

Key aspects of the Electricity Regulation Act Amendment Bill 2022

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On 10 February 2022, the minister of mineral resources and energy published the second Amendment Bill to the Electricity Regulation Act, 4 of 2006 (ERA) for public comments.



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A central theme of these amendments is a move away from a predominantly single-buyer electricity market to a competitive multi-market structure. The proposed amendments in the Bill will promote a competitive market for electricity generation and the establishment of an independent state-owned transmission entity. This will have an impact on IPPs, funders, offtakers and consumers.

Webber Wentzel has engaged with various players in the electricity industry on the amendments proposed in the Bill.

Below is an overview of the key amendments proposed.

Competitive multi-market

The Bill provides for a competitive multi-market structure for the South African electricity industry. The competitive multi-market structure would consist of: (i) market transactions, (ii) physical bilateral transactions, and (iii) regulated transactions.

The proposed multi-market structure is significant because it illustrates how the shift from South Africa's long-standing vertically integrated electricity model under Eskom's monopoly will be made. The following key features of the competitive multi-market are introduced in the Bill:

TSO: The Bill proposes the establishment of the transmission system operator (TSO) which will manage the competitive multi-market. It will be responsible for transmission planning and operation and control of the transmission system and market. Notably, the TSO will be charged with developing a transmission expansion plan in accordance with anticipated electricity demand, in line with the integrated resource plan (IRP). The role of the TSO is highly relevant and important for future electricity supply and regulation.

Central purchasing agency: The Bill envisions the formation of a central purchasing agency within the TSO. This agency will buy legacy power purchase contracts and may purchase additional capacity and energy as required to maintain system integrity in a competitive environment. The central purchasing agency will also fulfil the role of the "single buyer". The Bill does not define the "single buyer" and it is not clear what this term would mean in the context of a competitive multi-market. The central purchasing agency would be a key institution in establishing a reformed power sector. The central purchasing agency is only named twice in the Bill and provision for its functioning under the Bill is at a very high level only. We, therefore, recommend that further clarity be provided on the agency's roles and reporting structures.

Day-ahead market: The Bill proposes the introduction of the "day-ahead market", which will match the supply of electrical energy with the expected demand in each hour of the trading day. The introduction of the "day-ahead market" is welcomed because it promotes the open market of electricity trade in South Africa. It is, however, unclear how the day-ahead market will be housed, set up or operated. Should the board of the TSO, the central purchasing authority, the regulator or the minister determine this through rules? We recommend further consideration and provision of the definition and determination of the day-ahead market.

There are a number of undefined terms in the relevant provisions of the Bill regarding the TSO and the competitive multi-market, making these provisions difficult to evaluate fully.



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Ministerial powers

The publication of the Bill was preceded by the first Amendment Bill of the ERA, which was published (but not gazetted) on 16 March 2021 (the 2021 Bill). The 2021 Bill gave the minister far-reaching powers under the ERA. The second Bill makes a positive effort to remedy this aspect.

However, the Bill continues to grant far-reaching discretion to the minister. This contradicts the objective of a liberalised electricity market and may create uncertainty. Examples of the increased discretion granted to the minister in the Bill include:

- the power to issue determinations designating the buyer of electricity, the type of technology and the structure of the project, detracting from the principle of an open and competitive market;
- the power to issue a revised Integrated Resources Plan every three years, detracting from the TSO's ability to procure

electricity supply as may be needed when imbalances or shortfalls occur during that period;

- the power to determine that new electricity infrastructure is needed to ensure optimal supply of electricity;
- the power to order the TSO to adhere to a transmission development plan or specific aspects of the plan, which may impinge into the jurisdictions of the public enterprises and finance ministries;
- the power to deviate from the IRP or the transmission development plan in the national interest;
- the power to request the National Energy Regulator of South Africa (Nersa) to determine licence conditions for successful participants in IPP procurement processes;
- the power to request Nersa to determine maximum or guideline tariffs for a particular technology under an IPP procurement programme; and
- the power to determine categories of trading which require licences.

Nersa powers

The Bill provides further clarity on Nersa's roles, mandate and powers. As with the minister, the Bill grants Nersa wide powers that arguably compromise the objective of a liberalised electricity market. We recommend that further consideration be given to balance in these provisions of the Bill, with the overarching objective of creating a liberalised market. Some notable changes to Nersa's duties and powers include the following:

Arbitration: Section 30 empowers Nersa not only to mediate, but to also provide binding decisions in disputes among licensees and between licensees and customers or end-users through arbitration.

Tariff methodology: Section 14(d) empowers Nersa to set or approve tariffs charged by licensees, but the Bill has removed Nersa's obligation in Section 14(e) to include the methodology to be used to determine rates and tariffs in the licence conditions. We recommend reinstating this provision because the methodology used to determine the rates and tariffs must still be visible, but should not apply to private offtake deals or national or municipal offtake deals where tariffs have been bid under a procurement process. The setting of tariff levels may also curtail competition in the market.

Penalties: Section 14(y) of the Bill empowers Nersa to impose penalties on generation facilities for own use or for supply to customers under direct supply agreements if the facilities do not become operational within the requisite period. The imposition of such penalties on own generation facilities but not other types of facilities appears to be arbitrary and the justification for this amendment is not immediately clear. This is a matter that should be governed contractually between buyers and sellers, not by Nersa. Upper limits on the amounts of the possible penalties are also not specified. We recommend removing this provision because attempts to regulate timing (and price) of own generation or direct electricity supply facilities should be outside Nersa's mandate.

Licensing: Section 4(a)(i) of the Bill introduces seven activities for which Nersa can issue licences. Nersa is required to license according to the determination made by the minister in line with the IRP. We note that generation licensees do not also need to apply for trading licences, which is a useful practical amendment in keeping with current practice. We note, however, that construction of transmission and distribution power systems will now require a licence, which is likely to increase the administrative burden on IPPs opting for self-build of connection infrastructure. Nersa's consent will also need to be sought when there is a change in construction or operations contractor, which is likely to hinder the expeditious completion of projects.



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Expropriation (Section 26)

The Bill has clarified that the interests of the national transmission and distribution systems may trump individual land rights,

within Constitutional bounds. Accordingly, the Bill authorises the minister to expropriate land or land rights permanently or temporarily on behalf of licensees, which will entitle those licensees to become the owner of such land or the holder of such land rights. The Bill also empowers the minister to authorise a transmitter (such as the TSO) to expropriate land or any land rights permanently or temporarily for the purpose of constructing transmission lines.

Notably, the current draft only caters for expropriation by a transmitter for purposes of constructing transmission lines and not for the construction of other ancillary infrastructure, such as substations, which need to be constructed to enable additional generation facilities to connect to the national grid. We recommend expanding this section to cater for the construction of substations and other ancillary transmission infrastructure that may be required by the transmitter.

The proposed expropriation provisions in the Bill are generally welcomed because they will promote the expansion of South Africa's transmission grid by limiting unnecessary delays. There are, however, concerns whether expropriation of land is appropriate when land servitudes would be sufficient.

IRP

The Bill proposes that the minister be obliged to issue a revised IRP every three years. This obligation is to be applauded because IRP revisions have been too infrequent and have created a policy environment detached from South Africa's real-time electricity requirements.

However, the minister's power to issue a revised Integrated Resources Plan every three years detracts from the TSO's ability to procure electricity supply as needed when imbalances or shortfalls occur during that period.

It is also not clear whether new utility-scale generation capacity can be licensed by Nersa and constructed when it is not included in a ministerial determination.

We recommend further consideration of the balance between these two elements of the Bill.



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Transitional arrangements

From the date that the Bill comes into effect until the incorporation of the TSO, which should not be longer than five years, the Eskom transmission subsidiary will for all purposes be deemed to be the TSO and must perform the functions outlined in the Bill. It is not clear how this five-year period was determined.

Conclusion

Regular load shedding and power outages are a visceral manifestation of South Africa's urgent need for energy sector reform. The proposed amendments to ERA are welcomed as a positive step towards transforming South Africa's electricity sector and aligning it with international best practices.

The minister has invited interested and affected parties to submit representations on the Bill to the Department of Mineral Resources and Energy (DMRE) within 30 business days of publication of the Bill, which means by 25 March 2022. Webber Wentzel is supporting detailed submissions on the Bill by industry organisations to the DMRE ahead of this due date.

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