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GOVERNMENT NOTICE

DEPARTMENT OF ENERGY

No. R. 399 **4 May 2011**

Electricity Regulation Act No.4 of 2006

Electricity Regulations on New Generation Capacity

I, Dipuo Peters, Minister of Energy, hereby under section 35(4) of the Electricity Regulation Act, 2006 (Act No. 4 of 2006), make the regulations in the Schedule.

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SCHEDULE

1. Definitions

In these Regulations, any word or expression to which a meaning has been assigned in the Act, shall have the meaning so assigned and, unless the context otherwise indicates-

"ancillary services" means services supplied to the NTC by generators, which are necessary for the reliable and secure transport of electricity from generators to distributors and other customers;

"buyer" means, in relation to a new generation capacity project, any organ of state designated by the Minister in terms of section 34(1)(c) and (d) of the Act;

"cross border project" means a new generation capacity project in respect of which the generation facility is situated outside of the Republic;

"existing generation facilities" means generation facilities that are in operation on or immediately prior to the date of commencement of these Regulations;

"Eskom" means Eskom Holdings Limited contemplated in section 3(1) of the Eskom Conversion Act, 2001 (Act No. 13 of 2001);

"Government" means the Government of the Republic;

"Independent Power Producer" or **"IPP"** means any person in which the Government or any organ of state does not hold a controlling ownership interest (whether direct or indirect), which undertakes or intends to undertake the development of new generation capacity pursuant to a determination made by the Minister in terms of section 34(1) of the Act;

"IPP procurement programme" means a procurement process undertaken for the procurement of new generation capacity from IPPs;

"Minister" means the Minister of Energy;

"national transmission company" or **"NTC"** means the person licensed to execute the national transmission responsibility, in its capacity as such, including the transmission network service provider which maintains and develops the transmission network, but excluding the system operator;

"National Treasury" means the National Treasury established by section 5 of the Public Finance Management Act, 1999 (Act No. 1 of 1999);

"new generation capacity" means-

(a) electricity generation capacity other than the capacity of existing generation facilities;

(b) the electricity derived from the capacity referred to in (a); and

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(c) ancillary services relating thereto,

individually or in any combination thereof and including an increase in the electricity generation capacity of existing generation facilities;

"new generation capacity project" means a project for the development of new generation capacity pursuant to a determination made by the Minister in terms of section 34 of the Act;

"organ of state" bears the meaning ascribed to it in section 239 of the Constitution;

"Peaker Project" means the new generation capacity project to establish generation facilities at Avon in the Kwazulu Natal Province and Dedisa in the Eastern Cape Province;

"power purchase agreement" or "PPA" means an agreement concluded between a generator and the buyer for the sale and purchase of new electricity generation capacity or electricity derived therefrom, or both;

"procurer" means the person designated by the Minister in terms of section 34 as being responsible for the preparation, management and implementation of the activities related to procurement of new generation capacity under an IPP procurement programme including the negotiation of the applicable power purchase agreements, which person may or may not be the buyer;

"Public Finance Management Act" means the Public Finance Management Act, 1999 (Act No. 1 of 1999);

"system operator" means the person responsible for short-term reliability of the interconnected power system, which is in charge of controlling and operating the transmission power system and dispatching generation facilities (or balancing the supply of and demand for electricity) in real time, in its capacity as such;

"the Act" means the Electricity Regulation Act, 2006 (Act No. 4 of 2006);

"value for money" means that the new generation capacity project results in a net benefit to the prospective buyer or to Government having regard to cost, price, quality, quantity, risk transfer or a combination thereof, but also where applicable to the Government's policies in support of renewable energy.

2. Application of the Regulations

(1) These Regulations apply to the procurement of new generation capacity, by organs of state, including-

(a) new generation capacity derived from renewable energy sources and co-generation;

(b) base load, mid-merit load and peak load new generation capacity; and

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(c) cross border projects,

but excluding new generation capacity derived from nuclear power technology.

(2) These Regulations do not apply to the purchase of new electricity generation capacity and electricity by persons other than organs of state.

3. Objectives of the Regulations

The objectives of these Regulations are-

(a) to facilitate planning for the establishment of new generation capacity;

(b) the regulation of entry by a buyer and a generator into a power purchase agreement;

(c) to set minimum standards or requirements for power purchase agreements;

(d) the facilitation of the full recovery by the buyer of all costs efficiently incurred by it under or in connection with a power purchase agreement including a reasonable return based on the risks assumed by the buyer thereunder and to ensure transparency and cost reflectivity in the determination of electricity tariffs; and

(e) the provision of a framework for implementation of an IPP procurement programme and the relevant agreements to be concluded.

4. Planning for new generation capacity

(1) The integrated resource plan shall-

(a) be developed by the Minister after consultation with the Regulator; and

(b) be published in the *Government Gazette* by the Minister.

(2) The system operator, the NTC and the Regulator shall timeously provide such assistance as the Minister may require for purposes of developing and monitoring the implementation of an integrated resource plan.

(3) The Regulator shall, after consultation with the Minister, the system operator and the NTC, make rules relating to the keeping of relevant information, the submission of such information and the rendering of returns by licensees, as required in order to facilitate integrated resource planning.

5. Feasibility studies

(1) Having regard to the need for new generation capacity as provided for in the integrated resource plan, the Minister may undertake or commission the buyer or another party to undertake feasibility studies in respect of such new generation capacity requirement.

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(2) The following shall form part of the considerations and outcomes for a feasibility study undertaken pursuant to a decision in terms of sub-regulation (1)-

(a) the anticipated cost of the proposed new generation capacity;

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

(c) the demonstration of the anticipated value for money to be achieved through the new generation capacity project;

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

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

6. Ministerial determinations

(1) The Minister may, in consultation with the Regulator, make a determination in terms of section 34 of the Act.

(2) A determination under section 34(1) shall include a determination as to whether the new generation capacity shall be established by Eskom, another organ of state or an IPP.

(3) If the determination referred to in sub-regulation (2) requires that the new generation capacity be established by an IPP, the Minister shall also determine the identity of the buyer or, where applicable, the procurer and the buyer.

(4) The determination referred to in sub-regulation (2) may require or contemplate that new generation capacity be established through a cross border project, provided that the Minister is satisfied that adequate agreements, memoranda of understanding or arrangements are in place or will be in place between the Government and the relevant foreign government or international organisation, as are necessary to enable such cross border project.

(5) A determination contemplated in this Regulation is binding on the buyer and the procurer.

7. Procurement process under the IPP procurement programme

(1) Subject to any determination by the Minister in terms of section 34 of the Act as to the form of an IPP procurement programme, such IPP procurement programme shall take the form determined by the procurer.

(2) The procurer shall in the appropriate procurement documentation specify any qualification and evaluation criteria applicable to that IPP procurement programme.

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(3) Where the procurer in respect of a new generation capacity project procured under an IPP procurement programme is not the buyer, the buyer shall not itself conduct a procurement process.

8. Cross border projects

(1) Where a section 34(1) determination requires or contemplates that new generation capacity be established through a cross border project, as contemplated in regulation 6(4), the applicable IPP procurement programme may, but need not necessarily, have the sole purpose of procuring new generation capacity from beyond the borders of the Republic.

(2) The procurement process in respect of a cross border project shall be conducted with due regard to the agreements, memoranda of understanding or arrangements referred to in regulation 6(4).

9. Concluding the power purchase agreement

(1) A power purchase agreement between the buyer and an IPP must meet the following requirements-

(a) value for money;

(b) appropriate technical, operational and financial risk transfer to the generator;

(c) effective mechanisms for implementation, management, enforcement and monitoring of the power purchase agreement; and

(d) satisfactory due diligence in respect of the buyer's representative and the proposed generator in relation to matters of their respective competence and capacity to enter into the power purchase agreement.

(2) Before the buyer concludes a power purchase agreement, the buyer or the procurer must, subject to any approvals required in terms of the PFMA-

(a) ensure that the power purchase agreement meets the requirements set out in sub-regulation (1);

(b) ensure that the buyer has a contract management plan that explains the capacity of the buyer, and its proposed mechanisms and procedures, to effectively implement, manage, enforce, monitor and report on the power purchase agreement and any other agreements relating to a new generation capacity project to which the buyer is a party, to National Treasury and the Minister on a regular basis; and

(c) put in place arrangements to ensure that any portion of the buyer's allowable revenue approved or allocated by the Regulator for purposes of implementation of new generation capacity projects will be used solely for the purpose of ensuring that the buyer's financial obligations in respect of new generation capacity projects will be met.

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(3) Should the Minister determine, as contemplated in regulation 6(3), that Eskom should establish new generation capacity as part of its services as the national electricity producer, Eskom will be required to enter into a power purchase agreement with the buyer, unless Eskom itself is the buyer.

10. Cost recovery

The Regulator shall, when determining licence conditions relating to prices, charges and tariffs, ensure that the buyer is able to recover, at least, the full amount of the costs incurred by the buyer in the following categories:

(a) all payments made for the purchase of new generation capacity, in terms of a power purchase agreement entered into in terms of or as contemplated in these Regulations;

(b) all amounts paid by the buyer in terms of the power purchase agreement (other than those referred to in paragraphs (a) and (e)), provided that the buyer shall have acted efficiently in the exercise of those rights and the fulfilment of those obligations in terms of the power purchase agreement which gave rise to such payments;

(c) the efficiently incurred costs of the buyer in performing any function contemplated in these Regulations;

(d) the efficiently incurred costs of the buyer in administering power purchase agreements;

(e) costs of, and amounts paid by the buyer arising from the termination of a power purchase agreement; and

(f) all other costs efficiently incurred by the buyer in participating in an IPP procurement programme and in purchasing new generation capacity through new generation capacity projects, including, without limitation, operating expenditure, professional fees and hedging costs.

11. Exemptions

The Minister may, where justifiable having regard to all the circumstances and subject to any terms and conditions that he or she considers appropriate, exempt any person whether in relation to a specific new generation capacity project or in general, from complying with any or all of the provisions of these Regulations.

12. Transitional provisions

(1) The provisions of these Regulations do not apply in the case of any project relating to the electricity generation capacity listed under "Current Programmes" in the table titled IRP 1 in Schedule A to GN 25 of 29 January 2010: Determination regarding the integrated resource plan and new generation capacity, save for the electricity generation capacity listed as REFIT.

(2) Notwithstanding sub-regulation (1), regulation 10 shall apply to the Peaker Project.

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13. Repeal

These Regulations repeal the Regulations published under GNR. 721 dated 5 August 2009 in Government Gazette 32378.

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