

GUIDELINES ON PUBLIC CONSULTATION

(Version 2 of July 2011)

SUBJECT

Guidelines on Public Consultation.

DISCUSSION

1. Section 10(1)(d) of the National Energy Regulator Act, 2004 (Act No. 40 of 2004) (the Act) provides that decisions of the Energy Regulator must be:
“...taken within a procedurally fair process in which affected persons have the opportunity to submit their views and present relevant facts and evidence to the Energy Regulator” .
2. The implications of this section are the following :-
 - (a) That the decisions of the Energy Regulator must be taken within a procedurally fair process; and
 - (b) That affected persons must have the opportunity to submit their views and present relevant facts and evidence to the Energy Regulator.
3. The Energy Regulator, when taking a decision, in complying with the provisions of section 10 of the Act will follow the following processes:-
 - (a) Notice and comment procedure;
 - (b) Notice and comment procedure and public hearing; or

(c) Public hearing

4. The circumstances listed below are in terms of section 4 of the Promotions of Justice Administration Act, 2000 (Act No. 3 of 2000).

5. Notice and comment procedure

5.1 If the Energy Regulator decides to follow a notice and comment procedure, the administrator must :-

- (a) take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them;
- (b) consider any comments received;
- (c) decide whether or not to take the administrative action with or without changes; and
- (d) comply with the procedures to be followed in connection with the notice and comment procedures as prescribed,

5.2 If it is reasonable and justifiable in the circumstances the Energy Regulator may depart from the above requirements. In determining whether a departure is reasonable and justifiable an administrator must take into account all relevant factors including :-

- (a) the objects of the empowering provision;
- (b) the nature and purpose of, and the need to take the administrative action;
- (c) the likely effect of the administration action;
- (d) the urgency of taking the administrative action or the urgency of the matter; and
- (e) the need to promote an efficient administration and good governance.

6. The decision on which process/es the Energy Regulator must follow will be influenced by one or more of the following factors:-
 - (a) The nature, purpose and circumstances of a particular case, including (d) and (e) below;
 - (b) The public interest;
 - (c) The effect of the administrative decision;
 - (d) Whether or not there is consent/agreement from all affected third parties; and
 - (e) Whether or not there is a third party or parties who wish to be heard that is, comment or express a point of view.

7. The mandate of the Energy Regulator is derived from the provisions of section 4 of the Electricity Regulation Act, 2006 (Act No. 4 of 2006), section 4 of the Petroleum Pipelines Act, 2003 (Act No. 60 of 2003) and the Gas Act, 2001 (Act No 48 of 2001). From these three pieces of legislation the functions of the Energy Regulator can be summarised as follows:-
 - (a) Licensing;
 - (b) Pricing and tariffs;
 - (c) Compliance;
 - (d) Complaints and disputes;
 - (e) Investigations and inquiries; and
 - (f) Expropriations.

8. The other administrative decisions that Energy Regulator take relates to the request for access to information in terms of the Promotion of access to Information Act, 2000 (Act No 2 of 2000).

9. Licensing matters can be subdivided into various activities namely

- (a) New licence applications;
- (b) Amendments of existing licenses;
- (c) Suspensions of licences; and
- (d) Revocations of licences.

10. Pricing and Tariffs matters relate to:-

- (a) The application for setting/approval of pricing and tariffs; and
- (b) Amendment of pricing and tariffs.

11. Compliance on the other hand relates to compliance with the Acts, Regulations, Rules and conditions of licence.

12. The Energy Regulator, when deciding whether or not to hold a public hearing, will be influenced by the factors mentioned in point 6 above.



| ACTION | PROCEDURE | REASONS FOR THE PROCEDURE/S |
|---|---|---|
| Licence applications with objections (interested parties and/or request to be heard) | Notice and comment procedure and a public hearing | To hear the views of the applicant and the 3 rd parties |
| New licence applications without objections and the Energy Regulator. does not require further information from the applicant | Notice and comment procedure and a public hearing (unless there are exceptional circumstances; if the applicant declines the opportunity to present) | It may be prejudicial to the applicant, unnecessary prolonging of the process and wasted costs for the Energy Regulator and the applicant |

| ACTION | PROCEDURE | REASONS FOR THE PROCEDURE/S |
|--|---|---|
| New licence applications without objections | Notice and comment procedure and a public hearing | Based on public interest and the effect of the administrative decision |
| Amendment of licence on application by the applicant with objections | Notice and comment procedure and a public hearing | To hear the view of the applicant and the 3 rd parties |
| Amendment of licence on application by the applicant without objections and the Energy Regulator does not require further information from the applicant | Notice and comment procedure | It may be prejudicial to the applicant, unnecessary prolonging of the process and wasted costs for the Energy Regulator and the applicant |
| Amendment of licence on application by any affected party | Notice and comment procedure and a public hearing | To hear the views of the affected party and the applicant |
| Expropriation applications with consent by the landowner (this relates to the land in question, the compensation amount as well as the applicable law) | Notice and comment procedure | It may be prejudicial to the applicant, unnecessary prolonging of the process and wasted costs for the Energy Regulator and the applicant |

| ACTION | PROCEDURE | REASONS FOR THE PROCEDURE/S |
|--|---|---|
| Expropriation applications without consent by the landowner | Notice and comment procedure and a public hearing | To hear the views of the applicant and the land owner and/or the affected person/s |
| New tariff applications | Notice and comment and a public hearing | To hear the views of the applicant and the affected parties |
| Amendment of existing tariff | Notice and comment and a public hearing | To hear the views of the applicant and the affected parties |
| Licence amendments applications where a public hearing was held previously and the amendment is of no consequences on affected and/or interested parties | Notice and comment procedure | It may be prejudicial to the applicant, unnecessary prolonging of the process and wasted costs for the Energy Regulator and the applicant |
| Suspensions of licences | Notice and comment and a public hearing | To present the views of NERSA and to hear the views of the applicant and the affected parties |

| ACTION | PROCEDURE | REASONS FOR THE PROCEDURE/S |
|-------------------------|--|---|
| Revocations of licences | Notice and comment or a public hearing | To present the views of NERSA and to hear the views of the applicant and the affected parties |

