

NATIONAL ENERGY REGULATOR ACT 40 OF 2004

[ASSENTED TO 30 MARCH 2005] [DATE OF COMMENCEMENT: 15 SEPTEMBER 2005]

(English text signed by the President)

as amended by

Electricity Regulation Act 4 of 2006

ACT

To establish a single regulator to regulate the electricity, piped-gas and petroleum pipeline industries; and to provide for matters connected therewith.

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CHAPTER I

DEFINITIONS AND OBJECT (ss 1-2)

[a40y2004s1]1Definitions

In this Act, unless the context indicates otherwise-

'administrative action' bears the meaning ascribed to it in the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000);

'chief executive officer' means the chief executive officer contemplated in section 5;

'Department' means the Department of Minerals and Energy;

'Electricity Act' means the Electricity Act, 1987 (Act 41 of 1987);

'Energy Regulator' means the National Energy Regulator established by section 3;

'Gas Act' means the Gas Act, 2001 (Act 48 of 2001);

'Gas Regulator Levies Act' means the Gas Regulator Levies Act, 2002 (Act 75 of 2002);

'Minister'* means the Minister of Minerals and Energy;

'Petroleum Pipelines Act' means the Petroleum Pipelines Act, 2003 (Act 60 of 2003).

[a40y2004s2]2Object of Act

The object of this Act is to establish a National Energy Regulator for the regulation of the electricity, piped-gas and petroleum pipelines industries.

CHAPTER II

NATIONAL ENERGY REGULATOR (ss 3-14)

[a40y2004s3]3Establishment of Energy Regulator

The National Energy Regulator is hereby established as a juristic person.

[a40y2004s4]4Functions of Energy Regulator

(1) The Energy Regulator must-

(a) undertake the functions of the Gas Regulator as set out in section 4 of the Gas Act;

(b) undertake the functions of the Petroleum Pipelines Regulatory Authority as set out in section 4 of the Petroleum Pipelines Act; and

(c) undertake the functions set out in section 4 of the Electricity Regulation Act, 2006.*

[Para. (c) substituted by s. 48 (1) of Act 4 of 2006.]

(2)

[Sub-s. (2) deleted by s. 48 (1) of Act 4 of 2006.]

[a40y2004s5]5Composition of Energy Regulator

(1) The Energy Regulator consists of four full-time and five part-time members appointed by the Minister.

(2) The Minister must designate one of the part-time members as chairperson of the Energy Regulator and another part-time member as deputy chairperson.

(3) The Minister must designate one of the full-time members as the Chief Executive Officer of the Energy Regulator.

(4) The Minister must designate one of the other three full-time members to be primarily responsible for electricity regulation, another for piped-gas regulation and another for petroleum pipeline regulation.

(5) If the chairperson is for any reason unable to perform his or her functions, the deputy chairperson must perform them until the Minister designates another chairperson.

(6) (a) A part-time member of the Energy Regulator holds office for a period of four years.

(b) A full-time member of the Energy Regulator holds office for a period of five years.

(c) The Minister may reappoint a member of the Energy Regulator.

(d) If a vacancy occurs on the Energy Regulator the Minister may fill the vacancy temporarily for a period of not more than 12 months by appointing a person without complying with section 6 (7).

(7) Members of the Energy Regulator must be paid for their services such remuneration and allowances as the Minister may determine with the concurrence of the Minister of Finance.

[a40y2004s6]6Disqualifications and requirements for membership of Energy Regulator

(1) No person may be appointed as or remain a member of the Energy Regulator if that person-

(a) is not a South African citizen or the holder of a permit as a permanent resident in the Republic;

(b) is an unrehabilitated insolvent;

(c) has, within a period of 10 years immediately before the date of the proposed appointment, been convicted of an offence involving dishonesty or served a sentence of imprisonment without the option of a fine for any other offence; or

(d) has, after appointment, been convicted of an offence involving dishonesty or been sentenced to imprisonment without the option of a fine for any other offence.

(2) The Minister must appoint, as members of the Energy Regulator, persons who-

(a) collectively have adequate legal, technical, business, economic or other experience relevant to the electricity, piped-gas and petroleum pipelines industries;

(b) are collectively broadly representative of South African society as a whole;

(c) are committed and available to fulfil their role as members of the Energy Regulator; and

(d) demonstrate impartiality and objectivity in such a manner that a fair balance between continuity and capacity building is achieved.

(3) Upon appointment-

(a) every full-time member must terminate any employment or consulting relationship he or she has with any person, firm, association or company engaged in the electricity, piped-gas and petroleum pipelines industries and may not take up any such employment or consulting arrangement during his or her period of membership of the Energy Regulator;

(b) every full-time and part-time member must disclose to the Minister and the Energy Regulator his or her pecuniary interest in any person, firm, association or company engaged in the electricity, piped-gas and petroleum pipeline industries; and

(c) every full-time and part-time member must disclose to the Minister and the Energy Regulator if his or her spouse, life partner or child is in the employ of or acts as a consultant to, or has any relationship with, any person, firm, association or company engaged in the electricity, piped-gas and petroleum pipelines industries, or has any pecuniary interest in any such person, firm, association or company.

(4) A member may not at any time be present during the discussion of or the making of a decision on, or take part in, any matter before the Energy Regulator in which that member or his or her spouse, life partner, child or associate has a direct or indirect pecuniary interest.

(5) If a member acquires an interest contemplated in subsection (3) (b), such member must immediately in writing declare that fact to the Minister and the Energy Regulator.

(6) If the spouse, life partner or child of a member acquires an interest contemplated in subsection (3) (c), such member must immediately in writing declare that fact to the Minister and the Energy Regulator.

(7) Before appointing members to the Energy Regulator, the Minister must by notice in the Gazette call for nominations from members of the public.

(8) The notice published before the commencement of this Act calling for nominations for the first appointments to the Energy Regulator must be regarded as having been validly published in terms of subsection (7).

[a40y2004s7]7Vacation of office and termination of appointment of members of Energy Regulator

(1) A part-time or full-time member of the Energy Regulator must vacate his or her office if that member-

(a) becomes of unsound mind;

(b) has been absent from more than two consecutive meetings without leave of the chairperson for each absence;

(c) resigns by written notification to the Minister;

(d) materially fails to perform any duty imposed on him or her in terms of this Act, the Electricity Regulation Act, 2006, the Gas Act or the Petroleum Pipelines Act; or [Para. (d) substituted by s. 48 (1) of Act 4 of 2006.]

(e) becomes disqualified from being a member on any of the grounds referred to in section 6 (1).

(2) The Minister may terminate the appointment of a member of the Energy Regulator if such member contravenes section 9.

[a40y2004s8]8Meetings of Energy Regulator

(1) (a) The Energy Regulator must meet at such times and places as may be determined by the chairperson.

(b) The chairperson must convene such meetings of the Energy Regulator as are necessary for the proper performance of its functions.

(2) The chairperson must, upon a written request of the chief executive officer or two other members, convene a special meeting to be held within two weeks after the date of receipt of such request.

(3) If the chairperson is absent from a meeting of the Energy Regulator the deputy chairperson must chair the meeting.

(4) If both the chairperson and the deputy chairperson are absent from a meeting the chairperson must designate another part-time member to chair that meeting.

(5) Unless other procedures are prescribed by the Energy Regulator, the chairperson of any meeting of the Energy Regulator must determine the procedures to be followed at such meeting.

(6) The quorum for any meeting of the Energy Regulator is a majority of its serving members or four members, whichever is the greater.

(7) (a) A decision of the majority of the members present at a meeting constitutes a decision of the Energy Regulator.

(b) In the event of an equality of votes on any matter the person chairing the meeting has a casting vote in addition to his or her deliberative vote.

(8) No decision taken by the Energy Regulator is invalid merely because of a vacancy on the Energy Regulator or because any person not entitled to sit as a member sat as such at the time when the decision was taken if the rest of the members present at the meeting and

entitled to sit as members at the meeting constituted a quorum and the decision was taken by a majority of those members present and entitled to vote.

(9) (a) Any meeting of the Energy Regulator must be open to the public unless the quorate meeting passes a resolution to the effect that, for the part of the meeting concerned, the information to be discussed during that part of the meeting would create a record that would in turn oblige the Energy Regulator to refuse access to that information in terms of the Promotion of Access to Information Act, 2000 (Act 2 of 2000).

(b) If the Energy Regulator takes a decision in any other manner than at a formal meeting, such decision comes into effect after it has been reduced to writing and signed by a majority of the members and it must be submitted for noting at the first formal meeting of the Energy Regulator following the decision.

(c) The Energy Regulator must cause a record of all of its proceedings to be kept.

(10) (a) The Energy Regulator may establish subcommittees of its members to perform such functions of the Energy Regulator as it may determine, including conducting hearings and enquiries and sitting as a tribunal.

(b) The Energy Regulator must determine the composition of a subcommittee.

(c) The Energy Regulator may at any time dissolve or reconstitute a subcommittee.

(d) The Energy Regulator must designate a member of a subcommittee as chairperson of that subcommittee.

(e) This Act applies, with the changes required by the context, to a subcommittee established in terms of this section.

(f) The Energy Regulator is not absolved from the performance of any function entrusted to a subcommittee.

(11) The Energy Regulator must make rules concerning the manner in which notice of meetings to be held and the business to be conducted thereat is brought to the attention of the public.

[a40y2004s9]9Duties of members of Energy Regulator

Members of the Energy Regulator must-

(a) act in a justifiable and transparent manner whenever the exercise of their discretion is required;

(b) at all times act in the interests of the Energy Regulator and not in their own or sectoral interests;

(c) act independently of any undue influence or instruction;

(d) recuse themselves from and refrain from voting on or discussing any matter, pending before the Energy Regulator in which they have a direct or indirect pecuniary interest;

(e) act in a manner that is required and expected from the holder of a public office; and

(f) act in the public interest.

[a40y2004s10]10 Decisions of Energy Regulator

(1) Every decision of the Energy Regulator must be in writing and be-

(a) consistent with the Constitution and all applicable laws;

(b) in the public interest;

(c) within the powers of the Energy Regulator, as set out in this Act, the Electricity Act, the Gas Act and the Petroleum Pipelines Act;

(d) 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;

(e) based on reasons, facts and evidence that must be summarised and recorded; and

(f) explained clearly as to its factual and legal basis and the reasons therefor.

(2) Any decision of the Energy Regulator and the reasons therefor must be available to the public except information that is protected in terms of the Promotion of Access to Information Act, 2000 (Act 2 of 2000).

(3) Any person may institute proceedings in the High Court for the judicial review of an administrative action by the Energy Regulator in accordance with the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000).

(4) (a) Any person affected by a decision of the Energy Regulator sitting as a tribunal may appeal to the High Court against such decision.

(b) The procedure applicable to an appeal from a decision of a magistrate's court in a civil matter applies, with the changes required by the context, to an appeal contemplated in paragraph (a).

[a40y2004s11]11 Personnel of Energy Regulator

(1) Subject to the directions of the Energy Regulator, the chief executive officer is also responsible for-

- (a) the day-to-day management of the affairs of the Energy Regulator;
- (b) the appointment of other employees and contracting with persons to assist the Energy Regulator in the performance of its functions; and
- (c) administrative control over the employees of the Energy Regulator.

(2) The Energy Regulator must, on the recommendation of the Chief Executive Officer, from time to time determine the personnel and other resources to be made available to the full-time members contemplated in section 5 (4).

(3) The employees of the Energy Regulator must be paid such remuneration, allowances, subsidies and other benefits as the Energy Regulator may determine with the approval of the Minister and the Minister of Finance.

(4) Despite subsection (1) (b), the Minister may, where he or she determines a need exists, 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.

(5) Section 9 applies to every member of the personnel of the Energy Regulator, with the changes required by the context.

[a40y2004s12]12 Funds of Energy Regulator

(1) For the purpose of regulation of the piped-gas and petroleum pipelines industries, the funds of the Energy Regulator consist of-

- (a) money appropriated by Parliament;
- (b) levies imposed by or under separate legislation;
- (c) charges for dispute resolution and other services rendered in terms of this Act; and
- (d) licence fees.

(2) For the purpose of regulation of the electricity industry, the funds of the Energy Regulator consist of-

- (a) money appropriated by Parliament;
- (b) funds collected under section 5B of the Electricity Act; and
- (c) levies imposed by or under separate legislation.

[a40y2004s13]13 Accounting by Energy Regulator

(1) The Energy Regulator must perform its functions in accordance with the Public Finance Management Act, 1999 (Act 1 of 1999).

(2) The Energy Regulator must keep separate accounts for the electricity, piped-gas and petroleum pipelines regulatory functions.

(3) (a) The costs of the Energy Regulator must be shared between the electricity, piped-gas and petroleum pipeline regulatory functions in proportion to the costs incurred by the Energy Regulator in respect of each of those regulatory functions.

(b) Money appropriated by Parliament must be allocated to the separate accounts for the electricity, piped-gas and petroleum pipeline regulatory functions in proportion to the costs incurred by the Energy Regulator in respect of each of those functions unless Parliament determines otherwise.

(c) Money received by the Energy Regulator other than money appropriated by Parliament must be paid into the account that is kept in terms of subsection (2) for the industry from which such money was received, and must be used for the sole benefit of that industry.

(4) The Energy Regulator must open one or more accounts in its name with one or more financial institutions and deposit therein all money received from the sources contemplated in section 12.

(5) The financial records of the Energy Regulator must be audited by the Auditor-General.

(6) The financial year of the Energy Regulator starts on 1 April of one year and ends on 31 March of the following year.

[a40y2004s14]14 Reporting by Energy Regulator

The annual report required of public entities in terms of the Public Finance Management Act, 1999 (Act 1 of 1999), may include any matter that the Energy Regulator

deems necessary but must, in respect of electricity, piped-gas and petroleum pipeline matters, include information on-

- (a) licences granted, amended or withdrawn;
- (b) regulations made and directives issued by the Minister;
- (c) the envisaged strategies of the Energy Regulator;
- (d) the existing position and envisaged commercial developments with respect to the electricity, piped-gas and petroleum pipeline industries;
- (e) the position regarding health, safety and environmental matters;
- (f) access to network infrastructure; and
- (g) tariffs or tariff structures set or approved.

CHAPTER III

GENERAL PROVISIONS (ss 15-17)

[a40y2004s15]15 Repeal of laws

The laws mentioned in the Schedule are hereby repealed or amended to the extent indicated in the third column of the Schedule.

[a40y2004s16]16 Transitional provisions

(1) As from the date of commencement of this Act-

(a) the person who immediately before the commencement of this Act held the office of chief executive officer of the National Electricity Regulator is deemed to be the chief executive officer of the Energy Regulator;

(b) the persons who constituted the other personnel of the National Electricity Regulator immediately before the commencement of this Act are deemed to be the personnel of the Energy Regulator;

(c) the assets of the National Electricity Regulator vest in the Energy Regulator and the Energy Regulator takes over the liabilities of the National Electricity Regulator.

(2) Decisions of the National Electricity Regulator in force immediately before the date contemplated in section 4 (1) (c) remain in force until amended, replaced or repealed by the Energy Regulator.

[a40y2004s17]17 Short title and commencement

This Act is called the National Energy Regulator Act, 2004, and comes into operation on a date determined by the President by proclamation in the Gazette.

Schedule

No and year of Act	Short title	Extent of repeal or amendment
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Act 41 of 1987	Electricity Act, 1987	1. The repeal, with effect from the date contemplated in section 4 (1) (c) of the National Energy Regulator Act, 2004, of sections 2, 2A, 5, 5 A, 5C, 5D and 21.
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2. The amendment, with effect from the date contemplated in item 1 by the substitution for the definition of 'regulator' of the following definition:

"regulator" means the National Energy Regulator established by section 3 of the National Energy Regulator Act, 2004;'

Act 48 of 2001	Gas Act, 2001	1. The repeal of sections 3, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14.
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2. The amendment of section 1 by the substitution for the definitions of 'Gas Regulator' and 'distribution' of the following definitions, respectively:

"Gas Regulator" means the National Energy Regulator established by section 3 of the National Energy Regulator Act, 2004;

"distribution" means the distribution of bulk gas supplies and the transportation thereof by pipelines with a general operating pressure of more than 2 bar gauge and less than 15 bar gauge or by pipe-lines with such other operating pressure as the National Energy Regulator may permit according to criteria prescribed by regulation to points of ultimate consumption or to reticulation systems, or to both points of ultimate consumption and to reticulation systems, and any other activity incidental thereto, and 'distribute' and 'distributing' have corresponding meanings;'

Act 75 of 2002	Gas Regulator Levies Act, 2002	The amendment of section 1 by the substitution for the definition of 'Gas Regulator' of the following definition:
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"Gas Regulator" means the National Energy Regulator established by section 3 of the National Energy Regulator Act, 2004;'

Act 60 of 2003	Petroleum Pipelines Act, 2003	1. The repeal of sections 3, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14.
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2. The amendment of section 1 by the substitution for the definition of 'Authority' of the following definition:

"Authority" means the National Energy Regulator established by section 3 of the National Energy Regulator Act, 2004;'

[a34y2008]