

***In the Dark:***

*The Licensing Provisions in the Electricity Regulation Act as they Relate to Small Scale Electricity Generation.*

**THE RISE OF THE SOLAR PANEL**

Until relatively recently, announcing that you were considering “going off the grid” may have conjured up images of a reclusive lifestyle replete with tinfoil hats and tie-dyed clothing. Now, rising electricity prices, an increase in the availability of alternative energy options and the ever-present threat of load-shedding has led to many South Africans supplementing their residential and even commercial electricity supply with generators and photovoltaic (solar) systems.

At first glance, the advantages of turning to alternative energy generation systems certainly seem to outweigh the effort it would take to install these systems. Not only do South Africa’s sunny skies seem well suited to photovoltaic generation options but, according to the Council for Scientific Industrial Research, the past five years have seen the price of these systems decrease by 70-80%, while retail electricity tariffs have risen by 130-150%. However, as will be discussed below, many people are unaware of the onerous licensing requirements for the generation of electricity and the uncertainty regarding the applicability of the aforesaid requirements to certain types of small scale generation systems.

**LEGISLATIVE LACUNAE**

The Electricity Regulation Act 4 of 2006 (“the Act”), defines the generation of electricity as the production of electricity by any means. Section 7 of the Act makes it a requirement for any person operating a generation facility, importing or exporting electricity or involved in trading to obtain a licence from the National Energy Regulator of South Africa (“NERSA”).

The only exemptions to the requirement to hold a licence are contained in Schedule 2 of the Act and are both broad and unqualified. They are the following:-

1. *“Any generation plant constructed and operated for demonstration purposes only and not connected to an interconnected power supply*
2. *Any generation plant constructed and operated for own use*
3. *Non-grid connected supply of electricity except for commercial use”*

A cursory glance at the three exceptions could lead a layperson to assume that the generation facility that they are using to power their work space during load-shedding does not require a licence because it is for “own use”, or because they do not consider it to be “grid connected”. However, unpacking the latter two exemptions becomes problematic due to the fact that Act does not define the terms “plant”, “commercial use”, “own use” or grid connectivity.

#### **THE SECOND EXEMPTION: “OWN USE”**

Assumptions can be made, in the absence of clear legislative guidance, regarding some of the undefined terms in the exemptions. For example, one could read “plant” as being synonymous with “generation facility” (which although not defined in the Act, is referred to in section 7) and therefore conclude that the size and capacity of the facility is irrelevant; the paramount question being whether it produces electricity by any means.

However, the term “own use”, or a synonym thereof, is not mentioned anywhere else in the Act and the unqualified nature of the exemption does not allow for extrapolation through context.

This ambiguity gives rise to a host of questions, including whether:-

1. “own use” and commercial activity are necessarily mutually exclusive concepts (what if, for example, you use the generation facility to power your small business and adjust the price of your services accordingly?);
2. the use of a generation facility that is leased by one person to another (even if it were used for the latter’s personal use) would be considered to be “own use”, given that the person using the electricity would not be the owner of the facility?; and

3. generation facilities for “own use” can be grid-connected and still fall under the second exemption.

Grid-tied systems, the most popular of solar photovoltaic systems, are those that are connected to the utility’s network allowing their operators to alternate between the municipal electricity generation system and the photovoltaic generation facility. Power generation under 1MW that is connected to the utility network is known as Small Scale Energy Generation (“SSEG”). Due to their grid connectivity, these types of systems are probably excluded from the third exemption (see below) but, as it stands, it is unclear as to whether they could still fall under the second exemption. In this regard the City of Cape Town’s Guidelines for Embedded Generation (published on 20 July 2015) note that:-

*“Clarity is still required whether feeding surplus generation back onto the utility grid and then drawing the same amount of electricity off the grid at a later stage for consumption is regarded as being “generation for own use”. In the absence of this clarity, the City will not require SSEG’s (sic.) smaller than 1 MVA to obtain such a license provided that, over any consecutive 12-month period, they do not feed more electricity onto the City’s grid than they purchase from the City.”*

This seemingly contradicts NERSA’s views in its consultation paper entitled “Small-Scale Embedded Generation: Regulatory Rules”, published on 25 February 2015 (“the consultation paper”) which states that even zero or net consumption customers must be licensed or registered, due to connection to the grid.

#### **THE THIRD EXEMPTION: GRID CONNECTIVITY AND “COMMERCIAL USE”**

The third exemption allows non-licensed “[n]on-grid connected supply of electricity except for commercial use”. “Supply” is defined in the Act as the “trading and the generation, transmission or distribution of electricity”. Therefore, a strict approach could lead one to interpret this exemption to read that a plant need not be licensed if it was operated for the “non-grid connected trading and generation of electricity except for commercial use.”

This is nonsensical unless one understands “trading” to be separate and distinct from “commercial use”. If this is the case, then what is “commercial use” and how does it differ from “trading”, which in turn is defined in the Act as “the buying or selling of energy as a commercial activity”? The lack of clarity regarding what would constitute commercial use is especially problematic for businesses that wish to rent non-grid connected generation facilities and pay a consumption charge based on the usage thereof.

## **PENALTY PROVISIONS**

In addition to the legislative lacunae discussed above, it seems as though the Act, while not a paper tiger, is missing some teeth in that it does not clearly indicate what penalties a person might face should they not apply for and obtain a licence, despite being required to do so under the Act.

In terms of section 18 of the Act, which is entitled “Contraventions of licence”, the Regulator can impose fines of 10% of a licensee’s annual turnover or R2 000 000,00 (whichever is the *higher* amount) per day, commencing on the day of the receipt of the notice from the Regulator directing compliance with the Act or licence provision. Surprisingly this section, and the exceedingly harsh penalties it provides for, only applies to the holders of a licence granted under the Act and not to unlicensed persons who are contravening the Act’s licensing provisions.

Similarly, section 32, which deals with investigations by the Regulator, refers to the investigation of complaints involving licensees but not unlicensed persons. Section 4 (a) (vii) does state that the Regulator must enforce performance and compliance, and take appropriate steps in the case of non-compliance, however it fails to specify what these steps might be and what form his enforcement should take.

## **CURRENT DEVELOPMENTS**

The uncertainty surrounding the licensing of in particular is not only problematic for the South African public; but is also a concern for NERSA.

According to the draft version of the consultation paper, the increase in photovoltaic systems may lead to “revenue erosion” as customers stop purchasing electricity from their municipality. This in

turn will have a knock-on effect since municipal electricity revenue is used to cross-subsidise other municipal services and cover the losses inherent in providing electricity to poorer households.

Furthermore, the final version of the consultation paper notes that:-

*“Due to the envisaged high volumes of solar rooftop installations, the licensing of small-scale embedded PV generators ... may be a burden to the applicants who have little resources and may put constraints on NERSA.”*

It proposes, as a solution to the above problem, that systems that generate less than 1MW be registered with it via an application to Eskom or the municipal service provider.

On 19 May 2015, the Minister for Energy announced that she had finalised all processes (including the incorporation of public comments) to introduce amendments to the Electricity Regulation Second Amendment Bill (“the Bill”). While the current content of the Bill is unknown, the version of the Bill on the Department’s website introduces a definition for “own use” which excludes the sale of energy as well as the transmission of energy through a transmission power system, or distribution through an interconnected distribution power system, from being regarded as being generation for own use.

Interestingly the proposed definition also allows for the facility to be either owned or operated for own use, potentially allowing the non-licensed leasing of such facilities to “operators”, provided that they comply with the remainder of the definition. Furthermore, the Bill attempts to remedy the uncertainty regarding how unlicensed activity will be dealt with by stating that the Regulator may direct any person who is engaged in an activity requiring a licence in terms of the Act, but who is not in possession of the said licence, to cease such activity.

However, since it is uncertain as to when (if ever) the Bill will become law, the above comments on its provisions are of academic interest only and, given the uncertain regulatory and legislative landscape, it seems as though small scale generation facility owners will remain in the dark regarding the current licensing provisions, pending further developments.

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