RESPONSE OF SAWEA AND SOME OF ITS MEMBERS TO THE COMPLAINT LODGED BY THE ANTI-PROVERTY FORUM

INTRODUCTION

1. These submissions are made on behalf of the South African Wind Energy Association ("**SAWEA**") and those members of SAWEA, being Independent Power Producers ("**IPPs**"), which entered into Power Purchase Agreements ("**PPAs**" or "**Contracts**") with Eskom in or about April 2018, pursuant to the fourth round of the Renewable Energy Power Producer Procurement Programme ("**REIPPPP**"). The relevant IPPs are listed in Annexure "**A**" hereto.

2. This submission is made in response to the complaint dated 13 February 2019 and lodged by Ms Phapano Phasha, the Chairperson of the Anti-Poverty Forum ("**the Complaint**" and "**the Complainant**").

3. Following the filing of the Complaint in February 2019 the Public Protector wrote a letter dated 23 July 2019 to the then-Chairman of Eskom, Mr Jabu Mabuza ("**the Public Protector's letter**"). In that letter the Public Protector stated that she was investigating "*allegations of maladministration by Eskom and/or the Department of Energy/Public Enterprises regarding the alleged irregular and unlawful awarding of the contracts to the Independent Power Producers (IPPs)*" ("**the Investigation**").

4. At that time, no similar letters were sent to the IPPs which had been awarded the contracts with Eskom pursuant to the fourth round of the REIPPPP. Nevertheless, SAWEA and its members did receive a copy of the Public Protector's letter.

5. Neither SAWEA nor its members heard anything further about the Investigation until November 2021 when they heard via social media that, pursuant to the Investigation, the Public Protector was obtaining oral evidence from the Minister of Mineral Resources and Energy, Mr Gwede Mantashe ("**the Minister**")[1], the Director-General and other officials in the Department of Mineral Resources and Energy ("**the Department**"). It was this information which prompted SAWEA and its members to write to the Public Protector, via their attorneys, to request this opportunity to make submissions regarding the complaint. The Public Protector responded promptly and afforded SAWEA and its members that opportunity.

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[1] Wherever we refer to **"the Minister"** in these submissions we are referring to the Minister at the relevant time. There have been a number of changes.

6. We need to point out at the outset that besides having had sight of the Complaint and the Public Protector's letter, SAWEA and its members have not seen any other documents or received any other information concerning the Investigation. We have no knowledge of the evidence provided on behalf of Eskom, the National Energy Regulator of South Africa ("**NERSA**"), the Department, the IPP Office in the Department (which manages the various rounds of the REIPPPP) or anyone else. SAWEA and its members therefore reserve the right to supplement these submissions once we have obtained any other relevant documentation or information.

7. We should also point out that we have been required to prepare the submissions in a very short period of time over the 2021/22 Christmas/New Year period so have not had the opportunity to engage in detail with all the relevant IPPs.

8. The Complaint was a fairly lengthy document covering a very wide range of issues. Thankfully, the letter from the Public Protector seems to have distilled the issues in order to focus on a single issue, namely that quoted in paragraph 3 above. This submission is being prepared on the understanding that the Public Protector's investigation is limited to the issues outlined in her letter of 23 July 2019. Thus, for example, the Complaint refers to all rounds of the REIPPPP program although it focuses most specifically on the fourth round. The Public Protector's letter refers only to the fourth round and more specifically to the 27 PPAs entered into with the IPPs in April 2018.

9. The Public Protector's letter also raises a number of questions which are specific to Eskom and the Department's IPP office. We naturally cannot address those questions. We see our role as assisting the Public Protector to come to a full and complete understanding of the legal and practical environment which ultimately led to the decision to award PPAs to 27 IPPs in April 2018.

10. This legal background is lengthy. In the course of setting it out, we will refer to a large number of other documents. To avoid overburdening the submission we will not annex those documents, but we can make them available if required.

11. We will also in this submission refer to two judgments. During the course of the fourth round of the REIPPPP program two court applications were launched aimed at preventing the signing of the PPAs and setting aside those contracts which had been signed. Both those court applications failed.

12. Lastly by way of introduction, we point out that, pursuant to the signing of the PPAs in April 2018, most of the relevant IPPs are already providing energy to Eskom in accordance with the contracts which they concluded. If any of those contracts were

to be cancelled and the supply of energy stopped, it would have an immediate impact on the supply of electricity in this country and would increase the risk of load shedding.

FACTUAL AND LEGAL BACKGROUND

13. In order to address the Complaint properly, it is necessary for the Public Protector to have a full and complete understanding of the factual and legal background which ultimately lead to the decision to award Contracts to the 27 IPPs in the fourth round of the REIPPPP. Once this background is explained, it becomes clear that the Complainant has fallen into the same trap as the parties which failed in their attempt to stop the signing of the PPAs as referred to in paragraph 11 above and which will be spelt out in more detail below. This section highlights the fact that those seeking to challenge the decisions made pursuant to the fourth round of the REIPPPP have little or no understanding of the historical, factual and legal position which then leads them to filing patently incorrect or vexatious complaints such as the one filed by the Complainant.

14. The energy sector has a profound effect on the economic and social functioning of the country. It powers the productive activity of various sectors at the heart of South Africa's economy. Industry consumes approximately 40% of electricity generated in this country. Thus energy generally, and electricity specifically, plays a significant role in the economy and has the potential to contribute to economic growth and employment creation. The sector also provides basic energy services that make households' heating, lighting, refrigeration, cooking, communication and access to information and entertainment possible. Electricity shortages can have crippling effects on the economy and on individual households, as has occurred over the past seven years when the country has been subjected to regular energy shortages, commonly referred to as "load shedding".

15. Consequently, long term planning in the electricity supply sector is imperative to ensure there is adequate supply to meet the demand for electricity. Electricity planning enables government to prepare for the future in an organised way by anticipating the country's future energy needs, based on the best information available at the time, and identifying and analysing the different ways in which those needs and the country's energy objectives can be met. It is an onerous responsibility. Energy planning and procurement is a highly complex and polycentric area of government policy and decision-making, particularly in the electricity sector. There are a number of factors that impact on decision-making:

15.1 First, it is necessary to adopt a long-term planning approach because the cost and time to develop and commission new electricity facilities is significant and

such projects take many years of effort. There may also be uncertainty as to when projects will actually come online. Development of projects requires feasibility studies, environmental impact assessments, public participation processes, regulatory approvals, procurement processes, negotiations, acquisition of land and servitudes, design, construction, commissioning and testing of plants. For example, based on international studies, the average time to construct a nuclear reactor is 8.2 years, whereas renewable energy plants can usually be constructed in under three years. In short, power plants cannot be constructed as the need arises; they are constructed for the future.

15.2 Second, there is no certainty as to what will happen in future, and thus electricity planning has to be based on demand forecasts. In other words, decision-makers must make choices based on incomplete and limited information and have limited time to make choices because of the long lead times for power generation projects. Thus long term plans must be updated as new information becomes available.

15.3 Third, the electricity plan will seek to achieve multiple objectives, which will influence the selection of primary fuel sources. Throughout the world the primary objectives tend to be to have electricity supply that is available, affordable and sustainable. Availability means that there is enough supply to meet current and future needs with enough diversity in energy sources to protect security of supply. Affordability means that supply is priced appropriately so that consumers can afford the cost of electricity while energy suppliers can operate successful businesses. Sustainability means the manner in which electricity is generated and supplied is acceptable from a health, safety and environmental perspective in the long term. As will be apparent, these disparate goals may be in tension with one another. For example, the cheapest option may not be the most environmentally sustainable. So, planners must therefore seek to optimise across the criteria. Decision-makers must make value judgments as to how best to balance these competing objectives.

16. In short, planning electricity supply is a multi-criteria decision making process riddled with uncertainties, polycentric in nature and requires value judgments to be made.

The Regulatory Framework

17. First, we set out the policy framework for electricity supply and thereafter we explain the legislative framework.

The White Paper on Energy Policy, 1998

18. When the democratic government came to power in 1994, the fundamental shifts that had occurred in the country necessitated a review of the outdated 1986 Energy White Paper. The government embarked on an extensive public consultation process over a number of years, including public hearings, consultations with the National Economic Development Labour Council ("**NEDLAC**") and a series of stakeholder workshops, ultimately culminating in the White Paper on Energy Policy, which was approved by Cabinet in 1998 ("**the 1998 White Paper**").

19. The 1998 White Paper identifies a range of energy policy objectives that inform decision-making in the energy sector, the most pertinent in the context of electricity supply being:

19.1 increasing access to affordable energy services;

19.2 managing energy-related environmental and health impacts;

19.3 securing supply through diverse sources; and

19.4 stimulating economic development.

20. To ensure that these objectives are taken into account in decision-making processes, the 1998 White Paper adopted an 'integrated resource planning' approach. This approach accorded with international practice in economies with sophisticated energy sectors and provided for the *'compulsory'* use of integrated resource planning methodologies in evaluating further electricity supply investment (this reference is taken from page 53 at paragraph 7.1.5.6 of the 1998 White Paper).

21. In addition, in furtherance of the goals of affordability and diversity of supply the 1998 White Paper articulated a vision for the electricity supply industry which is anchored in *'introducing competition into the industry, especially the supply sector'* and *'encouraging private sector participation in the industry'* (this reference is taken from page 42 at paragraph 7.1.1 of the 1998 White Paper).

22. Against this backdrop, the 1998 White Paper recognised that South Africa is heavily dependent on coal as its primary source for power generation, as the country has large coal reserves which can be easily and cheaply exploited. For this reason, it is accepted that coal would remain the primary source of energy generation for the foreseeable future.

23. However, the 1998 White Paper acknowledged that coal has significant detrimental impacts on the environment, resulting in measurable external costs, also known as 'negative externalities', as well as other costs that are more difficult to quantify. The most significant impact is the emission of greenhouse gases which make the earth's surface warmer and in turn contribute to climate change.

24. In view of the environmental and health impacts of coal and the need to diversify the sources of supply to maintain energy security, the 1998 White Paper signalled a new direction in South Africa's energy policy: a commitment to support and promote the development of renewable energy to achieve a more sustainable energy mix. This is notable given that the global renewable energy industry was in its infancy at the time the 1998 White Paper was drafted.

The White Paper on Renewable Energy, 2003

25. Building on the commitment to support and promote the development of renewable energy, in November 2003 the Department of Minerals and Energy promulgated the White Paper on Renewable Energy ("**the 2003 White Paper on Renewable Energy**"). The 2003 White Paper was promulgated following a public consultation process.

26. The 2003 White Paper on Renewable Energy set a target of:

    '10 000 GWh (0.8 Mton) renewable energy contribution to final energy consumption by 2013, to be produced mainly from biomass, wind, solar and small-scale hydro. The renewable energy is to be utilised for power generation and non-electric technologies such as solar water heating and bio-fuels. This is approximately 4% (1667 MW) of the projected electricity demand for 2013 (41539 MW)." (This reference is taken from part 5 of the 2003 White Paper on Renewable Energy).

27. The 2003 White Paper on Renewable Energy contemplated that promoting renewable energy will contribute towards the diversification of electricity supply and introduction of greater levels of competition in electricity markets. It encourages investment by the private sector in renewable energy power producers, and in the commercialisation and local manufacturing of renewable energy technologies.

28. The 2003 White Paper on Renewable Energy recognised that initially renewable energy would be more expensive than other fuel sources and as a result government funding would be required to drive the commercialisation of renewable energy technologies. A range of potential financial instruments are identified to catalyse the investment in renewable energy technologies, including setting aside a predetermined amount of generation capacity to be procured from renewable energy technologies.

29. While recognising the need for government financial support in the short term, the 2003 White Paper on Renewable Energy anticipated that over time renewable energy technologies would become cheaper and would no longer require government support to be commercially competitive.

The Long Term Mitigation Scenarios

30. The Long Term Mitigation Scenarios ("**LTMS**") process was a Cabinet-mandated process led by the then-Department of Environmental Affairs and Tourism that took place between 2005 and 2008. The LTMS were derived through a combination of rigorous research and a facilitated stakeholder engagement process.

31. The LTMS arose out of the recognition that South Africa would need to contribute its fair share to reducing the greenhouse gas emissions, which, as noted above, in our country come mainly from coal-based electricity generation.

32. The research found that, without constraints on the business-as-usual trajectory, greenhouse gas emissions would quadruple by mid-century. There is a huge gap between such a path and what is required by science; which is absolute emissions reduction by 2050. Having explored a range of options, the LTMS report put forward four strategic options that South Africa could pursue.

33. The LTMS research was peer-reviewed twice and was found to be of best practice.

34. Based on the options presented in the LTMS, in mid-2008 Cabinet adopted a peak, plateau and decline trajectory ("**PPD trajectory**"). This strategic decision taken by Cabinet meant that our greenhouse gas emissions would grow for a while (as a result of investment in new coal-fired power plants), but peak between 2020 and 2025 at 550 Mt CO2-eq, remain flat for a decade, and decline in absolute terms from 2030-35 onwards. The upshot of this was that the use of coal as a power source would decline from 2030 onwards.

National Climate Change Response White Paper, 2011

35. In 2011 the Minister of Water and Environmental Affairs promulgated the National Climate Change Response White Paper ("**the 2011 White Paper**").

36. The 2011 White Paper acknowledged that South Africa, as a country, is extremely vulnerable to the impacts of climate change and therefore sets out South Africa's vision for an effective climate change response and the long-term, just transition to a climate-resilient and low-carbon economy and society. It proposed that climate change be addressed through interventions that build and sustain the country's social,

economic and environmental resilience in order to make a fair contribution to the global effort to stabilise greenhouse gas concentrations in the atmosphere. The 2011 White Paper was also the subject of extensive public participation.

37. The 2011 White Paper expressly recognised that South Africa's reliance on coal for electricity generation would continue to be a significant contributor to greenhouse gas emissions. In accordance with the adoption of the PPD trajectory, a shift to low-carbon electricity generation options would only be possible in the medium term, and not immediately.

38. Nevertheless, the 2011 White Paper recognised that new energy infrastructure investments must consider the impacts of climate change. Thus, it advocates that the investments should avoid locking-in emissions-intensive technologies into the future. However, since it is accepted that there will be investment in new coal-fired power plants in the short term, the 2011 White Paper identified the most promising mitigation options as '*energy efficiency and demand side management, coupled with <u>increasing investment in a renewable energy programme in the electricity sector</u>*' (our emphasis).

Nationally Determined Contributions

39. There are several international legal instruments to which South Africa is a party and which are aimed at encouraging and obliging member states to reduce their greenhouse gas emissions. South Africa has signed and ratified the United Nations Framework Convention on Climate Change, acceded to the Kyoto Protocol and signed and ratified the Paris Agreement. The UN Framework Convention and the Kyoto Protocol oblige developed countries, identified in Annex I to the Convention, to adopt measures to mitigate climate change, to limit green-house gases and to meet defined emissions targets.

40. The Paris Agreement requires State parties to commit to Nationally Determined Contributions ("**NDC**"), which describe the targets that they seek to achieve and the climate mitigation measures that they will pursue. South Africa's NDC, which was submitted in 2015, expressly acknowledges the country's reliance on coal and anticipates the establishment of further coal-fired power stations and an increased carbon emission rate until 2020. This accords with South Africa's commitment to the PPD trajectory. In the NDC, South Africa makes an international commitment that between 2025 and 2030 its emissions will be within a range of between 398 and 614 Mt CO2–eq.

41. At page 10 the NDC notes that '[c]*urrent analysis of investments in renewable energy projects shows that these have a positive impact on the economy.*'

National Development Plan, 2012

42. Then-President Jacob Zuma appointed the National Planning Commission ("**the NPC**") in May 2010 to draft a vision and national development plan for South Africa. The NPC is an advisory body consisting of 26 people drawn largely from outside government, chosen for their expertise in key areas. In November 2011 the NPC released a draft national development plan. The draft national development plan was the subject of extensive public consultation including public forums that drew in thousands of people and included engagement with parliament, the judiciary, national departments, provincial governments, development finance institutions, state-owned entities and local government formations, unions, business, religious leaders, non-profit organisations and individuals.

43. After taking into account public submissions, the National Development Plan 2030 ("**the NDP**") was promulgated by the NPC in August 2012. The NDP was adopted by cabinet and serves as the long term vision and plan for the country. The NDP has as one of its primary goals the just transition to a low carbon economy. The NDP recognises that this will not be easy given a starting point where the economy is heavily dependent on fossil fuels and that the path is likely to be challenging and contested, with difficult decisions having to be made. Notwithstanding this, and given that the benefits of building resilience against the effects of climate change are manifest, the NDP reaffirms South Africa's commitment to act responsibly to mitigate the effects of climate change and the commitment to the PPD trajectory. In order to achieve this goal the NDP sets a target of procuring at least 20 000MW of renewable electricity by 2030.

44. It does so while recognising that the poor will be disproportionately affected by climate change and must be protected from the transitional costs associated with transitioning to a low carbon economy, including job losses in carbon intensive industries. The protection that the NDP contemplates is not that the coal industry must be maintained, but rather that mechanisms should be put in place to facilitate a just transition for those in carbon intensive industries into the new low carbon economy. It is contemplated that the transition will pave the way for employment creation and greater equality as it secures a sustainable future for all South Africans.

45. From the policy framework set out above it is apparent that the decision to procure renewable energy generation capacity was consciously adopted by government based on a thorough and rational decision-making process and was informed by extensive public participation. This policy approach was adopted with full knowledge that, in the short term, incorporating renewables into the energy mix would impose

additional costs on the economy. But in the long term the average cost would decrease and South Africa would realise significant benefits, including diversification of supply, increased competition, stimulation of upstream supply industries, social and economic development benefits, a reduction in greenhouse emissions, and a reduction in other health and environmental externalities and impacts.

The Electricity Regulation Act, 2006

46. The Electricity Regulation Act, 4 of 2006 ("**ERA**"), is the framework legislation regulating electricity supply in South Africa.

Integrated Resource Plan

47. Section 1 of the ERA, defines the 'integrated resource plan' ("**IRP**") as *'a resource plan established by the national sphere of government to give effect to national policy'*. In other words, the IRP is a plan that is intended to give effect to the national policies that we have outlined above.

48. The 1998 White Paper provides a definition which explains the nature and intended outcomes of integrated resource planning. It is defined as:

> *'a decision-making process concerned with the acquisition of least-cost energy resources, which takes into account the need to maintain adequate, reliable, safe, and environmentally sound energy services for all customers. The IRP approach includes:*
>
> - *the evaluation of all candidate energy supply and demand resources in an unbiased manner;*
> - *the systematic consideration of a full range of economic, environmental, social and technological factors;*
> - *the consideration of risks and uncertainties posed by difference (sic) resource portfolios and external factors, such as fluctuations in fuel prices and economic conditions; and*
> - *the facilitation of public consultation in the utility planning process.'*

49. The IRP defines itself as '*a <u>co-ordinated schedule for generation expansion</u> and demand-side intervention programmes, <u>taking into consideration multiple criteria</u> to meet electricity demand*' (our emphasis).

50. The IRP plays a fundamental role in long term planning in the electricity supply industry. As we will explain in more detail below, it informs all determinations made by the Minister on new generation capacity requirements.

51. Section 4(a) of the ERA obliges NERSA to *'issue rules designed to implement the national government's electricity policy framework, the integrated resource plan and this Act'* (our emphasis).

52. No person may generate electricity without an electricity generation licence issued in terms of section 13 of the ERA. Section 10(2)(g) of the ERA prescribes that a generation licence 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'* (our emphasis).

Determinations

53. Section 34 of the ERA regulates the establishment and procurement of new generation capacity. Section 34(1) provides that:

> *'(1) The Minister may, in consultation with the Regulator* (NERSA) *-*
>
> *(a) determine that new generation capacity is needed to ensure the continued uninterrupted supply of electricity;*
>
> *(b) determine the types of energy sources from which electricity must be generated, and the percentages of electricity that must be generated from such sources;*
>
> *(c) determine that electricity thus produced may only be sold to the persons or in the manner set out in such notice;*
>
> *(d) determine that electricity thus produced must be purchased by the persons set out in such notice;*
>
> *(e) require that new generation capacity must -*
>
> *(i) be established through a tendering procedure which is fair, equitable, transparent, competitive and cost-effective;*
>
> *(ii) provide for private sector participation'* (our emphasis).

54. In terms of section 34(1)(d) it is apparent that the Minister is empowered to determine that a particular entity *must* purchase the new generation capacity that the Minister

had identified is required for the continued uninterrupted supply of electricity. Thus any suggestion that Eskom was 'pressured' by their political principals to sign the PPAs is misconceived and misguided. Once the Minister had made the determination Eskom had a legal obligation, flowing from the ERA, to sign the PPAs. This obligation is reinforced in the Electricity Regulations on New Generation Capacity under GN R399 in GG 34262 ("**the New Generation Regulations**"), which we discuss below.

55. In terms of section 34(3) of the ERA the NERSA, when issuing a generation licence, is '*bound*' by any determination made by the Minister.

56. On 4 May 2011 the Minister published the New Generation Regulations. Regulation 6 of the New Generation Regulations elaborates on the content and the nature of determinations made under section 34(1) in the following manner:

> *'(1) The Minister may, in consultation with the Regulator, make a determination in terms of section 34 of the Act.*
>
> *(2) A determination under section 34(1) shall include a determination as to whether the new generation capacity shall be established by Eskom, another organ of state <u>or an IPP</u>.*
>
> *(3) If the determination referred to in sub-regulation (2) requires that the new generation capacity be established by an IPP, <u>the Minister shall also determine the identity of the buyer or, where applicable, the procurer and the buyer.</u>*
>
> *(4) …*
>
> *(5) A determination contemplated in this Regulation is <u>binding on the buyer and the procurer</u>'* (our emphasis).

57. 'Buyer' is defined in the regulations to mean *'in relation to a new generation capacity project, any organ of state designated by the Minister in terms of section 34 (1) (c) and (d) of the Act.'*

58. 'Procurer' ‘is defined to mean *'the person designated by the Minister in terms of section 34 as being <u>responsible for the preparation, management and implementation of the activities related to procurement of new generation capacity under an IPP procurement programme including the negotiation of the applicable power purchase agreements</u>, which person may or may not be the buyer'* (our emphasis).

59. The Minister determined that Eskom would be the buyer in relation to the fourth round of the REIPPPP. Thus, in terms of Regulation 6, Eskom was bound by that determination and legally obliged to buy the electricity procured through the relevant procurement process.

60. As is apparent from section 34(1), the Minister, in consultation with NERSA, is empowered to determine in which circumstances '*new generation capacity is needed to ensure the continued uninterrupted supply of electricity*'. And she or he must '*determine the types of energy sources from which electricity must be generated, and the percentages of electricity that must be generated from such sources*'. When the Minister and NERSA take these decisions they must do so rationally, based on objective facts. The decision is not based on a whim or some personal preference of the Minister.

61. As we have explained, long term electricity generation planning is highly complex and relies on demand forecasts, must take into account the lead times for plant construction and must seek to address multiple (and often conflicting) objectives. Further, as we have also explained, South Africa has adopted an integrated resource planning approach to long term electricity planning. Consequently, the Minister and NERSA are reliant on the IRP to make rational and informed decisions that new electricity generation capacity is necessary and from which energy sources it should be generated. Thus the range of options that are possible in relation to these two decisions is constrained by the IRP (unless there is an objectively sound reason to depart).

62. The nexus between the IRP and the determinations is so close that the Department and the IPP Office have indicated that the relationship between the two is such that the '[i]*mplementation of the IRP 2010-2030 is carried out through Ministerial Determinations*'.

63. It is apparent when one considers the various determinations that have been made by the Minister and NERSA to date that they have been expressly based on and are closely aligned with the IRP. In other words, they are based on expert input and long-term planning.

64. Thus the matters upon which the Minister and NERSA have a broader discretion when making determinations are limited to matters of implementation, such as whether new generation capacity should be established by Eskom, another organ of state or an IPP and, if the new capacity is to be established by an IPP, determining who the buyer and the procurer should be.

THE PROCUREMENT PROCESS

65. The Complaint lodged by the Complainant broadly focusses on two issues: the process adopted to procure renewable energy, and the price paid by Eskom to obtain it. In this section of the submission we will deal with both of these issues. We will explain the steps that have been taken, in accordance with the ERA, to give effect to the energy policy framework. It is those steps that culminated in a competitive tender process in which the 27 IPPs were the successful bidders and, flowing from this outcome, concluded PPAs with Eskom.

66. Regulation 7 of the New Generation Regulations provides that:

'(1) Subject to any determination by the Minister in terms of section 34 of the Act as to the form of an IPP procurement programme, such IPP procurement programme shall take the form determined by the procurer.

(2) The procurer shall in the appropriate procurement documentation specify any qualification and evaluation criteria applicable to that IPP procurement programme.

(3) Where the procurer in respect of a new generation capacity project procured under an IPP procurement programme is not the buyer, <u>the buyer shall not itself conduct a procurement process</u>.' (our emphasis).

Power Purchase Agreements and Cost Recovery

67. Regulation 9 of the New Generation Regulations specifies the requirements for power purchase agreements concluded with IPPs:

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

(a) value for money;

(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 PFMA[2]*-*

(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.'

68. Regulation 3 sets out the objectives of the New Generation Regulations. Regulation 3(d) provides that one of the objectives is:

'the facilitation of the <u>full recovery by the buyer of all costs efficiently incurred by it under or in connection with a power purchase agreement</u> including a reasonable return based on the risks assumed by the buyer thereunder and to ensure transparency and cost reflectivity in the determination of electricity tariffs' (our emphasis).

69. Regulation 10 provides for cost recovery. It states that:

'<u>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</u> in the following categories:

(a) <u>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</u>;

(b) <u>all amounts paid by the buyer in terms of the power purchase agreement</u> (other than those referred to in paragraphs (a) and (e)),

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2 The Public Finance Management Act, No. 1 of 1999 (**"the PFMA"**)

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' (our emphasis).

70. Consequently, and contrary to what the Complainant states, the conclusion of a power purchase agreement entails no cost risk to Eskom since it is acting as 'the buyer' in these circumstances. Regulation 10 ensures that NERSA must, through the imposition of licence conditions, allow Eskom to recover its costs.

71. Furthermore, the Complainant effectively "blames" Eskom for the procurement process. Yet Eskom played no role whatsoever. In terms of Regulation 7(3), quoted in paragraph 66 above, the buyer (Eskom) plays no role in the procurement process.

Generation Licences

72. In terms of section 7 of the ERA no person may generate electricity without a licence issued by NERSA. A person who is required to hold a generation licence must make an application in terms of section 10 and NERSA may, when issuing a licence, impose certain conditions, including the setting and approval of prices, charges and tariffs charged by licence-holders and the methodology for determining those prices and tariffs. As we have already explained, when issuing a generation licence, NERSA is bound by an applicable determination made under section 34 of the ERA and must assess whether the application evidences compliance with any applicable integrated resource plan.

The IRP

73. As pointed out above, the primary objective of the IRP is to forecast the long term electricity demand, to determine what energy sources should be used to meet this demand, how new generation capacity will be allocated between the different energy sources, and when new capacity generation will be needed.

74. The Department gazetted its first draft of the IRP on 31 December 2009, although this iteration only covered a limited period (2010 -2013). The Department initiated the first round of public participation in April 2010. Consultation with the public and other government departments led to the development of a draft IRP which was published in October 2010. This scenario incorporated cost optimisation and a range of different policy objectives. At this early stage, the first draft of the IRP made provision for 11,4 GW of renewables.

75. The second round of public participation was conducted in November/December 2010. Interested parties were granted the opportunity to submit written comments or to make a presentation at one of three workshops held in Durban, Cape Town, and Johannesburg. 479 submissions were received from organisations, companies and individuals resulting in a total of 5 090 comments. The Department also solicited comments from independent international consultants. The comments were broadly supportive of the inclusion of renewable energy into the generation mix.

76. The final version of the IRP 2010 - 2030 ("**the IRP 2010**") was promulgated in the *Government Gazette* on 6 May 2011. When deciding on the required mix of energy sources, the Department sought to achieve an appropriate balance between the expectations of different stakeholders. It carefully considered key constraints and risks, including: reducing carbon emissions; new technology uncertainties such as costs, operability and lead time to build; water usage; localisation and job creation; regional development and integration; and security of supply. The IRP was informed by the PPD trajectory and included a cap on carbon emissions. Ultimately, the IRP 2010 determined that, in order to secure the continued and uninterrupted supply of energy, the following mix of new generation technologies were required between 2010 and 2030: a nuclear fleet of 9.6 GW; 6.3 GW of coal; 17.8 GW of renewables (an increase of 6.4 GW compared to the draft); and 8.9 GW of other generation sources.

77. The IRP 2010 was ultimately adopted by Cabinet, and thus represented the policy of government at the time the decision was made with regard to the REIPPPP decisions. It should be noted that, on 18 October 2019, the Minister published a new IRP for implementation. However, that was a year and a half after the decision was made

with respect to the fourth round of the REIPPPP. So the relevant IRP for purposes of the Investigation is the IRP 2010.

The Renewable Energy Determinations

78. The Minister of Energy published the first determination relating to renewable energy under section 34 of the ERA on 1 August 2011, in terms of which she determined, in consultation with NERSA, that 3725MW of new renewable energy generation capacity (from wind, concentrating solar power or CSP, solar photovoltaic, biogas, biomass, landfill gas and small hydro) should be procured from IPPs by 2016 or as soon as reasonably possible ("**the 2011 Determination**").

79. On 19 December 2012, the Minister, in consultation with NERSA, published a further determination under section 34 of the ERA determining, amongst other things, that a further 3200MW of new renewable energy generation capacity should be procured from IPPs between 2017 and 2020 or as soon as reasonably possible ("**the 2012 Determination**").

80. We shall refer to both determinations jointly as "**the Determinations**".

81. The Determinations each provided that:

81.1 the new generation capacity allocations in the Determinations are in accordance with the IRP 2010;

81.2 the Department shall be the procurer;

81.3 Department's role as the procurer is to conceptualise and conduct the procurement programmes, <u>including preparing all associated documents including power purchase agreements and other project agreements</u>;

81.4 Eskom shall be the <u>Buyer</u>;

81.5 Eskom may only buy the power <u>in accordance with the power purchase agreements and other project agreements prepared as part of the procurement program</u>; and

81.6 the procurement programs should target connection to the Grid for new generation capacity <u>as soon as possible</u> taking into account all relevant factors including the time required for procurement.

82. On 30 July 2015, the Minister in consultation with NERSA, published a determination under section 34 of the ERA in which she determined that a further 6 300 MW of new

renewable capacity should be procured from IPPs between 2021 and 2025 or as soon as reasonably possible, in the form of onshore wind, CSP, solar photovoltaic, biogas, biomass, small hydro and small projects ("**2015 Determination**"). The 2015 Determination is not relevant to the Complaint as all of the Projects in the fourth round of the REIPPPP fell within the capacity allocated in the 2011 and 2012 Determinations.

83. As noted above, the Department is the procurer in respect of the REIPPPP. The process has been run by the IPP office, an office established under the auspices of the Department, together with significant input and support from National Treasury and the Development Bank of Southern Africa.

84. The bidding process comprised the following stages:

84.1 bid notification, where bidders were required to indicate their intention to bid and to disclose information regarding grid connection for their project or projects;

84.2 bid registration, where bidders were required to pay a non-refundable registration fee of R15 000 to gain access to the request for proposal documentation ("the **RFP**");

84.3 bid submission, at which point bidders submitted their completed bid submissions;

84.4 bid evaluation, where the Department and its advisors assessed compliance with qualification criteria and evaluated and scored the bids against the evaluation criteria;

84.5 announcement of preferred bidders, where the winning bidders were selected and announced; and

84.6 signing of project documents, which is the stage that the IPP respondents and Eskom signed the Contracts.

85. The RFP is divided into three sections detailing: general requirements, qualification criteria, and evaluation criteria. The documents also included a standard Power Purchase Agreement ("**PPA**"), an Implementation Agreement ("**IA**") and Direct Agreements. The most important for present purposes is the PPA.

86. The PPA is an agreement signed between a successful bidder and Eskom. It governs the rights and duties of the parties regarding the generation and sale of electricity. The PPA has a lifespan of 20 years from the commercial operation date of the power plant concerned.

87. The PPA is 'non-negotiable', in that bidders must accept the terms as they are when submitting their bids. It was developed after an extensive review of global best practices and consultations with numerous public and private sector entities, including NERSA.

88. The REIPPPP bid evaluation involved a two-stage process. First, bidders had to satisfy certain minimum threshold requirements (also referred to as qualification criteria) in six areas: environment, land, commercial and legal, economic development, financial, and technical. For example, under the environmental qualification criteria, bidders needed to demonstrate that all relevant environmental approvals for the project were in place and in terms of the land criteria bidders needed to show that they had secured land tenure for their project, demonstrate proof of land use applications, and evidence any necessary approvals for the use of municipal land under the Local Government: Municipal Finance Management Act, 56 of 2003.

89. Bids that satisfied the threshold requirements then proceeded to the second stage of evaluation, where bidders were evaluated on price and economic development commitments.

89.1 The bidder with the best (lowest) price received 70 points and all other bidders received a proportional score based on the difference between the lowest price and their own price. The bid price is the electricity tariff offered by the bidder in Rands per megawatt-hour.

89.2 The economic development requirements were broken down into sub-categories covering job creation, local content, ownership by black people, management control, preferential procurement from sub-contractors, enterprise development and socio-economic development for local communities.

90. Price counted for 70 out of 100 points and economic development requirements counted for 30 out of 100 points. Thus in the REIPPPP, economic and social development has played a much stronger role than non-price criteria would normally play in public procurement processes conducted in terms of the Preferential Procurement Policy Framework Act, 5 of 2000 ("**the PPPFA**"). Ordinarily in large tenders of this nature, price counts for 90 points and non-price criteria count for 10 points. However, the Department obtained an exemption from the requirements of the PPPFA for this procurement process because, as stated in the RFP, it was regarded as '*inherently excellent for achieving positive socio-economic outcomes*'.

91. Overall, the REIPPPP targets economy-wide jobs, local content benefits, and local community development. It offers a unique opportunity to boost local manufacturing

in a sector that is new to the country. Also, renewable energy projects are distributed throughout the country and are mainly located in low income rural areas that may otherwise have little potential to attract investment.

92. By the time a decision was made in respect of the fourth round of the REIPPPP, four rounds had already been completed, as follows:

92.1 The first round of bidding, Bid Window 1, was completed (by which mean the time when bids were submitted) in November 2011. The prices in that first round were expensive relative to the average historical cost of power in the South African system. The IPP office had set a ceiling price for bids by technology and most bids were close to the ceiling. Ultimately, there were 28 successful bidders who collectively undertook to supply 1,426MW (megawatts) of electricity. All of the successful bidders have concluded PPAs with Eskom, have completed construction and at this point have been operating successfully for several years.

92.2 The second round, Bid Window 2, was completed in November 2012 with nineteen successful bidders. This time, price was a decisive factor for successful bids and tariffs fell by an average of 34% from the first round to the second round (See page 21 of the IPP Office Overview Report, a copy of which will be made available when we furnish this submission (**"the 2017 Overview Report"**))[3]. In addition, local content obligations improved. The nineteen successful bidders undertook to supply 1,040MW of electricity in this round. All of the successful bidders have concluded PPAs with Eskom, have completed construction and have commenced commercial operations.

92.3 The third round, Bid Window 3, was completed in November 2013 with seventeen successful bidders being chosen. They collectively undertook to provide 1,457MW worth of new capacity. Prices in this round fell again, this time by another 19% according to page 21 of the Overview Report. All of the successful bidders have concluded PPAs with Eskom, have completed construction and have commenced commercial operations.

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[3] The Overview Report on the REIPPPP is produced on a quarterly basis by the Department, National Treasury and the Development Bank of Southern Africa (DBSA). It is extremely informative. We will furnish the Public Protector with the 2017 Overview Report, which sets out the situation which applied during the fourth round of the REIPPPP, and the latest Overview Report (**"the 2021 Overview Report"**) which sets out the current position.

92.4 A technology specific round for Concentrating Solar Power, known as Bid Window 3.5, was completed on 15 December 2014, with two bidders being selected to provide 200 MW of additional capacity.

93. In the fourth round of the REIPPPP the successful bidders were announced in April 2015 and June 2015, the latter sometimes referred to as Round 4.5 or the extended Round 4. Altogether 27 Preferred Bidders were announced, collectively undertaking to provide 2,205MW. The price in this round fell by another 39%. At an average 82c per kWh (kilowatt hour), the price was significantly lower than the cost of energy to be generated by Eskom's Medupi and Kusile coal fired power stations.

94. As at the time of the fourth round of the REIPPP, a total of 6,422MW of renewable energy capacity had been procured from 112 IPP's, of which by that time approximately 4000 MW was already operating and contributing to the electricity grid.

95. The most significant feature of the bidding rounds completed by April 2018 was the dramatic drop in renewable energy tariffs. In the case of solar photovoltaic energy, the tariff fell from R3.65 per kWh to R0.91; in the case of wind, the fall was from R1.51 per kWh to R0.75 (all tariffs stated in 2016 Rands as set out at page 21 of the Overview Report). The prices of R0.91 and R0.75 per kWh for solar photovoltaic and wind respectively are significantly lower than the estimated cost for power from new coal IPPs (R1.03 per kWh), Eskom coal (R1.05 to R1.16 per kWh) or nuclear power (R1.17 to R1.30 per kWh). The average renewable bid tariff has fallen from R2.52 per kWh in the first round to 82 cents/kWh in the fourth round (the fourth round contracts being the subject the Complaint). The Department subsequently announced that the average renewable bid price fell further still to R65c/kWh in the Expedited Round.

96. So the Complainant is totally wrong when it states, as set out in the Public Protector's letter, that "*Eskom buys electricity from the IPPs at the rate of 223c per kWh*".

97. In addition, the REIPPPP has had a significant positive impact on the country and has materially contributed to socio-economic development. The REIPPPP had, as at 31 March 2017, attracted around R209.7 billion of committed investment into the country. Of this amount R41.8 billion is investment from foreign investors and financiers. This is more than double the inward foreign direct investment attracted into South Africa in 2015 (R22.6 billion) (this reference is taken from the 2021 Overview Report).

98. The procurement conditions require that at least 40% of each project must be owned by a South African entity with 50.1% or more of its equity owned by black people and

which is controlled by black people. The REIPPPP contributes to Broad Based Black Economic Empowerment ("**B-BBEE**") ownership across the value chain. On average 34% of project equity is owned by black South Africans, 8% of the projects are owned by black local communities (well above the RFP target of 5%) and 18% of the engineering and construction companies are owned by black people. While IPPs were set the target that 40% of top management positions should be filled by black people, to date the IPP's have surpassed this target reaching an average of 61% of top management positions filled by black people (this reference is taken from the 2021 Overview Report.)

99. In addition to favourable equity outcomes and financial investments into the country, the REIPPPP has targeted broader socio-economic developmental goals. The REIPPPP has implemented local content minimum thresholds to drive local manufacturing capacity. Local content commitments by the IPPs amount to 50% of the total project value (R61.9 billion out of R123.6 billion total project value). This exceeds the 45% commitment of the IPP's and the threshold in the various rounds of the REIPPPP which ranged from 25% to 45%.

100. By the time the fourth round REIPPPP contracts were signed, 31,207 job opportunities of at least a year had been created, with 28,152 in construction and 3,055 in operations. Significantly more people were employed from local communities than initially expected. The employment equity share of people in construction jobs shows that 51% of all jobs were held by people in local communities, with 8% being women and 41% being youths (this reference is taken from page 42 of the 2017 Overview Report).

101. The bid obligations included a requirement to contribute a portion of the revenue to the needs of local communities. These socio-economic development ("**SED**") contributions accrue over the 20 year operation period and will be utilised in education and skills development, social welfare, healthcare, general administration and enterprise development. Across the bid windows, by 2018 R19.3 billion had been committed to SED projects (this reference is taken from page 43 of the 2017 Overview Report).

102. The REIPPPP has also contributed towards the national response against the impacts of climate changes and the domestic contribution to international efforts in mitigating greenhouse gas emissions. A total of 11.2Mton (11,200,000,000 kg) of carbon dioxide equivalent reduction was achieved since from the time the REIPPPP began up to the fourth round of the REIPPPP.

103. Thus to date the REIPPPP has had a number of direct and indirect financial, economic and social benefits for the country.

CONSEQUENCES IF THE FOURTH ROUND REIPPPP CONTRACTS WERE TO BE SET ASIDE

104. The fourth round REIPPPP contracts were signed in April 2018. In other words, given that the preferred bidders were announced in April and June 2015, Eskom had more than three years to consider the PPAs and make appropriate representations should there have been any material problem with the signing of the PPAs, such as the conclusion of the PPAs resulting in significant losses to Eskom (which in any event would have been unlawful and not in compliance with the New Generation Regulations). Soon thereafter work commenced with regard to the construction of the necessary facilities and ultimately the connection to the Eskom grid. The Complainant is seeking to set aside those contracts and the consequences would be immense if that were to happen:

104.1 The affected IPPs and their financiers would stand to lose their entire investment in their projects. Since the IPPs would have no alternative market they would all be bankrupted and there would be significant direct job losses. Without revenues the IPPs would be unable to service their debt and would consequently all default simultaneously. All the major banks and development finance institutions in the country would be affected by the defaults as they have all been involved in the financing of REIPPPP projects. The result would be, by far, the largest debt default in the history of the country and could potentially bring the entire banking system into collapse. This in turn would have a catastrophic impact on the economy and the country as a whole. Potentially also the Government support in terms of the Implementation Agreements would also be invoked, thus seriously prejudicing Government.

104.2 The consequences for the country would be severe. The affected projects would not proceed and no further clean energy would be realised (and it is unlikely that IPPs would show any interest in supplying renewable energy in South Africa again). South Africa would remain almost entirely dependent on coal for its electricity. Thus, it is likely that South Africa would fall behind on its carbon emissions targets, become more vulnerable to the effects of climate change, face threats to energy security due to the lack of diversity of sources of energy supply, and, with less electricity available in the grid, there is a risk that South Africa could in the near future be faced with energy shortages and significantly increased load shedding. In essence the country's national policy

position to transition to a just low carbon economy through investment in renewable energy, which has been articulated consistently and insistently for 20 years, would be undermined.

104.3 The total direct investment (being the total project costs incurred in the design, construction, development, installation and/or commissioning of the projects) made by renewable energy companies into projects arising from Bid Window 4 would be lost to the economy. A significant benefit of the REIPPPP is the social investment that renewable energy companies are required to make, and as such it is not just a financial loss the country would suffer. The social benefits arising from the program would also be lost. In addition, an investment in infrastructure, such as renewable power plants, has a multiplier effect on the economy. In other words, for each rand invested the country's income will increase by a multiple of that amount, possibly between two and three times the initial investment.

104.4 In addition, at a time when South Africa can least afford it, with our ratings having been downgraded and the country reeling from the impact of Covid-19, investor confidence would be destroyed. In other words, the appetite of foreign and local investors to make further investments in the country would be harshly suppressed. This in turn would have disastrous effects for the economy as a whole.

104.5 Finally, 2021 was the worst year in South Africa's history as far as load shedding is concerned. If the amount contributed to the Eskom grid by the round 4 REIPPPP IPPs were to be halted, a total electricity supply of 2205 MW would be lost. That would result in the country entering a phase of almost constant load shedding. These problems would be aggravated by the fact that Eskom is in the process of decommissioning some of its older coal fired power plants.

105. It is implicit in the Complaint lodged by the Complainant that, by attacking the renewable energy industry, they are seeking to boost and support the coal industry. However, the signing of the REIPPPP round 4 PPAs had no impact on the coal industry whatsoever. The round 4 IPPs generate a very small amount of electricity relative to the country's needs. That small amount has little impact on the role played by the coal industry. Even while the REIPPPP fourth round was in progress, Eskom was in the process of establishing the Medupi and Kusile power stations, the third and fourth largest coal fired power plants in the world.

THE LITIGATION

106. The validity of the fourth round REIPPPP process has been tested in our courts on two occasions:

106.1 On 22 June 2017 the Coal Transporters Forum ("**CTF**") launched an application in the Gauteng Division, Pretoria, of the High Court of South Africa against Eskom, NERSA, the Minister of Energy and 35 IPPs ("**the CTF Application**"). Many of the IPPs were SAWEA members. It sought to interdict the signing of the fourth round REIPPPP contracts and set aside any which had been signed. The application was opposed by Eskom, NERSA, the Minister and most of the listed IPPs.

106.2 Prior to the finalisation of the CTF Application, and shortly before the fourth round PPAs were due to be signed, an urgent application was launched against the same respondents by Transform RSA and the National Union of Metal Workers of South Africa ("**NUMSA**"). That application was argued in court in April 2018 and was dismissed by the High Court, with the applicants ordered to pay the costs of all the opposing respondents.

106.3 Subsequent thereto, and after the signing of all of the fourth round REIPPPP PPAs, the CTF Application was argued. Argument took place on 18 March 2019 and judgment was handed down just over a week later, on 26 March 2019. Again, as with the application launched by Transform RSA and NUMSA, CTF sought to set aside the fourth round REIPPPP contracts on the basis of the process adopted by Eskom, NERSA and the Minister. Again this application was dismissed, with CTF being ordered to pay the respondents' costs. A copy of the judgment of Judge Meyer is annexed hereto marked Annexure "**B**".

107. It will be helpful for the Public Protector to give careful consideration to the very substantial papers filed in the CTF Application, the heads of argument tabled by the various parties and the judgment of Judge Meyer. Many of the issues canvassed in the course of that application have been raised by the Complainant. Many of the huge material factual errors made by CTF have been repeated by the Complainant.

CONCLUSION

108. The Complainant has shown a complete lack of understanding of the law, the procurement process and the relevant facts concerning the fourth round of the REIPPPP process:

108.1 The Complainant seems to contend that Eskom was under political pressure to sign the PPAs with the IPPs. In that regard they have ignored entirely section 34(1)(d) of the ERA (quoted in paragraph 53 above) which entitles the Minister

to determine that electricity produced "*must be purchased by the person set out in such notice*". They have also ignored entirely that, in terms of the determinations (referred to in paragraphs 78 to 81 above), Eskom was determined by the Minister as the buyer of electricity pursuant to the REIPPPP process.

108.2 It is up to Eskom to show that it complied with the correct internal processes and with the provisions of the PFMA and regulations promulgated in terms thereof. However, it is worth noting that, in the course of the two court cases referred to in paragraph 106 above, no evidence whatsoever emerged that Eskom did not comply with all legal requirements relating to the signing of the PPAs. Eskom asserted that they complied fully and that was not disputed.

108.3 The second challenge which the Complainant raised relates to the procurement process run by the IPP office. We have sketched in detail the process which was followed. That process complied fully with section 217 of the Constitution and the PPPFA. Then, no fault was found with regard to the procurement process in the litigation described in paragraph 106. It is also worth noting that, in all the REIPPPP rounds up to round 4 (the subject matter of the Complaint), and notwithstanding the very significant number of procurement awards made as a consequence of the procurement process, there was not a single challenge to the procurement process until the two unsuccessful court cases which we have referred to in paragraph 106.

108.4 Lastly, the Complainant has made the totally incorrect statement that Eskom buys electricity from the fourth round IPPs at the rate of 223c per kWh but sells it to consumers at 89c per kWh, resulting a loss estimated at R21 million per annum. Firstly, as we have shown in paragraphs 68 to 70, the conclusion of a PPA entails no cost risk to Eskom since it is acting as the buyer. Regulation 10 of the New Generation Regulations ensures that NERSA must, through the imposition of licence conditions, allow Eskom to recover its costs. Secondly, as we have shown in paragraphs 93 and 96, the average cost to Eskom in the fourth round of the REIPPPP was 82c per kWh, with wind energy being sold at 75c per kWh and solar photovoltaic at 91c. This is significantly lower than the estimated cost for power from new coal IPPs, Eskom coal or nuclear power. These figures are all reinforced in the 2017 and 2021 Overview Reports, which will be made available.

109. Taking all of the above into account, as read with the annexures hereto, the 2017 and 2021 Overview Reports and the other documents referred to in the submission and

the court papers in the CTF Application, it is quite clear that the Complaint should be dismissed in its entirety and no further time and expense should be wasted in pursuing the investigation.

110. We thank the Public Protector for the opportunity to make these submissions. We are available to address any further questions and provide any further information and documentation.

Yours faithfully

South African Wind Energy Association

Per:

Mercia Grimbeek (Chairperson)
Together with the 12 IPPs listed in Annexure A hereto

Annexure "A"

WEBBER WENTZEL

in alliance with > Linklaters

Public Protector of South Africa

Attention: Advocate Busisiwe Mkhwebane

Email: ephraimk@pprotect.org
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Your reference	Our reference	Date
	Michael Evans 3051910	14 December 2021

Dear Advocate Mkhwebane

INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION REGARDING THE IRREGULAR AWARDING OF CONTRACTS TO RENEWABLE ENERGY INDEPENDENT POWER PRODUCERS BY ESKOM

We act on behalf of the South African Wind Energy Association ("**SAWEA**") and those members of SAWEA, being Independent Power Producers ("**IPPs**"), which entered into Power Purchase Agreements (**"PPA's"** or **"contracts"**) with Eskom in or about April 2018, pursuant to the fourth round of the Renewable Energy Independent Power Producer Procurement Programme ("**REIPPPP**"). The relevant IPPs are listed in Annexure A hereto.

Our client has referred to us your letter to the then-chairman of Eskom, Mr Jabu Mabuza, dated 23 July 2019 in which you advised Mr Mabuza that your office had received a complaint from Ms EP Phasha, on behalf of the movement called the Anti-Poverty Forum (**"the complainant"**), relating to allegations of maladministration by Eskom and/or the Department of Energy and/or the Department of Public Enterprises regarding the alleged irregular and unlawful awarding of the contracts to the IPPs in the fourth round of the REIPPPP. We have also been briefed with a copy of the full complaint lodged by the complainant.

Partners in office at Cape Town: Office Managing Partner: G Fitzmaurice **Partners:** RB Africa AE Bennett AR Bowley SJ Chong KM Colman R Cruywagen MA Diemont HJ du Preez LF Egypt AE Esterhuizen MJR Evans OH Geldenhuys PM Holloway SJ Hutton AV Ismail S Jooste LA Kahn ACR Katzke A Keyser KE Kilner CS Meyer LE Mostert A October K Rew H Samsodien J Smit RS Smith PZ Vanda DM Visagie AWR Westwood

Senior Partner: JC Els **Managing Partner:** SJ Hutton **Partners:** BW Abraham RB Africa NG Alp RL Appelbaum DC Bayman KL Beilings AE Bennett AP Blair AR Bowley J Braum MS Burger M Bux RI Carrim T Cassim SJ Chong ME Claassens C Collett KL Collier KM Colman KE Coster K Couzyn DB Cron PA Crosland R Cruywagen JH Davies PM Daya L de Bruyn PU Dela M Denenga DW de Villiers BEC Dickinson MA Diemont DA Dingley MS Dladla G Driver W Drue GP Duncan HJ du Preez CP du Toit SK Edmundson LF Egypt KH Eiser AE Esterhuizen MJR Evans K Fazel G Fitzmaurice JB Forman L Franca KL Gawith OH Geldenhuys MM Gibson CI Gouws PD Grealy S Haroun JM Harvey JS Henning KR Hillis Z Hlophe CM Holfeld PM Holloway J Howard AV Ismail ME Jarvis CA Jennings JC Jones CM Jonker S Jooste LA Kahn ACR Katzke M Kennedy KE Kilner A Keyser MD Kota JC Kraamwinkel J Lamb E Louw M Mahlangu V Mannar L Marais G Masina T Masingi N Mbere MC McIntosh SJ McKenzie CS Meyer AJ Mills D Milo NP Mngomezulu P Mohanlall M Moloi N Moodley LE Mostert VM Movshovich C Murphy G Niven ZN Ntshona M Nxumalo AN Nyatsumba A October L Odendaal GJP Olivier N Paige AS Parry S Patel N Pather GR Penfold SE Phajane M Philippides BA Phillips MA Phillips DJ Rafferty D Ramjettan GI Rapson K Rew SA Ritchie J Roberts G Sader M Sader H Samsodien JW Scholtz KE Shepherd AJ Simpson N Singh N Singh-Nogueira P Singh S Sithole J Smit RS Smith MP Spalding PS Stein MW Straeuli LJ Swaine Z Swanepoel A Thakor T Theessen TK Thekiso C Theodosiou T Theunissen R Tlhavani G Truter PZ Vanda SE van der Meulen JP van der Poel CS Vanmali JE Veeran B Versfeld MG Versfeld TA Versfeld DM Visagie EME Warmington J Watson AWR Westwood RH Wilson KD Wolmarans DJ Wright M Yudaken

Chief Operating Officer: SA Boyd

In your letter of 23 July 2019 you asked for a significant amount of documentation and information relating to the PPA's entered into by our clients and other IPPs on the one hand, and Eskom on the other hand, including *inter alia* copies of the relevant contracts as well as all quotations and documents submitted by the bidding companies in relation to the 27 contracts which were awarded in the fourth round of the REIPPPP.

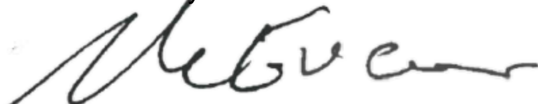
We have furthermore been instructed that you recently held oral sessions in which further evidence was gathered pursuant to your investigation. We understand that both the Minister and Director-General of Mineral resources and Energy, along with others, were interviewed last month as part of the investigation process. At this stage we are not aware of any preliminary report having been issued by you with regard to the investigation, but we assume that it is your intention to do so pursuant to section 8(3) of the Public Protector Act, 1994 and the definition of "investigation" in section 1 of that Act.

Our clients have a material interest in the outcome of the investigation. This is particularly so as one of the requests by the complainant is that you compel Eskom to cancel the contracts as soon as possible.

In the light of the above our clients have instructed us to request of you the opportunity to make written submissions with regard to the complaint lodged by the complainant and, if necessary, amplify those written submissions via oral submissions.

We look forward to hearing from you as soon as possible and trust that you will give this request your urgent and considered attention.

Yours faithfully



WEBBER WENTZEL
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Annexe A

LIST OF IPPs

1. Copperton Windfarm
2. Excelsior Wind Energy Facility
3. Garob Wind Farm
4. Golden Valley Wind
5. Kangnas
6. Oyster Bay Wind Farm
7. Perdekraal East
8. Roggeveld Wind Farm
9. Karusa Wind Farm
10. Nxuba Wind Farm
11. Soetwater Wind Farm
12. Wesley-Ciskei 32.

Annexure "B"

HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: Yes.
(2) OF INTEREST TO OTHER JUDGES: Yes.
(3) REVISED.

26-03-2019 .... [signature] ....

DATE SIGNATURE

Case No. 42887/2017

In the matter between:

COAL TRANSPORTERS FORUM	Applicant
and	
ESKOM HOLDINGS LIMITED	1st Respondent
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	2nd Respondent
MINISTER OF ENERGY	3rd Respondent
INDEPENDENT POWER PRODUCERS	4th – 38th Respondents

***Case Summary*: Electricity – Generation from renewable energy sources in line with government's policy decision to move towards a low-carbon economy and to incrementally introduce energy from private sector renewable energy technologies into the mix of energy sources - The Minister of Energy published Determinations relating to renewable energy under s 34(1) of the Electricity Regulation Act 4 of 2006 on 1 August 2011 and on 19 December 2012, in terms of which she determined, in consultation with the National Energy Regulator of South Africa, that 3 725 MW and a further 3 200 MW of new renewable energy capacity should be procured by Eskom from independent private producers (IPPs) through a procurement programme conducted by the Department of Energy - A bidding process followed and successful IPP bidders were announced - Eskom ultimately concluded power purchase agreements (PPAs) with all the successful IPP bidders, except with three of them.**

Contending that Eskom may not conclude PPAs with the IPPs until the Regulator has taken decisions on certain matters, the applicant seeks an order (a) interdicting Eskom from concluding PPAs with the IPPs until the Regulator has taken the decisions in question and (b) declaring invalid all the PPAs Eskom had already concluded. Application dismissed.

JUDGMENT

MEYER J

[1] On 1 August 2011 and on 19 December 2012, the Minister of Energy (the Minister), with the concurrence of the National Energy Regulator of South Africa (the Regulator), acting in terms of s 34(1) of the Electricity Regulation Act 4 of 2006 (ERA) and the Electricity Regulations on New Generation Capacity (published as GNR. 399 in *Government Gazette* No. 34262 dated 4 May 2011 (the New Generation Capacity Regulations)), determined that electricity generated from renewable energy sources – wind, concentrated solar power (CSP), solar photovoltaic (solar PV), biogas, biomass landfill gas, small hydro and other forms of energy (referred to as small projects) - should be procured through tender processes conducted by the Department of Energy (the DoE) for purchase by Eskom Holdings SOC Limited (Eskom) from independent power producers (IPPs). Pursuant to the procurement process that followed, successful IPP bidders were announced and power purchase agreements (PPAs) were ultimately concluded between Eskom and them, except with three of the successful IPP bidders.

[2] The applicant, the Coal Transporters Forum (CTP), which is a voluntary association with legal personality whose approximately fifty members are companies transporting coal for Eskom and engaged in the provision of logistical support and other services, seeks to interdict Eskom from entering into PPAs with the three IPPs until the Regulator has taken certain decisions and a declaration of invalidity of the PPAs that Eskom has already concluded with the other IPPs.

[3] The first respondent, Eskom, a state-owned company, is the largest generator, transmitter and distributor of electricity in Africa. Its 27 power stations produce approximately 95% of the electricity in South Africa. The vast majority of the electricity generated by Eskom emanates from coal-fired plants. The second respondent, the Regulator, which is a juristic person established in terms of s 3 of the National Energy Regulator Act 40 of 2004 (NERA), is, in terms of s 3 of ERA, the custodian and enforcer of the regulatory framework provided for in ERA. The third respondent, the Minister, issued the two Determinations in question pursuant to her powers in terms of s 34(1)

of ERA. The fourth to thirty-eighth respondents are IPPs in the renewable energy industry and they were successful bidders in the Renewable Energy Independent Power Production Procurement Programme (REIPPPP). They all oppose the application, except for the seventh, nineteenth, twenty-ninth, thirtieth, thirty-third to thirty-seventh respondents. The seventh respondent IPP, Ngodwana Energy (RF) (Pty) Ltd (Ngodwana), filed an answering affidavit but did not appear at the hearing. It, however, adopted the contentions of the other opposing IPPs.

[4] The government's policy on energy, which has been developed over almost two decades after extensive public participation and stakeholder involvement, recognizes that South Africa is heavily dependent on coal as its primary source for power generation. This is so because the country has large coal reserves which can easily and cheaply be exploited. Government's policy accepts that coal will remain the primary source of energy generation for the foreseeable future. However, it also acknowledges that coal has significant detrimental impacts on the environment, resulting in measurable external costs, also known as 'negative externalities', as well as other costs that are more difficult to quantify. The most significant impact is the emission of greenhouse gasses which make the earth's surface warmer and in turn contributes to climate change. In view of the environmental and health impacts of coal and the need to diversify the sources of supply to maintain energy security, government's energy policy supports and promotes the development of renewable energy to achieve a more sustainable energy mix.

[5] Government has adopted an integrated resource planning (IRP) approach to long term electricity planning. It is undisputed that 'the primary objective of the IRP is to forecast the long-term electricity demand, to determine what energy sources should be used to meet this demand, how new generation capacity will be allocated between the different energy sources, and when new capacity generation will be needed'. Cabinet, in mid-2008, adopted a peak, plateau and decline trajectory (the PPD trajectory), meaning that our greenhouse gas emissions will grow for a while (as a result of investment in new coal-fired power plants), peak between 2020 and 2025, remain flat for a decade and decline in absolute terms from 2030-35 onwards. The use of coal as a power source will thus decline from 2030 onwards. (See *White Paper on Energy Policy* (1998); *White Paper on Renewable Energy* (2003); *Long Term Mitigation Scenarios Report* (2008).) A policy decision, therefore, was made to move

towards a low-carbon economy (i.e. an economy and energy industry that is less dependent on coal) and to incrementally introduce energy from private sector renewable energy generation technologies into the mix of energy sources. The project is premised on the need for diversifying Eskom's energy mix and implementing technologies that will contribute to clean energy production, such as wind, solar, biomass and small scale hydro.

[6] ERA regulates electricity supply in South Africa. Section 1 defines the 'integrated resource plan' (IRP) as 'a resource plan established by the national sphere of government to give effect to national policy'. It is 'a coordinated schedule for generation expansion and demand-side intervention programmes, taking into consideration multiple criteria to meet electricity demand'. Section 4(a) obliges the Regulator to 'issue rules designed to implement the national government's electricity policy framework, the integrated resource plan and this Act'. Section 34 regulates the establishment and procurement of new generation capacity. Section 34(1) provides that-

'[t]he Minister may, in consultation with the Regulator-

(a) determine that new generation capacity is needed to ensure the continued uninterrupted supply of electricity;

(b) determine the types of energy sources from which electricity must be generated, and the percentages of electricity that must be generated from such sources;

(c) determine that electricity thus produced may only be sold to the persons or in the manner set out in the notice;

(d) determine that electricity thus produced must be purchased by the persons set out in such notice;

(e) require that new generation capacity must-

    (i) be established through a tendering procedure which is fair, equitable, transparent, competitive and cost-effective;

    (ii) provide for private sector participation.

[7] The New Generation Capacity Regulations establish rules and guidelines that are applicable to the undertaking of an IPP bid programme for the procurement of new generation capacity. They also facilitate the fair treatment and non-discrimination between IPPs and the buyer of the energy. In terms of the New Generation Capacity Regulations, an IRP will be developed by the DoE and will set out the new generation capacity requirement per technology, taking energy efficiency and the demand-side

management projects into account. The required new generation capacity must be met through the technologies and projects listed in the IRP and all IPP procurement programmes would be executed in accordance with the specified capacities and technologies listed in the IRP. Regulation 6 elaborates on the content and the nature of Determinations made under s 34(1) of ERA, thus:

'(1) The Minister may, in consultation with the Regulator, make a determination in terms of section 34 of the Act.

(2) A determination under section 34(1) shall include a determination as to whether the new generation capacity shall be established by Eskom, another organ of state or an IPP.

(3) If the determination referred to in sub-regulation (2) requires that the new generation capacity be established by an IPP, the Minister shall also determine the identity of the buyer or, where applicable, the procurer and the buyer.

(4) . . .

(5) A determination contemplated in this Regulation is binding on the buyer and the procurer.'

'Buyer' is defined to mean 'in relation to a new generation capacity project, any organ of state designated by the Minister in terms of section 34(1)(c) and (d) of the Act' and 'procurer' means 'the person designated by the Minister in terms of section 34 as being responsible for the preparation, management and implementation of the activities related to procurement of new generation capacity under an IPP procurement programme including the negotiation of the applicable power purchase agreements, which person may or may not be the buyer'.

[8] The powers and duties of the Regulator include the powers and duties to 'regulate prices and tariffs' (s 4(a)(ii) of ERA), to 'consider applications for licenses' and to 'issue licenses for . . . the operation of generation, transmission or distribution facilities' (s 4(a)(i)(aa)). Section 7(1)(a) read with s 4(a)(i) is to the effect that nobody may operate an electricity generation, transmission or distribution facility without a licence issued by the Regulator. The Regulator may make any licence subject to conditions relating, *inter alia*, to 'the setting and approval of prices, charges, rates and charges charged by licensees' (s 14(1)(d)), 'the methodology to be used in the determination of rates and tariffs which must be imposed by licensees (s 14(1)(e)), 'the format and contents of agreements entered into by licensees' (s 14(1)(f)) and 'the regulation of the revenues of licensees' (s 14(1)(g)). Section 15 provides for tariff principles applicable to licence conditions determined in terms of s 14.

[9] Following extensive public participation, representations and comments by interested parties and independent international consultants and consultations with government departments (in which process, it is undisputed, neither CTF nor any of its members participated), the final version of the IRP 2010-2030 (the IRP 2010) was promulgated in the *Government Gazette* on 6 May 2011. It is undisputed that when deciding on the required mix of energy sources, the DoE sought to achieve a balance between the expectations of different stakeholders. It considered key constraints and risks, including: reducing carbon emissions; new technology uncertainties such as costs, operability and lead time to build; water usage; localisation and job creation; regional development and integration; and security of supply, The IRP 2010 was informed by the PPD trajectory and included a cap on carbon emissions. Ultimately, the IRP 2010 determined that, in order to secure the continued and uninterrupted supply of energy, the following mix of new generation technologies was required between 2010 and 2030: a nuclear fleet of 9.6 GW; 6.3 GW of coal; 17.8 GW of renewables; and 8.9 GW of other generation sources. The IRP 2010 was ultimately adopted by Cabinet, and presently represents the government's policy.

[10] The Minister of Energy published the first Determination relating to renewable energy under s 34 of ERA on 1 August 2011, in terms of which she determined, with the concurrence of the Regulator, that 3 725 MW of new renewable energy generation capacity (from wind, CSP, solar PV, biogas, biomass, landfill gas and small hydro) should be procured from IPPs by 2016 or as soon as reasonably possible (the 2011 Determination). On 19 December 2012, the Minister, with the concurrence of the Regulator, published a further Determination under s 34, determining, *inter alia*, that a further 3 200 MW of new renewable energy generation capacity should be procured from IPPs between 2017 and 2020 or as soon as reasonably possible (the 2012 Determination). Each Determination provides that: (a) the new generation capacity allocations are in accordance with the IRP 2010; (b) the DoE shall be the procurer; (c) the electricity produced from the new generation capacity shall be procured through one or more tendering processes; (d) DoE's role as procurer is to conceptualise and conduct the procurement programme and preparation of all associated documents, including the power purchase agreements (PPAs) and other project agreements; (e) Eskom shall be the buyer; (f) the electricity must be purchased from IPPs; (g) the electricity may only be sold to Eskom in accordance with the PPAs and other project

agreements prepared as part of the procurement programme; and (h) the procurement programme should target connection to the Grid for new generation capacity as soon as possible taking into account all relevant factors including the time for procurement.

[11] The DoE is accordingly the procurer for purposes of the REIPPPP. The process has been run by the IPP office, an office established under the auspices of the DoE, together with significant input and support from National Treasury and the Development Bank of Southern Africa. The bidding process comprised the following stages: (a) bid notification; (b) bid registration; (c) bid submission; (d) bid evaluation; (e) announcement of preferred bidders; and (f) signing of project documents, including the PPAs. The REIPPPP bid evaluation involved a two stage process: Bidders had to satisfy certain minimum threshold requirements or qualification criteria in six areas. Bids that satisfied the threshold requirements then proceeded to the second stage of evaluation, where bidders were evaluated on price and economic development commitments. The bidder with the best (lowest) price received 70 points and all other bidders received a proportionate score based on the difference between the lowest price and their own price. The bid price is the electricity tariff offered by the bidder in rand per megawatt-hour. The economic development requirements were broken down into sub-categories covering job creation, local content, ownership by black people, management control, preferential procurement from sub-contractors, enterprise development and socio-economic development for local communities. Price counted for 70 out of 100 points and economic development requirements for 30 out of 100 points. To date there have been six procurement rounds in the REIPPPP, referred to as Bid Window 1, Bid Window 2, Bid Window 3, Bid Window 3.5, Bid Window 4, a Small Projects IPP Programme for projects of under 5 MW and what is referred to as the Expedited round.

[12] The present case only concerns the successful bidders in Bid Windows 4 and the Small Projects Programme. CTF seeks that Eskom be interdicted to sign the PPAs with the successful IPPs until the Regulator has taken certain decisions and that all PPAs that have already been concluded be declared null and void. A PPA is a standard purchase agreement that is signed between a successful bidder and Eskom; it governs the rights and duties of the parties regarding the generation and sale of electricity. The PPA has a lifespan of 20 years from the commercial operation date of the power plant concerned. The PPA, it is undisputed, is non-negotiable in that bidders

must accept the terms thereof as they are when submitting their bids. It was developed after an extensive review of global best practice and consultations with numerous public and private sector entities, including the Regulator. On 26 February 2018, Minister Jeff Radebe was appointed as the new Minister of Energy. He arranged for Eskom to sign the PPAs at a signing ceremony in Johannesburg on 4 April 2018. All the PPAs in respect of Bid Window 4 have been signed. It is only the 27th respondent, Adams Solar PV Project (RF) (Pty) Ltd (Adams), the 28th respondent, Bellatrix Solar PV Project (Pty) Ltd (Bellatrix), and the 31st respondent, Du Plessis Solar PV4 (Pty) Ltd (Du Plessis), who have not yet signed PPAs in respect of the Small Projects IPP Programme for projects of under 5 MW. The claim to interdict Eskom from concluding the PPAs, therefore, is moot as far as all the IPPs are concerned, except in respect of Adams, Bellatrix and Du Plessis.

[13] Despite CTP's protestation to the contrary, the evidence is simply overwhelming that the Regulator issued to each successful IPP bidder an electricity generation licence after following a public participation process for each project, including public hearings, and it issued a written decision. This is the evidence presented by all in the know; the Regulator and the IPPs, including Ngodwana. The Regulator, in issuing the licences, is guided by whether the application for a license is in compliance with the IRP 2010 and, in doing so, is bound by the Determinations. CTF criticises the veracity of the evidence of the Regulator and the IPPs regarding the issuing of the electricity generation licences on the basis that the licences are not annexed to their answering affidavits. Such criticism, in my view, is without merit. The IPPs explain that the decisions and generation licenses are voluminous and for that reason they were not attached to their answering affidavit. CTF, therefore, was at liberty, in terms of r 35(12) of the Uniform Rules of Court, to have required the IPPs to produce the electricity generation licenses, the decisions and the reasons for the decisions referred to in the answering affidavit of the IPPs but has failed to do so. Ngoldwana indeed attached the licence that the Regulator issued to it for the purpose of the operation of its generation facility, dated 29 October 2015, as well as the Regulator's decision and the reasons for the decision. Furthermore, in its replying affidavit, CTF did not take issue with the evidence that the Regulator issued to each IPP an electricity generation licence after following a public participation process for each project, including public hearings, and by issuing a written decision. Instead, it

avers that only the generation licences issued to the IPPs are available on the Regulator's website, but not the decisions and the reasons for the decisions.

[14] CTF's core contention is that Eskom may not conclude PPAs with the IPPs until the Regulator has taken decisions on the ten matters listed in prayers 1.1 to 1.10 of the notice of motion. However, at the commencement of the hearing, it conceded that the Regulator indeed has taken decisions on the matters listed in prayers 1.1 to 1.5 and 1.7, and what remains in dispute, therefore, is whether the Regulator has taken decisions on the four matters listed in prayers 1.6, 1.8 to 1.10. They are:

'1.6 the tariffs and provisions that would be contained in agreements between the IPPs and the buyer;

. . .

1.8 the prices and tariffs at which the electricity that is produced by an IPP should be sold and purchased;

1.9 the terms and conditions of the agreements that would be entered into between an IPP and the buyer; and

1.10 whether the intended power purchase agreement between the seller and the buyer meet all the regulatory requirements.'

[15] CTF concedes in its replying affidavit that, if the Regulator has in fact taken the decisions in question, then its application must fail. Furthermore, it concedes that it does not matter whether the Regulator lawfully took the decisions because even unlawful administrative action stands until reviewed and set aside and it has not sought to review any of the Regulator's decisions. It bears quoting what CTF says in this regard:

'If it can be shown that NERSA did in fact make the decisions relating to the said agreements as alleged, with or without a procedurally fair process, then obviously this application will be ill-founded because the said decisions should have been taken on review many years ago.'

[16] CTF's concession accords with the *Oudekraal* principle that until administrative action (and the consequences thereof) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. (*Per* Howie P and Nugent JA in *Oudekraal Estates (Pty) LTD v City of Cape Town and others* 2004 (6) SA 222 (SCA) ([2004] 3 All SA 1 (SCA)) para 26. Also see *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) paras 101-103; *Corruption Watch v President of the RSA* [2018]

ZACC 23 (13 August 2018) para 31.) Both the Minister's Determinations in terms of s 34(1) of ERA and the Regulator's concurrence in the determinations constitute administrative actions as contemplated in the Promotion of Administrative Justice Act 3 of 2000 PAJA). (*Earthlife Africa and another v Minister of Energy and others* 2017 (5) SA 227 (WCC) paras 32 and 37.)

[17] All the parties in the know – the Regulator, ESKOM and the IPPs – testify that the Regulator has taken the decisions in question. CTF offers no evidence to the contrary. What it does, instead, is to turn its burden of proof on its head. It contends that the respondents bear the burden of proving that the Regulator has already taken the decisions. It says for instance-

'[i]f the respondents are unable to prove that NERSA has indeed taken the said decisions, then the application must succeed.'

But that, of course, is not so. CTF bears the burden of establishing that it is entitled to the relief it seeks. It claims to be entitled to the interdict and declaratory order it seeks only because the Regulator has not yet taken the decisions on the matters in question. CTF thus bears the burden of proving that ingredient of its case.

[18] CTF has offered no evidence in support of that element of its case and can in any event not overcome the evidence of the Regulator, the IPPs and Eskom to the contrary, which evidence must prevail under the *Plascon-Evans* rule. (*Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited* 1984 (3) SA 623 (A) at 634E-635C.) Motion proceedings in which final relief is sought 'cannot be used to resolve factual issues because they are not designed to determine probabilities': *Per* Harms JA in *National Director of Public prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 290D-E. I, therefore, have to accept the facts alleged by the Regulator, the IPPs and Eskom, unless they constitute bald or uncreditworthy denials or are palpably implausible, far-fetched or so clearly untenable that they could safely be rejected on the papers. Such finding, it is trite, 'occurs infrequently because courts are always alive to the potential for evidence and cross-examination to alter its view of the facts and the plausibility of the evidence. (*Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd* 2017 (2) SA 1 (SCA) at 18A-B). That test was not satisfied *in casu.*

[19] Decisions 6 and 8 to 10 relate to the prices and terms upon which the IPPs will sell their electricity to Eskom. There is simply no merit in CTF's argument that the Regulator must first determine these matters before Eskom may enter into PPAs with

the IPPs. The Regulator may regulate these matters by imposing licence conditions on the IPPs in terms of sections 14(1)(d) to (g) read with s 15 of the ERA; it is not obliged to do so. There is nothing in s 14 to suggest that license conditions of the kind contemplated by questions 6 and 8 to 10 are a precondition for the conclusion of a valid PPA. The matters contemplated in those questions have been determined by the 2011 Determination and the 2012 Determination, in which Determinations the Regulator concurred. The Regulator, when issuing a generation license, is in terms of s 34(3) of ERA bound by any Determination made by the Minister in terms of s 34(1) in which the Regulator concurred. In terms of reg 6(5) of the New Generation Capacity Regulations the Determinations are also binding on the DoE, as the procurer, and on Eskom, as the buyer of the electricity generated by the IPPs. There is, therefore, nothing left for the Regulator's discretionary determination.

[20] Furthermore, when regard is had to the licence issued to Ngodwana (and I think it is safe to assume that similar licenses were issued to the other IPPs), it is clear that the Regulator adhered to the Determinations by the Minister in which it concurred. Therein, the Regulator endorsed the terms of the PPAs, *inter alia* by providing that '[t]he Licensee must at all times comply with its obligations under the Commercial Agreements, subject to and in accordance with the terms and conditions of those Commercial Agreements' (clause 7.1). 'Commercial Agreements', in terms of clause 1 of the license, 'means Power Purchase Agreement (PPA), Implementation Agreement (IA), Direct Agreement (DA), and Connection Agreement'. The license further provides that '[a]mendment, variations and/or ratification of Power Purchase and Connection Agreements must not be made without the prior written approval of the Energy Regulator'. As to tariffs and the payment of licence levies, the licence provides as follows:

'8. **Tariff**

8.1 The Licensee must sell electricity from the Contracted Capacity to the Buyer, at the tariff stipulated in the PPA.

8.2 Any variations to the tariff in the PPA, other than escalation of such tariff in accordance with the PPA, will be subject to approval by the Energy Regulator.

9. **Payment of licence levies**

The Licensee must pay to the National Energy Regulator such levies in respect of this Licence as determined by the Minister of Energy under the prevailing legislation.'

[21] Under the *Oudekraal* principle, the licences stand and are deemed valid for better or for worse. The Regulator, therefore, is *functus officio* and there is nothing left for it to determine. (See *FSB and Another v De Wet N.O. and Others* 2002 (3) SA 525 (C) para 147.) CTF is neither entitled to have Eskom interdicted from concluding the PPAs with Adams, Bellatrix and Du Plessis, nor is it entitled to have all the other PPAs in question declared unlawful, and therefore null and void. They too, under the *Oudekraal* principle, are deemed to be valid until reviewed and set aside. CTF seeks to escape the conclusion by arguing that 'the conclusion of an agreement . . . is not an administrative action' and accordingly not subject to PAJA. But this is manifestly not so. The decision to enter into each PPA in question constitutes administrative action and is subject to the *Oudekraal* principle. (See *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 90; *Kwa Sani Municipality v Underberg/Himeville Community Watch Association and Another* [2015] 2 All SA 657 (SCA) para 12; *Bowman Gilfillan Inc v Minister of Transport, In Re: Minister of Transport v Mahlalela and Others* [2018] 3 All SA 484 (GP) paras 62 and 72-80.)

[22] Finally, it bears mentioning that the process and procedure in challenging and setting aside administrative action is by means of legality review proceedings or review proceedings under PAJA, and not proceedings wherein a party merely seeks that the contract concluded be set aside by a court of law or declared null and void. Section 172(1)(a) of the Constitution makes it mandatory for a court to declare conduct that is inconsistent with the Constitution invalid and s 172(1)(b) gives the court the further power to make any order that is 'just and equitable'. Section 8 of PAJA empowers a court, in proceedings for judicial review under PAJA, to 'grant any order that is just and equitable'.

[23] My findings and conclusions thus far are dispositive of the relief claimed by CTF and renders it unnecessary to consider the other issues raised in the application.

[24] In the result, the following order is made:

(a) The application is dismissed.

(b) The applicant is to pay the costs of opposition of:

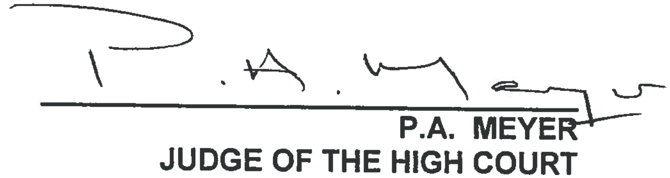
  (i) the first respondent, including those of two counsel;

  (ii) the second respondent, including those of two counsel;

  (iii) the third respondent, including those of two counsel;

(iv) the fourth, fifth, sixth, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, thirty-first, thirty-second and thirty eighth respondents, including those of two counsel; and

(v) the seventh respondent.



P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing:	18 March 2019
Date of judgment:	26 March 2019
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