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**TO: THE DIRECTOR-GENERAL: DEPARTMENT OF MINERAL
RESOURCES AND ENERGY**

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BY EMAIL: ndobe@dmre.gov.za

DATE: 01/10/2022

**RE: COMMENTS ON THE LICENSING EXEMPTION AND REGISTRATION NOTICE UNDER
THE ELECTRICITY REGULATION ACT 4 OF 2006**

PART 1: INTRODUCTION

1. We submit to the Department of Mineral Resources and Energy (the Department), the following comments pertaining to the gazetted *Licensing Exemption and Registration Notice under the Electricity Regulation Act 4 of 2006* (the Notice). The Notice was introduced on 02 September 2022.
2. We extend our gratitude to the Portfolio Committee of the Mineral Resources and Energy, for the opportunity to comment on this Notice.
3. This Commentary is set out as follows: - general comments, specific comments, and the conclusion.

PART 2: NATURAL JUSTICE: LAWYERS FOR COMMUNITIES AND THE ENVIRONMENT:

4. Natural Justice is a non-profit organization, registered in South Africa in 2007. Our vision is the conservation and sustainable use of biodiversity through the self-determination of indigenous peoples and local communities.
5. Our mission is to facilitate the full and effective participation of indigenous peoples and local communities in the development and implementation of laws and policies that relate to the conservation and customary uses of biodiversity and the protection of associated cultural heritage.
6. Natural Justice works at the local, national, regional, and international levels with a wide range of partners. We strive to ensure that community rights and responsibilities are represented and respected on a broader scale and that gains made in international fora are fully upheld at lower levels.
7. Natural Justice wishes to submit its comments to the Department. We further express our request to make a verbal submission or participate in any meaningful engagements with the Department when an opportunity arises.

PART 3: GENERAL COMMENTS

8. This Notice was introduced in September 2022, after the President had announced the States strategic plan and response to addressing the current energy crisis in South Africa. The purpose of

this Notice, as one of the major points in the States plan in alleviating load-shedding, is to allow the private sector and ordinary citizens to develop their own electricity generation capacity. Historically, the Department has denied access to generating large scalable energy generation for consumption from the private sector and only allowed the private sector and ordinary citizens to build a maximum of 100 Mega Watts (MW) of energy per generation capacity. However, the current Notice has lifted the exemption completely and will now allow the private sector to generate electricity at any MW level. The exemption and lifts the threshold entirely.

9. The Department's and indeed the States intention to progressively address the country's energy crisis is commended and applauded. The Notice is a major step toward deregulating South Africa's electricity supply industry. It encourages private electricity generators to produce electricity for their own use. Furthermore, it encourages greater private sector participation in the power market in the future.
10. The Notice is welcomed by businesses whose operations have been hampered by their dependency on Eskom. It also brings long anticipated energy security to smaller businesses and consumers, who can look forward to a reduction in load-shedding and less reliance on Eskom in the future.

Failure to take into consideration other polices and laws:

11. The South African government has ratified the Paris Agreement and is bound by it. South Africa has made commitments under the Paris Agreement (2015) to reduce emissions and keep temperatures well below 1.5 degrees Celsius, as well as to protect the rights of all South Africans as guaranteed in the Republic of South Africa's Constitution of 1996. Climate change is a human rights issue as well as an environmental, social, and economic concern. The South African Constitution mandated that the government take all necessary measures to protect South Africa's people and environment from the worst effects of climate change. South Africa's response to the climate crisis will necessitate a collaborative effort across government.
12. Moreover, the objectives of the Electricity Regulation Act 4 of 2006 must be upheld in terms of facilitating universal access to electricity and promoting the use of diverse energy sources and energy efficiency. These objects need to be in line with the Sustainable Development Goals 7 and 13. Achieving Sustainable Development Goals 7 and 13 will help the world "take urgent action to prevent climate change and its implications" and "provide access to affordable, dependable, sustainable, and modern energy for all."
13. The Notice, like the Electricity Regulation amendments, lacks a roadmap and long-term vision for sector-wide reform required to meet the moment's challenge and opportunity, specifically increasing the provision of reliable (access to electricity in accordance with the socio-economic

rights of the South African Constitution's Bill of Rights, 1996), least-cost energy and advancing a just energy transition to a low-carbon future to fulfil section 24(b) of the Constitution. Importantly, sections 24 and 27 of the Constitution should be read together and linked, as they state that everyone should have access to electricity, but it should be electricity that provides for a clean, healthy, and sustainable environment.

14. The importance of reliable, clean, low-cost electricity and a just transition is especially critical for vulnerable communities in South Africa, such as indigenous, poor, and marginalized communities, as well as rural communities. The Minister is compelled to do this as advised in the National Energy Act 34 of 2008 in Section 5. Section 5 states that "*the Minister must adopt measures that provide for universal access to appropriate forms of energy or energy services for all people of the Republic at affordable prices (2) The measures...must take into account (a) the safety, health and environmental suitability of such energy (b) the availability of energy resources ... (f) the State's commitment to provide free basic electricity to poor households*".

Failure to follow due process and consultation with the public:

15. There is a lack of sufficient and meaningful community consultation and participation in the process that led to the publication of these amendments. The Department must continue to engage with all communities in South Africa, with a particular focus on communities in rural areas and informal settlements that currently lack adequate access to electricity.
16. Furthermore, because of the license exemption, the aspect of public participation is not required in the proposed exempt activities. Section 11 of the Electricity Regulation Act, for example, requires a notice to be published in appropriate newspapers or other media circulated in the proposed activity. Section 11 provides that objections can be made in the form of an affidavit or declaration.
17. According to Section 35(5)(a) of the Electricity Regulation Act 4 of 2006, regulations must be promulgated in consultation with the Regulator. There is no evidence or description of the considerations made in consultation with the Regulator in accordance with this Notice. Has the impact of private wealthy individuals producing their own energy and not using the national grid been considered in consultation with the regulator? Specifically, the impact of the national grid's electricity price and how it will affect the poorest of the poor who have no choice but to use the national grid.
18. The Notice has been drafted in isolation of the Electricity Regulation Act 4 of 2006, the National Energy Act 34 of 2008 and the Just Energy Transition Framework 2022. All these pieces of legislation should have been considered and taken cognisance of in the drafting of this notice. Furthermore, the Integrated Energy Plan should be considered, more specifically accounting for

economically available energy resources, universal accessibility and free basic electricity, social equity, employment, the environment, international commitments, and the contribution of energy supply to socio-economic development.

Inadequate facilitation of accelerated deployment of renewable energy:

19. The following policies, white paper, and draft legislation state the following:
 - a. The Just Energy Transition Framework, 2022 – in draft form - (hereafter the “**JETF Framework**”) states the urgency of “...*implementation of an accelerated renewable energy build at a scale that allows for local manufacturing chains to develop*” and of “*establishing regulatory frameworks that promote new technologies, including by changing regulations that restrict them unnecessarily*”.
 - b. The White Paper states that policymakers “*must prioritise the mainstreaming of climate consideration and response into all relevant sector, national, provincial, and local planning regimes*” and “*review national policies legislation or strategies with a view to optimising and maximising the climate change co-benefits of their intervention.*”
 - c. The Climate Change Bill states that a “*just transition to a low-carbon and climate-resilient economy and society for South Africa in the context of sustainable development.*”
 - d. The Presidential Climate Commission’s Framework for a Just Energy Transition states that “*renewable energy production will make electricity cheaper and more dependable and will create new manufacturing and maintenance jobs.*”
20. A rapid transition to renewable energy is fundamental not only to mitigate South Africa's CO₂ emissions but also to the realisation of Section 24 of the Constitution: everyone has the right to an environment that is not harmful to their health or well-being, and to have the environment protected for the benefit of present and future generations.
21. A just energy transition must be highlighted in this Notice. To meet the Paris Climate Goals, there needs to be a reduction of emissions and use of fossil fuels as a matter of urgency, and therefore the generation of electricity should only be encouraged using renewable energy sources.
22. The state should move through with renewable energy projects as quickly as possible, and only such projects should be exempted at this time. This supports the notion of Natural Justice that we must lessen our carbon footprint. The inclusion of fossil fuels might be illegal because it might violate the Paris Agreement.

PART 4: SPECIFIC COMMENTS

Terms and Definitions

23. Paragraph 1.6 “Embedded Generator”:

- a. “or” is misspelled as “ory”.
- b. It is unclear why “Embedded Generator” is being defined in Schedule 2, (the Schedule) since the term is used nowhere in the Schedule.
- c. Natural Justice recommends the deletion of the term.

24. Paragraph 1.7 “Facility”

- a. The definition uses circular definition, creating confusion and ambiguity.
- b. The provision uses the language “facility” in the definition. We suggest replacing the language with “generation” to refer to the beginning of the definition.

25. Paragraph 1.10 “Reseller”

- a. The term “trading entity” is not defined in the Schedule. It is unclear which seller of electricity would qualify as a trading entity. It is unclear whether any Facility holder could qualify as a trading entity or whether a trading license is required.

26. “Energy Storage” vs “Battery Storage”

- a. The term “energy storage” has been replaced by “battery storage” in Paragraphs 2.1 and 2.2. It is unclear whether this change was intentional or not. It appears that the term was changed to explicitly exclude other forms of energy storage such as pumped storage, thermal storage, and compressed air energy storage.
- b. Being as near to net zero as is practically possible and even achieving it is made possible by battery storage. Batteries are used by wind and solar power plants to reduce power fluctuations and improve power delivery dependability. To guarantee a consistent supply of electricity to millions of homes and businesses, they store excess energy during low demand and release it at high demand. Without it, it would be impossible for the world to totally abandon fossil fuels.
- c. Note that “energy storage” remain unchanged in Paragraphs 3.1, 3.3, and 3.4.
- d. If the change was made intentionally and the terms are used interchangeably, we urge the Department to adopt consistency and only use the term “battery storage”.
- e. Alternatively, if the distinction between “energy storage” and “battery storage” was made intentionally, such that battery storage only applies to Paragraph 2 and energy storage only applies to Paragraph 3, we ask the Department to explicitly state the differences and define both terms in Paragraph 1 as defined terms.

27. Defined terms

- a. At various instances, defined terms in the Proposed Schedule are not properly capitalized in the content. Consistent use of the defined terms must be rigorously followed to avoid confusion and provide precision. Some instances are as follows:
- b. “Wheeling” is not capitalized in Paragraphs 3.1.1 and 3.1.2 despite being defined in Paragraph 1.13.
- c. “Point of Connection” is not capitalized in Paragraph 3.2 despite being defined in Paragraph 1.8 and capitalized in previous amendments of the Schedule.
- d. “Facility” is not capitalized in Paragraphs 2.3 and 5.2 despite being defined in Paragraph 1.7 and capitalized in previous amendments of the Schedule.

Activities Exempt from Licensing

28. Unclear Omission:

- a. Paragraph 2 explicitly exempts prescribed activities from licensing, but it is silent on the requirement to register with NERSA. Note that the current provision in force explicitly exempts activities prescribed under Paragraph 2 from registration with NERSA. It is unclear whether the current language continues to exempt these activities or not. It is unclear whether all activities under Paragraph 2 are exempted from both licensing and registration, except those listed under Paragraph 3.
- b. It is unclear whether activities under Paragraphs 2 and 3 are mutually exclusive, a subset of another, or with partial overlaps. Clarification would help delineate the difference and guide a registrant to the applicable process.
- c. We ask the Department to explicitly lay out all activities exempted from both licensing and registration with NERSA, if any. Otherwise, the current language risks unintended consequences requiring rooftop solar facilities or back-up generator to be registered with NERSA.

29. Missing Oversight

- a. Under the current regime, the licensing process, under section 11(2)(e) of the *Electricity Regulation Act, 2006* (Act No. 4 of 2006), ensures an applicant complies with applicable labour, health, safety and environmental legislation, subordinate legislation and such other requirements as may be applicable. It is unclear how the current proposed exemption would continue to oversee compliance with other applicable regulations without the licensing process.

- b. The National Energy Act 34 of 2008 also states that the Minister may adopt measures not contemplated in any other legislation, to minimize the negative safety, health, and environmental impacts of energy carriers. It is contrary to remove these protections that are the requirements of a license when it is clearly legislated that these protections need to exist.
- c. The exemptions listed in Paragraph 3.1 were previously limited to the operation of generation facilities with a capacity of no more than 100MW. This 100MW restriction is now removed and generation facilities of all capacities are exempted. We expect the proposed lift would encourage an exponential growth in generation facilities in the private sectors, with too little government oversight.
- d. Although Paragraph 3.6 requires a registered generator to comply with applicable legislative and regulatory requirements for the sustained operation of the national interconnected system. It is unclear what makes up the legislative and regulatory requirements besides the Code. The Department should specify the applicable regulations such as the National Environmental Management Act, 1998.
- e. On a related but different note, it is unclear whether generators exempted from registration are not required to comply with any applicable legislation since Paragraph 3.6 only applies to registered generators. We urge that all generators, whether registered or not, must comply with all applicable regulations.

30. Trading License

- a. It is unclear whether an operator of an exempted generation under Paragraph 2, remains required to obtain a trading license before electricity generated on-site can be sold. From a direct reading of the proposed language, only the generation of electricity is permitted without licensing. Any trading of generated electricity still requires a license.

31. Paragraph 3.2

- a. The Paragraph intends to capture conveyancing of electricity through the transmission or distribution power system. It is unclear whether the provision intends to exclude distribution lines that connect behind the meter.
- b. For instance, electricity exported to the purchaser's system that is conveyed through a distribution power system would not be captured by the proposed Paragraph 3.2. The Department should clarify whether this is the intended outcome.

32. Revocation and Deregistration

- a. Paragraph 4 is ambiguous on the grounds on which NERSA can vary, suspend, or a registration. The provision does not state specified grounds for a third-party application. It appears arbitrary that a third party could apply to remove another's registration.
- b. The Department should clarify the grounds of an accepted application under Paragraph 4. For instance, whether the grounds are limited to violations of the Code and affected via a third-party application under Paragraph 4.

Conclusion

33. While the transition to a competitive power sector has the potential to accelerate South Africa's transition to clean energy and improve energy equity, these amendments fail to provide the necessary support, incentives, and regulatory mandate for the country's renewable energy production to significantly increase. This has implications not only for South Africa's ability to meet its international obligations to reduce emissions, but also for consumers' access to reliable, affordable electricity.
34. We reiterate section 35(5) of the Electricity Regulation Act 4 of 2006 states that "*(5) Before promulgating regulations contemplated in subsection (4), the Minister must (a) consult with the Regulator; (b) invite public comments on the proposed regulations; and (c) duly consider the comments received.*"
35. All in all, Natural Justice supports the Department's initiative to address the country's energy crisis by encouraging private energy generation. However, conscious, and rigorous oversight must be put in place to ensure labour, health, safety, and environmental protection.