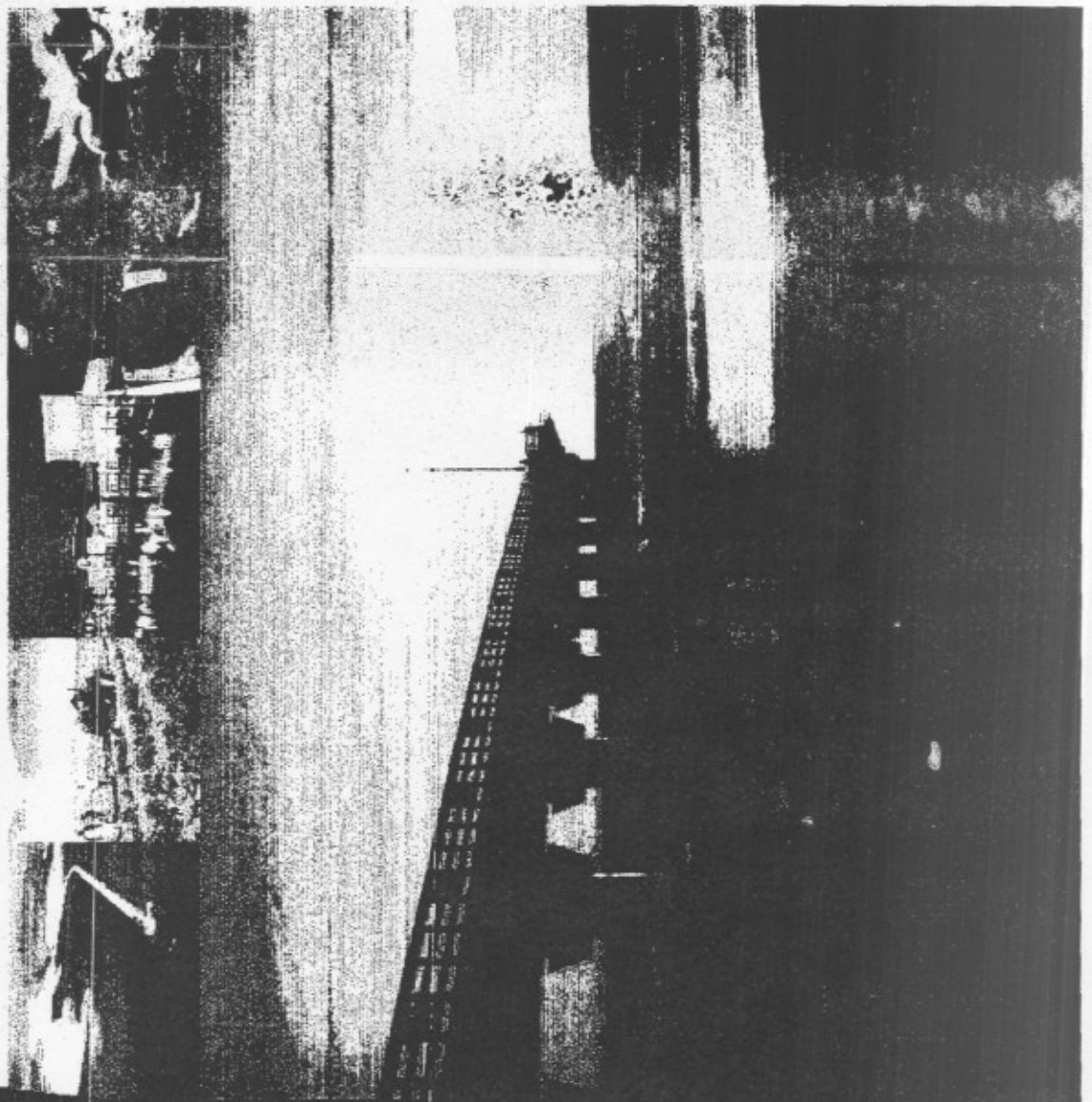


**Comment on
Electricity
Regulation Bill:
Portfolio Committee
on Minerals &
Energy
11/10/06**



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Introduction

In summary, it is the view of NMBM that:

- The definition of "reticulation" in the Bill is inconsistent with the Constitution
- The intervention provisions in the Bill (SS 40 & 41) are inconsistent with the Constitution
- The restriction of the Constitutional right to reticulate limits the ability of municipalities to deliver on their developmental mandate
- The consequences of implementation of the provisions of the Bill are contrary to the intention of EDIR
- Implementation of the Bill will have severe adverse effects on municipalities

Introduction (cont.)

- S 156 of the Constitution confers on municipalities executive authority in respect of, & the right to administer, the local government matters in Parts B, Schedules 4 & 5 of the Constitution
- S 152 imposes on local government a unique mandate to provide sustainable services & to promote social & economic development
- It is through the provision of services & carrying out of functions in relation to these services that municipalities fulfill their developmental obligations
- The fiscal base of a municipality is founded on the charging of fees for services provided, surcharges on fees & property rates (S 229 of the Constitution)
- Allocation of responsibility for electricity reticulation is consonant with the overall Constitutional, policy & legislative structure of local government

Objects of the Bill

- The object of the Bill is stated to be provide a framework for the setting of tariffs, to provide for the setting of KPAs for municipalities & to regulate the relationship between municipalities & service providers
- The objective of regulating reticulation services is not in itself objectionable i.e. SS 28, 29, 30 & 31 properly constitute regulation of the reticulation function
- However the introduction of certain definitions which have the effect of limiting the scope of municipal functions as defined in the Constitution make significant inroads into the functional executive authority of municipalities (which is guaranteed in the Constitution).



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Definition of "reticulation"

- "Reticulation" as defined in the Bill, limits its meaning to "trading with or distribution of electricity by a municipality to the community...."
- "Community" is defined to mean domestic end users, which in turn is defined to mean "persons who consume electricity for domestic purposes, a light industrial customer & such other customers as the Minister... may determine..."
- Finally, a light industrial or commercial customer, is one who purchases less than 5000 MW Hrs of electricity per annum
- The effect of these definitions is to purport to define the meaning of a term which is used in the Constitution without definition & in so doing, to restrict the constitutionally defined functions of municipalities
- No explanation is given in the memo as to why it is necessary to define the expression, nor as to why the apparently arbitrary level of usage of 5000 MW Hrs is used as an exclusionary measure
- Having excluded a class of customers from the broad concept of reticulation, the Bill does not purport to provide who should reticulate to that class of customers

Definition of “reticulation” (cont.)

- National government's authority to regulate the exercise of local government's right to reticulate electricity, is qualified by S44 of the Constitution (i.e. Parliament in legislating with regard to a Schedule 4 matter must act in accordance with the Constitution)
- This means that Parliament may not alter the functional competence of local government other than by amending the Constitution
- The section further precludes other spheres from exercising their powers in a way which encroaches on the “...functional & institutional integrity of government in another sphere”
- The restrictive definition in the Bill has the effect of doing just that
- For example, the exclusion of a class of customers will significantly undermine the capacity of a municipality to raise revenue (see also S16 of the Act)
- The restrictive definition will also undermine the capacity of municipalities to meet their social & economic obligations & indeed to meet the specific duties imposed by the Bill itself

Definition of "reticulation" (cont.)

- The provision in the definition of "community" affording the Minister authority to add to (or by extension, subtract from) the class of customers, effectively gives the Minister power to amend the Constitution by notice
- There is no doubt that the definitions are inconsistent with the Constitution
- The inconsistency may be cured by deleting from the definition of "community", the word "domestic" & by the deletion of the whole of the definitions of "domestic end-user" & "light industrial customer"

Intervention provisions (SS 40 & 41)

- The contents of the above sections is inconsistent with S 139 of the Constitution
- S 139 provides the only basis for the intervention of other spheres in municipalities. This can only occur if a municipality "cannot or will not fulfill an executive obligation".
- Such an intervention must be exercised by the provincial executive committee
- S40 of the Bill, by contrast, refers only to "the relevant MEC". Further, the provisions allowing the Regulator to request the MEC (sic) to issue a directive, are in contradiction to S 139, which allows the Executive Committee to issue a directive only in relation to a failure to fulfill an executive obligation
- The section further purports to give the Minister (of M & E) the power to intervene in certain circumstances. S139 however allows only the national executive has intervention powers & then only if the provincial executive has failed to perform an executive obligation

Intervention provisions (SS 40 & 41) (cont.)

- S 41 purports to provide for a form of direct intervention by the Minister of M & E in the circumstances, somewhat incoherently described in the Bill—the only form of intervention possible is that in S 139— This section is thus wholly in conflict with the Constitution to an extent incapable of remedy
- S 41 further purports to give the Minister power to “deviate from the Municipal Systems, Structures & Finance Management Acts” to a completely undefined extent effectively giving the Minister unbridled ad hoc legislative power
- It follows that both sections must be removed from the Act
- Regarding the regulatory authority in S 47, there is no obligation to consult organised local government cf. the provisions of the Systems Act & MFMA in this regard

Effect on NMBM

- As stated, the Bill detracts from the ability to fulfill the developmental obligation of the municipality
- The provisions result in a duplication of the tariff regime (the unnamed alternate distributor will set tariffs without referring to the overall developmental objectives of the municipality
- Use of energy consumption as a mechanism for categorising customers creates confusion. Usage fluctuates from year to year-users close to the cut off will be supplied by different distributors depending on usage in any one year
- On the current definition, at least 84 customers, which currently account for 35% of sales & 38% (R390m) of revenue will fall outside the cut off
- All customers within the metro are supplied in an integrated way from a network developed on the basis of this usage, which funds capital charges-splitting the customer base will devastate the economies of scale inherent in the system

Effect on NMBM (cont.)

- In NMBM, the Coega IDZ is a national project aimed at enhancing local development. NMBM has concluded reticulation & supply agreements with Coega & together millions have been spent on infrastructure. Allowing an independent distributor to fulfill the supply role flies in the face of the intention of S 152 of the Constitution, without regard to metro planning
- The split supply & tariff regime contemplated in the Bill is contrary to the intention of EDIR (e.g. municipalities to fulfill authority role, REDs to fulfill supplier role, common tariffs, transparent, consistent cross subsidisation framework)
- National government's role is increasingly being seen as a regulatory & oversight one-the Bill seems to lose sight of this in favour of sectoral interests, including what ESKOM seems to see as its right to distribute to selected customers

Conclusion

- The Bill has severe, probably fatal flaws, & if passed is unlikely to survive a Constitutional challenge
- It is suggested that the Bill be withdrawn & reworked, with proper consultation with local government
- Further, it should not be considered until clarity has been achieved on the EDIR Blueprint

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