

REPUBLIC OF SOUTH AFRICA

ELECTRICITY REGULATION AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 76 Bill); explanatory summary
of Bill and prior notice of its introduction published in Government Gazette No. 48441 of
19 April 2023)
(The English text is the official text of the Bill)*

(MINISTER OF MINERAL RESOURCES AND ENERGY)

[B 23—2023]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Electricity Regulation Act, 2006, so as to delete, amend, and insert certain definitions; to provide for the application of the Act; to provide for the National Energy Regulator to consider applications for licences and the issue of licences; to provide for revocation and deregistration of licences; to provide for additional electricity, new generation capacity and electricity infrastructure; to provide for the establishment, duties, powers and functions of the Transmission System Operator SOC Ltd and transitional measures; to provide for an open market platform that allows for competitive electricity trading; to assign the duties, powers and functions of the Transmission System Operator SOC Ltd to the National Transmission Company South Africa SOC Ltd; to provide for delegation and assignment; to provide for offences and penalties; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 4 of 2006, as amended by section 1 of Act 28 of 2007

1. Section 1 of the Electricity Regulation Act, 2006 (hereinafter referred to as the “principal Act”), is hereby amended—

(a) by the insertion before the definition of “chief executive officer” of the following definitions:

“**‘ancillary services’** means those services necessary to support the continuous and secure operation of an electric power system and necessary to maintain reliable operations of the national transmission power system and interconnected distribution power systems, including, but not limited to, those services necessary for voltage and reactive power control, automatic generation control, frequency control and black start capabilities;

‘balance responsible’ means taking physical and financial responsibility for maintaining real-time balancing at specified metering points by submitting forecasts and participating in the energy market;

‘balance responsible party’ means a licensed or registered generator, distributor or trader that is responsible for balance responsible activities, and which is accountable through the balancing mechanism for deviations;

‘balancing mechanism’ means the platform for the settlement of electrical energy operating in real-time with the system operator issuing dispatch instructions to dispatchable generating units and demand side

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- resources to ensure that supply and demand on the transmission and distribution system are in balance in real-time;
- ‘central purchasing agency’** means an entity assigned to fulfil the role of the wholesale buyer to maintain system integrity during the transition to a competitive electricity market;”;
- (b) by the deletion of the definition of “chief executive officer”;
- (c) by the insertion after the definition of “customer” of the following definitions:
- “**‘Department’** means the department responsible for mineral resources and energy;
- ‘Director-General’** means the Director-General of the Department;
- ‘direct supply agreement’** means an agreement for the sale of electricity between a generation licensee or trader, acting in its capacity as such, and a customer, whether such electricity is supplied directly or through a transmission power system or a distribution power system, provided that the customer is not a generator, transmitter, distributor, system operator or trader;
- ‘dispatching’** means the scheduling, coordination and management of the flow of electricity produced by generation facilities into and out of a transmission power system or an interconnected distribution power system, including scheduling, coordinating and managing the start-up and shut-down of those facilities, and ‘dispatch’ has a corresponding meaning;”;
- (d) by the insertion after the definition of “distribution” of the following definition:
- “**‘distribution licensee’** means a holder of a licence to operate a distribution facility;”;
- (e) by the substitution for the definition of “distribution power system” of the following definition:
- “**‘distribution power system’** means a **[power system that]** network for the conveyance of electricity, which operates at or below a nominal voltage of 132kV;”;
- (f) by the substitution for the definition of “end user” of the following definition:
- “**‘end user’** means a user of electricity **[or a service relating to the supply of]** who consumes such electricity;”;
- (g) by the insertion after the definition of “generation” of the following definition:
- “**‘generation licensee’** means a holder of a licence to operate a generation facility in terms of section 4(a)(i)(aa);”;
- (h) by the insertion after the definition of “generator” of the following definition:
- “**‘independent power producer’** means any person in which an organ of state does not hold a direct or indirect controlling interest, which undertakes or intends to undertake the development of new generation capacity or the generation of electricity pursuant to a section 34 determination;”;
- (i) by the substitution for the definition of “integrated resource plan” of the following definition:
- “**‘integrated resource plan’** means **[a resource]** an indicative, forward-looking plan **[established by the national sphere of government to give effect to]** for electricity generation, which reflects national policy on electricity planning, which plan specifies the types of energy sources and technologies from which electricity may be generated and indicates the amount of electricity that is to be generated from each of such sources or technologies;”;
- (j) by the insertion after the definition of “integrated resource plan” of the following definitions:
- “**‘interconnected distribution power system’** means a distribution power network that is interconnected to a transmission power system;
- ‘legacy independent power producer contract’** means a power purchase agreement that has been concluded prior to the launch of the competitive electricity market;
- ‘licence’** means a licence issued under this Act;

- ‘market operator’** means a person licensed to operate a trading platform for power market participants and who takes no ownership of the energy traded; **‘market transaction’** means a transaction that occurs in a competitive environment, either on a competitive trading platform or bilaterally;”;
- (k) by the substitution for the definition of “Minister” of the following definition: 5
 “**‘Minister’** means the Minister of [**Minerals**] Mineral Resources and Energy;”;
- (l) by the insertion after the definition of “Minister” of the following definition: 10
 “**‘multi-market’** means a hybrid market model accommodating market transactions, physical bilateral transactions and regulated transactions;”;
- (m) by the insertion after the definition of “National Energy Regulator Act” of the following definitions: 15
 “**‘national transmission power system’** means the interconnected transmission power system used for the transmission of electricity produced by generation facilities for purposes of the supply of electricity to customers across the Republic;
‘new generation capacity’ means additional electricity capacity, including capacity derived from new generation facilities, the expansion of existing facilities, or existing facilities not previously connected to the national transmission power system, or an interconnected distribution power system, other than— 20
 (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 2 to the Act; and 25
 (d) the capacity of generation facilities for export, which have been approved by the Minister;”;
- (n) by the insertion after the definition of “person” of the following definitions: 30
 “**‘physical bilateral transaction’** means a transaction entered into by generators, customers and traders for energy production which involves the conclusion of a power purchase agreement through a central purchasing agency to meet demand and supply as required by the system operator; 35
‘power market participants’ means participants that meet the qualifying criteria set, and choose to participate, in the market platform established by the market operator;
‘power purchase agreement’ means an agreement between a generator and a buyer, for the sale and purchase of electricity or electricity generation capacity;” 40
- (o) by the insertion after the definition of “prescribe” of the following definitions: 45
 “**‘registrant’** means a person registered with the Regulator in terms of section 9;
‘regulated transaction’ means a transaction that requires regulatory approval or oversight, specifically where the exercise of market power is likely or evident (for example, network charges);”;
- (p) by the deletion of the definition of “price”;
- (q) by the substitution for the definition of “supply” of the following definition: 50
 “**‘supply’** means trading, system operation, export and import and the generation, transmission or distribution of electricity;”;
- (r) by the insertion after the definition of “supply” of the following definitions: 55
 “**‘system operation’** means the operation of the national transmission power system in real time, including dispatching, scheduling of transmission and ancillary services, generation outage coordination, transmission congestion management and coordination, and such other activities as may be required for the reliable and efficient operation of the national transmission power system;
‘system operator’ means the person who is responsible for system operation;”;

- (s) by the substitution for the definition of “tariff” of the following definition:
 “**“tariff”** means a charge [**for electricity**] to a customer in respect of a licensed activity or registered activity, other than a surcharge, tax, levy or duty imposed by a municipality in terms of section 229 of the Constitution of the Republic of South Africa, 1996;” 5
- (t) by the insertion after the definition of “tariff” of the following definition:
 “**“trader”** means a person who trades in electricity;”;
- (u) by the substitution for the definition of “trading” of the following definition:
 “**“trading”** means the wholesale or retail buying [**or**] and selling of electricity [**as a commercial activity**], and ‘trade’ has a corresponding meaning;” 10
- (v) by the insertion after the definition of “trading” of the following definition:
 “**“trading platform”** means a platform where power market participants conduct trade;”;
- (w) by the substitution for the definition of “transmission” of the following definition:
 “**“transmission”** means the conveyance of electricity through a transmission power system, excluding system operation and trading, and ‘transmit’ and ‘transmitting’ have corresponding meanings;” 15
- (x) by the substitution for the definition of “transmission power system” of the following definition:
 “**“transmission power system”** means a [**power system that**] network for the conveyance of electricity, which operates above a nominal voltage of 132kV;” 20
- (y) by the insertion after the definition of “transmission power system” of the following definition:
 “**“Transmission System Operator SOC Ltd”** means a juristic person established in terms of section 34A(1);” 25
- (z) by the substitution for the definition of “transmitter” and “this Act” of the following definitions, respectively:
 “**“transmitter”** means a person who [**transmits electricity**] manages and maintains a transmission power system; [**and**]
 ‘**this Act**’ includes any regulation or rule made or issued in terms thereof[.]; and” 30
- (zA) by the insertion after the definition of “this Act” of the following definitions:
 “**“vertically integrated licensee”** means a person who holds one or more of the licences listed in section 4(a)(i), but excludes a person who only holds licences in terms of section 4(a)(i)(bb) and (cc); and
 ‘**vesting contract**’ means a contract between the National Transmission Company South Africa SOC Ltd and an Eskom generator or a distribution licensee, for the sale of a specified amount of electricity at a specified price as a mechanism to facilitate the transition to a competitive market.” 35

Amendment of section 2 of Act 4 of 2006

2. Section 2 of the principal Act is hereby amended by the substitution for paragraph (a) of the following paragraph: 45

“(a) achieve the efficient, effective, sustainable and orderly development and operation of electricity supply infrastructure in [**South Africa**] the Republic;”.

Insertion of section 2A in Act 4 of 2006

3. The following section is hereby inserted in the principal Act after section 2: 50

“Application of Act”

2A. (1) This Act is applicable to the generation, transmission, distribution, reticulation, system operation, trading, and import and export, of electricity activities, and to persons undertaking such activities. 55

- (2) The Act is not applicable to the operation of generation facilities with or without battery storage—
- (a) for the sole purpose of providing standby or back-up electricity;
 - (b) where the facility, irrespective of capacity (megawatts), does not have a point of connection to the facility; or
 - (c) with a capacity of not more than 100 kilowatts, which complies with the code, has a point of connection and is subject to the distributor's prescribed conditions relating to the continued use of the point of connection.
- (3) For the purposes of subsection (2), the Regulator shall prescribe the manner in which the distributor shall keep a register of each facility.”.

Substitution of section 3 of Act 4 of 2006

4. The following section is hereby substituted for section 3 of the principal Act:

“Regulator

3. (1) The National Energy Regulator established by section 3 of the National Energy Regulator Act is the custodian and enforcer of the regulatory framework provided for in this Act.

(2) The Regulator has regulatory authority over persons undertaking activities, and activities, which are subject to this Act and has the powers to issue, amend, withdraw, suspend and revoke licences and determine the registration, revocation and deregistration of persons or activities in accordance with this Act.”.

Amendment of section 4 of Act 4 of 2006, as amended by section 2 and renumbered by section 16 of Act 28 of 2007

5. Section 4 of the principal Act is hereby amended—

- (a) by the substitution in paragraph (a) for subparagraph (i) of the following subparagraph:
 - “(i) consider applications for [**licenses**] licences and may issue licences for—
 - (aa) the operation of generation, transmission or distribution facilities;
 - (bb) the import and export of electricity;
 - (cc) trading;
 - (dd) market operator; or
 - (ee) system operator, subject to the provisions of section 7;”;
- (b) by the substitution in paragraph (a) for subparagraph (ii) of the following subparagraph:
 - “(ii) [**regulate prices and**] set and approve tariffs;”;
- (c) by the deletion in paragraph (a) of subparagraph (iv);
- (d) by the substitution in paragraph (a) for subparagraph (v) of the following subparagraph:
 - “(v) (aa) establish and manage monitoring and information systems and a national information system, relating to matters within the Regulator's jurisdiction; and
 - (bb) co-ordinate the integration thereof with other relevant information systems;”;
- (e) by the substitution in paragraph (a) for subparagraph (vii) of the following subparagraph:
 - “(vii) enforce performance and compliance with this Act and the licence conditions imposed by the Regulator in terms of this Act, and take appropriate steps in the case of non-performance;”;
- (f) by the addition in paragraph (a) after subparagraph (vii) of the following subparagraph:
 - “(viii) exercise any power or perform any duty conferred or imposed on it under this Act or any other law;”;

- (g) by the substitution for paragraph (b) of the following paragraph:
- “(b) may—
- (i) mediate and, arbitrate disputes between generators, transmitters, distributors, traders, the Transmission System Operator SOC Ltd and any other licensee or customer, customers or end users; 5
 - (ii) undertake investigations and inquiries into the activities of licensees and other matters contemplated in this Act;
 - (iiA) at its own instance, or following an investigation of a complaint— 10
 - (aa) determine whether any person is engaged in an activity requiring a licence in terms of section 7, or registration in terms of section 9, without that person holding a licence or registration certificate in respect of that activity; and
 - (bb) direct any person engaged in an activity requiring a licence in terms of section 7 or registration in terms of section 9, who is not in possession of the necessary licence or registration certificate, to cease such activity; 15
- or
- (iii) perform any other act incidental to its functions.”. 20

Amendment of section 6 of Act 4 of 2006

6. Section 6 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:
- “(2) The Regulator [**must**] may require a licensee to establish and fund a customer or end users forum in the manner set out in the licence held by such a person.”. 25

Amendment of section 7 of Act 4 of 2006, as renumbered by section 16 of Act 28 of 2007

7. Section 7 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: 30
- “(1) Subject to sections 8 and 9, [No] no person may, without [a] the appropriate licence issued by the Regulator in accordance with this Act or, unless authorised in terms of a licence condition contemplated in section 14(1)(t)—
- (a) operate any generation, transmission or distribution facility;
 - (b) import or export any electricity; [or] 35
 - (c) be involved in trading[.];
 - (d) be a market operator; or
 - (e) engage in system operation.”.

Substitution of section 8 of Act 4 of 2006, as amended by section 3 and renumbered by section 16 of Act 28 of 2007 40

8. The following section is hereby substituted for section 8 of the principal Act:

“Certain activities not licensed

8. The Minister may, after consultation with the Regulator and stakeholders in the advisory forum referred to in section 5, determine by notice in the *Gazette* that any activity contemplated in section 7(1) need 45 no longer be a licensed activity, from the date set out in such notice.”.

Amendment of section 9 of Act 4 of 2006, as amended by section 4 and renumbered by section 16 of Act 28 of 2007

9. Section 9 of the principal Act is hereby amended— 50
- (a) by the substitution for subsection (1) of the following subsection:
 - “(1) The Minister may, in consultation with the Regulator, determine by notice in the *Gazette* that any person involved in an activity relating to trading, import or export, or the generation, transmission or distribution

- of electricity that does not require licensing in terms of section 7, read with section 8, must register with the Regulator.”;
- (b) by the substitution in subsection (4)(b) for the full stop at the end of paragraph (b) of a semi-colon; and
- (c) by the addition in subsection (4) after paragraph (b) of following paragraphs: 5
- “(c) compliance with the technical codes that may be applicable from time to time;
- (d) compliance with regulatory requirements necessary for the sustained operation of the national transmission power system and interconnected distribution power systems; and 10
- (e) payment of fees imposed by licensees for granting registrants access to their network.”.

Amendment of section 10 of Act 4 of 2006, as amended by section 5 and renumbered by section 16 of Act 28 of 2007

- 10.** Section 10 of the principal Act is hereby amended— 15
- (a) by the substitution in subsection (2) for paragraph (a) of the following paragraph:
- “(a) a description of the applicant, including its vertical and horizontal relationships with other persons engaged in the operation of generation, transmission and distribution facilities, the import or export of electricity, trading, market operation, system operation or any other prescribed activity relating thereto;” 20
- (b) by the substitution in subsection (2) for paragraph (d) of the following paragraph:
- “(d) a general description of the type of customer to be served and the tariff [**and price**] policies to be applied;” 25
- (c) by the substitution in subsection (2) for paragraph (h) of the following paragraph:
- “(h) such other particulars as the [**Minister**] Regulator may prescribe.”; 30
- and
- (d) by the addition after subsection (2) of the following subsection:
- “(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 licence application.”. 35

Amendment of section 11 of Act 4 of 2006, as renumbered by section 16 of Act 28 of 2007

- 11.** Section 11 of the principal Act is hereby amended—
- (a) by the substitution for subsection (1) of the following subsection:
- “(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 at least two official languages, for a period of 30 days, in [**appropriate**] newspapers or other [**appropriate**] media, as the Regulator may specify, circulating in the area of the proposed activity [**in at least two official languages**].”; 40 45
- (b) by the deletion of subsection (3); and
- (c) by the substitution for subsection (4) of the following subsection:
- “(4) The Regulator must, within 30 days from the date of expiry of the period contemplated in subsection (2)(d), consider objections to the application contemplated in subsection (1) and make its decision available to the public, together with its reasons for such decision.”. 50

Amendment of section 12 of Act 4 of 2006, as renumbered by section 16 of Act 28 of 2007

- 12.** Section 12 of the principal Act is hereby amended by the substitution for paragraph (a) of the following paragraph: 55
- “(a) must, if objections have been received, within 30 days from the date of expiry of the period contemplated in section 11(2)(d), furnish the applicant with all

substantiated objections in order to allow the applicant to respond thereto; and”.

Amendment of section 13 of Act 4 of 2006, as amended by section 6 and renumbered by section 16 of Act 28 of 2007

13. Section 13 of the principal Act is hereby amended— 5
- (a) by the substitution for subsection (1) of the following subsection: 5
 “(1) The Regulator must **[decide on]** grant or refuse an application in the prescribed manner within **[120]** 60 days—”;
- (b) by the substitution in subsection (1) for paragraph (b) of the following paragraph: 10
 “(b) after receiving the response of the applicant as contemplated in section 12(a) or after receiving the information contemplated in section 12(b), whichever is the later date.”;
- (c) by the substitution for subsection (3) of the following subsection: 15
 “(3) The Regulator must issue separate licences for [—
 (a) **the operation of generation, transmission and distribution facilities;**
 (b) **the import and export of electricity; or**
 (c) **trading]** the activities listed in section 4(a)(i).”; and
- (d) by the deletion of subsection (4). 20

Amendment of section 14 of Act 4 of 2006, as amended by section 7 and renumbered by section 16 of Act 28 of 2007

14. Section 14 of the principal Act is hereby amended—
- (a) by the substitution in subsection (1) for paragraph (a) of the following paragraph: 25
 “(a) the establishment of and compliance with directives to govern relations between a licensee and its customers or end users, including the establishment of customer or end user forums”;
- (b) by the substitution in subsection (1) for paragraph (d) of the following paragraph: 30
 “(d) the setting **[and]** or approval of **[prices, charges, rates and]** tariffs charged by licensees;”;
- (c) by the substitution in subsection (1) for paragraph (f) of the following paragraph: 35
 “(f) the **[format of and]** contents of agreements entered into by licensees and their customers;”;
- (d) by the substitution in subsection (1) for paragraphs (l) and (m) of the following paragraphs, respectively: 40
 “(l) the right to operate generation, transmission or distribution facilities, to import or export electricity, to trade, to perform market operation, to undertake system operation or to perform prescribed activities relating thereto, including exclusive rights to do so, and conditions attached to or limiting such rights;
 (m) the duty or obligation to trade, or to generate, transmit or distribute, import or export electricity, or to engage in market operation or system operation and conditions attached to such duties or obligations;”;
- (e) by the substitution in subsection (1) for paragraph (t) of the following paragraph: 50
 “(t) **[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 maintenance and operation of the generation, transmission or distribution facilities;”;
- (f) by the substitution in subsection (1) for paragraph (z) of the following paragraph: 55
 “(z) any other ancillary or incidental condition **[prescribed]** specified by the Regulator.”.

Amendment of section 15 of Act 4 of 2006, as amended by section 8 and renumbered by section 16 of Act 28 of 2007

15. Section 15 of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection: 5
- “(1) **[A licence condition determined under section 14 relating to the setting or approval of prices, charges and tariffs and the regulation of revenues]** The Regulator, when subjecting a licence to conditions relating to the setting and approval of tariffs charged by licensees as contemplated in section 14(1)(d)—
- (a) must enable an efficient licensee to recover the full cost of **[its] the** 10
 licensed **[activities] activity [, including a reasonable margin or return];**
- (aA) must allow for a reasonable return proportionate to the risk of the licensed activity;
- (b) **[must] may** provide for or prescribe incentives for continued 15
 improvement of the technical and economic efficiency with which services are to be provided;
- (d) must avoid undue discrimination between customer categories; **[and]**
- (e) may permit the cross-subsidy of tariffs to certain classes of 20
 customers[.]; and;
- (f) may have regard to the need to ensure security of supply, the diversity of supply and to promote renewable energy.”;
- (b) by the insertion after subsection (1) of the following subsections: 25
- “(1A) Tariff determinations must take into account all planned projects reflected in the integrated resource plan and the transmission development plan insofar as these projects shall impact on the costs of the licensee, for the period during which the tariff shall apply.
- (1B) In the case of vertically integrated licensees, the Regulator must set or approve separate tariffs for each of the licensed activities listed in section 4(a)(i).”; 30
- (c) by the substitution for subsection (2) of the following subsection:
- “(2) A licensee may not charge a customer any **[other] tariff [and make use of provisions in agreements]** other than **[that determined or approved by the Regulator as part of its licensing conditions]** the tariff set or approved by the Regulator as, or in accordance with, a licence condition.”; and 35
- (d) by the addition after subsection (3) of the following subsection:
- “(4) Notwithstanding subsection (2), a licensee may charge a customer a tariff which has not been set or approved by the Regulator where such tariff is charged pursuant to a direct supply agreement or arises as an outcome of a competitive market.”. 40

Amendment of section 16 of Act 4 of 2006, as renumbered by section 16 of Act 28 of 2007

16. Section 16 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection: 45

- “(2) The **[Minister] Regulator** must prescribe the procedure to be followed in varying, suspending, removing or adding any licence condition.”.

Amendment of section 17 of Act 4 of 2006, as renumbered by section 16 of Act 28 of 2007 50

17. Section 17 of the principal Act is hereby amended by the substitution for subsections (2) and (3) of the following subsections, respectively:

- “(2) A licensee must, in the circumstances contemplated in subsection (1)(a) and (b), give the Regulator at least 12 months’ notice in writing of **[his or her] its** intention to cease activities, unless the Regulator 55
 determines otherwise.
- (3) The **[Minister] Regulator** must prescribe the form and procedure to be followed in revoking a licence.”.

Insertion of section 17A in Act 4 of 2006

18. The following section is hereby inserted in the principal Act after section 17:

“Revocation and deregistration

17A. (1) The Regulator may vary, suspend or remove any registration on receipt of an application by a registrant or on application by a third party or upon violation of the applicable regulatory requirements. 5

(2) The Regulator may revoke a registration under the following circumstances:

- (a) On application by a registrant;
- (b) where the facility is no longer required; or
- (c) when the conditions for registration as contemplated in section 9(4) are not met. 10

(3) A registrant must, in the circumstances contemplated in subsection (2)(a), give the Regulator at least six months’ notice, in writing, of its intention to cease activities, unless the Regulator determines otherwise.”. 15

Substitution of section 20 of Act 4 of 2006, as renumbered by section 16 of Act 28 of 2007

19. The following section is hereby substituted for section 20 of the principal Act:

“Renewal of licence 20

20. (1) Any generation or transmission licence issued in terms of this Act is valid for a period of 15 years or such **[longer]** period as the Regulator may determine.

(2) Any distribution, **[or]** trading, import or export, market operation or system operation licence issued in terms of this Act is valid for the period determined by the Regulator. 25

(3) A licensee may apply for the renewal of **[his or her]** its licence.

(4) **[An application for renewal must be granted, but the]** The Regulator may set different licence conditions upon renewal of a licence.

(5) A licensee may not assign, cede or transfer a licence to another party without the written consent of the Regulator.”. 30

Amendment of section 21 of Act 4 of 2006, as renumbered by section 16 of Act 28 of 2007

20. Section 21 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection: 35

“(1) **[A]** Subject to a licence condition imposed in terms of section 14(1)(t), a licence issued in terms of this Act empowers and obliges a licensee to exercise the powers and perform the duties set out in such licence and this Act, and no licensee may cede, transfer or assign any such power or duty to any other person without the prior written consent of the Regulator.”; 40

(b) by the substitution for subsection (3) of the following subsection:

“(3) A transmission or distribution licensee must, to the extent provided for in the licence, provide non-discriminatory access to **[the]** its transmission **[and]** or distribution power **[systems]** system to third parties.”; 45

(c) by the insertion after subsection (3) of the following subsection:

“(3A) The system operator shall not discriminate between different generators or customers in relation to dispatching or balancing the system, except for objectively justifiable and identifiable reasons approved by the Regulator.”; 50

- (d) by the substitution in subsection (4) for the words preceding paragraph (a) of the following words:
 “(4) Access in terms of subsection (3) must be provided on the conditions set out in the licence of such transmitter or distributor, **[that]** which may relate to—”;
- (e) by the substitution in subsection (4) for paragraph (c) of the following paragraph:
 “(c) the strengthening or upgrading of the transmission or distribution power system in order to provide for access, including contributions towards such strengthening or upgrading by the potential users of such systems, if applicable;”;
- (f) by the substitution in subsection (4) for paragraphs (e) and (f) of the following paragraphs, respectively:
 “(e) compliance with any rule[,] or code **[or practice made by the Regulator]**; or
 (f) the **[fees]** tariffs that may be charged by a licensee for the use of such power system.”; and
- (g) by the insertion after subsection (4) of the following subsections:
 “(4A) Third party access to the transmission and distribution power system must be based on published tariffs, applicable to all eligible customers, and applied objectively and without discrimination between the system users.
 (4B) A transmission or distribution licensee may refuse access only where it lacks the necessary capacity, with written reasons given for such refusal.
 (4C) Any party requesting information on the network capacity and measures that would be necessary to reinforce the network, may be charged a reasonable fee for the costs of providing such information.
 (4D) Transmission and distribution licensees shall procure the energy they use to cover energy losses and reserve capacity in their system according to transparent, non-discriminatory and market-based procedures.
 (4E) Rules adopted by the Transmission System Operator SOC Ltd for balancing the national transmission power system and the interconnected distribution power systems, including the rules for charging system users of their networks for energy imbalance, shall be objective, transparent and non-discriminatory.”.

Amendment of section 22 of Act 4 of 2006, as amended by section 16 of Act 28 of 2007

21. Section 22 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) Any person authorised, in writing, thereto by a licensee may at all reasonable times enter any premises to which electricity is or has been supplied by such licensee, in order to inspect the lines, meters, fittings, works and apparatus belonging to such licensee, or for the purpose of ascertaining the quantity of electricity consumed, or where a supply is no longer required, or where such licensee may cut off the supply, for the purpose of removing any lines, meters, fittings, works and apparatus belonging to such licensee.”.

Amendment of section 24 of Act 4 of 2006, as amended by section 16 of Act 28 of 2007

22. Section 24 of the principal Act is hereby amended—

- (a) by the substitution for the heading of the following heading:
 “**24. Rights over roads or streets**”; and
 (b) by the substitution in subsection (1) for paragraph (b) of the following paragraph:
 “(b) Any activity contemplated in paragraph (a) must be undertaken subject to the right of supervision and in accordance with the plans, routes and specifications of the authority or person in control of that road”.

or street, except in cases of emergency or where the authority concerned fails or refuses to co-operate with the licensee.”.

Amendment of section 27 of Act 4 of 2006, as amended by section 10 of Act 28 of 2007

23. Section 27 of the principal Act is hereby amended by the substitution for paragraph (g) of the following paragraph: 5

“(g) regularly reporting and providing information to the Department of **[Provincial and Local Government]** Cooperative Governance and Traditional Affairs, the National Treasury, the Regulator and customers;”.

Amendment of section 30 of Act 4 of 2006, as amended by section 16 of Act 28 of 2007 10

24. Section 30 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraphs (a) and (b) of the following paragraphs, respectively:

“(a) if it is a dispute between licensees, act as mediator or arbitrator if so requested by both parties to the dispute; 15

(b) if it is a dispute between a customer or end user on the one hand and a licensee, **[registered person]** registrant[,] or a person who trades, **generates, transmits, or distributes electricity** on the other hand, settle that dispute by such means and on such terms as the Regulator thinks fit.”; 20

(b) by the substitution for subsection (2) of the following subsection:

“(2) The Regulator may appoint a suitable person to act as a mediator or arbitrator on its behalf, and any action or decision of a person so appointed is deemed to be an action by or decision of the Regulator.”; 25

(c) by the substitution for subsection (3) of the following subsection:

“(3) The **[Minister]** Regulator must prescribe the procedure to be followed in **[the]** a mediation and an arbitration and the fees to be paid.”;

(d) by the deletion of subsection (4); and

(e) by the addition after subsection (4) of the following subsection: 30

“(5) When acting as arbitrator, the Regulator or the person contemplated in subsection (2) must issue a decision on the matter, in writing, and such decision is binding on the parties to the dispute.”.

Amendment of section 32 of Act 4 of 2006, as amended by section 16 of Act 28 of 2007 35

25. Section 32 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) The Regulator must, in applicable circumstances, at its own instance or on receipt of a complaint **[or inquiry]** relating to **[the]** generation, transmission, distribution, **[or]** trading, market operation or system operation, investigate complaints and prepare a preliminary report in respect of— 40

(a) **[of]** alleged discrimination regarding tariffs or conditions of access; and

(b) if a licensee is involved, **[of]** an alleged failure to abide by its licensing conditions; **[or]**.”.

Amendment of section 33 of Act 4 of 2006, as amended by section 16 of Act 28 of 2007 45

26. Section 33 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraph (a) of the following paragraph:

“(a) at all reasonable times enter any property on which any activity relating to the supply of electricity is taking place, or is suspected to be taking place, to inspect any facility, equipment, machinery, book, account or other document relating to electricity found thereat; and”; and 50

- (b) by the insertion after subsection (3) of the following subsection:
 “(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 court.”.

Amendment of section 34 of Act 4 of 2006, as amended by section 16 of Act 28 of 2007

27. Section 34 of the principal Act is hereby amended—
- (a) by the substitution for the heading of the following heading: 10
 “**34. Additional electricity, [New] new generation capacity and electricity transmission infrastructure**”;
- (b) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:
 “(1) The Minister may, 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, [in] after consultation with the Regulator and the Minister of Finance, by notice in the *Gazette*, make a determination—”;
- (c) by the substitution in subsection (1) for paragraphs (a) and (b) for the following paragraphs, respectively: 20
 “(a) [determine] that additional electricity or new generation capacity is needed to ensure the [continued uninterrupted] optimal supply of electricity;
 (b) [determine the types of energy resources from which] that new electricity [must be generated, and the percentages of electricity that must be generated from such sources] transmission infrastructure is needed to ensure the optimal supply of electricity;”;
- (d) by the deletion in subsection (1) of paragraphs (d) and (e);
- (e) by the substitution for subsection (2) of the following subsection: 30
 “(2) A determination referred to in subsection (1)(a) 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; 35
 (b) the types of energy sources or technologies from which the electricity may be generated and an indication as to the amount of electricity that may be generated from each of such sources or technologies;
 (c) whether the generator or generators shall be independent power producers or an organ of state; 40
 (d) whether the electricity so produced, or a stated portion thereof, must be purchased by a person designated in the determination as the buyer of such electricity;
 (e) whether the electricity so produced, or a stated portion thereof, may only be sold to the buyer referred to in paragraph (d); 45
 (f) where applicable, the conducting of the procurement process for the acquisition of the electricity so produced; and
 (g) the extent to which the new generation capacity contemplated in paragraph (a) may be established by independent power producers and the electricity so produced supplied to customers pursuant to multiple supply agreements.”; 50
- (f) by the substitution for subsections (3) and (4) of the following subsections, respectively: 55
 “(3) A determination referred to in subsection (1)(b) may include provisions dealing with—
 (a) the nature, type and extent of the required electricity transmission infrastructure;
 (b) whether or not the person who shall manage, maintain or operate the required electricity transmission infrastructure (or engage in any combination of these activities), shall be an organ of state; 60

- (c) whether the person who constructs, manages, maintains or operates the required electricity transmission infrastructure shall own that infrastructure;
- (d) whether the electricity transmission infrastructure, or the electricity supplied by means of such infrastructure, shall be purchased or used by a person designated in the determination as the buyer or user;
- (e) whether the electricity transmission 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); and
- (f) where applicable, the conducting of the procurement process for the establishment of the required electricity transmission infrastructure.
- (4) A determination referred to in subsection (1) may include provisions dealing with any ancillary matter that is necessary or desirable to facilitate the procurement of electricity, new generation capacity or electricity transmission infrastructure, as the case may be.”; and
- (g) by the addition after subsection (4) of the following subsections:
- “(5) A determination contemplated in subsection (1)(a) may be combined with a determination contemplated in subsection (1)(b).
- (6) In making a determination in terms of this section, the Minister—
- (a) must have regard to the content of the integrated resource plan and the transmission development plan, as the case may be; and
- (b) may 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.
- (7) Prior to deviating from the integrated resource plan or transmission development plan as envisaged in subsection (6)(b), the Minister must publish a notice in the *Gazette*, inviting the public to comment on the proposed deviation.
- (8) If it is reasonable and justifiable in the circumstances, the Minister may depart from the provisions of subsection (7).
- (9) The Minister has such powers as may be necessary or incidental to giving effect to a determination referred to in subsection (1)(a) or (1)(b), including the power to—
- (a) undertake such management and development activities, including entering into contracts, as may be necessary to prepare and conduct procurement processes for the development, construction, commissioning and operation of electricity generation facilities and electricity transmission 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 participant in any relevant procurement process for the purpose of transferring such thing or right to a successful participant; and
- (c) subject to the Public Finance Management Act, 1999 (Act No. 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 public or privately owned generation facilities or electricity transmission infrastructure.
- (10) The Regulator, in 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)(a) or (b); and
- (b) may issue a licence or registration certificate for the activities listed in section 4(a)(i) in the absence of a determination made by the Minister in terms of subsection (1)(a) or (1)(b).
- (11) In exercising the powers under this section the Minister is not bound by the State Tender Board Act, 1968 (Act No. 86 of 1968).
- (12) A determination contemplated in this section may establish an energy infrastructure project, which includes not only new generation capacity and new electricity transmission infrastructure, but also other interconnected or related infrastructure, installations, buildings, structures, facilities, systems, services or processes, including gas infrastruc-

ture, in which case, subsections (3) and (9) shall, with the necessary changes, apply to such infrastructure, installations, buildings, structures, facilities, systems, services or processes.

(13) The Regulator must, in respect of an energy infrastructure project contemplated in subsection (12), exercise its powers and perform its functions under this Act and any other statute in a coordinated and integrated manner.

(14) 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 (12).

(15) For purposes of this section, ‘electricity transmission infrastructure’ means transmission facilities or any other electricity infrastructure designated by the Minister by notice in the *Gazette* for this purpose, excluding electricity generation facilities.”.

Insertion of sections 34A and 34B in Act 4 of 2006

28. The following section is hereby inserted in the principal Act after section 34:

“Establishment, duties, powers and functions of Transmission System Operator SOC Limited

34A. (1) Subject to section 35C(1), the Minister of Public Enterprises must establish a juristic person to be known as the “Transmission System Operator SOC Limited” in order to provide an open market platform that shall allow for competitive electricity trading.

(2) The duties, powers and functions of the Transmission System Operator SOC Limited referred to in subsection (1) shall include the following:

- (a) To be a transmitter;
- (b) system operation;
- (c) to be a market operator; and
- (d) to be a central purchasing agency.

Powers and functions of transmitter, system operator, market operator and central purchasing agency

34B. (1) A transmitter must—

- (a) implement infrastructure plans for the transmission network, incorporating the capacity and demand and outlook to ensure reliable grid services to generators and customers;
- (b) maintain and operate the transmission grid and coordinate outages;
- (c) develop and implement transmission use of system charges and transmission charges subject to the approval of the Regulator; and
- (d) provide non-discriminatory access to the transmission power system to third parties.

(2) A system operator must—

- (a) operate the integrated power system in a safe, secure, efficient and sustainable way;
- (b) plan in respect of the development, strengthening, upgrading and refurbishment of the national transmission power system; and
- (c) co-operate with the Minister and any person acting as a procurer in terms of section 34, to facilitate the establishment of any new generation capacity or electricity transmission infrastructure, or acquisition of electricity, that is the subject of a section 34 determination.”.

(3) A market operator must—

- (a) provide for a transparent, non-discriminatory trading platform, approved by the Regulator, for power market participants to trade;
- (b) develop a market code and rules, including qualifying criteria for power market participants approved by the Regulator; and

- (c) the market code shall include, but is not limited to, provisions related to the following:
- (i) The different types of markets necessary to ensure effective and secure operation of the industry including both physical and financial transactions between power market participants in the appropriate timescales, to enable the market transactions and regulated transactions;
 - (ii) the method of operation, as well as development of systems, processes and procedures for the implementation of these markets;
 - (iii) provisions for reconciliation in order to identify imbalances between scheduled and actual production, the consumption of electricity by power market participants, and the allocation of costs of remedial action and penalties where applicable;
 - (iv) the qualifying criteria for power market participants, including financial and prudential requirements;
 - (v) governance of the market code, including mechanisms for power market participants and stakeholders to propose changes to the code; and
 - (vi) any other aspects necessary for effective and efficient market operation.
- (4) A transparent, non-discriminatory trading platform and trading mechanism for power market participants referred to in subsection (3)(a) is envisaged to be a competitive multi-market structure, which provides for market transactions, physical bilateral transactions and regulated transactions.
- (5) A central purchasing agency must—
- (a) conclude and enter into transaction agreements as may be necessary for the procurement of electricity, including sufficient capacity and energy supply;
 - (b) in line with the Republic’s international obligations, agreements and undertakings—
 - (i) conclude electricity import agreements that ensure a reliable and stable supply of electricity for customers within the Republic; and
 - (ii) conclude electricity export agreements, having regard to the interests of the Republic over the long term;
 - (c) in relation to regulated transactions—
 - (i) be the buyer for existing Independent Power Producer power purchase agreements, as well as new Independent Power Producer power purchase agreements, as required by Ministerial determination;
 - (ii) conclude power purchase agreements with each Eskom generator to cover capacity payments and ancillary services for the remaining life of power plants;
 - (iii) conclude vesting contracts with Eskom generators and, or, distribution licensees to manage the transition to a competitive market; and
 - (iv) trade all energy purchased under the legacy independent power producer contracts and act as the balance responsible party on behalf of the legacy independent power producer contracts.”.

Amendment of section 35 of Act 4 of 2006, as amended by section 12, and renumbered by section 16, of Act 28 of 2007

29. Section 35 of the principal Act is hereby amended—

- (a) by the substitution in subsection (2) for paragraph (d) of the following paragraph:

“(d) [codes of practice relating to] the security, operation, use and maintenance of transmission and distribution power systems;”;

- (b) by the substitution in subsection (3) for paragraph (c) of the following paragraph:
“(c) the security, operation, use and maintenance of transmission and distribution power systems;”;
- (c) by the substitution in subsection (3) for paragraph (i) of the following paragraph:
“(i) the fees to be paid in respect of mediation, arbitration and the settlement of disputes;”;
- (d) by the insertion after subsection (3) of the following subsection:
“(3A) The Regulator must, after consultation with the Minister, make rules regarding the content of the transmission development plan, including rules relating to the inclusion in the plan of an analysis of grid connection capacity, reasonable timelines for the expansion and strengthening of the national transmission power system and the estimated cost of the transmission development, strengthening, upgrading and refurbishment envisaged in the plan.”; and
- (e) by the deletion in subsection (4) of paragraph (n).

Insertion of sections 35A, 35B and 35C in Act 4 of 2006

30. The following sections are hereby inserted in the principal Act after section 35:

“Delegation and assignment”

35A. (1) The Minister may, subject to such conditions he or she may impose, in writing, delegate any power conferred on him or her under this Act, except a power to make regulations, and may assign any duty so imposed on him or her, to the Director-General or any other officer in the Department.

(2) The Minister is not divested of any power or exempted from any duty delegated or assigned in terms of subsection (1).

(3) The Minister may at any time—

(a) amend or withdraw a delegation or assignment made in terms of subsection (1); or

(b) subject to subsection (4), withdraw or amend any decision made by a person exercising a power or performing a duty delegated or assigned in terms of subsection (1).

(4) A decision made by a delegatee or assignee may not be withdrawn in terms of subsection (3)(b) where it confers a right or entitlement on any third party.

Offences and penalties

35B. (1) Any person who wilfully—

(a) contravenes the provisions of section 7(1);

(b) fails to comply with a direction issued in terms of section 4(2)(c)(ii);

(c) obstructs or hinders any person authorised in terms of section 33(1) in the exercise of powers under section 33;

(d) makes any false or misleading statement to the Regulator in connection with any matter contemplated in this Act; or

(e) without lawful authority, damages, removes or destroys any transmission, distribution or reticulation cable, equipment or infrastructure, shall be guilty of an offence.

(2) Any person who is convicted of an offence referred to in subsection (1) shall be liable to a fine not exceeding R1 000 000,00 or to imprisonment for a period not exceeding five years or to both such fine and imprisonment.

Transitional provisions

35C. (1) From the effective date of this Act, until the date that the Transmission System Operator SOC Limited referred to in section

- 34A(1) is established, which period shall not be longer than five years, the National Transmission Company South Africa SOC Limited—
- (a) is for all purposes deemed to be the Transmission System Operator SOC Ltd;
 - (b) must perform the duties, powers and functions of the Transmission System Operator SOC Ltd; and
 - (c) in exercising its duties, must do so in a manner that is independent and ensures fair and equitable treatment of all system users.
- (2) During the period of transition referred to in subsection (1), the Regulator shall exercise regulatory oversight and facilitate the transition to a competitive market.
- (3) Notwithstanding the provisions of subsection (1), the Regulator must, subject to the conditions determined by the Regulator, upon application by the National Transmission Company South Africa SOC Limited and after satisfying itself regarding the appropriateness thereof, issue the relevant licence to the National Transmission Company South Africa SOC Limited for the performance of the duties, powers and functions of the Transmission System Operator SOC Ltd as provided for in section 34A(2).”

Amendment of arrangement of sections in Act 4 of 2006

- 31.** The arrangement of sections after the long title of the principal Act is hereby amended—
- (a) by the insertion after “2. Objects of Act” of the following:
“2A. Application of Act”;
 - (b) by the insertion after “17. Revocation of licence on application” of the following:
“17A. Revocation and deregistration”;
 - (c) by the substitution for “24. Rights over streets” of the following:
“24. Rights over roads or streets”;
 - (d) by the substitution for “34. New generation capacity” of the following:
“34. Additional electricity, [New] new generation capacity and electricity transmission infrastructure”;
 - (e) by the insertion after “34. Additional electricity, new generation capacity and electricity transmission infrastructure” of the following:
“34A. Establishment, duties, powers and functions of Transmission System Operator SOC Ltd
34B. Powers and functions of transmitter, system operator, market operator and central purchasing agency”; and
 - (f) by the insertion after “35. Regulations, rules, guidelines, directives and codes of conduct and practice” of the following:
“35A. Delegation and assignment
35B. Offences and penalties
35C. Transitional provisions”.

Substitution of long title of Act 4 of 2006, as amended by section 13 of Act 28 of 2007

- 32.** The following long title is hereby substituted for the long title of the principal Act:
“**To amend the Electricity Regulation Act, 2006 so as to delete, amend, and insert certain definitions; to provide for the application of the Act; to provide for the National Energy Regulator to consider applications for licences and the issue of licences; to provide for revocation and deregistration of licences; to provide for additional electricity, new generation capacity and electricity infrastructure; to provide for the establishment, duties, powers and functions of the Transmission System Operator SOC Ltd and transitional measures; to provide for an open market platform that allows for competitive electricity trading; to assign the duties, powers and functions of the Transmission System Operator SOC Ltd to the National Transmission Company South Africa SOC Ltd; to provide for delegation and assignment; to provide for offences and penalties; and to provide for matters connected therewith.**”

Short title and commencement

33. This Act is called the Electricity Regulation Amendment Act, 2023, and comes into operation on a date determined by the President.

MEMORANDUM ON THE OBJECTS OF THE ELECTRICITY REGULATION AMENDMENT BILL, 2023

1. BACKGROUND

The Electricity Regulation Amendment Bill, 2023 (the “Bill”), seeks to amend the Electricity Regulation Act, 2006 (Act No. 4 of 2006) (the “Act”).

2. OBJECTS OF THE BILL

The main purpose of the Bill is to effect amendments to the Act in order to improve the administration of the Act; to provide for additional electricity, new generation capacity and electricity infrastructure; to provide for the establishment, duties, powers and functions of the Transmission System Operator SOC Ltd; to provide for an open market platform that will allow for competitive electricity trading; and to assign the duties, powers and functions of the Transmission System Operator SOC Ltd to the National Transmission Company South Africa SOC Ltd.

3. SUMMARY OF THE BILL

3.1 Clause 1: Amendment of section 1

3.1.1 Clause 1 of the Bill seeks to amend section 1 of the Act, to provide for the insertions, amendments, and deletion of certain definitions in section 1 of the Act, in order to assist with the interpretation of the Act.

3.1.2 The proposed insertion of new definitions seeks to provide clarity on the meaning of the concepts introduced in the Bill under new provisions providing for a competitive electricity market.

3.2 Clause 2: Amendment of section 2

Clause 2 of the Bill seeks to amend section 2 of the Act, to substitute the words “South Africa” for the word “Republic”.

3.3 Clause 3: Insertion of section 2A

3.3.1 Clause 3 of the Bill seeks to insert the new section 2A into the Act. Pursuant to the Presidential pronouncement of 25 July 2022 and the promulgation of the amendment to Schedule 2 of the Electricity Regulation Act: Licensing Exemption and Registration Notice, 2023, the licensing threshold to apply for and hold a license for generation facilities in terms of the provisions of the Act has been removed and there is now a complete exemption from the obligation to apply, and hold a licence, for generation facilities. Generation facilities are only required to register with the National Electricity Regulator of South Africa (the “Regulator”).

3.3.2 The proposed amendments seek to provide clarity and provide the distinction of when the provisions of the Act are applicable and when they are not applicable.

3.4 Clause 4: Amendment of section 3

Clause 4 of the Bill seeks to amend section 3 of the Act. The proposed amendments clarify and extend the scope of the powers of the Regulator to align with the new proposed insertions in the Bill, providing for the Regulator to issue, amend, withdraw, suspend and revoke licences, and determine the registration, revocation and deregistration of persons or activities in accordance with the Act.

3.5 Clause 5: Amendment of section 4

- 3.5.1 Clause 5 of the Bill seeks to amend section 4 of the Act. Section 4(a)(i) of the Act provides for the Regulator to consider applications for licenses, and to issue licences for the operation of generation, transmission or distribution facilities, the import and export of electricity and trading.
- 3.5.2 With the proposed introduction of provisions relating to the competitive market and transitional provisions providing for the migration to a competitive market in the Bill, the proposed amendments extend the scope of licensable activities to include a market operator and system operator and will oblige the Regulator to consider applications, and it may issue licenses for these additional activities.
- 3.5.3 Section 4(a)(ii) of the Act provides for the Regulator to regulate prices and tariffs. The practical application of this provision has presented the Regulator with implementation challenges since it has proven difficult to regulate prices. The proposed amendments seek to remove the regulation of prices and provide that the Regulator shall set and approve tariffs. In the setting and approval of tariffs and the methodology thereof, the Regulator would provide for the prices as an integral part of tariff setting.
- 3.5.4 Section 4(a)(iv) provides for the Regulator to issue rules designed to implement the national government's electricity policy framework, the integrated resource plan and the Act. Consequent to the Regulator's inability to practically implement this provision, the proposed amendment to section 4(a)(iv) deletes this provision. The other proposed amendments to section 4(a) are for clarity purposes.
- 3.5.5 The Act limited the scope of dispute resolution only to mediation, to mediate disputes between generators, transmitters, distributors, customers or end users.
- The proposed amendments to section 4(b) seek to expand the powers of the Regulator to mediate and arbitrate disputes, and to extend its scope to cover traders, the transmission system operator and any other licensee or customer.
- 3.5.6 The proposed amendments further seek to empower the Regulator to conduct investigations at its own instance or, following a complaint, to provide clarity as to when a Regulator may conduct an investigation. This was not previously provided for in the Act.

3.6 Clause 6: Amendment of section 6

Clause 6 of the Bill seeks to amend section 6 of the Act. The proposed amendment to section 6(2) of the Act seeks to provide the Regulator with a discretionary power, rather than a mandatory obligation, to require a licensee to establish and fund a customer or end users forum in the manner set out in the licence held by such a person.

3.7 Clause 7: Amendment of section 7

- 3.7.1 Clause 7 of the Bill seeks to amend section 7 of the Act. The proposed amendments to section 7 seek to align with the amendment in section 4 and extend the scope of activities that require a license to include market operation and system operation.
- 3.7.2 The proposed amendments also seek to introduce an exception to hold a licence where a license contains a condition issued in terms of section 14(1)(t), allowing the licensee to sub-contract the performance of the licensed functions, including allowing for the licensee to

sub-contract the maintenance and operation of the generation, transmission or distribution facilities in accordance with section 14(1)(t) or where an activity is exempted under the provisions of sections 8 or 9 of the Act.

3.8 Clause 8: Amendment of section 8

Clause 8 of the Bill seeks to amend section 8 of the Act. The proposed amendment seeks to provide a cross reference for clarity purposes.

3.9 Clause 9: Amendment of section 9

- 3.9.1 Clause 9 of the Bill seeks to amend section 9 of the Act. The proposed amendment to section 9(1) seeks to expand the scope of activities to include import and export activities.
- 3.9.2 With the promulgation of the amendment to Schedule 2 to the Electricity Regulation Act: Licensing Exemption and Registration Notice, 2023, the exemption from the obligation to apply for and hold a licence for generation facilities leaves generation facilities with a requirement only to register with the Regulator. Since the technical and regulatory requirements for generation facilities were covered under license conditions issued under the provisions of the Act, the Schedule 2 developments present a regulatory gap in that the Regulator suddenly has no powers to set technical and regulatory requirements for facilities that are subject to registration and the provisions of the Act are silent in this regard.
- 3.9.3 The proposed insertion of section 9(4)(c), (d) and (e) seeks to close the resultant gap in the existing legislative provisions, to ensure that applicants for registration in terms of the provisions of the Act comply with technical codes, regulatory requirements necessary for the sustained operation of the national transmission power system and interconnected distribution power systems, as well as the payment of fees imposed by licensees for granting registrants access to their network.

3.10 Clause 10: Amendment of section 10

- 3.10.1 Clause 10 of the Bill seeks to amend section 10 of the Act. The proposed amendments seek to expand the scope of this section to include market operation and system operation in section 10(2)(a), to remove the reference to “prices” in section 10(2)(d) and to substitute the Minister of Mineral Resources and Energy (the “Minister”) with the “Regulator” in section 10(2)(h).
- 3.10.2 Section 11 of the Act requires an application for a license to be advertised. This provision may have unintended consequences where commercially sensitive information of an applicant may be disclosed. The proposed insertion of section 10(3) seeks to provide applicants with an opportunity to request the Regulator to treat their commercially sensitive information contained in an application for a licence confidential and not publicly disclose such information.

3.11 Clause 11: Amendment of section 11

- 3.11.1 Clause 11 of the Bill seeks to amend section 11 of the Act. Section 11 of the Act provides that a Regulator may require that an applicant publish a notice of the application for a license and must consider objections to the application. This provision, however, is silent on how the Regulator may require the applicant to publish a notice and does not provide for timelines within which the Regulator must deal with objections. This has presented challenges whereby applications have

been kept in the process for consideration by the Regulator for unacceptably lengthy periods of time.

- 3.11.2 The proposed amendment requires the Regulator to direct applicants to publish the application in writing. The proposed amendment further requires the Regulator to consider objections to applications within 30 days from the date of expiry of the time periods set out for receipt of objections. This seeks to improve the turnaround times for the consideration and finalisation of applications by the Regulator.

3.12 Clause 12: Amendment of section 12

- 3.12.1 Clause 12 of the Bill seeks to amend section 12 of the Act. Section 12 of the Act requires the Regulator to furnish the applicant with the objections received and allows the applicant the opportunity to respond thereto. The Regulator may request additional information, as may be necessary, before it considers an application for a licence. However, the existing section 12 does not provide for timelines within which the Regulator must deal with the above matters. Consequently, the licensing processes have been retained in the process for consideration by the Regulator, for unacceptably lengthy periods of time.
- 3.12.2 The proposed amendment prescribes that the Regulator must, if objections have been received and the applicant has provided responses to the objections, or such further requested information, consider the objections within a period of 30 days thereafter. This seeks to improve the turnaround times for the consideration and finalisation of applications by the Regulator.

3.13 Clause 13: Amendment of section 13

- 3.13.1 Clause 13 of the Bill seeks to amend section 13 of the Act. The Act allows for the Regulator a period of 120 days to grant or refuse an application. This timeline, compounded by a lack of defined timelines in other areas associated with the application process, has been considered to be too lengthy and to negatively affect applicants. More often than not, this timeline has also been exceeded and applications have taken longer to be considered by the Regulator. This is also considered to contribute to regulatory uncertainty.
- 3.13.2 The proposed amendment to section 13(1) shortens the period for the Regulator to grant or refuse an application and requires the Regulator to do so within 60 days.
- 3.13.3 The proposed amendment to section 13(3), and proposed deletion of section 13(4), is an amendment that seeks to align the amendments with the provisions of the Act.

3.14 Clause 14: Amendment of section 14

- 3.14.1 Clause 14 of the Bill seeks to amend section 14 of the Act. The provisions of section 14(1)(a) of the Act are limited to a licensee and its end-user. This has led to “customers” not being provided for in certain provisions of the Act. The definitions provide a distinction between an “end-user” and a “customer”. The proposed amendment to section 14(1)(a) seeks to expand the scope to include customers, thereby ensuring that clarity is provided that “customer” and “end-user” may be considered as separate and distinct from each other.
- 3.14.2 Section 4(a)(ii), read with section 14(1)(d), of the Act obliges the Regulator to regulate prices and tariffs. The practical application of

this provision has presented the Regulator with implementation challenges, since it has proven difficult to regulate prices. The proposed amendment removes the regulation of prices element and obliges the Regulator to set and approve tariffs. In the setting and approval of tariffs, and the methodology thereof, the Regulator would provide for the element of prices as an integral part of tariff setting.

- 3.14.3 The proposed amendments to section 14(1)(f), (l), (m) and (z) seek to expand the scope of application of these provisions.
- 3.14.4 With regards to the application of section 7 of the Act, a legal scenario arose as to whether a person who is, or intends to be, sub-contracted by a holder of a license is required to also apply for and hold a license for that sub-contracted portion. The proposed amendment to section 14(1)(t) seeks to clarify that position by introducing an exception to the effect that a license may contain a license condition allowing the licensee to sub-contract the performance of the licensed functions, including allowing for the licensee to sub-contract the maintenance and operation of the generation, transmission or distribution facilities.

3.15 Clause 15: Amendment of section 15

- 3.15.1 Clause 15 of the Bill seeks to amend section 15 of the Act. Section 15(1) of the Act provides for the license conditions relating to the setting or approval of prices, charges and the regulation of revenues to enable an efficient licensee to recover the full cost of the licensed activities, including a reasonable margin or return. Due to difficulties experienced by the Regulator in practically implementing this provision, the proposed amendment to section 14(1)(d) of the Act seeks to remove the setting or approval of prices. It was identified that in the Act, the license conditions did not provide for considerations relating to security of supply.
- 3.15.2 The proposed amendments to section 15(1) of the Act seek to allow the Regulator, in setting and approving tariffs, to provide for license conditions that allow for a reasonable return commensurate with the risk of the licensed activity and may have regard to the need to ensure security of supply, the diversity of supply and to promote renewable energy.
- 3.15.3 With regards to the proposed transition to a competitive market, challenges are presented as to whether the market would determine prices for itself, or would it be subject to regulation through tariff setting by the Regulator. A further concern was that clarity was needed regarding the protection of customers in relation to tariffs that may be charged.
- 3.15.4 The proposed insertion of section 15(1A) and (1B) into the Act seeks to provide for factors that need to be taken into account for tariff determinations, including all planned projects reflected in the integrated resource plan and the transmission development plan, insofar as these projects may impact on the costs of the licensee, for the period during which the tariff applies. Further, in the case of vertically integrated licensees, the Regulator must set or approve separate tariffs for each of the licensed activities.
- 3.15.5 The proposed amendment of section 15(2) of the Act seeks to provide clarity that a licensee may not charge a customer any tariff other than, the tariff set or approved by the Regulator as, or in accordance with, a licence condition.
- 3.15.6 The proposed addition of section 15(4) into the Act seeks to provide clarity on the charging of prices emanating from a competitive market

or from bilateral arrangements. The proposed addition provides an exception, permitting a licensee to charge a customer a tariff, which has not been set or approved by the Regulator, where such tariff is charged pursuant to a direct supply agreement or arises as an outcome of a competitive market.

3.16 Clause 16: Amendment of section 16

Clause 16 of the Bill seeks to amend section 16 of the Act. Section 16 of the Act obliges the Minister to prescribe the procedure to be followed in varying, suspending, removing or adding any license condition. This is a regulatory function, which the Regulator is best suited to perform. The proposed amendment intends to allocate this function to the Regulator instead of the Minister.

3.17 Clause 17: Amendment of section 17

Clause 17 of the Bill seeks to amend section 17 of the Act. The proposed amendment is a textual amendment and further seeks to allocate the function to prescribe the form and procedure to be followed in revoking a licence, from the Minister to the Regulator.

3.18 Clause 18: Insertion of section 17A

3.18.1 Clause 18 of the Bill seeks to insert section 17A into the Act. The promulgation of the amendment to Schedule 2 of the Electricity Regulation Act: Licensing Exemption and Registration Notice, 2023, created a regulatory gap wherein generation facilities, which were regulated under license conditions, are now only required to register with the Regulator, and there are no explicit provisions in the Act providing for the variation, suspension or removal of registrations.

3.18.2 The proposed insertion of section 17A into the Act seeks to empower the Regulator to be able to consider the variation, suspension, deregistration or revocation of registrations, and the amendment further integrates these provisions from Schedule 2 with the main provisions of the Act.

3.19 Clause 19: Amendment of section 20

3.19.1 Clause 19 of the Bill seeks to amend section 20 of the Act. The provision of the Act provides for a prohibition on the transfer of licenses. This is contrary to similar provisions contained in other similar legislation, which provide for the prohibition, but contain an exception that the transfer may occur if approved by the relevant regulatory body.

3.19.2 The proposed amendment seeks to provide textual corrections, expand the scope of licensable activities to cover import and export, market operation and system operation, and permits the transfer of a license upon the written consent of the Regulator.

3.20 Clause 20: Amendment of section 21

3.20.1 Clause 20 of the Bill seeks to amend section 21 of the Act. The proposed amendment to section 21(1) of the Act seeks to qualify this provision to give due consideration to the application of section 14(1)(t). The proposed amendments to section 21(3), (4), (4)(c), (e) and (f) of the Act, are textual amendments.

3.20.2 The main objective of the Bill is to introduce a competitive market in the electricity sector. With the proposed migration from a monopolistic electricity supply industry model, to a competitive model, there is

a necessity to provide measures that would ensure that third parties are not discriminated against, and that they will be granted access to the Transmission System Operator SOC Ltd's transmission or distribution power systems to evacuate their generated power. This would ensure that the competitive market would be able to function. This necessitates that measures, such as legislative provisions providing for non-discrimination against third parties, be put in place to provide for the interaction between the different role players in the electricity sector, to provide the process whereby new role players would be guaranteed access to the use of the electricity grid system, and to provide for such access charges.

- 3.20.3 The proposed insertion of the new section 21(3A), (4A), (4B) and (4C) into the Act seeks to ensure that there will not be discrimination between different generators or customers in relation to dispatching or balancing the system. Balancing the system refers to the process of ensuring that electricity consumption matches the electricity production of the electrical grid (the system) at any moment. Third party access to the transmission and distribution power system will be based on published tariffs, applicable to all eligible customers, and applied objectively, without discrimination between system users. The operation of the system must be transparent, non-discriminatory and in line with market-based procedures.

3.21 Clause 21: Amendment of section 22

Clause 21 of the Bill seeks to amend section 22 of the Act. The proposed amendment seeks to provide a directive that a form of authorisation must be in writing.

3.22 Clause 22: Amendment of section 24

Clause 22 of the Bill seeks to amend section 24 of the Act. The proposed amendment seeks to expand this provision to include a reference to "road".

3.23 Clause 23: Amendment of section 27

Clause 23 of the Bill seeks to amend section 27 of the Act. The proposed amendment is a consequential amendment, which substitutes a reference to "Provincial and Local Government" for "Cooperative Governance and Traditional Affairs".

3.24 Clause 24: Amendment of section 30

Clause 24 of the Bill seeks to amend section 30 of the Act. The proposed amendment seeks to align the provision with those that extend the scope of the Regulator to arbitrate disputes, provide textual correction, and allocate the function to prescribe a procedure from the Minister to the Regulator. The proposed insertion of section 30(5) into the Act seeks to ensure that arbitration decisions are made and to provide clarity on the status of arbitration decisions.

3.25 Clause 25: Amendment of section 32

Clause 25 of the Bill seeks to amend section 32 of the Act. The proposed amendment seeks to expand the scope of this section to include market operation or system operation, provide textual clarity and also obliges the Regulator to produce a preliminary report in relation to investigations undertaken.

3.26 Clause 26: Amendment of section 33

Clause 26 of the Bill seeks to amend section 33 of the Act. The proposed amendment to section 33(1)(a) of the Act seeks to provide textual clarity.

3.27 Clause 27: Amendment of section 34

- 3.27.1 Clause 27 of the Bill seeks to amend section 34 of the Act. The National Development Plan, 2030, envisions a South African energy sector that will be reliable, efficient and competitive, socially equitable through expanded access at affordable tariffs and pronounces a 20-year planning horizon to roll out electricity infrastructure, in line with the Ministerial determinations in terms of section 34 of the Act. These Ministerial determinations are policy signals to investors to plan their investments in the South African energy sector.
- 3.27.2 The National Energy Act, 2008 (Act No. 34 of 2008) (“Energy Act”) deals with the issue of energy security for South Africa. Section 2(a) and (b) of the Energy Act provides for its objectives as being, among others, to ensure uninterrupted supply of energy to the Republic and to promote diversity of supply of energy and its sources. The Minister is responsible for the implementation of the Energy Act.
- 3.27.3 For the purposes of the security of electricity supply, section 34 of the Act provides for matters dealing with energy security. Section 2(a) and (e) of the Energy Act states the objects of this Act to be to achieve the efficient, effective, sustainable and orderly development and operation of electricity supply infrastructure in South Africa and promote the use of diverse energy sources and energy efficiency. The Minister has the responsibility of ensuring that there is security of electricity supply. There have been occasions where the Regulator has refused to grant its concurrence on matters where the Minister sought to implement the provisions of section 34 of the Act, in his responsibilities to ensure security of electricity supply. This was because section 34 of the Act provided for the Minister to make determinations subject to the concurrence of the Regulator. Various court decisions have also affirmed that where the Regulator has not provided its concurrence, the Minister cannot implement the provisions of section 34. This has led to unintended consequences where the Minister has been rendered unable to carry out his responsibilities in terms of the Act.
- 3.27.4 The proposed amendment seeks to provide clarity on the scope of areas for which the Minister may make determinations, and the circumstances under which the Minister may make determinations. The proposed amendment further seeks to empower the Minister to make determinations after consultations with the Regulator and the Minister of Finance.

3.28 Clause 28: Insertion of sections 34A and 34B

- 3.28.1 Clause 28 of the Bill seeks to insert sections 34A and 34B into the Act. The White Paper on Energy Policy, 1998, sets out the energy sector policy objectives as being, among others, to stimulate economic development by Government, encouraging competition within energy markets. The White Paper further provides that to ensure the success of the electricity supply industry, various developments will have to be considered by government over time, namely, giving customers the right to choose their electricity supplier, introducing competition into the industry, especially in the generation sector; permitting open non-discriminatory access to the transmission system, and encouraging private sector participation in the industry.
- 3.28.2 In the State of the Nation Address, 2022, it was stated that, in addition to closing the energy supply shortfall, South Africa is implementing fundamental changes to the structure of the electricity sector and that the proposals in the Amendment Bill will enable the competitive market for electricity generation.

- 3.28.3 The strategic objective of Government for the electricity supply industry is, among others, articulated in the Department of Public Enterprises' Roadmap for Eskom in a Reformed Electricity Supply Industry, 2019 (the "Eskom Roadmap"), which outlines the future of Eskom. Eskom is to be unbundled, by splitting it into separate companies responsible for generation, transmission and distribution functions, starting with the creation of a transmission entity. This proposed restructuring is in line with the Energy Policy White Paper, 1998, which stated that Eskom be restructured into separate generation and transmission companies and that independent distributors would be established.
- 3.28.4 The Eskom Roadmap envisages the transmission entity to be wholly Eskom owned and fully regulated and will act as both the system operator and market operator, which will set the electricity sector on a new path. The formation of a transmission entity under Eskom Holdings will foster a competitive market and encourage the use of diversified market. The transmission entity has been registered by Eskom as the National Transmission Company South Africa SOC Ltd.
- 3.28.5 The objects of the Act in section 2(c), (e) and (f) are to facilitate investment in the electricity supply industry, promote the use of diverse energy sources and energy efficiency and promote competitiveness and customer and end user choice.
- 3.28.6 The proposed insertion also provides for the mechanisms to enable competitive markets in the electricity industry, provide transitional measures to an open competitive electricity market environment and encourage private sector participation in the industry as envisaged in the strategic objectives of Government.

3.29 Clause 29: Amendment of section 35

Clause 29 of the Bill seeks to amend section 35 of the Act. The proposed amendment seeks to clarify and expand the scope of application. The proposed insertion of section 35(3A) into the Act seeks to empower the Regulator to make transmission development related rules. The Regulator did not have this power previously. The proposed deletion seeks to ensure that the Regulator does not undertake activities for which there are other competent entities who are required to carry out such activities by legislation.

3.30 Clause 30: Insertion of sections 35A, 35B and 35C

- 3.30.1 Clause 30 of the Bill seeks to insert sections 35A and 35B in the Act. The Act is silent and does not have provisions on the delegation and assignment of powers and duties, as well as provisions on offences and penalties for contravention of the Act.
- 3.30.2 This omission renders the Act not to be aligned with similar legislation, which contain these provisions.
- 3.30.3 The proposed insertion of these provisions seeks to ensure that the Act aligns with other similar legislation. The proposed insertion also seeks to provide for measures wherein the Minister may delegate powers or assign duties to the Director-General or other officials. Further, the proposed insertion will enable certain contraventions to be treated as offences for which penalties may be imposed.
- 3.30.4 Clause 30 of the Bill further seeks to insert section 35C in the Act to provide for the transitional provisions that shall be in effect after the promulgation of this Bill. The proposed insertion of section 35C further seeks to enable the Regulator to have the powers to exercise

oversight and license the activities carried for the implementation of the Eskom Roadmap to enable the Eskom unbundling.

3.31 Clause 31: Amendment of arrangement of sections

Clause 31 provides for the amendment of the arrangement of sections.

3.32 Clause 32: Amendment of long title

The proposed amendment seeks to substitute the long title of the Act.

4. CONSULTATIONS

The amendments proposed by this Bill were published in Government *Gazette* No. 45898 Notice No. 1746 of 10 February 2022 for public comments. Comments by interested parties were considered. A series of consultations were undertaken with industry and other key sector stakeholders. Accordingly, the general public and institutions at large have been consulted in preparing the Bill.

5. FINANCIAL IMPLICATIONS FOR STATE

There are no financial implications for the State.

6. PARLIAMENTARY PROCEDURE

- 6.1 The Department and the State Law Advisers are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 76 of the Constitution since it contains no provision to which the procedure set out in section 75 of the Constitution applies.
- 6.2 The Constitution prescribes the classification of Bills, therefore a Bill must be correctly classified otherwise it will be constitutionally out of order.
- 6.3 We have considered the Bill against the provisions of the Constitution relating to the tagging of Bills, and against the functional areas listed in Schedule 4 (functional areas of concurrent national and provincial competence) and Schedule 5 (functional areas of exclusive provincial legislative competence) to the Constitution.
- 6.4 For the purposes of tagging, the constitutional court case of *Tongoane and Others v Minister for Agriculture and Land Affairs and Others CCT 100/09 [2010] ZACC 10* confirmed the “substantial measure” test indicated in *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 12/99 [1999] ZACC 15*. The test entails that “any Bill whose provisions in substantial measure” falls within a specific Schedule must be classified in terms of that Schedule.
- 6.5 In terms of section 76(3) of the Constitution, a Bill must be dealt with in accordance with the procedure established by either subsection (1) or (2) if it falls within a functional area listed in Schedule 4 to the Constitution.
- 6.6 The issue to be determined is whether the clauses as contained in the Bill, in a substantial measure, fall within a functional area listed in Schedule 4 to the Constitution.
- 6.7 The Bill provides for the electricity of the whole of the Republic, we have considered all the provisions of the Bill in order to establish the extent to which the provisions substantially affect any of the matters or functional areas listed in Schedule 4. The Bill provides for electricity matters for the whole Republic, and electricity and gas reticulation is listed under part B of Schedule 4, therefore the Bill should be tagged as a section 76 Bill.

- 6.8 Therefore, in our opinion, the Bill is an ordinary Bill affecting the provinces and must be dealt with in accordance with the procedure set out in section 76 of the Constitution.

7. REFERRAL TO NATIONAL HOUSE OF TRADITIONAL LEADERS

The State Law Advisors are of the opinion that it is not necessary to refer the Bill to the National House of Traditional and Khoi-San Leaders in terms of section 18(1)(a) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since it does not contain provisions pertaining to traditional or Khoi-San communities or pertaining to customary law or customs of traditional or Khoi-San communities or pertaining to any matter referred to in section 154(2) of the Constitution.

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