Eskom Comments on SPLUMB 2012, as published with explanatory memoranda of August 2012, for submission to the Parliamentary Portfolio Committee on Rural Development and Land Reform.

Abbreviations used in text below:

- SDF – spatial development framework
- MSDF, RSDF, PSDF, NSDF – for Municipal, Regional, Provincial and National SDFs
- I&APs – Interested and Affected Parties
- NERSA – National Electricity Regulator of South Africa
- DoE – Department of Energy
- DPE Department of Public Enterprises

It is essential that the overall impact that the proposed legislation will have on the provision of electrical reticulation and infrastructure be reviewed or re-considered, as in its present form it will have severe adverse impacts on existing planned networks, constructed in such a way as to cater for new networks, to new planning and construction. All of these are currently exempt in terms of the prevailing legislation, and should this bill be enacted, a minimum of one year will be added to each application, with its accompanying gross impacts on costs and time for delivery.

As indicated in our covering letter, Eskom has held discussions with representatives of the Department of Rural Development ("Rural Development") in order to get an opportunity of explaining the impact of the bill on Eskom if passed. Rural Development indicated that the need for the bill arose out of the court judgements of Maccsand (Pty) Ltd v City of Cape Town and Others ("Maccsand") and the City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal ("CoJ")

Below is a summary of Eskom's view of the said judgements referred to in paragraph 2 of our cover letter and the potential impact of the SPLUMB on SOEs and thereafter suggestions for a sustainable way forward.

- **Maccsand, CC judgement**

  The court essentially came to the conclusion that in terms of LUPO, mining may only be undertaken on land if the municipal zoning scheme permits it (or a departure is granted). If not, rezoning of the land must be obtained before the commencement of mining operations. The judgement did not question LUPO or its validity, it questioned MaccSand's right to mine on land not thus zoned.

  The judgement confirmed, in paragraph (42) thereof, that LUPO governs the control and regulation of the use of all land in the Western Cape Province. This function constitutes municipal planning, a functional area

which the Constitution allocates to the local sphere of government" and the court further found, per paragraph 49 of the judgement, that "LUPO authorises a landowner to apply for rezoning of land. However, land may also be rezoned at the instance of the provincial government or the municipality in whose jurisdiction it is located. In the light of the City of Cape Town's opposition to the mining in question, it is still open to MaccSand to request the Provincial Government to intervene and have the rezoning effected."

The court did not make any adverse comments (for present purposes) to the existing planning legislation, save to confirm that entities to whom the planning legislation would be applicable, would need to obtain appropriate authorisations, in addition to what they may require in terms of other national or provincial legislation.

- **CoJ in Re DFA Judgement**

The judgement dealt with the unconstitutionality of some of the DFA chapters. It neither questioned the constitutionality of the existing ordinances such as LUPO, nor did it suspend or limit their jurisdiction.

Paragraphs (32) and (33) of the judgement state that the DFA was intended to be a temporary solution, pending enactment of comprehensive land use legislation, as the ordinances only applied in those territories that formed part of the old Cape, Natal, Orange Free State and Transvaal Provinces and problems arose from the homelands and self-governing territories.

The CoJ argument was (paragraph (9)) that "as an authorised local authority under the Town-Planning and Townships Ordinance (Ordinance), the CoJ is empowered to consider applications to rezone land and to establish new townships within its area of control." (Again note that the issue dealt with a specific aspect of planning, to wit the establishment of townships, which are generally confined to one municipality, and one of the most fundamental aspects of its planning.)

It further stated that "in the alternative, the CoJ contended that the powers in question fall within the functional area of 'municipal planning' which is a local government competence in terms of section 156(1) of the Constitution, read with Part B of Schedule 4"

In paragraph (31) of the judgement, the court found that the "ordinance provides for the creation of town-planning schemes by municipalities. These schemes set out the manner in which land within the municipal area will be used . . . Where a local authority has not been authorised, the

final decision on the approval of rezoning applications or township developments rests with the provincial authority.

The question put to the court and which the court answered was that the Tribunal under the DFA did not have the jurisdiction to make the decision for the CoJ regarding the establishment of townships and zoning under municipal planning.

The court further stated in paragraph (45) of the judgement that "the starting point in assessing the powers of the local government sphere is section 156 (1) of the Constitution, which affords municipalities original constitutional powers, which reads "(1) A municipality has executive authority in respect of, and has the right to administer—

(a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and

(b) any other matter assigned to it by national or provincial legislation.

- Part B of schedule 4 includes the following functional areas:

  . . .

  Electricity and gas reticulation

  . . .

  Municipal planning

  . . .

  The functional areas listed in part B of schedule 5 are not material to the present enquiry. Part B of schedule 4 and part B of schedule 5 itemise the functional areas assigned to municipalities, and these functions may be regulated by the national and provincial spheres of government to the extent defined in section 155 (6) (a) and (7)."

- Furthermore in paragraph (55), the court stated that "the distinctiveness lies in the level at which a particular power is exercised. For example, the provinces exercise powers relating to 'provincial roads' whereas municipalities have authority over 'municipal roads'", and in paragraph (56) stated that "the constitutional scheme propels one ineluctably to the conclusion that, barring functional areas of concurrent competence, each sphere of government is allocated separate and distinct powers which it alone is entitled to exercise."

Summary

- Eskom is of the opinion that the judgements have possibly been interpreted too narrowly, and that the courts did not intend what this bill aims to achieve.

- The court judgments did not find the present land use ordinances, in terms of which municipal planning takes place, and under which the current exemptions exist for SOEs, to be unconstitutional.

- In addition this is a bill that has been in the works for a long time and the constitutional judgement in the Maccsand case was only decided in April 2012.

- It must be noted here that part A of schedule 4 lists under concurrent national and provincial competence, provincial public enterprises in respect of the functional areas in that schedule and schedule 5, (that includes the functional areas in B (electricity and gas reticulation) under jurisdiction of public enterprises such as Eskom.

- The SPLUMB is perhaps too far-reaching and attempts to fix something that is not broken. If this bill is enacted in its present form, Eskom will experience severe delays with its planning and execution, with the concomitant costs and delays in service delivery. Should a deviation be necessitated

Concerns:

- Since the Land Use Planning Ordinances (LUPOs) do not appear to be repealed, it is not clear what the interaction between the SPLUMB and such LUPOs will be. This needs to be clarified.

- One gains the impression that the SPLUMB is intended to operate on a policy and strategy level, and we suggest that the LUPOs may still operate to determine the practical implications thereof, but that their areas of applicability be extended to areas that are not yet regulated.

- The impact on the providers of bulk “engineering services” such as Eskom, as defined in the SPLUMB must be considered and clarified. It is not clear whether such providers would, in addition to all other approvals to be obtained, and bearing in mind that it is already a regulated entity by NERSA in terms of prevailing energy legislation, be required to make further application to a Municipal Planning Tribunal. In addition, Eskom’s electrification plan is carried out in areas approved by the Department of Energy, and we suggest that before this bill can be enacted, there has to be

consultation with that department, and also the Department of Public Enterprises.

- We request that exemptions or provisions catering for the specific needs of State-owned entities supporting Government's developmental duties, are reviewed and included – both for land and for servitudes. Essentially a servitude would not alter land use, and we suggest that in this event, no land use application needs to be make where engineering services are provided through servitudes.

- Eskom has always considered and incorporated municipality plans in its own planning. A suggestion for this to continue is to obtain Eskom's input to the municipal spatial development frameworks, and not limit it to traditional councils.

Queries with regard to the Legislation

- It is possible and indeed more than often it so happens that Eskom's projects span more than one municipality's land. In this instance we suggest that at least these projects be exempted from municipal approval.

- We are very concerned about the impacts this bill may have on Eskom's ability to deliver on its mandate to delivery timely and cost-effective electricity and request that the department please reconsider the requirement, as we understand it at present that Eskom would need to make application to a municipal tribunal.

- If it was not the intention and what we understand is inadvertent, then we request that it be stipulated in no unclear language to what extent this would apply to Eskom (we suggest on a macro level only), to land or servitudes as well (we suggest only land, but reiterate that in any event Eskom should not have to apply for change in land use, where linear infrastructure is concerned).