



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

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URGENT

Dear Minister

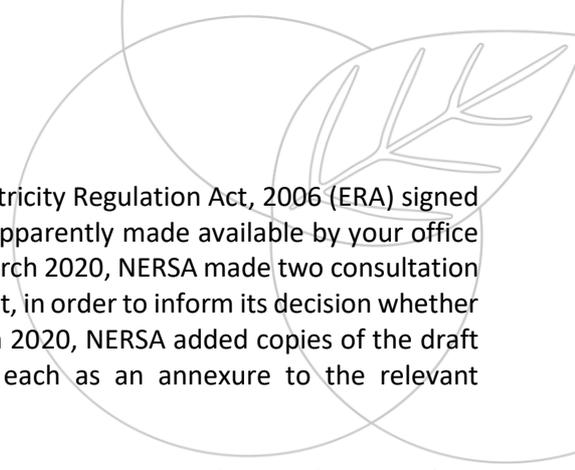
2020 PROPOSED DETERMINATIONS FOR NEW GENERATION CAPACITY

1. We write on behalf of the Life After Coal Campaign.¹

¹ Life After Coal is a joint campaign by Earthlife Africa, groundWork, and the Centre for Environmental Rights, which aims to: discourage the development of new coal-fired power stations and mines; reduce emissions from existing coal infrastructure and encourage a coal phase-out; and enable a just transition to sustainable energy systems for the people. See <https://lifeaftercoal.org.za/>.

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2. We refer to the proposed determinations under section 34(1) of the Electricity Regulation Act, 2006 (ERA) signed by you on 18 February 2020 (“the draft determinations”),² which were apparently made available by your office to the National Energy Regulator (NERSA) on 21 February 2020. On 18 March 2020, NERSA made two consultation papers relating to these draft determinations available for public comment, in order to inform its decision whether or not to concur in the draft determinations. Subsequently, on 20 March 2020, NERSA added copies of the draft determinations themselves (to which we now refer) to its website, each as an annexure to the relevant consultation paper.
 3. We do not intend to comment on the draft determinations in this letter, but reserve our rights in relation to their legal validity and the process followed to date in making them available for comment. Instead, we request urgent clarity from you on a number of issues in relation to the draft determinations; in particular:
 - 3.1. whether you have conducted/will be conducting any public participation process/es in respect of the draft determinations; and
 - 3.2. the status of the two proposed coal-fired power projects – Thabametsi and Khanyisa - that were, in October 2016, identified as “preferred bidders” in terms of the Coal Baseload Independent Power Producer (IPP) Procurement Programme, under the 2012 Ministerial Determination for a Baseload IPP Procurement Programme, which included 2500 MW of new coal capacity (GN 1075, GG 36005) (“the 2012 determination”). The 2012 determination refers to the previous Integrated Resource Plan for Electricity 2010-2030 (“the 2010 IRP”), and Thabametsi and Khanyisa’s appointment flowed from the first bid window under the 2012 determination which advertised 1000 MW for allocation to Preferred Bidders under that first bid submission phase.

Public Participation by the Minister on the Draft Determinations

4. In relation to both draft determinations, we seek clarity on the consultation process followed, or to be followed, by the Minister.
5. As confirmed by the Western Cape High Court in *Earthlife Africa Johannesburg and Southern African Faith Communities Environment Institute v the Minister of Energy & Others*,³ a decision to issue a determination in terms of section 34 of the ERA constitutes administrative action which materially affects the public.⁴
6. We refer further to section 4 of the Promotion of Administrative Justice Act, 2000 (PAJA), which states that:

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

 - (a) to hold a public inquiry in terms of subsection (2);*
 - (b) to follow a notice and comment procedure in terms of subsection (3);*
 - (c) to follow the procedures in both subsections (2) and (3);*
 - (d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or*
 - (e) to follow another appropriate procedure which gives effect to section 3”.*
7. Kindly advise whether, as a decision-maker in respect of the draft determinations, you have conducted a public consultation process in relation to the draft determinations prior to their signature, and if so, please provide details. Alternatively, please advise what consultation process, if any, you still intend to conduct before publishing

² One determination being for 2000MW new generation capacity from a range of sources (apparently related to co-generation, biomass, landfill, and distributed generation only), and the other for: 6800MW renewable energy; 513 MW from storage; 3000 MW from gas; and 1500 MW from coal.

³ (19529/2015) [2017] 3 All SA 187 (WCC); 2017 (5) SA 227 (WCC) (26 April 2017).

⁴ Paras 32 and 40.

the determinations for implementation. If you take the view that the Ministry is not required to conduct public participation, kindly advise us of the reasons for this opinion.

The status of the coal IPP preferred bidders in relation to the new proposed determination for 1500 MW coal capacity

8. We refer to the two “preferred bidder” coal independent power producer (IPP) coal-fired power stations, Thabametsi and Khanyisa, appointed as such in October 2016 in terms of the Coal Baseload IPP Procurement Programme (“the coal IPPs”). To date, the coal IPPs have not reached commercial and financial close.
9. The Integrated Resource Plan for Electricity 2019 – 2030 (“the IRP 2019”) implies that the coal IPPs are included in the 1500 MW coal allocation, stating that: *“the assumption in the IRP is that all new coal to power capacity beyond the already procured 900 MW will be in the form of clean coal technology, which is still generally financed”* (emphasis added).⁵ In other words, it appears that the 1500 MW allocated to coal in the 2019 IRP includes Thabametsi and Khanyisa (which together, as “preferred bidders”, were awarded some 863 MW of capacity).
10. While we continue to await reasons and clarity from you on a number of issues in relation to the IRP 2019 (as requested in our letters of November and December 2019), our rights are reserved insofar as the legality of various components of the IRP 2019 are concerned.
12. The draft determination accompanying NERSA’s second consultation paper, makes provision for 1500 MW of coal capacity *“which represents the capacity allocated under the heading “Coal” for the years 2023 to 2027, in Table 5 of the Integrated Resource Plan for Electricity 2019 – 2030”*. It is not clear, however, whether this capacity includes the 900 MW already appointed to the coal IPPs and apparently allocated to the coal IPPs in the IRP 2019.
13. Kindly therefore advise on the following:
 - 13.1. Whether the 1500 MW of coal in the draft determination accompanying consultation paper 2 includes the 900 MW allocated to the coal IPPs, so that, in fact, only 600 MW of coal capacity is available?
 - 13.2. If the determination does include the capacity previously awarded to the coal IPPs as “preferred bidders”, will they be required to participate again in a bidding process flowing from this determination, or does their 2016 appointment as preferred bidders remain in place? If the coal IPPs’ appointment as preferred bidders remains in place, does this mean that procurement under this draft determination will, in effect, only be for 600 MW of new coal capacity? In short, please provide clarity on the status of the coal IPPs and the size of the coal allocation.
14. We await your urgent responses to the questions in paragraphs 7 and 13 above.

Yours faithfully

CENTRE FOR ENVIRONMENTAL RIGHTS

per: 

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⁵ See the section titled “Risk Considerations”.