording related to section 7, is correct, and reference to section 4 should be removed.

6.7.2. Section 10(2)(d) which deals with what should be included in the licence application, is proposed to be amended as follows: *"(d) a general description of the type of customer to be served and the tariff **[and price]** policies to be applied*;". It is unclear why only the price policies are excluded

[7] https://www.nersa.org.za/wp-content/uploads/2021/03/Generation-Licensing-and-registration-frequently-asked-questions.pdf

however, insofar as there is a distinction between tariff and pricing, both should be explained in the application.

6.7.3. Section 10(2)(g) currently requires that the applicant provide "*evidence of compliance with any integrated resource plan applicable at that point in time or provide reasons for any deviation for the approval of the Minister*." However, the Amendment section 9(e) proposes a deletion of this section. We propose that this section be maintained, since the Integrated Resource Plan (IRP) is an important guidance document, which should inform sound electricity planning in alignment with credible modelling as well as Constitutional obligations. Therefore, in order to prevent oversubscription of unnecessary amounts or types of electricity capacity, the applicant should still show compliance (or deviation) with the government plan.

6.8. Section 13A is inserted in the ERA after "section 1", however, there are no specifics as to what section 13A would entail. The reference to "section 1" is presumably meant to be section 13.

6.9. The current section 14 relates to the conditions of licences, which may be imposed by NERSA, and the following amendments apply:

6.9.1. The current section 14(1)(e) allows for NERSA to make any licence subject to conditions relating to the methodology to be used in the determination of rates and tariffs which must be imposed by the licencees. Further, section 14(1)(g) allows NERSA to make conditions in relation to regulation of the revenues of licencees. However, both these sections are proposed to be deleted, and this power now rests with the Minister under newly inserted section 14A. It is submitted that these sections be kept, since it is NERSA as the energy expert, and not the Minister, who should have the power to determine the methodologies to be used in the determination of tariffs, and allowed to make conditions related to revenues, for the purposes of checks and balances.

6.9.2. Section 14(1)(t) is proposed to be amended as follows: "*(t)* **[compliance with any regulation, rule or code made under this Act]** <u>allowing the licensee to sub-contract the performance of the licensed functions, including allowing for the licensee to sub-contract the construction, maintenance and operation of the generation facility, transmission power system or distribution power system;</u>" We propose that this section related to subcontracting of licences be deleted, and subcontracting not be permitted, since it is difficult to regulate and enforce the subcontracted licences in respect of all these activities, especially in the event that sub-contractors do not complete or perform these duties imposed.

6.9.3. Section 14(1)(y) is proposed to be substituted as follows: "*(y)* <u>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</u>;" It is submitted that these proposed penalties should apply to all new generation capacities (and not only limited to own use, or direct supply agreements), to ensure the timeous and effect built out of generation facilities.

7. Application of the Act

7.1. 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 compliance with the prescribed Rule (instead of ERA) is necessary. As such, the wording "prescribed by rule", is now inserted in s9(2), s9(3)(b), s10(1)(a) and (b), and s11(1).

7.2. For legal certainty purposes any rules made by NERSA should be published simultaneously to this amendment, in order for the public to meaningfully engage with the changes accordingly. These of course do not apply to the exclusion of the ERA and this should be clarified.

7.3. Further, Section 9 deals with those who are exempt from obtaining a generation licence, trading, export import or system operation, generation or tradition or distribution of electricity, who are nonetheless required to register such facilities with NERSA. However, in doing so, the current amendment proposes to delete section 4(a) which states that NERSA "*may make registration subject to (a) adherence to the provision of this Act*". The Registration should still be subject to the ERA and therefore the current wording of Section 9(4)(a) should be retained.

8. IRP

8.1. We note that the Amendment introduces a new definition of the IRP and seeks to set out the requirements for the revision and development of the IRP – this additional legal certainty in relation to the IRP is commended. We do, however, make a number of recommendations in respect of the proposed provisions in the Amendment.

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

8.3. 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. To this end, we call on government to promulgate section 6 of the NEA, which makes provision for an IEP, as a crucial and necessary component of South Africa's energy planning.

8.4. In terms of the IRP the following new section is proposed to be inserted:

"*Integrated resource plan [32A] 70.*

(1) The Minister shall, after consultation with the Regulator—

(a) compile the integrated resource plan; and

(b) revise the integrated resource plan at least every three years.

(2) The integrated resource plan shall be developed and revised in accordance with the following process:

(a) The Minister shall, with the assistance of the system operator, engage in electricity supply and demand scenario planning and prepare a document setting out various scenarios in respect of electricity supply and demand and the estimated costs of those scenarios, which the Minister shall publish for public comment in the Gazette;

(b) after considering any comments received in terms of paragraph (a), the Minister shall, with the assistance of the system operator, prepare a draft integrated resource plan, which shall be published for public comment in the Gazette; and

(c) after considering comments received in terms of paragraph (b), the Minister shall finalise the integrated resource plan and publish the plan in the Gazette.

(3) In preparing the integrated resource plan, the Minister must, as far as possible, ensure alignment with the transmission development plan and have regard to all relevant considerations, including—

(a) the location and condition of the current transmission and distribution power systems;

(b) the capacity of those systems;

(c) the extent to which the various electricity supply and demand scenarios will require the development; and

(d) strengthening or upgrading of those systems and the cost of such development, strengthening or upgrading.

(4) The Regulator and any licensee shall timeously provide such assistance and information as the system operator or the Minister may require for the purpose of compiling the integrated resource plan."

8.5. 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.

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

8.6.1. 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;

8.6.2. The need for a just transition from fossil fuels towards a decarbonised electricity system that prioritises affordable and accessible clean electricity;

8.6.3. The health impacts and external costs (for water and other impacts) of various electricity technologies;

8.6.4. consideration of value for money and least-cost electricity planning incorporating full lifecycle costs;

8.6.5. consideration of the public interest;

8.6.6. unconstrained modelling results in terms of least lifecycle cost when considering energy security; and

8.6.7. Disclosure and publication of modelling outputs and input assumptions, as well as the modelling and methodologies used to develop the IRP and various scenarios;

8.6.8. declaration of, and detailed reasons for, any artificial limitations and policy adjustments imposed in the various modelling scenarios.

9. S34 Determinations and Procurement

9.1. 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.

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

9.3. 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 reside with 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.

9.4. The current section 34(1)(e) states that the Minister may, <u>in consultation</u> 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. Any electricity procurement should be transparent, fair and equitable, and thus we propose that current section 34(1)(e) be retained.

9.5. The proposed amendment suggests an insertion of s34(2) as follows:

"(2) A determination referred to in subsection (1) must include provisions dealing with—
(a) the extent of the new generation capacity required to be established, or electricity required to be produced, pursuant to such determination;
(b) ***[determine]*** *the types of energy sources or technologies from which the electricity* ***[must]*** *may be generated****[,]*** *and an indication as to the* ***[percentages]*** *amount of electricity that* ***[must]*** *may be generated from each of such sources or technologies;*
(bA) whether the generator or generators shall be independent power producers or an organ of state;
(bB) whether the electricity thus produced, or a stated portion thereof, must be purchased by a person designated in the determination as the buyer of such electricity;
(c) ***[determine that]*** *whether the electricity thus produced, or a stated portion thereof, may only be sold to* ***[the persons or in the manner set out in such notice]*** *the buyer referred to in paragraph (bB);*
(d) undertake such management activities and enter into such contracts as may be necessary or expedient for the effective establishment and operation of a public or privately owned electricity generation business; (e) where applicable, the identity of the person responsible for preparing and conducting the procurement process for the acquisition of the electricity thus produced, which may be a person different from the buyer of such electricity; (f) where applicable, the procurement process to be conducted for acquisition of the electricity thus produced, which may include— (i) a detailed stipulation of the procurement process in the determination; (ii) the stipulation in the determination of general principles governing the procurement process with which the procurement process determined by the person designated as the procurer in accordance with paragraph (e) must comply; or (iii) a provision stipulating that the person designated as the procurer in accordance with paragraph (e) will be responsible for determining the procurement process ; and (g) the extent to which the new generation capacity contemplated in paragraph (a) may be established by independent power producers and the electricity thus produced supplied to customers pursuant to direct supply agreements."

…

"(3) The Minister may, by notice in the Gazette, after consultation with the Regulator and the Minister of Finance, make a determination that new electricity infrastructure is needed to ensure the optimal supply of electricity.
(4) A determination referred to in subsection (3) may include provisions dealing with— (a) the nature, type and extent of the required electricity infrastructure; (b) whether or not the person who will construct, manage, maintain or operate the required electricity infrastructure (or engage in any combination of these activities), will be an organ of state; (c) whether the person who constructs, manages, maintains or operates the required electricity infrastructure will own that infrastructure; (d) whether the electricity infrastructure, or the electricity supplied by means of such infrastructure, will be purchased or used by a person designated in the determination as the buyer or user; (e) whether the electricity infrastructure, or electricity supplied by means of the infrastructure, may only be sold to or used by the buyer or user referred to in paragraph (d); (f) where applicable, the identity of the person responsible for preparing and conducting the procurement process for the establishment of the required electricity infrastructure, which may be a person different to the buyer or user referred to in paragraph (d); and (g) the matters contemplated in paragraphs (i) to (iii) of subsection (2)(f).
(5) A determination referred to in subsection (1) or (3) may include provisions dealing with any ancillary matter that is necessary or desirable to facilitate the procurement of electricity, new generation capacity or electricity infrastructure, as the case may be.
(6) A determination contemplated in subsection (1) may be combined with a determination contemplated in subsection (3).
(7) In making a determination in terms of this section, the Minister— (a) must have regard to the content of the integrated resource plan or the transmission development plan, as the case may be; and (b) deviate from the integrated resource plan or transmission development plan in an emergency or if it is necessary to do so in the national interest.

(8) Prior to deviating from the integrated resource plan or transmission development plan as envisaged in subsection (7)(b), the Minister must publish a notice in the Gazette, inviting the public to comment on the proposed deviation.
(9) If it is reasonable and justifiable in the circumstances, the Minister may depart from the provisions of subsection (8)
[(2)](10) *The Minister has such powers as may be necessary or incidental to* ***[any purpose set out in subsection (1)]*** *giving effect to the determination referred to in subsection (1) or (3), including the power to— (a) undertake such management and development activities, including entering into contracts, as may be necessary to* ***[organise tenders and to facilitate the tendering process]*** *prepare and conduct procurement processes for the development, construction, commissioning and operation of* ***[such new]*** *electricity generation* ***[capacity]*** *facilities and electricity infrastructure; (b) purchase, hire or let anything or acquire or grant any right or incur obligations for or on behalf of the State or prospective* ***[tenderers]*** *participant in any relevant procurement process for the purpose of transferring such thing or right to a successful* ***[tenderer]*** *participant;";*
(10): (e) subject to the Public Finance Management Act, 1999 (Act 1 of 1999), issue any guarantee, indemnity or security or enter into any other transaction that binds the State to any future financial commitment that is necessary or expedient for the development, construction, commissioning or effective operation of ***[a]*** *public or privately owned generation facilities or electricity* ***[generation business]*** *infrastructure.";*
[(3)]*(11) The Regulator, in* ***[issuing a generation licence–]*** *exercising its powers and performing its functions under this Act* ***[(a)]*** *is bound by any determination made by the Minister in terms of subsection (1) or (3)*
[(4)]*(12) In exercising the powers under this section the Minister is not bound by the State Tender Board Act, 1968 (Act No. 86 of 1968)."; and (m) by the insertion after subsection (12) of the following subsections:*
(13) For purposes of this section, "electricity infrastructure" means transmission facilities (and distribution facilities) or any other electricity infrastructure designated by the Minister by notice in the Gazette for this purpose, excluding electricity generation facilities.
(14) A determination contemplated in this section may establish an energy infrastructure project which includes not only new generation capacity and new electricity infrastructure but also other interconnected or related infrastructure, installations, buildings, structures, facilities, systems, services or processes, including gas infrastructure, in which case, the provisions of subsections (4) and (10) shall, with the necessary changes, apply to such infrastructure, installations, buildings, structures, facilities, systems, services or processes.
(15) The Regulator must, in respect of an energy infrastructure project contemplated in subsection (14), exercise its powers and perform its functions under this Act and any other statute in a coordinated and integrated manner.
(16) The Minister may, in writing, direct the Regulator to conclude a memorandum of understanding with any other regulator in order to facilitate the coordinated establishment of an energy infrastructure project contemplated in subsection (14).".

9.6. Again the unfettered discretionary power of the Minister is concerning. We suggest that this power rest 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".

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

9.8. 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.

9.9. The proposed insertion of section 34(7)(b) 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 this section 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.

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

10. Confidential Information, publication and public participation

10.1. The proposed amendment to section 9, recommends insertion of the following subsection (3) of section (10), dealing with licence application requirements: *"(3) The applicant may request confidential treatment of commercially sensitive information contained in an application and, subject to the concurrence of the Regulator, such information may be withheld from publicly available copies of the application."*

10.2. 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 of the person to whom that information relates, except in terms of an order of the High Court*.".

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

10.3.1. Insertion of this provision 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).

10.3.2. 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.

10.3.3. 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. This affect the public and this and other information should be made publicly available, and should not be considered confidential.

10.3.4. According to PAIA, mandatory protection of commercial information of a third party only applies to "trade secrets",[8] "*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*"[9]; 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*

[8] PAIA, s36(1)(a)
[9] PAIA, s36(1)(b)

in contractual or other negotiations; or to prejudice that third party in commercial competition." [10] 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.

10.3.5. 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.

10.3.6. 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.

10.4. 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 –
(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."*

10.5. 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.

[10] PAIA, s36(1)(c)

10.6. The provisions in section 4 of PAJA pertaining to the administrative action affecting the public, and the ancillary PAJA regulations[11] 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[12] is required for the publication, and it must be in at least two official languages (taking into account the usage in the area concerned).[13] Moreover, the PAJA Regulations provide additional measures for the administrator such as communication through printed or electronic media, press releases, press conference, internet radio or television broadcasts, or leaflets, to ensure that suitable notification is brought to the attention of the public.

10.7. 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 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**]*

[11] sPAJA Regulation, 3 and 18.
[12] PAJA Regulation 3(3)(b) and Regulation 18(2)(a).
[13] PAJA Regulation 19

11. Increasing and Unregulated Powers by the Minister

11.1. The new section 14A is proposed to be inserted and relates to pre-approval of tariffs and licence conditions.

> **"14A.** (*1) The Minister may, either prior to or after the relevant section 34 determination and in order to facilitate the procurement of electricity or new generation capacity through an IPP procurement process, in writing request the Regulator, prior to the commencement of such process and within a reasonable time period specified by the Minister in the request, to—*
>
> *(a) determine licence conditions that shall apply to the successful participant or participants in that IPP procurement process; and*
>
> *(b) determine a tariff, a maximum tariff or a guideline tariff for a particular generation technology, that shall apply in respect of electricity generated by means of that technology pursuant to that IPP procurement process.*
>
> *(2) The determination referred to in subsection (1)(b) may include conditions to which the tariff, maximum tariff or guideline tariff is subject. (3) Subject to conditions determined in accordance with subsection (2), if the Regulator has, in terms of subsection (1)(b), determined:*
>
> *(a) a tariff, the Regulator shall impose that tariff as a condition of any generation licence granted in respect of the relevant technology pursuant to the relevant IPP procurement process;*
>
> *(b) a maximum tariff, the Regulator shall, in granting a generation licence in respect of the relevant technology pursuant to the relevant IPP procurement process, approve any tariff agreed between the independent power producer and the buyer that does not exceed that maximum tariff; and*
>
> *(c) a guideline tariff, the Regulator shall have regard to the guideline tariff in setting or approving the tariffs in a generation licence granted in respect of the relevant technology pursuant to the relevant IPP procurement process.*
>
> *(4) The provisions of subsections (1), (2) and (3) apply, with the necessary changes, to the procurement of electricity infrastructure through an electricity infrastructure procurement process.*".

11.2. According to the new section above, the Minister now has wide powers to determine licence conditions in the IPP procurement process, and determine tariffs for electricity generation prior to or after the s34 Determination. In other words, the Minister can determine the tariffs prior to a PPA and bid, as well as conditions related thereto, and without methodology for this being shown. Such a wide power may be problematic, since this may lead to uncompetitive procurement processes, which lack transparency. Further, as with the most recent Karpowership applications, the condition and the tariff requirements which is in the Minister's discretion to prescribe, may lead to favouring of procurement of the type or energy to be procured, which may in effect be more expensive. We therefore submit that this section should be deleted.

11.3. In addition to the above, 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, in setting and approving tariffs as contemplated in sections 14 or 14A— (f) may have regard to the need to ensure security of supply and diversity of supply and to promote renewable energy.*" 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.

11.4. The newly inserted section 32 proposes the following:

> ***"33. The following section is hereby inserted in the principal Act after section 32:*** *(1) The Minister may make regulations, notices and schedules regarding— (a) any matter relating to generation, distribution*

or transmission that is necessary to ensure security of energy; and (b) any ancillary or incidental administrative or procedural matter that it is necessary to prescribe in order to ensure security of energy."
As indicated above, whilst energy security is important, this needs to speak to South Africa's climate change commitments and obligations, as well as plans for a just transition away from fossil fuels and transition of South Africa's electricity sector. As such, this wide power should not only hinge on energy security alone but should talk to South Africa's climate change commitments and obligations.

11.5. Please also see the comments above related to s34 determinations.

12. Legal Review and Revocation

12.1. Currently, section 17 of ERA only allows for the revocation of a licence on the application of a licencee, in instances where the facility is no longer required, economically viable, or where licence conditions are not met. We suggest that section 17 be amended to include the application for revocation by stakeholders in the public where there is material breach with the licence condition and circumstances where climate considerations and greenhouse gas emission constraints – for example sectoral emission targets – make it infeasible for particular facilities to continue operating.

12.2. Further, in terms of current section 19 in order to proceed with a revocation of licence, only NERSA may apply for a revocation and may only do so under application to the High Court. In the recent Karpowership applications, NERSA granted licences even when environmental authorisation for Karpowership had not been granted. If the environmental authorisation continues to be refused, NERSA would have to apply to the high court to have these revoked. It is submitted that such procedures are expensive, and take a long time to reach a resolution. We suggest that this section be amended to provide for internal revocation procedure, and power be granted to NERSA to revoke the licences.

Yours faithfully
CENTRE FOR ENVIRONMENTAL RIGHTS

per: 

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