IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No:

In the matter between:

THE GREEN CONNECTION NPC (Registration number: 2021/773490/08)	Applicant
and	
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	First Respondent
MINISTER OF MINERAL RESOURCES AND ENERGY	Second Respondent
KARPOWERSHIP SA SALDANHA BAY (RF) PROPRIETARY LIMITED (Registration number: 2020/754347/07)	Third Respondent
KARPOWERSHIP SA COEGA (RF) PROPRIETARY LIMITED (Registration number: 2020/754336/07)	Fourth Respondent
KARPOWERSHIP SA RICHARDS BAY (RF) PROPRIETARY LIMITED (Registration number: 2020/754352/07)	Fifth Respondent
ESKOM HOLDINGS SOC LTD (Registration number: 2002/015527/30)	Sixth Respondent

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FOUNDING AFFIDAVIT

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I, the undersigned,

Vuyelwa Nandipha Masango

do hereby make oath and state:

1. I am employed as the media co-ordinator of the Applicant. I hold a Bachelor of Science Honours in Environmental Management and a Digital Marketing Certificate and have been working for the applicant since April 2021. My responsibilities include working with the applicant's media team to coordinate media-related activities, and providing support to the different departments within the applicant. My work includes planning media-related activities, digital marketing, content creation, development of training and awareness materials, and social media management.

2. I am aware of the activities of the applicant through regulator internal meetings and discussions, reading submissions made by the applicant, creating content for social media, as well as reviewing and providing feedback on other media content relating to the activities of the applicant.

3. The facts deposed to in this affidavit are within my personal knowledge, unless the context indicates otherwise, and are to the best of my belief both true and correct. Where in this affidavit I make legal submissions, such submissions are made on the advice of Applicant's legal representatives.

THE PARTIES

4. The Applicant is **THE GREEN CONNECTION NPC ("TGC")**, a non profit company, with registration number 2021/773490/08) and with its registered

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address at Unit B1 Clareview Business Park, 236 Imam Haron Road, Claremont, Western Cape. TGC is a registered non-governmental organisation that believes that economic growth and development, improvement of socio-economic status and conservation of natural resources can only take place within a commonly understood framework of sustainable development. It aims to provide practical support to both the government and non-governmental/civil society sectors, which are an integral part of sustainable development.

5. I am authorised to instruct TGC's legal representatives to bring this application and to depose to this affidavit on behalf of it. A copy of TGC's resolution to this effect is annexed, marked "**TGC1**".

6. The First Respondent is the **NATIONAL ENERGY REGULATOR OF SOUTH AFRICA** ("**NERSA**"), a regulatory authority established as a juristic person in terms of s 3 of the National Energy Regulator Act 40 of 2004 ("**NERA**"), with its offices and principal place of administration at Kulawula House, 526 Madiba (Former Vermeulen) Street, Arcadia, Pretoria. In terms of s 3 of the Electricity Regulation Act 4 of 2006 ("**ERA**"), NERSA is the custodian and enforcer of the regulatory framework provided for in ERA.

7. The Second Respondent is the **MINISTER** ("**the Minister**") **OF MINERAL RESOURCES AND ENERGY**, which office is currently held by Mr Gwede Mantashe, with offices at 192 Visagie Street, Corner Paul Kruger & Visagie Street, Pretoria. No substantive relief is sought against the Second Respondent. The Second Respondent is cited in his capacity as the Minister

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responsible for the Department of Mineral Resources and Energy ("**the Department**"), to whom NERSA reports.

8. The Third Respondent is **KARPOWERSHIP SA SALDANHA BAY (RF) PROPRIETARY LIMITED** ("**KPSASB**"), a company incorporated in accordance with the company laws of the Republic of South Africa, with registration number 2020/754347/07 and with its registered address at 164 Totius Street, Groenkloof, Pretoria. The Third Respondent is cited as it was granted an electricity generation licence to operate a generation facility at the Port of Saldanha Bay by NERSA, which decision is under review in this application.

9. The Fourth Respondent is **KARPOWERSHIP SA COEGA (RF) PROPRIETARY LIMITED** ("**KPSAC**"), a company incorporated in accordance with the company laws of the Republic of South Africa, with registration number 2020/754336/07 and with its registered address at 164 Totius Street, Groenkloof, Pretoria. The Fourth Respondent is cited as it was granted an electricity generation licence to operate a generation facility at the Port of Ngqura by NERSA, which decision is under review in this application.

10. The Fifth Respondent is **KARPOWERSHIP SA RICHARDS BAY (RF) PROPRIETARY LIMITED** ("**KPSARB**"), a company incorporated in accordance with the company laws of the Republic of South Africa, with registration number 2020/754352/07 and with its registered address at 164 Totius Street, Groenkloof, Pretoria. The Fifth Respondent is cited as it was granted an electricity generation licence to operate a generation facility at the

Port of Richards Bay by NERSA, which decision is under review in this application.[1]

11. The Sixth Respondent is **ESKOM HOLDINGS SOC LIMITED**, deemed in terms of the Eskom Conversion Act 13 of 2001 to be a public company incorporated in terms of the Companies Act 61 of 1973, with its entire share capital held by the State, and with registration number 2002/015527/30 and registered address at Megawatt Park, 2 Maxwell Drive, Sunninghill, Gauteng. No substantive relief is sought against the Sixth Respondent **(ESKOM)**. The Sixth Respondent is cited as it will be the buyer of the electricity generated by the Karpowership companies under the generation licences in accordance with Power Purchase Agreements ("**PPA**") to be entered into with the Karpowership companies.

NATURE OF THE APPLICATION

12. This is an application for an order reviewing and setting aside the decisions of NERSA to: (i) approve that three electricity generation licences be granted in terms of ERA to the Karpowership companies to operate generation facilities at the Port of Saldanha Bay, the Port of Ngqura ("**Coega**") and the Port of Richards Bay, respectively (collectively, "**the generation licenses**"); and (ii) approve the charge rates used by each of the Karpowership companies to calculate the tariffs in their PPAs.

13. The decisions by NERSA to grant the generation licenses and approve the charge rates constitute administrative action in terms of the Promotion of

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[1] I shall refer to the third, fourth and fifth Respondents collectively as the "Karpowership companies".

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Administrative Justice Act 3 of 2000 ("**PAJA**") and fall to be set aside on a number of the grounds set out in s 6(2) of PAJA. In the alternative, TGC seeks to review the decisions in terms of the principle of legality.

ACTING IN A REPRESENTATIVE CAPACITY

14. TGC acts not only in its own interests, but also: (i) in the public interest in terms of s 38(d) of the Constitution; and (ii) in the interests of those people living in and around Saldanha Bay, Coega and Richards Bay who will be adversely affected by NERSA granting the licences which are under review in this application, but who are unable to afford to engage in the legal proceedings necessary to assert their rights (s 38(b) of the Constitution).

15. Granting TGC leave to act in a representative capacity in terms of s 38 of the Constitution is consistent with the objects of TGC (particularly the objectives of enhancing economic growth and conserving natural resources within the framework of sustainable development) as well as its impressive track-record record of acting in the public interest, including through litigation.

16. Given that NERSA is statutorily required to act in the public interest and safeguard the needs of present and future electricity customers, unless TGC is granted standing to act in the public interest, there will be no effective means of ensuring that NERSA complies with these obligations.

17. In light of the vulnerability of the majority of the people and communities that TGC seeks leave to represent, the fact that they have no means of asserting their rights through litigation and the likely adverse impact of the decisions under review on their rights (particularly with regard to their rights as

consumers of electricity), as well as the environmental rights of all South Africans, I submit that it will be in the interests of justice to grant TGC the representative standing which it seeks.

JURISDICTION

18. This Court has jurisdiction to hear this matter for the following reasons:

18.1. In terms of s 6(1) of PAJA, any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

18.2. The term "court" is defined in s 1 of PAJA to include a High Court within whose area of jurisdiction the administrator has his or her or its principal place of administration.

18.3. NERSA's principal place of administration is where its offices are located, which is Kulawula House, 526 Madiba Street, Arcadia, Pretoria, which falls within the jurisidiction of this Court.

18.4. In any event, the decision-maker's principal place of administration is located within the jurisdiction of this Court (as are the registered offices of the Karpowership companies), the decisions under review were taken here and this Court is accordingly most closely associated with, and best-placed to determine, the matter.

BACKGROUND TO REVIEW APPLICATION

Relevant facts

19. The Karpowership companies are energy producers that intend to operate "powerships" (floating power plants that generate electricity) to generate electricity at the Ports of Saldanha Bay, Coega and Richards Bay.

20. To this end, the Karpowership companies previously applied for, and received (on 18 March 2021), "Preferred Bidder" status for purposes of the Department's Risk Mitigation IPP Procurement Programme ("**RMIPPPP**"),[2] which was developed by the Department to fulfil the Minister's determination, promulgated in Government Notice No. 753 in Government Gazette No. 43509 dated 07 July 2020 under s 34(1)(a)[3] of the ERA, that, *inter alia*, new generation capacity is needed to be procured to contribute towards energy security ("**the July 2020 Determination**").

21. A copy of the July 2020 Determination is annexed hereto marked "**TGC2.1**", and a copy of the Minster's media briefing dated 18 March 2021 announcing the Preferred Bidders for the RMIPPP is annexed hereto marked "**TGC2.2**".

22. The operation of the powerships constitute the operation of "generation"[4] facilities as defined in s 1 of ERA, and therefore the Karpowership companies

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[2] The RMIPPPP was launched on 23 August 2020 and its stated objective is to fill the current short-term supply gap, alleviate the current electricity supply constraints and reduce the extensive utilisation of diesel-based peaking electrical generators.
[3] In terms of s 34(1)(a) of ERA, the Minister may, in consultation with NERSA, determine that new generation capacity is needed to ensure the continued uninterrupted supply of electricity.
[4] Defined in s 1 of ERA to mean "*the production of electricity by any means, and 'generate' and 'generating' have corresponding meanings*".

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are required to obtain generation licenses from NERSA to operate the generation facilities in terms of s 7[5] of ERA.

23. S 10(1) of ERA prescribes that a person who has to hold a licence in terms of s 7 must apply to NERSA for such licence in the form and in accordance with the prescribed procedure.

24. The Karpowership companies made applications to NERSA for such electricity generation licenses on 13 April 2021 as follows:

    24.1. KPSASB applied for a generation licence to operate a generation facility at the Port of Saldanha Bay ("**KPSASB's generation licence application**"). A copy of the application is annexed hereto marked "**TGC3**".

    24.2. KPSAC applied for a generation licence to operate a generation facility at the Port of Ngqura ("**KPSAC's generation licence application**"). A copy of the application is annexed hereto marked "**TGC4**".

    24.3. KPSARB applied for a generation licence to operate a generation facility at the Port of Richards Bay ("**KPSARB's generation licence application**). A copy of the application is annexed hereto marked "**TGC5**".

[5] Section 7(1)(a) of ERA stipulates that no person may, without a licence issued by NERSA in accordance with ERA, operate any generation, transmission or distribution facility.

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25. The Karpowership companies indicated in their applications that they had submitted environmental approval applications to the Department of Forestry, Fisheries and the Enviroment ("**DFFE**") on 26 April 2021.

26. NERSA required that the Karpowership companies publish notices of their applications in newspapers circulating in the areas of the proposed activity in at least two official languages in terms of s 11 of ERA.

27. On 23 June 2021, the DFFE notified the Karpowership companies that it had decided to refuse their applications for environmental authorisation, and issued a Record of Refusal.

28. On 2 July 2021, TGC addressed a letter to NERSA, a copy of which is annexed hereto marked "**TGC6**", in which it requested an extension of time (of thirty days) for it to make written submissions on the applications by the Karpowership companies. In its letter, TGC recorded that:

28.1. it did not receive any notification in relation to these applications for these projects, despite being a registered I&AP in relation to the Environmental Impact Assessment processes for these projects;

28.2. it was informed by the Centre for Environmental Rights ("**CER**") on 29 June 2021 that:

28.2.1. the applications had been advertised in some local newspapers (in certain instances only in Afrikaans),

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28.2.2. CER had been able to determine the following dates of publication of the said notices from its correspondence with NERSA dated 24 June 2021:

28.2.2.1. the KPSAC application - publication in the Daily Dispatch on 04 June 2021 and in the PE Express on 09 June;

28.2.2.2. the KPSASB application - publication in an unspecified newspaper on 05 June 2021 and in the Weslander on 10 June 2021;

28.2.2.3. the KPSARB application – publication in the Eyethu Bay on 07 June 2021 and in ZO Classified on 09 June 2021.

29. NERSA replied by way of a letter dated 04 July 2021, a copy of which is annexed hereto marked "**TGC7**", in terms of which it recorded that the Karpowership companies had duly advertised their applications in accordance with s 11(1) of ERA and that NERSA disputed that there were instances where the adverts were made in Afrikaans only, but that NERSA would grant TGC an extension to submit its comments by no later than 03 August 2021.

30. On 02 August 2021, TGC's legal representative, Adrian Pole ("**Pole**"), submitted to NERSA, on behalf of TGC, representations on and objections to

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the KPSASB generation licence application and the KPSAC generation licence application.[6]

31. A copy of TGC's representations on and objections to the KPSASB generation licence application is annexed hereto marked "**TGC8.1**", and a copy of TGC's representations on and objections to the KPSAC generation licence application is annexed hereto marked "**TGC8.2**".

32. On 19 August 2021, NERSA began public hearings for generation licence applications under the RMIPPP. Ms Liz McDaid appeared on behalf of TGC at the public hearing held on 19 August 2021 for the Karpowership companies' applications for generation licenses, and made oral submissions to NERSA on the applications. A copy of the PowerPoint slide that she presented to NERSA during her oral submissions is annexed hereto marked "**TGC9**".

33. Subsequently, at a meeting of NERSA held on 21 September 2021, NERSA proceeded to approve: (i) the KPSASB generation licence application, (ii) the KPSAC generation licence application and (iii) the KPSARB generation licence application. In each instance NERSA also approved the charge rates used by each of the Karpowership companies to calculate the tariffs in their PPAs.

34. In a letter to NERSA dated 23 September 2021, a copy of which is annexed hereto marked "**TGC10**", Pole, on behalf of TGC, requested that NERSA provide its written decisions in relation to the Karpowership companies'

[6] No representations or objections were submitted by TGC in respect of the KPSARB generation licence application because, at the time, TGC was not working with communities in Richards Bay, and objections were being submitted by other organisations.

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generation licence applications, including the legal and factual basis and the reasons for the decisions, as required in terms of s 10(1) of NERA.

35. Nokukhanya Msweli of NERSA sent NERSA's Reason for Decision documents for the licence approvals to Pole under cover of email dated 29 October 2021, a copy of which is annexed hereto marked "**TGC11**".

36. Copies of NERSA's Reason for Decision documents for the approval of the KPSASB generation licence application, the KPSAC generation licence application and the KPSARB generation licence application are annexed hereto marked "**TGC12.1**", "**TGC12.2**" and "**TGC12.3**", respectively.

THE LEGISLATIVE CONTEXT

National Energy Regulator Act 40 of 2004

37. NERA was enacted to establish a single regulator to regulate[7] among other things, the electricity, piped-gas and petroleum sector, and the object of NERA is to establish NERSA for this purpose.[8]

38. NERSA is required to, *inter alia*, undertake the functions set out in s 4 of NERA.[9]

39. The duties of the members of the NERSA are set out in s 9(1), in terms of which the members must, *inter alia*:

"*(a) act in a justifiable and transparent manner whenever the exercise of their discretion is required;…*
(c) act independently of any undue influence or instruction;…
(f) act in the public interest".

[7] Preamble of NERA.
[8] Section 2 of NERA.
[9] Section 4(1)(c) of NERA.

40. S 10(1) of NERA stipulates that every decision of NERSA must be in writing and must be, *inter alia*:

> "*(a)* *consistent with the Constitution and all applicable laws;.*
> *(b)* *in the public interest;...*
> *(c)* *taken within a procedurally fair process in which affected persons have the opportunity to submit their views and present relevant facts and evidence to the Energy Regulator*".

41. Any decision of NERSA and the reasons therefor must be available to the public except information that is protected in terms of the Promotion of Access to Information Act.[10]

42. Any person may institute proceedings in the High Court for the judicial review of an administrative action by NERSA in accordance with PAJA.[11]

<u>Electricity Regulation Act 4 of 2006</u>

43. ERA was enacted (among other things) to establish a national regulatory framework for the electricity supply industry; to make NERSA the custodian and enforcer of the national electricity regulatory framework; and to provide for licences and registration as the manner in which generation, transmission, distribution, reticulation, trading and the import and export of electricity are regulated.[12]

44. In terms of s 2, the objects of ERA are to, *inter alia*:

> "*(a)* *achieve the efficient, effective, sustainable and orderly development and operation of electricity supply infrastructure in South Africa;*
> *(b)* *ensure that the interests and needs of present and future electricity customers and end users are safeguarded and met, having regard to the governance, efficiency, effectiveness and long-term sustainability of the electricity supply*

[10] Act 2 of 2000. Section 10(2) of NERA.
[11] Section 10(2) of NERA.
[12] Preamble of ERA.

industry within the broader context of economic energy regulation in the Republic;...

(g) *facilitate a fair balance between the interests of customers and end users, licensees, investors in the electricity supply industry and the public".*

45. NERSA is the custodian and enforcer of the regulatory framework provided for in ERA[13] and in performing its statutory functions it is required to ensure that the objects set out in s 2 of ERA are achieved.

46. The powers and duties of NERSA under ERA include mandatory and discretionary powers and duties.

47. In terms of s 4(a), NERSA must, *inter alia*:

"(i) consider applications for licenses and may issue licences for -
(aa) the operation of generation, transmission or distribution facilities;...
(ii) regulate prices and tariffs;...
(iv) issue rules designed to implement the national government's electricity policy framework, the integrated resource plan and this Act".

48. Various rules have been issued by NERSA, including Regulatory Rules for Power Purchase Cost Recovery,[14] and the Multi-year Price Determination Methodology[15] (which includes rules for Eskom to purchase electricity from independent power producers).

49. S 7(1) addresses activities requiring licensing, and stipulates that:

"(1) No person may, without a licence issued by the Regulator in accordance with this Act;
(a) operate any generation, transmission or distribution facility;
(b) import or export any electricity; or
(c) be involved in trading".

[13] Section 3 of ERA.
[14] GNR.119 of 24 February 2010.
[15] https://www.nersa.org.za/wp-content/uploads/bsk-pdf-manager/2020/09/MYPD-regulatory-methodology-20-Nov-_2_.pdf

50. Any person required to hold a license in terms of s 7 is required to apply to NERSA for a license as prescribed, and in terms of s 10 such an application must include, *inter alia*:

> *"(b) such documentary evidence of the administrative, financial and technical abilities of the applicant as may be required by the Regulator;…*
> *(d) a general description of the type of customer to be served and the tariff and price policies to be applied;*
> *(e) the plans and the ability of the applicant to comply with applicable labour, health, safety and environmental legislation, subordinate legislation and such other requirements as may be applicable;…*
> *(g) evidence of compliance with any integrated resource plan applicable at that point in time or provide reasons for any deviation for the approval of the Minister".*

51. It is relevant to note that NERSA is required to issue separate licenses for (a) the operation of generation, transmission and distribution facilities; (b) the import and export of electricity; or (c) trading.[16] NERSA is not obliged to issue a license, and may only issue one licence per applicant for each of the activities that require licensing.[17]

52. NERSA has wide powers under s 14 to make any licence subject to conditions relating to (among other things), *inter alia*:

> *"(c) the period of validity of the licence in accordance with section 20;*
> *(d) the setting and approval of prices, charges, rates and tariffs charged by licensees;*
> *(e) the methodology to be used in the determination of rates and tariffs which must be imposed by licensees;*
> *(f) the format of and contents of agreements entered into by licensees;*
> *(g) the regulation of the revenues of licensees;…*
> *(l) the right to operate generation, transmission or distribution facilities, to import or export electricity, to trade or to perform prescribed activities relating thereto, including exclusive rights to do so, and conditions attached to or limiting such rights;…*
> *(r) the types of energy sources from which electricity must or may be generated, bought or sold;*
> *(s) compliance with health, safety and environmental standards and requirements".*

[16] Section 13(3) of ERA.
[17] Section 13(4) of ERA.

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53. With regard to tariff[18] principles, ss 15(1) stipulates that a licence condition determined under s 14 relating to the setting or approval of prices, charges and tariffs and the regulation of revenues, *inter alia*:

> "(a) *must enable an efficient licensee to recover the full cost of its licensed activities, including a reasonable margin or return;…*
> (c) *must give end users proper information regarding the costs that their consumption imposes on the licensee's business*".

54. A licensee may not charge a customer any other tariff and make use of provisions in agreements other than that determined or approved by NERSA as part of its licensing conditions.[19] NERSA may, in prescribed circumstances, approve a deviation from set or approved tariffs.[20]

55. Any generation license issued in terms of ERA is valid for a period of 15 years or such longer period as NERSA may determine.[21] No minimum duration is prescribed for distribution or trading licenses (which are valid for the period determined by NERSA).[22] Licensees may apply for renewal of their licenses.[23] An application for renewal must be granted, but NERSA may set different licensing conditions.[24]

56. It is relevant to note that, in terms of ss 26(1), the State may, in order to facilitate the achievement of the objectives of ERA, expropriate land, or any right in, over or in respect of land, on behalf of a licensee in accordance with

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[18] Tariff is defined in s 1 of ERA as meaning "*a charge for electricity*".
[19] S 15(2) of ERA.
[20] S 15(3) of ERA.
[21] S 20(1) of ERA.
[22] S 20(2) of ERA.
[23] S 20(3) of ERA.
[24] S 20(4) of ERA.

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s 25 of the Constitution and s 2 of the Expropriation Act.[25] The State may exercise these powers only if:

> "(a) *a licensee is unable to acquire land or a right in, over or in respect of such land by agreement with the owner; and*
> (b) *the land or any right in, over or in respect of such land is reasonably required by a licensee for facilities which will enhance the electricity infrastructure in the national interest*".[26]

57. In terms of ss 34(3), NERSA, in issuing a generation license, is bound by any determination made by the Minister in terms of ss 34(1), and may facilitate the conclusion of an agreement to buy and sell power between a generator and a purchaser of that electricity.[27]

Electricity Regulations on New Generation Capacity[28]

58. The Electricity Regulations on New Generation Capacity ("**the Regulations**") apply to the procurement of new generation capacity, by organs of state active in the energy sector, including: new generation capacity derived from renewable energy sources and co-generation; base load, mid-merit load, peak load new generation capacity, and energy storage; and cross border projects.[29]

59. The objectives of the Regulations are:

> "(a) *to facilitate planning for the establishment of new generation capacity;*
> (b) *the regulation of entry by a buyer and a seller into a power purchase agreement;*
> (c) *to set minimum standards or requirements for power purchase agreements;*
> (d) *the facilitation of the full recovery by the buyer of all costs efficiently incurred by it under or in connection with a power purchase agreement including a reasonable return based on the risks assumed by the buyer thereunder and to*

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[25] 63 of 1975.
[26] S 26(3) of ERA.
[27] S 34(3)(a) and (b).
[28] GNR.399 of 4 May 2011.
[29] Regulation 2.

ensure transparency and cost reflectivity in the determination of electricity tariffs; and

(e) the provision of a framework for implementation of an IPP procurement programme and the relevant agreements to be concluded."[30]

60. With regard to concluding power purchase agreements (PPA), Regulation 9 provides that:

"(1) A power purchase agreement between the buyer and an IPP must meet the following requirements:

(a) value for money;[31]

(b) appropriate technical, operational and financial risk transfer to the seller;

(c) effective mechanisms for implementation, management, enforcement and monitoring of the power purchase agreement; and

(d) satisfactory due diligence in respect of the buyer's representative and the proposed seller in relation to matters of their respective competence and capacity to enter into the power purchase agreement.

(2) Before the buyer concludes a power purchase agreement, the buyer or the procurer must, subject to any approvals required in terms of the Public Finance Management Act, the Municipal Finance Management Act or the Municipal Systems Act, as the case may be -

(a) ensure that the power purchase agreement meets the requirements set out in sub-regulation (1);

(b) ensure that the buyer has a contract management plan that explains the capacity of the buyer, and its proposed mechanisms and procedures, to effectively implement, manage, enforce, monitor and report on the power purchase agreement and any other agreements relating to a new generation capacity project to which the buyer is a party, to National Treasury and the Minister on a regular basis; and

(c) put in place arrangements to ensure that any portion of the buyer's allowable revenue approved or allocated by the Regulator for purposes of implementation of new generation capacity projects will be used solely for the purpose of ensuring that the buyer's financial obligations in respect of new generation capacity projects will be met.

(3) Should the Minister determine, as contemplated in regulation 6 (3), that Eskom should establish new generation capacity as part of its services as the national electricity producer, Eskom will be required to enter into a power purchase agreement with the buyer, unless Eskom itself is the buyer."

61. With regard to cost recovery, Regulation 10 provides that:

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[30] Regulation 3.

31 The term "*value for money*" is defined in Regulation 1 to mean "*that the new generation capacity project results in a net benefit to the prospective buyer or to Government having regard to cost, price, quality, quantity, risk transfer or a combination thereof, but also where applicable to the Government's policies in support of renewable energy*".

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"10. Cost Recovery

The Regulator shall, when determining licence conditions relating to prices, charges and tariffs, ensure that the buyer is able to recover, at least, the full amount of the costs incurred by the buyer in the following categories –

(a) all payments made for the purchase of new generation capacity, in terms of a power purchase agreement entered into in terms of or as contemplated in these Regulations;

(b) all amounts paid by the buyer in terms of the power purchase agreement (other than those referred to in paragraphs (a) and (e)), provided that the buyer shall have acted efficiently in the exercise of those rights and the fulfilment of those obligations in terms of the power purchase agreement which gave rise to such payments;

(c) the efficiently incurred costs of the buyer in performing any function contemplated in these Regulations;

(d) the efficiently incurred costs of the buyer in administering power purchase agreements;

(e) costs of, and amounts paid by the buyer arising from the termination of a power purchase agreement: and

(f) all other costs efficiently incurred by the buyer in participating in an IPP procurement programme and in purchasing new generation capacity through new generation capacity projects, including, without limitation, operating expenditure, professional fees and hedging costs."

Integrated Resource Plan 2019

62. As noted above, s 7(g) of ERA stipulates that a license application must include evidence of compliance with any integrated resource plan applicable at that point in time (or provide reasons for any deviation for the approval of the Minister).

63. IRP2019 does not allocate new additional capacity in respect of gas until 2024.[32]

64. An allocation "*to the extent of the short term capacity and energy gap*" is made under in the last column of Table 5 of the IRP2019 to "*Other (Distributed Generation, CoGen, Biomass, Landfill).*"

[32] IRP2019, Table 5, pp. 18 – 19.

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65. The third bullet-point below Table 5 indicates that "*Other / Distributed generation*" includes all generation facilities in circumstances in which the facility is operated solely to supply electricity to an end-use customer within the same property with the facility.

66. With regard to immediate/ short term electricity supply and demand-side management, the IRP2019 provides as follows:

> *"While the purpose of the IRP is to balance supply and demand on a least-cost basis, implementation lead times for various generation technologies limit the options available for deployment immediately and in the short term.*[33]
>
> *...*
>
> *5.3.1 Immediate Term Security Supply*
> *In the short-term supply and demand side interventions will have to be deployed to minimise the risk of load shedding and/or extensive usage of diesel peaking plant due to Eskom's plant low EAF. The short-term gap is estimated to be between 2 000 - 3 000 MW. It generally takes about 36 months minimum for ... green field utility scale projects to produce first power. A medium-term power purchase programme (MTPPP) similar to that adopted following the IRP 2010 must be considered. Under the MTPPP power was purchased from already existing facilities such as cogeneration and small hydro which are generally not run as it is cheaper to buy power from Eskom. The development of generation for own use must also be encouraged through the enactment of policies and regulations that eliminate red tape without compromising security of supply.*
>
> *Decision 1: Undertake a power purchase programme to assist with the acquisition of capacity needed to supplement Eskom's declining plant performance and to reduce the extensive utilisation of diesel peaking generators in the immediate to medium term. Lead-time is therefore key."*[34]

67. With regard to the risk associated with low energy availability factor (EAF) of Eskom's generating units, the IRP2019 indicates that:

> *"This can be mitigated by implementing a threshold and monitoring plant performance trends for decisions. In the short term, emergency power will have to be procured, as was the case in the past. In the long run this will imply accelerating or bringing forward capacity proposed in the plan."*[35]

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[33] IRP2019, para 5.1, p. 18
[34] IRP2019, para 5.3.1, pp. 19 – 20
[35] IRP2019, para 5.3.10, p. 22.

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68. With regard to natural gas, the IRP2019 indicates that:

> "***Natural Gas:*** *Gas to power technologies in the form of CCGT, CCGE or ICE provide the flexibility required to complement renewable energy. While in the short term the opportunity is to pursue gas import options, local and regional gas resources will allow for scaling up within manageable risk levels. Exploration to assess the magnitude of local recoverable shale and coastal gas are being pursued and must be accelerated.*
>
> *There is enormous potential and opportunity in this respect and the Brulpadda gas resource discovery in the Outeniqua Basin of South Africa, piped natural gas from Mozambique (Rovuma Basin), indigenous gas like coal-bed methane and ultimately shale gas, could form a central part of our strategy for regional economic integration within SADC.*
>
> *Co-operation with neighbouring countries is being pursued and partnerships are being developed for joint exploitation and beneficiation of natural gas within the SADC region. SADC is developing a Gas Master Plan, to identify the short- and long-term infrastructure requirements to enable the uptake of a natural gas market."*
>
> *Availability of gas provides an opportunity to convert to CCGT and run open-cycle gas turbine plants at Ankerlig (Saldanha Bay), Gourikwa (Mossel Bay), Avon (Outside Durban) and Dedisa (Coega IDZ) on gas."*[36]

69. The IRP2019 allocation of 3000MW of new electricity generation capacity to "*gas and diesel*" for the years 2024 - 2027 is included in the determination published by the Minister on 25 September 2020 under s 34(1) of ERA.[37]

70. The July 2020 Determination[38] also references the allocation under the heading "*Others*" in the IRP2019. While reference is made to procuring "*from a range of energy source technologies*", this is qualified by the reference to the category "*Others*". No reference is made to gas in the July 2020 Determination:

> *"2000 megawatts (MW) should be procured from a range of energy source technologies in accordance with the short term risk mitigation capacity allocated under the heading "Others", for the years 2019 to 2022, in Table S of the Integrated Resource Plan for Electricity 2019-2030...("IRP2019")..."*[39]

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[36] IRP2019, para 2.1, pp. 5 – 6.
[37] GN1015 of 25 September 2020, para 1.3, p. 1.
[38] GN753 of 7 July 2020, para 1.1, p. 1.
[39] IRP2019, paragraph 1.1.

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The National Environmental Management Act 107 of 1998 (**NEMA**)

71. Section 24(2) of NEMA empowers the Minister of Forestry, Fisheries and the Environment **(MFFE)** to identify activities which may not commence without an environmental authorisation.

72. The process through which an environmental authorisation is obtained is prescribed by the Environmental Impact Assessment Regulations, 2014 **(the EIARegulations)**.

73. The activities which require an environmental authorisation are prescribed by Listing Notices 1 to 3 of the EIA Regulations.

74. The proposed projects involve conducting a number of activities listed in the Listing Notices. These are listed in Table 2.4, pages 2-4 to 2-5 of the Final EIR.

75. As a result, the proposed projects required to undergo a Scoping and Environmental Impact Assessment process as set out by regulations 21 to 24 ofthe EIA Rsegulations.

Environmental authorisations for coastal activities

76. Section 63(1) of the National Environmental Management: Integrated Coastal Management Act 24 of 2008 **("NEM:ICMA")** requires a competent authority to take account of specific factors when deciding whether or not to grant an environmental authorisation under NEMA for "coastal activities" (as defined in NEM:ICMA). I discuss this requirement in more detail below.

The broader framework of Environmental Law

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77. The obligation to obtain an environmental authorisation is the implementation of the broader principles of environmental law. The most relevant of these are set out below.

78. Section 24 of the Constitution provides that:

> Everyone has the right –
>
> *(a)* to an environment that is not harmful to their health or well- being; and
>
> *(b)* to have the environment protected for the benefit of present and future generations, through reasonable legislative and other means that –
>
> *(i)* prevent pollution and ecological degradation;
>
> *(ii)* promote conservation; and
>
> *(iii)* secure ecologically sustainable development and useof natural resources while promoting justifiable economic and social development.

79. NEMA was enacted to give effect to this constitutional right. Section 2 of NEMA contains a set of principles which serve as a general framework for environmental management and guide the interpretation and implementation of the Act.

80. The most relevant of these principles are:

80.1. Environmental management must place people and their needs at the forefront of its concern, and serve the physical, psychological, developmental, cultural and social interests equitably.

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80.2. Development must be socially, environmentally and economically sustainable.

80.3. Pollution and degradation of the environment must be avoided or, where this cannot be done altogether, be minimised and remedied.

80.4. The exploitation of non-renewable resources must be responsible, equitable and take into account the depletion of that resource.

80.5. That the disturbance of landscapes and sites that constitute the nation's cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied

80.6. That the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised.

80.7. That a risk-averse and cautious approach should be applied which takes into account the limits of current knowledge about the consequences of decisions and actions.

80.8. Negative impacts on the environment and on people's environmental rights must be anticipated and prevented and where they cannot be altogether prevented the must be minimised and remedied.

80.9. The environment is held in the public trust for the people and the beneficial use of the environmental resources must serve the public interest and the environment must be protected as the people's common heritage.

80.10. The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment.

80.11. Sensitive, vulnerable, highly dynamic or stressed ecosystems, such as coastal shores, estuaries, wetlands and similar systems require specific attention in management and planning procedures.

81. I shall now consider the grounds upon which TGC seeks to set aside the decisions under consideration.

THE REVIEW GROUNDS

<u>Introduction</u>

82. In broad terms, the review grounds relied upon are the following:

82.1. The decisions were procedurally unfair;

82.2. The decisions did not comply with the IRP2019;

82.3. The decisions were irrational;

82.4. NERSA failed to comply with the provisions of s 10(2)(g) of ERA; and

82.5. NERSA failed to discharge its obligation to take into account environmental considerations.

83. NERSA has not published much of the financial and contractual information necessary to review its decisions to approve the charge rates used to calculate

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the tariffs in the Karpowership companies' PPAs. TGC will accordingly deal with this aspect of the reviews in greater detail in its supplementary affidavits, after receipt of the Rule 53 record.

<u>The decisions were procedurally unfair</u>

84. Sections 9[40] and 10(1)[41] of NERA stipulate that: (i) in taking decisions NERSA must follow a procedurally fair process, in terms of which affected persons have the opportunity to submit their views and present relevant facts and evidence; and (ii) it must act independently of any undue influence or instruction in the public interest.

85. In assessing the fairness of the procedure followed by NERSA in issuing a licence, the requirements of s 11 of ERA[42], dealing with the publication of

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40 Quoted above, in relevant part.

41 *Ibid.*

42 ***11. Advertising of licence application.***—*(1) When application is made for a licence the Regulator may require that the applicant publish a notice of the application in appropriate newspapers or other appropriate media circulating in the area of the proposed activity in <u>at least two official languages.</u>*

(2) The advertisement must state—

(a) the name of the applicant;

(b) the objectives of the applicant;

(c) the place where the application will be available for inspection by any member of the public;

(d) the period within which any objections to the issue of the licence may be lodged with the Regulator;

(e) the address of the Regulator where any objections may be lodged;

(f) that objections must be substantiated by way of an affidavit or solemn declaration; and

(g) such other particulars as may be prescribed.

(3) The advertisement contemplated in subsection (1) must be published for such period or in such number of issues of a newspaper as may be prescribed.

(4) The Regulator must consider objections to the application contemplated in subsection (1) and make its decision available to the public together with its reasons for such decision.

[emphasis added]

licence applications, and s 4 of PAJA,[43] in relation to the requirements for: (i) public inquiries; and (ii) notice and comment procedures, are applicable.

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43 ***4. Administrative action affecting public.***—*(1) In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether—*

(a) to hold a public inquiry in terms of subsection (2);
(b) to follow a notice and comment procedure in terms of subsection (3);
(c) to follow the procedures in both subsections (2) and (3);
(d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or
(e) to follow another appropriate procedure which gives effect to section 3.

(2) If an administrator decides to hold a public inquiry—
(a) the administrator must conduct the public inquiry or appoint a suitably qualified person or panel of persons to do so; and
(b) the administrator or the person or panel referred to in paragraph (a) must—
(i) determine the procedure for the public inquiry, which must—
(aa) include a public hearing; and
(bb) comply with the procedures to be followed in connection with public inquiries, as prescribed;
(ii) conduct the inquiry in accordance with that procedure;
(iii) compile a written report on the inquiry and give reasons for any administrative action taken or recommended; and
(iv) as soon as possible thereafter—
(aa) publish in English and in at least one of the other official languages in the Gazette or relevant provincial Gazette a notice containing a concise summary of any report and the particulars of the places and times at which the report may be inspected and copied; and
(bb) convey by such other means of communication which the administrator considers effective, the information referred to in item (aa) to the public concerned.

(3) If an administrator decides to follow a notice and comment procedure, the administrator must—
(a) take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them;
(b) consider any comments received;
(c) decide whether or not to take the administrative action, with or without changes; and
(d) comply with the procedures to be followed in connection with notice and comment procedures, as prescribed.

(4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from the requirements referred to in subsections (1) (a) to (e), (2) and (3).
(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including—
(i) the objects of the empowering provision;
(ii) the nature and purpose of, and the need to take, the administrative action;
(iii) the likely effect of the administrative action;
(iv) the urgency of taking the administrative action or the urgency of the matter; and
(v) the need to promote an efficient administration and good governance.

(Date of commencement of s. 4: 31 July, 2002.) [emphasis added]

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86. It appears from the information available to TGC that the procedure followed in issuing the Karpowership electricity generation licences was unfair in that:

86.1. The proposed licence applications were not advertised or communicated adequately, so as to place people likely to be materially and adversely by the process in a position to comment on the applications;

86.2. The above defect was compounded by the failure to hold public meetings in the areas where the Karpowerships were to be operated;

86.3. The Karpowerships companies only submitted their environmental plans, required in terms of ss 10(2)(e) of ERA, after the time for representations and oral submissions had passed, effectively shielding these plans from scrutiny and comment;

86.4. The reasons given for the decisions demonstrate that NERSA failed to act independently and impartially;

86.5. The licence applications were so redacted so extensively that critical aspects, particularly (but not exclusively) in relation to the financial and contractual arrangements, of the applications could not be commented on in any meaningful fashion; and

86.6. NERSA failed to comply with the requirements of PAJA in relation to the holding of public inquiries.

87. Taken both individually and cumulatively, the above defects effectively stripped the right to comment on the applications of any meaningful content. I shall consider each of the procedural defects in turn.

<u>The advertisements</u>

88. The purpose of advertising the licence applications, as prescribed in s 11 of ERA, is to draw the attention of individuals and communities likely to be adversely affected by the granting of the applications, and to put them in a position to make representations. This purpose was frustrated by the procedure adopted.

89. It appears from the reasons for NERSA's decisions that the licence applications were advertised in the *Daily Dispatch* and *EP Express* newspapers (Coega), *Die Burger* and *Weslander* newspapers (Saldanha Bay) and *Zululand Observer* and *Eyethu Bay Watch* newspapers (Richards Bay) respectively.[44] In its response to comments of objectors, NERSA noted that *"each applicant advertised in local newspapers in two official languages"* and on this basis contended that there had been compliance with s 11 of ERA.

90. I am advised that the claim that there had been adequate compliance with the requirements for advertising the licence applications is incorrect.

91. TGC has, to date, been unable to obtain copies of the relevant advertisements and accordingly is not in a position to comment on their content. This issue

[44] NERSA also states that the applications were also published on the applicant companies' and NERSA's websites, and it (NERSA) published notices in *The Business Day*, *City Press*, *The Star* and *The Sowetan* newspapers.

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will accordingly be addressed more fully in our supplementary affidavits after receipt of the Rule 53 record.

92. However, the reasons for NERSA's decisions show that in each instance the applications were only advertised in two official languages.

93. In terms of ss 5(1) of the Constitution of the Western Cape, the province in which Saldanha Bay is situated, the official languages of the Province are Afrikaans, English and isiXhosa and the three languages enjoy equal status. Section 5(3) of the Western Cape Constitution requires the Province to *"take practical and positive measures to elevate the status and advance the use of those indigenous languages of the people of the Western Cape whose status and use have been historically diminished."*[45]

94. Read in the context of the Western Cape Constitution, the requirement that the Saldanha Bay licence application be advertised in at least two official languages in the area of the proposed activity, has to be interpreted as requiring publication in all three official languages of the Western Cape. Any other interpretation would be inconsistent with the Western Cape Constitution, unfairly discriminatory and demeaning of the third official language (which was not used in the advertisements). Mother tongue speakers of the official language which was not used in the advertisements would be justifiably aggrieved, as they (and other members of their language group) would have

[45] Section 5(3) of the Western Cape Constitution should be read together with ss 6(2) of the national Constitution, in terms of which the State is required to take "*practical and positive measures to elevate the status and advance the use of*" the indigenous languages of South Africa. Section 30 of the (national) Constitution states that everyone has the right to use the language of their choice.

been deprived of a full and fair opportunity to comment on the Saldanha Bay licence application.

95. The same considerations apply, with the changes appropriate to the context, to the Coega application. In terms of the Eastern Cape Use of Official Languages Act 8 of 2016, the official languages of that Province are isiXhosa, Afrikaans, English and Sesotho. It follows that the Coega application should have been advertised in all four official languages of the Eastern Cape – the failure to publish the licence application in all four official languages constitutes a far-reaching procedural defect.

Failure to hold public hearings in areas directly affected

96. NERSA's claim (in the reasons for its decisions) that it was unable to hold public hearings in the areas *"where the facilities are to be built"*, due to *"Covid-19 restrictions"* does not stand up to scrutiny. It is clear that Covid-19 restrictions did not preclude the holding of public hearings. Why such restrictions should prevent the hearings being held in the areas most directly affected – but not elsewhere – defies logic. The failure to hold public hearings in the areas in which it is proposed that the Karpowerships will operate, compounds the short-comings in the advertising process and further attenuated the rights of those individuals and communities who will be most directly impacted by the granting of the licences, to have their views heard and taken into account in the decision-making process.

<u>No opportunity to comment on ss 10(2)(e) plan</u>

97. Sections 10(2)(d) of NERA requires NERSA to take its decisions following a procedurally fair process, in which affected persons are given the opportunity to present their views and submit relevant facts and evidence to it, while ss 10(2)(e) of ERA requires licence applicants to submit plans demonstrating their ability to comply with (amongst other things) environmental plans.[46]

98. TGC submitted written objections, drafted by attorney Adrian Pole and dated 2 August 2021, to NERSA in respect of the Saldanha Bay and Coega licence applications (annexures **TGC8.1** and **8.2**). On 19 August 2021 Ms Liz McDaid made oral submissions in respect of the Karpowership applications at a public hearing hosted by NERSA.

99. The Karpowerships companies only submitted their environmental plans required in terms of ss 10(2)(e) of ERA after the time for representations and oral submissions had passed, effectively shielding these plans from scrutiny and comment. These plans constituted critical components of the companies' licence applications and, by denying objectors their right to comment on them, NERSA deprived objectors of their rights under ss 10(2)(d) of NERA and rendered the decision making process procedurally unfair.

<u>Bias</u>

100. Members of NERSA are required (in terns if ss 9(c) of NERA) to act independently, without subjecting themselves to any undue influence or instruction. In responding to objector comments on the Coega and Saldanha

[46] This provision is considered in greater detail below.

Bay licence applications, NERSA stated *"our application complied with the ERA, including the provisions pertaining to public participation"*.[47]

101. The responses referred to above reflect that someone from the Karpowership companies or a representative thereof drafted NERSA's comments on the objections, or, alternatively, NERSA copied and pasted comments made by Karpowership comapanies without independently applying its mind to the comments, or, in the further alternative, NERSA associated itself with the Karpowership companies in an improper manner. Any of the above alternatives taints the process and renders it procedurally unfair.

Redaction of the applications

102. It is trite that the rights of members of the public in terms of a public participation process will be of little or no value unless they are provided with sufficient information to enable them to comment meaningfully on the issues under consideration. This principle is reinforced by ss 10(2)(d) of NERA, which has been quoted above.

103. There are two principal elements to the relief sought in this application: (i) the review of the decision to issue the Karpowership companies with generation licences; and (ii) the review of the decisions to approve the charge rates used to calculate the tariffs in their PPAs. The failure to provide any material information concerning the charge rates or tariffs meant that the public participation process was effectively meaningless in respect of the decisions with regard to the second of these elements. The process failed entirely to

[47] Page 12, item 2 of the Coega Reason for Decision (annexure **TGC12.2**); Page 13, item 3 of the Saldanha Bay Reason for Decision (annexure **TGC12.1**).

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comply with the requirements of procedural fairness and the provisions of ss 10(2)(d) of NERA.

104. In relation to the broader question of the review of the granting of the generation licences, in TGC's 2 August 2021 written objections (annexures "**TGC8.1**" and "**TGC8.2**") to NERSA in respect of the Saldanha Bay and Coega licence applications, it was stated that the following critical information had been redacted from the licence application:

> ***"Summary of the Power Purchase Agreement (PPA) and any version of the PPA (including draft or generic versions arising from the RMI4P) that may have been put up as an annexure;***
>
> ***Particulars of the contractual arrangements with the primary energy (LNG) supplier;***
>
> ***Financial information, including: projections in respect of the proposed undertaking; annual forecasts for the next five years of costs, sales and revenues generated by the project (including any assumptions underlying the figures); estimates of net annual cash flows for subsequent periods (5, 10 and 15 years) sufficient to demonstrate financial security of operating the generating station; and project financing (including who will finance the project, how funding is split between debt and equity, and the terms and conditions of funding arrangements)."***[48] **[footnotes omitted]**

105. The representations proceeded to point out that the redaction of this information frustrated the ability of Interested and Affected Parties ("**I&Aps**") to analyse the abovementioned aspects of the application and, where appropriate, to obtain expert input. This in turn precluded the achievement of the objects set out in ss 2(a), (b) and (g) of ERA.[49]

106. The objections noted further that:

[48] Coega representations, Annexure TGC8.2, 2 August 2021, para 44.
[49] Coega representations, Annexure TGC8.2, 2 August 2021, para 45.

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In relation to PPAs

106.1. Many material aspects of the agreements were simply unknown, including: whether PPAs had been concluded; what the relevant terms were (of the agreements or drafts presented to NERSA); how stranded assets were addressed; and whether any *"take or pay"* or minimum off-take provisions were included;[50]

Fuel supply contracts

106.2. While a Karpowerships subsidiary was indicated as the fuel supplier, Shell has confirmed that it is the exclusive supplier of Liquified Natural Gas ("**LNG**") to the three projects, but the relevant contractual arrangements have all been redacted. This means that it is not possible to comment in any meaningful fashion on the cost of the project and precluded I&APs from assessing the risks of the arrangements (including the risk of additional costs being passed on to South African consumers).[51]

Financial information

106.3. The entire financial case for the projects had been redacted – this meant that I&APs were precluded from presenting relevant facts and evidence with regard to the implications of the licences and tariffs for current and future electricity users or their long-term sustainability.[52]

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[50] Coega representations, Annexure **TGC8.2**, 2 August 2021, paras 47 - 52.

[51] Coega representations, Annexure **TGC8.2**, 2 August 2021, para 54 - 55. This was of particular importance given reports that LNG, exchange-rate and other costs had been indexed to US dollar prices.

[52] Coega representations, Annexure TGC8.2, 2 August 2021, para 57.

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107. I refer further to Mr Trollip's evidence, in which he concludes that there is a lack of substantive explanation for the failure to provide the financial and contractual information withheld, which raises serious concerns about the rationale for not disclosing it.

108. In short, the redaction of the licence applications was so extensive that it effectively gutted the public participation process, leaving it with little, if any, meaningful content.

<u>Public Inquiry requirements</u>

109. As far as I, and TGC, have been able to establish, NERSA failed to comply with the PAJA requirements set out in ss 4(2)(b)(iii) (compiling written report on the inquiry) and (iv) (publishing summary of the inquiry and place to inspect the report in a Government or Provincial Gazette). This served to compound the procedural flaws described above.

<u>Review grounds</u>

110. It follows from what has been stated above that the decisions stand to be set aside on the grounds that process adopted by NERSA was procedurally unfair (PAJA ss 6(2)(c)), and more particularly, in that:

110.1. It does not comply with the requirements for administrative action affecting the public in terms of ss 4(2) and (3) of PAJA;

110.2. The administrator was biased or reasonably suspected of bias (ss 6(2)(a)(iii));

110.3. a mandatory and material procedure or condition prescribed by an empowering provision was not complied with (ss 6(2)(b));

110.4. the action was materially influenced by an error of law (ss 6(2)(d));

110.5. the action was taken for an ulterior purpose or motive (ss 6(2)(e)(ii));

110.6. the action was taken because of the unauthorised or unwarranted dictates of another person or body and/or arbitrarily or capriciously (ss 6(2)(e)(iv) and (v)); and

110.7. the action contravenes a law or was not authorised by the empowering provision and/or was not rationally connected to the purpose for which it was taken and/or of the empowering provision (ss 6(2)(f)(i) and (ii)).

111. In the alternative, the process should be set aside as it was inconsistent with the principle of legality, for the reasons set out in relation to the PAJA review grounds (with the changes appropriate to the context).

Failure to comply with the IRP2019

112. Section 10(2)(g) of ERA requires an applicant for a generation licence to include in their application *"evidence of compliance with any integrated resource plan applicable at that point in time or provide reasons for any deviation for the approval of the Minister"*.

113. The IRP2019, which has been described above, is *"an electricity infrastructure development plan based on least-cost electricity supply and demand balance,*

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taking into account security of supply and the environment (minimize negative emissions and water usage).”[53]

114. The context to the document is set out as follows:

> ***“South Africa’s National Development Plan (NDP) 2020 offers a long-term plan for the country. It denies a desired destination where inequality and unemployment are reduced and poverty is eliminated so that all South African can attain a decent standard of living. Electricity is one of the core elements of a decent standard of living.***
>
> ***The NDP envisages that, by 2030, South Africa will have an energy sector that provides reliable and efficient energy service at competitive rates; that is socially equitable through expanded access to energy at affordable tariffs; and that is environmentally sustainable through reduced emissions and pollution. In formulating its vision for the energy sector, the NDP took as a point of departure the Integrated Resource Plan (IRP) 2010-2030 promulgated in March 2011.***
>
> ***South Africa is a signatory to the Paris Agreement on Climate Change and has ratified the agreement. In line with INDCs (submitted to the UNFCCC in November 2016), South Africa’s emissions are expected to peak, plateau and from year 2025 decline. The energy sector contributes close to 80% towards the country’s total greenhouse gas emissions of which 50% are from electricity generation and liquid fuel production alone. There is action to reduce emissions with investment already in renewable energy, energy efficiency and public transport.”***[54]

115. A fundamental principle articulated in the IRP2019 is that, given the fast pace of technological change in the energy sector, in planning for the next decade, technological uncertainty is expected to continue *“and this calls for caution as we make assumptions and commitment for the future in a rapidly changing environment. <u>Accordingly, long-range commitments are to be avoided as much as possible, to eliminate the risk that they might prove costly and ill-advised</u>”.*

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[53] IRP2019, p 8, para 1.
[54] IRP2019, p 8, para 1.

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116. As discussed in further detail under the third ground of review ("*The decisions are irrational*", at paragraphs 123 to 147 below), an economic analysis conducted by energy expert Mr Hilton Trollip on the Karpowership projects shows that the long term commitment of 20 years in the PPAs are indeed costly and ill-advised. This evidence is equally relevant to, and will be relied upon in support of, the second ground of review.

117. TGC's objections with regard to the failure of the Karpowerships' applications to comply with the IRP2019 were stated clearly its 2 August 2021 written objections (annexures "**TGC8.1**" and "**TGC8.2**"). These comments noted that the IRP2019 does not allocate new additional capacity in respect of gas until 2024[55] and the well-articulated grounds for objection set out thereafter bear repeating:[56]

"29

An allocation 'to the extent of the short term capacity and energy gap' is made under in the last column of Table 5 of the IRP2019 to 'Other (Distributed Generation, CoGen, Biomass, Landfill).' The third bullet-point below Table 5 indicates that 'Other / Distributed generation' includes all generation facilities in circumstances in which the facility is operated solely to supply electricity to an end-use customer within the same property [with] the facility'.

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The Green Connection submits that the Karpowership installations clearly do not fall within the categories of 'Other (Distributed Generation, Co-Generation, Biomass or Landfill)', and the third bullet-point referred to above also does not apply to the Karpowership installations which are intended to supply electricity to Eskom.

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With regard to immediate / short term electricity supply and demand-side management, the IRP2019 provides as follows:

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[55] IRP2019, Table 5.

[56] The paragraphs quoted below are from the Coega submission, annexure TGC8.2. but are equally applicable to the other two applications.

While the purpose of the IRP is to balance supply and demand on a least-cost basis, implementation lead times for various generation technologies limit the options available for deployment immediately and in the short term.[57]

...

5.3.1 Immediate Term Security Supply

In the short-term supply and demand side interventions will have to be deployed to minimise the risk of load shedding and/or extensive usage of diesel peaking plant due to Eskom's plant low EAF. The short-term gap is estimated to be between 2 000 – 3 000 MW. It generally takes about 36 months minimum for... green field utility scale projects to produce first power. A medium-term power purchase programme (MTPPP) similar to that adopted following the IRP 2010 must be considered. Under the MTPPP power was purchased from already existing facilities such as co-generation and small hydro which are generally not run as it is cheaper to buy power from Eskom. The development of generation for own use must also be encouraged through the enactment of policies and regulations that eliminate red tape without compromising security of supply.

Decision 1: Undertake a power purchase programme to assist with the acquisition of capacity needed to supplement Eskom's declining plant performance and to reduce the extensive utilisation of diesel peaking generators in the immediate to medium term. Lead-time is therefore key.[58]

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With regard to the risk associated with low energy availability factor (EAF) of Eskom's generating units, the IRP2019 indicates that:

This can be mitigated by implementing a threshold and monitoring plant performance trends for decisions. In the short term, emergency power will have to be procured, as was the case in the past. In the long run this will imply accelerating or bringing forward capacity proposed in the plan.[59]

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With regard to natural gas, the IRP2019 indicates that:

Gas to power technologies in the form of CCGT, CCGE or ICE provide the flexibility required to complement renewable energy. ***While in the short term the opportunity is to pursue gas import options****, local and regional gas resources will allow for scaling up within manageable risk levels. Exploration to assess the magnitude of local recoverable shale and coastal gas are being pursued and must be accelerated.*

There is enormous potential and opportunity in this respect and the Brulpadda gas resource discovery in the Outeniqua Basin of South Africa, piped natural gas from Mozambique (Rovuma Basin), indigenous gas like coal-bed methane and ultimately shale gas, could form a central part of our strategy for regional economic integration within SADC.

Co-operation with neighbouring countries is being pursued and partnerships are being developed for joint exploitation and beneficiation of natural gas within the SADC region.

SADC is developing a Gas Master Plan, to identify the short- and long-term infrastructure requirements to enable the uptake of a natural gas market.

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[57] IRP2019, p41.

[58] IRP2019, p43-44.

[59] IRP2019, p50.

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Availability of gas provides an opportunity to convert to CCGT and run open-cycle gas turbine plants at Ankerlig (Saldanha Bay), Gourikwa (Mossel Bay), Avon (Outside Durban) and Dedisa (Coega IDZ) on gas.[60]

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The short term capacity allocation in the IRP2019 clearly does not extend to the Karpowership installations which utilise liquified natural gas (LNG), and are intended to supply electricity to Eskom. The IRP2019 allocation of 3000MW of new electricity generation capacity to 'gas and diesel' for the years 2024-2027 is included in the s34 Determination published on 25 September 2020.[61]

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In the Green Connection's view, the IRP2019 provided an allocation to the extent of the short term capacity and energy gap to 'Other (Distributed Generation, CoGen, Biomass, Landfill)'. This included (but is not necessarily restricted to) generation facilities operated solely to supply electricity to an end-use customer within the same property which the facility. According to available information,[62] *there is a large market interest in investing in the distributed energy sector in South Africa, with conservative estimates indicating that at least approximately 5000 MW of additional capacity could be unlocked over a period of 5 years from residential, commercial, industrial and agricultural sectors. The CSIR has estimated that:*

> *There is roughly a total of 3400MW of capacity that could be deployed by the end of 2022, in the form of roughly 500MW solar PV in the residential sector, 1650MW commercial and agricultural sectors and 1300MW in the industrial sector. By 2024, the CSIR estimates that a cumulative total of 4900MW could be deployed on condition that an enabling regulatory regime is established.*[63]

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A significant step has already been taken to creating this enabling regulatory regime, with President Ramaphosa on 10 June 2021 announcing:

> *…a significant new step in further reforming our electricity sector towards achieving a stable and secure supply of energy.*

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[60] IRP2019, p13.
[61] GN1015 of 25 September 2020.
[62] See for example Meridian Briefing Note January (No. 2021/01) Survey Results: Scoping Interest in the South African Distributed Energy Sector.
[63] Referred to in Meridian Briefing Note January (No. 2021/01) Survey Results: Scoping Interest in the South African Distributed Energy Sector, p2.

Following an extensive public consultation process and a significant amount of technical work undertaken by the Department of Mineral Resources and Energy, we will be amending Schedule 2 of the Electricity Regulation Act to increase the NERSA licensing threshold for embedded generation projects from 1 MW to 100 MW….[64]

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The section 34 determination relating to short-term risk mitigation[65] *also references the allocation under the heading 'Others' in the IRP2019. While reference is made to procuring 'from a range of energy sources', this is qualified by the reference to the category 'Others'. No reference is made to gas in the s34 determination:*

2000 megawatts (MW) should be procured from a range of energy source technologies ***in accordance with the short term risk mitigation capacity allocated under the heading 'Others', for the years 2019 to 2022, in Table 5 of the Integrated Resource Plan for Electricity 2019-2030****… ('IRP2019')….*[66]

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However, instead of targeting new generation capacity from 'Other (Distributed Generation, CoGen, Biomass, Landfill)' when implementing the IRP2019 through the s34 determination relating to short term risk mitigation, the DMRE conducted an IPP procurement programme (RMI4P) which culminated in the Karpowership gas power generation facilities (among others) being granted preferred bidder status. In the Green Connection's view, the RMI4P displaces the intended new generation capacity allocation given to the category 'Others (Distributed Generation, CoGen, Biomass, Landfill)' in the IRP2019, and on the face of it is an irregular and unlawful misstep in the implementation of short term risk mitigation measures intended to fill the energy gap.

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It is also relevant to note that the s34 determination relating to short term risk mitigation stipulates that '[t]he procurement programme shall target connection to the Grid for the new generation capacity as soon as reasonably possible but by no later than December 2021'.[67] *In its Coega (Ngqura)*

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[64] https://www.gov.za/speeches/president-cyril-ramaphosa-amendment-schedule-two-electricity-regulation-act-10-jun-2021-0
[65] GN753 of 7 July 2020.
[66] IRP2019, paragraph 1.1.
[67] GN753 of 7 July 2020, para 1.1.

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generation license application, Karpowership indicates that expected commissioning date is 31 August 2022. Clearly the application does not meet this target, and on the face of it does not meet the IRP2019's goal of addressing 'the immediate risk of energy shortage in the immediate term'.[68] *Furthermore, according to the Karpowership generation license application, the DMRE Letter of Appointment informing Karpowership that it had been granted preferred bidder status stipulates that it is required to submit a copy of the issued generation license to the DMRE by no later than 30 June 2021 (a month prior to the scheduled Commercial Close). It has since come to the Green Connection's attention that the Commercial Closure date has been shifted to September 2021. This could result in further delays to Karpowership's expected commissioning date.*

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In its generation licence application, Karpowership relies on it having been granted 'Preferred Bidder Status' under the RMI4P to demonstrate compliance with the IRP2019. The Green Connection disputes this for the reasons explained above."

118. TGC's objections also noted that according to the environmental impact reports ("**EIR**") submitted by Karpowership companies in the environmental authorisation process, the Coega project was estimated to have cumulative generation emissions of 19.56 million tons of CO_2e (calculated over the 20 year contract period at constant 100% capacity), while the Saldanha and Richards Bay projects were estimated to have cumulative generation emissions of 15.21 and 19.56 million tons of CO_2e respectively (calculated over the 20 year contract periods at constant 100% capacity). Cumulatively,

[68] IRP2019, p40.

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the Karpowership projects would therefore generate emissions of 54.33 million tons of CO_2e.[69]

119. The reasons given by NERSA for rejecting the objections raised with regard to non-compliance with the IRP2019 may be summarised as follows:[70]

119.1. Karpowership confirmed that: (i) it is committed to environmental protection: (ii) its solution is compliant with South African environmental [legislation]; and (iii) if it were to fail to meet these requirements, the DFFE would impose appropriate sanctions. LNG is not a substitute for (and does not disqualify) renewable energy sources. South Africa's energy policy promotes an energy mix. A shorter PPA term would have resulted in a higher tariff and the longer term makes the projects affordable to consumers;[71]

119.2. The comment that the applications were not compliant with the IRP2019 was rejected on the basis that the IRP identified that short term supply and demand interventions would be necessary, one of which was to procure 2 000MW to 3 000MW. The procurement programme was aimed at achieving this and the applications accordingly comply with the IRP2019, while challenges to the Request For Proposals ("**RFP**") were directed at the incorrect regulatory authority;[72]

[69] The objections also note that the emission figures given are likely to be under-estimates. See Coega objection, annexure TGC8.2, paras 78 – 79.
[70] The reasons are illustrated with reference to the Coega decision, annexure TGC12.2, but are equally applicable to the other decisions.
[71] Coega reasons for decision, annexure TGC12.2, p. 12, item 2.
[72] Coega reasons for decision, annexure TGC12.2, p. 14, item 8.

119.3. An objection that the applications are: (i) inconsistent with a low-carbon, inclusive, climate change resilient economy and society; and (ii) that a 20-year PPA will lock South Africa into carbon and greenhouse gas emissions; was dismissed on the grounds that South Africa's energy policy promotes the use of different technologies. Gas technology is cleaner than coal, while a 20 years PPA will enable the applicant to recover costs over a longer period and result in lower tariffs which are affordable to consumers;[73]

119.4. The objections concerning the delay in commencing with the project and the requirement that the PPA should offer incentives for an early Commercial Operation Date ("**COD**") and penalties for late COD were dismissed on the grounds that there are in fact penalties for a late COD. These are that for every day that the COD is delayed beyond the scheduled date, the expiry date will be brought forward by six days, provided that it is not brought forward by more than five years in total (unless the delay is caused by *force majeure*, a late system connection event or a compensation event).[74]

120. The reasons furnished by NERSA, set out above, are patently insupportable:[75]

120.1. While it is correct that South Africa's energy policy promotes an energy mix, this does not justify adopting measures which – in flagrant violation of the principle that *long-range commitments are to be*

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[73] Coega reasons for decision, annexure TGC12.2, p. 16, item 19, read with p. 14, item 2.
[74] Coega reasons for decision, annexure TGC12.2, p. 17, item 24.
[75] The irrational nature of the financial terms and the 20 year contract period will be considered in greater detail in the next section.

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avoided as much as possible, to eliminate the risk that they might prove costly and ill-advised – bind the country to extremely costly (both financially and environmentally) 20 year commitments in a misguided attempt to manage a short-term power supply gap;

120.2. The claim that gas is cleaner than coal is no answer – IRP2019 requires NERSA to minimise negative emissions. This objective is not achieved by adopting measures that are better than the worst option available;

120.3. NERSA failed to furnish any coherent reasons in response to the objections that: (i) the Karpowerships applications did not qualify under the provisions made for *"Other"* energy sources in the last column of Table 5 of the IRP2019; or (ii) the applications should target connection to the grid as soon as possible, but by no later than December 2021. With regard to the latter requirement, the statement that the PPA would provide that for every day the COD is delayed beyond the scheduled date, the expiry date will be brought forward by six days (but no more than five years in total) is so clearly inadequate, given that immediate need is to address a short-term supply power supply gap, which will no longer be a factor in the medium term.[76] Given that in a media release, a copy of which is attached marked annexure **TGC13**, in response to a query concerning the on 31 March 2022 financial closure deadline, the DMRE stated that the signing of the PPA's by the preferred bidders and ESKOM had to be delayed

[76] This is addressed further in Mr Trollip's evidence.

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due to *"outstanding matters and conditions"* and the need for the preferred bidders and their lenders to *"undertake due diligence reviews of the project agreements"* and a new date for the signing of the PPAs will be announced *"in due course"*. In the circumstances, there would appear to be no realistic prospect of the Karpowerships companies connecting to the electricity grid before – at best – 2023.

<u>Review grounds</u>

121. In the premises, I submit that the decisions stand to be reveiewed on the grounds that:

121.1. a mandatory and material procedure or condition prescribed by an empowering provision was not complied with (ss 6(2)(b) of PAJA);

121.2. they were taken for a reason not authorised by the empowering provision and because irrelevant considerations were taken into account or relevant considerations were not considered (ss 6(2)(e));

121.3. they were taken arbitrarily or capriciously (ss 6(2)(e)(vi));

121.4. they contravene a law or are not authorised by the empowering provision ss 6(2)(f));

121.5. they are not rationally connected to:

121.5.1. the purpose for which they were taken (ss 6(2)(f)(ii)(aa) of PAJA);

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121.5.2. the purpose of the empowering provisions (ss 6(2)(f)(ii)(bb) of PAJA);

121.5.3. the information before NERSA (ss 6(2)(f)(ii)(cc) of PAJA); and

121.6. they are so unreasonable that no reasonable person could have made such decisions (ss 6(2)(h) of PAJA).

122. In the alternative to the preceding paragraph, the decisions should be set aside on the grounds that they are inconsistent with the principle of legality, on the grounds set out in the previous paragraph (with the changes appropriate to the context).

<u>The decisions are irrational</u>

123. In terms of s 2 of ERA, the objects of ERA are to, *inter alia*:

> *"(a) achieve the efficient, effective, sustainable and orderly development and operation of electricity supply infrastructure in South Africa;*
>
> *(b) ensure that the interests and needs of present and future electricity customers and end users are safeguarded and met, having regard to the governance, efficiency, effectiveness and long-term sustainability of the electricity supply industry within the broader context of economic energy regulation in the Republic;...*
>
> *(g) facilitate a fair balance between the interests of customers and end users, licensees, investors in the electricity supply industry and the*

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public".

124. NERSA is the custodian and enforcer of the regulatory framework provided for in ERA.[77]

125. Section 9 of NERA requires members of NERSA to, *inter alia*:

> *"(a) act in a justifiable and transparent manner whenever the exercise of their discretion is required;…*
>
> *(f) act in the public interest."*

126. Any person required to hold a license in terms of s 7 of NERA is required to apply to NERSA for a license as prescribed, and in terms of ss 10(1) of NERA such an application must include, *inter alia*:

> *"(b) such documentary evidence of the administrative, financial and technical abilities of the applicant as may be required by the Regulator;…*
>
> *(d) a general description of the type of customer to be served and the tariff and price policies to be applied".*

127. In order to determine whether NERSA complied with its aforementioned requirements in ERA and NERA when deciding to grant the generation licenses to the KPSA companies and approve the tariffs, it is necessary to conduct an analysis of the economic impact these decisions will have in South Africa.

128. Mr. Hilton Trollip, an energy sector specialist and a research fellow in energy at the Global Risk Governance Programme at the University of Cape Town,

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[77] Section 3 of ERA.

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has performed such an analysis, which is explained in his supporting affidavit, filed in this application.

129. As noted in Mr Trollip's affidavit, it is critical to have knowledge of the terms of the relevant PPAs to conclude a definitive analysis of the economic effect of the granting of the generation licenses to the Karpowership companies and approval of the tariffs.

130. Summaries of the PPAs and any version of the PPAs (including draft or generic versions arising from the RMIPPPP) that may have been put up as annexures were redacted from the Karpowership companies' applications for generation licenses. Thus, the terms of the PPAs are not known.

131. However, Mr Trollip is of the view that there is sufficient information available to make some reasonable assumptions regarding the following important aspects:

131.1. <u>The minimum offtake prescribed in the PPAs:</u>

131.1.1. For the resons set out in his supporting affidavit, Mr. Trollip is of the view that the weight of evidence available strongly suggests that the PPAs have minimum offtake provisions involving a percentage of between 50% to 72% minimum purchase commitment.

131.1.2. He accordingly conducted his economic analysis on the basis that the PPAs include minimum offtake provisions. Specifically, he assumed a conservative minimum offtake figure (in favour of the Karpowerships) of 50% for

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purposes of the analysis. In other words, it was assumed that the minimum offtake would be equal to 50% of Karpowership-maximum capacity at the announced tariffs every day.

131.2. Length of the licenses:

131.2.1. It seems clear from NERSA's Reason for Decision documents that the envisaged PPAs will be for a period of 20 years.

131.2.2. Mr Trollip's analysis was thus concluded on the basis that the relevant PPAs would run for a period of 20 years.

132. Mr Trollip also made the following assumptions in performing his analysis:

132.1. The Karpowerships are designed to perform in the generation system:

132.1.1. In the NERSA "*Reasons for Decision, Concurrence with Ministerial Determination*" ("**Concurrence RFD**") it is reported that Eskom submitted formally that dispatchable power in a mid-merit mode is required.

132.1.2. Mr Trollip used this as the basis for assessing the economics of the Karpowerships and alternatives.

132.2. Length of the short-term supply gap:

132.2.1. For purposes of his analysis, Mr. Trollip assumed that the short-term supply gap in South Africa will be closed over a five-year period.

132.3. Number of days in a year for which Karpowerships would be required at 100% capacity:

132.3.1. For the purposes of his analysis, Mr. Trollip assumed that the conditions required for the use of 100% capacity of the Karpowerships would occur on 100 days during each year of the short-term supply gap period.

133. In terms of Mr Trollip's analysis, the net benefits (approximately **R4.1 billion**) of the Karpowerships over the short-term supply gap period of five years, is eclipsed by the costs in the period after the short-term supply gap is closed (assuming this closes over a five-year period), which is approximately **R30 billion**.

134. Thus, in Mr Trollip's view, the Karpowerships would not be economic to dispatch on a 20-year basis. The granting of the licences, and the tariffs, would accordingly be highly prejudicial to future electricity consumers, whose needs and interests NERSA is required to safeguard in terms of s 2 of ERA.

135. Mr Trollip also critiques the explanations contained in documents issued by the Department and NERSA relating to the Karpowership projects.

136. Mr Trollip notes that NERSA's rationale that, "*a shorter PPA term would have resulted in a higher tariff, since the capital cost and rate of return would be*

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recouped in a shorter term. A longer term makes the project affordable to consumers" is flawed, because recouping of the capital cost over a longer term is a minor factor for the following reasons:

136.1. This capital is not invested in South Africa:

136.1.1. Most of the operating capital plant already exists and will be sailed into South African ports and connected to the electricity grid and then removed by sailing away. This is the typical arrangement for a "lease", not capital investment;

136.1.2. Accordingly, a South African backed sovereign guarantee will be used to provide a return on capital plant that already exists and will remain the property of the Karpowership companies and removed from South Africa at the end of the relevant period. Over a 20-year period, this is tantamount to SA electricity consumers paying for a generation asset that is then removed from South Africa.

136.2. Most importantly, **capital is not the main cost element** in making the technology used in Karpowerships competitive with Open Cycle Gas Turbines ("**OCGTs**") (which is one of the Karpowerships two primary purposes in the RMIPPPP), rather (on NERSA's own version) the main cost element in making the technology used in Karpowerships competitive with OCGTs is **the gas price**:

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136.2.1. Bbecause of gas costs, the high average tariffs resulting from only a five-year PPA would <u>not</u> make the technology used by the Karpowerships companies competitive with OCGTs.

136.2.2. The average tariff has therefore been reduced by shifting revenue from a five-year period to a twenty-year period and by securing terms in the PPAs for either minimum offtake or a net dependable capacity payment for 20 years.

136.2.3. This does not reduce overall costs to the generation system or consumers but increases costs and hence electricity tariffs. Future buyers will pay a substantial premium to subsidise benefits in the short term. This has been arranged by means of a complicated and opaque RFP and PPA process and NERSA has refused so far to give details which allow accurate and definitive calculations of what the benefits in the short term and costs in the longer term could be.

136.2.4. Extending the terms of the PPAs to twenty-years does not make the Kaprowerships economically rational during the short-term power shortage period – it merely subsidises it from premiums paid in the extended period.

136.2.5. It is irrational from an overall economic perspective, because it extends revenues from forced payments

(payments made when there are less costly options available) from the short-term to the whole 20-year term. This will impose a premium on power purchase costs in the period when the shortage is over, and thus cross-subsidising the short-term with the longer-term and in fact imposing higher tariffs on consumers.

137. Mr Trollip records that his anlaysis and comments have shown that_there are (at best) serious concerns that, because the term of the Karpowership PPAs will be 20 years and the minimum dispatch commitments therein in all likelihood extend far past the time in which there will be a shortage, there is a false rationale for this arrangement.

138. He notes that disclosure of key numbers with accompanying analysis would allow the Department to either confirm or dispel this. Instead, the Department and NERSA have offered a number of explanations for withholding information on the tariffs and for the PPAs being 20 years in length. These explanations have, in turn, been questioned by both the public and independent analysts.

139. Upon a consideration of these explanarions, Mr Trollip concludes that, what emerges is a lack of substantive explanation in relation to a serious concern, as well as direct contradictions made in the statements.

140. Mr Trollip states that there are glaring problems with using a 20-year PPA to resolve a short-term power supply gap which are not adequately explained. He also notes that the explanations further do not show how the fundamentally different investment regimes for technologies with approximately 95% of their costs in up-front capital versus a technology with 35% (and that capital plant

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actually being mobile and only being made available on essentially a lease arrangement – as has been discussed above) are addressed.

141. Mr Trollip also notes with concern the statement in paragraph 58 of the NERSA Reason for Decision document in relation to KPSAC's application for a generation licence, that "*(t)he plant is expected to generate 52.4 TWh during the PPA term of 20 years.*"

142. Based on Mr Trollip's calculations, this would mean that the KPSAC Karpowership is expected to deliver 100% dispatch for 20 years. Given that dispatch of the Karpowerships should only be during shortages or according to mandatory minimum dispatch, Mr Trollip records that this is worrying and very concerning.

143. Mr Trollip concludes that NERSA's statement in paragraph 58 of the Reasons for Decision is either incorrect or is evidence of an even more serious problem in the PPA of overcommitting the buyer (i.e. Eskom) to significantly more than he assumed based on the other data that he gleaned from other relevant sources (i.e. the 50% minimum offtake).

144. Mr Trollip also confirms that he is in agreement with the conclusions in the Dyson and Mallinson reports (which are attached to his affidavit) that:

144.1. The Karpowerships (from what we can best assume from incomplete available information) are not part of the least cost long-term power system development pathway.

144.2. There are more cost-effective solutions, from a pure techno economic point of view. These other solutions have a number of additional benefits. Most important of these is that they fit into a rational least cost pathway for power sector development. In addition (from a techno economic perspective) they have a far lower risk of becoming stranded assets as very plausible scenarios of costs of technologies, especially PV and batteries evolve. In addition, they are far less polluting.

145. Mr Trollip records that it is common cause among independent energy systems modellers that Karpowerships would not be part of a rational long-term pathway.

Review grounds

146. In the premises, I submit that:

146.1. NERSA's decisions to grant the generation licences to the Karpowership companies and approve the tariffs were:

146.1.1. taken because irrelevant considerations were taken into account or relevant considerations were not considered (ss 6(2)(e)(iii) of PAJA);

146.1.2. taken arbitrarily or capriciously (ss 6(2)(e)(vi) of PAJA);

146.1.3. are not rationally connected to:

146.1.3.1. the purpose for which they were taken (ss 6(2)(f)(ii)(aa) of PAJA);

146.1.3.2. the purpose of the empowering provisions (ss 6(2)(f)(ii)(bb) of PAJA);

146.1.3.3. the information before NERSA (ss 6(2)(f)(ii)(cc) of PAJA);

146.1.3.4. the reasons given for them by NERSA (ss 6(2)(f)(ii)(dd) of PAJA).

146.1.4. so unreasonable that no reasonable person could have made such decisions (ss 6(2)(h) of PAJA).

147. In the alternative to the preceding paragraph, the decisions should be set aside on the grounds that they are inconsistent with the principle of legality, on the grounds set out in the previous paragraph (with the changes appropriate to the context).

<u>The decisions did not comply with ss 10(2)(g) of ERA</u>

148. Section 10(2)(g) of ERA requires an application for a licence to include *"the plans and the ability of the applicant to comply with applicable labour, health, safety and environmental legislation, subordinate legislation and such other requirements as may be applicable"*. This provision should be read with ss 2(4)(l) of NEMA which requires inter-governmental co-ordination and harmonisation of policies, legislation and actions in relation to the environment.

149. At the time that NERSA made the licensing decisions, at least the following authorisations were outstanding:

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149.1. Environmental Authorisations had been refused by the DFFE, and the internal appeal process was still underway;

149.2. No water use licences, atmospheric emissions licences or waste management licences had been awarded;

149.3. A fuel pipeline licence had not been awarded;

149.4. A fuel supply agreement had not been concluded;

149.5. Port Authorisation from Transnet had not been received;

150. The reasons by the DFFE in its 23 June 2021 decision refusing the environmental authorisations, included the following:

150.1. Public participation was deficient and there was a failure to comply with ss 21(1A)(c) of NEMA.

150.2. Significant changes were made to and/or significant new information was included in the final Environmental Impact Assessment Report ("**EIAR**") and was not included in the EIAR that was provided for comment during public participation process.

150.3. There was a failure to conduct the public participation process in terms of Regulations 39 to 44, inclusive, of the EIAR Regulations 2014, as amended, and the principles of NEMA as outlined in Chapter 2 of the Act.

150.4. There was a failure by the Environmental Assessment Practitioner to ensure that all relevant listed and specified activities were applied for, were specific and could be linked to the development activity or infrastructure.

150.5. There was a failure to consult with the holders of land rights over certain portions of land included in the Draft EIAR and Final EIAR.

150.6. There was a failure to undertake a noise modelling study to gain a more quantitative understanding of the noise produced by the Powership companies and the cumulative impacts on the surrounding marine environment.

150.7. The SACNASP peer review of the estuary and impact report was excluded from the Final EIAR submissions.

150.8. Specialists indicated in their reports that they either had limited time to properly apply their minds, or that the studies were undertaken in the wrong season.

150.9. Consequent gaps and limitations were identified which raised concerns regarding the validity of the findings.

151. In amplification of the above, the DFFE made a finding that a noise modelling study - recommended by the Marine Ecology Specialist Study (and echoed by the estuarine specialist) to gain a more quantitative understanding of the noise produced from power ship operations in the Port of Ngqura and the cumulative impacts on the surrounding marine ecology, had not been conducted. An additional finding was that most of the specialists had indicated limitations in their studies (such as having very limited time to apply their minds, that it did not apply to the standards of undertaking the assessments and that the

studies were taken in the wrong season), which raised the DFFE's concerns with regard to the adequacy of the assessment and the validity of the findings made.

152. TGC submitted in its representations to NERSA, on these grounds (amongst others), that the Karpowership companies' applications were irregular.

153. NERSA's reasons for not upholding the objections raised by *inter alia* TGC, to the Karpowerships' companies failure to comply with environmental legislation may be summarised as follows:[78]

153.1. NERSA licences the operation of generation facilities and nothing else. Section 10(2) of ERA refers to matters which NERSA does not have the power to evaluate, and which accordingly must be determined by other authorities. Section (2)(e) requires an applicant to submit plans regarding their ability to comply. The legislature deliberately did not require approved plans to be submitted. NERSA's powers are limited to scanning the environment to which the application relates and demanding the submission of further information (if necessary). It would be irrational for NERSA to determine the correctness of information relating to decisions which must be taken by other authorities.[79]

153.2. Karpowership submitted a plan in accordance with ss 10(2)(e) of ERA and an appeal was subsequently lodged with the DFFE on 13 July

[78] The summary below is based on the reasons furnished for the Coega, but it reflects the substance of the other two decisions.
[79] Coega reasons for decision, annexure TGC12.2, paras 26 – 30.

2021. The overarching grounds of appeal are common across all three project sites although the details may differ.[80]

153.3. The reasons given for refusing the EIA was insufficient public consultation on the draft reports and the final reports also contained significant new information. Further there were no proper underwater noise impact studies. This is however disputed by Karpowership which showed that the public consultation process was extensive. Further it has appealed the DFFE's decision and submitted all documentary evidence. *"NERSA does not have the authority to review these documents but is satisfied that the plan submitted to the appropriate authority will enable the DFFE to make a decision"*, and on this basis Karpowership has complied with ss 10(2e) of ERA. *"There is no harm suffered by NERSA should NERSA issue a licence and the EIA appeal fails later, as there is provision in the legislation to revoke such licences." The Applicant will however have suffered irreparable harm in the form of loss of business, should NERSA delay issuing the licence.*[81]

153.4. *"[o]ur application complied with the ERA including the provisions pertaining to public participation"*;[82]

153.5. the objection relating to the environmental authorisation resides within the policy development realm and NERSA cannot venture into this space. The objection falls outside the jurisdiction of NERSA and

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[80] Coega reasons for decision, annexure TGC12.2, paras 31 – 32.
[81] Coega reasons for decision, annexure TGC12.2, p. 12, item 2.
[82] Coega reasons for decision, annexure TGC12.2, p. 12, item 2.

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NERSA cannot decide on these aspects and therefore the objection falls to be dismissed.[83]

154. NERSA's account of the DFFE's grounds for refusing the environmental applications is superficial and its reasons do not address the substance of the DFFE's reasoning.

155. In essence, NERSA's reasoning is that it has no jurisdiction to evaluate the environmental authorisations and the fact that the Karpowership companies have submitted plans is sufficient to show compliance with s 10(2)(e) of the ERA. However, this does not hold water.

156. While NERSA's argument that it should not take environmental considerations into account is contested by TGC – for reasons that are detailed below – it is illogical for NERSA, in the same breath as saying that environmental concerns lie outside its jurisdiction, to second-guess the DFFE's decisions to refuse the environmental approvals. This conclusion is supported by ss 2(4)(l) of NEMA which requires NERSA to act in accordance with the DFFE's decisions.

157. The argument that no harm will be suffered by NERSA if it issues the licences and that, should the DFFE appeals fail, it can then revoke them, is untenable. There is no evidence on record to sustain the contention that it relies on in support of this conclusion – that the Karpowership companies will suffer irreparable harm in the form of loss of business if the licences are refused – and, the reasoning disregards the fact that, as at the date the licences were issued, the applications were non-compliant. Given that NERSA concedes

[83] Coega reasons for decision, annexure TGC12.2, p. 13, para 42 and p. 15, item 13.

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that the merits of the environmental applications for environmental fall outside of its jurisdiction, logic then dictates that it should have regarded itself as bound by the DFFE's refusal of the applications, rather than issuing the licences in the hope or expectation that the Karpowerships companies would be successful in their appeals.

158. It follows that the decisions to grant the three Karpowership companies generation licences and enorse their tariffs stand to be reviewed on the following grounds in ss 6(2) of PAJA:

"(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(d) the action was materially influenced by an error of law;

(e) the action was taken—

(i) for a reason not authorised by the empowering provision;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(vi)

(vi) arbitrarily or capriciously;

(f) the action itself—

(i) contravenes a law or is not authorised by the empowering provision; and

(ii) is not rationally connected to—

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; and

(dd) the reasons given for it by the administrator.

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable

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person could have so exercised the power or performed the function;

159. In the alternative, the process should be set aside as it is inconsistent with the principle of legality, on the grounds set out in the previous paragraph.

NERSA failed to discharge its environmental obligations

160. NEMA's s 2 environmental management principles apply throughout the Republic to all organs of state that may significantly affect the environment, and (s2(1)(c)) *'serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment'.*

161. The environmental management principles themselves deal with a range of issues, including social, environmental and economic sustainability, applying a risk averse and cautious approach, environmental justice, lifecycle responsibility, promotion of public participation (especially for vulnerable and disadvantaged persons). The principles are reinforced by NERSA's obligation, in terms of s 2 of ERA, to promote sustainable and orderly development and s 24 of the Constitution, which entrenches the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures.

162. It follows that environmental considerations (such as the climate change impacts of methane emissions over 20 years, the economic and social impacts of the 20-year lock-in, and the implications of its decisions for future generations) should have been a core consideration in NERSA's decisions on

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whether to issue the licences under review. Its failure to take the environmental implications of the decisions into account vitiates its decisions.

163. In the premises, the decisions stand to be reviewed on the following grounds in ss 6(2) of PAJA:

> *"(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;*
>
> *(d) the action was materially influenced by an error of law;*
>
> *(e) the action was taken—*
>
> *(i) for a reason not authorised by the empowering provision;*
>
> *...*
>
> *(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;*
>
> *(vi) arbitrarily or capriciously;*
>
> *(f) the action itself—*
>
> *(i) contravenes a law or is not authorised by the empowering provision; and*
>
> *(ii) is not rationally connected to—*
>
> *(aa) the purpose for which it was taken;*
>
> *(bb) the purpose of the empowering provision;*
>
> *(cc) the information before the administrator; and*
>
> *(dd) the reasons given for it by the administrator; and*
>
> *(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function;*

164. In the alternative, the decisions should be set aside as they are inconsistent with the principle of legality, on the grounds set out in the previous paragraph (with the changes appropriate to the context).

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CONCLUSION

165. TGC received NERSA's reasons for the decisions under review on 29 October 2021 (please refer to paragraph 35 above). This application has been instituted without unreasonable delay and not later than 180 days after such date.

166. TGC did not take steps to institute this application immediately after receipt of NERSA's reasons on 29 October 2021 for the following reasons:

166.1. It was waiting for the Organisation Undoing Tax Abuse ("**OUTA**") to make a decision on whether it would institute an application to review NERSA's decisions. In this regard, it is understood that draft review application papers had been prepared by OUTA, but that no final decision has been made by the organisation. Should OUTA have intended to proceed, TGC would have either joined the application as applicants, or applied to intervene as an amicus curiae.

166.2. The Karpowership EIA appeals have not yet been decided upon and this will impact the review application. The decision was taken to seek to launch a review of the NERSA's decisions notwithstanding the EIA appeals not having been finalised given that (among other things) there is a risk that the *dies* will run out before the appeal decisions are made, and in any event it is likely that, regardless of the outcome, the appeal decisions will be taken on review (for example by the Karpowership companies if the refusals are upheld, and by the Centre for Environmental Rights if the refusals are replaced with environmental authorisations).

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166.3. The application encompasses a range of complex legal and factual issues. In the circumstances, it would not have been feasible to have launched the application substantially less than six months after receiving the reasons for the decisions.

167. I am advised that: (i) in public interest litigation of this nature, applicants are entitled to their costs if they are substantially successful, and there should be no order for costs if they are not successful; and (ii) these principles are re-inforced by the provisions of s 32 of NEMA, which is applicable in this case and in terms of which no adverse costs orders should be made against anyone acting reasonably out of a concern for the publice interest or in the interest of protecting the environment.

168. I accordingly request an order in terms of the notice of motion to which this affidavit is attached.

Vuyelwa Nandipha Masango

I certify that:

1 The deponent has acknowledged that:

1.1 she knows and understands the contents of this declaration;

1.2 she has no objection to taking prescribed oath; and

1.3 she considers the prescribed oath to be binding on her conscience.

2 The deponent thereafter uttered the words: "I swear that the contents of this declaration are true, so help me God".

3 The deponent signed this declaration in my presence at the address set out hereunder on this **22nd** day of **APRIL 2022**.

COMMISSIONER OF OATHS

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COMMISSIONER OF OATHS
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