

## **THE IMPACT OF THE BOTSWANA ENERGY REGULATORY AUTHORITY ACT ON FUEL SUPPLIERS - (Mark McKee, Partner)**

The Botswana Energy Regulatory Authority Act of 2016 has recently come into force ("the Act"). The Act is intended to regulate the energy sector including persons or entities that supply fuel to generators of electricity.

Part II of the Act establishes the Botswana Energy Regulatory Authority ("the Authority") whose functions or powers include inter alia:

- the regulation of prices or charges imposed on goods or services in a regulated sector;
- regulation of coal supply agreements between collieries, coal suppliers and price regulated generators;
- subject to regulated sector legislation, the licensing of activities in the regulated sector;
- the regulation of network access and storage system access in natural gas networks, gas storage, oil pipeline, petroleum pipelines and storage of oil and petroleum products.

"A regulated entity" means a licensee, operator, supplier and any other entity involved in the provision of services or activities in the regulated sector "A regulated sector" means a sector dealing with electricity, petroleum products, coal, natural gas, bio-energy, solar energy, renewable energy resources and other energy resources.

### **Licensing**

Part VI of the Act contains the licensing provisions of the Act. In terms of section 33 (1) of Part VI of the Act the Authority is required to establish and maintain a regulatory frame work to be followed by all regulated entities in the regulated sector including a framework or rules to deal with the licensing of activities in the regulated sector.

In terms of section 34(1) of Part VI, a person or entity is prohibited from providing a service in a regulated sector unless he or she is issued with a license in the prescribed manner by the Authority authorising him or her to provide such service.

Sections 36 and 37 of Part VI deal specifically with suppliers of fuel and in this respect, require suppliers of petroleum and natural gas to be licensed under the Act. This licensing obligation also extends to related activities such as the importation, storage, transmission, transporting and distribution of gas and the importation, storage, and transportation of petroleum products via a pipeline.

Interestingly, however, Part VI does not contain any express or specific provision requiring suppliers or producers of coal to obtain a license. It is thus strongly arguable that coal supply as a supply activity is not required to be licensed under the Act and further that the wide wording of section 34 be interpreted accordingly (i.e. it be limited to the specific supplies set out in the sections of Part VI that follow section 34).

## **Pricing**

The Act also regulates the pricing of fuel. In terms of section 57 of the Act, Authority is given the power to review a tariff where:

- it is considered necessary to do so in the interest of customers, consumers and other users;
- the tariff is due for periodic review as determined by the Authority from time to time;
- the Authority determines that there has been a material change in the circumstances making it necessary that a tariff be reviewed.

“Tariff” is defined under the Act as a price or charge imposed on goods or services.

To initiate a tariff review, the Authority must in writing serve a review notice upon the licensee and persons affected or likely to be affected by the tariff review. Following delivery of the said notice the Authority will undertake its review and once completed will submit any proposed changes to the tariff for approval by the Minister. Where the Minister approves such tariff change, this will be notified to the licensee, consumers and affected persons as well as what steps are required to be implemented to achieve such tariff change and the date from which the change takes effect.

Whether the provisions of Section 57 apply to coal suppliers however is unclear. This is because section 57 appears only to apply to tariffs of licensees and, for the reasons stated previously in this note, coal suppliers apparently are not required to be licensed under the Act.

If Section 57 does not apply to coal suppliers, this does not however mean that coal suppliers will necessarily escape price regulation under the Act. This is because in terms of section 60 there is indirect regulation of such charges through the requirement that prior to a power producer entering into a fuel supply agreement such producer must first submit the terms of the supply agreement to the Authority and the Authority upon receipt of such agreement will determine the proportion of the coal price paid by that producer that will be allowed as a pass through to the off taker of power.

## **Major Construction**

There is one further area of regulation under the Act which affects fuel suppliers. In terms of section 41, a person is not permitted to construct a significant infrastructure unless she or he is authorised to do so by the Authority. In accessing any application for such approval, the Authority is empowered to consult any person and shall consider any objection raised during consultation and comments received from any affected person.

The Authority is yet to issue its frame work documents setting out in detail how the Act will be practically implemented including the criteria it will apply when determining a tariff change. It is therefore too early to determine the full extent and impact of the Act on fuel suppliers in the energy sector. What is however clear is that this previously lightly regulated fuel supply sector is about to be more heavily regulated.