CONSULTATION PAPER ON THE REVIEW OF THE DISTRIBUTION LICENSING PROCESS

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1 THE CONSULTATION PROCESS

The National Energy Regulator (NERSA) is in the process of considering the implications of section 156 of the Constitution of the Republic of South Africa 1996 read with sections 76-83 of the Municipal Systems Act, 2000 (Act No. 32 of 2000) and the Electricity Regulation Act, 2006 (Act No. 4 of 2006) against the current regulatory licensing practice.

Stakeholders are requested to comment in writing on the review of distribution licensing consultation paper. Written comments can be forwarded to (email); hand delivered to Kulawula House, 526 Madiba Street, Arcadia, Pretoria, 0083 or posted at PO Box 40343, Arcadia, Pretoria, 0007. The closing date for the submission of comments is 22 July 2016.

For more information and enquiries on the above, please contact Mr. Mmboniseni Murathi at +27 12 401 4659.

2. INTRODUCTION

The Electricity Regulation Act, 2006 (Act No. 4 of 2006) (the Act) mandates the Energy Regulator to, among other things to issue electricity distribution licence to any person who complies with the requirements of the Act. The Energy Regulator issues a licence to a person who has applied, furnished all the documents showing ability to comply with labour, health, safety and environmental legislations and any other requirements the Energy Regulator may require.

The assessment of any licence application is comprehensively done and in compliance with the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) wherein all interested and affected parties can make representation before the decision is made. Municipalities, Eskom and private distributors licence applications are considered in terms of the Act.

Electricity distribution licence is issued to a person operating a distribution facility within an electricity area of supply and not to a single customer. The activity of distribution of electricity is the subject of a licence and not an area of supply. An area of supply specifies where the activity may be performed. An area of supply is found within a municipal area, thereby creating a distinction between an area of supply in terms of the Act and municipal area in terms of Municipal Systems Act, 2000 (Act No. 32 of 2000).
Section 156 of the Constitution of the Republic of South Africa 1996 (Powers and functions of municipalities) provides that a municipality has an executive authority in respect of electricity and gas reticulation. The implications of section 156 has not been analysed with a view to ensure proper implementation.

3. PURPOSE

The principle aim of this consultation paper on the review of the electricity distribution licensing is to:

3.1 solicit comments from stakeholders on the proposed distribution licensing review; and
3.2 explore various options that can be used in the orderly development of the electricity distribution industry.

4. APPLICABLE LAWS

4.1 Constitution of the Republic of South Africa 1996;
4.2 Electricity Regulation Act, 2006 (Act No. 4 of 2006);
4.3 Eskom Conversion Act, 2001 (Act No. 13 of 2001);

5. CONTEXT OF THE CONSULTATION PAPER

The Energy Regulator has been inundated with requests and inferences that the current licensing regime is contrary to the provisions of the Constitution with primary reference to the definition of a supply area in terms of the Act.

The Energy Regulator licenses any person who is operating a distribution facility as opposed to licensing a customer. The Constitution provides in Section 156 that a municipality has an executive authority to reticulate electricity in its municipal area.

1. Does this constitutional provision give exclusivity to municipalities and no other person can provide electricity within a municipal area without the consent/permission of a municipality?
The electricity supply industry has been in existence for years. Eskom as a strategic generator, transmitter and distributor of electricity informed by law and government policies at the time there was no industry regulation and no Section 156 of the Constitution and also there was no wall to wall municipal structure.

This allowed different entities to enter into the realm of the electricity supply to different areas and customers.

The historical development of the electricity supply industry has resulted in investment by different entities into the electricity infrastructure to ensure supply sustainability.

2. Does it mean that the historical context of the electricity supply industry should be left as is? If not, how should the historical context of the industry be treated?

If the historical context of the electricity supply industry is to be changed, and have all persons distributing electricity within a municipal area be required to seek permission of a municipality, will it not stifle the orderly development of the electricity supply industry.

Municipalities have been confronted with a situation wherein the implementation of some of the legislated by-laws has been constricted by having multiple service authorities within the municipal area.

Municipalities can in terms of Section 102 of the Municipal Systems Act consolidate accounts of a customer that the municipality supply and be able to implement credit control policy to recover the unpaid amounts whereas the same legislated by-laws cannot be implemented to non-municipality electricity supply customers.

3. Can Eskom or any private distributor contract with a municipality to enable Eskom or private distributor to disconnect electricity supply in respect of municipal charges even if a customer is up to date with his/her Eskom the electricity bill?
The Act sets out the circumstances under which an electricity customer can be disconnected and the non-payment of services outside of electricity is not considered as one of the activities, therefore the disconnection for non-electricity service charge may be open to legal challenge.

4. What will be the potential legal implication for the utility if the electricity customer is disconnected by the utility for non-electricity service charges or other municipal services debts?

Premised on many requests that NERSA has received from municipalities regarding their status as the services authority and wanting to take over the Eskom licensed electricity supply areas, this consultation will serve to create a platform to unbundle all related issues without resorting to dispute resolution or litigation.

The Energy Regulator has been approaching such requests in terms of the legal mandate that NERSA has in terms of the Electricity Regulation Act by referring the matter back to the municipalities and Eskom for resolution or agreement as the right to supply electricity is conferred on either party in terms of the Electricity Regulation Act.

5. Without an agreement between the parties, can a municipality take over an electricity area of supply of Eskom or how would a request for a takeover be processed in law as electricity area of supply is a legal right conferred by the Energy Regulator in terms of the enabling law?

In accordance with the current regulatory regime, multiple electricity supply authorities exist within a municipal area. The supply authority can either be Eskom municipality or private distributor. Instances do exist wherein Eskom is a service provider of a municipality, in such cases a municipality is a licence holder (service authority) although a municipality is unable to render the service on its own.

In the instance wherein a person is a licensed service authority within a municipal area such a person shall:
• charge own Energy Regulator approved tariff, only
• do disconnections in terms of the law,
• licence conditions and own credit control policy,
• change the network design and structure

Whereas in an instance where the person in not licensed but providing the service on behalf of another licensed person (service authority), the tariffs to be charged, disconnection policy, network design and any other electricity related service shall be that of the licensed authority.

6. Is the perception that the electricity supply industry is established on an understanding that the electricity supply area as licensed by NERSA in terms of the enabling law is separate from a municipal area as defined in the Municipal System Act still hold?

The distribution network within the Republic of South Africa is mainly planned, constructed and operated by Eskom with municipalities operating distribution networks within their licensed supply areas or where there is customer connected. There are areas within municipal areas that Eskom network traverses without any load close by enabling proper supply to municipal load and or customers.

7. If municipalities were to take over the distribution network within the municipal area and operate it, will it not create technical challenges in terms of bulk supply to another municipality and also impact on the orderly development of the electricity supply industry?
8. How will the distribution planning function be done in areas where Eskom was doing it in an event that the current format is changed.

There are differences in Eskom and municipal tariffs in terms of the structure and charges. The supply to Eskom customers is premised on contracts therefore any change not necessitated by law will require the consent of both parties.
9. What will be the tariffs chargeable to these customers if there is a change to the status quo?

10. What will be the benefit to these customers if the licensing regime is changed?