

REPORT OF INVESTIGATIONS BY THE ESSENTIAL SERVICE COMMITTEE IN TERMS OF SECTION 70(2)(a) READ WITH SECTION 71 OF THE LABOUR RELATIONS ACT 66 OF 1995 TO DETERMINE WHETHER THE PROVISION OF POWER IS AN ESSENTIAL SERVICE

BACKGROUND

Section 20(1) of the Public Service Labour Relations Act of 1994 listed the provision of power and the services which support it as essential services. In terms of section 46(1)(a) and (b) of the Labour Relations Act, No.28 of 1956, power provided by any local authority or any employer within the area of a local authority was an essential service.

In terms of items 24 and 25 respectively of the Regulations No. R1734 of 01 November 1996 the provision of power and the services which support it were deemed to be designated as essential services for a period of six (6) months from 11 November 1996. This period was extended to ten (10) months by Regulation R654 of 09 May 1997.

ARRANGEMENTS

Notice of the investigation was published in Government Gazette No. R2094 on 20 December 1996. On 4 May 1997 and 16 May 1997 notice of the hearings was published in "The Sunday Times" and "The Weekly Mail" respectively. In addition, interested parties received notice of the hearing on or about 19 May 1997.

The hearing was held from 3 to 5 June 1997 in room number 321, 3rd Floor, CCMA House, 20 Anderson Street, Johannesburg.

REPRESENTATIONS

Written and oral representations were received from Eskom, the National Union of Metal Workers of South Africa (NUMSA), the National Union of Mine Workers (NUM), the Greater Johannesburg Metropolitan Council and the Lekoa Vaal Metropolitan Council.

THE SERVICE

Evidence was led that Eskom supplies some 96% of the electricity consumed in South Africa. No substitute is available for this national provider. It generates power, transmits it onto a grid from where it is distributed to private companies and secondary distributors, such as the Lekoa Vaal Council. **Power generation** is operated, maintained and monitored on a continuous basis by employees who work shifts such as on coal off loading and handling. Other employees are responsible for the maintenance of critical and potentially dangerous plant.

The **distribution** function of Eskom must maintain a safe and continuous supply to all consumers via an electrical network. The electrical network in the Johannesburg Metropolitan area, for example, is directly and indirectly accessible to over two million people. This consists of, inter alia, underground and overhead low and medium voltage mains, service cables to individual consumers, mini substations and brick kiosks feeding groups of customers. This supply stretches right into the houses and commercial buildings of consumers and must therefore be kept in a safe condition because electricity is potentially lethal. The electrical network is also often more dangerous when the power is off, given that people assume it is safe and can be injured or killed when it becomes live again.

Power system operations are responsible for ensuring that control over electrical load and information about the status of the network is not lost which could result in

a breakdown of the electrical supply to the area concerned. This section also ensures that correct procedures are followed when high voltage plant is worked on.

Telecommunication is also a support service to the provision of electricity, given that communication must be maintained to ensure safe operating, and accurate and effective communication during repair work.

End users of electricity, other than the household consumer, were also specified in the evidence, which drew attention to the fact that many of these users are themselves classified as essential services. Eskom also provides power for the cooling, ventilation and hoisting systems of mines. They submitted that the backup systems available are not sufficient to prevent endangerment of the staff in terms of life, health and personal safety.

Traffic lights and signals, road lighting, trains and booms at railway junctions were also cited as reliant on a continuous supply of electricity. However, in the opinion of the committee, these do not come into the same category as the services mentioned above. Disruptions of electricity occur quite regularly in these services and alternatives are provided via, for example, the use of traffic police and others. Inconvenience and the economic effect of disruptions of train services do not amount to an endangerment of the population.

A stronger case can be made for arguing that the absence of electricity in the form of street lighting, commercial and domestic security systems and the powering of lifts in high rise buildings would have a direct impact on public safety as would interruptions of supply in the winter months when demand for electricity is already high and when maintenance and repair work to restore heating and the use of other household equipment becomes more urgent. The fact that many thousands of consumers have not, to date, had access to electric power or have not been able to afford such access, should not alter the committee's views on this issue. There are alternatives to the use of electricity for domestic needs. However, many consumers have little discretionary income and some are on the breadline so that accessing

alternative supplies of a power source is generally not a viable proposition for them, either in the short or long term. Furthermore, society organises itself on the basis of available technological resources. Whereas people survived with no power before its discovery the same is not true today.

Examples were provided by The National Union of Metalworkers of Southern Africa (NUMSA) which argued that the interruption of the supply of electricity would fall within the definition of essential services, as contained in the LRA, for some consumers and not for others. It said that those that met the criteria and fell within the definition included:

- Hospitals
- Fire Services
- Police Services
- South African National Defence Force
- The National Intelligence Agency
- Schools
- Any industrial or commercial activity designated as an essential service by the Essential Services Committee
- Any part of an industrial enterprise designated as a maintenance service by the Essential Services Committee and requiring electricity for that maintenance service to be performed.

It was the Union's contention that no other industrial or commercial enterprises could argue for electricity to be an essential service because the Essential Services Committee has not designated any such enterprises as essential. Electricity supply to them could not therefore constitute an essential service.

NUMSA also raised the fact that the Constitution protects the right to strike and it would therefore be desirable to limit the cases where that right is infringed to "exceptional and manifestly viable instances." NUMSA argued that it was possible

to distinguish essential users of electricity from non-essential ones which would thus make it possible for a right to strike to be exercised while electricity was still being supplied to essential users. NUMSA's assertion was that Eskom can supply certain categories of electricity to the exclusion of others. However this was disputed by Eskom. NUMSA also believes that Eskom and the local authorities have contingency plans in place to cater for the possibility of a reduction in generation capacity in case of emergencies. According to NUMSA, this is the case in the majority of industrial areas because of the Eskom/local authorities' switching arrangements. NUMSA's argument continued with the following specific recommendations: that sufficient electricity should be generated to supply essential customers only, the quantity needing to be calculated but likely to be between 15 - 20% of normal capacity. In the case of a generalised strike of electricity workers, NUMSA argued that certain power stations with the necessary capacity would be designated as essential services, leaving other power station workers free to strike. In cases of partial strikes power station workers would be permitted to strike on condition that sufficient power stations were still functioning to produce electricity required by essential customers. With regard to transmission and distribution, in NUMSA's view all workers should have the right to strike, except those required to direct the electricity generated to essential customers.

ANALYSIS

First it is necessary to deal with the submission that the committee should take note of the rights contained in the Constitution, in particular the right to strike. As a body established in terms of the LRA under the auspices of the Commission for Conciliation, Mediation and Arbitration, the committee must also act consistently with the primary objects of the statute which include:

- giving effect to and regulating the fundamental labour relations rights conferred by the Constitution;

- giving effect to those obligations which South Africa has incurred with the ILO, notably the ratification of Conventions 87 and 98;
- promoting orderly collective bargaining and the effective resolution of labour disputes.

The primary function of the committee is to determine whether the interruption of a service would endanger the life, personal safety and health of the population or a part of it. Predictably, the exercise of some Constitutional rights would result in an encroachment on other rights. This is equally true of the Constitutional right to strike. The proper forum for reconciling or balancing these rights is the Constitutional Court.

However, because the designation of a service as essential is a limitation on the right to strike, such a limitation must be reasonable and justifiable, otherwise the designation will be unconstitutional. The test as to whether a designation is reasonable and justifiable will be met if it is established as a fact or a reasonable probability that the interruption of a service would endanger life, personal safety or health of the whole or part of the population. The requirement of endangerment, as opposed to impairment, narrows the task of the committee to a nicety. If an interruption is likely to "put in danger or peril", "jeopardise, put at risk" or "threaten" life, personal safety and health of the whole or part of the population, the committee is obliged to designate the service as essential. The balancing of interests or harm is therefore not within the scope of the powers of the committee. Consistently with the standard set by the international Labour Organisation (ILO), the interpretation of the definition of essential services is strict.

If the committee finds that the service or parts of it are not essential it is also obliged to designate accordingly. Otherwise it may be validly argued that the designation as an essential service is an unreasonable and unjustifiable limitation of the constitutional right to strike. However, if it is not possible to demarcate the service or

parts of it with certainty then the service as a whole should be assessed to determine whether it is predominantly essential or not. If it is essential it must be left to the collective bargaining parties to agree the minimum services.

Evidence by Eskom was that it was extremely difficult to isolate the supply of electricity: determining exactly where these essential services exist and ensuring that they are all correctly identified and correctly supplied with power in the event of a strike would require highly detailed data and extreme care in implementation. Given the argument about the dangerousness of a network when the power is off, common sense dictates that the fewer the variations in the supply of electricity, the smaller the risk of mistakes and even fatal accidents on the resumption of supply.

DESIGNATION

The Committee designates the generation, transmission and distribution of power as essential services.

DATED : 17 October, 1997

MS DHAYA PILLAY (CHAIRPERSON) _____

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