

**SUBMISSION TO THE PARLIAMENTARY PORTFOLIO COMMITTEE ON
MINERALS AND ENERGY BY THE NATIONAL ELECTRICITY REGULATOR
(NER): ENERGY REGULATOR BILL [B9-2004]: 30 JULY 2004**

A. INTRODUCTION

Following a feasibility study on the rationalisation of regulators within the energy industry, commissioned by the Department of Minerals and Energy, Cabinet approved in 2002 the recommendation that the National Electricity Regulator (NER), established in terms of the Electricity Act, 1987 (Act No 41 of 1987), the National Gas Regulator established in terms of the Gas Act, 2001 (Act No 48 of 2001), and the Petroleum Pipelines Regulatory Authority established in terms of the Petroleum Pipelines Act, 2003 (Act No 60 of 2003), be grouped together to form a single national energy regulator. To date neither the Gas Regulator nor the Petroleum Pipelines Regulatory Authority has been established since the relevant Acts are not yet in operation. It was therefore decided that the NER be used as the basis to create the envisaged national energy regulator. In order to facilitate the establishment of the national energy regulator without impeding the normal functioning of the NER, it has been decided to establish a separate Project Team headed by the Chief Executive Officer (CEO) of the NER.

The NER supports the Energy Regulator Bill and wishes to contribute the following comments and recommendations to facilitate the functioning of the proposed National Energy Regulator established in terms of the Bill. It must be emphasised that these comments and recommendations are based on a decade of experience in electricity regulation.

In essence, the NER recommendations entail that:

- the CEO should be a full-time member of the Energy Regulator;
- the other full-time members of the Energy Regulator should be executive members and should report to the CEO for their day-to-day functions, and that the appointment process for the full-time executive members should be different from that of appointing part-time members and the CEO;
- the only government agreement that should bind the Energy Regulator on gas regulation should be the Mozambique Gas Pipeline Agreement;
- the provision that the Minister should instruct the Energy Regulator to appoint or make use of other persons should be deleted;
- funding for electricity regulation should not be differentiated from funding for gas and petroleum pipelines regulation; and
- provision should be made for the decisions of the NER to be deemed to be those of the Energy Regulator, in addition to the transfer the CEO, staff, assets and liabilities.

B. COMPOSITION OF THE REGULATOR

Subsection 5. (1) read with subsection 5. (3)

“5. (1)The Energy Regulator consists of three full-time and five part-time members appointed by the Minister.”

5. (2) . . .

5. (3) The Minister must designate one of the full-time members to be primarily responsible for electricity regulation, another for piped-gas regulation and another for petroleum pipeline regulation.”

Comment

1. The NER submits that, in order to ensure conformity with the recommendations of the King Report on Corporate Governance for South Africa (2002) on the structure of a board, as well as with the Protocol on Corporate Governance in the Public Sector (2002), the following principles should be applied:

- the full-time members should be executive members and the part-time members should be non-executive members;
- there should be more part-time members than full-time members (as is already contemplated in sub-section 5. (1)); and
- the chairperson should be a non-executive member (as is already contemplated in sub-section 5. (2)).

2. The NER further submits that the Chief Executive Officer (CEO) should be a full-time member of the Energy Regulator. The reasons for this submission are as follows:

- the full-time members will be working together as a group on a day-to-day basis, and that group should be properly structured with day-to-day reporting responsibilities to the CEO, to ensure appropriate lines of accountability in administrative terms, but ultimate responsibility as part of the Energy Regulator;
- as a public entity subject to the Public Finance Management Act, 1999 (Act No 1 of 1999), the Energy Regulator will be the accounting authority with fiduciary duties and other responsibilities as regards the entity. The CEO, who will have day-to-day decision-making powers and responsibility for the operations of the entity, should assume those duties, and joint ultimate responsibility with the other members as a voting participant in the accounting authority to ensure that full accountability is accorded these responsibilities;
- if the CEO is a member of the Energy Regulator, that will contribute to the depth of knowledge in the Regulator of the entity’s operations, and could optimise the decision-making process of the Regulator through the actively engaged participation of the CEO and shared accountability of decisions taken by the Regulator. This could serve to avert any delays in decision-making and the problems experienced in some other entities with the accounting authority attempting to anticipate the decisions of the CEO, without his or her direct

participation, and thus potentially frustrating day-to-day operations that may have strategic consequences or financial implications through unnecessary delays;

- the function of the Regulator where the CEO is not a member runs counter to conventional corporate governance wisdom requiring the CEO to be an actively engaged, voting member with shared responsibilities and liabilities, both in fact and in principle; and
 - it also runs counter to contemporary thinking that full-time members of the Regulator (considered to be “executive” in nature) could be appointed to the Regulator, without the presence of the CEO on the Regulator body on an equal and accountable footing with colleagues reporting to him or her administratively. Without addressing this important aspect of governance accountability, the existing structure proposed in the Bill has the effect of giving the full-time members a higher level of authority than the CEO by virtue of their position on the Regulator to the exclusion of the CEO. This will make the position of the CEO untenable.
3. The NER further submits that, if the CEO were an executive member of the Energy Regulator, the ideal composition for the Energy Regulator would be four full-time members and five part-time members. This structure would have the following advantages:
- a better balance between the executive and non-executive members, while retaining the important principle that there should be more non-executive members than executive members;
 - there would be a greater depth and diversity of skills and experience among the executive members than if there are only three executives, as an additional member with specific legal and/or economic skills could be appointed (legal skills could be especially important for expropriation, licensing and dispute resolution proceedings); and
 - this structure would free the CEO to concentrate on operational matters, while the remaining three executives could focus on their particular areas of specialisation.
4. If the Parliamentary Portfolio Committee accepts that the CEO should be an executive member of the Energy Regulator, but is unable to accept the proposal that there be four executive members in total, then the NER proposes that the specialisation in gas regulation and petroleum pipeline regulation should be combined in one person, as there are synergies between the two. It is also noted that, taken together, these two areas of regulation will form a more or less balanced workload with that of the specialist in electricity regulation. It is therefore proposed that, if only three full-time members can be accommodated in the Energy Regulator,

one of the full-time members should specialise in electricity regulation and another should specialise in piped-gas and petroleum pipeline regulation. The third would be the CEO.

5. The NER's view is that responsibility must always be coupled to appropriate authority to discharge that responsibility. The notion of a person being "primarily responsible" for an area of regulation could create confusion as regards the role of that person vis-à-vis other members of the Energy Regulator, and this would be in conflict with the principle of collective responsibility contained in the Public Finance Management Act and in subsection 8. (5)(a) of the Energy Regulator Bill, which states that "a decision of the majority of the members present at a meeting constitutes a decision of the Energy Regulator". We therefore propose that the notion of "primary responsibility" be substituted with the notion of "specialisation".
6. Taking the above into account, a further aspect to reinforce appropriate structures of accountability in corporate governance terms, would be the sequence of appointments to the Regulator body. It is proposed that the Minister should first see to the appointment of the part-time ("non-executive") members, including the chairperson, and the full-time CEO who would also be a full-time member of the Regulator as has been motivated in this submission. On appointment, the part-time members and the CEO would then advertise for the required full-time ("executive") members (see 4 above), and who would be finally appointed to the Regulator body by the Minister on the recommendation of the members initially appointed.
7. This would ensure that the CEO holds accountable authority over the administrative affairs of the NER and its executive, while ultimate or primary authority for the Regulator resides firmly with the Minister as contemplated in the existing provisions of the Bill.

Recommendation

The above-mentioned sub-sections should be amended to read as follows:

"5. (1) The Energy Regulator consists of four full-time executive members, one of whom is the chief executive officer, and five part-time non-executive members.

5. (2) The part-time members and the chief executive officer must, subject to subsection 16(a), be appointed by the Minister.

5. (3) The remaining full-time members must be appointed by the Minister on the recommendation of the members referred to in subsection 5. (2).

5. (4) The Minister must designate one of the part-time members as chairperson of the Energy Regulator.

5. (5) The Minister must, on the recommendation of the members referred to in subsection 5. (2), designate one of the remaining full-time members to specialise in electricity regulation, another to specialise in piped-gas regulation and petroleum pipeline regulation, and another to specialise in expropriation, licensing and dispute resolution. Those full-time members shall report to the chief executive officer as regards the execution of their day-to-day functions."

Alternatively,

“5. (1) The Energy Regulator consists of three full-time executive members, one of whom is the chief executive officer, and five part-time non-executive members.

5. (2) The part-time members and the chief executive officer must, subject to subsection 16(a), be appointed by the Minister.

5. (3) The remaining full-time members must be appointed by the Minister on the recommendation of the members referred to in subsection 5. (2).

5. (4) The Minister must designate one of the part-time members as chairperson of the Energy Regulator.

5. (5) The Minister must, on the recommendation of the members referred to in subsection 5. (2), designate one of the remaining full-time members to specialise in electricity regulation, and another to specialise in piped-gas regulation and petroleum pipeline regulation. Those full-time members shall report to the chief executive officer as regards the execution of their day-to-day functions.”

Consequential Amendments

If the above proposals are accepted, the following consequential amendments must be made:

- *Definition of the chief executive officer in section 1 should refer to section 5 instead of section 11,*
- *Delete the whole of sub-section 8. (7) (attendance of meetings);*
- *Delete the whole of sub-section 11. (1) (appointment of the CEO by the Regulator);*
- *Delete the words “chief executive officer and other” in sub-section 11. (3).*

C. FUNCTIONS OF THE ENERGY REGULATOR

Sub-section 4 (b)

This provision requires that the Energy Regulator undertake “any other function assigned to the Gas Regulator by any government agreement”.

Comment

It must be clear that this provision refers only to the agreement between the government and Sasol referred to in section 36 of the Gas Act. Any other interpretation could be used to make this provision refer to unspecified government agreements at any time in the future or from the distant past (who knows of all the government agreements that were made during the sanctions era?). This in turn could lead to side-stepping of the provisions of the Gas Act as passed by Parliament.

Recommendation

This sub-section should be amended as follows:

“4. (b) undertake the functions of the Gas Regulator as set out in section 4 of the Gas Act and the functions assigned to it in terms of the government agreement referred to

in section 36 of the Gas Act for the period stipulated in sub-section 36 (2) of the Gas Act; and”

D. PERSONNEL OF THE ENERGY REGULATOR

Sub-section 11 (4)

This sub-section empowers “the Minister to instruct the Energy Regulator to appoint or make use of persons employed or contracted by another licensing or regulatory authority falling under the Minister’s jurisdiction.”

Comment

This provision was originally inserted in the Gas Act (and later the Petroleum Pipelines Act) to enable a quick start to the establishment of the Gas Regulator (and later the Petroleum Pipelines Regulatory Authority) by using the NER or DME staff in the initial phase. The rationale for this provision has since fallen away. Perpetuating the provision could be perceived by stakeholders as reflecting on the independence of the Energy Regulator.

Recommendation

Delete this provision as redundant.

E. FUNDS OF THE REGULATOR

Section 12

This section makes a distinction between the funds for the electricity regulator, the difference being that for electricity no provision is made for charges for dispute resolution and licence fees (the current Electricity Act limits licence fees/levy to generators –section 5B (1) (a) and (2)).

Comment

It is quite possible that provisions will be made at a later date for charges for dispute resolution and all types of electricity licences in the electricity industry (as it is proposed in the current Draft Electricity Regulation Bill). This would then require that both the Electricity Act and the Energy Regulator Act be amended to accommodate this. This could be easily avoided by deleting section 12 (2) of the Bill.

Recommendation

Delete this provision as redundant

F. TRANSITIONAL PROVISIONS

Section 16

This section makes provision for the NER CEO, the staff, assets and liabilities to be transferred to the Energy Regulator.

Comment

The NER fully supports the above provisions. However, for continuity and to avoid confusion it would be prudent to specify that the decisions of the NER will remain in force until such time as they are amended, replaced or deleted by the Energy Regulator.

Recommendation

A new sub-section 16 (d) be inserted to read as follows:

“(d) decisions of the National Electricity Regulator that are in force immediately before commencement of this Act will remain in force until such time as they are amended, replaced or deleted by the Energy Regulator.”

G. CONCLUSIONS

The National Electricity Regulator (NER) welcomes the opportunity to contribute to the deliberations of the Parliamentary Portfolio Committee on Minerals and Energy and trust that our comments and recommendations would make a positive contribution to the implementation of the Cabinet decision regarding the establishment of single Energy Regulator using the NER as a basis. We believe that this will also enhance the effective functioning of the Energy Regulator, once established.

We wish to thank the Department of Minerals and Energy (DME) for its excellent work on this Bill and also acknowledge the leadership of the Minister of Minerals and Energy in the restructuring of the regulation of the energy industry.

We wish the Chairperson and the Parliamentary Portfolio Committee a successful conclusion to their deliberations on this important matter. Thank you, once again for the opportunity provided.

End.