

DEPARTMENT OF ECONOMIC DEVELOPMENT

NO. 582

2 July 2021

MEMORANDUM OF AGREEMENT

("MOA")

Entered into between

THE COMPETITION COMMISSION OF SOUTH AFRICA

("the Commission")

a juristic person established in terms of section 19 of the Competition Act No. 89 of 1998 as amended, ("the Competition Act"), herein duly represented by **Mr. Tembinkosi Bonakele**, in his capacity as the **Commissioner** of the Competition Commission of South Africa

And

NATIONAL ENERGY REGULATOR OF SOUTH AFRICA

(Hereinafter referred to as "NERSA")

A juristic person established in terms of section 3 of the National Energy Regulator Act, No. 40 of 2004, ("the Energy Act") herein duly represented by **Advocate Nomalanga Sithole** in her capacity as **Acting Chief Executive Office** of NERSA.



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PREAMBLE

WHEREAS, the Commission is mandated by the Competition Act No 89 of 1998 as amended ("the Competition Act") to, *inter alia*, investigate and evaluate restrictive practices, abuse of dominant position, exemptions and mergers, as well as conducting market inquiries;

AND WHEREAS, the Commission, in terms of the provisions of section 21(1) (h) read with section 82 (2) of the Competition Act has to negotiate agreements with any regulatory authority which, in terms of any public regulation, has jurisdiction in respect of conduct regulated in terms of the Competition Act. In respect of a particular matter within the regulatory authority's jurisdiction, the regulatory authority may exercise its jurisdiction by way of an agreement;

WHEREAS NERSA is established in terms of section 3 of the National Energy Regulator Act No 40 of 2004 (the "NERSA Act") to regulate the electricity, piped-gas, and petroleum pipeline industries in terms of the Electricity Regulation Act No 4 of 2006 ("Electricity Act"), the Gas Act No 48 of 2001 ("Gas Act"), and the Petroleum Pipelines Act No 60 of 2003 ("Petroleum Pipelines Act") respectively;

WHEREAS the key functions of NERSA are to regulate the electricity, piped-gas, and petroleum pipeline industries; issue licenses, set and approve tariffs and charges, mediate disputes, gather information pertaining to electricity, gas and petroleum pipelines and promote the optimal use of gas resources;

AND WHEREAS in terms of the objectives as set out in the Electricity Act; the Gas Act and the Petroleum Pipelines Act, respectively, NERSA is obliged to promote the development of competitive markets in the electricity; gas and gas services as well as in the petroleum pipelines industries.

AND WHEREAS, NERSA, in terms of section 4(e) of the Petroleum Pipelines Act and the Gas Act may consult with government department and other bodies and institutions regarding any matter contemplated in its legislation;

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AND WHEREAS, it is recorded that this Memorandum of Agreement (The Agreement) shall, on an ongoing basis, be reviewed to accommodate developments incidental to matters that require co-operation between the Commission and NERSA in the electricity, piped-gas, and petroleum pipeline industries. The review shall take into account prevailing legal precedents, legislative amendments, promulgation of regulations, and policy reviews, as the case may be.

NOW THEREFORE, the Commission and NERSA agree as follows:

1. INTERPRETATION

In the interpretation of any terminology used in this Agreement, any word or expression to which a meaning is assigned in the Competition Act, NERSA Act, Electricity Act, the Gas Act and the Petroleum Pipelines Act, has the meaning assigned to it unless otherwise specified.

2. PURPOSE OF THE AGREEMENT

2.1. This Agreement is entered into to establish the manner in which the Commission and NERSA will interact with each other to enable both regulatory authorities to, *inter alia*:

- 2.1.1. effectively coordinate the exercise of the Commission's jurisdiction and powers when taking decisions on competition matters within the energy sector;
- 2.1.2. apply a consistent interpretation and application of the principles of competition when exercising their powers and their respective functions in terms of their enabling legislation;
- 2.1.3. consult each other regarding the definition of markets for electricity, piped-gas and petroleum pipelines and determining whether there is effective competition in these markets, and undertaking enquiries



regarding dominance or significant market power in such markets;
and

- 2.1.4. timeously provide each other with necessary information in respect of the investigation of anti-competitive practices, regulation of mergers and acquisitions, as well as research developments or studies within the energy market.

- 2.2. The Commission and NERSA may inform each other of any previous decision or judgement that either of them has previously taken in respect of the anti-competitive practice or conduct involving the same party/parties, in so far as it pertains to competition matters.

3. PRINCIPLES OF COOPERATION

- 3.1. In order to achieve the purposes of this Agreement, the Commission and NERSA have agreed to:

- 3.1.1. cooperate with each other in mutual trust and good faith;
- 3.1.2. assist and support each other in respect of agreed upon services and commitments between them in terms of this Agreement;
- 3.1.3. inform each other of, and consult each other on matters of common interest; and
- 3.1.4. provide to each other the necessary support for the successful performance of the tasks and programmes envisaged in this Agreement.



4. LEGISLATIVE FRAMEWORK

- 4.1. the Commission has jurisdiction to investigate and evaluate alleged prohibited practices within any industry or sector, to grant or refuse exemption applications, and to review mergers within any industry or sector in terms of section 21(1) of the Competition Act. Accordingly, NERSA agrees that the Commission shall exercise its jurisdiction as provided for in Competition Act, to investigate and evaluate alleged prohibited practices, to grant or refuse exemption applications, and to review mergers within the energy sector.
- 4.2. NERSA is established in terms of section 3 of the Energy Act to regulate the electricity, piped-gas, and petroleum pipeline industries and to carry out the objectives of the Electricity Act, the Gas Act, and the Petroleum Pipelines Act respectively;
- 4.3. This Agreement shall in no way affect the independence and exercise of statutory powers by the two regulatory authorities in terms of their enabling legislation.

5. COOPERATION BETWEEN THE PARTIES

- 5.1. The areas of cooperation between the Commission and NERSA shall include the following:
- 5.1.1. Collaboration, cooperation and deference on matters encountered by either regulatory authority that affects the mandate and functions of the other.
 - 5.1.2. Strategic collaboration on measures to promote competition in the electricity, piped-gas and petroleum pipelines industries.
 - 5.1.3. Collaboration on advocacy and outreach initiatives to facilitate better access to the public and become more visibly involved in education and promotional campaigns, particularly in rural areas.



5.1.4. Any other areas of interest as may be identified from time to time.

6. GUIDELINES FOR INTERACTION BETWEEN THE COMMISSION AND NERSA UNDER THIS AGREEMENT

- 6.1. NERSA may request and receive advice from the Commission, in respect of aspects falling under the competency of the Commission in matters relating to the electricity, piped-gas and petroleum pipelines industries or proceedings as set out in clauses 7 and 8 below.
- 6.2. The Commission may request and receive advice from NERSA, in respect of proceedings which require consideration of regulatory aspects falling under the competency of NERSA as set out in clauses 7 and 8 below.
- 6.3. All requests for advice or information by either regulatory authority will be submitted in writing.
- 6.4. The regulatory authority seeking advice or information must indicate a deadline before or upon which such advice or information should be given by the other regulatory authority.
- 6.5. When the Commission and NERSA consult each other under this Agreement, they shall do so at no cost to each other and with an acknowledgement of their respective areas of expertise.
- 6.6. Should either regulatory authority consider a matter before it, in terms of a timeline, such regulatory authority would share with the other, its expected process, and the other regulatory authority would cooperate to the best of its ability, towards achieving the targets set out in the project timelines.

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7. APPLICATION FOR APPROVAL IN RESPECT OF MERGER TRANSACTIONS

- 7.1. Where a merger transaction ("transaction") requires the approval of both the Commission and licence from NERSA, such as one involving the issuance or revocation of a licence or control, the Commission and NERSA shall consider the transaction in accordance with their enabling legislation.¹ The merging parties shall submit applications containing the required information to both the Commission (in accordance with the Competition Act) and to NERSA (in accordance with the Energy Act) for their respective consideration.
- 7.2. Where a transaction requires the approval of the Commission, such as one involving the issuance or revocation of a licence or control, the Commission may prior to arriving at a decision, consult NERSA so as to ensure the consistent application of principles to the transaction in question.
- 7.3. The Commission and NERSA shall make independent determinations on the basis of the criteria and mandates of their respective legislative and regulatory frameworks. In arriving at these determinations, the Commission and NERSA may consult each other in as far as competition matters are concerned.
- 7.4. When consulting each other in terms of sub-clause 7.2 above, the Commission and NERSA must have regard to the principles that:
- 7.4.1. the Commission shall exercise jurisdiction as set out in Chapter 3 of the Competition Act, in the review of mergers in any industry, as required, to give effect to the Competition Act.
 - 7.4.2. NERSA shall exercise its authority as provided for by the Electricity, Gas and Petroleum Pipelines Acts, respectively, in order to regulate

¹ The Commission is responsible to authorize, with or without conditions, prohibit or refer mergers of which it receives notice in terms of Chapter 3 of the Competition Act.



and establish conditions within the electricity, piped-gas and petroleum pipelines industries.

8. COMPLAINTS

8.1. Where a complaint is lodged regarding a practice or conduct in respect of which either the Commission and NERSA have jurisdiction and the other one or either of the authorities has an interest in the complaint, the following process will be followed to the extent possible:

- 8.1.1. The complaint may be lodged with the regulator that has jurisdiction ("recipient regulator");
- 8.1.2. If upon receiving a complaint, the recipient regulator is of a view that it does not have jurisdiction over the matter, the recipient regulator may advise the complainant(s) accordingly and recommend that the complainant refer the complaint to the relevant regulator.
- 8.1.3. The Commission and NERSA may consult with each other in respect of the complaint;
- 8.1.4. If NERSA is the recipient regulator that has jurisdiction, it may in its discretion liaise and consult with the Commission;
- 8.1.5. If the Commission is the recipient regulator that has jurisdiction, it may in its discretion liaise and consult with NERSA;
- 8.1.6. The Commission and NERSA may, upon request from each other, participate in each other's proceedings in an advisory capacity;
- 8.1.7. In consulting each other in respect of the complaint, the parties must have regard to the principle that –



- 8.1.7.1. The Commission is to exercise primary authority to investigate and evaluate alleged prohibited practices to give effect to the Competition Act; and
- 8.1.7.2. NERSA has primary authority to exercise powers and perform functions assigned to it in terms of the Energy Act, the Electricity Act, the Gas Act and the Petroleum Pipelines Act in order to give effect to its relevant objectives and provisions contained therein.
- 8.1.8. The recipient regulator may, in its discretion, advise the complainant(s) as soon as reasonably possible of the outcome of the consultation between the Commission and NERSA;
- 8.1.9. The recipient regulator may give the complainant(s) further directions regarding the investigation of the complaint in question;
- 8.1.10. In the event that the matter is dealt with by the Commission, representatives from NERSA may, at the request of the Commission, participate in the matter through, inter alia, attending meetings when required, providing inputs during the case investigation and making representations at the Competition Tribunal hearing, if necessary.
- 8.1.11. In the event that the matter is dealt with by NERSA, representatives from the Commission may, at the request of NERSA, participate in the matter through, inter alia, attending meetings, providing inputs during the case investigation and making representations at NERSA's proceedings if necessary.
- 8.1.12. The decision by any of the Parties to consult the other regulator shall be discretionary and voluntary, and either Party shall be entitled, with or without consultation, to make its independent



decision in respect of the complaint in terms of its enabling legislation;

8.1.13. Nothing in the consultation procedures contemplated herein, shall detract from the jurisdiction of the Commission or the jurisdiction of NERSA to receive and deal with complaints in terms of their enabling statutes as they deem fit, or preclude the public from lodging complaints with both the Commission and NERSA.

8.1.14. When the Commission and NERSA consult each other, as contemplated in this Agreement, they shall do so at no cost to each other and shall act as expeditiously as possible.

9. ESTABLISHMENT OF THE JOINT WORKING JWC

9.1. A Joint Working JWC ("the JWC") constituted by representatives of the Commission and NERSA, as nominated by the respective regulators, shall be established pursuant to this Agreement and shall function on an on-going basis.

9.2. The functions of the JWC shall be:

9.2.1. to manage and facilitate co-operation and consultation in respect of matters dealt with by each regulator in terms of this Agreement;

9.2.2. to propose, when necessary, any amendment of or supplementation to this Agreement;

9.2.3. to advise management of the Commission and NERSA on issues affecting competition in the energy sector, as the case may be, and make recommendations on how to deal with same. Such advice shall be on, but not limited to, the following:

9.2.3.1. Types of conduct or transactions affected by both the Competition Act and the NERSA Act, the Electricity Act, the Gas



Act and the Petroleum Pipelines Act in respect of which concurrent jurisdiction is to be exercised by the two regulators;

9.2.3.2. International approach to issues of overlap concerning jurisdiction between Commission and NERSA, as the case may be;

9.2.3.3. Amendments to the relevant or applicable statutes that may be necessary from time to time; and

9.2.3.4. Any other related matter.

9.3. The JWC shall meet regularly, but no less than twice a year, to ensure both regulatory authorities are aware of developments in areas of common interest.

10. INSTITUTIONAL CONTACT PERSONS

10.1. For purposes of this Agreement:

10.2. The Manager of the Advocacy Division will be the main contact person at the Commission.

10.3. The Head of Communications and Stakeholder Management will be the main contact person at NERSA.

10.4. Should the regulatory authorities have to exchange information, as a result of discussions at the JWC, the processes set out in this Agreement shall be followed.

11. EXCHANGE OF INFORMATION

11.1. Subject to clause 12 below, the Commission and NERSA may exchange information as may be necessary to give effect to this Agreement.



12. CONFIDENTIALITY

- 12.1. Any information shared by either Party pursuant to this Agreement must be used only for lawful purposes in matters of concurrent jurisdiction.
- 12.2. Any request made by either of the parties for confidential information in possession of the other shall be dealt with in accordance with the procedures set out in the parties' respective enabling legislation, policies or procedures.
- 12.3. The parties shall ensure that confidential information accordingly disclosed to them remains confidential and is not placed in the public domain through any negligent or wilful conduct on its behalf.
- 12.4. To the extent permitted by law, the Parties shall hold confidential information received from each other pursuant to this Agreement and shall not otherwise disclose such information except when required to do so by the law or an order of a Court or a Tribunal.
- 12.5. The Commission and NERSA shall, prior to disclosing such confidential information or a part thereof when required to do so by the law or an order of a Court or a Tribunal, notify each other of the law or an order of a Court or Tribunal requiring such disclosure.
- 12.6. The sharing of confidential information, in accordance with this Agreement, relies on the assurances given in 12.1; 12.2 and 12.3 above and shall not constitute a waiver of any legally recognizable grounds for refusing disclosure of information.
- 12.7. Where confidential information is disclosed either by the Commission or NERSA in contravention of this Agreement, such disclosing party shall be solely liable in law for such disclosure.



12.8. Any of the parties may in its discretion decline a request for access to confidential information made in terms of this Agreement.

13. DATA PROTECTION

13.1. The Parties acknowledge their respective obligations to comply with the substantive provisions of the Protection of Personal Information Act, 2013 (Act No. 4 of 2013) (hereinafter referred to as the 'POPI Act').

13.2. Where any Party receives any personal information as defined in the POPI Act such Party shall ensure that it fully complies with the provisions of POPI and only deal or process such personal information to fulfil its obligations in terms of this Agreement.

13.3. The personal information received by a Party shall not be processed or disclosed for any other purpose without the consent of the disclosing Party.

13.4. Each Party therefore understands and agrees, notwithstanding any contrary provision in any other agreement between the Parties, that each Party retains its full rights to pursue legal or equitable remedies in the event of any breach or threatened breach of the provisions of POPI when dealing with and/or processing personal information of the disclosing Party, and may prevent the other Party, any of its agents or subcontractors, or any third party who has received records or information from that Party from violating this Agreement by any legal means available.

13.5. Each Party further understands that the violation of the provisions dealing with POPI may subject that Party to applicable legal penalties, including those provided under the POPI Act.

13.6. Within thirty (30) days after the termination of this Agreement, for whatever reason, the receiving Party of either Party's personal information shall return same or at the discretion of the disclosing Party of such personal information,



destroy such personal information, and shall not retain copies, samples or excerpts thereof.

- 13.7. In cases where the disclosing Party has elected for the personal information to be destroyed, as provided for in clause 13.6 above, the receiving Party shall, within ten (10) days of receiving the instruction to destroy the personal information, send an affidavit confirming the destruction of such personal information.

14. GENERAL PROVISIONS

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

- 14.1.1 where compliance would require the Commission or NERSA to act in a manner that would violate the applicable law;
- 14.1.2 under circumstances where there is an imminent risk to national security; or
- 14.1.3 when compliance with a request or provision of information would interfere with an ongoing investigation in circumstances where prejudice to the investigation is likely to outweigh the adverse effects of denying the information.

- 14.2. No provision of this Agreement shall give rise to a right on the part of any person, entity or organ of state other than the Commission and NERSA, directly or indirectly, to obtain any information or to challenge the execution of a request for information under this Agreement.

- 14.3. The provisions set forth under clauses 12 and 13 must prevail with respect to any information provided or actions taken under this Agreement prior to its termination.



15. TERMINATION OF PREVIOUS AGREEMENTS

15.1. This Agreement terminates existing agreements entered into between the Commission and NERSA (previously the National Electricity Regulator), published in Government Gazette General Notice 3067 of 2002.

15.2. Any pending transactions, projects, requests being processed in terms of the Memorandum of Agreement published in Government Notice 3067 of 2002 under Government Gazette 24108 shall be brought to completion in terms of this Agreement and shall be considered in effect.

16. EFFECTIVE DATE OF THE AGREEMENT

16.1. This Agreement shall come into effect on the date on which it is last signed by the persons authorized to act on behalf of either of the Parties.

16.2. This Agreement shall be governed and construed in accordance with the laws of the Republic of South Africa.

17. DURATION OF THE AGREEMENT

17.1. This Agreement must remain in force until it is amended or repealed by both regulators acting jointly.

18. REVIEW OF THE AGREEMENT

18.1. This Agreement shall, on an ongoing basis and when necessary, be reviewed to accommodate developments incidental to matters that require co-operation between the two statutory bodies in the electronic communications, broadcasting and postal industries. The review shall take into account prevailing legal precedents, legislative amendments, promulgation of regulations, and policy reviews, as the case may be.



19. DISPUTE RESOLUTION

19.1. Should any dispute or difference arise between the regulators with regard to interpretation and/or implementation of any one or more of the provisions of this Agreement, such dispute or difference must be resolved in any manner other than through judicial proceedings.

20. LEGAL EFFECT

20.1. This Agreement is not intended to be a legally enforceable document and intends to describe the nature and co-operative intentions of the Parties involved, and to suggest guidelines for co-operation. Nothing therefore shall diminish the full autonomy of either Party nor may constrain either Party from discharging its statutory functions.

21. DOMICILIUM CITANDI ET EXECUTANDI

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

The Competition Commission:

Block C, DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, 0002

Contact Person: Mrs Khanyisa Qobo, Manager: Advocacy Division

The National Energy Regulator Of South Africa:

Kulawula House, 526 Madiba Street, Arcadia, Pretoria, 0007

Contact Person: Head of Department: Communications & Stakeholder Management



Signatures

Signed at PRETORIA on this 14TH day of JANUARY 2021 by

Mr. **Tembinkosi Bonakele**, Commissioner of the Competition Commission South Africa.



COMPETITION COMMISSION



WITNESS 1

WITNESS 2

Signed at Pretoria on this 5th day of May 2021 by

Advocate Nomalanga Sithole in her capacity as Acting Chief Executive Officer of the National Energy Regulator of South Africa



NATIONAL ENERGY REGULATOR OF SOUTH AFRICA

WITNESS 1

WITNESS 2

