

CIRCULAR 17 / 2023

**FROM : RIO NOLUTSHUNGU
CHIEF EXECUTIVE OFFICER (ACTING)**

**TO : EXECUTIVE MAYORS/MAYORS
CITY/MUNICIPAL MANAGERS**

DATE : 25 MARCH 2023

SALGA APPLICATION AGAINST NERSA TARIFF DECISION

1. Purpose of the Circular

The purpose of this Circular is to advise municipalities that SALGA is challenging the National Energy Regulator of South African's (NERSA) decision taken on 12 January 2023 to approve Eskom Holding SOC Limited's (ESKOM) MYPD5 application to increase tariffs for the 2023/2024 financial year by 18.65% and for 2024/25 financial year by 12.74% respectively, on the grounds that it is unconstitutional.

2. Background

Eskom applied in September 2022 for a 32% tariff increase for the 2023/24 financial year, starting in April 2023. NERSA published Eskom's revenue requirements (MYPD5) for the financial years 2022/23 – 2024/25 and requested comments. Following consultations with member municipalities, SALGA made a written submission to NERSA rejecting the proposed increases: in an economy where we are likely to see weak economic growth, with stagflation risks, high unemployment and rising prices, a price increase of more than 8 times inflation is unsustainable and unaffordable.

Amongst other factors SALGA cited that municipalities have a large proportion of clients who are mainly poor, and the increase will have a negative impact on the affordability of their clients. The submission further argued that should the proposed increase be approved, municipalities would be forced to apply for a high increase in July, given the impact of the increase on the cost of Bulk Electricity purchases. The effect of the increase is likely to result in clients opting to reduce their electricity usage drastically, including defection from the grid, which in turn would affect municipalities' revenue. Revenue collection would also be affected due to unaffordability.

SALGA also raised concerns about Eskom's performance and the need to undertake measures to cut costs and improve efficiency.

3. Legal Challenge

SALGA is bringing an application in terms of Section 38(e) of the Constitution of the Republic of South Africa, 1996 on behalf of its members, since NERSA's decision to approve an Eskom tariff hike by 18.65% and 12.74% impacts municipalities as both electricity distributors and as consumers.

Given the astronomical increase in the price of electricity in recent years, electricity has become expensive and unaffordable for many, with the resultant loss of revenue for municipalities. This loss of revenue is exacerbated by an increase in illegal connections due to unaffordable rates, end users going off the grid, loadshedding, and theft and vandalism to infrastructure. Ultimately, the loss of revenue stifles municipalities' ability to fulfil their constitutional obligations.

SALGA's application is brought in terms of the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**"), where the main grounds of review are that NERSA's decision is irrational and various relevant considerations were ignored when they made the decision. This is informed by section 15 of the Electricity Regulation Act No. 4 of 2006 ("**ERA**") which provides:

"15. Tariff principles-

(1) A licence condition determined under section 14 relating to the setting or approval of prices, charges and tariffs and the regulation of revenues –

- (a) must enable **an efficient licensee to recover the full cost of its licensed activities, including a reasonable margin or return;***
- (b) must provide for or prescribe incentives for continued improvement of the technical and economic efficiency with which services are to be provided;*
- (c) must give end users proper information regarding the costs that their consumption imposes on the licensee's business;*
- (d) must avoid undue discrimination between customer categories; and*
- (e) may permit the cross-subsidy of tariffs to certain classes of customers.*

(2) A licensee may not charge a customer any other tariff and make use of provisions in agreements other than that determined or approved by the Regulator as part of its licensing conditions.

(3) Notwithstanding subsection (2), the Regulator may, in prescribed circumstances, approve a deviation from set or approved tariffs."

In terms of Section 15(1)(a) above and particularly the methodology employed by NERSA, we are of the view that Eskom's efficiency or lack thereof directly impacts on any tariff increase approved by NERSA.

In addition, one of the objectives of a tariff according to the Electricity Pricing Policy (EPP), is that *'Price levels should assume an efficient and prudent utility, in other words prices should be based on least cost options and exclude inefficiencies'*.

Before approving a tariff increase, NERSA should have assessed Eskom's operational and financial efficiency and prudence. Without this assessment, it is not possible for NERSA to have taken efficiency and prudence considerations into account before approving a tariff increase.

We are also of the view that when taking the decision, NERSA failed to take into account or apply its mind to fundamental issues impacting Eskom's **efficiency and prudence** as required by Section 15(1)(a) of ERA. The theme of SALGA's application is thus **efficiency and prudence**.

In its reasons for the tariff increase decision, there is no indication that NERSA conducted a prudence assessment taking into account the fraud, corruption, fruitless and wasteful expenditure at Eskom. Consequently, NERSA failed to consider these matters when making the decision and this renders NERSA's decision as irrational and demonstrates a failure by NERSA to properly apply its mind. Having not conducted prudence and efficiency assessment also amounts to a contravention of the Multi-Year Price Determination Methodology Four (MYPD4), the Electricity Regulation Act, and the Electricity Pricing Policy.

There are various other considerations that NERSA did not take into account, such as the impact of load-shedding, the impact of sales by Independent Power Producers ("**IPP's**") to Eskom in terms of the sales forecast, amongst others.

4. Progress to date

SALGA's urgent application against NERSA, Eskom and other stakeholders that the NERSA decision taken on 12 January 2023 is unconstitutional and should be reviewed and set aside, has been filed with the Registrar of the Pretoria Urgent High Court and issued on the 13th of March 2023 and has been served on all interested respondents.

The SALGA legal team led by Adv. EC Labuschagne, SC, and Adv. V Mabuza are further informed that the matter is currently under the judicial case management of Judge Davis, who will be attending to the hearing of the urgent application. A practice directive had been issued by the Honorable Court setting out the timelines for parties to file further documents.

The consolidated application is set down for hearing in the High Court of South Africa ,Gauteng Division, Pretoria on the 5th,8th, and 9th of May 2023.

For any further enquiries relating to this circular, please contact **Mr. George Thomas, Senior Manager: External Legal Advisory Services** via email gthomas@salga.org.za or on 071 792 9637.

Yours Sincerely,



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