

Presentation to SAIPPA

The Current Challenges of Licensing IPP Generators

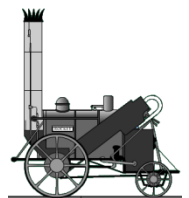
Sue Röhrs

20 November 2013



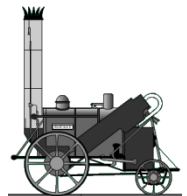
Background

- Until fairly recently it was relatively easy for Independent Power Producers (IPPs) to obtain generation licences from NERSA in terms of the Electricity Regulation Act of 2006 (ERA)
- A number of IPPs are now struggling with a number of challenges in convincing NERSA to issue both new licences and amendments to existing licences
- This presentation serves to provide an overview of some of the current licensing challenges facing IPP Generators



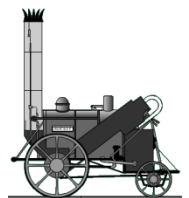
Overview of the “roadblocks”

- The New Generation Regulations present a significant obstacle to sales of new generation capacity to “organs of State” other than through National programmes
- A plethora of legislation makes it difficult to enter into PPAs with Municipalities for periods of longer than 3 years



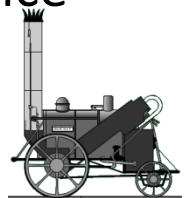
More Active Role of DoE

- NERSA'S ROLE UNDER THE ERA
- CHALLENGES IN CURRENT IMPLEMENTATION OF THE LICENSING PROVISIONS OF THE ERA BY NERSA
 - Insistence on compliance with IRP2010
 - Application of same procedures for new licences and licence amendments
 - NERSA's view that Ministerial Determinations are required for sale of new generation capacity
 - 120 day period for consideration by NERSA
 - Remedies against NERSA decisions
- ERA 2



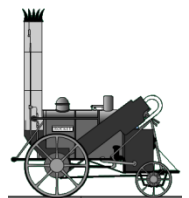
NERSA's role under the ERA

- NERSA is the *'custodian and enforcer of the national electricity regulatory framework'*
- As such NERSA must give effect to the Objects of the ERA, which include:
 - Achieving the efficient, effective, sustainable and orderly development and operation of electricity supply infrastructure in South Africa
 - Having regard to the governance, efficiency, effectiveness and long-term sustainability of the electricity supply industry
 - Facilitating investment in the electricity supply industry
 - Facilitating universal access to electricity
 - Promote the use of diverse energy sources and energy efficiency
 - Promote competitiveness and customer and end user choice



NERSA's role under the ERA

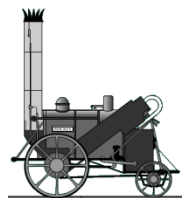
- Granting of licences to IPPs will fulfill these Objects, yet there seems to be a reluctance on the part of NERSA to do so
- Support for IPPs in the attainment of the Objects of the Act is required, rather than the implementation of “roadblocks” to the granting of licences



Challenges in current implementation of the ERA by NERSA

INSISTENCE ON COMPLIANCE WITH IRP 2010

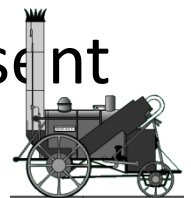
- NERSA are relying on the provisions of s10(2)(g) of the ERA and insisting that Generators show compliance with the IRP 2010 before granting licences or amendments to licences
- This section is one that should only apply to the issue of new licences and not amendments, but is being applied across the board by NERSA
- Failing “compliance” (in NERSA’s view) the consent of the Minister of Energy to the issue of the licence must be obtained



Challenges in current implementation of the ERA by NERSA

INSISTENCE ON COMPLIANCE WITH IRP 2010 (cont)

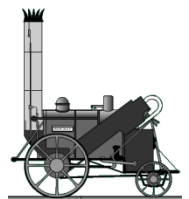
- The IRP 2010 is a long term planning document which does not take account of –
 - all modes of generation (leading to the exclusion of certain classes of Generators from the plan), and
 - the “willing buyer, willing seller” method of sale, thus private sales are not catered for in this document
- Any proposed sales which do not fall within the provisions of the IRP 2010 (or the MTRMP which is an annexure to the plan) require Ministerial consent



Challenges in current implementation of the ERA by NERSA

INSISTENCE ON COMPLIANCE WITH IRP 2010 (cont)

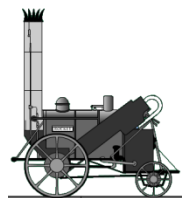
- NERSA has yet to comply with its obligation to s4(a)(iv) of the ERA to *'issue rules designed to implement the national government's electricity policy framework, the integrated resource plan and this Act'*
- Because of this, it is even more unclear and confusing to IPPs how compliance with the IRP 2010 is to be achieved and licences granted



Challenges in current implementation of the ERA by NERSA

APPLICATION OF THE SAME PROCEDURE FOR NEW LICENCES AND LICENCE AMENDMENTS

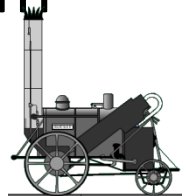
- NERSA are applying the same processes and procedures for the granting of new licence applications and licence amendment applications
- This is onerous and complicated for IPPs, creates an administrative burden for NERSA, and has unnecessary cost and time implications



Challenges in current implementation of the ERA by NERSA

APPLICATION OF SAME PROCEDURE FOR NEW LICENCES AND LICENCE AMENDMENTS (cont)

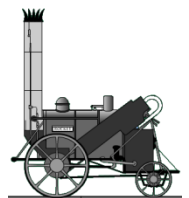
- s16(2) provides that the Minister must prescribe the procedure to be followed in varying, suspending, removing or adding any licence condition
- This has not been done, therefore the full procedures for granting of an initial licence are being followed for amendments, including compliance with IRP 2010, and NERSA's review period of 120 days from receipt of final information



Challenges in current implementation of the ERA by NERSA

NERSA'S VIEW THAT MINISTERIAL DETERMINATIONS ARE REQUIRED FOR SALE OF NEW GENERATION CAPACITY

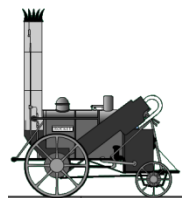
- NERSA have adopted a restrictive view of s34 of the ERA and maintain that new generation capacity may only be sold in terms of a Ministerial Determination
- All Ministerial Determinations thus far envisage a National Programme with the DoE as procurer and Eskom as the Buyer, and allocate the technologies and quantities of energy to be bought and sold
- This would exclude all other sales of new generation capacity



Challenges in current implementation of the ERA by NERSA

120 DAY TIME PERIOD FOR CONSIDERATION OF LICENCES

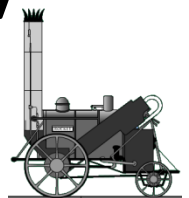
- The 120 day time period within which NERSA is required to have decided on an application refers to a new licence application, not an application for an amendment to an existing licence (s13 read with s12)
- This time period should be dealt with in the procedure which should be prescribed by the Minister, or should be within a reasonable time



Challenges in current implementation of the ERA by NERSA

REMEDIES AGAINST NERSA DECISIONS / LACK OF DECISIONS

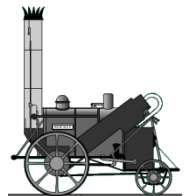
- Review to the High Court under PAJA (which may include a referral back to NERSA to reconsider their decision)
- The effectiveness of the remedy needs to be considered, as well as the willingness of industry or any individual IPP to potentially alienate the Regulator



Challenges in current implementation of the ERA by NERSA

MORE ACTIVE ROLE PLAYED BY DOE

- DoE seems to be playing a much more active role in the granting of licenses
- Justified by :
 - reliance on s10(2)(g) of the ERA for new licenses and amendments
 - S34 of the ERA (on NERSA's interpretation of this section); and
 - the New Generation Regulations



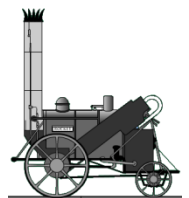
ERA 2 (the proposed second Amendment Bill to the ERA)

- ERA 2 tightens up the provisions of s34 and makes it clear that any new generation capacity may only be sold in terms of a Ministerial Determination (this is reinforced by amendments to s13)
- ERA 2 will remove any current maneuverability in terms of the interpretation of the current s34 and will mean that the sale of new generation capacity (even on a “willing seller, willing buyer” basis) will have to be approved by the Minister



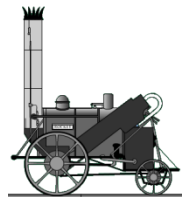
New Generation Regulations

- The New Generation Regulations are regulations under the ERA and accordingly have the force of law
- They apply to sales of new generation capacity to organs of State (which includes Municipalities)
- The regulations are structured in such a way that they are only applicable to National Procurement Programmes in terms of Ministerial Determinations
- Sales by IPPs to Municipalities must have Ministerial exemption from the regulations



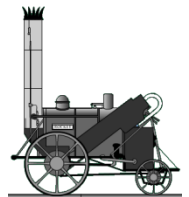
Municipal Legislation

- In addition to the New Gen Regs, it is difficult for IPPs to sell to Municipalities because of all of the legislation affecting these sales, including
 - MFMA (Municipal Finance Management Act)
 - Municipal Systems Act
 - Municipal Structures Act
 - Provincial Legislation
 - Local Bylaws



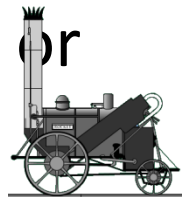
Municipal Legislation

- The ERA also contains specific provisions relating to Municipalities which need to be complied with
- Sales by IPPs to Municipalities thus present a number of challenges (certainly those for longer than 3 years), especially longer term sales under “bankable” PPAs



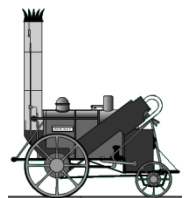
What Now?

- Because of the challenges currently and potentially facing IPPs in selling their power, it is recommended that they seriously consider making representations to and consulting with the drafters of the IRP 2012/3 and the new Integrated Energy Plan (submissions on the IEP are due by 15 December 2013)
- The IRP should refer in some way to the “willing seller, willing buyer” concept and the provisions of the MTRMP should be expanded upon to adequately cater for the needs of those IPPs whose proposed sales of energy are not covered by either the IRP or the MTRMP



What Now?

- If it is correct that another draft of ERA 2 is being prepared, IPPs should also take the opportunity, either individually or through their industry associations, of giving input into the proposed Bill and having necessary amendments made before “the horse has bolted” and it is too late to sell energy other than in terms of a National Procurement Programme, with Ministerial consent, or through a trader
- It is in the interests of all IPPs to push hard for a competitive market for energy sales



Thank you

Questions?

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