



# THE ASSOCIATION OF MUNICIPAL ELECTRICITY UTILITIES (AMEU)

## APPLICABILITY OF SDAs TO ESKOM HOLDINGS

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# Topics

- Introduction
- Legal and Regulatory Framework
  - ❖ The Constitution
  - ❖ The Systems Act
  - ❖ Electricity Regulation Act
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- Conclusion



# Introduction

- ❑ Subject matter - the applicability of SDAs between Eskom and municipalities in whose areas of jurisdiction Eskom distributes electricity
- ❑ Specifically to advise whether Eskom is required to enter into SDAs with such municipalities
- ❑ Common cause - Eskom currently distributes electricity in a number of municipalities without an SDA
- ❑ Is it Required in terms of Law?
- ❑ Applicable Legal Instruments
  - ❖ The Constitution
  - ❖ The Systems Act
  - ❖ The ERA



# The Constitution

- ❑ Complement of 12 lawyers
- ❑ Section 156(1) provides that a municipality has **executive authority** in respect of and **has the right to administer**, inter alia, the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5
- ❑ Section 156(2) provides that a municipality **may make and administer by-laws** for the effective administration of the matters which it has the right to administer
- ❑ Part B of Schedule 4 lists electricity reticulation as one of the local government matters over which a municipality has executive authority



# The Constitution (continued)

- ❑ Thus a municipality has both an **executive authority** and **legislative authority** over electricity reticulation in its area of jurisdiction
- ❑ Be noted that the Constitution does not define “electricity reticulation
- ❑ Section 164 of the Constitution, provides that any local government matter not dealt with in the Constitution may be prescribed by national legislation or by provincial legislation



# The Systems Act

- ❑ Section 73(1)(c) of the Systems Act requires a municipality **to give effect to the provisions of the Constitution** and to ensure that all members of the local community have access to at least **minimum level of basic municipal services**
- ❑ Municipal services is defined as *“a service that a municipality in terms of its powers and functions provides or may provide to or for the benefit of the local community irrespective of whether, inter alia, such a service is provided by the municipality through an internal mechanism contemplated in section 76 or by engaging an external mechanism contemplated in section 76”*



# The Systems Act (continued)

- ❑ Thus even where an external mechanism (SDA) is applicable, such service remains a municipal service
- ❑ Accordingly, as municipalities have the power to provide electricity reticulation, electricity reticulation constitutes a municipal service as defined in the Systems Act
- ❑ Accordingly, in terms of Part B of Schedule 4, read with section 73(1)(c) of the Systems Act, **only** a municipality has an executive authority over electricity reticulation in its area of jurisdiction
- ❑ Any other entity has no such executive authority to provide electricity reticulation in the area of a municipality



# The Systems Act (continued)

- ❑ In terms of section 76 of the Systems Act, a municipality may provide a municipal service through:
  - ❖ an internal mechanism; or
  - ❖ an external mechanism by entering into an SDA with:-
    - a municipal entity
    - another municipality
    - an organ of state including a licensed service provider registered or recognised in terms of national legislation
    - any other institution, entity or person legally competent to operate a business activity





# The Systems Act (continued)

- ❑ Thus section 76 gives a municipality only two options through which it may provide a municipal service
- ❑ The Systems Act does not define an SDA
- ❑ What is clear though is that an SDA is required even where an entity is an organ of state that is licensed in terms of another legislation to provide a service
- ❑ It is also clear that where a service is provided through an external mechanism, an SDA is required.
- ❑ In fact, the Systems Act uses “*external mechanism*” interchangeably with “*an SDA – e.g, section 80 and 81*”



# The Systems Act (continued)

- ❑ Thus an SDA cannot be divorced from an external delivery mechanism – it is integral to it
- ❑ Put differently where a municipality is not providing the service itself, then an SDA is required
- ❑ **Note** that the Systems Act does not contain any express provisions allowing a municipality to dispense with an SDA when it uses an external mechanism
- ❑ In terms of section 81(1), if a municipal service is provided through an SDA, the municipality remains responsible for ensuring that the municipal service is provided to the local community in terms of the Systems Act.



# The Systems Act (continued)

- ❑ This responsibility includes a duty to:
  - ❖ regulate the provision of the service through performance management
  - ❖ monitor and assess the implementation of the SDA
  - ❖ control the setting and adjustment of tariffs by the service provider
  - ❖ exercise its service authority to ensure uninterrupted service delivery.
  
- ❑ In relation to the duty to control the setting and adjustment of tariffs, it becomes a concurrent jurisdiction with NERSA, and requires harmonisation



# The Electricity Regulation Act

- ❑ SDAs are dealt with under Chapter 4 of ERA which is titled “*Reticulation*”
- ❑ Section 28(1) provides that *a municipality must comply with Chapter 8 of the Systems Act and the ERA prior to entering into an SDA with a service provider*
- ❑ *SDA is defined as an agreement between a municipality and an institution or person providing electricity reticulation, either for its own account or on behalf of the municipality*
- ❑ It must be noted that this definition does not expressly state that there must be an SDA, but assumes that an SDA will be in place **when an institution other than the municipality provides electricity reticulation services**



# The Electricity Regulation Act (continued)

- ❑ Service provider is defined as, “*a person or institution which provides a municipal service in terms of an SDA*”
- ❑ *Electricity reticulation* is not defined. What is defined is “*reticulation services*”, which means trading or distribution of electricity and includes services associated therewith.
- ❑ It is our view that, based on this definition, electricity reticulation has the same meaning as reticulation services
- ❑ It is clear that distribution of electricity constitutes reticulation of electricity. Thus, in terms of the ERA, any person who distributes electricity is performing an electricity reticulation function



# The Electricity Regulation Act (continued)

- ❑ *Distribution* is defined as the conveyance of electricity through a distribution power system excluding trading
- ❑ In terms of section 28(2), an SDA entered into by a municipality with an external service provider must comply with the Systems Act, the MFMA and ERA
- ❑ Sections 4 and 7 set out the type of licences that may be issued under ERA
- ❑ **Note** that the ERA does not make provision for a licence to provide *reticulation services*



# The Electricity Regulation Act (continued)

- ❑ This is so because, in terms of section 13(3), NERSA is required to issue separate licences for the operation of, inter alia, distribution facilities and for trading
- ❑ Section 27 puts an obligation on a municipality to exercise authority and perform its duty by performing certain functions relating to reticulation services
- ❑ It is our view that this constitutes a recognition by the ERA that municipalities have executive authority over reticulation services



# Our Opinion

- ❑ In terms of law, a municipality has executive authority over electricity reticulation services in its area of jurisdiction. This includes the power to regulate how electricity reticulation services are provided
- ❑ If a municipality does not distribute electricity itself, it must conclude an SDA with the person who reticulates electricity in its area of jurisdiction
- ❑ Put differently, any entity other than a municipality itself, which distributes electricity within the area of the municipality's jurisdiction can only lawfully do so if such distribution is done in accordance with an SDA entered into with the relevant municipality





# Our Opinion (continued)

- ❑ An SDA is required even where an entity is an organ of state that is licensed in terms of another legislation to provide such particular service
- ❑ ERA recognises that a municipality has executive authority over reticulation services. Further recognises that provision of reticulation services within a municipality's area of jurisdiction will require an SDA, and regulates how such SDAs should be concluded



# Conclusion

- ❑ Eskom is required in terms of law to conclude SDAs with municipalities in whose areas it distributes electricity
- ❑ That Eskom holds a licence issued to it by NERSA to distribute electricity does not exempt it from complying with the provisions of the Systems Act.
- ❑ To the contrary:-
  - ❖ the Systems Act states that an SDA may be concluded with an entity licensed to provide a service; and
  - ❖ the ERA recognises that entities licensed by NERSA to reticulate electricity within the area of jurisdiction of a municipality will be required to enter into an SDA with such municipality



**THANK YOU**

**QUESTIONS AND DISCUSSION**



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