

“ANNEXURE A”

**INTERNAL APPEAL IN TERMS OF THE PROMOTION OF ACCESS TO
INFORMATION ACT 2 OF 2000**

GROUNDWORK

Appellant

THE INFORMATION OFFICER, ESKOM HOLDINGS SOC LIMITED Respondent

**ANNEXURE “A”: APPEAL IN RESPECT OF THE DEEMED REFUSAL TO GRANT
INFORMATION REQUESTED PURSUANT TO A REQUEST FOR RECORDS
MADE BY THE CENTRE FOR ENVIRONMENTAL RIGHTS IN TERMS OF THE
PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000**

1. This is an appeal in terms of s74 of the Promotion of Access to Information Act, 2000 (PAIA), read with Eskom’s Guide to Requesting Information¹ and internal appeal procedure referred to below, against the deemed refusal of the Information Officer of Eskom Holdings SOC Limited (“Eskom”) to grant access to records relating to Eskom’s compliance with its Atmospheric Emission Licences (AELs) and Minimum Emission Standards published in terms of GN 893 (GG 37054) of 22 November 2013 (MES), the decommissioning schedules and plans for Eskom’s coal-fired power stations, as well as all records and information regarding the decision-making timelines and mechanisms within Eskom’s board to ensure compliance with the AELs and MES.
2. Eskom does not fall within paragraph (a) of the definition of “public body” in s1 of PAIA and as such is not subject to the appeal provisions in Part 4 of PAIA.

¹ http://www.eskom.co.za/OurCompany/PAIA/Pages/Guide_To_Requesting_Information_From_Eskom.aspx.



However, Eskom's Guide to Requesting Information² on its website provides an internal appeal form and Eskom's "system generated" PAIA response email provides for an internal appeal process to be followed, it states that: "*Part 4 Section 74 and 75 of the Act excludes Eskom or similar defined from having an appeal process. We, however, instituted such an action should someone want to appeal. It allows us to re-evaluate our response and we do that by appointing a third party. It is obviously not recognised by law and you can approach the courts after our first refusal.*" This is attached as "A1". Whilst the appellant disputes that it is required to challenge Eskom's deemed refusal through an internal appeal, it submits this appeal in order to exhaust its internal remedies.

3. The relevant details of the request and the refusal, as well as the grounds of appeal are set out below.

THE PARTIES

4. The appellant is groundWork ("**the appellant**"), a registered non-profit organisation (NPO) with registration number, 045/2C5/NPO. groundWork is an environmental justice service and developmental organisation aimed at improving the quality of life of vulnerable people in South Africa (and increasingly in Southern Africa), through assisting civil society to have a greater impact on environmental governance. groundWork places particular emphasis on assisting vulnerable and previously disadvantaged people who are most affected by environmental injustices.
5. groundWork is represented by the Centre for Environmental Rights (CER), an NPO established for the advancement of environmental rights in South Africa, with registration number 2009/020736/08.
6. groundWork and CER work closely with communities impacted by industrial pollution, including the harmful health and environmental impacts caused by coal-fired power stations.

² [http://www.eskom.co.za/OurCompany/PAIA/Pages/Guide To Requesting Information From Eskom.aspx](http://www.eskom.co.za/OurCompany/PAIA/Pages/Guide%20To%20Requesting%20Information%20From%20Eskom.aspx).



7. The respondent is Mr Brian Molefe in his official capacity as Information Officer of Eskom Holdings SOC Limited ("**the respondent**"), a state-owned entity with registration number 2002/015527/30.

THE PAIA REQUEST

8. On 18 May 2016, CER, on behalf of groundWork, submitted a PAIA request ("**the request**") to Eskom's National Deputy Information Officer, Mr Eddie Laubscher, with reference number CER-2016-ESK-0002 (Emission reduction and decommissioning). The reference number assigned to the request by Eskom is 10521.

9. Eskom falls within the definition of paragraph (b) (ii) of a "public body" under PAIA. As such, the request was submitted in terms of Part 2 of PAIA.

10. The email dated 18 May 2016, with the attached cover letter and the completed Form A, are attached as "**A2**".

11. The request was for:

11.1. All records and information regarding the decision-making timelines and mechanisms within Eskom's board to ensure compliance with the AELs and MES, and the decommissioning schedule and plans. This, we, assume, would at least include funding for capex and maintenance to comply with the AELs and MES, as well as funding for the environmental impact assessments (EIAs) for decommissioning; and

11.2. more specifically, copies of the following records in relation to the following Eskom facilities:

Arnot

11.2.1. Arnot's emission reduction plan and compliance roadmap to ensure compliance with the emission standards as per the current AEL from 1 April 2015 to 1 April 2025, providing a detailed outline of how Eskom will achieve compliance; and



- 11.2.2. Arnot's decommissioning plan, including the dates when Eskom plans to start the decommissioning process and the required EIA process. In this regard, the AEL indicates that the station is due to be decommissioned between 2021 and 2029;

Camden

- 11.2.3. Camden's emission reduction plan and compliance roadmap to ensure compliance with the emission standards as per the current AEL and MES from 1 April 2015 to 1 April 2025, providing a detailed outline of how Eskom will achieve compliance; and
- 11.2.4. Camden's decommissioning plan, including the dates when Eskom plans to start the decommissioning process and the required EIA process. In terms of the postponement decision issued on 13 February 2015, Camden is scheduled to be decommissioned in 2020;

Duvha

- 11.2.5. Duvha's emission reduction plan and compliance roadmap to ensure compliance with the emission standards as per the current AEL from 1 April 2015 to 1 April 2025, providing a detailed outline of how Eskom will achieve compliance; and
- 11.2.6. Duvha's decommissioning plan, including the dates when Eskom plans to start the decommissioning process and the required EIA process. In terms of the postponement decision issued on 13 February 2015, Duvha is scheduled to be decommissioned between 2030 and 2034;

Grootvlei

- 11.2.7. Grootvlei's emission reduction plan and compliance roadmap to ensure compliance with the emission standards as per the current AEL and MES from 1 April 2015 to 1 April 2025, providing a detailed outline of how Eskom will achieve compliance; and
- 11.2.8. Grootvlei's decommissioning plan, including the dates when Eskom plans to start the decommissioning process and the



required EIA process. In terms of the postponement decision issued on 13 February 2015, Grootvlei is scheduled to be decommissioned between 2025 and 2028;

Hendrina

- 11.2.9. Hendrina's emission reduction plan and compliance roadmap to ensure compliance with the emission standards as per the current AEL from 1 April 2015 to 1 April 2025, providing a detailed outline of how Eskom will achieve compliance; and
- 11.2.10. Hendrina's decommissioning plan, including the dates when Eskom plans to start the decommissioning process and the required EIA process. In terms of the postponement decision issued on 13 February 2015, Hendrina is scheduled to be decommissioned between 2020 and 2027;

Kendal

- 11.2.11. Kendal's emission reduction plan and compliance roadmap to ensure compliance with the emission standards as per the current AEL from 1 April 2015 to 1 April 2025, providing a detailed outline of how Eskom will achieve compliance; and
- 11.2.12. Kendal's decommissioning plan, including the dates when Eskom plans to start the decommissioning process and the required EIA process. Neither the postponement decision nor the AEL indicate when Kendal is scheduled to be decommissioned. However, the January 2014 postponement application stated that Kendal would either be decommissioned between 2038 and 2043 (in accordance with the 50 year life plan) or between 2048 and 2053 (in accordance with the 60 year span). We note that this is the same date as in the compliance roadmaps provided to us by the NAQO;

Komati

- 11.2.13. Komati's emission reduction plan and compliance roadmap to ensure compliance with the emission standards as per the current



AEL and MES from 1 April 2015 to 1 April 2025, providing a detailed outline of how Eskom will achieve compliance; and

- 11.2.14. Komati's decommissioning plan, including the dates when Eskom plans to start the decommissioning process and the required EIA process. In terms of the AEL, Komati is scheduled to be decommissioned between 2024-2029;

Kriel

- 11.2.15. Kriel's emission reduction plan and compliance roadmap to ensure compliance with the emission standards as per the current AEL from 1 April 2015 to 1 April 2025, providing a detailed outline of how Eskom will achieve compliance; and
- 11.2.16. Kriel's decommissioning plan, including the dates when Eskom plans to start the decommissioning process and the required EIA process. In terms of the AEL, Kriel is scheduled to be decommissioned between 2020-2034;


Kusile

- 11.2.17. Kusile's emission reduction plan and compliance roadmap to ensure compliance with the emission standards as per the current AEL, providing a detailed outline of how Eskom will achieve compliance; and
- 11.2.18. Kusile's decommissioning plan, including the dates when Eskom plans to start the decommissioning process and the required EIA process. Neither the AEL nor the postponement applications state when Kusile will be decommissioned. However, the 2013 IEP Report states that it is scheduled to be decommissioned in 2054 after a 40 year life span;³

Lethabo

- 11.2.19. Lethabo's emission reduction plan and compliance roadmap to ensure compliance with the emission standards as per the current

³ GG 36690 dated 24 July 2013



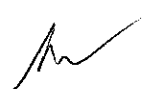
- AEL and MES from 1 April 2015 to 1 April 2025, providing a detailed outline of how Eskom will achieve compliance; and
- 11.2.20. Lethabo's decommissioning plan, including the dates when Eskom plans to start the decommissioning process and the required EIA process. Neither the AEL nor the postponement decision letter give an indication of when Lethabo will be decommissioned. However the postponement application dated February 2014 provides that Lethabo is scheduled to be decommissioned between 2035 and 2040 (according to the 50 year life span), or between 2045-2050 (according to the 60 year life span);

Majuba

- 11.2.21. Majuba's emission reduction plan and compliance roadmap to ensure compliance with the emission standards as per the current AEL and MES from 1 April 2015 to 1 April 2025, providing a detailed outline of how Eskom will achieve compliance; and
- 11.2.22. Majuba's decommissioning plan, including the dates when Eskom plans to start the decommissioning process and the required EIA process. Neither the AEL nor the postponement decision letter give an indication of when Majuba will be decommissioned. However, the postponement application dated February 2014 provides that Majuba is scheduled to be decommissioned between 2046 and 2051 (according to the 50 year life span), or between 2056-2061 (according to the 60 year life span);

Matimba

- 11.2.23. Matimba's emission reduction plan and compliance roadmap to ensure compliance with the emission standards as per the current AEL from 1 April 2015 to 1 April 2025, providing a detailed outline of how Eskom will achieve compliance; and
- 11.2.24. Matimba's decommissioning plan, including the dates when Eskom plans to start the decommissioning process and the required EIA process. Neither the AEL nor the postponement



decision letter provide an indication of when Matimba will be decommissioned. However, the postponement application dated February 2014 provides that Matimba is scheduled to be decommissioned between 2037 and 2041 (according to the 50 year life span), or between 2047-2051 (according to the 60 year life span);

Matla

- 11.2.25. Matla's emission reduction plan and compliance roadmap to ensure compliance with the emission standards as per the current AEL from 1 April 2015 to 1 April 2025, providing a detailed outline of how Eskom will achieve compliance; and
- 11.2.26. Matla's decommissioning plan, including the dates when Eskom plans to start the decommissioning process and the required EIA process. Neither the AEL nor the postponement decision letter provide an indication of when Matla will be decommissioned. However, the postponement application dated February 2014 provides that it is scheduled to be decommissioned between 2029 and 2033 (according to the 50 year life span), or between 2039 and 2043 (according to the 60 year life span);

Medupi

- 11.2.27. Medupi's emission reduction plan and compliance roadmap to ensure compliance with the emission standards as per the current AEL from 1 April 2015 to 1 April 2025, providing a detailed outline of how Eskom will achieve compliance; and
- 11.2.28. Medupi's decommissioning plan, including the dates when Eskom plans to start the decommissioning process and the required EIA process. Neither the AEL nor the postponement decision letter provide an indication of when Medupi will be decommissioned. However, the postponement application dated February 2014 provides that it is scheduled to be decommissioned in 2064 (according to the 50 year life span), or in 2074 (according to the 60 year life span);



Tutuka

- 11.2.29. Tutuka's emission reduction plan and compliance roadmap to ensure compliance with the emission standards as per the current AEL and MES from 1 April 2015 to 1 January 2026, providing a detailed outline of how Eskom will achieve compliance; and
- 11.2.30. Tutuka's decommissioning plan, including the dates when Eskom plans to start the decommissioning process and the required EIA process. Neither the AEL nor the postponement decision letter provide an indication of when Tutuka will be decommissioned. However, the postponement application dated February 2014 provides that it is scheduled to be decommissioned between 2035 and 2040 (according to the 50 year life span), or between 2045-2050 (according to the 60 year life span).

FACTUAL BACKGROUND

12. The request, which is the subject of this appeal, is one of various requests for information that have been submitted to Eskom during this year by CER on behalf of the appellant or other CER clients. The appellant has encountered numerous delays from Eskom in responding, with the statutory timeframes of PAIA being breached as a matter of course.
13. The request was initially made by way of a letter from CER to Eskom on 25 April 2016. This letter sets out background information in relation to the documents requested, and is attached as "A3". The letter asked what Eskom would regard as a reasonable timeframe for a response and concluded "*(g)iven the nature of this correspondence and the documents and responses requested, we trust that you will not require a request in terms of [PAIA]*".
14. A number of follow-up emails from CER were necessary, due to the Eskom's delays in responding. Copies of this correspondence are available on request.



15. On 12 May 2016, Eskom responded, advising CER that it would be necessary to request this information by way of a PAIA request as “a matter of formality”. This appears from “**A4**” attached hereto. In the past, information of a similar nature has been made available by Eskom to CER without the need for a request in terms of PAIA.
16. After experiencing some technical difficulties with the online platform which the CER uses for submitting PAIA requests, the request was submitted on 18 May 2016 (attached as “**A2**” above).
17. CER had requested that Eskom calculate the 30 days for responding to the request from 25 April 2016, or that it, at least, process the request more speedily than within 30 days from the date of the request, given that CER had sought access to the requested information from Eskom already on 25 April 2016. Eskom advised, on 13 May 2016, that they would start working on the reply “straight away”. This appears from “**A5**” attached hereto.
18. On 27 May 2016, CER sent an email to Eskom requesting acknowledgment of receipt of the request. Laubscher responded and acknowledged that they had received the request. This email correspondence is attached as “**A6**”.
19. CER sent emails to Eskom on 6 and 14 June 2016 to remind them that their decision was due on 17 June 2016. CER received a response from Laubscher to 6 June email, on the same day, stating that *"The DIO and Eskom employees do their best to attend to these as soon as possible but there are also other needs that have to be addressed. We have always met statutory requirements (or arranged) and will continue to do so."* This email correspondence is attached as “**A7**”.
20. On 15 June 2016, CER received a notification of extension in terms of s26 of PAIA, from Eskom’s Mr Bryan McCourt (Manager Reporting, Assurance and Systems-Environmental Management), this is the system generated email referred to above and attached as “**A1**”. Under the notification, the new decision date became 18 July 2016.



21. CER responded on the same day noting the extension, but also recording its frustrations with Eskom's delays in making this information available, which had been requested as far back as April 2016. This correspondence is attached as "A8".
22. On 27 June 2016 (more than two months since the CER had first requested the records), CER received an email from McCourt in which he asked for further clarification regarding the request. This email is attached as "A9".
23. On 30 June 2016, CER reverted to Eskom with the requested clarification, a copy of this email is attached as "A10".
24. On 18 July 2016, a reminder email was sent to Eskom notifying them that their response was due that day. This email is attached as "A11".
25. On 20 July 2016, CER received an email from McCourt advising that "despite their best efforts," the information requested was not ready. McCourt advised that Eskom still intended to provide a response as soon as possible. This email is attached marked "A12".
26. What follows is a record of numerous follow-up emails and telephone calls between CER and Eskom, containing regular assurances by Eskom that the requested information would be made available as soon as possible. Some of the relevant correspondence is attached. Extracts from the CER communications log and copies of the relevant correspondence, not attached, can be made available on request.
27. On 22 July 2016, in a telephonic conversation between CER's Ms Christine Reddell and McCourt, McCourt explained the reason for the delay in the response as being that information needed to be collated from all the various coal-fired power stations, which had apparently entailed significant back and forth engagement, and that in relation to the minutes of meetings and decisions, these



needed to be confirmed by the Eskom board before being released into the public domain.

28. Reddell asked when CER could expect a decision. McCourt advised that:
 - 28.1. he was reluctant to commit to a date in writing, and acknowledged that Eskom had already missed deadlines and that accordingly they were in non-compliance with their obligations under PAIA;
 - 28.2. Eskom hoped to make the information available before mid-August 2016; and
 - 28.3. although it was possible that access to the requested information could still be refused, to his knowledge, there was no indication that it would be refused.

29. On 16 August 2016, CER requested a status update on the overdue decision. Laubscher responded that "*We are currently awaiting authorised signature and will revert back as soon as possible. Apology for the delay.*" This email is attached as "**A13**".

30. On 22 August 2016, CER received an email from McCourt to say that he was still working on the request, but was unable to give a commitment as to when a response could be given. This email is attached "**A14**".

31. On 8 September 2016, after still having received no response from Eskom to the request, CER sent a letter of demand to the respondent, Mr Brian Molefe (Chief Executive Officer and Information Officer at Eskom) and other employees at Eskom including McCourt and Laubscher, affording Eskom until 22 September 2016 to respond, failing which the appellant would consider other legal options. This letter is attached as "**A15**".

32. On 19 September 2016, CER sent a follow-up email to McCourt in relation to CER's letter of 8 September 2016. This appears from "**A16**".

33. On 21 September 2016, in a telephonic conversation between Reddell and Laubscher, Laubscher advised that the information had been ready for 2 months,



but that the file containing the information needed to go through the relevant signature process. Apparently 2 signatures were outstanding, the signature of the respondent, and one other executive. Laubscher advised that there was no guarantee that the requested information would be granted, but stated that there was no indication from the respondent that he would refuse the request. Laubscher requested that Eskom be given until Friday 23 September 2016 to provide the information. CER agreed to this request.

34. Laubscher confirmed the aforementioned telephone discussion in an email, advising that: "*As discussed, we there but not there yet. We need signatures and endeavour to have that by Friday latest. I will contact you then.*" This email is attached as "**A17**".
35. On 23 September 2016, CER received an email update from Laubscher, the contents of which stated: "*Good and bad news. Good news, only need CEO signature. Got all the others. Bad news. He has been to parliament and not back yet. It is on his desk marked urgent. Will let you know as soon as I get his signature.*" This correspondence is attached as "**A18**".
36. On 26 September 2016, CER received an email update from Laubscher advising that he was still awaiting the respondent's signature of the response. This correspondence is attached as "**A19**".
37. On 27 September 2016, CER received an email from Laubscher which stated that: "*As indicated, Ref 10521 is in the CEO office awaiting signature ... I hope to have Ref 10521 asap and then 10536 thereafter.*" This email is attached as "**A20**". "Ref 10521" refers to the request that is the subject of this appeal.
38. On 29 September 2016, CER received another email update from Laubscher "*Still waiting. Know it is on his desk*". This email is attached as "**A21**".
39. On 3 October 2016, in a telephonic conversation between Reddell and Laubscher, Laubscher advised that the response required one more executive signature and then the signature of the respondent. Apparently, it was a separate



PAIA request (Eskom reference 10536) which was ready and only awaiting the signature of the respondent. Laubscher reiterated that the delay was not deliberate and said that the decision letter would get signed.

40. On 5 October 2016, CER sent a further follow-up email to Eskom highlighting the urgency of the request and the need for a response. This appears from "**A22**".
41. On 19 October 2016, in a telephonic conversation between Reddell and Laubscher, Laubscher advised that the file (presumably containing the decision letter) had been lost. He advised that if they are unable to find the file then McCourt will need to compile the file again and go through the whole signature process from the beginning.
42. On 21 October 2016, in a telephonic conversation between Reddell and McCourt, it was confirmed that the file appeared to be lost, with McCourt referring to this as an "*admin glitch*". McCourt advised that he was waiting to hear back on the search for the file in the next 2 days. Reddell emphasised that having to compile the file again would result in further unacceptable delays. McCourt however assured Reddell that compiling the file and obtaining the signatures again would only take a "couple of days".
43. On 28 October 2016, McCourt confirmed that the file could not be found, but that it would be recreated within the following week and that it would take "a week or so" to obtain signatures. In other words, the CER could expect the decision by about 4 November 2016.
44. 10 days have elapsed since 28 October 2016 and CER has not received a response from Eskom.

GROUNDS OF APPEAL

45. The 30 (thirty) day period stipulated in s25(1) of PAIA for Eskom to provide the records has lapsed, as has the 30 (thirty) day extension requested by Eskom in terms of s26 of PAIA.



46. The appellant hereby appeals this decision, in terms of s75 of PAIA, on the following grounds:

46.1. As set out above, after numerous attempts to obtain the information requested, no clarity can be obtained from Eskom as to when the requested information will be provided and if the file is indeed lost. No letter of decision has been provided and Eskom has failed to meet a single one of its promised deadlines for providing the decision.

46.2. Therefore in term of s58 of PAIA, the request is deemed to be refused. It is this deemed refusal that is the subject of this appeal.

47. As the final response deadline lapsed on 18 July 2016, this was the date of deemed refusal and an appeal would have been due, in terms of s75(a)(i) of PAIA, on 16 September 2016 (this being within 60 days of the deemed refusal). The appellant therefore acknowledges that it is technically out of time for the filing of an internal appeal in terms of PAIA. However, the correspondence referenced above clearly demonstrates an impression that was created over the past 3 months by Eskom that the information would be forthcoming shortly. Eskom continuously provided assurances that the information would be provided, asking that the CER exercise patience. To have submitted an appeal under those circumstances would have been premature, and the appellant did not wish to incur the time and resources for the drafting and submitting of an appeal in circumstances where a response appeared to be – and was promised to be – forthcoming shortly.

48. Eskom did respond to the request with reference 10536 on 5 October 2016, although this response was also substantially delayed. The appellant therefore had reason to believe that it would soon receive a response to the request which is the subject of this appeal, as per Eskom's numerous and ongoing undertakings.

49. However, with the long delay and the latest developments - including Eskom's alleged loss of the file - the appellant is no longer prepared to accept Eskom's delays in responding. The appellant has sought this information since April 2016



and it has been more than accommodating in respect of Eskom's delays in providing a response.

50. As set out above, on 28 October 2016, Eskom indicated that it required "a week or so" to provide the decision. More than a week has now elapsed and the records have not been forthcoming.
51. Although it is disputed that this is required, to the extent that it is, the appellant therefore requests condonation for the late filing of the appeal, on the grounds that Eskom's assurances and the events leading up to this appeal as set out above, constitute good cause for allowing the appeal to be lodged after the legislated deadline, in terms of s75(2)(a) PAIA. In any event, as set out above, there is no legislated provision for an internal appeal of an Eskom decision. The appellant submits that a refusal by Eskom to determine the appeal on the grounds of it being "out of time" would be highly unconscionable, given Eskom's undertakings in relation to its response and the fact that it has now lost the relevant documentation.
52. The appellant emphasises that Eskom's consistent and unreasonable delays in responding to PAIA requests during the past year are unacceptable and a blatant contravention of PAIA and the constitutional rights of access to information and to just administrative action.
53. It is respectfully submitted that none of the grounds for refusal set out in Chapter 4 of PAIA could validly be claimed by Eskom as a basis upon which to refuse access to the information requested in the request.

STATUTORY COMPLIANCE

54. The appellant hereby submits its appeal of the deemed refusal in accordance with the provisions of s75 of PAIA:
 - 54.1. although the appeal is not submitted within 60 days of the deemed refusal date, it is submitted well within 60 days of Eskom's last undertaking that the decision could be expected by about 4 November 2016; to the extent that



condonation is required, good cause has been shown to grant such
condonation and condonation is requested;

54.2. the appellant is delivering this appeal to the Information Officer of the
Eskom at his/her fax and electronic mail address; and

54.3. the subject of the appeal and the reasons for the appeal are identified.

RELIEF SOUGHT

55. Under the circumstances, the appellant calls on the responsible authority to
uphold this appeal and grant access to the information requested in the
application.

A handwritten signature in black ink, located in the bottom right corner of the page. The signature is stylized and appears to be a single name or set of initials.