

DATED 27 SEPTEMBER 2022

**LEGAL REPORT
FOR
LEGAL FRAMEWORK APPLICABLE TO
EMBEDDED GENERATION IN SOUTH AFRICAN
MUNICIPALITIES**



Pinsent Masons

INTRODUCTION AND TERMS OF REFERENCE

1. INTRODUCTION

- 1.1 This "**LEGAL REPORT FOR LEGAL FRAMEWORK APPLICABLE TO EMBEDDED GENERATION IN SOUTH AFRICAN MUNICIPALITIES**", dated as of 27 September 2022 (this "**Report**") has been prepared by Pinsent Masons Africa LLP together with specialist local counsel (collectively, "**Counsel**", "**us**" or "**we**") who have been engaged by Sustainable Energy Africa NPC ("**SEA**") in connection with the preparation of this Report in order to assess various legal and regulatory issues pertaining to the municipal legal framework applicable to embedded generation ("**EG**").
- 1.2 We confirm that we have been requested to issue this Report in order to address the following:-
- 1.2.1 The obligations of a distributor to connect a generator to the network, and circumstances under which such connection may be refused.
- 1.2.2 What legislation compels a generator to obtain permission from a distributor, if any?
- 1.2.3 Ensuring compliance with municipal requirements and policy is legally binding, including:
- (a) Contract(s) needed, including Connection Agreements, Electricity Supply Contracts and Supplemental Contracts.
 - (b) By-law amendments needed.
 - (c) Noting whether official council approval of a policy/requirements document has legal standing.
- 1.2.4 Under which circumstances a section 34 determination is needed, including:
- (a) Municipal procurement from an IPP.
 - (b) Municipal PPP with an IPP.
 - (c) Municipal own generation establishment.
 - (d) If a section 34 determination is considered necessary in any of the above cases, will the generator need a licence because of requiring such a determination, or will it remain licence exempt because of the provisions of Schedule 2?
- 1.2.5 Net consumers, net generators and export credits:
- (a) Is it legally sound to apply export credits?
 - (b) What constraints Schedule 2, the MFMA, the MSA or other legislation place on embedded generation regarding net generation, and on export credits that may be applied, and up to what limits (for example a 'net-spend' on the prosumer's energy account).
 - (c) Does the fact that NERSA has approved numerous export tariffs affect how the above cases are seen with respect to the MFMA?
 - (d) Can a 'pure generator' (i.e. no self-consumption) export power in terms of Schedule 2 and qualify for export credits?

- 1.2.6 Legally sound options regarding commissioning signoff, including:
- (a) Where and whether ECSA registered persons or other competent persons (such as those with industry accreditation e.g. PV GreenCard) should be involved. It should be noted that SANS10142-1-2 has been developed and released, and subsequently withdrawn. Given that the timeframe for its reinstatement is uncertain, the opinion on commissioning signoff requirements should consider both the scenario where it is not in place, and where it is in place, and specifically how its official release will change ECSA or other competent person commissioning signoff requirements.
 - (b) Is any commission signoff needed given that municipal requirements can be made legally binding and various Connection and Supplemental Contracts entered into?
- 1.2.7 Change of ownership e.g. selling of property with an EG – what is required to transfer responsibility and liability to someone else? (see Annex B of the municipal 'Requirements' document for current transfer practice).
- 1.2.8 Are municipal distributors obliged to wait for NERSA 'approval of registration' for systems between 100 kVA and 100 MW before issuing permission to install and accepting generators onto their networks?

1.3 This Report has been prepared solely for the benefit of SEA. This Report or any part thereof is not to be disclosed or provided, directly or indirectly, to any other party without the express written consent of Counsel.

1.4 This Report constitutes an overview of various aspects of the South African legal system and is not, in and of itself, legal advice. To the extent that SEA requires specific legal advice in relation to any matter covered in this Report or otherwise, we would be happy to provide that advice at the appropriate time.

1.5 We will not, under any circumstances whatsoever, be liable to any person for any loss or damage, whether direct or indirect, resulting from and/or arising out of reliance on any information contained in this Report and any warranties as to the completeness, reliability and accuracy of the information provided in this Report are expressly disclaimed.

2. **SCOPE OF OUR REVIEW**

2.1 In this Report we have endeavoured to provide a summary of the key legal framework in order to establish what conditions and procedures relating to the connection and operation of EG facilities are required to provide municipalities with reasonable legal security that these systems comply with the necessary technical and legal requirements while minimising any disincentives for prospective EG customers and the EG industry that such requirements may pose in South Africa and address specific issues detailed in paragraphs 1.2.1 to 1.2.8 above.

2.2 Unless specified otherwise or defined herein, all capitalised terms used herein shall bear the meaning ascribed thereto in the Glossary of this Report.

2.3 In this Report, we have preliminarily examined and discussed the key legal and regulatory aspects relating to EG facilities in South African municipalities as at the date of this Report. This Report is not to be considered exhaustive for the purposes of regulatory evaluation. Instead, this Report aims to serve as a starting point for an initial understanding of some of the key aspects of the relevant regulatory framework relating to EG facilities in municipalities in South Africa.

2.4 This Report is designed to only be a part of the overall due diligence process in respect of EG in South African municipalities which a prudent investor would wish to undertake and

to which it must bring its own expertise and knowledge. There is no guarantee that our review procedures will result in the identification of all matters which may be of interest to such investors, and they should be seen as forming only part of wider commercial due diligence enquiries.

2.5 We have examined various enactments as listed in this Report. Each of these enactments confers rule-making powers and the power to issue notifications. These enactments, rules and notifications are amended from time to time. There is no reliable compilation of these enactments, rules and notifications, and the same are published in various official gazettes. To the extent practical, and considering the broad scope of this Report, we have endeavoured to satisfy ourselves that we have reviewed all the relevant enactments, rules and notifications and amendments thereof, however, the possibility of us having overlooked an enactment, rule, notification or amendment thereof remains.

2.6 This Report is not a comprehensive or formal legal opinion concerning any matter referred to in it. This Report should not be treated as a substitute for specific legal advice concerning individual contracts, arrangements or circumstances.

3. **EFFECTIVE DATE OF REPORT**

The contents of this Report reflect the position as known to us as at 27 September 2022 and may not be relied upon or regarded as reporting at any subsequent date or time. We will not update this Report unless specifically asked to do so.

Emma Roberts
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GLOSSARY

"By-law Amendment"	means the amendments made by municipalities to amend their electricity by-law to reflect various requirements of EG installations
"Code"	means the South African Distribution Network Code, the South African Transmission Network Code or any other similar code approved by NERSA, unless indicated otherwise
"Constitution"	means the Constitution of the Republic of South Africa, 1996
"Council Approval"	means the approval and adoption of an EG 'requirements' document which typically contains a range of requirements for EG facilities which is considered adequate to give the document a legally binding status
"EG Policy"	means the council approval and adoption of an EG 'requirements' document
"EG Requirements"	means a range of requirements for EG facilities
"Electrical Installation Regulations"	means the Electrical Installation Regulations, 2009 issued in terms of the OHS Act
"EPP"	means the Electricity Pricing Policy
"ERA"	means the Electricity Regulation Act No. 4 of 2006
"Eskom"	means Eskom Holdings SOC Limited
"Governance Code"	means the South African Distribution Code: Governance Code Version 6.1 of August 2019 issued by NERSA
"Government"	means the Government of the Republic of South Africa, and any of its departments, agencies or other entities that it manages and controls
"IDP"	means the Integrated Development Plan, as contemplated in section 25 of the Municipal Systems Act
"IPPs"	means independent power producers
"IRP"	means Integrated Resource Plan
"IRP2019"	means Integrated Resource Plan (2019 – 2030): GN 1360 of 18 October 2019: Integrated Resource Plan (IRP2019) – October 2019 (Government Gazette No. 42784)
"MFMA"	means the Municipal Finance Management Act No. 56 of 2003
"Minister"	means the Minister of Mineral Resources and Energy
"MSA"	means the Local Government: Municipal Systems Act No. 32 of 2000
"Municipal Structures Act"	means the Local Government: Municipal Structures Act No. 117 of 1998
"NERSA"	means the National Energy Regulator of South Africa, a regulatory authority established in terms of section 3 of the NERA

"New Generation Regulations"	means GNR. 399 of 4 May 2011: Electricity Regulations on New Generation Capacity (Government Gazette No. 34262) as amended by Government Notice No. R. 1366 published in Government Gazette No. 40401 of 4 November 2016 and as amended by Government Notice No. 1093. published in Government Gazette No. 43810 of 16 October 2020
"OHSA"	means the Occupational Health and Safety Act 85 of 1993
"Schedule 2"	means Schedule 2 to the ERA, being the amended Licensing Exemption and Registration Notice published in Government Gazette No. 45266, Vol. 676 (5 October 2021)
"section 34 determination"	means a determination issued by the Minister in terms of section 34 of the ERA
"South Africa"	means the Republic of South Africa
"Supplemental Contracts"	means an additional contract to the existing Electricity Supply Contract

1. OBLIGATIONS OF A DISTRIBUTOR TO CONNECT A GENERATOR TO THE NETWORK

Question: The obligations of a distributor to connect a generator to the network, and circumstances under which such connection may be refused

1.1 MSA

- 1.1.1 The MSA provides that a municipality is an organ of state within the local sphere of Government exercising legislative and executive authority within an area determined in terms of the Local Government: Municipal Demarcation Act.¹
- 1.1.2 The MSA² establishes that a municipality has all the functions and powers conferred by or assigned to it in terms of the Constitution and must exercise those powers subject to chapter 5³ of the Municipal Structures Act⁴. Section 83 of the Municipal Structures Act refers to the functions and powers of a municipality as being those assigned to it in terms of sections 156 and 229 of the Constitution.
- 1.1.3 The Constitution empowers a municipality with the executive authority and the right to administer certain local Government matters⁵ and any other matter assigned to it by national or provincial legislation.⁶ In terms of section 156(1) of the Constitution these matters are listed in Part B of Schedule 4 and Part B of Schedule 5 of the Constitution.
- 1.1.4 The Constitution provides in section 155(6)(a) and (7) and Schedule 4B that electricity reticulation is a municipal competency. This means that a municipality is responsible for providing electricity reticulation services to the customers within its jurisdiction.
- 1.1.5 Reticulation is defined under the ERA as "*trading or distribution of electricity and includes services associated therewith.*" Distribution of electricity is defined in the ERA as "*the conveyance of electricity through a distribution power system excluding trading, and "distribute" and "distributing" have corresponding meanings.*"
- 1.1.6 The electricity reticulation function extends to the obligation on municipalities as licensed distributors to provide open and non-discriminatory access to the municipal distribution system. Accordingly, its electricity reticulation function includes, *inter alia*, administering the connection of generation systems to the municipal distribution system.
- 1.1.7 Accordingly, a municipality has the executive constitutional authority to undertake the reticulation of electricity in its jurisdiction and any services associated therewith, which would include providing access to the distribution system.
- 1.1.8 In terms of section 156(5) of the Constitution, a municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions. Electricity reticulation is one of the functions administered by local Government.⁷

1.2 Municipal Executive Authority

- 1.2.1 One of the objectives of the ERA is to regulate the reticulation of electricity by municipalities. In terms of section 1 of the ERA, a municipality is defined as a category of municipality that has executive authority over and the right to reticulate electricity within its area of jurisdiction in terms of the MSA. Accordingly,

¹ Act 27 of 1998.

² At section 8 of the Municipal Systems Act.

³ Chapter 5 of the Municipal System Act deals with Integrated Development Planning.

⁴ Act 117 of 1998.

⁵ In terms of section 156(4), national and provincial government may assign Part A matters to a municipality under certain circumstances.

⁶ Pursuant to sections 99, 126 and 156(4) of the Constitution, a Cabinet member or member of the provincial Executive Council, as the case may be, may assign any power or function that is to be exercised or performed in terms of an Act of Parliament or a provincial Act, to a Municipal Council. An assignment must be in terms of an agreement between the relevant Executive Council member, Cabinet Member, and the Municipal Council; consistent with the Act in terms of which the relevant power or function is exercised or performed; and takes effect upon proclamation by the President or Premier.

⁷ Section 156(1)(a) of the Constitution.

in performing its reticulation services, a municipality is subject to the provisions of the ERA. In order to distribute electricity, each municipality is required to hold a licence for the operation of a distribution facility as required in terms of section 7 of the ERA. In terms of section 22 of the ERA, municipalities (as a licensee) may not discriminate between customers or classes of customers regarding access, tariffs, prices and conditions of service, except for objectively justifiable and identifiable differences approved by NERSA.⁸ Such differences will be approved in terms of conditions to the licence or pursuant to any rule, code or practice made by NERSA. For example, a licensee may refuse to grant access to the distribution power system in circumstances where a licensee has failed to make payment of amounts due and payable for the service or where there are health and safety concerns.

1.2.2 In terms of section 22(3) of the ERA, a licensee must, to the extent provided for in the licence, provide non-discriminatory access to the transmission and distribution power systems. In Section 22(2) and (3) of the ERA must be read together with section 22(4) of the ERA that provides that access must be provided on the conditions set out in the licence of such transmitter or distributor, that may relate to -

- (a) the circumstances under which access must be allowed;
- (b) the circumstances under which access may be refused;
- (c) the strengthening or upgrading of the transmission or distribution power system in order to provide for access, including contributions towards such upgrading by the potential users of such systems, if applicable;
- (d) the rights and obligations of other existing or new users regarding the use of such power systems;
- (e) compliance with any rule, code or practice made by the Regulator; or
- (f) the fees that may be charged by a licensee for the use of such power system.

1.2.3 Further, section 27 of the ERA provides that each municipality must exercise its executive authority and perform its duties by, *inter alia*:-

- (a) complying with all the technical and operational requirements for electricity networks determined by NERSA;
- (b) integrating its reticulation services with its integrated development plans;
- (c) progressively ensuring access to at least basic reticulation services through appropriate investments in its electricity infrastructure;
- (d) providing basic reticulation services free of charge or at a minimum cost to certain classes of end users within its available resources;
- (e) ensuring sustainable reticulation services through effective and efficient management and adherence to the national norms and standards contemplated in section 35 of the ERA; and
- (f) executing its reticulation function in accordance with relevant national energy policies.

⁸ In terms of section 15(1) of the ERA, a licensed distributor may permit the cross-subsidy of tariffs to certain classes of customers which is considered permitted discrimination on justifiable grounds

- 1.2.4 The Distribution Code is applicable to all users of the distribution system including distributors, which would include a municipality as a licensed distributor for the purpose of the Distribution Code. As a licensed distributor, there are provisions in the distribution licence itself that require the distributor to comply with all codes, laws and other applicable regulations.
- 1.2.5 Paragraph 3.2 of the Distribution Code states that:-
- (a) upon receipt of the application for connection to the distribution system, the distributor shall advise whether the applicant can be connected to the existing system and / or what technical improvements are required to enable the new connection;
 - (b) the distributor shall provide an offer to connect and if accepted by the customer⁹, both parties shall enter into a connection agreement which shall include information such as project planning data, inspection, testing and commissioning programs, electrical diagrams and any other information the distributor may deem necessary to proceed with the processing of the application for connection; and
 - (c) if the application for connection has been declined, the distributor shall advise the customer on the alternative options available for connection to make the connection successful.
- 1.2.6 The Distribution Code provides that the municipality is obliged to provide reasons for declining an application for connection insofar as the municipality must provide an applicant with the technical information and improvements required to connect their system and of the alternative options available to rectify an unsuccessful application.
- 1.2.7 Paragraph 4 of the Distribution Code sets out the responsibilities of distributors and stipulates in paragraph 4(1) that the distributor "*shall make capacity available on its networks and provide open and non-discriminatory access for the use of this capacity to all customers including embedded generators.*".
- 1.2.8 Each distributor is required in terms of paragraph 4(2) of the Distribution Code to make available to the customers the "Customer Connection Information Guide" which shall cover as a minimum:-
- (a) the process to follow when applying for supply at the specific distributor;
 - (b) information requirements of the Distributor from the customer to effect an appropriate connection; and
 - (c) the process and related timeframes which follow the application.
- 1.2.9 Paragraph 8.2 details additional responsibilities for distributors and provides in paragraph 8.2(2) that "*the distributor shall treat all applications for connection to the distribution system by potential embedded generators in an open and transparent manner that ensures equal treatment for all applicants*".
- 1.2.10 Accordingly, subject to the applicable conditions contained in its distribution and/or transmission licence and provided that the third party has complied with its obligations under law in terms of the ERA and the distribution licences issued to the network owners (both Eskom and the relevant municipalities), distributors are obliged to provide non-discriminatory access to their transmission and distribution power systems to third parties. If the distributor is unable to provide

⁹ "Customer" is defined in the Distribution Code as, "A person or legal entity that has entered into an agreement with a Distributor for the provision of distribution services. An entity may be an Embedded Generator, another Distributor, an end-use customer (including generators), and international customer, a retailer or a reseller."

access to the network at the point of connection applied for, the distributor has to advise the customer of an alternative options available, which includes increasing the capacity of an existing connection. Accordingly, a distributor may decline an application to connect to the network on the basis that there is no available capacity at the chosen point of connection, however the distributor has to provide alternative available options in order to ensure non-discriminatory access to the network.

- 1.2.11 There is unfortunately nothing that in law that regulates the process when there are two competing applications that have both applied for competing grid connections and whether or not this is on a first come first serve basis. It is important to note that in terms of the Distribution Code, the distributor is obliged to *“treat all applications for connection to the Distribution System by potential Embedded Generators in an open and transparent manner that ensures equal treatment for all applicants”* which would be dependent on the circumstances as at the time.

1.3 **Distributor Refusal to Connect Generator to Network – grounds, process and recourse**

- 1.3.1 If an EG Policy is in place, it must be perused in detail to consider what rights and remedies are available to an EG to connect to the network, where a municipality has refused access to the network. Any such policy has to comply with the provisions of the ERA and the Distribution Code.
- 1.3.2 A licensee may not discriminate between customers and as stated in paragraph 1.2.1 of the Report. Access must be provided on the conditions set out in the licence of such transmitter or distributor.
- 1.3.3 Licensed distributors may not refuse to permit an EG facility to connect to the network provided the network access would not violate any technical and safety requirements as set out in the relevant grid codes, licence conditions and tariff schedules.¹⁰
- 1.3.4 In accordance with paragraph 1.2.1 above, a municipality’s electricity reticulation function includes, *inter alia*, administering the connection of generation systems to the municipal distribution system. If an application for connection is denied by a municipality, the relevant municipality must adhere to the procedure contemplated in paragraph 1.2.5(a) above.
- 1.3.5 The authorised person as per the policy in place is required to provide reasons for any refusal to connect to the distribution system and, to the extent that the connection has been declined, is obliged to advise the customer on the alternative options available for connection to make the connection successful. Thus, the policy document will prescribe the next steps should access to the network be refused and the proper process of providing reasons not been followed.

¹⁰ Wheeling Discussion Paper, available at https://www.cityenergy.org.za/wp-content/uploads/2021/02/resource_501.pdf.

1.3.6 In the event that a distributor declines to approve an application for connection to the grid, the following remedies are available:-

(a) Paragraph 3.2 (4) and 3.2 (5) of the Distribution Code states that:-

"3.2(4) If the application for connection has been declined, the Distributor shall advise the customer on the alternative options available for connection to make the connection successful.

(5) If the customer and the Distributor cannot reach an agreement on the proposed connection, a dispute resolution process as outlined in the Governance Code will be followed by the parties"

1.3.7 In accordance with the Governance Code, the dispute mechanism requires the customer to first submit an incident report to the service provider as to a breach of the Code and the service provider is afforded an opportunity to respond with a reasonable explanation and if appropriate, indicate what action it will take to address the problem. If the dispute cannot be resolved, the dispute may then be submitted to NERSA requesting either mediation or arbitration by NERSA. If a party believes that a licensed distributor is not complying with the conditions of its licence by unduly denying the party access to the distribution system (i.e. failure to approve the connection of the EG facility to the distribution system), then the party may refer the matter to NERSA for resolution in terms of section 19 of the ERA.

1.4 **Conclusion**

1.4.1 The laws, regulations and codes referenced in this section of the Report clearly set out the duty that licensed distributors have in relation to allowing access to the distribution system and the circumstances under which such access may be refused.

1.4.2 Licensed distributors have an obligation to allow access to generators in connecting their systems to the network and may not refuse to permit an EG facility to connect to the network provided the network access would not violate any technical and safety requirements as set out in the relevant grid codes, licence conditions and tariff schedules.

1.4.3 If the licensed distributor is unable to provide access to the network at the point of connection applied for, it must provide reasons and advise the customer of an alternative options available, which includes increasing the capacity of an existing connection. Accordingly, a distributor may decline an application to connect to the network on the basis that there is no available capacity at the chosen point of connection, however the distributor has to provide alternative available options in order to ensure non-discriminatory access to the network.

1.4.4 If the customer and the licensed distributor cannot reach an agreement on the proposed connection, a dispute resolution process as outlined in the Governance Code will be followed by the parties.

1.4.5 It is recommended that an EG Policy should detail the rights and remedies that are available to an EG to connect to the network and the circumstances where a municipality has refused access to the network in compliance with the provisions of the ERA and the Distribution Code.

2. LEGISLATION: GENERATOR OBTAINING PERMISSION FROM DISTRIBUTOR

Question: What legislation compels a generator to obtain permission from a distributor, if any?

2.1 Legislation and Distribution Code

2.1.1 The Constitution confers powers and functions on the national, provincial and local spheres of Government and provides that one sphere of Government may not assume a power or function conferred on another sphere.¹¹ With reference to municipalities, the Constitution states that:

*"A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution."*¹²

2.1.2 The Distribution Code is applicable to all users of the distribution system including distributors, EGs, end-use customers and any other entities with equipment connected to the distribution system. We note that municipalities are licensed distributors for the purpose of the Distribution Code. Paragraph 4.4 of the Distribution Code states that the generator must enter into a connection agreement with the licensed distributor before any actual connection to the distribution system can take place. Any generator that intends on connecting to the distribution system must lodge an application to connect to the distribution system with the relevant licensed distributor. The application for such approval shall be made in writing and shall include a full specification of the equipment and a wiring diagram. The electricity generation equipment should also be designed and installed such that there are protections safeguarding against any unintended back energisation from such equipment.

2.1.3 The Distribution Code refers to NRS047 (electricity supply quality of service) with regards to the response time that a licensed Distributor will need to adhere to for connection requests. In this regard NRS047 provides that *"The Distributor shall respond to the customer's request to connect within the period specified in NRS047"*.

2.1.4 NRS047 Section 2 titled "Processing Requests for Supply", specifies the following response timelines in the event that existing infrastructure can be used:-

- (a) in the case of providing a quotation to customers regarding a connection (NRS047, 4.2.2), within 10 working days; and
- (b) in the case of provision of a (new) connection and supply (NRS047, 4.2.3), within 30 working days.

2.1.5 It is important to note that although there is an obligation on municipalities to establish timeframes for the application process in terms of the Distribution Code, there are no minimum prescribed timelines by which a licensed distributor is obligated to respond under the Distribution Code. The timeframe will be established in terms of the relevant policy documents governing the connection process having regard to the principles outlined in the NRS047 to the extent applicable¹³. This has to be considered against the licence conditions imposed on municipalities under their distribution licence that requires them to provide non-discriminatory access to the distribution system and to avoid unnecessary administrative delays.

¹¹ Section 41(1)(f) of the Constitution.

¹² Section 151(3) of the Constitution.

¹³It should be noted that the NRS047 is better suited to requests for supply of electricity than to a generator requesting to connect to the network.

2.2 Municipal By-Laws and Guideline Policies

- 2.2.1 Municipalities should adopt a by-law and a guideline policy to effectively administer the connection of EGs to the municipal distribution system requirements and application process for connecting all forms of EG. The purpose of the policy is to provide guidelines to be followed by customers in applying to the municipality for connection of an EG facility to the municipal distribution system. However, the policy itself cannot impose the same legal obligations on the customers as created by by-laws. Therefore, the policy should be regulated and enforced through a by-law, being the instrument used by mandated municipalities to exercise their legislative authority over electricity services.
- 2.2.2 In terms of the ERA, generators are entitled to wheel electricity generated by an EG facility through the municipal distribution system. The by-law should regulate the wheeling of the electricity generated by an EG facility within the municipal electrical grid.
- 2.2.3 As a licensed distributor, there will also be provisions in the distribution licence itself that require the distributor to comply with all codes, laws and other applicable regulations that have to be considered on a case by case basis. In exchange for the services set out in the Distribution Code, the Distributor is entitled to a fair compensation through electricity tariffs. Paragraph 3.2 of the Distribution Code sets out the procedure that a licensed distributor must adhere to upon receipt from a customer of an application for connection to the distribution system as set out above in paragraph 1.2.5.
- 2.2.4 The Distribution Code is a national standard which, according to section 27 of the ERA, must be adhered to by a municipality in exercising its municipal functions.
- 2.2.5 Further, pursuant to section 35 of the ERA, NERSA has published the Grid Connection Code for Renewable Power Plants ("**RPP**") connected to the electricity Transmission System ("**TS**") or the Distribution System ("**DS**") in South Africa ("**RPP Code**"). The primary objective of the RPP Code is to specify minimum technical and design grid connection requirements for RPPs connected to or seeking connection to the South African electricity transmission system or distribution system. The RPP Code states that it shall be used together with other applicable requirements of the code such as the South African Grid Code as compliance criteria for RPPs connected to the TS and the DS.
- 2.2.6 Paragraph 4 of the Distribution Code sets out the responsibilities of distributors and stipulates in paragraph 4(1) that the distributor shall make capacity available on its networks and provide open and non-discriminatory access for the use of this capacity to all customers including embedded generators. Each distributor is required in terms of paragraph 4(2) to make available to the customers the 'Customer Connection Information Guide' which shall cover as a minimum:-
- (a) the process to follow when applying for supply at the specific distributor;
 - (b) information requirements of the Distributor from the customer to effect an appropriate connection; and
 - (c) the process and related timeframes which follow the application.
- 2.2.7 Authorised municipalities have the duty to develop electricity services policies relating to, *inter alia*, the connection of generation systems to the distribution system and to pass and implement by-laws with respect to the electricity distribution functions set out in paragraph 1.2.3 above.
- 2.2.8 The EPP states that network (transmission and distribution) owners have an obligation to allow customers access to and use of their networks, provided that the customers are not in arrears in paying all the relevant charges as approved by NERSA from time to time and

that such access should not violate any technical and safety requirements as set out in the relevant grid code licence conditions and tariff schedules.¹⁴

2.3 Conclusion

- 2.3.1 Accordingly, if there is no policy document or by-law issued by a municipality governing the application process for generation systems, the application for connection should be dealt with in accordance with the Distribution Code, the RPP Code and the ERA.
- 2.3.2 The fact that there is no policy document issued by a municipality in respect of the connection of a generation system does not constitute justifiable reasons to refuse the connection to a municipality's distribution system. Justifiable reasons would relate to, *inter alia*, a failure to comply with the requirements of applicable grid code and relevant technical requirements or failure obtain any consents required under law necessary for connection.
- 2.3.3 Most metropolitan municipalities have established an application process for the installation and connection of EG facilities to their municipal owned distribution system. The methodology/approach will however be subject to each municipal policy on the matter and will have to be considered on a case-by-case basis.
- 2.3.4 It is however noted that various municipalities have not developed policies dealing with the connection of EG facilities with an installed capacity greater than 1 MW.
- 2.3.5 The absence of a policy document regulating the application process for connection of an EG facility greater than 1 MW is insufficient grounds for the municipality to refuse to consider the connection to the municipality's distribution system. An application for connection can be submitted in accordance with the provisions of the Distribution Code.

¹⁴ EPP, clause 2.6.

3. MAKING COMPLIANCE WITH MUNICIPAL REQUIREMENTS AND POLICY LEGALLY BINDING

Question: How to ensure compliance with municipal requirements and policy is legally binding, including:

- (a) **Contract(s) needed, including Connection Agreements, Electricity Supply Contracts and Supplemental Contracts.**
- (b) **By-law amendments needed.**
- (c) **Noting whether official council approval of a policy/requirements document has legal standing**

3.1 Contracts

- 3.1.1 We understand that typically municipalities require EG customers to sign a Supplemental Contract, being an amendment to the existing electricity supply contract between the EG customer and the municipality. Given that there will need to be a billing reconciliation of the customers' account with the municipality, a Supplemental Contract is required to be signed between the relevant distributor and the EG customer setting out, *inter alia*, the process for adjusting the buyer's electricity bill taking into account that a portion of the EG customers electricity is generated by an EG facility and not supplied by the municipality.
- 3.1.2 The Supplemental Contract is not required in order to legally enforce the EG Policy from a contractual perspective. The contractual requirements in this regard will be contained in the connection agreement required to be entered into between the EG customer and the distributor in accordance with the Distribution Code and the ERA. However, the Supplemental Contract is necessary from a contractual perspective in order to regulate the billing reconciliation and invoice adjustments.
- 3.1.3 It is however noted that there is the option of combining the Supplemental Contract and the connection agreement into one contract, namely a "Contract for Connection of an Embedded Generator". In this instance, the contract would govern the connection of the EG facility to the municipal distribution system and the export of electricity to the municipal distribution system, which electricity is purchased by the relevant municipality. In this instance, the customer's electricity account with the municipality shall be credited for electricity generated by the EG facility and exported to the distribution system in the amounts reflected in the municipality's annual tariff relating to the import and export of electricity for small scale embedded generation. However, to the extent that electricity generated by the EG facility is wheeled to a third party purchaser, a separate Supplemental Contract would have to be concluded between the relevant municipality and the ultimate purchaser of the electricity.
- 3.1.4 We further note that it is possible for municipalities to consider implementing the Contract for Connection of an Embedded Generator as general terms and conditions that are made available on their website or at their offices. The application form for connection completed by the customer would then be in a form that would bind the customer to the general terms and conditions and could be attached to the Contract for Connection of an Embedded Generator as the relevant schedule. The application form would need to include the following wording as well as the information to be completed:

"Acceptance of Terms and Conditions

The Customer acknowledges that it has read and understood the General Terms and Conditions: Contract for Connection of Embedded Generator and that by signing this application form, the Customer agrees to be bound by the General Terms and Conditions:

Contract for Connection of Embedded Generator, should approval for the Embedded Generator be granted by the municipality. A copy of the General Terms and Conditions: Contract for Connection of Embedded Generator can be found on [insert website] or a copy is available on request. Any amended terms and conditions found on the aforementioned website [insert website] will form part of the terms and conditions of the General Terms and Conditions: Contract for Connection of Embedded Generator, to which terms the Customer agrees to be bound. The information provided in this Application Form also will form part of the General Terms and Conditions: Contract for Connection of Embedded Generator."

3.2 **By-law Amendments**

- 3.2.1 Whilst the Constitution provides that municipalities may make and administer by-laws for the effective administration of the matters which it has the right to administer, in terms of section 4(2) of the MSA, the municipal council has a duty to exercise the municipality's executive and legislative authority.
- 3.2.2 The purpose of a municipal electricity services policy is to provide policy guidelines. Therefore, the EG Policy would only be a guideline relating to the implementation of the municipalities' electricity reticulation services in the relevant jurisdictional area. The policy itself cannot impose the same legal obligations on the customers as created by by-laws. The policy should be regulated and enforced through a by-law, being the instrument used by mandated municipalities to exercise their legislative authority over electricity services.
- 3.2.3 A by-law enacted in terms of Section 156(2) of the Constitution, or a by-law amendment to an existing by-law - to the extent that an electricity by-law has already been made by the relevant municipality - is required to ensure that the conditions for connection imposed on EG customers are legally binding and enforceable.
- 3.2.4 Accordingly, it is our view that a municipality has a duty to make a by-law so as to enable it to effectively administer its executive authority to provide electricity reticulation services and to enforce the EG Policy. A by-law passed by a municipal council has the same force of law as national legislation and provincial ordinances and can be enforced by courts of law.

3.3 **Council Approval**

- 3.3.1 In terms of the MSA, any decision taken by a municipal council must be recorded in writing (e.g. a Council Approval). Accordingly, any such policy (e.g. the EG Policy) must be adopted by the municipal council and the decision to adopt the policy would be recorded in writing. It is important to note that in relation to municipal policies, Council Approval is required to make the policy official, however as stated in paragraph 3.2.2 above such policies are not legally binding on customers unless the policy is regulated and enforced through a by-law or contractually.
- 3.3.2 A policy approved by the municipal council must set out the EG Requirements and the application process for connection of the EG facility to the municipal distribution system.
- 3.3.3 The internal rules and/or by-laws governing the internal arrangements, business proceedings, establishment, composition, procedures, powers, and functions of the municipal council should make provision for whether or not Council Approval is required each and every time there is an amendment to the EG Policy or if the person delegated with the power to administer the EG Policy is empowered to amend the EG Policy without having to refer the matter back the municipal council for resolution. Given that this is a fast evolving field and the national regulatory situation changes frequently, municipalities should enable changes to policy details without having to revert to a council process so as to avoid unnecessary delays and outdated policy content (potentially by having most of the technical

and regulatory detail which is subject to frequent revision in an annexure to the Policy).

- 3.3.4 Regard should also be given to the IDP of the applicable municipality in determining whether or not the Council Approval is necessary to cover any amendments to the policy. The IDP is the product of the integrated development planning process undertaken by a municipality pursuant to section 23 of the MSA. The IDP is, therefore, the principle strategic planning, budgeting, management and decision-making tool in a municipality.
- 3.3.5 Therefore, in order for municipal requirements and policies to be legally binding, such requirements must be recorded in writing and once the municipal requirements have obtained Council Approval, the relevant municipal council must pass a by-law enforcing the policy which in turn will give the policy the same force of law as national legislation and provincial ordinances.

4. SECTION 34 DETERMINATION

Question: Under which circumstances a section 34 determination is needed, including:

- (a) ***Municipal procurement from an IPP.***
- (b) ***Municipal PPP with an IPP.***
- (c) ***Municipal own generation establishment.***
- (d) ***If a section 34 determination is considered necessary in any of the above cases, will the generator need a licence because of requiring such a determination, or will it remain licence exempt because of the provisions of Schedule 2?***

4.1 In what circumstances is a section 34 determination required

4.1.1 In terms of section 35(4) of the ERA, the Minister is granted the power to make regulations regarding:-

- (a) new generation capacity;
- (b) types of energy sources from which electricity must be generated;
- (c) the percentages of electricity that must be generated from different energy sources;
- (d) the participation of the private sector in new generation activities;
- (e) the setting of standards relating to health, safety and the environment and their incorporation into licences or national norms and standards;
- (f) the prohibition of certain practices in the electricity supply industry; and
- (g) the criteria for or prohibition of cross-ownership or vertical and horizontal integration by licensees in generation, transmission and distribution assets.

4.1.2 The New Generation Regulations published pursuant to section 35 of the ERA are intended to regulate the procurement of "*new generation capacity*" by an organ of state active in the energy sectors, including new generation capacity derived from renewable energy sources and co-generation; base load, mid merit load, peak load and energy storage; and cross border projects. An "organ of state" includes a municipality for the purpose of the application of the New Generation Regulations.

4.1.3 In terms of the New Generation Regulations, "*new generation capacity*" means *electricity or electricity capacity sold or made available, or generation capacity connected, to the national transmission power system or an interconnected distribution power system, pursuant to a determination in terms of section 34(1) of the Act, which is derived from—*

- (a) *new generation facilities;*
- (b) *an expansion of existing generation facilities;*
- (c) *existing generation facilities not previously supplying electricity to the national transmission power system or an interconnected distribution power system;*
- (d) *existing generation facilities through an extension of any existing agreement for the purchase of electricity capacity or electricity for an additional supply period to*

be defined in the power purchase agreement, or through entering into a new power purchase agreement for a supply period to be defined in terms of such new power purchase agreement; or

(e) *demand side reduction measures, including aggregation, management of demand side reduction, or energy efficiency measures.*

4.1.4 Accordingly, the New Generation Capacity Regulations are only applicable to the procurement of energy by an organ of state already active in the energy sector in relation to new generation capacity that has been determined as required pursuant to a section 34 determination issued by the Minister in terms of the ERA.

4.1.5 To the extent that a section 34 determination has been issued by Minister in terms of which the new generation capacity is determined as either (i) being established by the municipality; or (ii) to be established by an IPP with the municipality identified as the procurer, then the New Generation Regulations will be applicable.

4.1.6 To the extent that a section 34 determination has not been issued by the Minister for the procurement of capacity, the New Generation Regulations are not applicable to the procurement of such capacity by an organ of state. This is derived from the definition of “*new generation capacity*” in the New Generation Regulations in terms of which reference is specifically made to electricity or electricity capacity sold or made available, or generation capacity connected, to the national transmission power system or an interconnected distribution power system, **pursuant to a determination in terms of section 34(1) of the ERA**. It is therefore submitted that the New Generation Regulations are only intended to regulate new generation capacity to be procured pursuant to a section 34 determination.

4.1.7 In terms of Regulation 5(3) to the New Generation Regulations:-

“A municipality, as an organ of state, may apply to the Minister to procure or buy new generation capacity in accordance with the Integrated Resource Plan, and such municipality must-

(a) *conduct and submit a feasibility study as contemplated in sub-regulation (2), where it intends to deliver the new generation capacity project through an internal mechanism as contemplated in section 76(a) of the Municipal Systems Act;*

(b) *submit proof that it has complied with the provisions of section 120 of the Municipal Finance Management Act and the Municipal Public-Private Partnership Regulations published by Government Notice No. R. 309 in Government Gazette No. 27431 of 1 April 2005, where it intends to deliver the new generation capacity project through an external mechanism as contemplated in section 76(b) of the Municipal Systems Act; and*

(c) *submit proof that the application is aligned with its Integrated Development Plan.”*

4.1.8 What is apparent from Regulation 5, is that a municipality has the option (but is not obliged) to apply to the Minister to procure or buy new generation capacity in accordance with the then prevailing Integrated Resource Plan, being IRP2019 as at the date of this Report. The benefit or need in this is that in order for a generator to obtain a generation licence in terms of the ERA, it is necessary for the generator to demonstrate compliance with the Integrated Resource Plan.¹⁵ To the extent that a section 34 determination has been issued allocating energy from the Integrated Resource Plan to the particular new generation capacity project to be procured by the municipality, the generator would be able to demonstrate compliance with the Integrated Resource Plan and NERSA would be obliged to

¹⁵ Section 10(2)(g) of the ERA

issue the generation licence (subject to the generator's compliance with the other provisions of section 10 of the ERA). To the extent that a generator is required to obtain a generation licence in terms of the ERA, the absence of a section 34 determination would present a significant hurdle that the generator would be unable to overcome in the absence of the Minister specifically agreeing to deviate from the obligation to comply with the Integrated Resource Plan as permitted in section 10(2)(g) of the ERA.

- 4.1.9 In this regard we note that the specific issue of whether a municipality is entitled to procure new generation capacity in the absence of a section 34 determination under the ERA was brought before the High Court in the matter of *City of Cape Town v National Energy Regulator of South Africa*.¹⁶
- 4.1.10 In this case, NERSA contended that it was not able to issue licenses for generation capacity procured by municipalities since, at the time, the New Generation Regulations did not allow for municipal procurement of energy and that there was also no section 34 determination relating to the procurement of new generation capacity by municipalities (existing determinations referring only to Eskom).
- 4.1.11 The High Court dismissed the matter in August 2020, determining that this was an inter-governmental dispute and that, since not all avenues for determining the dispute had been exhausted under the Intergovernmental Relations Framework Act,¹⁷ the dispute was brought before the courts prematurely. Accordingly, the High Court did not rule on the merits of the section 34 issue and so the substantive questions posed by the City of Cape Town remain unanswered.
- 4.1.12 However, the fact that the New Generation Regulations and Schedule 2 of the ERA have subsequently been amended may render the above matter of academic interest only. In *City of Cape Town*, the issue experienced by the City was ultimately that NERSA was not willing to issue licenses to potential generators in the absence of a section 34 determination. With the amendments to Schedule 2, this position has fundamentally changed in light of the following:-
- (a) In order to be issued a generation license, an application is required to satisfy a number of criteria in making an application to NERSA.¹⁸ This includes “*evidence of compliance with any integrated resource plan applicable at that point in time or provide reasons for any deviation for the approval of the Minister*”.¹⁹
 - (b) The Minister issues section 34 determinations in accordance with, and to give effect to, the IRP2019, and so NERSA has generally taken the issuance of determinations in terms of section 34 of the ERA as a prerequisite for “evidence of compliance” with the current IRP in compliance with section 10(2)(g) of the ERA.
 - (c) Thus, the issuing of licenses has been contingent on section 34 determinations being issued. This has previously been problematic for EG above 1 MW as the generation for electricity from such facilities and subsequent trading required a license. Now that the MW cap has been lifted to 100 MW, and only registration is required, this impediment no longer arises for an EG facility with a capacity of 100MW or less as was

¹⁶ [2020] ZAGPPHC 800.

¹⁷ Act 13 of 2005.

¹⁸ Section 10(1)(a) and (2) of the ERA.

¹⁹ Section 10(2)(g) of the ERA.

previously the case. The key issue experienced by the City of Cape Town thus falls away.

- 4.1.13 It is further noted that Section 34 of the ERA does not expressly prohibit the procurement of capacity by an organ of state in the absence of a section 34 determination.
- 4.1.14 A section 34 determination can be requested by a municipality, voluntarily, pursuant to Regulation 5 of the New Generation Regulations in order to facilitate the procurement of energy by a municipality from a generator that is required to obtain a generation licence (and accordingly has to demonstrate compliance with IRP2019).
- 4.1.15 Accordingly, it is our view that a municipality has inherent power to establish its own generation capacity and/or procure energy directly from an IPP, be it pursuant to a power purchase agreement or in terms of a municipal public private partnership, in the absence of a section 34 determination but at times subject to compliance with the ERA and applicable legislation government procurement, particularly under the MFMA and MSA.

4.2 If a section 34 determination is considered necessary in any of the above cases, will the generator need a licence because of requiring such a determination, or will it remain licence exempt because of the provisions of Schedule 2?

- 4.2.1 In light of the above, our view is that even if a section 34 determination was a prerequisite for a municipality to enter into an arrangement with an EG facility (which we contend it is not), this does not influence the licensing situation under Schedule 2.
- 4.2.2 The section 34 determinations deal with procurement of new generation capacity by organs of state, and do not dictate what activities carried out by persons in relation to the generation facility do or do not require licenses. Schedule 2 of the ERA stands alone and there is no mechanism in the ERA whereby a section 34 determination requirement would change explicit exemptions provided for in Schedule 2.
- 4.2.3 Thus, a section 34 determination is not required in order for a municipality to purchase electricity directly from an EG facility which is exempt from licensing requirements. Further, the municipality is permitted to do so outside the framework of the New Generation Regulations.
- 4.2.4 Of course, we note that registration is still required (unless a generation facility is under 100kW capacity) and is carried out in accordance with the registration procedure prescribed by NERSA. The most recent procedure for registration of EG facilities was published by NERSA in 10 October 2021 (version 3) ("**Registration Procedure**").²⁰ The Registration Procedure imposes certain requirements for registration such as technical capability and an executed power purchase agreement but does not refer to IRP compliance or a determination being required.

4.3 Conclusion

- 4.3.1 It is our view that a municipality has inherent power to establish its own generation capacity and/or procure energy directly from an IPP, be it pursuant to a power purchase agreement or in terms of a municipal public private partnership, in the absence of a section 34 determination subject to compliance with the ERA and

²⁰ Registration Procedure in Terms of Schedule 2 of the Electricity Regulation Act, 2006 (ACT NO. 4 OF 2006), available at <https://www.nersa.org.za/wp-content/uploads/2021/02/Registration-Procedure-.pdf> .

applicable legislation government procurement, particularly under the MFMA and MSA.

- 4.3.2 Our view is that even if a section 34 determination was a prerequisite for a municipality to enter into an arrangement with an EG facility (which we contend it is not), this does not influence the licensing situation under Schedule 2.

5. NET CONSUMER, NET GENERATORS AND EXPORT CREDITS

Questions:

- (a) ***Is it legally sound to apply export credits?***
- (b) ***What constraints do the ERA Schedule 2, the MFMA, the MSA or other legislation place on embedded generation regarding net generation, and on export credits that may be applied, and up to what limits (for example a 'net-spend' on the prosumer's energy account).***
- (c) ***Does the fact that NERSA has approved numerous export tariffs affect how the above cases are seen with respect to the MFMA?***
- (d) ***Can a 'pure generator' (i.e. no self-consumption) export power in terms of Schedule 2 and qualify for export credits?***

5.1 Net Consumer

- 5.1.1 A net consumer is a person with a generation facility that is connected to the municipal distribution grid and draws more power than they (potentially) export back onto the grid.
- 5.1.2 On a plain reading of the terms of Schedule 2 a grid connected EG facility that has a capacity of no more than 100 MW²¹ could be operated without a licence issued by NERSA in terms of the ERA (although the activity would need to be registered with NERSA if over 100 kW in capacity) and the person would be entitled to sell surplus electricity to the relevant municipality, provided all other regulatory requirements are met.
- 5.1.3 A person operating an EG facility is not restricted from supplying electricity to more than one customer. Furthermore, in this regard it is noted that "customer" is defined in Schedule 2 as "*a person who purchases electricity or services relating to the supply of electricity*" and in our view there is nothing in this definition that implies the supply could not be to a municipality pursuant to Schedule 2.²²
- 5.1.4 Accordingly, a net consumer is permitted to export power and rely on the exemptions under Schedule 2 as applicable for an EG facility provided that all of the regulatory requirements under Schedule 2 are met.
- 5.1.5 It is however necessary to consider the applicability of other regulatory requirements outside of Schedule 2, particularly under the MFMA and MSA. The regulatory requirements which would need to be satisfied would be the municipal financial management and municipal procurement and supply chain management requirements in the MFMA and related secondary legislation, to the extent applicable.
- 5.1.6 In respect of a net consumer, it is understood that the municipality would apply an offset and the net consumer would get a credit on the electricity bill for the surplus energy exported onto the grid that is not consumed by the net consumer. A single bi-directional meter is installed to measure both the energy usage and

²¹We note that the President of the Republic of South Africa announced on 25 July 2022 that the 100 MW threshold under Schedule 2 to the ERA will be removed in its entirety. This is however still subject to formal promulgation and any such amendment has not been published in the Gazette as at the date of this Report.

²²This is also supported by the inclusion of a separate definition for an "end-user" in Schedule 2 which, although the definition is not used elsewhere, strongly implies that a "customer" could include a municipality as it is distinct from an "end-user".

the energy exported. In this scenario, there would be no compensation paid by the municipality for the exported energy. In this scenario:-

- (a) Under the MFMA, a net consumer does not impose financial obligations on a municipality, and accordingly provided that the municipality is not required to incur expenditure, its budgetary cycle approval is not impacted and the provisions of the MFMA are not triggered.
- (b) By contrast, under the MSA, even where no expenditure is incurred, the adoption of a new mechanism for service delivery (such as an EG programme) could trigger the requirements under Chapter 8 Part 2 of the MSA. Whether or not an EG programme is considered a new mechanism for service delivery under the MSA is still to be determined.

5.1.7 The net consumer would also be entitled to sell electricity generated by the EG facility to municipalities, however, this is subject to regulatory compliance with the MFMA (if payments are made to the net consumer) and MSA in particular (regardless of whether payment is made to the net consumer).

5.2 Net Generation and Export Credits

5.2.1 There is no distinction under Schedule 2 in respect of net consumers versus net generators (i.e. who export more power than they import). Accordingly, our view is that the licensing exemption applies equally to net generators that meet the requirements under Schedule 2.

5.2.2 In respect of a net generator where compensation is intended to be made by the distributor for power exported onto the grid, the provisions of the MFMA are triggered as the payments to the net generator impose a financial obligation on municipalities and have budgetary and expenditure implications. Accordingly, the regulatory requirements which would need to be satisfied would be the municipal financial management and municipal procurement and supply chain management requirements in the MFMA and related secondary legislation.

5.2.3 It must be noted that the ERA read with Schedule 2 is a separate regime and only addresses licensing / registration of generation facilities and so does not alter, or purport to alter, other regulatory obligations placed on organs of state. Thus, the provisions of the ERA cannot override the MFMA compliance obligations of municipalities.

5.2.4 Our view, therefore, is that a net generator is entitled, under Schedule 2, to export electricity and is able to rely on the exemption contained therein provided that the requirements for such exemption are met. It is also entitled to sell such electricity to a municipality and receive compensation provided that the requirements of the MFMA and MSA as addressed above are met.

5.2.5 Despite being a net generator in terms of measured kWh, there may nevertheless be no payment by the municipality in respect of the power exported onto the grid by a net generator. This situation brings into question the concept of a “net consumer / generator”. Although municipal documentation such as the City of Cape Town Guidelines for Embedded Generation²³ generally define net consumer / generator in terms of total kWh imported/purchased versus exported/sold, these concepts are not defined in national legislation, be it electricity regulation such as the ERA, or local Government legislation such as the MFMA / MSA.

5.2.6 The distinction in respect of net kWh imported or exported is, itself, largely irrelevant for purposes of the ERA, MFMA and MSA. Accordingly, where a “net generator” in terms of actual kWh nevertheless does not cause a net spend by

²³Available at <https://www.sustainable.org.za/uploads/files/file49.pdf> access on 8 November 2021.

the municipality to which it is exporting electricity, the provisions of the MFMA will not be triggered.

5.3 Export Tariffs

- 5.3.1 In NERSA carrying out its tariff approval powers, it is exercising a function explicitly granted to it under the ERA to “*regulate prices and tariffs*”.²⁴ A licensee may not charge a customer any other tariff and make use of provisions in agreements other than that determined or approved by NERSA as part of its licensing conditions²⁵
- 5.3.2 Through the act of approving tariffs, NERSA can or does influence the application of the MFMA / MSA in respect of the sale/purchase of electricity from EG facilities.
- 5.3.3 A part of the principle of legality, which requires that all exercises of public power be lawful²⁶, is the concept that when an administrative body which is created and empowered by legislation carries out its functions, it must do so within the limits of the powers ascribed to it, and any action beyond its power is said to be “*ultra vires*” and is accordingly unlawful.²⁷
- 5.3.4 The legislative powers granted to NERSA only relate to gas matters under the Gas Act, electricity under the ERA, and other matters related to energy regulation. They do not extend to exercising any power under the MFMA or administering municipalities, which is instead administered by the Minister of Finance and National Treasury (itself established under the Public Finance Management Act).²⁸
- 5.3.5 It is a cornerstone principle of our law that NERSA cannot, through exercising powers within its functional jurisdiction, bind other administrative bodies over which it does not exercise oversight, nor can it influence the interpretation / meaning of national legislation, which is a matter for Parliament and courts.
- 5.3.6 Where a set export tariff payable would influence the application of the MFMA (i.e. if the amount owed to the customer exceeds the amount owed by the customer) is in respect of the justification for the accounting officer to dispense with official procurement processes in various circumstances, including in exceptional cases “where it is impractical or impossible to follow the official procurement processes”, which may be justifiable in the embedded generator context given the impracticality of applying a full procurement process to every possible consumer who may wish to export electricity through EG and in circumstances where there is a set/discernible tariff at which the municipality will purchase the electricity as the policy would satisfy the MFMA requirements of being “fair, equitable, competitive, cost-effective, transparent” should it provide certainty through means of a set / discernible tariff. Note that this is distinguishable from the case of a pure generator, which will generally produce sufficient electricity for export that it cannot be said to be “impractical or impossible” to follow a ordinary procurement process for the supply of such exported electricity.
- 5.3.7 However it is noted that at a meeting held on 25 May 2022 regarding electricity tariffs for the period of 1 July 2022 – 30 June 2023, NERSA declared that it “*lacks both statutory and regulatory jurisdiction over the proposed activity*” between distributor and EGs in relation to applications for the approval of EG tariffs. The response from NERSA requires further interrogation and clarification from NERSA as it is not aligned with the provision of the ERA.

²⁴ Section 4(a)(ii) of the ERA.

²⁵ 15(2) of the ERA

²⁶ The Law of South Africa, Volume 2(3) at 13.

²⁷ Ibid.

²⁸ Act 1 of 1999.

- 5.3.8 In terms of section 15 of the ERA, a licensee may not charge a customer any other tariff and make use of provisions in agreements other than that determined or approved by NERSA as part of its licensing conditions pursuant to section 14 of the ERA²⁹.
- 5.3.9 Any licence condition relating to the setting or approval of prices, charges and tariffs and the regulation of revenues³⁰:-
- (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.
- 5.3.10 Having regard to the licence conditions contained in certain municipal distribution licences, it is noted that the licence conditions provide that the licensee is only entitled to charge the consumer and/or end user tariffs and prices that are approved by NERSA and has to comply with the price and tariff methodology provided by NERSA in determining its prices and tariffs.

5.4 **Pure Generator**

- 5.4.1 In a technical sense, the distinction between a pure generator and a net generator is that while the net generator both exports and imports power, the pure generator only exports power.
- 5.4.2 In a legal sense, we are of the view that there is no legal distinction between these two concepts as follows:-
- (a) Under Schedule 2, the relevant exemption for an EG facility depends on (i) the generation capacity of the facility (i.e. up to 100kW / 100 MW); (ii) whether the generation facility is grid connected; (iii) whether or not wheeling occurs; and (iv) compliance with connection requirements. There is no consideration as to whether importing of power occurs.
 - (b) Under the MFMA, as discussed under Question 3, the actual kWh imported or exported is irrelevant, but rather the expenditure by the municipality is what matters. The only difference between a net generator (where compensation is intended to be made by the distributor for power exported onto the grid) and a pure generator is the amount of the expenditure, which is unlikely to impact MFMA compliance although may have relevance when it comes to procurement thresholds under supply chain management policies and the Municipal Supply Chain Management Regulations (which could also have implications in respect of preferential procurement).³¹
- 5.4.3 Accordingly, our views in respect of net generators are equally applicable to pure generators. However, we note that in practice, a pure generator is likely to have a much larger generation capacity (i.e. in the tens of MW or close to the 100 MW

²⁹ 15(2) of the ERA

³⁰ Section 15(1) of the ERA

³¹ Regulation 12(1) of the Municipal Supply Chain Management Regulations.

limit). This will likely have an impact in respect of procurement and will have budgetary implications due to the payments to such generators. In such cases a significant net spend will be incurred (for substantial net generators or pure generators), and it is more difficult to consider that such power is “competitive and cost effective” without carrying out a normal procurement process. This holds true even in cases where the export tariff is less than the purchase price from Eskom, as a tender process could in theory deliver power cheaper than even the export tariff.

5.4.4 Further, a municipal distributor could apply for deviation from the standard tendering processes, but such deviations require that it is either “*impractical or impossible to follow the official procurement processes*” or “*practicalities impede the strict application*” of MFMA requirements. Therefore, it will be difficult to motivate that it is impractical/impossible to procure power from larger EG facilities through a competitive process, particularly since only a handful of such facilities will be necessary to address a typical municipality’s energy needs. This question will require further exploration, including to consider whether a feed-in tariff could be applied for larger EG facilities. MFMA procurement processes are, therefore, appropriate in these circumstances pending further clarification.

5.5 Conclusion

5.5.1 Is it legally sound to apply export credits?

(a) It is legally sound to apply export credits in the case of a net consumer. In respect of a net consumer, it is understood that the municipality would apply an offset and the net consumer would get a credit on the electricity bill for the surplus energy exported onto the grid that is not consumed by the net consumer. A single bi-directional meter is installed to measure both the energy usage and the energy exported. In this scenario, there would be no compensation paid by the municipality for the exported energy because the export offset would always be less than the spend on purchasing energy.

(b) A net consumer operating a EG facility would fall within the Schedule 2 exemption and would not be required to hold a NERSA license to generate electricity. The net consumer would also be entitled to sell electricity generated by the generation facility to municipalities, however, this is subject to regulatory compliance with the MFMA (if payments are made to the net consumer) and MSA in particular (regardless of whether payment is made to the net consumer). Under the MFMA, a net consumer does not impose financial obligations on a municipality, and accordingly provided that the municipality is not required to incur expenditure, its budgetary cycle approval is not impacted and the provisions of the MFMA are not triggered. By contrast, under the MSA, even where no expenditure is incurred, the adoption of a new mechanism for service delivery (such as an EG programme) could trigger the requirements under Chapter 8 Part 2 of the MSA. It is noted that whether an EG programme constitutes a ‘new mechanism for service delivery’ is yet to be clarified in terms of law.

5.5.2 What constraints do the ERA Schedule 2, the MFMA, the MSA or other legislation place on embedded generation regarding net generation, and on export credits that may be applied, and up to what limits (for example a ‘net-spend’ on the prosumer’s energy account).

(a) A net generator is entitled, under Schedule 2, to export electricity and is able to rely on the exemption contained therein provided that the requirements for such exemption are met. It is also entitled to sell such electricity to a municipality and receive compensation provided that the requirements of the MFMA and MSA are met. In respect of a net

generator where compensation is intended to be made by the distributor for power exported onto the grid, the provisions of the MFMA are triggered as the payments to the net generator impose a financial obligation on municipalities and have budgetary and expenditure implications. Where a “net generator” in terms of actual kWh does not cause a net spend by the municipality to which it is exporting electricity, the provisions of the MFMA will not be triggered.

5.5.3 Does the fact that NERSA has approved numerous export tariffs affect how the above cases are seen with respect to the MFMA?

(a) The approval of tariffs by NERSA does not influence our above views or the correct legal interpretation of the impact of the ERA, Schedule 2, MFMF or MSA.

(b) It is however noted that to the extent that the municipal supply chain management policy permits the accounting officer to dispense with official procurement processes in various circumstances, including in exceptional cases “where it is impractical or impossible to follow the official procurement processes”, it may be justifiable in the embedded generator context to dispense with official procurement under the MFMA given the impracticality of applying a full procurement process to every possible consumer who may wish to export electricity though EG and in circumstances where there is a set/ discernible tariff at which the municipality will purchase the electricity as the policy would satisfy the MFMA requirements of being “fair, equitable, competitive, cost-effective, transparent” should it provide certainty through means of a set / discernible tariff.

5.5.4 Can a ‘pure generator’ (i.e. no self-consumption) export power in terms of Schedule 2 and qualify for export credits?

(a) From an MFMA / MSA compliance perspective, there is no legal distinction between a net generator and pure generator. The larger MW capacity of a pure generator may, however, impact whether a municipality can motivate for deviation from standard procurement processes.

(b) Our views set out above in respect of net generators are equally applicable to pure generators. However, we note that in practice, a pure generator is likely to have a much larger generation capacity (i.e. in the tens of MW or close to the 100MW limit). This will likely have an impact in respect of procurement, and will have budgetary implications due to the payments to such generators. In such cases a significant net spend will be incurred (for substantial net generators or pure generators), and it is more difficult to consider that such power is “competitive and cost effective” without carrying out a normal procurement process. This holds true even in cases where the export tariff is less than the purchase price from Eskom, as a tender process could in theory deliver power cheaper than even the export tariff.

6. COMMISSIONING SIGNOFF

Question: Legally sound options regarding commissioning signoff, including:

- (a) **Where and whether ECSA registered persons or other competent persons (such as those with industry accreditation e.g. PV GreenCard) should be involved. It should be noted that SANS10142-1-2 has been developed and released, and subsequently withdrawn. Given that the timeframe for its reinstatement is uncertain, the opinion on commissioning signoff requirements should consider both the scenario where it is not in place, and where it is in place, and specifically how its official release will change ECSA or other competent person commissioning signoff requirements.**
- (b) **Is any commission signoff needed given that municipal requirements can be made legally binding and various Connection and Supplemental Contracts entered into?**

6.1 Background

6.1.1 We understand that there is currently no national standard covering wiring of EG facilities and that SANS10142-1 does not adequately cover such systems. It should be noted that SANS10142-1-2 has been developed and released, and subsequently withdrawn. In addition, it is noted that training for registered electricians will need to be developed and then training courses run before they can sign off EG facilities according to the SANS10142-1-2. Accordingly, there is likely to be a delay as to when any such certified electricians are available in the marketplace or any clarity is obtained on the legal requirements.

6.1.2 We further understand that in the absence of the abovementioned SANS10142-1-2 certified electricians, most municipalities currently require an ECSA registered professional engineer ("Pr.Eng, Pr.TechEng etc") or professional technical engineer to sign off EG facilities on the commissioning. From the municipality's perspective this signoff is considered to pass the liability on to the Pr.Eng. However, no training or specific EG certification of such persons is required. Such sign-off is typically expensive and could be a prohibiting factor particularly for the smaller sized EG facilities, contributing to the significant numbers of EG customers ignoring the formal municipal approval process. Some consider that this requirement for Pr.Eng or Pr. Tech Eng signoff is unnecessarily cautious.

6.2 Legislative Requirements

6.2.1 ERA

The ERA requires that municipal distribution licence holders need to adhere to the ERA and comply with all the technical and operational requirements for electricity networks determined by NERSA, such as the Distribution Code.

6.2.2 Distribution Code

- (a) Section 14 of the ERA provides that NERSA may make any licence subject to conditions relating to, *inter alia*, compliance with health, safety and environmental standards and requirements and compliance with any regulation, rule or code made under the ERA. As a licensed distributor, a municipality would be subject to the conditions in the distribution licence which should stipulate that the distributor must comply with all codes, laws and other applicable regulations.
- (b) Since the Distribution Code is applicable to the municipality as a licensed distributor, the municipality must comply with its provisions in terms of section 27 of the ERA as described above. Paragraph 4(7) of the Distribution Code provides that the distributor must maintain the

distribution system in accordance with good industry practice and NRS 082. Paragraph 6.1(3) of the Distribution Code provides that the customer shall, on request, provide the distributor with test certificates, prior to commissioning, of the protection system/s that are installed at the point of interface with the distributor.

- (c) With regard to testing the Distribution Code provides that the distributor must maintain the distribution system in accordance with good industry practice and NRS 082. Accordingly, certain testing has to be undertaken before allowing the customer to connect to the distribution system.

6.2.3 OHSA

- (a) The Electrical Installation Regulations, which are published under section 43 of OHSA, regulates the approvals required for the design and connection of an electrical installation. References to the term 'Regulation' in this section of the Report shall be referencing the Regulation as contemplated in the Electrical Installation Regulations.

- (b) According to section 1 of the Electrical Installation Regulations, an electrical installation means:-

“any machinery, in or on any premises, used for the transmission of electricity from a point of control to a point of consumption anywhere on the premises, including any article forming part of such an electrical installation irrespective of whether or not it is part of the electrical circuit, but excluding –

- (a) *any machinery of the supplier related to the supply of electricity on the premises;*

- (b) *any machinery which transmits electrical energy in communication, control circuits, television or radio circuits;*

- (c) *an electrical installation on a vehicle, vessel, train or aircraft; and*

- (d) *control circuits of 50 V or less between different parts of machinery or system components, forming a unit, that are separately installed and derived from an independent source or an isolating transformer;”*

- (c) The EG facility itself is not considered to be an electrical installation for purposes of the Electrical Installation Regulations as it is explicitly excluded in subparagraph (a) of section 1 to the Electrical Installation Regulations as set out above³² and as such, a certificate should not be required for the commissioning of the EG facility in terms of the Electrical Installation Regulations. However, it is understood that the electrical wiring connecting the EG facility to the distribution system would fall within the definition of an electrical installation.

- (d) With regard to Regulation 7(4), where any addition or alteration has been affected to an electrical installation for which a certificate of compliance was previously issued, the user or lessor of such electrical installation shall also obtain a certificate of compliance for at least the addition or alteration.

³² Note that although subparagraph (a) refers to “Machinery of the supplier”, it is irrelevant for the purpose of the Regulations whether the machinery is owned by a third party or not. The definition of supplier is wide: “supplier” in relation to a particular electrical installation, means any person who supplies or contracts or agrees to supply electricity to that electrical installation.

- (e) Regulation 8(2) goes on to provide that, no person shall connect or permit the connection of any completed or partially completed electrical installation to the electricity supply unless it has been inspected and tested by a "*registered person*" and a certificate of compliance for that electrical installation has been issued.
- (f) Having regard to the above, the question then is whether or not a 'registered person' for the purpose of certifying the connection to the distribution system in terms of Regulation 5(5) has to be a Pr.Eng.
- (g) A registered person is defined as follows in the Electrical Installation Regulations:
- "registered person" means a person registered in terms of –*
- (a) regulation 11; or*
- (b) regulation 9 of the Electrical Installation Regulations, 1992, as an electrical tester for single phase, an installation electrician or a master installation electrician, as the case may be."*
- (h) Regulation 11(2) provides that a registered person has to have sufficient knowledge of the rules applicable to electrical installations in the category for which the application is being made, and have appropriate practical experience in respect of electrical installation, verification and certification of the construction, testing and inspection of the type of electrical installation for which the application is being made and has to be registered as an electrical tester for single phase, an installation electrician, or a master installation electrician, as the case may be.
- (i) Regulation 11(2) does not specify that a registered person has to be a Pr.Eng.
- (j) Furthermore and in addition to the requirement under Regulation 11(2), with regard to the design and construction of the electrical installation, Regulation 5(5) provides that where the voltage *exceeds* 1 kV, a person deemed competent in terms of paragraphs (b), (c) or (d) of the definition of a 'competent person' in regulation 1 of the General Machinery Regulations, 1988 or a person registered in a professional category in terms of the Engineering Profession Act, 2000, shall also approve the design of that part of an electrical installation.
- (k) Therefore, to the extent that the voltage *exceeds* 1 kV, in addition to a certificate of compliance for the electrical installation having to be issued by a 'registered person', the design and construction of the electrical installation a person deemed competent or a person reregistered in a professional category in terms of the Engineering Profession Act, 2000, shall also approve the design of that part of an electrical installation.
- (l) A "Competent Person" is defined in the General Machinery Regulations as –
- "(b) has obtained an engineering diploma in either the mechanical or electrotechnical (heavy current) fields with an academic qualification of at least T3 or N5, or of an equivalent level, and who subsequent to achieving such qualification has had not less than two years' practical*

experience in the operation and maintenance appropriate to the class of machinery he is required to supervise;

(c) is a graduate engineer and has had not less than two years' post-graduate practical experience in the operation and maintenance appropriate to the class of machinery he is required to supervise and who has passed the examination on the Act and the regulations made thereunder, held by the Commission of Examiners in terms of Regulation E5(2) of the regulations published under Government Notice R929 of 28 June 1963; or

(d) is a certificated engineer.”

- (m) Professional category in terms of the Engineering Profession Act refers to a professional engineer, professional engineering technologist, professional certificated engineer or a professional engineering technician.
- (n) It is noted that Regulation 5(3) of the General Machinery Regulations therefore does not constitute a legal basis or obligation upon which a municipality can require that a Pr.Eng issue the certificate of compliance required in terms of Regulation 8(2) of the General Machinery Regulations.

6.3 Is any Commissioning Signoff needed?

- 6.3.1 There is no specific legal requirement that a Pr.Eng has to issue the certificate of compliance to permit the electrical installation connected to the EG facility to be connected to the distribution system.
- 6.3.2 The certificate of compliance has to be provided by a 'registered person', being a person that has sufficient knowledge of the rules applicable to electrical installations in the category for which the application is being made, and have appropriate practical experience in respect of electrical installation, verification and certification of the construction, testing and inspection of the type of electrical installation for which the application is being made and is registered as an electrical tester for single phase, an installation electrician, or a master installation electrician, as the case may be.
- 6.3.3 The Pr.Eng would only be entitled to issue a certificate of compliance if he or she falls within the definition of a registered person as defined in Regulation 11.
- 6.3.4 In the event that an installation electrician is registered with the Department of Labour as an installation electrician that is permitted to issue a certificate of compliance for the connection of a SSEG facility to the distribution system, this registration will provide sufficient legal assurance that the electrical installer is entitled to issue the certificate of compliance in a form that is acceptable to the municipality.
- 6.3.5 We understand that one of the proposals being considered in the solar industry is whether or not an installation electrician who has attended and passed the PV GreenCard Programme is capable of being considered a 'registered person' for the purpose of issuing the certificate of compliance in satisfaction of the requirements of Regulation 8(2).
- 6.3.6 Regulation 8(2) of the General Machinery Regulations provides that, no person shall connect or permit the connection of any completed or partially completed electrical installation to the electricity supply unless it has been inspected and tested by a "registered person" and a certificate of compliance for that electrical installation has been issued.

6.3.7 Accordingly, it is necessary for a certificate of compliance to be provided by the applicant to the municipality.

6.4 **Obligations and Liability**

6.4.1 Regulation 2 provides that the user or lessor of an electrical installation, as the case may be, is responsible for the (a) safety, safe use and maintenance of the electrical installation he or she uses or leases; and (b) safety of the conductors on his or her premises connecting the electrical installation to the point of supply in the case where the point of supply is not the point of control.

6.4.2 Regulation 7(1) places the obligation on the user or lessor of an electrical installation to have a valid certificate of compliance for that installation.

6.4.3 Regulation 8(2) prohibits a municipality from connecting an electrical installation to the electricity supply unless the electrical installation has been inspected and tested by a registered person and a certificate of compliance has been issued in compliance with Regulation 8. The municipality is however entitled to permit the connection of the electrical installation for the purpose of testing the electrical installation for the purpose of the compliance certificate.

6.4.4 In the event that the user or lessor fails to obtain a certificate of compliance from a registered person, and the municipality permits the connection of the electricity supply, the municipality and the user or lessor will be in contravention of the Electrical Installation Regulations and liable for payment of a fine or imprisonment in terms of Regulation 15, as applicable.

6.4.5 In the event of death or injury to a person caused by the connection of the EG facility, in the event that the municipality connected the EG facility to the distribution system in contravention of Regulation 8(2) (i.e. the customer did not have a valid certificate of compliance), the municipality could potentially attract liability. This would of course depend on the factual circumstances surrounding the claim.

6.4.6 It is noted that Section 25 of the ERA provides that in any civil proceedings against a licensee arising out of damage or injury caused by induction or electrolysis or in any other manner by means of electricity generated, transmitted or distributed by a licensee, such damage or injury is deemed to have been caused by the negligence of the licensee, unless there is credible evidence to the contrary.

6.5 **Conclusion**

Until the SANS10142-1-2 is released and electricians are certified accordingly, is sign-off by a professional engineer necessary to provide municipalities with sufficient legal assurance regarding the compliance of EG facility's?

6.5.1 There is no specific legal requirement that a Pr.Eng has to issue the certificate of compliance to permit the electrical installation connected to the EG facility to be connected to the distribution system.

6.5.2 The certificate of compliance has to be provided by a 'registered person', being a person that has sufficient knowledge of the rules applicable to electrical installations in the category for which the application is being made, and have appropriate practical experience in respect of electrical installation, verification and certification of the construction, testing and inspection of the type of electrical installation for which the application is being made and is registered as an electrical tester for single phase, an installation electrician, or a master installation electrician, as the case may be.

- 6.5.3 The Pr.Eng would only be entitled to issue a certificate of compliance if he or she falls within the definition of a registered person as defined in Regulation 11.
- 6.5.4 In the event that an installation electrician is registered with the Department of Labour as an installation electrician that is permitted to issue a certificate of compliance for the connection of a EG facility to the distribution system, this registration will provide sufficient legal assurance that the electrical installer is entitled to issue the certificate of compliance in a form that is acceptable to the municipality.

What legally secure options exist for signoff that are efficient and lower cost?

- 6.5.5 A certificate of compliance is required to be obtained in terms of Regulation 8(2).
- 6.5.6 Regulation 11 provides that a natural person can apply to the chief inspector to be registered as a 'registered person' in the specific category for which the application is being made. The chief inspector is an officer in the Department of Labour.
- 6.5.7 Accordingly, provided that the chief inspector is satisfied that the installation electrician meets the requirements to be registered as a 'registered person', and the installation electricity is registered, the installation electrician will be considered to be a registered person for the purpose of issuing the certificate of compliance pursuant to Regulation 8(2) in respect of the connection of the EG to the distribution system.
- 6.5.8 We understand that one of the proposals being considered in the solar industry is whether or not an installation electrician who has attended and passed the PV GreenCard Programme or other industry accredited training is capable of being considered a 'registered person' for the purpose of issuing the certificate of compliance in satisfaction of the requirements of Regulation 8(2).
- 6.5.9 In the event that the chief inspector is satisfied that passing the PV GreenCard Programme or other industry accreditation is sufficient evidence to demonstrate that the installation electrician (a) has sufficient knowledge of the rules applicable to electrical installation of a EG facility, and (b) has appropriate practical experience in respect of electrical installation, verification and certification of the construction, testing and inspection of EG facilities and consequently, the installer can be registered under Regulation 11.
- 6.5.10 Therefore, once the installation electrician has been registered with the Department of Labour, this will be sufficient evidence to demonstrate the installation electrician is entitled to issue the certificate of compliance required to be obtained before a municipality is permitted to connect the EG facility to the distribution system.

Is any sign-off legally necessary given the other legal agreements and obligations of SSEG customers that municipalities typically put in place (Supplemental Contract, By-law Amendment, Council Approval etc)?

- 6.5.11 Regulation 8(2) provides that, no person shall connect or permit the connection of any completed or partially completed electrical installation to the electricity supply unless it has been inspected and tested by a "registered person" and a certificate of compliance for that electrical installation has been issued.
- 6.5.12 Accordingly, it is necessary for a certificate of compliance to be provided by the applicant to the municipality.

7. CHANGE OF OWNERSHIP

Question: Change of ownership e.g. selling of property with an EG – what is required to transfer responsibility and liability to someone else? (see Annex B of the municipal ‘Requirements’ document for current transfer practice

7.1 The methodology/approach of municipalities in respect of change of ownership of a property that has an EG facility located on it (whether ground mounted or rooftop) will have to be considered on a case-by-case basis as this is subject to each municipal policy on the matter.

7.2 Certain municipalities that have established EG policies³³ state that when transfer of ownership of a property takes place which has an EG facility installed on it, the new owner will be required to sign a new Supplemental Contract with the relevant municipality or alternatively the EG facility must be decommissioned and disconnected from the grid. At the time that the owner of the EG facility ceases to be on the EG tariff, any remaining credit balance will be refunded to the owner of the EG facility on written request provided that the owner of the EG facility has no other outstanding municipal debt.³⁴

7.3 It is important to note that section 24 of the ERA states that:-

“(1) Any asset belonging to a licensee that is lawfully constructed, erected, used, placed, installed or affixed to any land or premises not belonging to that licensee, remains the property of that licensee notwithstanding the fact that such an asset may be fixed or permanent in nature.

(2) An asset belonging to a licensee in terms of subsection (1) -

(a) may not be attached or taken in execution under any process of law, or be the subject of any insolvency or liquidation proceedings, instituted against the owner of the land, the landlord or the occupier of the premises concerned;

(b) may not be subjected to a landlord’s hypothec for rent; and

(c) may only be validly disposed of or otherwise dealt with in terms of a written agreement with the licensee.”

7.3.1 In terms of the ERA, “licensee” means “the holder of a licence granted or deemed to have been granted by the Regulator under this Act”. In the circumstance where a person is exempt pursuant to Schedule 2 from the obligation to obtain a licence in terms of section 7 of the Act, the person is therefore not considered to be a “licensee” for the purpose of the ERA. As a consequence, section 24 to the ERA does not apply to a person that owns an EG in circumstances where such person is exempt from the obligation to hold a licence under the ERA.

7.3.2 To the extent that section 24 of the ERA is not applicable, if the EG facility is considered to be ‘attached’ to the property in terms of law, then the purchaser of the property assumes responsibility for the EG facility in terms of law together with taking transfer of ownership of the property. The certificate of compliance issued in terms of Regulation 8(2) of the Electrical Installation Regulations will need to specify the EG connection and a rates clearance certificate processed by the relevant municipality is required to confirm that all fees payable to the municipality have been settled. The value of the EG facility will also be included in the value of the property, therefore the payment of transfer duty includes the value of the EG facility.

³³ See “Requirements for Small-Scale Embedded Generation” available at: <https://www.langeberg.gov.za>
“Small Scale Embedded Generation Guidelines in Western Cape Municipalities” available at: <https://www.overstrand.gov.za> and
“City of Ekurhuleni: Requirements for Embedded Generation” available at: <https://www.ekurhuleni.gov.za/>
³⁴ See “City of Cape Town: Guidelines for Embedded Generation” available at: <https://www.capetown.gov.za>

- 7.3.3 In the event that the EG facility is not considered to be attached to the property (for example if installed under a lease agreement), a separate written agreement would have to be entered into in respect of the disposal (purchase and sale) of the EG facility for the transfer of ownership of the EG . No certificate of compliance and rates clearance certificate will be required, and no transfer duty will be levied on the transfer of the EG facility seeing that the EG facility is separate from the property.
- 7.3.4 The legal position concerning whether movable property (i.e. the EG facility) accedes to the immovable land depends on various objective and subjective factors. Objectively, the EG facility must not be affixed in a manner that will destroy the separate identity of the EG facility or that will create the impression that it has been affixed permanently. Subjectively, the courts³⁵ also have looked at the recorded intention of the parties and any surrounding factual circumstances in the event that there is a dispute³⁶. Given the composition and structure of renewable plants such as solar photovoltaic facility (being the type of facility likely to be utilised on residential or commercial properties), it is arguable that the EG facility is capable of being decommissioned and removed from the property in a manner that does not damage/destroy the EG facility or the property. It is widely considered that an EG facility of such nature does not accede (affix/attach) to the property on which it is located and remains the property of the person that contractually owns the EG facility.
- 7.3.5 Accordingly, the transfer of ownership of the EG facility to a new property owner would have to be regulated in the purchase agreement concluded between the seller and the buyer. Alternatively, to the extent that the EG facility is not owned by the property owner and ownership is retained by a third party, in which case the property owner only has to the right to use of the EG facility be it through a lease agreement or a power purchase agreement, the purchaser of the property would have to enter into a new lease or power purchase agreement for the continued enjoyment of the EG facility.
- 7.3.6 To the extent that the purchaser of the property elects to purchase the EG facility and keep the EG facility on the property and operate same, a certificate of compliance in terms of Regulation 8(2) of the Electrical Installation Regulations will be required as a condition of transfer of ownership of the property and it must include a statement regarding the state of connection or disconnection. This is in compliance with the requirements of the of the Electrical Installation Regulations and the Distribution Code. In accordance with Regulation 8(2) of the Electrical Installation Regulations, no person shall connect or permit the connection of any completed or partially completed electrical installation to the electricity supply unless it has been inspected and tested by a "registered person" and a certificate of compliance for that electrical installation has been issued. The purchaser of the property will also have to enter into a Supplemental Contract with the relevant municipality as contemplated above in paragraph 7.2 as the new owner of the EG facility. This can involve the purchaser signing a new contract with the municipality or the purchaser signing an accession to the terms of the original contract.

³⁵ *Melcorp SA (Pty) Limited v Joint Municipal Pension Fund* (Tvl) 1980 (2) SA 214

³⁶ *Theatre Investments (Pty) Limited v Butcher Brothers Limited* 1978 (3) SA 682 (A)

8. NERSA APPROVAL OF REGISTRATION

Question: Are municipal distributors obliged to wait for NERSA ‘approval of registration’ for systems between 100 kVA and 100 MW before issuing permission to install and accepting generators onto their networks?

- 8.1 Generators are not permitted to connect an EG facility to the municipality’s distribution network without the prior written consent of such municipality in accordance with the Distribution Codes and the Electrical Installation Regulations. In accordance with paragraph 8.2 of the Distribution Code, the permission by such municipality shall not be unreasonably withheld or delayed, provided that such permission shall only be granted upon successful completion of the pre-commissioning tests and compliance with such municipality’s technical requirements.
- 8.2 The Distribution Code³⁷ states that no electricity generation equipment provided by a consumer in terms of any regulations or for his own operational requirements shall be connected to any installation without the prior written approval of the licensed distributor. The section provides that application for such approval shall be made in writing and shall include a full specification of the equipment and a wiring diagram. The electricity generation equipment should also be designed and installed such there are protections safeguarding against any unintended back energisation from such equipment. The procedures for connecting a generator to a municipal distribution system will depend on the EG Requirements contained in that municipality’s EG Policy.
- 8.3 There is no provision in the Distribution Code or the ERA which explicitly precludes municipal distributors from consenting to the connection of the EG facility and accepting generators onto their networks prior to NERSA submitting its approval of registration for such EG facilities. Further, in terms of the ERA the activity that has to be licensed or registered is the “operation” of the generation facility which will occur following the connection of the EG facility to the network.
- 8.4 However, it is noted that the ERA³⁸ requires that municipal distribution licence holders need to adhere to the ERA. In the event that a party connects a generation facility without obtaining a generation licence in terms of section 7 of the ERA or registering the activity with NERSA, as may be applicable, that party will be considered to be operating a generation facility in contravention of the ERA. In terms of the ERA and in compliance with its distribution licence, the municipality will be required to instruct the customer to disconnect the EG facility from the connection point until such time as the activity has been licensed or registered with NERSA, at which point the EG facility can be reconnected and switched on. A certificate of compliance in terms of Regulation 8(2) of the Electrical Installation Regulations issued by an authorised electrical contractor will be required as proof of such disconnection.
- 8.5 Therefore, in the event that the municipal distributor has issued its permission to install and accept an EG facility onto their network and subsequently NERSA does not approve the registration of the EG facility, it would follow that the EG would have to be disconnected from the network.

³⁷ Paragraph 3 of the Distribution Code.

³⁸ Section 18(1) of the ERA