



Energy

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South Africa

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Overview of the current energy mix, and the place in the market of different energy sources

The energy mix in South Africa is made up of renewables, gas, coal, hydroelectric and nuclear. Electricity generation is undertaken primarily by state-owned power and utilities company Eskom, however increasingly by independent power producers. The transmission of electricity is undertaken by Eskom and electricity distribution (the final delivery of electricity to end users) is currently undertaken by Eskom together with various local municipalities. South Africa is heavily reliant on coal based energy sources, which generated 39,126 MW of the country's 51,981 MW installed capacity in 2018 – approximately 75%. At present, hydro, pumped storage, PV and wind sit at approximately 4%, 5.5%, 2.8% and 3.8% of installed capacity respectively, while nuclear remains an auxiliary power contributor, providing 3.5% of installed capacity.

Changes in the energy situation in the last 12 months, which are likely to have an impact on future direction or policy

Change in ministerial responsibility

On 29 May 2019, President Ramaphosa (the President) announced the appointment of a reconfigured national executive following the 2019 South African general elections. The President committed to a process of further reforms to “promote coherence, better coordination and improved efficiency” of government. Accordingly, the Department of Mineral Resources and the Department of Energy are to be merged into a single department named the Department of Mineral Resources and Energy (DMRE). The previous Minister of Mineral Resources, Mr Gwede Mantashe (Minister) has been appointed as the Minister responsible for this new consolidated department.

Unbundling the national utility

On 7 February 2019, the President announced that Eskom would be unbundled into three separate state-owned entities, responsible for generation, distribution and transmission respectively. The need for unbundling stems from the poor financial, structural and operational performance of Eskom. The decision to unbundle Eskom follows a recommendation from a President-appointed task team comprising experts in the electricity sector, established to provide recommendations on improving Eskom's performance. The task team found that the unbundling of Eskom would assist in the allocation of costs and responsibility within the national utility.

Unbundling involves the separation of energy production activities from transmission and distribution. Eskom will undergo a form of legal unbundling, which will separate the State

utility into three separate legal entities. These entities will be owned and controlled by an Eskom holding company. It is expected that this will also allow for and necessitate the separation of bookkeeping across the energy generation, distribution and transmission entities. Eskom's largest source of debt relates to coal purchases and plant maintenance, which falls into the generation component of the energy supply chain. Separate bookkeeping of the respective entities would free Eskom's transmission and distribution entities from this historic debt, and enable each entity to borrow money, secure debts and raise investments separately from one another.

It is uncertain whether the unbundling of Eskom will create a more competitive environment for Independent Power Producers (IPP) to enter and participate in the electricity market. Currently, Eskom's transmission branch has a propensity to give its own generation plants preferential access to the grid. Because the three entities for generation, distribution and transmission will all be state-owned, it is unlikely that unbundling will result in greater private participation in the energy sector. On the contrary, should the unbundling be successful in revitalising Eskom, IPPs may struggle to compete with a fully functional state utility (supported by tax revenue and government administration).

Developments in government policy/strategy/approach

Integrated Resources Plan

The South African Integrated Resource Plan (IRP) is an electricity capacity plan, which sets out an indication of the country's anticipated electricity demand, how such demand is to be addressed and the cost thereof. In terms of the Electricity Regulation Act, 4 of 2006 (ERA), the National Energy Regulator of South Africa (NERSA) is required to issue rules designed to implement the Integrated Resource Plan. The IRP hence provides insight into the development of the nation's energy mix.

On 6 May 2011, the Department of Energy released the Integrated Resource Plan 2010–2030 (IRP 2010) in respect of SA's forecast energy demand for a 20-year period from 2010 to 2030. To date, the Department of Energy has implemented IRP 2010 by issuing Ministerial Determinations in accordance with section 34 of the ERA. The IRP 2010 is a living plan intended to be updated by the Department of Energy, although no such update has been formally published to date.

A review has been necessitated by a number of changes in the assumptions utilised in the IRP 2010, and an updated draft Integrated Resource Plan 2018 (Draft IRP) was released by former Minister of Energy, Jeff Radebe on 27 August 2018 for comment by the public.

The Minister has subsequently announced that the Draft IRP is in the process of being finalised and will be tabled before Cabinet for approval. During an interview in August 2019, the Minister said that, although nuclear energy generation has been de-emphasised, the Draft IRP, once final and published, will make provision for use of modular nuclear technology. The Minister added that nuclear energy generation would compete with other power sources to replace energy capacity, which will be decommissioned in the medium to long term. Accordingly, the timelines for any nuclear build will become clearer once the Draft IRP is approved.

The Draft IRP contemplates the following additional capacity:

- 1,000 MW of coal-generated electricity;
- 2,500 MW of hydro-generated electricity;
- 5,670 of solar PV-generated electricity;

- 8,100 MW of wind-generated electricity; and
- 8,100 MW of gas-generated electricity.

It is notable that the Draft IRP includes capacity allocation for solar photovoltaic, wind (onshore), embedded generation and gas. It excludes nuclear and solar CSP and any new coal generation capacity.

Coal

As noted above, the Draft IRP includes provision for 1,000MW of coal-to-power generated electricity in 2023–2024 based on the two procured and announced coal projects under the Coal Baseload IPP programme. South Africa is committed to the efficient use of its coal reserves through the employment of clean coal technologies, and coal remains of high strategic importance due to the significant number of jobs the industry provides. Notwithstanding this, these two projects may struggle to reach financial close and implementation as a result of funding and environmental challenges (especially within the market context of major private sector investors favouring environmentally friendly investment options).

Renewable energy

South Africa's renewable energy industry is in its infancy, but growing. South Africa has successfully implemented four rounds of independent power procurement under its renewable independent power producer programme (REIPPP). After a delay of almost two years, 27 new power purchase agreements under REIPPP rounds 3.5 and 4 were signed on 4 April 2018. Furthermore, financial close in respect of round 4 and 4.5 projects was reached on 31 July 2018. The continued development of the renewable energy sector has provided much-needed investment in South Africa and it is hoped that the commencement of these 27 projects will catalyse growth in related industries (primarily the construction industry). The Draft IRP contemplates renewable capacity coming online in 2025, which clearly indicates a delay in the scale and pace with which the bid windows have been implemented to date. The Draft IRP recommends a least-cost plan for the implementation of renewable energy capacity, with the retention of annual build limits to provide a smooth rollout and help sustain the industry.

Gas

It is clear from the Draft IRP that gas-based power generation will be a significant part of the energy mix in the future: 8,100 MW of new additional capacity is projected to be procured, with a total contribution of 11,930 MW by 2030. Gas-based power generation will account for approximately 16% of installed capacity mix by the year 2030.

In July 2019, South African state-owned rail, port and pipeline company, Transnet, announced that it had entered into a US\$2 million cost-sharing agreement with the World Bank International Finance Corporation (IFC). The purpose of the agreement is to conduct a study concerning the feasibility of liquefied natural gas (LNG) storage and a regasification terminal in Richard's Bay. A special purpose vehicle (SPV) will be established for the purposes of developing the terminal. This SPV will comprise private investors, who will hold a majority stake holding, together with Transnet and other state-owned companies. The rationale for the SPV is to encourage private public partnerships in the natural gas sector. The study will also focus on the future use of Transnet Pipelines for the development of inland natural gas transmission and the establishment of virtual LNG pipelines. All these facilities are earmarked to become operational by 2024, provided Transnet obtains the necessary regulatory approvals in this regard. It is anticipated that the expansion of natural gas networks in South Africa will promote access to sustainable, secure and affordable natural gas for consumers.

Embedded generation

The Draft IRP has allocated 200 MW *per annum* to embedded generation for own use of between 1 MW and 10 MW, commencing in 2018. A generation licence will be needed to undertake the activities listed in Appendix E to the Draft IRP which, depending on each use-case, may apply to small-scale embedded generation as well. Licensing is facilitated by NERSA, and accordingly the accuracy of these predictions depends in part on NERSA's administrative capacity.

Hydro

Hydro-electrical power generation is envisaged to come online in the year 2030, in accordance with South Africa's commitments under the RSA–DRC treaty on the Inga Hydro Power Project. This is in line with South Africa's commitments as set out in the National Development Plan to partner with regional countries.

Developments in legislation or regulation

The Independent Management Operator Bill

The announcement of Eskom's restructure has called for the reconsideration of the Independent Market Operator Bill (IEMO Bill) in Parliament. The IEMO Bill (previously called the Independent System and Market Operator Bill) was first introduced by the Department of Energy in 2011 and provides for the establishment of an Independent Market Operator (IEMO), which will be tasked with the operation of the national grid as well as the purchase and sale of electricity from generators to consumers.

While the Bill was withdrawn in 2014, Democratic Alliance Member of Parliament published a notice of intention to re-introduce the Bill in the Government Gazette in 2019. The IEMO will carry out its operation duties by dispatching all generation plants into the national grid. In addition to operation, the IEMO Bill also confers ownership of the grid on the IEMO, with Eskom retaining ownership of the generation arm. The IEMO Bill will be introduced to Cabinet in the second half of 2019; however, it is likely that the Bill will undergo much political scrutiny given its potential impact on Eskom's monopoly.

Should the IEMO Bill be successfully promulgated, the establishment of an independent grid owner and operator would be a significant boost for renewable power generators in South Africa.

Judicial decisions, court judgments, results of public enquiries

Electricity prices and transmission tariffs

In 2019, the Constitutional Court handed down judgment concerning a decision of the National Energy Regulator of South Africa (NERSA) to approve the maximum gas price and transmission tariff of Sasol Gas Limited (Sasol). As the first gas producer active in the country, Sasol has held a monopoly over the South African gas market. To better facilitate competition in the gas market, maximum gas prices and its transmission tariffs are approved by NERSA. However, such decisions are usually based on applications made by Sasol as the gas producer.

Following approval by NERSA of an application by Sasol in respect of applicable maximum prices, and implementation thereof, a group of seven industrial gas users challenged the decision on the basis that they were required to pay significantly higher prices in respect to their gas use as a result. The applicants applied to review and set aside NERSA's decision,

on the basis that the process of regulating a monopolist's prices must be rational and reasonable in terms of South African Administrative Justice law.

The Constitutional Court held that because NERSA had failed to consider the marginal costs of Sasol in the process of determining maximum and tariff prices, its decision was irrational and unreasonable. Accordingly, the court found in favour of the applicants, and overturned NERSA's decision.

Fracking technical regulations

Between 2008 and 2010, three applications were made in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) to explore shale gas through hydrolytic fracturing (fracking) in the Karoo. Following a general moratorium on the granting of subsequent petroleum right or permit applications over the Karoo, a further moratorium was implemented in February 2014, restricting the approval of applications which provided for use of hydraulic fracturing until such time as technical regulations had been promulgated regulating the practice.

To determine the environmental and social implications of fracking, the Minister of Mineral Resources set up an inter-ministerial task team and subsequently a monitoring committee. The task team and monitoring committee made certain recommendations to Cabinet pertaining to fracking. Upon these recommendations, the Minister of Mineral Resources promulgated technical petroleum regulations in 2015 (Technical Regulations).

The publication of the Technical Regulations was challenged in two concurrent applications (in each of the Eastern Cape and the Pretoria North Gauteng High Courts), on the basis that: (i) such promulgation had been procedurally unfair; and (ii) the Minister of Mineral Resources did not have authority to promulgate the regulations under the Mineral and Petroleum Resources Development Act, 28 of 2002.

The applicant succeeded in the matter brought before the Eastern Cape High Court, and obtained an order setting aside the Technical Regulations in their entirety. Conversely, the Pretoria North Gauteng High Court dismissed the application brought before it and found that the Minister of Mineral Resources was authorised to promulgate the regulations and that its promulgation had been fair.

The two matters were consolidated and heard by the Supreme Court of Appeal (SCA) in July 2019, wherein the SCA concurred with the Eastern Cape High Court and held that the publication of the Technical Regulations had been *ultra vires*. The Court found that the Minister did not have the power to make regulations of an environmental nature, including many provisions of the Technical Regulations. The SCA found that, as those provisions of the Technical Regulations which the Minister published unlawfully could not be separated from the remainder of the provisions of the Technical Regulations without rendering them ineffective, the Technical Regulations had to be set aside in their entirety.

The Technical Regulations are accordingly of no force or effect and will need to be redrafted in a lawful manner. As such, plans for exploration by hydraulic fracturing in South Africa remain suspended pending the redrafting and promulgation of appropriate Technical Regulations.

Major events or developments

Ministerial deviation from Integrated Resources Plan in respect of small-scale embedded generation

On 31 May 2019, the Minister of Energy at the time, Jeff Radebe, granted a deviation from

the existing IRP 2010 for the licensing of small-scale embedded generation renewable energy projects ranging above 1MW to 10MW. Small-scale embedded generation refers to the production of electricity from power stations that are directly connected to the distribution network.

In terms of the Energy Regulation Act ERA, no person may operate any generation facility without a licence issued by the National Energy Regulatory Authority (NERSA). The ERA furthermore provides that an application for such a licence must include evidence of compliance with the IRP 2010 or provide reasons for any deviation for the approval of the Minister.

The impact of the deviation granted by the Minister is that NERSA may now grant licences to such small-scale embedded generation projects without the Minister needing to provide any further approval. The permitted deviation applies to all projects generating up to an annual ceiling of 500 MW. NERSA has emphasised that that applications for these small-scale projects will not automatically be approved and will still have to undergo the prescribed registration procedure and evaluation process in terms of the IRP.

Rollout of energy storage

In 2018, it was confirmed that Eskom would be deploying a large-scale distributed energy storage project across South Africa funded by the International Bank for Reconstruction and Development, the Clean Technology Fund and the African Development Bank. The first phase of the project involves 800-megawatt hours (MWh) of distributed energy storage to be installed at Eskom's 48 distribution sites in the Eastern Cape, Northern Cape, Western Cape and KwaZulu-Natal respectively.

Requests for proposals for the first phase were set to be released to the market by mid-2019 (although these are still pending as of date of publication). The second phase involves an aggregate amount of 640 MWh of distributed battery storage, with 60 MW of distributed Solar PV to be installed in all nine South African provinces by the end of 2021. The storage facilities that will be used in the project comprise container-encased grid-scale electrochemical batteries. The facilities store electricity from power plants and can be used when demand arises.

In 2019, it was confirmed that Eskom, together with the World Bank and ATA Insights, would be hosting a webinar regarding Eskom's storage project. The will allow interested parties to discover large-scale battery investment opportunities and to provide recommendations on the manner in which the project should be carried out.

Energy storage could circumvent the need for diesel and other fossil fuels for peaking and baseload power, as well as increase South Africa's ability to incorporate renewable energy into its energy mix. Currently, there is no legislation which specifically regulates energy storage. Energy storage facilities would, however, need to comply with South Africa's environmental legislation.

Proposals for changes in laws or regulations

Draft Petroleum Resources Development Bill

As of the date of publication, the Minerals and Petroleum Resources Development Act 28 of 2002 (MPRDA) governs the upstream petroleum and mining industry. Seven years ago, the Mineral and Petroleum Resources and Development Amendment Bill (Bill) was published for public comment as an amendment to the MPRDA.

Following passage through the South African National Assembly on 16 January 2015, the President of South Africa at the time, acting in terms of section 79(1) of the Constitution,

referred the Bill back to the National Assembly due to reservations the President had as to the constitutionality of the Bill (including that inadequate public participation had been provided for in its publication).

Accordingly, and in order to remedy the defects identified by the President, the National Council of Provinces Select Committee on Land and Mineral Resources (the Select Committee) held an extensive public participation process during 2017 which involved public hearings on the Bill held in every province in the country, and which allowed for the submission of written submissions by members of the public in respect of the Bill.

On 20 September 2018, the Minister of Mineral Resources announced his decision to withdraw the Bill from parliament. The Minister then announced that a separate legislative framework for the upstream oil and gas sector will be developed and that this bill will be fast-tracked.

As it currently stands, the target date for the passing of the Petroleum Bill into legislation is early/mid 2020. Before the Petroleum Bill can be passed into law, the Bill will undergo a process of public participation and deliberation between Parliament and the Executive. A draft of the Bill has not yet been released for public comment, and as of yet we cannot comment as to the provisions of the Bill or changes to the legislative regime.

Draft Financial Provisioning Regulations

In terms of the Financial Provisioning Regulations published under the National Environmental Management Act 107 of 1998 (NEMA), financial provision must be made by the holder of an exploration or production right granted under the Minerals and Petroleum Resources Development Act 28 of 2002 (MPRDA) for rehabilitation, closure and ongoing post-decommissioning management of negative environmental impacts related to the activities conducted under such right. The Financial Provisioning Regulations are however undergoing a process of amendment and revision and a new version of the regulations is expected to be promulgated towards the end of 2019.

In May 2019, the Minister of Environmental Affairs published the 'Proposed Regulations Pertaining to the Financial Provision for the Rehabilitation and Remediation of Environmental Damage Caused by Reconnaissance, Prospecting, Exploration, Mining or Production Operations' for public comment in the Government Gazette (draft Financial Provisioning Regulations). Important aspects of the proposed amendments include a requirement that provision is made upfront for remediation and decommissioning costs in relation to activities which are planned to be performed over a 12-month period from the date of assessment, regardless of when such remediation and decommissioning costs are actually incurred, as well as a requirement that holders annually update and reassess existing financial provisions set aside. Furthermore, the draft Financial Provisioning Regulations provide for changes to the financial vehicles which may be used in the setting-aside of funds. Holders of rights who applied for exploration or production rights prior to 20 November 2015 (when the Financial Provisioning Regulations were promulgated) will be afforded a transitioning period expiring in February 2024 to comply with the draft Financial Provisioning Regulations (once promulgated).

Challenge to the Single-Buyer Model

South Africa currently uses a single-buyer model of electricity, whereby Eskom has the exclusive right to purchase power from Independent Power Producers (IPPs) and transmit this power through the national grid for distribution. This model has, however, been challenged by the City of Cape Town municipality (the City) which is currently seeking to

procure electricity directly from IPPs for the purposes of resale. Section 34 of the Electricity Regulation Act 4 of 2006 (ERA) states that the Minister may, in consultation with NERSA, determine the types and quantity of electricity that is to be generated and the manner in which the electricity generated may be sold. The City has lodged an application seeking a court declaration that ministerial consent is not required for an IPP to sell electricity to a municipality. In the alternative, the City has submitted that if ministerial consent is required, s 34 of the ERA is to be declared as unconstitutional.

Litigation is still pending and it is uncertain if the City will be successful in challenging the prevailing single-buyer electricity model.

Should the City be successful, the liberalisation of the energy market, and the introduction of hundreds of potential new buyers through local municipalities, will be a significant boon for the burgeoning renewables sector.

Conclusion

While the impact of Eskom's unbundling on South Africa's energy landscape is uncertain, the imminent publication of the updated IRP, and the promotion of small-scale renewable energy generation, are positive steps toward diversifying South Africa's energy mix. The provision of energy storage is also a key factor in ensuring energy security in the country. However, a diversified energy mix requires significant investment. Government has taken steps towards facilitating a competitive and investor-friendly regulatory environment; however, it may take time before the sector sees significant change.



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