
GENERAL NOTICE

NOTICE 3067 OF 2002

COMPETITION COMMISSION OF SOUTH AFRICA

**MEMORANDUM OF AGREEMENT ENTERED INTO BETWEEN THE COMPETITION
COMMISSION OF SOUTH AFRICA AND THE NATIONAL ELECTRICITY
REGULATOR**

(Effective from 28 October 2002)

Notice is hereby given that a Memorandum of Agreement (the "Agreement") has been concluded between the between the Competition Commission of South Africa (the "Commission") and The National Electricity (the "NER") as required in terms of the provisions of section 21(1)(h), read with sections 3(1A)(b) and 82(1), (2) and (3) of the Competition Act 89 of 1998, *as amended*.

This Notice is published in terms of section 82(3)(d) of the Competition Act 89 of 1998, *as amended*.

Copies may be obtained from the Government Printer or on the Competition Commission's Website <http://www.compcom.co.za>.

MEMORANDUM OF AGREEMENT

Entered Into between

THE COMPETITION COMMISSION
(Hereinafter referred to as "the Commission")

a juristic person established in terms of the provisions of section 19 of the Competition Act, 1998 (Act No. 89 of 1998), as amended, herein duly represented by Advocate Menzi Simelane, in his capacity as the Commissioner of the Competition Commission

and

THE NATIONAL ELECTRICITY REGULATOR
(Hereinafter referred to as "the NER")

a juristic person established in terms of section 2 of the Electricity Act, 1987 (Act No. 41 of 1987), herein duly represented by Dr Xolani Mkhwanazi in his capacity as the Chief Executive Officer of the National Electricity Regulator

WHEREAS-

The National Electricity Regulator is established in terms of section 2 of the Electricity Act, 41 of 1987 ("the Electricity Act") in order to, *inter alia*, regulate and control the supply of electricity in South Africa.

WHEREAS-

The Competition Commission is established in terms of the provisions of section 19 of the Competition Act No, 89 of 1998 ("the Competition Act") in order to, *inter alia*, investigate, control, and evaluate restrictive practices, abuse of dominant position, exemptions and mergers.

WHEREAS-

The Commission, in terms of the provisions of section 21(1)(h) read with sections 3(1A)(b) and 82(1), (2) and (3) of the Competition Act, has a responsibility to negotiate agreements with any regulatory authority according to which concurrent jurisdiction is exercised over competition matters within the relevant industry or sector, and to ensure the consistent application of the principles of the Competition Act.

AND WHEREAS-

The parties record that their respective areas of jurisdiction and/or concurrent jurisdiction will likely be impacted by changes being contemplated in the electricity supply industry. These changes envisage the introduction of competition in the generation sector, the establishment of a separate power exchange to facilitate such competition, and the creation of six regional electricity distributors to provide electricity to consumers. The parties agree that the content of this Agreement shall, on an ongoing basis, be reviewed to accommodate such developments.

THEREFORE, the parties now agree to conclude this Agreement as follows:

1. BASIS OF THIS AGREEMENT

- 1.1 This Agreement is entered into in order to establish the manner in which the parties will interact with each other in respect of the investigation, evaluation and analysis of merger transactions and complaints involving electricity licensees, other licensees, consumers and persons which are subject to the regulation and control of the NER.
- 1.2 This Agreement is entered into on the basis of mutual respect, in a spirit of goodwill and does not affect the independence of the two regulatory bodies hereto.

2. APPLICATION FOR APPROVAL IN RESPECT OF MERGER TRANSACTIONS

- 2.1 Where a transaction requires the approval of the Commission and the NER, the public shall submit separate and concurrent applications to the Commission (in accordance with the Competition Act) and to the NER (in accordance with the Electricity Act) for their respective consideration.
- 2.2 The Commission and the NER shall thereafter make independent determinations on the basis of the criteria and mandates of their respective legislations. In arriving at these determinations the Commission and the NER may consult with each other.
- 2.3 In the event of the Commission and the NER arriving at different determinations, the following process shall apply:
- 2.3.1 The Commission and the NER may discuss the matter in order to identify the reason(s) for the difference in determinations and whether such differences, if they pertain substantially to similar criteria used by both regulators on issues (e.g. definition of the market), could be resolved prior to the determinations being made public, for instance, by the imposition of certain conditions;

- 2.3.2 If the Commission and the NER reach an agreement following the course suggested in 2.3.1 above, the Commission and the NER shall make known their unanimous decision to the applicant(s) and the transaction shall be approved or disapproved accordingly;
- 2.3.3 If the difference in conclusion cannot be resolved following the course suggested in 2.3.1 above, the Commission and the NER shall make known their respective determinations and reasons for the decisions to the applicant(s);
- 2.3.4 If either the Commission and the NER does not approve the transaction, such transaction shall not be an approved transaction.
- 2.4 Where a transaction requires the approval of either the Commission or the NER, but not of both, the following shall apply:
- 2.4.1 The applicant seeking approval shall lodge the application with the regulator with jurisdiction.
- 2.4.2 If the NER is the regulator whose approval is required, it shall, if it is legally competent under its legislation to take into account considerations of competition, be entitled to liaise and consult with the Commission so as to ensure the consistent application of competition principles to the transaction in question.
- 2.4.3 The Commission shall be entitled to do likewise when its approval is required, and be entitled to consult with the NER on the regulatory aspects subject to the jurisdiction of the NER, in order to obtain the input of the NER on regulatory issues pertaining to the transaction.
- 2.5 In the circumstances contemplated in 2.4 above, the decision by the regulator exercising jurisdiction over the transaction to consult the other regulator, shall be discretionary and voluntary, and the regulator exercising jurisdiction shall, with or without consultation, make its independent decision.

- 2.6 In either of the circumstances set out in 2.1 or 2.4 above, the Commission and the NER may participate in each other's proceedings and may advise or receive advice from each other.
- 2.7 When the Commission and the NER consult each other as contemplated in 2.2 or 2.4.2 above, they shall do so at no cost to each other.
- 2.8 In either of the circumstances contemplated in 2.1 and 2.4, the Commission and the NER shall act as expeditiously as circumstances permit and shall each encourage the other party to achieve a timely response.

3. COMPLAINTS

- 3.1 Where a complaint is lodged about a practice in respect of which the Commission and the NER have concurrent jurisdiction, the following process shall be followed:
- 3.1.1 The regulator that receives the complaint ("the recipient regulator") shall ensure that the said complaint is made available to the other regulator;
- 3.1.2 The recipient regulator shall inform the complainant(s) that the matter will be discussed jointly by the Commission and the NER in terms of this Agreement;
- 3.1.3 The Commission and the NER shall consult with each other and evaluate the complaint in order to establish how the matter should be managed in terms of this Agreement;
- 3.1.4 The recipient regulator shall advise the complainant(s) within a period of sixty (60) days of the decision of the joint discussion between the Commission and the NER;

- 3.1.5 The recipient regulator shall give the complainant(s) further directions regarding the prosecution of the complaint in question;
- 3.1.6 In the event that the matter is dealt with by the Commission, persons from the NER will participate in the matter;
- 3.1.7 In the event that the matter is dealt with by the NER, persons from the Commission will participate in the matter.
- 3.2 If it is decided in the consultation process contemplated in 3.1.3 above that the NER will deal with the matter, the Commission shall issue a notice of non-referral in terms of section 50(2)(b) of the Competition Act and in instances where the Commission received the initial complaint, the complainant(s) shall not be precluded from pursuing the matter with the Competition Tribunal (established in terms of section 26 of the Act).
- 3.3 Nothing in the procedures contemplated in paragraph 3 shall detract from the jurisdiction of the Commission or the NER to receive and deal with complaints in terms of their enabling statute, or preclude the public from lodging complaints with both the Commission and the NER.
- 3.4 Where a complaint relates to a matter where either the Commission or the NER has jurisdiction, but there is no concurrent jurisdiction, the following shall apply:
- 3.4.1 The complaint must be lodged with the regulator that has jurisdiction;
- 3.4.2 If upon receiving a complaint, the regulator is of the view that it does not have jurisdiction over the matter, the regulator with whom the complaint is lodged shall advise the complainant(s) accordingly and recommend that the complainant(s) refer the complaint to the relevant regulator;
- 3.4.3 If the NER is the regulator that has jurisdiction, it shall, if it is legally competent under its legislation to take into account considerations of competition, be entitled to liaise and consult with the Commission so as to

ensure the consistent application of competition principles to the complaint in question;

- 3.4.4 The Commission shall be entitled to do likewise when it is the regulator with jurisdiction, and be entitled to consult with the NER on the regulatory aspects subject to the NER's jurisdiction in order to obtain the NER's input on regulatory issues pertaining to the complaint;
- 3.4.5 The Commission and the NER may, upon request from each other, participate in each other's proceedings in their advisory capacity.
- 3.5 In the circumstances contemplated in 3.8 above, the decision by the regulator exercising jurisdiction over the complaint to consult the other regulator, shall be discretionary and voluntary, and the regulator exercising jurisdiction shall, with or without consultation, make its independent decision.
- 3.6 When the Commission and the NER consult each other as contemplated in 3.3 or 3.8 above, they shall do so at no cost to each other.
- 3.7 In either of the circumstances contemplated in 3.3 and 3.8 above, the Commission and the NER shall act as expeditiously as circumstances permit and shall on both sides facilitate the other party to achieve a timely response.

4. ESTABLISHMENT OF JOINT WORKING COMMITTEE

- 4.1 A Joint Working Committee ("the Committee") constituted by representatives of the Commission and the NER as nominated by the regulators respectively, shall be established pursuant to this Agreement and shall function on an on-going basis.
- 4.2 Functions of the Committee shall include:
- 4.2.1 to manage and facilitate cooperation and consultation in respect of matters dealt with by each regulator in terms of this Agreement;

- 4.2.2 to propose, when necessary, any amendment of or supplementation to this Agreement;
- 4.2.3 to advise management of both the Commission and the NER on issues affecting competition in the electricity generation and supply sectors, as the case may be, and make recommendations on how to deal with same. Such advice shall be on, but not limited to, the following:
- 4.2.3.1 types of conduct or transactions affected by both the Competition Act and the Electricity Act in respect of which concurrent jurisdiction is to be exercised by the two regulators;
 - 4.2.3.2 international approach to issues of jurisdictional overlap between a competition authority and the electricity regulator;
 - 4.2.3.3 amendments to the relevant or applicable statutes that may be necessary from time to time; and
 - 4.2.3.4 any other related matter.

5. SHARING OF RESOURCES

The Commission and the NER may, under certain circumstances, share each other's available resources in order to bring the provisions of this Agreement into full effect; provided such a process is reasonable, shall not compromise the respective independence of the two institutions and does not contravene any statute with which the two parties must conform.

6. EXCHANGE OF INFORMATION

Subject to paragraph 7 below, the Commission and the NER may exchange such information as may be necessary to give effect to this Agreement.

7. CONFIDENTIALITY

- 7.1 Any information shared by the Commission and the NER pursuant to this Agreement shall be used only for lawful supervisory or statutory purposes.
- 7.2 Where confidential information has been submitted by the parties to the NER, the NER shall obtain permission from the parties who have lodged such confidential information with it, prior to such confidential information being disclosed to the Commission. The Commission shall ensure that the information accordingly disclosed to it remains confidential and is not placed in the public domain.
- 7.3 Where information has been submitted by the parties to the Commission, the Commission shall disclose such information in accordance with the provisions of section 69(2) of the Competition Act. The NER shall ensure that the information accordingly disclosed to it remains confidential and is not placed in the public domain.
- 7.4 To the extent permitted by law, the Commission and the NER shall hold confidential all information, including the information contemplated in Clauses 7.2 and 7.3 above, received from each other pursuant to this Agreement and shall not otherwise disclose such information than is necessary to carry out their regulatory or statutory responsibilities or otherwise in accordance with national law.
- 7.5 The Commission and the NER shall, prior to disclosing such confidential or a part thereof, consult each other for direction and advice on such disclosure.
- 7.6 The sharing of confidential information in accordance with this Agreement relies on the assurances given in Clauses 7.1, 7.2 and 7.3 above and shall not constitute a waiver of any legally recognisable privilege by any person other than the parties to this Agreement.

- 7.7 The Commission and the NER, in providing confidential written material pursuant to this Agreement, shall mark every page of the material provided with a legend reading as follows:

"CONFIDENTIAL - PROVIDED PURSUANT TO THE COMPETITION COMMISSION / NATIONAL ELECTRICITY REGULATOR AGREEMENT"

- 7.8 Where confidential information is made available by either the Commission or the NER in contravention of Clause 7 above, such disclosing party shall be solely liable in law for such disclosure.

8. GENERAL PROVISIONS

- 8.1 The provision of, or request for, information under this Agreement may be denied:

8.1.1 where compliance would require the Commission or NER to act in a manner that would violate the applicable law;

8.1.2 under circumstances where there is an imminent risk to national security;
or

8.1.3 when compliance with a request or provision of information would interfere with an ongoing investigation in circumstances where prejudice to the investigation is likely to outweigh the adverse effects of denying the information.

- 8.2 No provision of this Agreement shall give rise to the right on the part of any person, entity or government authority other than the Commission and the NER, or other competition authorities, directly or indirectly, to obtain any information or to challenge the execution of a request for information under this Agreement.

8.3 The provisions set forth under clauses 7 and 8 shall prevail with respect to any information provided or actions taken under this Agreement prior to its termination.

8.4 The two regulators shall consult each other before either of them issues a media release concerning a transaction covered by this Agreement

9. VARIATION OF THE AGREEMENT

Any variation of this Agreement shall have no legal effect and shall not be binding on the parties unless reduced to writing and signed by persons authorised to act on behalf of both the parties.

10. EFFECTIVE DATE OF THE AGREEMENT

This Agreement shall come into force on the date on which it is signed by persons authorised to act on behalf of both the parties.

11. DURATION OF THE AGREEMENT

This Agreement shall remain in force until it is changed or repealed by both parties hereto, acting jointly.

12. DOMICILIM CITANDI ET EXECUTANDI

The parties choose the following addresses as their respective domicilium citandi et executandi for purposes of this Agreement:

THE COMPETITION COMMISSION
BUILDING B
GLENFIELD OFFICE PARK
CORNER OBERON AND GLENWOOD ROADS
FAERIE GLEN
PRETORIA EAST
0043
CONTACT PERSON: **MS ZODWA NTULI**

THE NATIONAL ELECTRICITY REGULATOR
KULAWULA HOUSE
526 VERMUELEN STREET
ARCADIA
PRETORIA
CONTACT PERSON: **MS RIZIA BUCKAS**

13 PUBLICATION

This Agreement shall be published in the Gazette for public information as soon as it has been signed.
