Electricity Governance Initiative

South Africa

Final Assessment Report

October 2009

Contents

Introduction

The Electricity Governance Initiative (EGI) is a collaborative global initiative of civil society, policymakers, regulators, and other electricity sector actors to promote the open, transparent, and accountable decision-making processes that are a necessary part of a socially and environmentally sustainable energy future.[1] The EGI is led jointly by the World Resources Institute and Prayas Energy Group (India). The National Institute of Public Finance and Policy (India) was centrally involved in development of the EGI Toolkit and implementation of the pilot phase of assessments in a number of South and South-East Asian countries. EGI is a partnership for sustainable development registered with the UN Commission on Sustainable Development.

Policymakers, regulators and citizens all over the world are grappling with the challenges of providing access to clean, reliable and affordable electricity, and addressing major environmental challenges including climate change. Improved transparency and public participation in the development of policy and regulation can help manage trade-offs between environmental, social, and financial considerations, and also identify points of convergence of these public interests. Building on global experiences, EGI has initiated a new effort to improve governance of electricity in South Africa (EGI-SA) by analysing government and regulatory capacity to create the right conditions for the promotion of social equity, energy efficiency and renewable energy, in line with the requirements of sustainable development and public interests.

During 2008-9, EGI-SA undertook a systematic assessment of decision-making processes in the electricity sector in South Africa. A research consortium was established, consisting of a partnership of civil society groups, including the Energy Research Centre (UCT), Sustainable Energy Africa, Earthlife Africa, WWF-SA, the Green Connection, and the International Labour Resource and Information Group (ILRIG), as well as independent researchers, and co-ordinated by Idasa.

Each organisation and individual researcher was commissioned to compile information on a number of indicators specified in the EGI Toolkit. This assessment report is based on the results of that research.

The Toolkit presents a framework to assess and promote good governance in the electricity sector. Governance in this sense refers mainly to decision making, in particular *how* decisions are made rather than *what* decisions are made. The decision making that is covered in the Toolkit falls mainly into *how* policy decisions are made and *how* regulatory decisions are made. The analysis also concerns itself with the institutional capacity involved in making the decisions. The focus is on policy and regulatory *processes,* not *outcomes.*

According to the Toolkit documentation:

> *"Understanding how decisions are made in this sector is of critical importance as better decision- making processes can enable the making of better decisions. Closed political processes and politically powerful groups often give limited attention to sustainable development objectives and public interest in decision making, particularly during sector reform processes. In order for reform to be politically sustainable, the public must have confidence in its benefits, and this is best supported by transparency. Exclusive processes are prey to being subverted and*

[1] Dixit et al, 2007. Toolkit….

> *used for narrow ends, whereas open processes provide checks on such abuses of power."*

This framework assesses, then, the extent to which decision making processes in national electricity sectors are transparent, allow for public participation, remain accountable to the public interests and permit access to redress. In addition, the Toolkit seeks to assess institutional capacity to adequately meet the requirements of good process.

The Toolkit comprises a set of qualitative research questions or 'indicators', whose answers assess decision-making processes in order to develop a metric to conceptualise good governance. 64 indicators are specified in the Toolkit, including a set of questions on key attributes of the electricity sector. The reader is referred to the Toolkit document[2] for a full specification of the indicators.

The indicator specifications, or research questions, require researchers to provide descriptive information on policy and regulatory decision making processes and institutional capacity involved in these processes. Also, for each indicator, questions around *elements of quality* are posed which require researchers to answer 'yes' or 'no' depending on whether the element of quality is considered to be present in the decision making process or the capacity involved in making decisions related to the process under examination. Based on these questions concerning elements of quality, a rating of (i) Low (ii) Low-Medium (iii) Medium (iv) Medium-High or (v) High is given to the indicator. A summary of the scores for each indicator and its elements of quality is contained in the Appendix.

The indicator scores record the spectrum of researchers' approaches, reflecting the perspectives of the deliberately diverse range of participants invited to contribute to the assessment. Differing points of view are the essence of policy analyses, as they involve a number of perspectives. It is thus to be expected that a collaborative description of existing governance processes by a variety of organisations will reflect differing perspectives. This report endeavours to present a consensus position, while retaining the breadth and diversity of viewpoints, and aims to highlight the key themes that emerged.

Preliminary results have been shared with multi-stakeholder Reference and Advisory Groups, which included academics, civil society and community based organisations, and representatives of government, the national electricity utility and business, respectively. In addition, several researchers have consulted with individual members of these groups during the research process. EGI-SA is most grateful for the advice and guidance, and constructive criticism, received during these interactions, as well during communications with the National Energy Regulator of South Africa (NERSA).

The report is prefaced by an Executive Summary containing key findings and recommendations, and includes an 'Electricity Charter' proposed as a basis for subsequent advocacy and engagement. It is hoped that these tools will be useful to a broad range of stakeholders in the sector.

Parts 1 and 2 sketch the historical background and current context for the assessment, drawn from the Baseline Indicators, and include analysis of these parts of the assessment. Parts 3 and 4 summarise the *key findings* from the Policy Process ('PP') and Regulatory Process ('RP') indicators, respectively.

Appendix I lists a summary of the scores for individual Indicators

[2] Dixit *et al.*, 2007.

Appendix II Incorporates the indicators themselves

The report focuses on identifying strengths and weaknesses in existing processes, and tries to highlight opportunities for intervention in and improvement of critical governance processes.

Idasa

Cape Town

October 2009

Executive Summary

The assessment highlights a systemic lack of clarity concerning roles and responsibilities in the electricity sector, with an associated extended period of policy uncertainty. Despite an initially clear vision for energy policy, established after extensive collaboration and co-operation, a sense of drift – possibly even destructive competition – has subsequently characterised policy development in the sector. Infrastructural and institutional capacity has suffered.

Roleplayers have become withdrawn and isolated, distrustful of each other. Mutual respect has almost vanished, and authority undermined. A lack of policy co-ordination has contributed to chronic under-capacitation, compounding the complex and profound social and environmental challenges that confront the country, both internally and externally. Previous assumptions are being questioned anew.

Successful engagement with the array of needs demands a fundamental reassessment of the adequacy of our institutions and of how effectively we relate to each other.

Key findings and recommendations

1. Policy and planning

Findings

1.1 There is evidence of an adversarial and non-cooperative relationship between elements of the executive and other government agencies in the energy sector that would need to co-operate for policy formulation and implementation to be effective.

1.2 This is borne out by the profound lack of role-clarity and organisational uncertainty that has weakened government capacity and functioning in this sector, rendering policy processes vulnerable to economically and politically powerful interests outside government. Formal electricity policy development and implementation has, therefore, been susceptible to domination by quiet, informal policy-making processes.

1.3 A key challenge for governance of the South African electricity sector is balancing the interests of 'core' players with other less well-represented groups and interests, including those of ordinary consumers, especially the poor.

1.4 A primary example is the uneven trajectory of evolving independent power producer (IPP) policy, which is not without its own controversies, and which is sorely in need of a transparently and thoroughly consulted, clearly articulated strategic vision that decides whether and how to draw in reliable partners in a manner that synergises social and environmental concerns with available technology options for a sustainable future.

Recommendations

1.5 There is an urgent need to open up the process of -

(a) clarifying energy policy and planning roles and responsibilities to an inclusive national discussion in order to agree a common vision that appropriately balances all legitimate interests; and

(b) the internal design, resourcing and staffing of the new DoE to reflect this vision

2. The regulatory process

Findings

2.1 Related to the context of sectoral policy instability, is uncertainty regarding the precise nature, status, role and functions of the Energy Regulator (NERSA). Independent regulation can play an important role in balancing complex competing interests and priorities. NERSA exhibits most key features of an effective system regulator, and has shown a preparedness to engage with the implications of its extensive mandate.

2.2 However, shifting responsibilities, opaque appointment procedures, and limited capacity, have contributed to undermining its authority and to the under-capacitation of the Regulator in key areas, such as in regard to its social and environmental mandate, substantive inclusion of weaker groups in decision-making processes, and effective and creative imposition, monitoring and enforcement of licence conditions.

2.3 The Regulator is in the process of implementing its responsibility set out in the Electricity Regulation Act[3] to ensure the "efficiency" and "long-term sustainability of the electricity supply industry", and to "promote the use of diverse energy sources and energy efficiency". It has done so during 2009 by managing an open and inclusive public consultation process on a set of Renewable Energy Feed-In Tariffs (REFIT). It is less clear, however, that NERSA has adequately considered its broader environmental obligations in terms of the Constitution and the National Environmental Management Act[4] (NEMA), for example, by including relevant requirements in licences.

2.4 NERSA has a pivotal role to play in helping to interpret how a variety of sometimes conflicting policies from various line ministries should be interpreted and applied in practice. There is evidence to suggest that it has the self-confidence, if not always the necessary capacity, to assert its authority and independence.

2.5 Importantly, NERSA is empowered to convene advisory, and customer and "end-user", forums to advise it on any matters affecting customers and end users, and it may impose a licence condition requiring licensees to establish and fund such a forum. This authority has been under-utilised.

2.6 Overall, NERSA's operations offer significant procedural space that is currently not well occupied by civil society.

2.7 In its interpretation of its obligations in terms of the Constitution and and the Promotion of Access to Information Act (PAIA)[5], NERSA appears to have failed in its responsibility to systematically categorise information in its possession and to then adequately apply its mind to making as much of it as possible automatically available

[3] Act 4 of 2006, section 2(a) and (e)

[4] Act 107 of 1998

[5] Act 2 of 2000

in accordance with the presumption of disclosure. It has, for example, uncritically allowed Eskom – an effective monopoly – to assert confidentiality exceptions in PAIA on the basis of 'commercial' sensitivity of information provided by Eskom.

2.8 The Regulator's decision-making processes are generally open and transparent, decisions and reasons are generally adequately transparent, and are made available timeously, using multiple modes of dissemination, including its website. Staff are available to provide at least oral explanations and translations of its decisions. The Regulator acknowledges the inadequacy of this practice, but explained it on the basis of limited resources and capacity. Overall, a fairly good attempt is made to improve public understanding of decisions made.

2.9 NERSA's capacity to impose challenging and creative licence conditions, and to monitor and enforce compliance, is severely constrained. Its inability to properly perform its regulatory and oversight responsibilities undermines its authority. NERSA is, however, undertaking a review of its compliance procedures.

Recommendations

2.10 There is an urgent need to clarify the role and authority of the Regulator in energy policy formulation, planning and regulation.

2.11 The process of appointing NERSA's managing members should be reviewed in order to make the process more transparent, thereby affirming the independence and authority of the Regulator, and enhancing public confidence it is integrity and accountability.

2.12 NERSA should be provided with adequate resources to enable it to fully develop and implement its social responsibilities, such as ensuring access to affordable and sustainable energy supplies and electricity services, and its environmental mandate, including the creative application of the principles of sustainable development.

2.13 NERSA should exercise greater creativity in the use of its authority to facilitate sustained and meaningful communication and engagement between licensees and consumers, including the use of standing forums to provide it with, for example, information on licensee compliance and advice. It should also expand its public education activities, including wider dissemination of its decisions, such as through translations.

2.14 Transparency is essential to democratic accountability, and the Constitutional right of access to information is vital to meaningful enjoyment of a range of socio-economic rights. NERSA should, accordingly, urgently review its interpretation and practice to make information more easily available.

3. The legislative process

Findings

3.1 Parliament and, particularly, the then-Portfolio Committee on Minerals and Energy, have, at key moments, not adequately fulfilled their role as fora for the broadest range of stakeholders to participate meaningfully in information sharing, and to engage with each other and with other stakeholders in transparent and substantive informed debate. As a result, it has not always been clear that they have fully appreciated the wider implications of important policy choices.

3.2 Parliament and the Committee have also not fully developed their oversight function in respect of the executive and administrative arms of government to require and facilitate coherent policy development and implementation.

Recommendations

3.3 The Parliamentary committee process at its best provides an open public forum for sharing of information, with adequate notice and equitable opportunity to air diverse perspectives. These contributions should then be thoroughly interrogated, with the benefit of a range of expert analyses of issues raised, which make clear to all interested parties the options involved, and the consequences and implications attached to those choices. These should then be complemented with proper reporting and dissemination of reasoned decisions that include responses to the views expressed, and that explains how and why particular choices are preferred and will be recommended to Parliament.

3.4 More particularly, Parliament should urgently convene a cross-committee process, to be led by the Portfolio Committee on Energy, to support a multi-stakeholder national conversation on equitable access to affordable electricity and on sustainable energy security.

3.5 Parliament should take more seriously its responsibility to exercise its oversight responsibilities in order to hold the executive accountable for implementation of an agreed strategic vision for equitable access to affordable electricity and sustainable energy security.

4. Correlation between inconsistent policies and intermittent engagement with partners

Findings

4.1 The assessment concludes that there is a close correlation between government's often inconsistent policy and practice, and its essentially *ad hoc* engagement with its social 'partners', usually driven by a particular need at a given time. In the past, disengagement and isolation has been government's primary mode of operation. Policy confusion has been the result.

Recommendation

4.2 Strategic coherence of government policy and practice would benefit from a commitment to consistent and open engagement with the entire range of social partners.

5. Civil society as equal partners

Findings

5.1 It is clear from the assessment process that the disparities and inequality that characterise South African communities are reflected in the way they are able to engage in meaningful participation in the range of available public processes. Equally, the state's ability and willingness to hear these voices is seen by many as very uneven.

5.2 However, there are promising signs of a willingness to move away from this sterile standoff, for example, in the government's stated intention to move to a more inclusive model for development, and that the new administration recognises the unacceptable distance between the 'governors' and the 'governed'. These signals have not, however, yet reached the electricity sector in a coherent or consistent manner.

Recommendations

5.3 Despite significant levels of societal mistrust, the assessment team believes that a new openness should inform the manner in which the challenges identified during this assessment are addressed. Sustained and inclusive engagement to build mutual confidence – a partnership of true equals, built on reciprocal respect – is vital if urgent and fundamental social and environmental needs are to be confronted with a coherent vision and an effective plan of action.

5.4 For this to happen, however, significant resources must be applied to enable meaningful engagement by the full spectrum of civil society. The assessment recognises the disempowering effect for prospective participants in public processes of ignorance of their rights. Equally, civil society must prepare itself to make effective use of the opportunities signaled in the emerging policy terrain.

An Electricity Charter

Preamble

The electricity sector is a crucial driver of both harm and potential solutions for the sustainability challenges that South Africa and the region face. Lack of access to affordable electricity by all people, especially the poor, impacts significantly on their ability to live dignified, safe and productive lives[6].

South Africa must urgently make important choices about its future. It is essential that those choices are both well-informed and widely supported.

But the governance of the electricity sector in South Africa is seriously flawed; there is a profound democratic deficit in the way decisions are taken, oversight and regulation occurs, and in which stakeholders are listened to and included in the policy-making process. In particular, the sector is prone to manipulation and domination by a select group of state and non-state actors, allowing the public interest to be obscured by vested private interests.

To strengthen the governance of electricity in South Africa we recommend the following Charter of reforms:

Institutional Arrangements and Processes

1. There is an urgent need for clarification about which state authorities are responsible for policy-making, planning, implementation and oversight, and for precision about their respective mandates.

2. A transparent, inclusive and responsive public process should be established to define and clarify roles and responsibilities in government, including the form and functions of Eskom.

3. The Department of Minerals and Energy has almost invariably failed to take properly into account relevant social and environmental issues. Capacity to do so must urgently be built within the new Department of Energy and other related parts of the executive, such as the National Planning Commission.

4. As a matter of priority, the implications of Cabinet's July 2008 decision to accept the guidance offered by the Long-Term Mitigation Scenarios (LTMS) must be clarified, and a transparent, inclusive and responsive public process should be established to discuss and agree a national action plan to address the realities of climate change, and the implications for sustainable energy security and equitable access to electricity services.

Transparency

5. Both policy-making and oversight processes are marred by undue and unlawful secrecy and need to be urgently opened up. Executive agencies, including Eskom, and oversight bodies, such as NERSA, must not only fully comply with the provisions of section 32 of the Constitution and the Promotion of Access to Information Act 2000

[6] The Constitutional Court in *Government of the RSA v Grootboom & Others* 2001 (1) SA 46 (CC) concluded that the right to adequate housing includes access to services including electricity. See Tully 'The Human Right to Access Electricity' in *The Electricity Journal* 2006 at p30.

(PAIA), but must take urgent steps to inculcate a new culture of openness, which makes the automatic disclosure of information the default position.

6. Eskom operates in a highly secretive and unaccountable way. The quasi-corporatist model that exists for Eskom must not be used as an excuse for unlawful administrative practices or secrecy. In particular, any internal protocols relating to the application of the commercial confidentiality exemption in PAIA must be reviewed and subjected to a public process of consultation to ensure that it reflects the public interest rather than special, particularly private, interests.

7. Accordingly, and as a necessary first step, we call upon DoE, the Department of Public Enterprises (DPE), and Eskom to disclose the following records:
    a. Eskom's Integrated Strategic Electricity Plans (ISEPs) numbers 1 to 11.
    b. Eskom's contracts with large private electricity users, including details such as usage and tariffs.
    c. Eskom's contracts with other countries, including similar details.
    d. Eskom's contracts with coal suppliers, including details such as duration and price.
    e. Eskom's plans for new generation capacity, including anticipated costs.
    f. Disaggregated electricity usage data.

Parliamentary Oversight

8. Parliamentary debate on policy and draft legislation needs to be more thorough, better informed, transparent and inclusive. Parliament must take seriously its responsibility to hold the executive to account, and must create space for meaningful engagement with civil society actors.

9. Parliament should, accordingly, establish a cross-portfolio process, to be led by the Portfolio Committee on Energy, to support a multi-stakeholder national conversation on equitable access to sustainable energy and energy security.

Regulatory Governance

10. The National Energy Regulator (NERSA) should reconsider its implementation of its broad social mandate to "facilitate a fair balance" between the interests of all its stakeholders. To this end, it should make greater use of its authority to convene advisory and user forums.

11. NERSA should reconsider the environmental implications of the provisions of the Electricity Regulation Act 2006, read with the principles of the National Environment Management Act 1998 (NEMA) and section 24 of the Constitution 1996 regarding environmental rights. It should, thereby, proactively take up its legal mandate to address environmental issues.

12. NERSA must urgently perform its functions of monitoring and enforcing licence conditions. Simultaneously, NERSA must ensure that licencees have the necessary capacity to comply with those conditions.

13. The process of appointing the Regulator must be transparent and independent, with clear criteria, in order to enhance the credibility of and public confidence in the Regulator's pivotal role in energy governance.

Public Participation

14. Public participation processes need to establish and maintain high standards of good procedure, compliant with the requirements of the Promotion of Administrative Justice

Act 2000 (PAJA), to ensure that there is full opportunity for a diverse range of social actors to contribute to the debate and have a meaningful opportunity to have their voices heard. The principles of good public participation practice include: special efforts to include and engage weaker social stakeholders for whom the barriers to active participation are more severe; public education concerning the process of participating; adequate notice of opportunities to participate; careful documentation; and early and wide dissemination of submissions, prior to reasoned decisions.

15. Civil society organisations, in turn, need to make full use of opportunities to participate that arise and, in order to do so, they need to establish partnerships to develop the necessary capacity to make constructive and creative contributions to the policy and oversight debate.

1 Background – the South African Electricity Sector[7]

The South African electricity sector is the largest in Africa, representing approximately 45% of total electricity consumed on the continent. State-owned Eskom, the national utility, is one of the largest electricity utilities in the world. In 2008, it ranked 13th in the world by generation capacity. Nett profit in 2008 amounted to ZAR 974 million.[8]

A few privately-owned coal companies supply most of the 125 million tonnes of coal to Eskom, which generates some 90% of South African electricity from this coal. Most of this electricity, in energy terms, is supplied to 25 large industrial consumers[9]. The bulk of the remaining supply is taken up by the three largest metropolitan electricity departments for on-selling, often for significant profit. Thus, in physical energy supply and consumption terms, the South African electricity system is dominated by a core of fifteen or at most twenty major participants. By virtue of their position in this physical energy supply and consumption system, this core has developed significant financial, technical and organisational resources through which they exert significant influence on governance of the system.

A key challenge for governance of the South African electricity sector is balancing the interests of the core players as identified above, with other less well-represented groups and interests, including those of ordinary consumers, in order to ensure that decisions are made in the broader public interest.

Additional contextual factors in the sector relate to failures or weaknesses in policy and regulatory processes, for example:

- An electricity supply crisis with features starting in early 2008 such as widespread blackouts, load shedding and mandatory limits on supply leading to disruption, significant economic damage and loss of confidence in national governance. Ongoing national reserve margin problems with associated severe security of supply risks are expected for years to come[10].

- NERSA's espoused tariff philosophy is *"centered on price stability and predictability in the interests of the customers*" yet, in 2008 and 2009, average price increases of 27.5% and 31% were awarded, with more of the same expected in the foreseeable future, indicating ongoing difficulties in adhering to central tenets of the philosophy.

- The national electrification programme, which during the first years of democratic government was comparatively one of the most successful in the world, shows signs of significant slowing due to increasing disconnection rates because of unaffordability. This trend has potentially severe welfare impacts for poor South Africans.[11]

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[7] See Baseline Indicators

[8] Eskom Annual Report 2008, http://www.eskom.co.za/annreport08/ar_2008/downloads.htm

[9] See section 3.1.4 for further information. [check ref]

[10] A decrease in demand linked to the world-wide economic recession has provided respite.

[11] INEP shows serious signs of floundering because connection targets are not being met, the backlog is growing, actual benefit to the beneficiaries are not as comprehensive as expected, and bulk infrastructure is needed for more connections and 100% access. Refer to PP9.

1.1 Structure of the electricity supply industry (ESI)

The electricity supply industry (ESI) is organised as a traditional public monopoly. Eskom produces 96% of the country's electricity, and it owns and operates the national high voltage transmission grid, as well as a significant proportion of the distribution system. In terms of quantity of electric energy supplied, Eskom accounts for 60% and in terms of numbers of customers, and supplies 40% of the retail market, with the balance accounted for by municipal distributors. Thus Eskom and the municipal electricity distributors fit the definition of traditional *utilities*.

In 2005, total electricity production in South Africa was 230 TWh, of which 3.1% was generated by private generators, 0.5% by local authorities and the balance by Eskom. Private generation is currently primarily generation for own-use and is dominated by sugar mills, and the Sasol coal-to-liquid fuels plant. The Kelvin power station located in Johannesburg supplies City Power Johannesburg, the Municipal electricity department, and is an anomaly in the South African system.

1.2 Distribution

The political settlement in 1994 granted rights and responsibilities to the three spheres of government, one of which is the right of local government to supply electricity to customers within its area of jurisdiction.

The organisation of the distribution industry is the result of the takeover of failing local and regional distributors by Eskom in the early 1990s during the transition from apartheid, and the restructuring of local authorities in the late 1990s. Since then there has been a highly contested process of attempted re-structuring of distribution systems which is ongoing: at present the process has stalled mainly through resistance by local authorities, particularly the large metros, which stand to lose a significant portion of their revenue base. A constitutional amendment is required for implementing the official policy to replace the local government distributors with 6 regional electricity distributors (REDs). National Cabinet has recently approved plans for a constitutional remedy and draft legislation (the Constitution Seventeenth Amendment Bill, 2009) has been tabled in Parliament by the justice department.

1.3 Consumers

Electricity consumption is characterised by the dominance of a handful of energy-intensive users and a large number of small consumers.

Customer Group	**Electricity Consumption**	**No. of Consumers**
Residential	17%	7.5million
Agriculture	3%	103 000
Commercial	13%	255 000
Mining	15%	1100
Industry/Manufacturing	38%	33000
Transport	3%	1800
Exports	6%	7
Own use of distributors	5%	
Total	100%	7.9 million

Energy-intensive consumers are organised into the Energy-Intensive Users Group (EUIG), established in 1999. It has 25 members, who consume around 40% of the electricity sold in South Africa annually.

1.4 Important events and controversial issues

The following information, pertinent for contextualising the South African electricity sector, is drawn directly from the Baseline indicators.

Table 1.4.1 – Timeline of Important Events in the Electricity Sector in the past 50 years	
Year	Event
1970s	Completion of the national grid
1984-5	De Villiers Commission
1986-7	Escom become Eskom Eskom is able to make a profit
1990-1994	Eskom takes over apartheid-era regional and local distributors of descredited apartheid-era black local authorities
1991	First Eskom price compact with government
1992	ANC Electrification conference
1992-4	National Electrification Forum, initiates electrification programme and restructuring of distribution sector mandates an independent electricity regulator
1994	Reconstruction and Development Programme contains electrification targets
1994	Eskom's second Compact with government includes employment equity and electrification targets
1994-9	National Accelerated Electrification Programme
1994	National Electricity Regulator formed
1998	Energy Policy White Paper outlines restructuring process for electricity sector, which includes a commitment to break up the generation sector into competing units and introduce an electricity market, as well as restructure the distribution industry into REDS
2004	Electricity Sector restructuring policy reversed
2008	Medium term supply crisis - first un-deniable symptoms: load shedding, large tariff increase applications

Table 1.4.2 – Recent Events (past 5 years)	
Year	Event
2004	Government announces that the electricity sector restructuring process has been halted, and that Eskom has been instructed to build the next power station
2005	The first Regional Electricity Distributor, RED 1, is created in the Western Cape, and is issued a distribution license by NERSA
2006	Electricity bulk supply crisis in the Western Cape: blackouts, load shedding
2007	NERSA decides to withdraw RED 1's license, RED 1 effectively ceases to function – restructuring of distribution industry put on hold
2007-8	National electricity bulk supply crisis – emergency load shedding
2008	Eskom asks for 50% tariff increase, and gets a 27% tariff rise instead

Table 1.4.3 - Current Issues
Sector roles and responsibilities - is it DME/DoE, DPE, Eskom, NERSA that should have actual responsibility for a number of key areas such as sector planning and responsibilities for supply security?
Tariffs – whether tariff increase should be kept low, to prioritise the immediate needs of poorer consumers; or accelerate at a faster rate as requested by Eskom, to fund new capacity?
Provisions of electricity to poor households – what poor households should pay for electricity, whether they should pay at all, and how fast should the electrification programme proceed?
New electricity supply – how should these decisions be made, who should make them, and what is the most appropriate energy mix?
Climate change – how should the electricity sector respond, what should be the response, and who should bear the cost?

2 Structure of the South African Electricity Sector[12]

2.1 Policy structures

Although the Department of Minerals and Energy (DME) has had formal responsibility for electricity policy (the creation of the Department of Energy (DoE) after the 2009 general election is likely to change this), in practice, electricity sector policy decisions are also taken by a number other agencies and branches of government such as the Department of Public Enterprises (DPE), Eskom, the National Energy Regulator of South Africa (NERSA) and metropolitan local government.

It is not always clear, even to government insiders, where policy is being made. Although electricity sector policy statements are most often officially attributed to the DME, it is often not clear which government department/agency has in fact produced the policies that have been recommended to Cabinet for approval. For example, there are reports of Eskom bypassing the DME and having important sector policy proposals directly considered and approved by Cabinet.

Most recently, in its responses to stakeholder comments on the National Energy Bill, 2008, the DME stated that energy modeling and planning remained a function of the DME. Nevertheless, policy development has been informally diffused (and sometimes confused) across ministries and other entities *outside* DME. A recent example is the February 2009 release for comment by the then-DME of potentially contradictory draft regulations for independent power producers, at the same time as NERSA was undertaking extensive consultations on its proposed Renewable Energy Feed-In Tariff Policy (REFIT). The DME's draft regulations also emerged some considerable time after Eskom had, in the midst of the electricity supply crisis of early 2008, already launched its own urgent power procurement programme, inviting expressions of interest based on a proposed standard agreement.

The apparent lack of co-ordination was emphasised by the fact that Eskom, as the dominant national utility and system operator, was appointed as the DME's buying office for all new generation capacity, apparently without taking into account the very different philosophy and requirements inherent in the REFIT process, in which NERSA must play a pivotal gate-keeping role. The draft and final regulations also, in effect, require Eskom to manage the dilution of its dominance, itself a challenging responsibility. The draft regulations were subsequently withdrawn pending necessary clarification, but final regulations have since been published[13]. (See further below)

Similarly, while a few years ago the state foresaw itself reducing its role in the electricity sector, the DPE now takes a more active interest the activities of Eskom, the wholly-owned national utility managed through DPE. State interests have been overseen by the DPE's Deputy Director-General of Energy, Mining and Broadband, which has an 'Energy Sector Sub-programme'. The DPE also sees Eskom as playing a major role in the state's infrastructure development programme (through Eskom's ISEP), and takes an interest in electricity planning.

[12] See Baseline Indicators

[13] Final regulations were published in August 2009 - Electricity Regulation Act 4 of 2006: Electricity Regulations on New Generation Capacity. Government Gazette No. 32378, 5 August 2009 GN R. 721

Furthermore, although legislation made it the DME's responsibility to manage a National Integrated Resource Plan (NIRP), which includes the "official" plan for future power generation capacity (including demand side measures – DSM), in practice NERSA was extensively involved in its preparation, although NIRP3 was apparently never finalised. While the latest regulations restore Eskom's central role in developing the national integrated resource plan, it must do so in consultation with the 'energy planner' (DoE) and the regulator (NERSA).

Moreover, the DPE website takes a strong stance in promoting nuclear technology in long range generation planning while not mentioning any other technology. However, the mandate for nuclear energy was part of the DME portfolio and included DME representing state shareholding in the South African Nuclear Energy Corporation (NECSA).

As a result of the effective diffusion of electricity policy development between at least the DME, DPE and Eskom, to date some crucial electricity policy decisions, such as the choice of technology and timing for new major (>1000MW) generation plant, and investment in energy assets that determine South Africa's overall energy mix, including the mix between demand side and supply side interventions, have effectively been taken by Eskom: essentially as an outcome of non-transparent internal Eskom strategic planning processes – the Integrated Strategic Electricity Plan (ISEP).

In addition, local government, especially the large metropolitan authorities, which house the larger proportion of electricity reticulation assets and operations, and serve most electricity users, has for decades played a major, even decisive, role in key policy decisions affecting local government and electricity, especially the central policy issue of the overall structure of the electricity distribution sector. The official DME policy of establishing regional electricity distributors (REDs), which would remove electricity distribution from ownership and control of local authorities, has been effectively resisted for years, thwarting a key element of DME electricity policy. This policy proposal was recently reintroduced in the form of a draft Constitution Seventeenth Amendment Bill, 2009, which would entail the compulsory transfer of electricity assets from local to central government.

2.2 Internal DME structures

These experiences mirror the dispersed location of electricity policy development structures *inside* the DME. Various capacities for policy making involving various aspects of the electricity sector are dispersed among the branches of DME, which often militates against or even prevents the possibility of effective policy-making in a number of important areas, described in the preceding section. Moreover, the organisational structure of DME has undergone frequent change, further exacerbating existing structural sector problems, such as the relationship between these and other related external energy policy structures.

Moreover, fundamental features in the organisational structure of the DME have reflected existing dominant interests in energy policy. These structural features prevented effective consideration in the policy process of interests not backed by the organisational, political and economic resources which the core[14] energy sector participants muster. The internal structure of the DME inherently promoted minerals exploitation and minerals-energy-complex industry interests and prevented effective policy formulation and implementation related to issues such

[14] See Baseline Indicators for a definition of this core.

as sector energy efficiency, small and medium electricity consumer interests, and environmental and social issues.

Thus, while the DME's development of electricity policy has been formally the responsibility of the Chief Directorate: Electricity, effectively it is made and implemented in a multiplicity of locations. In practice, the energy branches of the DME that have made electricity policy were divided between two Deputy Director-Generals, whose offices were small and understaffed, and there are other external agencies which probably have a more real impact on electricity policy, particularly DPE and Eskom, as well as NERSA through its responsibility to produce NIRP2.

Furthermore, within the DME, in completely different line departments, there have existed a directorate of Electrification and Policy Development, a directorate for the Integrated National Electrification Programme **(**INEP/BPU), and a directorate of Energy Planning and Development. Despite their descriptive titles, these branches have not been strictly responsible for policy making, often changing their roles and responsibilities, militating against effective policy planning and co-ordination.

The internal DME structure has been undergoing constant change, with the No. 1 Risk identified in the 2008/9 – 2010/11 DME Strategic Plan of "Failure to attract and retain personnel with the right skills and knowledge" playing an ongoing role in constraining the DME's capacity to develop and implement electricity policy. Aside from a general lack of capacity and resources for policy development and implementation, both within the Department and across the public sector generally, the deployment of capacity is very uneven. For instance, during interviews conducted as part of the research, officials stated that areas such as renewable energy and energy efficiency and an effective demand side management programme are "Cinderella issues", and the way the DME organogram is structured makes it almost impossible to mainstream them, no matter what their (potential) importance.

Similarly, until very recently, the Clean Energy Chief Directorate (containing, amongst others, the Energy Efficiency and Renewable Energy Directorates) was part of the Hydrocarbons and Energy Planning Branch, along with the Energy Planning Chief Directorate, a minority (chiefly) demand-side function in a branch dominated by supply-side functions. Since a demand-side approach to energy policy is specified in the 1998 White Paper, and is also regarded internationally as best practice, one might reasonably have expected demand-side functions to be better-resourced in terms of budget, capacity and prestige.

The essential challenge of the DME's structure was that policy and implementation functions pertaining to demand-side and cross-cutting issues, such as energy efficiency, renewable and provision of energy services to low-income households, were placed within policy branches formally dealing with a specific energy carrier. So, for example, there was an energy efficiency function in the electricity branch and no energy efficiency function in the hydrocarbons branch. With this kind of structure, it is not difficult to appreciate at least some of the reasons for the very poor track record of efficiency programmes in the electricity sector to date. The same can be said for renewable energy sources and also growing problems in the national electrification programme, which during the first years of democratic government was comparatively one of the most successful in the world, but which has recently shown signs of significant slowing. Similarly, while there was an Energy Planning Chief Director in Hydrocarbons and Energy Planning, there was no evidence of responsibility for planning in the Electricity Chief Directorate. This may well have contributed to the serious consequences of the failure to effectively plan electricity supply, leading to the current and ongoing severe supply crisis and the struggling electrification programme.

The DME has shown awareness of these structural problems inasmuch as, prior to the recent establishment of the DoE, it reorganised several Chief Directorates. Thus, for example, the Chief Directorate of Clean Energy was moved out from under the Hydrocarbons and Energy

Planning Branch, and the Electricity and Nuclear Energy Branch was renamed the Electricity and Nuclear and Clean Energy Branch, with a Clean Energy Chief Directorate containing Energy Efficiency and Renewable Energy Directorates.

These measures represented some indication that the DME had begun attempting to address these general problems. In the past few years, coinciding with the manifestation of an electricity supply crisis in national load-shedding and the acknowledgement of the crisis in statements by the President of the Republic[15], important new laws have been promulgated[16] which, if effectively implemented, could lead to policy developments which address electricity planning in a manner which improves the balance between traditional vested interests and broader considerations.

This new legislation appeared to offer an opportunity to clarify these relationships. They have been followed in 2009 by draft and then final regulations to begin implementation.[17] These regulations again shift strategically important planning responsibilities from NERSA to Eskom, and give the Minister of Energy a wide discretion regarding NERSA's REFIT process. Given the complexities inherent in the details of the laws and their elaboration in regulation, and of the evolving institutional context, the practicalities of implementation thus remain problematic. The potential remains for well-intentioned laws to be derailed in implementation. While a lack of co-ordination does not necessarily result in bad policy, it will almost certainly entail an inability to implement good policy.

However, even this recent re-organisation does not address the primary concern, which is that there were fundamental features in the organisational structure that reflected the old dominant interests in energy policy in South Africa. Although important that the contribution which these interests make to the South African economy continues to be well represented in the politics of policy development, there are other perspectives that need to be taken into account. These are as important to the economy, and to social well-being and sustainable economic development.

This profound lack of role-clarity and organisational uncertainty has weakened government capacity and functioning in this area, rendering policy processes vulnerable to economically and politically powerful interests outside government. Formal electricity policy development and implementation has, therefore, been susceptible to domination by quiet, informal policy-making processes.

Crucially, therefore, an assessment of the organisational structure of the new DoE needs to show how it is designed to achieve, not only a better balance between these interests, but also how the state is structured to address the special needs for those interests which are not backed by mining and energy industry organisational, political and economic resources. This is not evident at present.

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[15] Mbeki, T, February 2008. State of the Nation Address, issued by the Presidency. Cited in March 2009, http://www.info.gov.za/speeches/2008/08020811021001.htm

[16] National Energy Act No. 34 of 2008; Electricity Regulation Amendment Act No 28 of 2007.

[17] Draft Electricity Regulations on new Generation Capacity, R. 79, Government Gazette 30 January 2009 and Electricity Regulation, Notice 139 of 2009, Government Gazette 13 February 2009; and final regulations were published in August 2009 - Electricity Regulation Act 4 of 2006: Electricity Regulations on New Generation Capacity. Government Gazette No. 32378, 5 August 2009 GN R. 721.

The formation of a new Energy Ministry to "…be responsible for implementing a clear energy strategy" thus provides an important opportunity to establish a new internal structure which addresses the entire spectrum of legitimate interests. On the other hand, in her recent budget speech, new Energy Minister Dipou Peters announced that the South African National Energy Development Institute (SANEDI), established in terms of the new Energy Act, 2009, is intended to "integrate energy planning". Further, draft regulations published in February 2009 for comment indicate that the 'System Operator' – Eskom – will be appointed as the "National Energy Planner to carry out the national integrated resource planning process".

Consequently, while the establishment of the DoE and SANEDI represent a potentially important opportunity to give appropriate priority to an energy policy that is liberated from a minerals-centric paradigm, it is equally essential to clarify roles and responsibilities across the sector.

There is, moreover, an urgent need to open up this process to an inclusive national discussion in order to agree a common vision, as envisaged in both the Minister's budget speech and in the Medium Term Strategic Framework document released by the Presidency in July 2009.

Nevertheless, for all the necessity of the broad and inclusive discussion recommended here, it is essential that inadequate technical capacity within state institutions is simultaneously addressed. Operation of a complex national system requires, firstly, institutional coherence and stability, which ought then to be able to attract, develop and retain this capacity.

2.3 Organisational relations and sector co-ordination

There is evidence of an adversarial and non-cooperative nature in the relationship between elements of the executive and other government agencies that need to exhibit far greater co-operation for policy formulation and implementation to be effective.

The Minister for Public Enterprises is on record as saying, ahead of Eskom's key 2008 special tariff increase application to NERSA, that if the regulatory process did not yield a specific outcome it would need to be reviewed. Subsequently, the outcome did not yield the outcome the Minister said was wanted and it was in fact reviewed. This undermines perceptions of regulatory independence and autonomy.

Two linked examples are the National Integrated Resource Plan (NIRP) and the Independent Power Producer (IPP) process, which illustrate key government department and agencies acting at cross purposes in the formulation and implementation of major sector policies, leading, after years of difficulties, to a situation where implementation remains stalled. It is worth noting key features of the interaction between DME, Eskom and NERSA to illustrate the lack of co-operation prevalent in this process.

- DME effectively prevented Eskom from building bulk generation capacity, with a policy announced in 2003 that DME-contracted IPPs would provide the additional capacity necessary to meet growing demand. Doubts regarding the practicalities and modalities of the policy, and the respective roles of DME and Eskom, deterred prospective IPPs, and the policy ultimately failed, becoming one of the chief causes of precipitating South Africa at beginning 2008 into a medium-to-long term electricity supply crisis.

- NERSA, according to DME policy, has been responsible for compiling the National Integrated Resource Plan (NIRP), which is a plan for building large scale generation capacity. Its main output is the timing, size and technology of generation plant

required to meet demand requirements. Development of the Plan was delayed for several years.

- Eskom has its own Integrated Strategic Electricity Plan (ISEP), according to which it plans the timing, size and technology of generation plant required to meet national demand requirements.

Compounding these tensions, during the 2008 electricity supply crisis:

- In mid-2008, in reaction to the electricity emergency announced by the President, Eskom announced a power purchase programme to "bridge the gap between the supply and demand" in a tender process for base-load, co-generation and medium term power purchases.

- In late 2008, NERSA stated on the record that it was opposed to Eskom being made responsible for managing the IPP process.

- DME published separate sets of draft regulations on 30 January 2009 and 13 February 2009, which would make Eskom responsible for managing the National Integrated Resource Plan and the IPP process. Final regulations published by the DoE in August 2009 confirmed this move.

- In March 2009, NERSA announced a REFIT tariff[18] mechanism that is being interpreted as incompatible with the IPP part of the regulations.[19]

- In May 2009, Eskom suspended the base-load, cogeneration and medium term power purchases tendering process, saying it is waiting for adequate regulatory certainty on IPPs.[20]

There is extensive evidence that major "official" DME policies (relating to overall sector structure, sector planning, and responsibility for security of supply) have not been implemented, or were directly resisted, by other government organs and agencies and that in many cases "actual" policy was made elsewhere, in undisclosed processes outside the official policy process and, moreover, that this "actual" policy has been implemented without regard to, or in direct non-compliance with, "official" DME policy[21].

For example, the DME's 2003 Renewable Energy policy included a modest target[22] that remains far from being achieved. Simultaneously, Eskom's programme to build large coal-

[18] The March 2009 tariffs included only some renewable energy technologies. A further round of hearings and consultations in September 2009 is expected to result in tariffs for other technologies in October 2009.

[19] Even with a fixed tariff for renewables, in terms of applicable procurement regulations, aspirant RE plants would still have to compete against one another on the basis of other specifications.

[20] NERSA has since published a proposed Power Purchase Agreement (PPA) to replace Eskom's 2008 draft.

[21] See page 35 below.

[22] The 2003 White Paper stated: "In order to meet the long-term goal of a sustainable renewable energy industry, Government has set the following 10-year target for renewable energy:
10 000 GWh (0.8 Mtoe) renewable energy contribution to final energy consumption by 2013, to be produced mainly from biomass, wind, solar and small-scale hydro. The renewable energy is to be

fired power stations continues while its modest solar panel subsidy programme appears to show a lack of equivalent commitment.

Similarly, the DME's 1998 White Paper on energy clearly stated[23] that "Government will ensure that decisions to construct new nuclear power stations are taken within the context of an integrated energy policy planning process with due consideration given to all relevant legislation, and the process subject to structured participation and consultation with all stakeholders." In the meantime, however, and in the absence of an integrated energy plan, Eskom has proposed a plan for nuclear power, DPE has accepted that position, followed by the DME. Significant financial resources continue to be committed to PBMR research, making a modestly scaled nuclear programme increasingly unlikely.

2.4 Regulatory structures

In structural terms, the research clearly concludes that, in law and in practice, the National Energy Regulator (NERSA) is responsible for economic regulation of the electricity sector. Despite this clarity, there are a number of uncertainties regarding structural issues.

Much of the current regulatory regime was premised on an electricity policy outlined in the 1998 Energy Policy White Paper, which was centered on the restructuring of the electricity sector. This involved the introduction of wholesale competition and the regrouping of the electricity distribution industry into a few regional electricity distribution entities (REDs). In 2004, much of this policy was abandoned, and the implementation of the remainder has stalled.

On the other hand, recent developments, including the possible reintroduction of aspects of the REDs policy (mooted by the Constitution Seventeenth Amendment Bill of 2009), together with the new REFIT policy, point to a return to prioritising involvement of independent power producers (IPPs). Moreover, the indecision regarding energy planning responsibility indicates the continuing relevance of important features of that Policy that require a strong regulatory role.

Independent regulation in South Africa is a relatively recent development; although an independent regulator has existed since 1994 in South Africa, the negotiation of two Compacts between government and Eskom for the duration of the 1990s left the National Electricity Regulator (the predecessor of NERSA) with no substantive role in economic regulation until 2000. Recent tariff rulings (in 2008 and 2009) exhibit an appreciation of the Regulator's broad and complex mandate to find a fair balance between the diverse interests of investors, producers, licencees, and consumers and the broader public. So, too, does the Regulator's role in development of the National Integrated Resource Plan (albeit since suspended).

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utilised for power generation and non-electric technologies such as solar water heating and bio-fuels. This is approximately 4% (1667 MW) of the estimated electricity demand (41539 MW) by 2013. This is equivalent to replacing two (2x 660 MW) units of Eskom's combined coal fired power stations.
This is in addition to the estimated existing (in 2000) renewable energy contribution of 115,278 GWh/annum (mainly fuelwood and waste) (Hughes et al, 2000). More efficient conversion of wood and waste for power generation will contribute to the target."

[23] In paragraph 7.2.4 on page 60.

These developments signal that certainty about the role and authority of the Regulator is of pressing relevance, and one of the primary outstanding issues identified by the research. The place and character of the Regulator therefore require urgent clarification.

2.5 Relevance of policy and regulatory structure to realities of the sector

It is pertinent to ask whether the current legislative, policy and regulatory programme are appropriate, given key sector characteristics. This question arises owing to historical policy and regulatory designs which have been overtaken by events.

Much of the current regulatory regime was premised on an electricity policy outlined in the 1998 Energy Policy White Paper, the central tenet of which was restructuring of the electricity sector, involving the introduction of wholesale competition and the regrouping of the electricity distribution industry into a few regional distribution entities. In 2004, much of this policy was abandoned. The lack of alignment between the regulatory regime and the fundamental industry structure raises key policy and regulatory issues.

Attempts to foster competition in generation have failed, and new regulations put Eskom back at the centre of the electricity system: compiling NIRPs, managing the IPP programme, being the single buyer of electricity from other suppliers. Simultaneously, the regulatory regime treats Eskom as having competitors it doesn't have: Eskom lives in a non-existent artificial commercial habitat while in fact being a monopoly utility. Eskom benefits from not having to disclose information for "commercial reasons" while in effect not having any commercial competition. Eskom is also vertically integrated, controlling generation, transmission and distribution. Consequently, even opening up generation to new IPPs will not, by itself, remove its monopoly on transmission and distribution.

The commitment by the South African state to the notion of *independent regulation* is equivocal. "Independent Regulation" is a phrase that often appears in the literature regarding best international practice in regulation. But it is interesting to note that a phrase-search through a number of key documents such as the Energy Policy White Paper, the NERSA Act, the Electricity Regulation Act, the Electricity Regulation Amendment Act, and associated regulations issued in regards to these Acts, the phrase "Independent Regulation" was not found.[24]

[24] The international literature almost invariably refers to *Independent Regulation* and *"Regulatory Independence"* (like "Separation of the Judiciary") which is seen as a primary condition for effective regulation, and "Independent Regulation" is a phrase that often appears in the literature regarding best international practice in regulation. It is interesting to note that in the course of the research in compiling the information for the indicators, in a phrase-search through a number of key documents such as the Energy Policy White Paper, the NERSA Act, the Electricity Regulation Act, the Electricity Regulation Amendment Act, and associated regulations issued in regards to the Acts the phrase "Independent Regulation" was not found. This, combined with the difficulties NERSA has been and is experiencing in independently regulating Eskom suggests that the process of actually accepting the notion of Independent Regulation is not complete. This has structural implications for all relationships in the sector.

3 The Policy Process

3.1 Effectiveness of the legislature in the policy process[25]

Conclusions in the associated Indicators are drawn from the research on the Parliamentary Portfolio Committee on Minerals and Energy *in general*, i.e. from information of committee activities over a period of time in all areas[26]. A case study on the committee process around the seminal National Energy Bill[27] corroborates much of the research findings.

The research assessment finds that the Portfolio Committee has access to essential resources, such as research capacity for knowledge enhancement and financial resources provided by the Parliamentary Research Unit (PRU), but this should be viewed within the context of Parliament's generally relatively limited and shared capacity. In practice this has, at crucial times, been limited to the use of one researcher who has been required to deal with both minerals- and energy- related matters, an often-difficult balance to strike. Political parties represented on the Committee may have their own internal research capacity, but the impact is constrained by the wide variance in parties' size and resources. This has meant that the Committee's capacity to assess environmental and social issues, for example, has been extensively reliant on members' own knowledge.

The Committee has arranged public hearings that have served as a useful sounding board for stakeholders interested in various policies and legislation affecting the ESI. However, this form of public participation is only as valuable as far as the information it elicits is subsequently utilised by the Committee. The most significant weakness identified during the assessment is that the Committee has, at crucial moments, engaged in brief, superficial and cursory consideration of issues raised by interested stakeholders. Primary attention seems to have been focused on including the perspectives of state representatives, as opposed to a dispassionate evaluation of the spectrum of views.

In addition, the Committee secretariat does not provide members or other interested stakeholders with adequate information or summarised reports of submissions to the committee. Nor does it always provide a record of the Committee's discussions, deliberations or conclusions, which may have reflected an objective consideration of the relative merits of various submissions. While the Committee provides a forum for questions and answers, there is little evidence of enhanced independent research support by the PRU or by the Committee's secretariat to facilitate informed public participation, or proper interrogation of, and reporting on, subsequent decisions.

A case study on the committee process around the National Energy Act, 2008 - a key piece of legislation with far-reaching impacts on governance of the electricity sector - records that interested stakeholders were not given sufficient advance notification of the dates of either an official briefing, or of subsequent public hearings and deliberations in order to enable them to participate properly. During the hearings, Committee members made constant reference to

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[25] Refer to: PP1 Capacity of Legislative Committee, PP2 Capacity of Legislative Committee to Assess Environmental Issues, PP3 Capacity of Legislative Committee to Assess Social Issues, PP4 Effective Functioning of the Legislative Committee on Electricity, PP14 Quality of legislative debate on electricity laws

[26] Note that the legislative committee corresponding with DPE was not considered in the research undertaken for the indicators.

[27] Refer to the case study of the National Energy Act for an example of the points which follow.

the content of the departmental briefing that had preceded the hearings, and appeared critical of participants who had not attended the briefing, although invitations to participate in the hearings had made no reference to this prior official briefing. Crucially, members appeared extensively reliant on perspectives contained in the DME briefings, and insufficiently responsive to public submissions.

Ultimately, inadequate time was allocated for consideration of complex issues and no assistance was given to interested participants to consider others' submissions. Moreover, while a core of ruling party members usually attended continuously, others, including some opposition members, were often absent for periods even during the limited times allocated for hearings and deliberations.

It may be fairly questioned whether the committee process leads to an adequate understanding of the complex issues involved and the impact of the resulting legislation.

Bluntly put, the legislative process goes through the motions but lacks real substance. A raft of recent legislation promulgated and regulations drafted has had little in the way of corresponding overarching open analysis of the likely impacts on a complex sector.

Too frequently, complex legislation is forwarded to Parliament by the Committee apparatus without having undertaken comprehensive analysis, and without adequate records of how inputs have been considered, or reasoned motivation for recommending approval.

While parliamentary processes allow stakeholders including members of the public to make written and oral submissions, and to participate in hearings, there are instances where some stakeholders have been effectively prevented from proper participation through not being timeously advised of hearings and not having access to key submissions by government and its agencies, notably in recent hearings related to the fundamentally important and wide-ranging National Energy Act.

The Parliamentary Committee process at its best provides an open public forum for sharing of information and adequate notice and equitable opportunity to air diverse perspectives. These contributions should then be thoroughly interrogated, with the benefit of a range of expert analyses of issues raised, which make clear the options involved, and the consequences and implications attached to those choices. These should then be complemented with proper reporting and dissemination of reasoned decisions that include responses to the views expressed, and explain how and why particular choices are preferred and recommended to Parliament.

The establishment in 2009 of a separate Department of Energy, and of a separate Parliamentary energy committee, offers an important opportunity to develop the necessary specialist expertise on energy in Parliament.

3.2 Public participation in the policy process[28]

The scope and effectiveness of public participation in the *legislative process* and particularly in the most directly relevant *legislative committee* has been discussed above. However, there

[28] Refer to: PP16 Clarity of Process for Public Participation in Policy-Making, PP17 Public Disclosure of Information on the Basis and Goals of Policy Reform, PP18 Effectiveness of Public Participation Process

are also *policy processes*, mainly the drawing up of government policy documents, which offer opportunities for public participation; these are dealt with here.

A case study analyses the process of drawing up the Nuclear Energy Policy of 2008. Government's own price tag on its nuclear plans will constitute the country's largest-ever public procurement exercise, and industry safety is the focus of considerable public concern. Despite the significance of this policy context, then, it is important to record that, due to overlapping mandates of public agencies, and a rather confusing process, characterised at key moments by an acute lack of transparency, the research could not ascertain definitively which government department or agency *actually* took responsibility for recommending adoption of the policy.

Opportunities for public participation followed a two-track process, with the more transparent part of it in Parliament. Nevertheless, it was not clear how information and views contained in public submissions were intended to be used or were eventually used. Submissions by interested parties were not made available to other interested parties and there was no indication of proactive efforts to facilitate participation of vulnerable groups. The final policy document makes no reference to, and undertakes no reasoned evaluation of, these submissions.

There is much to suggest that the public consultation process was not sincere, and that comments and submissions by the public, and particularly members of some civil society organisations, were not seriously considered and have not influenced the final policy in any meaningful way.

The final policy was made public six months after it was apparently adopted, potentially allowing extensive state action towards implementation of critical aspects of the policy before the public was even made aware of such possibility.

Civil society capacity

The substantive value of opportunities for public participation is considered further in the sections that follow. However, civil society's capacity for participation in the policy-making and law-making processes is also bears examination.

It is clear from the assessment process that the disparities and inequality that characterise South African communities are reflected in the way they are able to engage in meaningful participation in these public processes. Thus, for example, a relatively limited number of CSOs, albeit relatively influential bodies, including trade unions, organised consumer groups, academic institutions, or environmental NGOs, may be able to formulate detailed written submissions and be able to afford to travel to venues where public hearings are being held. At the same time, 'grassroots' community formations, often holding very different perspectives and driven by very different imperatives, do not necessarily enjoy similar capacity for participation, despite representing sizeable constituencies.

The state's ability to hear these voices is, in consequence, very uneven. So, too, is the state's willingness to hear these voices, in the view of many. Felt experiences of past attempts at participation in formal processes vary widely, with not inconsiderable alienation expressed by some as a result. Several organisations and individuals consulted during the assessment expressed deeply felt suspicion towards possibilities and prospects presented by future processes.

The unacceptable distance between the governors and the governed appears to be recognised in recent messages by the new administration under President Zuma. The conceptualisation of a developmental state, with its implications for a more engaged relationship with citizens, are reflected, for example, in the Presidency's July 2009 Medium term Strategic Framework (MTSF). Here, the need for open and sustained mutual

engagement is accepted as fundamental to a co-operative approach to developing a shared commitment to a uniting vision of a more inclusive model for development.

The assessment team shares a strong consensus that this approach must inform the manner in which the challenges identified during this assessment are addressed. Sustained and inclusive engagement to build mutual confidence – a true partnership of equals – is vital if urgent and fundamental social and environmental needs are to be confronted with a coherent vision and plan of action.

For this to happen, however, significant resources must be applied to enable meaningful engagement by the full spectrum of civil society. Equally, civil society must prepare itself to make effective use of the opportunities signaled in the emerging policy terrain.

3.3 The effectiveness of the executive in the policy process[29]

Social and environmental mandate

The impact of the diffused nature of energy policy-making and planning has been discussed above. The assessment also considers the nature and extent of the executive's (specifically, the DME's) environmental and social mandate, and its implementation of that mandate. Consideration is also given to how effectively the executive capacitates itself by integrating the perspectives of other stakeholders into key policy responses.

According to policy documents and ensuing legislation, the executive has a comprehensive and clear environmental and social mandate. Similarly, while the regulator is explicitly required to implement *economic* regulation, it retains a clear obligation to integrate social and environmental considerations into the regulatory process. Even before the recent promulgation of the National Energy Act, policy and legislation provided the executive with a comprehensive and clear set of environmental and social responsibilities related to processes involved with governance of the electricity sector.

The National Energy Act makes the mandates even more explicit in the requirements set out for the National Integrated Resource Plan: requirements which oblige the executive to govern the electricity sector in a way that fully includes environmental and social considerations. The Act makes specific reference to health and safety considerations, and affordable access to electricity services, including the state's commitment to free basic electricity.

The mandate on paper is one matter; the discharge of that mandate is, however, quite another. Here, the research results are as clear, documenting how the capacity of the executive to carry out the environmental and social mandates has been inadequate in view of the mandates so clearly articulated in its own legislation, policy and planning documents. The research reveals a pattern where unambiguous formal requirements set out in legislation, from the Constitution downwards all the way through to strategic plans, are mismatched with the actual capacity in the executive required to adequately fulfill these requirements. Capacity constraints identified include difficulties regarding staff retention (discussed elsewhere in this report), which is probably at least partly due to the absence of consistent commitment to a coherent vision for the sector.

[29] Refer to: PP6 Clarity and Transparency of the Executive's Environmental Mandate, PP8 Capacity of Executive to Evaluate Environmental Issues, PP9 Capacity of executive to evaluate social issues, PP10 Annual Reports of the Electricity Ministry/Department, PP11 Advisory Committees to the Electricity Ministry/Department

The 1998 Energy White Paper provides that "government will work towards the establishment and acceptance of broad national targets for the reduction of energy-related emissions that are harmful to the environment and to human health", and will also "ensure a balance between exploiting fossil fuels and maintenance of acceptable environmental requirements." The DME's Energy Policy therefore contains key objectives that include "environmentally responsible energy provision", and diversification of primary energy sources and reducing dependency on coal, in accordance with the principles of sustainable development. The present reality, however, is that Eskom has continued its programme to construct large coal-fired power stations while its modest solar panel subsidy programme fails to impress.

Further, the cross-cutting obligations of the National Environmental Management Act (NEMA), 1998, require the integration of social, economic and environmental factors into all executive planning, implementation and decision-making so as to ensure that development serves present and future generations. The National Environmental Management Principles in Section 2 of NEMA require the DME to allow for public participation when it engages in activities or sets policies that may significantly affect the environment. Section 2(4)(f) of NEMA, notably, requires that "the participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured."

The executive has a detailed system for evaluation of environmental aspects of the electricity sector via Environmental Impact Assessments (EIAs) in terms of NEMA and related legislation, particularly in regard to air, water and soil pollution, which is overseen by the Department of Environment and Tourism (DEAT), but which is implemented by, among others, the Department of Health, the Department of Environment and Water Affairs and the Department of Agriculture, as well as provincial environment departments. Environmental issues relating to nuclear energy are overseen by the National Nuclear Regulator. While these agencies have dedicated financial resources for this purpose, public sector under-capacity is a generalised problem.

This may contribute to limited effectives of public participation in environmental impact assessments for power sector projects[30]. Two case studies examined in the research considered the Pebble-Bed Modular Reactor (PBMR) and the Darling Wind Farm processes. Some of the weaknesses in implementation of the EIA framework include the shallow penetration of capacity-building workshops for the potentially-affected community; and limited time to examine complex and voluminous documentation, although both processes complied with the mandatory minimum period of 30 days. The EIA Reports often simply state that public comments were "noted", without clearly making an effort to respond substantively to them. The draft PBMR EIR made assertions regarding the benefits of the PBMR which the public was unable to comment on as the public were not given access to the information upon which the consultants based their conclusions. A public interest body then successfully took the government to court for their failure to provide adequate opportunity for comment.

More detailed guidelines for public participation have subsequently been developed at provincial level.

The assessment notes that the EIA is the only tool used in assessing the environmental sustainability of development projects. However, the case studies record that economic interests, often associated with private vested interests, not necessarily public economic interest, often cloud the process. Such views tend to be expressed in terms such as "EIAs

[30] Refer to: PP34 Public Participation in EIAs for power sector projects

delay progress", a view that seems to imply any development is "good", irrespective of the damage it may cause to people's health, well being and environmental resources.

The EIA process itself can be a terrain of struggle. Thus, a small private vested interest group delayed implementation of the Wind Farm project, claiming a public interest biodiversity issue. It is arguable that it is precisely the purpose of EIAs to identify and attempt to resolve competing interests, but that it is the wide inequality in power between these interests that is not pertinently or adequately addressed by current policy.

The research also identified the difficulty in accessing information about environmental approvals that is inherent in the extensively devolved and cross-cutting environmental impact assessment process.[31] While the Constitutional principles of co-operative governance require co-operation between state agencies at national and provincial level responsible for this dimension of environmental oversight, it is not always easy for the public to establish which agency has been involved in a particular approval unless they have registered as an 'interested and affected party' from the start of the approval process.

Despite its broad legal responsibilities, the DME's structures and capacity have tended to reflect the more generalised, indirect and even subordinated manner in which its wider obligations have been interpreted. For example, the failure to prioritise environmental and social issues has been mirrored by the relative size and location of environmental and social policy and management capacity in the Department. This is evidenced in the emphasis in NIRP2, for example, on economic modeling, with low priority given to other options that may show favourable social or environmental benefits, and which states that "the basis for the optimisation of this NIRP is the least cost of electricity for the supply life cycle" and that for a technology to be included for consideration it merely needs to be "environmentally acceptable".

Energy efficiency, clean energy and renewable energy considerations have not, until relatively recently, been afforded due attention, and the department has consequently not been well-resourced to investigate the relative social, environmental and economic benefits of a range of policy options. Even then, the DME sees overemphasis on environmental considerations as its sixth most significant strategic risk. The research reflects the department's own recognition that its primary risk is its persistent inability to attract and retain suitably qualified staff.

Co-operation and consultation

While the Energy Policy, the new National Energy Act and NEMA, as well as the co-operative governance principles in the Constitution, require all executive agencies to work closely with each other, the DME does not generally report details of its collaboration with other departments and agencies on its fulfillment of its own environmental responsibilities.

This omission is in contrast to what the research finds is a generally good standard of, especially, financial reporting,[32] subject to the qualification that these reports are primarily available only in English. In addition to the department's Annual Report, there is also a current

[31] Refer to: PP 29 Clarity of Authority and Jurisdiction to Grant Environmental Approvals for Power Sector Projects

[32] Refer to: PP10 Annual Reports of the Electricity Ministry/Department

Strategic Plan,[33] which is candid about a number of challenges and also gives a good sense of the tensions between the various objectives that the executive has to accommodate, for example, between an orientation towards maximum exploitation of available mineral resources and the need for environmental protection.

Reporting is also found to be weak in regard to any specific or concerted efforts to reach out to weaker social groups, except in regard to women's groups on some nuclear issues. However, as important aspects of the executive's social mandate, such as the basis on which access should be given to sustainable sources of affordable electricity, are the subject of considerable ongoing debate, this is not entirely unexpected. Effectiveness of implementation is, consequently, similarly contested, the assessment shows.

3.4 The executive's use of advisory committees[34]

Reflective of proactive efforts by the executive to seek or encourage substantive consultation with various social groups is government's use of advisory committees. The assessment concludes that there is a close correlation between government's often inconsistent policy and practice with its essentially *ad hoc* engagement with its social 'partners', usually driven by a particular need at a given time.

Advisory committees have been established from time to time to inform and guide a number of important DME policy processes, including reform of the electricity distribution industry, and the ongoing electricity crisis. Assessments were made of the Electricity Restructuring Interim Committee (ERIC); EDI Restructuring Committee (EDIRC) and associated Minister's Reference Group on The Review of The Electricity Distribution Industry; and the National Electricity Response Team (NERT) and National Stakeholders Advisory Committee on Electricity (NSACE).

The assessments find that, in general, the DME's advisory committee processes demonstrate clear, albeit quite narrow, subject and time mandates, balanced composition, and exemplary transparency and accountability. The adequacy of public representation on NSACE – the committee with the broadest scope – may, however, be questioned, as it is limited to representatives of organisations recognised by and participating in the structures of the National Economic Development and Labour Council (NEDLAC). The representivity of this constituency has been the subject of disagreement.

Nevertheless, the advisory committees investigated in the case study had a record of regular meetings, public disclosure of minutes and other documents and transparent feedback from the executive. While the research focused on the procedural integrity and value of these committees, the substantive relevance and value of the committees' outputs, and implementation, are notable.[35] They provide examples of the potential value of 'good process'

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[33] Department of Minerals and Energy Strategic Plan 2008/9-1010/11

[34] Refer to: PP11 Advisory Committees to the Electricity Ministry/Department

[35] Thus, for example, formal financial support has also been made available with the establishment of a project management unit (PMU), which supports committee processes. Recommendations are now the result of more considered processes: as a result of NSACE recommendations, National Treasury has provided medium term funding of R1.55bn for Clean Renewable and Efficient Energy Programmes, and substantial financial support has been made available to municipalities for retro-fitting lighting-voltage controllers to public lighting systems. Refer to PP11.

even on an *ad hoc* basis, although they are insufficient in the broader context of uncertain roles and authorities in the sector as a whole.

3.5 Consideration of environmental and social issues in policy formulation

One of the primary social dimensions of electricity policy reform and evolution, as well as of the resulting incremental and fluctuating nature of industry restructuring has been the loss of employment in the sector. The global trend towards partial or complete industry privatisation, and the introduction of independent power producers (IPPs), with associated job losses as the sector reorganises itself, has not been mirrored in South Africa. Nevertheless, job losses in the sector have been extensive.

The research highlights the significant impact on employment of extended policy uncertainty and instability.[36] Two aspects are particularly noteworthy. First is the effect of the quasi-corporatisation of Eskom and attendant job losses as the utility was required to become increasingly costs-driven, despite the increased organisational capacity one might expect arising from the demands of the national electrification programme and the mooted establishment of regional electricity distributors (REDs). Second is mixed policy signals and modest levels of commitment and ambition, and associated delays in technology innovation, related to the introduction of renewable energy.

Apart from the unhappiness stimulated among trade unions, their members and their dependents about declining employment, a key part of the assessment records the alienation of some influential grassroots organisations from both policy and regulatory process. Consultations, in very different fora (viz. imbizos and public hearings, on access to electricity and tariff increases, respectively) are perceived as a façade that masks underlying power relations and leads to the discounting of views of weaker groups. The view is repeated that the real decisions have already been taken elsewhere. On the other hand, the assessment notes the important disempowering role played by (prospective) participants' lack of knowledge about their rights.[37]

The assessment notes that agreement remains elusive on how best to promote the social objective of access to electricity. The National Electrification Programme envisages expansion of the physical network and increasing the number of connections to include the previously unserviced majority of the population. While the number of connections has been growing, albeit at a slowing rate, the number of disconnections has also been increasing due to persistent widespread poverty and an inability to pay for the purchase of electricity, despite cross-subsidisation within the tariff structure[38]. Consequently, while this fundamental social

[36] Refer to: PP20 Assessment of job losses linked to policy changes or electricity sector reforms.

[37] Refer to: PP36 Participation in decision-making on access; and RP22 Institutional mechanisms for representing the interests of weaker groups.

[38] See, for example, PP28 Transparency and accountability in the design and implementation of subsidies, and RP 28 Tariff philosophy

issue is clearly spelled out and is located at the centre of existing government policy, the effectiveness of policy design and implementation remains disputed.[39]

Environmental issues have been considered explicitly in recent electricity sector reform law and policy,[40] but social issues less overtly[41]. Government's planned expansion of the use of nuclear energy as a source of electricity production in South Africa is of potentially enormous significance for the sector. Government has promoted the nuclear option as a part of its integrated energy planning that aims at diversification of energy supply while also contributing to a resolution of the problem of global climate change by reducing carbon dioxide emissions. Government owned electricity provider Eskom has reported that its planned shift to nuclear energy is an attempt to reduce greenhouse gas emissions.[42]

Related concerns regarding the risks associated with radioactive waste were voiced in Parliament during deliberations on nuclear energy use prior to the adoption of the Radioactive Waste Management Policy and Strategy of 2005, and the National Radioactive Waste Management Agency Act, 2008. The Policy includes among its principles that radioactive waste should be "managed in such a way as to provide an acceptable level of protection of the environment."[43]

Moreover, the National Energy Act, although enacted subsequently, provides the legal foundation and framework for the development of future energy policies and legislation. The objectives of the National Energy Act include to "provide for certain safety, health and environment matters that pertain to energy", and to "contribute to sustainable development of South Africa's economy."

The Act requires the responsible Minister to adopt measures that provide for universal access to energy services and that such measures must take into account the "safety, health and environmental suitability of such energy" and the availability of energy resources and the sustainability of the energy provision. The Minister must also develop an Integrated Energy Plan that must "deal with issues relating to the supply, transformation, transport, storage and demand of energy in a way that accounts for - … the environment…", and must take into account "sustainable development," and "environmental, health, safety and socio-economic impacts."

The Nuclear Energy Policy provides a framework for the use of nuclear materials and the development and utilisation of nuclear energy for peaceful purposes with the stated aim of securing alternative energy resources for the future. The Policy includes reference to the nuclear energy option as a strategy to mitigate greenhouse gas emissions and global warming because it is a low carbon emission source of electricity generation in comparison to

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[39] Refer to: PP7 Clarity and transparency of the executive's social mandate; PP36 Participation in decision-making on access; and RP22 Institutional mechanisms for representing the interests of weaker groups.

[40] Refer to: PP19 Consideration of environmental issues in sector reform law and policy.

[41] Refer to PP20: Assessment of job losses linked to policy changes or electricity sector reforms.

[42] Environmental Affairs and Tourism Portfolio Committee, Climate Change: Department Briefing, Parliamentary Monitoring Group (PMG) Meeting Report Information, 7 August 2007. Available at www.pmg.org.za

[43] See also PP16 Clarity of process for public participation in policy-making, based on a case study of the nuclear energy policy of 2008.

fossil fuels. The Policy's principles stipulate that "All activities undertaken in pursuit of nuclear energy shall be in a manner that takes the environmental impact into account," and that "In implementing the country's nuclear energy policy, existing environmental protection legislation and regulations need to be applied and updated as necessary."

The Policy, especially in regard to the adequacy of related laws' treatment of the environmental impacts of nuclear waste, is not uncontested however.

An equally significant development is NERSA's current consideration of a Renewable Energy Feed-In Tariff (REFIT) as a means to incentivise the expansion of the role of renewable energy sources in power generation for the national electricity grid. The motivations of "socio-economic and environmentally sustainable growth" explicitly inform the Regulator's initiative.

3.6 Participation of independent power producers (IPPs)[44]

Unlike many other developing countries, IPPs do not currently play a significant role in the South African electricity sector, and have not done so since the 1940s. However, it is stated national policy to encourage the development of IPPs. At the same time, the precise terms of this development are uncertain and have been subject to frequent policy and legislative shifts. A multi-year procurement process for IPPs by the DME has recently ended without results, and an Eskom-driven emergency programme to procure additional generation capacity from IPPs has also recently been suspended pending clarification of the regulatory and legal systems for IPPs.[45] It remains to be seen whether the August 2009 regulations on new generation capacity and planning will herald significant involvement of IPPs.

There are thus two important qualifications to any consideration of the role of IPPs. Firstly, the IPP legal and regulatory environment is changing very rapidly in South Africa. For instance, since the completion of the research, two more significant sets of draft regulations have been published. Secondly, establishment of existing IPPs has been on a very small scale and in an *ad hoc* manner. They are, consequently, not a good indicator of the overall context of South African policy and regulation of IPPs.

The assessment rates highly the transparent formulation of policy and legislative frameworks authorising IPP involvement in the electricity sector; accommodation of public concerns in draft legislation; endorsement of competitive bidding (albeit a principal to be phased in); adequate demand analysis; anticipated disclosure of the power purchase agreements (PPAs)[46]; ingrained analysis of financial impact; and public participation granted prior to project approval (which is provided for through the regulator's approval process).

Related to any extensive involvement of IPPs, and the closely linked regulatory pricing process, is the question whether valuation of sector assets is adequately transparent,[47] as

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[44] Refer to: PP21 Transparent formulation of policy on independent power, PP25 Transparent and accountable implementation of Independent Power Producer policy/legislation, PP26 Transparent selection of private sector service providers

[45] It remains to be seen whether the August 2009 regulations on new generation capacity and planning will herald significant involvement of IPPs.

[46] Eskom placed a draft on its website in 2008, but no such agreements have yet been concluded as part of this process. As noted elsewhere, in 2009 NERSA has released its own proposed PPA.

[47] Refer to: PP27 Transparency of asset valuation/balance sheet restructuring

well as any cross-subsidies[48]. The research notes the complexity and intricacies of selecting a methodology that must balance the realities of an entrenched utility with the need to attract new investors, while simultaneously recognising the different needs of large-scale and ordinary consumers. While wholesale privatisation is not being undertaken in the sector, the current rate-of-return pricing approach to regulation is based on asset valuation, so this is a formal and routine process for valuation of the Eskom assets base under regulation.

The basis of the method chosen to value the regulated asset base is currently under review – Eskom has been seeking a change in the rules of valuation of its regulated assets since 2007 and the matter was an important factor in Eskom's May 2009 tariff increase application[49].

Also important in terms of the contested process of changing the valuation method is the extent to which economic efficiency and cost-reflectiveness are used as the basis for price setting and how other considerations, such as affordability, the role of electricity as a social good, and environmental externalities are addressed.

The research finds that the rationale for the current choice has been relatively transparent and followed a public consultation process.

Nevertheless, other aspects of IPP participation suggest there is cause to be concerned about conflicts of interest on the part of Eskom as it manages the process of selecting its prospective private sector competitors. This is due to recent regulations that confirm the appointment of Eskom as the Single Buyer Office, following a Cabinet decision in November 2007[50]. While it is a virtual monopoly, executive policy and draft legislation will require Eskom to ensure an adequate supply of electricity, with a target of 30% of new generation capacity to be derived from IPPs.[51]

It is also acknowledged that, as was the experience with regard to the REDs, legislative provisions for IPPs may be superseded by new draft regulations issued in terms of more recent legislation. It is concluded that the IPP process in South Africa is new and still evolving, requiring close monitoring and further assessment in the near future.

The evolving situation is currently characterised by draft regulations, which have been published during the final phases of the research. These have potentially complicated implications in an already complex policy and regulatory environment, and may also contradict specific NERSA regulatory responsibilities and policy initiatives[52]. This is against a backdrop of other major draft regulations being published[53] and then withdrawn without

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[48] Refer to: PP28 Transparency and accountability in the design and implementation of subsidies.

[49] Refer to: RP15 Clarity about regulatory procedures and substantive basis of decisions.

[50] See earlier reference to regulations on new generation capacity and planning, of 5 August 2009.

[51] See Eskom's IPP Bidder's Guide, p. 1. Available at www.eskom.co.za . This represents and advance from the Government's target in the Renewable Energy White Paper of 2003, which committed to "10 000 GWh (0.8 Mtoe) renewable energy contribution to final energy consumption by 2013, to be produced mainly from biomass, wind, solar and small-scale hydro. The renewable energy is to be utilised for power generation and non-electric technologies such as solar water heating and bio-fuels. *This is approximately 4% (1667 MW) of the projected electricity demand for 2013 (41539 MW)."*

[52] "Regulator gears up for next big Eskom application", Terence Creamer 19 Sep 2008.

[53] For example the DME 2008 Draft electricity regulations for the prohibition of certain practices in the electricity supply sector and compulsory norms and standards for reticulation services.

explanation. Amidst these changing and inconsistent legislative developments, and resultant controversies, Eskom suspended tenders in May 2009, reportedly stating that: "the tenders were on hold until proper legal and regulatory systems for IPPs were in place" in all three of its PPP categories. Again, however, this process may now resume following promulgation of the new generation capacity and electricity planning regulations in August 2009, and NERSA's release of a power purchase agreement (PPA).

Due to the March 2009 announcement of aspects of the Renewable Energy Feed-In-Tariff (REFIT) by NERSA, and the expectation that IPPs will be responsible for a significant share of renewable energy-sourced electricity generation in the medium term, matters concerning renewable energy and IPPs have many overlapping features. However, while RE policy and IPP legislation may complement each other, they should not be conflated.

Ultimately, the trajectory of evolving IPP policy is not without controversy and is sorely in need of a transparently and thoroughly consulted, clearly articulated strategic vision that draws in reliable partners in a manner that synergises social and environmental concerns with available technology options for a sustainable future.

3.7 Sectoral policy co-ordination

The assessment concludes that executive policy structures involved in electricity policy are problematic in several respects, viz. in terms of organisational structure, and as regards relations between the executive and key state agencies, with a foreseeable negative impact on policy processes and overall capacity.

These weaknesses pose significant challenges to an effective policy process in that:

- Certain classes of interests are de-prioritised by the executive organisational structure itself and/or lack of capacity.

- Even though the official policy process is ostensibly transparent, the actual policy process is often non-transparent.

- Although public participation is allowed in the official process, it is impossible for excluded stakeholders to participate in the undisclosed processes[54], which are now often believed to be the "real" processes, that is, the processes which lead to formulation of the policies that are "actually" implemented.

- The executive often cannot effectively be held to account, due to the absence of structural clarity concerning which government department or agency effectively formulates policy.

The nett result is the absence of a coherent vision for the sector within the executive, evident in continually shifting, and often incompatible, policies and regulations, many of which are never implemented. An overall sense emerges that the executive is unable to effectively deal with powerful incumbent vested interests in order to lead governance of the sector. The

[54] For example, the Energy Regulator's report on 'Electricity Shortages and Load Shedding' (12 May 2008), refers to the relatively unknown Forum of Energy Executives (FEE), which reports to an Inter-Ministerial Committee (IMC), and the uncertain relationship with the NEDLAC-linked National Electricity Response Team (NERT). In addition, Eskom's development of ISEP is an internal, closed process. The Report diplomatically emphasises the risks inherent in Eskom "internalizing events of national importance" (see page 26).

DME's Annual Report and Strategic Plan 2008/9-2010/11 are remarkably candid about these and other challenges the department faces.

A clear need emerges from the assessment for the urgent clarification of government roles and policy in these interrelated arenas. The coherence and integrity of recent policy processes have been mixed, leaving many stakeholders feeling marginalised, with critical concerns avoided. Domestic and international policy responses to the systemic crises of global climate change and severe economic recession require urgent but complex trade-offs. Coherent management of national efforts to address these challenges will require levels of trust, co-operation and commitment that must be built on exemplary openness, transparency and broad participation.

4 The Regulatory Process

4.1 Structural and institutional issues[55]

4.1.1 Institutional structure, mandate, authority

The National Energy Regulator of South Africa (NERSA) is established as an independent body responsible for the economic regulation of the electricity supply industry, primarily through the setting of tariffs, and is empowered to ensure that licensees comply with statutory and licence obligations, including social and environmental obligations. In order to fulfil this obligation, it may establish and manage information gathering and monitoring systems, undertake enquiries and investigations, resolve disputes and complaints, and take steps, including the imposition of penalties, to enforce compliance with licencees' duties.

The autonomy of NERSA equates to that of a referee enforcing the rules, but which also authorises it, as "custodian and enforcer" of the regulatory framework, to engage in rule-making designed to implement government's electricity policy framework, including promotion of universal access to electricity, implementation of the national integrated resource plan, and licensing of the spectrum of activities from generation to distribution, including importation and export of electricity. Existing legislation and regulations effectively result in a comprehensive social mandate and environmental mandate for government in general, which the regulator must enforce.

NERSA's broad mandate gives it unique responsibilities to enhance sector governance, and it has shown a willingness to take proactive steps to accept this authority. For example, its decision-making processes are significantly more participatory, open and transparent when compared with policy and legislative processes. It has also endeavoured to ensure that perspectives of weaker social groups have been taken into account when making decisions.

NERSA has a pivotal role to play in helping interpret how a variety of sometimes conflicting policies from various line ministries should be interpreted and applied in practice. The fact that it is ultimately accountable to Parliament, rather than to the executive, gives it some latitude to do this, athough it is of course constrained by the political forces and pressures to which the legislature is exposed. There is some evidence, for example, in its report on the electricity crisis and in its recent electricity tariff decisions, to suggest that it has the capacity to assert its authority and independence.

NERSA has direct and indirect social and environmental obligations provided for in legislation such as the Electricity Regulation Act of 2006, the National Energy Act of 2008 and the National Environment Management Act. The former includes the obligation to promote the use of diverse energy sources and energy efficiency, which will tend to ensure energy security and environmental health. It is, moreover, authorised by the Electricity Regulation Act to impose licence conditions relating to the types of energy sources from which electricity must or may be generated, bought or sold, and to ensure compliance with, for example, workplace safety and environmental health standards and requirements.

As a public body, it also has overarching environmental responsibilities and a duty to ensure that its conduct promotes the progressive realisation of the socio-economic rights in the

[55] Refer to: RP1 Institutional Structure for Regulatory Decisions, RP2 Authority of the Regulatory Body, RP 3 Jurisdiction of the regulatory body, RP4 Scope and transparency of the environmental mandate of the regulatory body, RP5 Scope and Transparency of the Social Mandate of the Regulatory Body

Constitution. While, therefore, it does have formal social and environmental obligations, it has not exhibited explicit and thorough assumption of its responsibility for prioritising the full range of these objectives.

Similarly, in terms of the Constitutional principles of co-operative government, it has a responsibility to assist other government agencies and departments, such as Eskom, DEAT, the Department of Health (DoH) and the Department of Labour (DoL), to comply with their legal obligations.

Importantly, NERSA is empowered to convene advisory, and customer and "end-user", forums to advise it on any matters affecting customers and end users, and it may impose a licence condition requiring a licensee, such as Eskom, to establish and fund such a forum.

Overall, NERSA's operations thus offer significant procedural space that is currently not well occupied by civil society.

4.1.2 Selection of members of the Regulator, autonomy, conflicts of interest[56]

Section 6 of the National Regulator Act, 2004, requires full-time members to terminate any employment with parties subject to regulation, or involved with such parties, and full- and part-time members are subject to an extensive disclosure of interests regime that includes their spouses, children and partners, or relationships with regulated parties or involved with such parties, in accordance with international best practice. Members are also obliged to recuse (absent) themselves from processes involving such parties.

On the other hand, the procedures to select and appoint regulators are exclusively controlled by the executive, and are silent concerning the extent to which public suggestions are incorporated. While Section 6(7) of the National Energy Regulator Act requires that the candidates have to be drawn from nominations by any member of the public, including industry participants and stakeholders, in a publicly advertised process, there is no requirement that the executive disclose the identity of these nominees or the short-listed candidates. This enables the minister to appoint any person as a regulator without providing any reasons for doing so, and without disclosing any criteria taken into account when making a choice. In effect, there is no transparency regarding the selection of candidates. There is, moreover, no limit to the re-appointment of regulators, nor any post-employment restriction relating to the fields in which they might choose to work should they not be re-appointed.

The lack of transparency characterising the appointment and re-appointment processes is undesireable and unnecessary, as comparable statutory oversight bodies already adhere to more open and accountable appointment processes. Current law and practice creates entirely avoidable suspicions that may undermine public perceptions of the Regulator's autonomy.

While existing security of tenure is an important guarantor of regulatory independence, the absence of constraints on what members may do after their term/s as regulator, may mean that conflicts of interest may nevertheless occur, as members may (perhaps unfairly) be suspected of taking decisions that facilitate and enhance their subsequent employment prospects in the private sector. This is a relatively simple problem to resolve. Consideration should be given to the suggestion made during the assessment process that a mechanism be

[56] Refer to: RP6 Selection of regulators, RP7 Preventing formal conflicts of interests on the part of regulators, RP8 Autonomy or regulatory body, RP9 Appeal mechanism

developed to allow the retention of skilled members in an advisory capacity after the end of their term of office.

NERSA has an acceptable degree of financial autonomy, as it receives funds appropriated by Parliament and has a prerogative to raise income through tariffs, charges for services rendered, and other levies in terms of section 12 of the National Energy Regulator Act. It appears, however, that this prerogative has not, to date, been exercised.

The Regulator may appoint such staff as it considers necessary within its budget, but conditions of employment, such as remuneration, require approval of the Minister. The autonomy of the Regulator is potentially also compromised by the provisions of section 11 of the National Energy Regulator Act, 2004, which allows the Minister, where he or she determines that a "need" exists, to instruct the Energy Regulator to "make use" of persons employed by or contracted to the Department or another licensing or regulatory authority falling under the Minister's jurisdiction. The Regulator has indicated, however, that these provisions have not, in fact, compromised its independence.

4.1.3 Quality of the judicial or administrative forums that address social and environmental claims[57]

The Constitutional principles of administrative justice apply to the Regulator, and this is reflected in its detailed procedures for hearings, the provision of written, reasoned decisions, and internal appeal procedures available to any person whether or not directly affected by the regulator's decisions. Where appropriate, the regulator's rulings and decisions are, at the instance of any affected person, subject to review or appeal in a court of law, warranting a significant degree of confidence in the regulatory process. The judicial system is generally regarded as independent and competent. Albeit that litigation can be expensive and time-consuming, a case study of litigation between Earthlife Africa and Eskom shows that the courts can be creative in accessing relevant expertise to supplement their own.

4.1.4 Capacity of the Regulator[58]

Capacity development of staff members at NERSA is not provided for in formal national policy or legislation. However, according to NERSA's Annual Report 2007/8, human resource development is a relevant consideration, and many courses and conferences are attended, apparently mostly related to industrial and financial economics regarding tariff and price-setting. None of the courses or conferences attended during 2007/8 seem to have a particular focus on social or environmental issues.

Greater transparency regarding the regulator's human resource development programmes and resultant capacity would assist stakeholders both to more accurately evaluate the body's performance in terms of its social and environmental objectives, and to improve the quality of their own participation in its operations.

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[57] Refer to: RP10 Quality of the judicial or administrative forums that address environmental and social claims

[58] Refer to RP11 Training of regulatory body members and staff, RP 13 Regulator's capacity to evaluate social issues

Despite the breadth of NERSA's mandate, it does not have dedicated personnel or financial allocations to address social issues. Consequently, its proactive effort to require its staff to prepare background briefings aimed at inclusion of considerations of affordability for poor households in the tariff applications by Eskom in July 2008 and in May 2009 (see additional information in RP5), is commendable. It is arguable that it would have been preferable to also assist organisations representative of affected groups to make submissions themselves, but the initiative should be welcomed.

While these are the only examples of NERSA's direct evaluation of a social issue to date, they reflect the Regulator's recent compilation and approval of an internal policy position paper on its "contribution to the socio-economic development programmes of government". The paper includes the following three key goals:

> - "Actively participate in developmental energy programmes and in particular the achievement of universal access by 2012;
>
> - Adapt regulatory processes to support the socio-economic development objectives of government. This includes removing regulatory obstacles to achieving the socio-economic development objectives of government;
>
> - Adapt tariff principles and policies to support the socio-economic development objectives of government and to balance pro-poor regulation with world class economic regulatory principles."

4.2 Public access to regulatory process and information[59]

4.2.1 Access to information

Generally, establishment of the Regulator, and its operations to date, have resulted in enhanced transparency in the electricity sector. Due to NERSA's compliance with its statutory obligation to provide detailed, reasoned written decisions for its tariff decisions, for example, there is a significantly better understanding of sector dynamics. Nevertheless, the assessment identifies key areas where greater openness is both required and that could contribute to deeper engagement with underlying relationships and structural challenges, and improve prospects for identification of sustainable solutions to systemic challenges.

The assessment considers the Regulator's use of consultants, which is evident from calls for tenders and associated terms of reference, available on the NERSA website. However, no further details concerning consulting arrangements are available. Not even the existence, and titles or general descriptions of the nature of the issues canvassed in reports and recommendations of consultants, is acknowledged, either on the Regulator's website or in its annual report.

[59] Refer to: RP 14 Information Available to Public Regarding Use of Consultants, RP 15 Clarity about regulatory procedures and substantive basis of decisions, RP 18 Disclosure of Documents in the Possession of the Regulatory Body, RP 19 Procedure for Public Access to Regulatory Body Documents, RP 20 Space of public participation in the regulatory process, RP 21 Public Access to Regulatory Documents and Hearings, RP 22 Institutional mechanisms for representing the interests of weak groups, RP 23 Building the capacity of weaker groups to participate in the regulatory process, RP 24 Interventions by civil society in the regulatory process, RP 29 Participation in decision-making related to affordability of electricity prices

Consultants' reports and advice make a potentially significant contribution to the Regulator's decisions. Consequently, transparency concerning the role and influence is necessary. The Promotion of Access to Information Act, 2000 (PAIA) allows 'internal' draft documents, and evaluative or deliberative information, which can encompass consultants' advice, to be treated in confidence. However, some information should be routinely disclosed, including, at least, information about the identity of consultants utilised, and a description of the nature of information from consultants that is relied on in the process of making a final decision. Such information should be identified in the record of decision and should be automatically available on the NERSA website.

In terms of PAIA, there is a general presumption that all documents in the possession of a public body (such as the Regulatory) are available to the public unless one of the mandatory or discretionary exceptions apply. These provisions authorise the Regulator to classify certain documents, or parts of them, as 'confidential', and there are clear procedures and rules to assist it to define such 'confidentiality'.

Research conducted by the assessment team revealed, however, that in practice many documents are not readily available, for no immediately evident and justifiable reason. One such example is the reports and recommendations of consultants, which are routinely classified confidential by the consultants – a classification apparently accepted by the Regulator. The grounds for such blanket classification are not explained or motivated by the Regulator. Information that is crucial for understanding regulatory decisions, and their authority, legitimacy or integrity might, in such cases, not be disclosed.

As reports and recommendations of consultants are not automatically made available to the public, the assessment team requested access to these reports, but was informed that they could not be provided due to confidentiality clauses included in agreements with the consultants. The request was therefore denied, but the assessment team was informed that if a specific report was identified, the Information Officer would apply the provisions of PAIA, suggesting the possibility that an appropriate degree of discretion would be exercised.

This response suggests there may be an inadequate appreciation of the law's requirement that the holder of information must, firstly, develop a system, including detailed criteria, in terms of which all information, including portions or aspects of documents, in its possession will be categorised and classified, and must then proactively classify all such information as and when it is created or received. Secondly, the classification system must be made public so that potential requesters know in advance, for example, which information is automatically available, which is automatically unavailable (in terms of PAIA's obligatory confidentiality provisions), and which information will be subjected to the body's responsibility to exercise its discretion whether or not it may disclose.

The public body is then required to apply its own reasoned judgment to determine whether certain portions of documents actually requested, or particular aspects of information therein, should be kept confidential and whether other parts may be 'severable' and then disclosed. Mere assertions of confidentiality by the body itself or by a third party, without just cause, do not remove the obligation to properly consider whether there are, in a particular instance, good grounds to depart from the overarching presumption in favour of disclosure.

As a further example of the impact of the Regulator's current approach, it is instructive to consider some implications surrounding information contained in Eskom's application (April 30, 2007) for a rule change to the multi-year price determination (MYPD) for the 2008/09 financial year. NERSA noted Eskom's assertion that "confidential commercial information" was contained in the reports submitted to the Regulator in support of its application, and "observed commercial sensitivity of information in its consultation papers that were made available for stakeholder input and public comment." Eskom was – appropriately, it seems – then asked to indicate which phrases, numbers and figures it considered confidential and to make specific requests for confidentiality before the reasons for the decision were placed in the public domain.

In light of this treatment of information by the Regulator, allegations by some major organisations that certain information in the 2009 Eskom tariff application process was inappropriately withheld warrant closer scrutiny. Concerns have been expressed that Eskom may be attempting to claim an unduly broad interpretation of information confidentiality provisions, particularly as the utility does not conduct its operations in a commercially competitive environment. Uncritical acceptance of such assertions of confidentiality make it unnecessarily difficult to determine, for example, what information NERSA does and doesn't have, and exactly what level of compliance is required with licence conditions, or how much leeway for deviation should be tolerated.

The NERSA website does provide an extensive index of documents, which is easily navigable. However, many key documents are not available, such as consultation papers and *all* written submissions made in response. While some written submissions are available on the website, and all are available electronically or in hard copy upon request[60], neither lists nor transcriptions of oral submissions made at public hearings are identified or available on the website. A sample of such submissions was provided to the assessment team upon request[61], indicating that the Regulator appreciates the value of these records.

On the other hand, NERSA was unable to assist the assessment team to determine how many similar requests had been received in the previous year, although PAIA requires that this information be included in an annual report to the SA Human Rights Commission. It was, therefore, not possible to determine how willing NERSA has been to accede to such requests.

It is suggested that automatic posting on the website of these and other submissions would provide a valuable information and research tool, particularly during public consultation processes, and would relieve some pressure on the Information Officer.

4.2.2 Public participation in regulatory processes

The assessment records that a NERSA staff members appears to have emphasised that, while it is of the view that it has no obligation to appoint a consumer representative to any of its fora, or to build the capacity of weaker groups in the regulatory process, the body does to recognise that its decision-making processes would benefit from more informed participation by a broad spectrum of stakeholders. Thus, for example, it has a customer education and awareness programme which has included written publications and road shows.

Its staff has also actively solicited questions from participants at hearings who may be reluctant to speak in public, and these are evaluated and then posed to the presiding panel. This commendable endeavour to give due consideration to perspectives of weaker groups has been acknowledged earlier. These actions suggest a clear, if implicit, recognition of the obligation imposed on the Regulator by Electricity Regulation Act to "facilitate a fair balance" between diverse interests. This kind of assistance is undoubtedly a laudable practice, and should be encouraged and extended beyond those who find the resources to be present at public hearings.

But these interventions are unavoidably constrained, perhaps unnecessarily so, particularly in view of the power the Regulator has to convene, or require a licensee to convene,

[60] RP 20 Space for public participation in regulatory process; RP 21 Public access to regulatory documents and hearings

[61] RP 19 Procedure for public access to regulatory body documents

stakeholder advisory forums. Such forums could provide the Regulator with direct access to affected persons, including more organised representative groupings.

While, therefore, the research indicates that no appeals have been lodged against the Regulator's decisions, and that no cases were filed in the courts by consumers or civil society organisations in support of general or long-term public interests, this should not necessarily be interpreted as indefinite general acceptance, for example, that the Regulator's current tariff philosophy of 'reasonable price stability' will necessarily always accommodate affordability of electricity prices.

Further, there is a basis to believe that direct participation of consumer organisations, as well as government and civil society interventions on behalf of weaker stakeholders, contributed to NERSA's partly "pro-poor" decision on Eskom's tariff increase application. NERSA's position paper on this issue indicated some willingness to be proactive on these issues, too.

However, to fully realise the intention of helping to meet the Regulator's broad social objectives, it is important for there to be capable and empowered consumer organisations in place, and for weaker constituencies to be the focus of more co-ordinated efforts to enable their direct, equitable participation in the regulatory process.

4.3 Regulator decisions and reasons[62]

The procedures and processes for accommodating public participation with regard to regulatory decision-making are detailed in legislation. They are notably sensitive to Constitutional requirements of administrative fairness, transparency and accountability.

The National Energy Regulator Act, 2004, sets out the general procedural framework for decisions by NERSA. It provides that every decision of the Regulator must be in writing, consistent with the Constitution and all applicable laws, and within the powers of the Regulator as contained in *inter alia* the Electricity Act (now the Electricity Regulation Act, 2006), and – significantly – in the public interest.

Decisions must be taken within a "procedurally fair process in which affected persons have the opportunity to submit their views and present relevant facts and evidence to the Energy Regulator". NERSA's decisions must be written and "based on reasons, facts and evidence that must be summarised and recorded", and their reasoning, and factual and legal basis, must be "explained clearly".

These requirements plainly require that, for example, sufficient time is allowed to alert all stakeholders to opportunities to participate, that special efforts are undertaken to facilitate participation of under-capacitated or marginalised groups, and that the final decision should be based on a detailed assessment of inputs received. A case study[63] of the Regulator's decision in regard to Eskom's 2008 tariff application indicates that these criteria were reasonably well observed in practice, although the 'special efforts' did not include direct participation by representatives of such marginalised groups, only consideration of their 'likely' interest in a low or no tariff increase. There was, therefore, a consideration of the legal, policy

[62] RP 15 Clarity about regulatory procedures and substantive basis of decisions, 26 Orders and decisions of the regulator body, RP 27 Dissemination of regulator's decisions, RP 28 Tariff Philosophy

[63] Refer to: RP 15 Clarity about regulatory procedures and substantive basis of decisions; and RP20 Space for public participation in regulatory processes.

and factual context, an explicit recognition of assumptions, the extent and content of stakeholder participation was assessed and responded to[64], and the final decision was motivated in reasonable detail, and was subsequently well-publicised.

The assessment concludes that the Regulator's decisions and reasons are generally adequately and transparent. Decision or orders are generally made available timeously, use multiple modes of dissemination and attempt to improve public understanding of decisions made. The Regulator also reported that staff are available to provide at least oral explanations and translations of its decisions. The Regulator acknowledges the inadequacy of this practice, but explained it on the basis of limited resources and capacity.

4.4 License applications and monitoring licensees' performance[65]

The research on performance reporting and consumer service and quality of supply (QOS) lead to the clear conclusion that corroborates much of the general pattern in sector governance, namely, that while in law there are often excellent governance standards, a challenge remains concerning implementation.

The Electricity Regulation Act gives NERSA both the responsibility and a wide discretion to impose licence conditions, and powers to monitor and enforce performance, including, ultimately, an application to a court for a suitable order.

To assist the Regulator in the performance of its oversight functions, licensees are required to file annual reports, the Distribution[66] "D" forms, which are comprehensive and well-conceived. If undertaken correctly, reporting would be consistent and clear, as the data capture forms are standardised.

However, the specification of NERSA's powers and the statement of this requirement is not complemented by any reference within licence agreements to consequences of non-submission of these forms. Perhaps unsurprisingly then, actual delivery on reporting requirements and enforcement of these on the ground is weak. For example, the last round of reporting – for 2005-2006 data – had a submission rate of only 48% of D forms from licensees. Of the forms submitted, 60% were not fully complete. NERSA's capacity to remedy this deficiency is limited as, at the beginning of 2008, there was only one person employed within the Data Analysis Section responsible for processing the D forms and compiling the

[64] This may be compared to the EIA process, where a 'comments and responses' document details how every comment or submission made has been responded to. It is arguable that NERSA's record of decision on the 2009 tariff increases, for example, does not go as far as is typically the case in an EIA.

[65] Refer to; RP 30 Licensing, RP 31 Periodic Performance Reports by Licensees and Utilities, RP 32 Consumer Service and Quality of Supply

[66] There are six components of the NERSA "D" form

NER D1 – Financial Information
NER D2 – Market Information
The above two cover all areas with regard to the performance of generation plants and the details of transmission and distribution systems.
NER D3 – HR Information
NER D5 - Connection Information
NER D6 – Tariff Information
NER D7 – Application for tariff increase/tariff structure change

data for the Electricity Supply Statistics (ESS) report, which is meant to be released annually. (The last ESS was released in 2007, with data from 2005. The ESS prior to this was released in 2004 by the NER before NERSA took over this role.)

Other weaknesses identified by the assessment include that while standards for quality of service and electricity supply are defined in national standards NRS 047, NRS 048 and NRS 057, which are endorsed by NERSA, and the Power Quality Directive, the license does not specifically bind distributors to the NRS standards, even though these are the officially designated standards of a 'quality service'.

Likewise, the overall 'paper' designs of the distributor/utility "supply-side" reporting systems and consumer "demand-side" systems are comprehensive, but both NERSA and most distributors/utilities lack the required capacity to implement the system. Consequently, enforcement is limited to attempting to assist those non-compliant licensees that are identified by the underperforming monitoring systems. When licensees fail to meet the minimum standards, NERSA assists in developing a remedial action plan, and provides support through their monitoring and technical teams, which assist licensees' staff to implement the requisite systems towards the stage where they meet standards. NERSA assists to the best of its ability to ensure quality systems are in place amongst those licensees that are struggling, but with around 180 licensees on their books and very limited capacity of its own, this task remains a challenge.

There has not yet been an instance where the route of removal of a license due to non-compliance has been followed.

NERSA's intention is to enhance public accountability of licensees, and the Regulator is developing adequate reporting systems that will facilitate making information and data concerning quality of service readily available to the public. This process is not yet in place and the NERSA could not provide a time frame for implementation of the new reporting system.

NERSA's success in this regard, in common with the public sector generally, including the ESI, necessarily rests on its success in developing, recruiting and retaining a large number of suitably qualified and skilled staff. The Regulator's 'Electricity Shortage and Load Shedding' Report (of 12 May 2008) notes Eskom's needs in this regard, for example. This is a long-term project, as these are recognised as "scarce" skills, but it requires deliberate and focused attention. Successful skills retention, in turn, is dependent on the creation of an enabling environment where policy development and implementation is coherent, and where expertise is recognised and respected.

APPENDIX I: INDICATORS SUMMARY TABLE

POLICY PROCESS

	Indicators	Elements of Quality	Assessed Status *0=element not met* *1= element is met*	Score
INSTITUTIONS				
PP1	Capacity of legislative committee	• Access to knowledge • Knowledge enhancement • Financial Resources • Authority	1 1	High
PP2	Capacity of legislative committee to assess environmental issues	• Relevant expertise • Designated point person • Dedicated financial resources • Knowledge enhancement on environmental issues	0 0	Low
PP3	Capacity of legislative committee to assess social issues	• Relevant expertise • Designated point person • Dedicated financial resources • Knowledge enhancement on social issues	1 0	Medium
PP4	Effective functioning of the legislative committee on electricity	• Disclosure of interests • Active committee • Reasoned reports • Proactive committee • Public consultations • Transparency of submissions to committee • Transparency of committee reports • Reporting by executive	0 1 0 1	Medium
PP5	Staffing policies of electricity ministry/ department	• Clear criteria • Predictable tenure • Disclosure of interests • Conflict of interest rules	1 1	High

PP6	Clarity and transparency of the executive's environmental mandate	• Environmental responsibilities defined • Cooperation with other authorities 16. Available on website and local offices 17. Regular reporting 18. Outreach to weaker groups	1 0 1	Medium
PP7	Clarity and transparency of the executive's social mandate	• Social responsibilities defined • Cooperation with other authorities • Available on website and local offices • Regular reporting • Outreach to weaker groups	1 1 1	Medium-High
PP8	Capacity of executive to evaluate environmental issues	Dedicated financial resources Access to expertise Designated point person Knowledge enhancement on environmental	0 0	Medium
PP9	Capacity of executive to evaluate social issues	• Dedicated financial resources • Access to expertise • Designated point person • Knowledge enhancement on social issues	0 0	Low
PP10	Annual reports of the electricity ministry/department	• Financial reporting • Review of progress • Easy availability • Local languages	1 1	Medium-High
PP11	Advisory committees to the electricity ministry / department	• Clear mandate • Balanced composition • Financial resources • Regular meetings • Public disclosure of minutes • Public disclosure of documents • Transparent feedback from executive	1 1 1 1	High
PP12	Effective functioning of distinct planning / policy agency	• Requirement to consult planning agency • Mechanism to evaluate executive response • Authority to seek information • Adequate resources • Transparency in functioning • Consultation procedures	0 0 0	Low

PP13	Capacity of civil society organizations	• Techno-economic analytic capacity • Proactive engagement and strategic capability • CSO analysis of environmental and social impacts • Support for weaker groups and grass roots links • Ongoing learning capacity • Networking • Broad credibility	1 1 1 1 1 1 1	High
POLICY FORMULATION				
PP14	Quality of legislative debate on electricity laws	• Duration of debate • Attendance of members • Composition of speakers • Availability of transcripts	0 0	Low-Medium
PP15	Quality of media coverage of electricity policy and reform	• Volume of coverage • Quality of coverage • Balance of coverage	1 0	Medium
PP16	Clarity of process for public participation in policy-making	• Responsibility for decision • Clear time frame for decision • Clear time frame for input • Accountability for input • Documentation of consultation process • Timely distribution of information about process • Broad distribution of information about process	0 0 1 0 0	Low-Medium
PP17	Public disclosure of information on the basis and goals of policy reform	• Breadth of documentation availability • Ease of access • Timeliness of availability • Accessible by a range of stakeholders	0 0	Medium
PP18	Effectiveness of public participation process	• Quantity of participation • Breadth of participation • Summary of public participation • Response to public participation	1 1	Medium
PP19	Consideration of environmental issues in sector reform law and policy	• Addressed in background documents • Included in reform policy and laws • Mitigating direct impacts of power sector • Global and economic effects of environmental impacts	1 1	High

PP20	Assessment of job losses linked to policy changes or sector reforms in the electricity sector	• Assessment of unemployment impacts was carried out • Assessment was conducted before reforms were implemented • Adverse impacts were mitigated • Redress mechanisms were created	0 0	High
PP21	Transparent formulation of policy on independent power	• Legislative approval • Public consultations during policy development • Competitive bidding • Adequate demand analysis • Disclosure of the PPA • Analysis of financial impact • Adequate public consultations prior to project approval	1 1 1 1	High
PP22	Public disclosure regarding use of consultants	• Details of consulting arrangement • Details of final report • Comment period on consultant report • Revision requirement in response to public comment	N/A	N/A
PP23	Transparency of donor engagement through policy loans	• Transparency on policy position • Transparency on conditions • Transparency about disbursement • Transparency of evaluation mechanisms	N/A	N/A
POLICY IMPLEMENTATION				
PP 24	Transparency of donor engagement through technical assistance	• Transparency on details of technical assistance • Transparency on outputs • Wide dissemination of effort	N/A	N/A
PP 25	Transparent and accountable implementation of IPP policy/legislation	• Competitive bidding • Disclosure of the PPA • Adequate demand analysis • Analysis of financial impact • Adequate public consultations prior to project approval	0 1 1	Medium-High
PP 26	Transparent selection of private sector service providers	• Transparency in request for proposals • Information provided to bidders publicly available • Transparency in decision criteria and process • Justification for decision	1 1	Medium-High

PP 27	Transparency of asset valuation / balance sheet restructuring	• Disclosure and justification of methodology • Explanation of method application • Independent scrutiny • Public disclosure of review	1 1	Medium/ High
PP 28	Transparency and accountability in the design and implementation of subsidies	• Transparent criteria • Justification of allocation decisions • Monitoring and reporting • Evaluation	0 0	Medium
PP29	Clarity of authority and jurisdiction to grant environmental approvals for power sector projects	• Provisions on authority and jurisdiction • Clarity on how authority is shared • Low cost or web access • Accessible format • Available in public office or library • Timely disclosure of approvals • Comprehensive disclosure	1 1 1 1 1 1 1	High
ENVIRONMENTAL AND SOCIAL ISSUES				
PP30	Public participation in setting minimum environmental performance standards	• Basis for standards • Evidence of public consultation • Diversity of public participation mechanisms • Explanation of use of public input • Reporting on utility compliance	N/A	N/A
PP31	Public participation in developing policies to reduce environmental impacts	• Consideration of multiple approaches • Evidence of consultation • Systematic efforts to consult affected communities • Multiple mechanisms for public participation	N/A	N/A
PP32	Inclusion of environmental considerations in the national plan for the electricity sector	• Environmental considerations addressed • Comprehensive consideration of impacts • Multiple public participation mechanisms • Systemic efforts to seek input from range of stakeholders • Comments disclosed • Disclosure of how input incorporated into decision	Case Study	N/A

PP33	Comprehensiveness of environmental impact assessment laws, policies and procedures	• Requirements for EIA • Comprehensive consideration of impacts • Strategic impact guidelines • Strategic assessments conducted	N/A	N/A
PP34	Public participation in environmental impact assessments	• Public Participation At Scoping • More than One Public Participation Mechanism Used • Adequate Comment Period • Public release of EIA reports • Public Consultation Guidelines • Disclosure of Public Comments on EIA • Public comments addressed in final EIA report	1 1 ? ? 0 1 0	Medium
PP35	Scope for project- affected people to exercise their rights in project licensing/approval	• Consultations adhered to required procedures/guidelines • Systematic efforts were made to educate potentially project-affected people • More than one participation mechanism was employed • Principle of free, prior and informed consent guided consultation efforts	N/A	N/A
PP36	Participation in decision-making on access to electricity services	• Evidence that more than one consultation was carried out • Systematic efforts were made to consult more vulnerable socio-economic groups • More than two mechanisms of public participation existed • Public comments were considered	N/A	N/A

REGULATORY PROCESS

	Indicators	**Elements of Quality**	**Assessed Status** *0=element not met* *1= element is met*	**Score**
REGULATORY STRUCTURE				
RP1	Institutional structure for	• An independent regulator exists	1	High
RP2	Authority of the regulatory body	**Authority** • Information and evidence: • Investigation • Enforce compliance: • Penalties for breach of order	 1 1	High
RP3	Jurisdiction of the Regulatory Body	• Clarity about jurisdiction • Regulator entrusted with all critical functions	1	High

	Indicators	Elements of Quality	Assessed Status *0=element not met* *1= element is met*	Score
RP4	Scope and transparency of the environmental mandate of the regulatory body	**Scope of Mandate:** • Environment included in mandate • Specific responsibilities **Information Disclosure:** • Published in government journal • Available on website • Low cost	 0 0 1	Low-Medium
RP5	Scope and transparency of the social mandate of the regulatory body	**Scope of Mandate**: • Social issues included in mandate • Specific responsibilities **Information Disclosure**: • Published in government journal • Available on website • Low cost	 0 0 n/a	Low
RP6	Selection of regulators	• Independence of the selection process • Well-defined process • Transparency about candidates • Criteria for composition and eligibility • Differing tenures	0 0 0	Low-Medium
RP7	Preventing conflicts of interests on the part of regulators	• Financial Interests • Cooling off period • Re-appointment prohibited • Regulatory representation prohibited	1 0 0	Low-Medium
RP8	Autonomy of regulatory body	• Fixed tenure • Financial autonomy • Discretion over human resources	1 1	Medium

	Indicators	Elements of Quality	Assessed Status *0=element not met* *1= element is met*	Score
RP9	Appeal mechanism	• Any affected party can appeal a decision • Appeals can be filed on procedural grounds • Appeals can be filed on substantive grounds • Appeal mechanism impacts decisions in at least one case	1 1 1	Medium-High
RP10	Quality of the judicial or administrative forums that address environmental and social claims	• Binding decisions • Independence • Capacity to address sector- specific issues • Access to information for all parties • Clear basis for claims • Standing of affected parties	1 1 0 n/a	High
RP11	Training of regulatory body members and staff	• Certainty • Multi-disciplinary training • Diversity	0 1	Low-Medium
RP12	Regulator's capacity to evaluate environmental issues	• Dedicated financial resources • Access to expertise • Designated point person • Knowledge enhancement on environmental issues	N/A	N/A
RP13	Regulator's capacity to evaluate social issues	• Dedicated financial resources • Access to expertise • Designated point person • Knowledge enhancement on social issues	0 1 0	Low

	Indicators	Elements of Quality	Assessed Status *0=element not met* *1= element is met*	Score
RP14	Information available to public regarding use of consultants	• Details of the consulting arrangement publicly available • Reports and recommendations of the consultants publicly available	0 0	Low
	DECISION-MAKING PROCESSES			
RP15	Clarity about regulatory procedures and substantive basis of decisions	• Procedural certainty • Clarity about substantive basis of decisions	1	Medium
RP16	Regulator's response to environmental and social claims	• Explanation provided for response to claim • Exercise of stated environmental and social mandate	N/A	N/A
RP17	Proactive initiatives of the regulator	• Self initiated cases (Suo-motu petitions) • Discussion papers, studies, conferences	N/A	N/A
RP18	Disclosure of documents in the possession of the regulatory body	• Presumption that documents publicly available unless stated to be confidential • Clear procedures and rules to define 'confidentiality'	1	High
RP19	Procedure for public access to regulatory body documents	• Well-indexed database of documents • Simple, well-defined procedure for inspecting / obtaining documents • Reasonable cost • Wide dissemination of information	0 0	Low-Medium

	Indicators	Elements of Quality	Assessed Status *0=element not met* *1= element is met*	Score
RP20	Space for public participation in the regulatory process	• Proceedings open to the public by law • Public has the right to participate • Overall assessment	1 1	High
RP21	Public access to regulatory documents and hearings	• Number of public requests for documents • Participation in public hearings	1	High
RP22	Institutional mechanisms for representing the interests of weak groups	• Consumer representatives • Submissions on behalf of weaker groups • Government representation • Representation by executive branch for social development • Other mechanisms	0 0 0	Low
RP23	Building the capacity of weaker stakeholders to participate in the regulatory	• Information targeting weaker stakeholders • Support for weaker stakeholders to represent themselves	0 0	Medium
RP24	Interventions by civil society in the regulatory process	• Number of civil society organizations involved • Nature of cases filed • Number of cases filed	0 0	Low
RP25	Electricity provider engagement with civil society organizations and potentially-affected populations	• Designated department • Corporate policy addresses community engagement • Creation and operation of a consultation group • Support for weaker groups • Information on how groups can file complaints	0 0 0	Low
RP26	Orders and decisions of the regulatory body	• Legal requirement that orders include explanations / reasoning • Quality of reasoning in practice	1	High

	Indicators	Elements of Quality	Assessed Status *0=element not met* *1= element is met*	Score
RP27	Dissemination of decisions	• Easy availability • Timely availability • Local language • Use of multiple modes of dissemination • Help in understanding orders	1 1 0 1 1	Medium-High
	OPERATIONAL ISSUES			
RP28	Tariff philosophy	• Detailed analysis • Mitigating adverse impacts • Easy to understand • Recent tariffs reflect the philosophy /principles	0 1	Medium
RP29	Participation in decision-making related to affordability of electricity	• Attention to affordability in tariff principles / philosophy • Public participation in revisions • Educating low-income groups	0 1	Low-Medium
RP30	Licensing	• Well defined **procedure** for consideration of license applications • Well defined **criteria** for consideration of license applications • Clarity about the basis for amendment / revocation / suspension of licenses • Dispute • Compliance and performance-monitoring	1 1	Medium-High

	Indicators	**Elements of Quality**	**Assessed Status** *0=element not met* *1= element is met*	**Score**
RP31	Periodic performance reports by licensees and utilities	• Mandatory filing requirement • Easy availability • Timely availability • Available in local languages • Consistency and clarity of reporting parameters • Comprehensive reporting	1 0 0 0	Medium
RP32	Consumer service and quality of supply	**Existence of Standards** • Standards for consumer service and supply quality • Supply standards are mandatory **Quality of Standards** • Monitoring performance • Compliance reviews • Compliance reviews information / results publicly available	1 ½	Medium-High