



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

Ms Karen Breytenbach
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Department of Energy
IPP Projects
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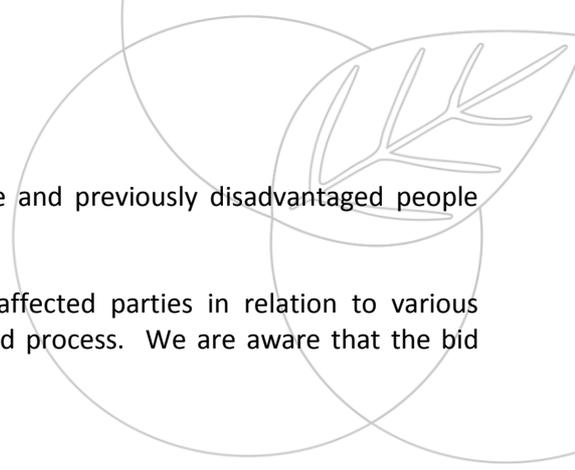
DEA ref: 14/12/16/3/3/3/40
Our ref: RH/NL
Date: 17 August 2015

Dear Ms Breytenbach

COAL BASELOAD BIDS: APPEAL AGAINST ENVIRONMENTAL AUTHORISATION FOR THABAMETSI INDEPENDENT POWER PRODUCER (IPP) POWER STATION NEAR LEPHALALE, LIMPOPO PROVINCE UNDER AUTHORISATION REGISTER NUMBER 14/12/16/3/3/3/40

1. The Centre for Environmental Rights (“the Centre”) is a non-profit organisation established in October 2008 by eight civil society organisations in South Africa’s environmental and environmental justice sector to provide legal and related support to civil society organisations and communities in South Africa. The Centre’s mission is to advance environmental rights in South Africa, and its vision is stronger civil society participation in environmental governance. The Centre provides expert legal support for a collaborative campaign led by Earthlife Africa Jhb (“ELA”), and groundWork (“gW”), aimed at transitioning South Africa’s energy sector to a cleaner, healthier, climate-friendly and, ultimately, lower-cost future.
2. We address you on behalf of ELA, the appellant in the appeal of the environmental authorisation granted on 25 February 2015 (and amended on 17 March 2015) to Newshelf 1282 (Pty) Limited (“Newshelf”) for the establishment of a 1200 megawatt (MW) coal-fired power station and associated infrastructure, namely the Independent Power Producer (IPP) Thabametsi power station near Lephalale, Limpopo Province (“Thabametsi”), under authorisation register number 14/12/16/3/3/3/40 (“the authorisation”). We also address you on behalf of gW.
3. ELA was founded in 1988 to mobilise civil society around environmental issues in relation to people, and is a membership organisation, with approximately 100 members, led by a Core Group which serves as its management committee. The organisation challenges environmental degradation and aims to promote a culture of environmental awareness and sustainable development. It also seeks to improve the quality of life of vulnerable people in South Africa through assisting civil society to have a greater impact on environmental governance by understanding and defending their constitutional rights, specifically those enshrined in section 24 of the Constitution. gW is a non-profit environmental justice service and developmental organisation working primarily in South Africa, but increasingly in Southern Africa. gW seeks to improve the quality of life of vulnerable people, through assisting civil society to have a greater impact on environmental

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governance. gW places particular emphasis on assisting vulnerable and previously disadvantaged people who are most affected by environmental injustices.

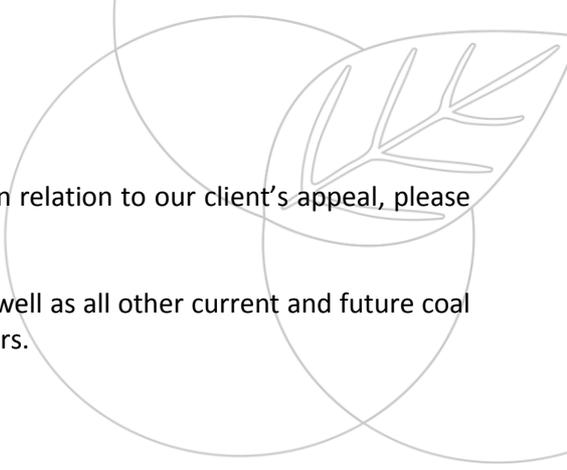
4. The Centre and/or our clients are registered as interested and affected parties in relation to various authorisation applications by potential IPPs in the coal baseload bid process. We are aware that the bid submission date for the first round is 31 August 2015.
5. The purpose of this correspondence is twofold:
 - a. to request that we be placed on your list of relevant stakeholders and that we be kept updated in relation to the coal baseload IPP bid process; including that we be advised of all bid submissions and the announcement of preferred bidders; and
 - b. to address you in relation to the appeal brought by ELA of the Thabametsi authorisation. As explained below, we submit that, to the extent that the appeal is still pending when Thabametsi's bid response is considered, that this bid response is insufficient to pass the threshold legal qualification criteria.
6. On 11 May 2015, CER, on behalf of ELA, appealed the authorisation granted by the Chief Director: integrated Environmental Authorisations at the DEA, asking for it to be set aside by the Minister of Environmental Affairs. A copy of our client's appeal is available at <http://cer.org.za/wp-content/uploads/2015/05/Annexure-A-Appeal-Submissions-Thabametsi-IPP.pdf>
7. Our client's appeal is based on grounds that include the following:
 - a. The decision to grant the authorisation contravenes section 24 of the Constitution – the right to an environment not harmful to one's health or wellbeing, and the right to have the environment protected for the benefit of present and future generations – and also contravenes various provisions of the National Environmental Management Act, 1998 (NEMA);
 - b. The power station would be built in the Waterberg, an area of Limpopo that is already so water-stressed that the Department of Water and Sanitation is pumping water into it as part of the Mokolo Crocodile Water Augmentation Project to supply industry and residents with water;
 - c. The project would fall within an area where air quality is of such concern that it has been declared a priority area under the National Environmental Management: Air Quality Act, 2004. The threat assessment for the Waterberg-Bojanala Priority Area published by the Department of Environmental Affairs (DEA) in April 2015, as part of the draft air quality management plan for the priority area, pointed out that the planned expansion of energy-based projects and coal mining in the district threatens ambient air quality, and poses threats to human and environmental health;
 - d. The project fails to take into account the state's international and national obligations to mitigate and take positive steps against climate change. Not only would a new coal-fired power station contribute to climate change through greenhouse gas emissions, but it would also use precious freshwater already threatened by the impacts of climate change, making it even harder for future generations living in Limpopo to withstand the impacts of climate change;
 - e. There was a failure to consider feasible and reasonable alternatives to building another coal-fired power station, such as renewable energy – including solar energy.
 - f. The DEA failed to take into account the cumulative impacts of the project and additional industrial and other activities in the area – the harmful impacts that these existing activities (i.e. excluding the

Thabametsi project) will already have on people's health and the environment. Two Eskom coal-fired power stations, namely Medupi power station (soon to be fully commissioned) and Matimba power station, are situated within 15km of the project site. The site is also close to the Grootgeluk coal mine.

8. Newshelf opposed our client's appeal on 10 June 2015,¹ and ELA's answering statement was submitted to the Minister on the 13 July 2015. A copy of the answering statement is available at <http://cer.org.za/wp-content/uploads/2015/07/Answering-Statement-Thabametsi-IPP-13-7-2015.pdf>
9. In terms of regulation 66(2) of the 2010 Environmental Impact Assessment (EIA) Regulations (which govern this appeal), the Minister must make a decision within 90 days of receipt of all relevant information in the decision-making process. Assuming the Minister does not request any further information or appoint an appeal panel in terms of section 43(5) of NEMA, to consider the appeal and advise her on it, the final appeal decision is due on or before 15 October 2015.
10. In the event that our client's appeal is still pending at the date of Newshelf's bid submission, our client submits that the Department of Energy should, in terms of Volume 2 Part 1, section 4.1.3 of the Legal Qualification Criteria of the Bid submission requirements, "*consider the Bidder's Bid Response as being insufficient to pass the threshold requirement for this Qualification Criterion*". This provision goes on to provide that, "*in considering this the Department will pay particular regard to whether the Bidder has demonstrated that such an appeal or review or anticipated appeal or review does not go to the heart of the relevant key Environmental Consents or does not affect the key activities required for the Project, and whether the Bidder has demonstrated that it is capable of timeous resolution*".
11. It is submitted that it is clear from the nature and scope of our client's appeal that it certainly goes to the heart of the authorisation granted and will affect the key activities required for the Project. For reasons detailed in the appeal, our client submits that the authorisation should not have been granted at all, and that it should be set aside. Without environmental authorisation, Newshelf is not permitted to operate, and none of the activities listed in the EIA Regulations may be conducted. As appears from Newshelf's responding statement, our client's appeal grounds were not answered adequately; and, in many cases, not at all.
12. We are also instructed to point out – as is also addressed in our client's appeal - that Newshelf is currently 100% owned by GDF Suez Energy International Global Developments BV ("Engie") which forms part of the Engie Group, and that the CEO of the Engie Group, Gerard Mestrallet, has publically announced that Engie "*won't be involved in a new coal plant in South Africa*".² In the circumstances, it appears that there is, in any event, no funding for Thabametsi.
13. We have also been advised today by the DEA that there is another pending appeal against the Thabametsi power station. This is by LVP Attorneys on behalf of "Minnasvlakte Eiendom CC Petrus Gerhardus Steenekamp Steenliza CC; and Gerhardus Steenkamp".
14. In the circumstances, we are instructed to request that, insofar as our client's appeal is still pending at the date of bid submission, the Department exercises its discretion to regard Newshelf's bid response as failing to meet the legal qualification criteria, and excluding it from consideration as a bidder.

¹ The answering statement is available at: <http://cer.org.za/wp-content/uploads/2015/07/2015-06-10-Thabametsi-Appeal-Response-Part-1.pdf> and <http://cer.org.za/wp-content/uploads/2015/07/2015-06-10-Thabametsi-Appeal-Response-Part-2.pdf>

² <http://www.bloomberg.com/news/articles/2015-07-01/coal-trading-an-awkward-contradiction-for-climate-talks-sponsor>

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15. Should you have any queries, or require any additional information in relation to our client's appeal, please let us know.
 16. We also reiterate our request to be kept updated on Thabametsi, as well as all other current and future coal baseload IPP bid submissions and announcements of preferred bidders.
 17. Kindly confirm receipt of this correspondence.

Yours sincerely

CENTRE FOR ENVIRONMENTAL RIGHTS



per:

Robyn Hugo

Attorney and Programme Head: Pollution and Climate Change

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