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**TO: HONOURABLE MINISTER OF MINERAL RESOURCES AND ENERGY
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**AND TO: DIRECTOR OF ENERGY, DEPARTMENT OF MINERAL RESOURCES AND
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**NATURAL JUSTICE COMMENTS ON THE
ELECTRICITY REGULATION ACT (4/2006): 2ND AMENDMENT BILL FOR PUBLIC
COMMENTS**

1. NATURAL JUSTICE:

1.1. Natural Justice is a non-profit organisation registered in South Africa. Natural Justice's mission is to support indigenous peoples and local communities to participate fully and effectively in the development and implementation of laws and policies that affect their lives, livelihoods, health, the environment, biodiversity conservation, and cultural heritage. We work at the local, national, regional, and international levels with a wide range of communities and partners. We strive to ensure that community rights are represented and respected in decision-making in all sectors, including the energy sector, and that South Africa's international climate, biodiversity and human rights commitments are fully implemented at the national and local levels.

1.2. Natural Justice appreciates the opportunity given by the Department of Mineral Resources and Energy (hereafter the "**Department**") to comment on the Electricity Regulations Act Amendment Bill B-2021 as gazetted in Government Gazette number 45898 on 10 February 2022 (hereafter referred to as the "**Bill**").

2. INTRODUCTION:

2.1. At the outset, Natural Justice welcomes the development of the Bill. The Bill's amendments present various positive elements, for example, the establishment of an independent transmission system operator that is mandated to provide a transparent, non-discriminatory electricity trading platform – a fundamental first step towards developing a competitive electricity market that can facilitate greater deployment of clean, renewable energy.

2.2. However, despite these positive elements establishing new systems and processes to facilitate greater access to clean electricity for the people of South Africa, the amendments lack a roadmap and longer-term vision for sector-wide reforms necessary to meet the challenge and opportunity of the moment, in particular, increasing the provision of reliable, least-cost energy and advancing a just energy transition to a low carbon future in order to fulfil section 24(b) of the Constitution of the Republic of South Africa, 1996's (hereafter the "**Constitution**") mandate of developing legislation that will secure

ecologically sustainable development in order to protect the environment for present and future generations.

2.3. Considering the above, this submission will accouter to the Department its concerns and points of issues. Please take note that the submission will be split into three sections. The first section will deal with the Department's failure to provide meaningful public participation during the comment period of the Bill. The second section will make general comments on the overall themes of the Bill. The third section of the submission will provide comments on specific amendments proposed by the Bill. Each section of the submission will provide, where appropriate, recommendations or reflections for the committee to take into consideration. The submission will then provide a conclusion.

2.4. **FIRST SECTION - LACK OF OPPORTUNITY FOR PUBLIC CONSULTATION:**

2.4.1. The importance of reliable, clean, least-cost electricity and a just transition is particularly critical for vulnerable communities, such as indigenous, poor and marginalised, and rural communities in South Africa. There has not been proper consultation and participation of communities in the process leading to the publication of these amendments. There is a need for the Department to continuously engage with all communities in South Africa, with a particular emphasis on communities in rural areas and informal settlements, who currently lack sufficient access to electricity.

3. **SECOND SECTION - GENERAL COMMENTARY:**

3.1. LIMITED SCOPE OF THE AMENDMENTS:

3.1.1. The general thematic comments on the limited scope of the Bill are as follows:

3.1.2. Firstly, despite the fact that the electricity sector is responsible for approximately 40% of South Africa's greenhouse gas (hereafter "**carbon or CO₂**") emissions, the Bill fails to take into consideration any climate change issues that arise from the generation of electricity in South Africa; in particular, it fails to take into consideration the various objective principles and

outcomes outlined in the National Climate Change Response White Paper, 2011 (hereafter the “**White Paper**”) the Climate Change Bill, the Paris Agreement and section 9, 10, 11, 24(a), 27(1), 28 of the Constitution;

3.1.2.1. Secondly, although the Bill in its current state can be applauded in so far as the establishment of the independent Transmission System Operator (a critical step for the establishment of a competitive electricity market and implementation of the Department of Public Enterprises roadmap for Eskom unbundling), the Bill fails to provide a clear roadmap or timelines on the subsequent steps in the transition to the more competitive, open market;

3.1.2.2. Thirdly, The Bill fails to fully provide for a truly competitive market due to the Minister being granted far-reaching powers¹. These powers allow the Minister to effectively determine the type of generation capacity that will be needed to ensure optimal electricity supply which may exacerbate the climate crisis or failure to implement the just energy transition; and

3.1.2.3. Fourthly, the Bill instructs that the Minister of Mineral Resources and Energy (hereafter the “**Minister**”) consult two National Departments (the Department of Public Enterprises and the Department of Finance) before taking certain decisions, the Bill (a) fails to provide for a broader public participation process, (b) fails to provide any assurances that consultation with the two departments will be meaningful and made public; and (c) fails to require that other key departments at both the national and provincial level be part of the decision-making process. For example, at the national level, the following, *inter alia*, departments should be included in the decision-making process for a broader and collective implementation and sustainable development of the energy sector in South Africa:

1.1.1.1. ¹ Such as the power to issue determinations designating the buyer of electricity, the type of technology and the structure of the project, detracting from the principle of an open and competitive market; the power to issue a revised Integrated Resources Plan every three years, detracting from the TSO's ability to procure electricity supply as may be needed when imbalances or shortfalls occur during that period; the power to determine that new electricity infrastructure is needed to ensure optimal supply of electricity; the power to order the TSO to adhere to a transmission development plan or specific aspects of the plan, which may impinge into the jurisdictions of the public enterprises and finance ministries; the power to deviate from the IRP or the transmission development plan in the national interest; the power to request the National Energy Regulator of South Africa (NERSA) to determine licence conditions for successful participants in IPP procurement processes; the power to request NERSA to determine maximum or guideline tariffs for a particular technology under an IPP procurement programme; and the power to determine categories of trading which require licences.

- the Department of Fisheries, Forestry and the Environment;
- the Department of Water and Sanitation; and
- the Department of Human Settlements, etc.....

3.2. INADEQUATE FACILITATION OF ACCELERATED DEPLOYMENT OF RENEWABLE ENERGY:

3.2.1. The following policies, white paper and draft legislation state the following:

3.2.1.1. 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”¹⁰ and of “establishing regulatory frameworks that promote new technologies, including by changing regulations that restrict them unnecessarily”.

3.2.1.2. The White Paper states that policymakers “must priorities 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 maximising the climate change co-benefits of their intervention.”

3.2.1.3. 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.”

3.2.1.4. 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.”

3.2.2. Taking these extracts from the above documents into consideration, a rapid transition to renewable energy is fundamental not only to mitigate South Africa’s CO₂ emissions but also for the realisation of Section 24 of the Constitution, everyone has the right to (a) to an environment that

is not harmful to their health or well-being, and (b) to have the environment protected for the benefit of present and future generations. The amendments do not sufficiently facilitate the urgency of transition to renewable energy, nor do they explicitly require taking climate and just energy transitions considerations into account in the context of licensing of new generation capacity. Natural Justice recommends that priority be given to renewable energy generation capacity in the Bill and that the Bill facilitates the principles of a just energy transition to benefit the nation's sustainable socio-economic development.

4. THIRD SECTION - SPECIFIC COMMENTARY:

4.1.PREAMBLE AND SECTION 2 OF THE BILL - OBJECTIVES:

4.1.1. Despite the Government's efforts to date to advance, through the REIPPP, the development of the renewable energy sector in South Africa, the electricity sector is still, as highlighted above, one of the largest contributors to South Africa's CO₂ emissions and one of the biggest emitters of CO₂ emissions per capita in the world. Despite this, both the preamble and the objectives of the Act / Bill have not been amended in the Bill to reflect the climate crises. It is our submission that both the preamble and the objectives of the act be amended to take into consideration the issues around climate change, prioritising renewable or clean energy and including the principles of just energy transition.

4.2.SECTION 7 OF THE BILL: CONFLICTING LICENCE REQUIREMENTS FOR EMBEDDED GENERATION UP TO 100 MW:

4.2.1. The Bill amends section 7 of the Act expanding activities that require licensing unless the activity is exempted from licensing requirements under Schedule 2. These activities include, *inter alia*, a new requirement for issuance of a construction license for the construction of *any* generation facility. However, Schedule 2 of the Electricity Regulation Act exempts embedded generation projects up to 100MW from the NERSA operating licensing requirement – a measure to avoid delay in getting new generation assets online to alleviate load shedding.

4.2.2. As drafted, the Bill's new construction licensing requirement for *all* new generations – without regard for the Schedule 2 exemption for generation up to 100MW – would undermine that policy objective. This is likely a drafting error, and it is our submission that this should be corrected to reflect the exemption for generation of up to 100MW.

4.3. SECTION 35(4)(RF) OF THE BILL: PROMOTION OF SMALL-SCALE ELECTRICITY GENERATION:

4.3.1. Section 35(4)(rF) gives authority to the Minister to promulgate regulations for “*the promotion of the establishment and operation of generation facilities with a capacity of 100kW or less, which are operated by end-users, generate electricity from a renewable source and are connected to a distribution power system* (Section 35(4)(rF). Natural Justice believes that the word may in section 35(4)(rF) be amended to “must,” to provide additional support certainty to accelerate this category of very small-scale embedded generation.

4.4. SECTION 34 OF THE BILL: DETERMINATIONS ON NEW GENERATION CAPACITY AND PUBLIC CONSULTATION:

4.4.1. The Bill makes multiple amendments to section 34 of the Act, including that the Minister may decide that additional electricity or new generation capacity is needed *after consultation* with the Regulator and the Minister of Finance.

4.4.2. Considering the above, the current amended section 34 effectively gives the Minister sole extraordinary powers in determining what additional electricity or new generation capacity is needed in South Africa. The amendment to section 34 also fails to include consultation with key government departments that address climate change or and implementing the just energy transition in the determination process.

4.4.3. The submission recommends that the minister does not have exclusive authority over Section 34 determinations, that NERSA should be a concurrent decision-maker, and that municipalities have more autonomy to make their own procurement decisions.

4.4.4. The submission further submits that, at a minimum, the Department of Fisheries, Forestry and the Environment also be consulted when new electricity or capacity generation decisions are taken that have climate change implications.

4.5. SECTION 34 INTEGRATED RESOURCE PLAN:

4.5.1. The amendments ([32A] 70) of section 34 of the Act state that: “(1) *The Minister shall, after consultation with the Regulator— (a) compile the integrated resource plan; and (b) revise the integrated resource plan at least every three years.*”

4.5.2. In light of the above, this amendment in the Bill gives the Minister sole authority over the integrated resource plan in practical terms as it fails to provide guidance on procedures, timeline, nor scope of the consultation with NERSA, nor does the amendment provide assurances that meaningful consultation will take place and be reflected in the IRP. It again fails to require that the Minister DMRE co-operate with other vital departments such as the Department for Fisheries, Forestry and the Environment when making decisions that might impact sectors outside the energy sector.

4.5.3. This submission request that section 34 be amended to include meaningful consultation with other key players in the IRP process and for the Act to provide a detailed process for consultation with government agencies as well as for a robust public participation process.

4.6. SECTION 26 - EXPROPRIATION OF LAND FOR ENERGY INFRASTRUCTURE:

4.6.1. The amendment to section 26, providing for the permanent or temporary expropriation of land on behalf of a licensee, must include specific requirements mandating that the Minister or licensee obtain free, prior, and informed consent (FPIC) of the landowners—including from customary, informal, and communal landowners—as well as provisions ensuring just compensation. Section 26 (3) allows the Minister to expropriate “land which is reasonably required by the licensee for facilities which will enhance the electricity infrastructure in the national interest”. While the

wording recognises that such expropriation must comply with constitutional protections, there must be further protection in the amendments, including for communities that may not have formal land tenure. These communities' right to consultation (Free Prior Informed Consent) must be recognised and protected by the expropriation provisions of the amendments.

4.7. SECTION 14A - TARIFFS:

- 4.7.1. Proposed section 14A of the Bill would permit the Minister to request in writing that NERSA "(b) determine a tariff, a maximum tariff or a guideline tariff for particular generation technology that shall apply in respect of electricity generated by means of that technology pursuant to that IPP procurement process."
- 4.7.2. We note that the determination of a fixed tariff may undermine the basic principles of a competitive electricity market and may not pass legal muster given the obligation to ensure "value for money" as required under the New Generation Capacity regulations.

5. **CONCLUSION:**

- 5.1.1. While the transition to a competitive power sector has great potential to accelerate the transition to clean energy in South Africa and to ensure better energy equity, these amendments fail to provide the necessary support, incentives, and regulatory mandate for renewable energy production in the country to meaningfully increase. This not only has implications for South Africa's ability to meet its international obligations with respect to emissions reductions, but it also has a significant impact on consumers' access to reliable, affordable electricity.
- 5.1.2. The Electricity Regulation Amendment Bill represents an important step in the establishment of a modern electricity market in South Africa. However, the bill lacks a broader vision and roadmap for the electricity sector modernisation project, and fails to provide the necessary support, incentives, and mandate to increase renewable energy production in the country commensurate with the domestic economic and social need and the global climate crisis.