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Dear Sirs

LIFE AFTER COAL CAMPAIGN COMMENTS ON THE DRAFT REGULATIONS AMENDING THE ELECTRICITY REGULATIONS ON NEW GENERATION CAPACITY, 2011

1. We refer to the proposed Draft Regulations Amending the Electricity Regulations on New Generation Capacity, published for 30 days' comment on 5 May 2020 (GN 500, GG 43277) ("**Draft Regulations**") under the Electricity Regulation Act, 20006 (**ERA**).

2. We submit herein, on behalf of the Life After Coal Campaign,[1] comments on the Draft Regulations.

3. Our comments are set out as follows:

   3.1. As a starting position, in response to the Draft Regulations, we confirm that the law, namely ERA and the Regulations for New Generation Capacity, 2011 ("**New Generation Regulations**"), do not specifically require prior approval of the Minister in order for municipalities to be able to establish their own electricity capacity. As a result, the Draft Regulations are redundant and not in line with the true legal position. We elaborate more on why this is so, below.

   3.2. We refer to the numerous barriers and practical impediments that make it difficult for municipalities to establish electricity capacity – with or without these Draft Regulations – which need to be prioritised for resolution and addressed.

   3.3. Should the Draft Regulations remain in place and proceed, despite the abovementioned legal inconsistency and our objections, we make recommendations on the Draft Regulation provisions below.

[1] Life After Coal is a joint campaign by organisations Earthlife Africa, groundWork, and the Centre for Environmental Rights, which aims to: discourage the development of new coal-fired power stations and mines; reduce emissions from existing coal infrastructure and encourage a coal phase-out; and enable a just transition to sustainable energy systems for the people. See https://lifeaftercoal.org.za/.

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The Draft Regulations are not in Line with the Legal Position: Ministerial Approval is not necessary in Order for Municipalities to establish their own Clean Generation Capacity

4. There is no legal provision in ERA or elsewhere, that specifically requires the prior approval of the Minister of Mineral Resources and Energy ("**the Minister**") for the designation of electricity capacity to municipalities, or that the National Energy Regulator of South Africa (**NERSA**) is prohibited from licensing new generation capacity in the absence of a Ministerial determination under section 34, ERA.

5. Any new generation facilities, established by municipalities or otherwise, would need to obtain a licence from NERSA – designated as "*the custodian and enforcer of the regulatory framework provided for in [the ERA]*",[2] unless they qualify for a schedule 2 exemption under ERA,[3] and they would need to show "*evidence of compliance with any Integrated Resource Plan applicable at that point in time or provide reasons for any deviation for the approval of the Minister*".[4] These checks and balances are already provided for in the law for anyone that wants to establish new generation capacity. NERSA is bound by a Ministerial determination under section 34(3)(a) of ERA, only to the extent that a determination exists. NERSA is not bound, in the absence of a determination, to refuse any licence applications for new generation capacity.

6. Government has an obligation, at **all** levels, to ensure that electricity decision-making encompasses and gives effect to the Constitution of the Republic of South Africa, 1996 ("**the Constitution**") and Bill of Rights – including the right to an environment not harmful to health or wellbeing and to have the environment protected for the benefit of present and future generations.[5] The ERA and its regulations must be interpreted and applied in a manner that is consistent with the Constitution.

7. Local government also has a particular Constitutional obligation to provide services in a sustainable manner and to promote a safe and healthy environment.[6] This is reiterated in the Local Government Municipal Systems Act, 2000 section 4(2)(d), which states that "*the council of a municipality, within the municipality's financial and administrative capacity and having regard to practical considerations, has the duty to - … strive to ensure that municipal services are provided to the local community in a financially and environmentally sustainable manner*". Insofar as a municipality intends to supply efficient, clean and affordable electricity to its people and to reduce its greenhouse gas (**GHG**) emissions, it must not be impeded in doing so, particularly given electricity constraints and the urgent need for clean and affordable electricity to be developed as soon as possible. In other words, national government should not serve as a barrier to the local governments that are seeking to fulfil their Constitutional obligations and provide clean and healthy electricity to the people they serve.

8. It is worth noting that – according to a 2018 report by the South African Local Government Association (**SALGA**) and the South African-German Energy Programme titled 'Sustainable Energy and Climate Change in Municipal IDPs' - "*More than 80% of municipalities mentioned sustainable energy and/or climate change as a priority within their IDPs, which translates into 210 out of 257 municipalities. This is an increase from the 66% seen in 2015. Furthermore, the number of municipalities that included both sustainable energy and climate change as a priority also increased*".[7]

9. South Africa's electricity sector has, and historically has had, far-reaching negative impacts for human health, social wellbeing, the environment, and the climate. 86% of South Africa's electricity is from coal-fired power stations, most of which are based in the Mpumalanga Highveld, where the impacts of air and water pollution of these plants are being felt on a daily basis by surrounding communities, many of whom do not have access to, or

[2] S3, ERA.
[3] GN 402, Licensing Exemption and Registration Notice. 26 March 2020.
[4] S10(2)(g), ERA.
[5] Section 24, the Constitution.
[6] S152(1)(b) and (d), the Constitution.
[7] P17, Sustainable Energy and Climate Change in Municipal IDPs, 2017 – 2018, at https://www.sagen.org.za/publications/80-sustainable-energy-climate-change-in-municipal-idps-2017-2018/file.

are simply unable to afford, electricity. Electricity from coal-fired power will continue to become increasingly expensive.

10. There is extensive evidence to demonstrate the harms to human health, the climate, the environment and the economy of burning fossil fuels (coal and gas) for electricity:

    10.1. **Climate harms**: Coal-fired power stations emit GHGs, such as carbon dioxide (**CO_2**) and nitrous oxide (**N_2O**), which contribute significantly to climate change. The burning of fossil fuels for energy is the single biggest contributor to climate-changing GHG emissions, and 77% of South Africa's GHG emissions are from energy (with 40-45% from electricity). This has severe negative impacts for the climate – which in turn affects people and the world we depend on to survive. Global coal use in electricity generation must fall by 80% below 2010 levels within the next 10 years to avoid exceeding the 1.5 degree Celsius limit,[8] confirmed to be the tipping point for our climate.[9] The Intergovernmental Panel on Climate Change (**IPCC**) confirms severe harmful consequences for Southern Africa if the 1.5 °C limit is exceeded.[10] These harmful consequences will largely be felt through: significant warming (as high as 5–8°C, over the South African interior by the end of this century);[11] impacts on water resources, such as changes in water availability; and a higher frequency of natural disasters (flooding and droughts), with cross-sectoral effects on human settlements, health, disaster risk management and food security.[12] Already the impacts of drought, extreme weather events, and fires in South Africa are being felt and have cost the country billions.[13] Government is having to subsidise these high costs, and will increasingly have to do so.[14] Coupled with the impacts of the COVID-19 pandemic, the impacts of the climate crisis and higher costs of living will be even more acutely felt, and increasingly so in the coming years. The World Economic Forum's annual "Global Risks Report"[15] lists the climate crisis and environmental threats as the top five global risks in terms of likelihood of occurring over the course of the next 10 years. These are risks which have already materialised and will become more severe unless urgent meaningful action is taken.

    10.2. **Health harms**: The burning of coal for electricity has drastic consequences for human health. The emissions of Eskom's coal-fired power stations alone are estimated to be responsible for some 2 000 deaths annually, costing government USD$ 2 372.78 annually.[16] Similarly, the use of gas for electricity generation will increase the atmospheric concentration of harmful air pollutants such as sulphur dioxide, nitrogen oxides, particulate matter, volatile organic compounds and hydrogen sulphide, exacerbating the burdens already placed on peoples' health and wellbeing in South Africa as a result of toxic air pollution.

    10.3. **Water and broader environmental harms**: both coal-fired power and gas power stations require large volumes of water in order to operate. Coal plants pose a risk of polluting water in the areas in which they

[8] See https://climateanalytics.org/briefings/coal-phase-out/.
[9] Steffen, W., Johan Rockström, Katherine Richardson, Timothy Lenton, Carl Folke, Diana Liverman, Colin Summerhayes, Anthony Barnosky, Sarah Cornell, Michel Crucifix, Jonathan Donges, Ingo Fetzer, Steven Ladea, Marten Scheffer, Ricarda Winkelmann, and Hans Joachim Schellnhuber, 2018. Trajectories of the Earth System in the Anthropocene, www.pnas.org/cgi/doi/10.1073/pnas.1810141115.
[10] https://www.ipcc.ch/sr15/chapter/spm/.
[11] P128, Long Term Adaptation Scenarios: Climate Trends and Scenarios for South Africa.
[12] P129, Long Term Adaptation Scenarios: Climate Trends and Scenarios for South Africa.
[13] Western Cape Government: Environmental Affairs and Development Planning "Western Cape Climate Change Response Strategy 2nd Biennial Monitoring and Evaluation Report 2017/18" (March, 2018) available at https://www.westerncape.gov.za/eadp/files/atoms/files/WC%20Climate%20Change%20Response%20Strategy%20Biennial%20M%26E%20Report%20%282017-18%29_1.pdf.
[14] See examples of the impacts of the country-wide droughts at https://pmg.org.za/committee-meeting/29261/; https://www.sanews.gov.za/south-africa/kzn-roll-out-drought-emergency-plan; and https://www.politicsweb.co.za/politics/declare-nw-a-drought-disaster-area-to-assist-agris
[15] https://www.weforum.org/global-risks/reports.
[16] https://lifeaftercoal.org.za/wp-content/uploads/2017/04/Annexure-A4.pdf.

operate and store their coal and toxic ash waste. Gas, throughout its lifecycle and particularly during extraction, poses major threats to vulnerable and scarce water resources.

10.4. **Economic harms**: coal-fired electricity from new coal plants costs more than solar PV and wind, even without factoring in external costs. A report by Carbon Tracker[17] says that "*coal developers risk wasting more than $600 billion because it is already cheaper to generate electricity from new renewables than from new coal plants in all major markets*." The COVID-19 crisis will result in a recession with severe economic impacts for South Africa. Government needs to focus on the most cost-effective electricity sources, to ensure that all people have access to affordable electricity, which is climate-resilient. Fossil fuel technologies will simply make electricity more expensive and unaffordable for most (even if its severe negative externalities are discounted). We can no longer afford to subsidise an inefficient fossil fuel sector with expensive, harmful and inefficient technologies.

11. The application process provided for in these Draft Regulations and a section 34 Ministerial determination would be a barrier to local governments developing clean electricity capacity, in circumstances where the Minister' prior approval and a Ministerial Determination under the ERA are not required by law; and in circumstances where a transition to clean energy is **urgently** needed. Unfortunately South Africa's steps to address the transition to date have been inadequate. It is clear that the transition is not being treated with the urgency or priority it demands. According to World Economic Forum Energy Transition index 2019 results, South Africa, globally ranks as the second worst-prepared country for the energy transition (only Haiti is less prepared).[18] The 2020 index rates South Africa as 10th worst-prepared, despite having a major share of global total energy supply.[19] Amidst the other countries with the biggest share in global total energy supply, South Africa ranks worst in terms of its readiness for a fast and effective transition.[20]

12. We refer to the case of *City of Cape Town v NERSA and the Minister of Energy* (case no 51765/2017) ("**the City of Cape Town case**") argued before Judge Windell of the North Gauteng High Court, in a virtual hearing on 11 and 12 May 2020. This case, and the now-awaited judgement, are directly relevant for this matter and the future of the Draft Regulations, as the primary legal questions to be determined relate to the rights and powers of local governments to establish their own electricity capacity, in the absence of the prior permission of the Minister, through a Ministerial Determination under the ERA. The interpretation of section 34 of the ERA and the Constitutional powers and functions of local governments are a central focus of this case.

13. If the City of Cape Town is successful in its case, this could mean that:

13.1. the Court would confirm and declare that ERA does not preclude municipalities from establishing their own electricity capacity in the absence of a Ministerial Determination: in other words, there is nothing in ERA that precludes NERSA from issuing a licence to a municipality where there is no section 34 Ministerial determination – such a judgment would render these Draft Regulations redundant, confirming that prior permission from the Minister is not required for municipalities to establish generation capacity;

13.2. it is unconstitutional to require municipalities to seek prior permission from the Minister - in the form of a determination - in order to establish capacity (this is the City's second prayer in its requested relief). If the Court finds that ERA does prohibit municipalities from establishing their own capacity without a prior determination from the Minister, then, the City argues that section 34 is unconstitutional as it infringes on municipalities' Constitutional powers and obligations to provide basic services, including affordable electricity – a judgment from the Court to this effect would render these Draft Regulations redundant and

[17] "How to waste over half a trillion dollars: The economic implications of deflationary renewable energy for coal power investments" available at https://carbontracker.org/reports/how-to-waste-over-half-a-trillion-dollars/.

[18] https://reports.weforum.org/fostering-effective-energy-transition-2019/energy-transition-index/energy-transition-index-ranking/.

[19] P13, http://www3.weforum.org/docs/WEF_Fostering_Effective_Energy_Transition_2020_Edition.pdf.

[20] Figure 3, p16, http://www3.weforum.org/docs/WEF_Fostering_Effective_Energy_Transition_2020_Edition.pdf.

in conflict with the Constitution, confirming that prior permission from the Minister is not required for municipalities to establish their own generation capacity; or

13.3. the Minister must grant, or at least consider and decide the City's request for a determination – this is the relief sought in the event that the City is unsuccessful on the above two prayers i.e. if the Court does not agree that municipalities have the power and entitlement under ERA and/or the Constitution to establish their own generation capacity without the Minister's permission.

14. If the City is unsuccessful, it may decide to take the decision on appeal. Similarly, if the respondents are unsuccessful, they may also choose to appeal.

15. As argued by the *amicus curiae*[21] in the above case – the Centre for Environmental Rights (**CER**) - it is the imperative, prerogative and Constitutional obligation of local government to promote a safe and healthy environment[22] and to provide services in a sustainable manner.[23] Municipalities must not be impeded from establishing clean electricity.

16. We therefore reiterate that Ministerial permission in the form of a section 34 ERA Ministerial determination is **not** legally required in order for a municipality to proceed to develop its own clean electricity capacity.

17. We emphasise the need to urgently transition South Africa's electricity system from one predominantly based on harmful fossil fuels to one which relies primarily on renewable clean energy. Municipalities are at the forefront of the harmful effects and costs of electricity generation and climate change, they are best-placed to respond to the needs of the people. Globally municipalities across the world are leading the transition, taking decisive steps, finding practical solutions and treating the transition with the necessary priority and urgency.[24] Many South African municipalities are seeking to do the same, and should be supported in this.

Practical Problems and Impediments to Local Governments establishing their own Generation Capacity in a way that is Consistent with the Constitution

18. There are a number of practical problems and impediments to local governments establishing their own generation capacity, with or without these Draft Regulations and even in circumstances where it is confirmed that a prior Ministerial determination would not be required.

19. Firstly, the Integrated Resource Plan for Electricity, published in October 2019 ("**IRP 2019**"), places an annual constraint on renewable energy (solar PV and wind) capacity, meaning that the amount of clean energy that can be developed by local governments, should they wish to (under the Draft Regulations or otherwise), is limited, while more expensive fossil fuel coal is forced into the IRP 2019. It is unclear how the renewable energy limits in the IRP 2019 were arrived at, and how that capacity would be shared between national and local governments and other generators, if at all. We record our objections to various aspects of the IRP 2019, including this unjustified renewable constraint. We further object to the provision for 1 500 MW new coal capacity, despite this not forming part of a least-cost plan, and 3 000 MW new gas capacity. We reserve the right to take any further legal steps, including bringing a court application in relation to the objectionable portions of the IRP 2019 and any

[21] The amicus papers can be accessed here https://cer.org.za/programmes/pollution-climate-change/litigation/final-cer-application-to-be-admitted-as-amicus-curiae-in-the-city-of-cape-town-v-nersa-and-minister-of-energy-case-no-51765-2017.
[22] In terms of section 24 and 152(1)(d) of the Constitution of the Republic of SA, 1996.
[23] Section 152(1)(b) of the Constitution.
[24] See Annexure "NL17"to the founding affidavit of Nicole Loser in the City of Cape case Town Amicus Curiae submission, available at https://cer.org.za/wp-content/uploads/2019/05/CER-COCT-Amicus-Intervention.pdf.

decisions flowing therefrom.[25]

20. Currently already all the renewable and storage capacity in the IRP up to the year 2024 has been allocated under a draft determination designating Eskom as the sole buyer and IPPs as the sellers. If the determination is published in its current form, municipalities would not be able to partake in this allocation. 2 000 MW from a "range of sources", including distributed generation and cogeneration designated as "Other" in the IRP 2019, have been allocated under a separate determination, recently approved by NERSA,[26] signed by the Minister on 18 February 2020. While this final approved determination for 2 000 MW from a range of sources has not yet been published, the draft that was made available for comment also only designated Eskom as the buyer and IPPs as sellers – excluding municipalities.

21. The IRP 2019 does not make sufficient provision to enable local governments to establish clean electricity. This is in addition to the concerns that the IRP 2019 does not provide for a least-cost plan, as it appears to unjustifiably force in new coal and unjustifiably constrain renewables – further unacceptable barriers to the development of urgently-needed clean energy.

22. As stated above, municipalities are best placed to provide for the needs of the people and to play a key role in the energy transition to clean and affordable energy; being at the forefront of service delivery, and themselves being impacted by climate change impacts and costs, as well as the negative effects of pollution caused by electricity generation.

23. We need transformation of the entire electricity planning process – municipalities need to be enabled to manage their own grids, and many already have plans to develop and implement their own IRPs: this should be supported at a national level. There is a need for a sustained, credible, planned and coordinated national plan and procurement programme for municipalities, taking into account national demand and supply options and constraints, which contributes to a national IRP, and focuses on wind, PV and storage capacity. In this regard the IRP needs to be frequently revised and aligned with municipal plans to provide sustainable services to communities. The laws and policies regulating municipal electricity establishment need to be reflective of current circumstances and to foster and aid (not hinder) the development of electricity systems for municipal involvement.

24. There is no provision, in the Draft Regulations or otherwise, to support and encourage small-scale generation by communities. It should be a priority and a goal to have residential areas feed in electricity to the grid as a way of ensuring that the benefits of an energy transition are fairly distributed, and that not only the private sector benefits, but also communities, especially impoverished communities that cannot afford to install renewable energy technologies.

25. Energy trends are moving towards decentralisation and municipalities should take advantage of this, and to ensure that smaller, under-resourced municipalities and communities are not left behind. In this regard, we recommend that:

    25.1. all players must be given equal access to the electricity grid;

    25.2. to encourage a thriving energy system at local level, embedded generators (of any size) ought to be able to connect to the grid and feed in excess energy. According to ERA's schedule 2 exemptions,[27] generators, irrespective of capacity, that do **not** have a "point of connection" shall be exempt from needing a NERSA licence, and while this may decrease their hurdle rate and they can generate electricity for their own use,

[25] We also refer to our objections to the draft determination for 1 500MW new coal capacity and 3 000MW new gas capacity. The comments are available here https://cer.org.za/wp-content/uploads/2020/05/Life-After-Coal-Comments_Determination-NERSA-Consultation-Paper-2_7.5.20.docx.pdf.

[26] https://m.engineeringnews.co.za/article/bid-documents-for-2-000-mw-emergency-power-being-finalised-after-nersa-concurrence-milestone-2020-05-26/rep_id:4433.

[27] GN 402, GG 43151, 26 March 2020.

they cannot be integrated into the energy system. Smaller, 1 MW facilities with a point of connection, can – subject to certain requirements – be integrated into the system and also do not require a NERSA licence.[28] Embedded generation has a vital role to play in an efficient, least-cost and clean energy system, and therefore steps must be taken to enable and integrate embedded generation more fully into the energy system; and

25.3. only renewable energy sources (solar and wind) and storage should be considered for small-scale municipal and/or community deployment as they can be quickly set up and are easily scalable. Further, these technologies are clean and have the least harmful impact in comparison with other generation sources. Any energy options that are considered must be in line with the Constitution and the Bill of Rights, as well as South Africa's climate goals. This would exclude new generation from coal and gas technologies.

26. Whether or not these Draft Regulations are passed, these issues need to be addressed. There evidently needs to be much more consideration given to the role of local government in the transition to clean energy systems, in the development of policies and laws, including the IRP, and to enable local government to fulfill vital potential functions in the energy sector.

Comments on the Provisions of the Draft Regulations

27. In general, we submit that **these Draft Regulations are not a solution** to the current shortcoming in the regulatory regime for electricity planning. Government urgently needs to remove barriers to local and small-scale electricity development, as stated above. The Draft Regulations simply perpetuate the barriers.

28. We again record that we dispute that the Draft Regulations are lawful. The Minister's prior approval is **not** needed in order for municipalities to establish their own generation capacity. As stated above at paragraphs 4 to 5, these Draft Regulations are redundant.

29. In the event that the Draft Regulations are to remain in place and proceed to promulgation, despite our objections and the legal inconsistency, we make comments and/or suggested changes to the provisions of the Draft Regulations; some of which include the following:

29.1. the Draft Regulations' requirements for applications for determinations must be amended to at least, make express provision for Constitutional and public interest - including environmental, climate and human health - considerations to be taken into account in considering the establishment of any new generation capacity under the New Generation Regulations;

29.2. the Draft Regulations must provide for timeframes within which applications must be processed and decided; and

29.3. express provision must be made for transparency and public consultation on the applications to be made by municipalities.

30. We make these comments and recommendations for the substantive provisions of the Draft Regulations with full reservation of our and our clients' rights, and with no condonation or support for the adoption of the Draft Regulations.

The application requirements (section 4 of the Draft Regulations amending regulation 5)

31. The Draft Regulations stipulate that a Municipality may apply to the Minister to establish new generation capacity in accordance with the IRP, and such application must - be accompanied by "*a detailed feasibility study as*

[28] Ibid.

contemplated in sub-regulation (2); demonstrate sound financial standing of the Municipality; and be aligned to the Integrated Development Plan of that Municipality."

32. While a narrow set of prescribed objective conditions is favourable from an administrative decision-making perspective, these requirements should be amended to, at least, make provision for important Constitutional and public interest considerations in the decision-making process. There is also a concern that the "good financial standing" requirement is unduly restrictive – as explained below.

33. We do not oppose the requirement in the Draft Regulations for the application's allocation to be within the IRP. However, as shown above (see paragraphs 19 to 21), this leads to many obstacles and impediments owing to problems in the IRP 2019 itself. With the current caps on renewables in the IRP 2019 and the possibility that the Minister will designate Eskom as the single buyer of all IRP 2019 allocations up to 2030, in future determinations, before these Draft Regulations are even passed, allowing municipalities to apply under the Draft Regulations may result in no practical effect if there is no allocation left for clean energy to be developed by municipalities up to 2030 under the IRP 2019. As stated above, this points to the need for a better IRP and one that gives effect to Constitutional rights and a least-cost plan, and acknowledges the role for municipalities in electricity development.

34. An application under the Draft Regulations also has to be aligned to the Integrated Development Plan (**IDP**) of the applying Municipality. The requirements for an IDP under section 25 of the Local Government: Municipal Systems Act, 2000, are that each municipal council "*must, within a prescribed period after the start of its elected term, adopt a single, inclusive and strategic plan for the development of the municipality which: (a) links, integrates and coordinates plans and takes into account proposals for the development of the municipality; (b) aligns the resources and capacity of the municipality with the implementation of the plan; (c) forms the policy framework and general basis on which annual budgets must be based; (d) complies with the provisions of this Chapter; and (e) is compatible with national and provincial development plans and planning requirements binding on the municipality in terms of legislation*". An IDP would have to be aligned with the provisions of the Constitution. We refer also to paragraph 8 above, in relation to the increased ambitions of municipalities in South Africa to provide sustainable energy and address climate change, through their IDPs.

35. Although a decision under the Draft Regulations would in any event have to comply with and give effect to the Constitution, express provision should be made in the Draft Regulations for consideration of whether the new generation capacity gives effect to the Constitutional obligations of local government, in particular to promote an environment not harmful to health or wellbeing and to ensure the provision of services to communities in a sustainable manner (section 152(1)(b)).

<u>Need for a requirement for environmental, climate and human health considerations to be taken into account in considering an application and the feasibility of new generation capacity</u>

36. The Draft Regulations currently make no mention of any requirements to consider whether an application by a municipality would be aligned with the Constitution and the public interest, nor is there any specific requirement for consideration of impacts for human health, the environment and the climate in assessing such applications or in determining the feasibility of any new generation capacity for that matter – despite electricity generation having such far-reaching impacts in all of these respects. We refer to the above submissions at paragraphs 9 to 10 in this regard.

37. The New Generation Regulations state that a detailed feasibility study that must accompany an application under the Draft Regulations, must include the following considerations:[29]

    37.1. the anticipated cost of the proposed new generation capacity;

[29] Regulation 5, Regulations for New Generation Capacity, 2011.

37.2. the proposed allocation of financial, technical and operational risk between the prospective buyer and the generator, and between the generator and the national transmission company (NTC) or the distributor, as the case may be;

37.3. the demonstration of the anticipated value for money to be achieved through the new generation capacity project;

37.4. the material legal, financial and technical requirements including consents that will be required in order to procure the new generation capacity; and

37.5. whether the appropriate generator should be Eskom as part of its services as the national electricity producer, another organ of state or an IPP.

38. While the above requirements for a feasibility study are all relevant and necessary considerations, there is a glaring gap insofar as considerations of the impacts of the new generation capacity for human health, the environment and the climate are concerned. This must be amended to provide for these considerations in assessing the feasibility of **all** new generation capacity. The impacts of climate change, including water scarcity and temperature increases, as well as other health and environmental impacts can materially affect the feasibility of new generation capacity. The

39. Given the significant and irreversible impacts that electricity generation is currently having in South Africa (see paragraphs 9 to 10 above) this is a relevant consideration. Electricity generation sources with the harms listed in paragraph 10, would not be in the public interest or aligned with the Constitution.

40. It is unacceptable that an application for new generation capacity could be made, considered and granted, without any consideration of these impacts and the risks of harm posed, or that any assessment of the feasibility of new generation capacity would not take these factors into account.

41. These **considerations must be factored into the regulation 5(2) feasibility study requirements** (which is preferable, since they should apply to all such studies – not just applications by municipalities). **A feasibility study must demonstrate that the new capacity is in the interests of human health, the environment and climate and aligned with the Constitution and the public interest**.

<u>The requirement for applying municipalities to be of sound financial standing could have the effect of being unduly restrictive and unjustifiably exclusionary</u>

42. The Draft Regulations define "sound financial standing" as "*an organ of state must be a going concern, and that the financial commitments to be incurred acquiring new generation capacity can be met by funds - (a) designated within the organ of state's existing budget; or destined for the organ of state in accordance with the future budgetary projections for the institution.*"

43. Practically-speaking, it is, of course, important and necessary that municipalities that wish to develop their own generation capacity have the resources to do so.

44. Yet, the option to develop clean electricity should not be one that is only available to well-resourced municipalities. As stated above, municipalities have a Constitutional obligation to provide services in a sustainable manner and to promote a safe and healthy environment. Municipalities must therefore be enabled and supported to develop clean and affordable electricity irrespective of their financial circumstances. In other words, there should be measures in place to help less well-resourced municipalities to develop clean energy.

45. Provision must be made for financial support mechanisms from national government to enable, assist and incentivise municipalities to develop clean energy within their jurisdictions. This would be aligned with the Constitutional obligations of all levels of government.

The need for timeframes for decision-making

46. There must be set timeframes within which decisions under the Draft Regulations must be made.

47. The City of Cape Town case was instituted as a result of substantial delays on the part of the Minister to make a decision on the City's request for a determination for renewable capacity.

48. The Draft Regulations should state that an application by a municipality must be decided within a reasonable timeframe, such as 60 days from submission of an application by a municipality or from receipt of all comments and input thereon.

The need for transparency, consultation and accountability in the application and decision-making process

49. As electricity generation capacity is a matter of substantial public interest, the application process provided for in the Draft Regulations must be fully transparent and provision must be made for members of the public to have full access to information, including access to the full application records; to be consulted; and have a reasonable opportunity to give input on the applications, which input and comments must be considered by the decision-maker.

50. Decisions on the applications must also be accompanied by written reasons.

Conclusion

51. As stated above, we make these comments with full reservation of our and our clients' rights.

52. Kindly contact us should you require any further information or have any questions.

Yours faithfully
CENTRE FOR ENVIRONMENTAL RIGHTS

per:

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