



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

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14 April 2020

Dear Sir

COMMENTS ON CONSULTATION PAPER 1: CONCURRENCE WITH THE MINISTERIAL DETERMINATION ON THE PROCUREMENT OF NEW GENERATION CAPACITY FROM A RANGE OF ENERGY TECHNOLOGIES 2020

1. We write on behalf of the Life After Coal Campaign.¹
2. We refer to the two consultation papers published by the National Energy Regulator of South Africa (**NERSA**) on 18 March 2020 in relation to NERSA's concurrence with proposed Ministerial Determinations on the procurement of new generation capacity, signed by the Minister of Mineral Resources and Energy ("**the Minister**") on 18 February 2020 ("**the draft determinations**"). The draft determinations were made available by NERSA on its website on 20 March 2020 as annexures to the consultation papers.
3. The consultation paper and accompanying draft determination addressed in these comments, are those which propose new generation capacity from a range of energy technologies, intended to address the supply gap in the immediate term ("**the consultation paper**" and "**the draft determination**", respectively).

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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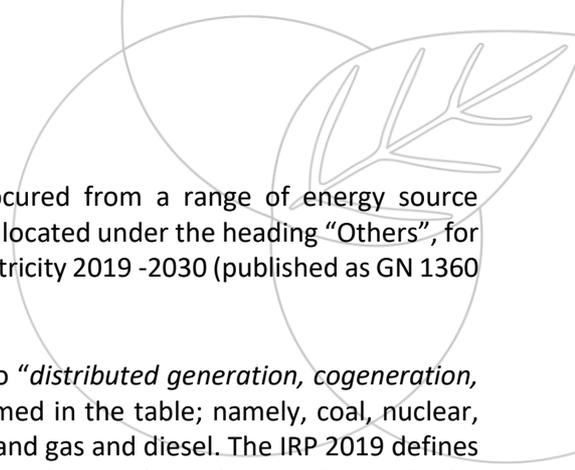
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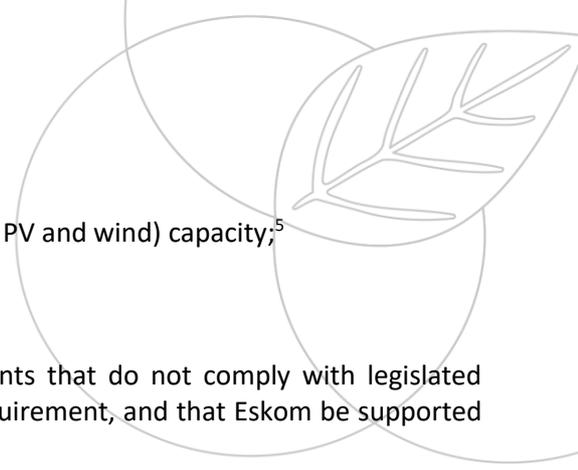
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4. The draft determination proposes 2 000 megawatts (MW) to be procured from a range of energy source technologies in accordance with the short-term risk mitigation capacity allocated under the heading “Others”, for the years 2019 to 2022, in Table 5 of the Integrated Resource Plan for Electricity 2019 -2030 (published as GN 1360 of 18 October 2019 in Government Gazette No. 42784) (“**IRP 2019**”).
 5. We note that the “Other” in Table 5 of the IRP 2019 refers specifically to “*distributed generation, cogeneration, biomass and landfill*”, as distinct from the other generation sources named in the table; namely, coal, nuclear, hydro, storage, photovoltaic (PV), wind, concentrated solar power (CSP) and gas and diesel. The IRP 2019 defines “distributed generation” as “*small-scale technologies to produce electricity close to the end users of power*”. The implication therefore is that this determination is only for small-scale technologies close to end users (although “small-scale” is not defined), cogeneration, biomass and landfill. **NERSA should provide clarity on exactly what generation sources and component sizes are envisaged for the distributed generation and cogeneration components of this allocation. Without this crucial information, stakeholders cannot participate in a just and fair manner in the consultation process on the draft determination.**
 6. We note further that in December 2019 the Department of Mineral Resources and Energy (**DMRE**) published a Request for Information (“**the RFI**”) to analyse options to procure between 2 000 – 3 000 MW of power generation capacity that could be grid connected in the shortest time at the least possible cost. This forms part of the DMRE’s plan to launch a Risk Mitigation Power Purchase Programme to alleviate the current electricity supply constraints in the immediate to medium-term, as envisaged in the IRP 2019.² The DMRE invited responses to the RFI, from “the market” on “*innovative potential solutions to deliver power generation to the grid as expeditiously as possible*”, with a deadline of 13 January 2020. Presumably this draft determination and NERSA’s consultation process are informed by input received in response to the RFI. However, the RFI responses have **not** been made available, nor has any indication of the content of the responses been provided. This impinges on the ability to adequately consider and participate in this consultation process. **All relevant information, including the RFI responses, must be made available to the public, particularly if this information is informing the decision to be made by NERSA through this consultation process. It is also not clear how these responses are being considered by the DMRE and NERSA, how they will inform decision-making on the draft determination, what the legal status of the responses is, and what the envisaged next steps are for the responses with project proposals that were submitted under the RFI. Clarity must be urgently provided.**
 7. While these comments are not directed at the IRP 2019, the draft determination and consultation paper are both based on the allocations in the IRP 2019. We therefore record that our clients’ rights in relation to the IRP 2019, and its legal validity, are reserved. We note a number of concerns in relation to the IRP 2019; including, *inter alia*, that:
 - 7.1. it forces 1 500 MW of new coal capacity into the electricity plan as a policy adjustment – despite this not forming part of the least-cost plan for South Africa;³
 - 7.2. it does not recognise that the extreme urgency of the climate crisis creates an immediate imperative to reduce greenhouse gas (**GHG**) emissions from burning fossil fuels. The supposed ‘carbon constraint’ in the IRP 2019 makes no difference in this decade (2020-2030) and yields fewer reductions than the least-cost option through to 2050. In other words, South Africans are asked to subsidise the higher emissions allowed by the ‘carbon constraint’;
 - 7.3. it refers misleadingly to so-called ‘clean coal’ technologies, which are in fact not capable of mitigating the harmful impacts of coal, and would in any event, result in substantially higher costs – making coal even more uncompetitive;⁴

² <http://www.energy.gov.za/files/media/invites/2019/MediaAdvisory-Request-For-Info-to-Assess-Generation-Options-available-in-short-term.pdf>.

³ Table 5, p42, IRP 2019.

⁴ Table 5 and decision 6, p46, IRP 2019.



- 7.4. it places an arbitrary annual constraint on renewable energy (solar PV and wind) capacity;⁵
- 7.5. it proposes a significant gas allocation of 3 000 MW;⁶ and
- 7.6. it recommends the continued operation of coal-fired power plants that do not comply with legislated minimum emission standards (**MES**), despite this being a legal requirement, and that Eskom be supported to comply with the MES “over time”.⁷
8. We record that we do not accept that the decisions and allocations in the IRP 2019 above, are lawful, nor that they constitute a valid basis for the procurement of new fossil fuel (coal and gas) capacity under any determinations in terms of section 34 of the Electricity Regulation Act, 2006 (**ERA**). We reserve the right to take any further legal steps, including bringing a court application in relation to the IRP 2019 and any decisions flowing therefrom.
9. We have written to both the Minister and NERSA to request reasons for various decisions in relation to the IRP 2019, in terms of the Promotion of Administrative Justice Act 2000 (**PAJA**).⁸ Those reasons fell due in February 2020, in accordance with the legislated 90 day timeframe of PAJA.⁹ To date, no reasons have been received from either the Minister or NERSA.
10. We have no objection to the generation of electricity from distributed and cogeneration to address immediate-term electricity supply constraints, provided the sources relied upon are clean (renewable and not fossil fuels), affordable, in the best interests of the public, and aligned with the Constitution of the Republic of South Africa, 1996 (“**the Constitution**”) and other applicable laws.
11. In these comments we respond to some of the questions posed to stakeholders in this consultation paper. We also comment on the process followed by NERSA for this consultation paper and decision-making in respect of the draft determination. Our general submissions in response to the consultation paper and draft determination are set out below (paragraphs 12 to 16), followed by our responses to NERSA’s questions (paragraphs 17 to 18), and comments on NERSA’s consultation process (paragraphs 19 to 24).

General submissions on immediate term electricity procurement for South Africa

12. As stated above, we have no objection to the expedited procurement of electricity to address the immediate term supply gap, provided that the electricity sources are in the public interest and aligned with the law, and a fair and adequate public consultation process is followed by NERSA in reaching its decision.
13. NERSA is legally obliged, under the National Energy Regulator of South Africa Act, 2004 (“**NERSA Act**”), to ensure that all of its decisions are:
 - 13.1. consistent with the Constitution and all applicable laws;
 - 13.2. in the public interest;
 - 13.3. within the powers of the Energy Regulator, as set out in the NERSA Act, the ERA, the Gas Act, 2001 and the Petroleum Pipelines Act, 2003;

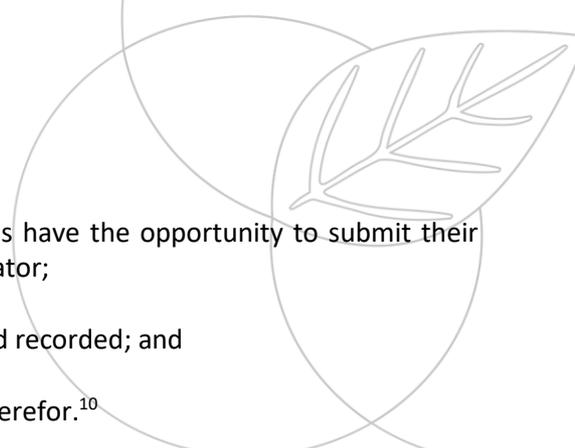
⁵ Decision 5, p46, IRP 2019.

⁶ Decision 7, p47 IRP 2019.

⁷ Decision 3, p44, IRP 2019.

⁸ Copies of the letters are available at https://cer.org.za/wp-content/uploads/2019/11/CER-IRP-Request-for-Reasons_NERSA-5-11-19.pdf and https://cer.org.za/wp-content/uploads/2019/11/CER-IRP-Request-for-Reasons_Minister-Mantashe-5-11-19.pdf.

⁹ S5, PAJA.



- 13.4. taken within a procedurally fair process in which affected persons have the opportunity to submit their views and present relevant facts and evidence to the Energy Regulator;
- 13.5. based on reasons, facts and evidence that must be summarised and recorded; and
- 13.6. explained clearly as to its factual and legal basis and the reasons therefor.¹⁰
14. Electricity sources which are harmful to human health and wellbeing, expensive and inefficient are not in the public interest, nor are they consistent with the Constitution.
15. There is extensive evidence to demonstrate the harms to human health, the climate, the environment and the economy of burning fossil fuels (coal and gas) for electricity. **Any decisions by NERSA to proceed with new fossil fuel-based electricity through this allocation** – to the extent that that is planned - **would thus be in conflict with section 10 of the NERSA Act.** We elaborate further in the paragraphs below:
- 15.1. **Climate harms:** the burning of fossil fuels for energy is the single biggest contributor to climate-changing GHG emissions. This has severe negative impacts for the climate – which in turn affects people and the world we depend on to survive. Global coal use in electricity generation must fall by 80% below 2010 levels within the next 10 years to avoid exceeding the 1.5 degree Celsius limit,¹¹ confirmed to be the tipping point for our climate.¹² The Intergovernmental Panel on Climate Change (**IPCC**) confirms severe harmful consequences for Southern Africa if the 1.5 °C limit is exceeded.¹³ These harmful consequences will largely be felt through: significant warming (as high as 5–8°C, over the South African interior by the end of this century);¹⁴ impacts on water resources, such as changes in water availability; and a higher frequency of natural disasters (flooding and drought), with cross-sectoral effects on human settlements, health, disaster risk management and food security.¹⁵ Already the impacts of drought, extreme weather events, and fires in South Africa are being felt and have cost the country billions.¹⁶ Government is having to subsidise these high costs, and will increasingly have to do so.¹⁷ Coupled with the impacts of the COVID-19 pandemic, the impacts of the climate crisis and higher costs of living will be even more acutely felt, and increasingly so in the coming years. The World Economic Forum’s annual “Global Risks Report”¹⁸ lists the climate crisis and environmental threats as the top five global risks in terms of likelihood of occurring over the course of the next 10 years. These are risks which have already materialised and will become more severe unless urgent meaningful action is taken.
- 15.2. **Health harms:** The burning of coal for electricity has drastic consequences for human health. The emissions of Eskom’s coal-fired power stations alone are estimated to be responsible for some 2 000

¹⁰ S10, NERSA Act.

¹¹ See <https://climateanalytics.org/briefings/coal-phase-out/>.

¹² Steffen, W., Johan Rockström, Katherine Richardson, Timothy Lenton, Carl Folke, Diana Liverman, Colin Summerhayes, Anthony Barnosky, Sarah Cornell, Michel Crucifix, Jonathan Donges, Ingo Fetzer, Steven Ladea, Marten Scheffer, Ricarda Winkelmann, and Hans Joachim Schellnhuber, 2018. Trajectories of the Earth System in the Anthropocene, www.pnas.org/cgi/doi/10.1073/pnas.1810141115.

¹³ <https://www.ipcc.ch/sr15/chapter/spm/>.

¹⁴ P128, Long Term Adaptation Scenarios: Climate Trends and Scenarios for South Africa.

¹⁵ P129, Long Term Adaptation Scenarios: Climate Trends and Scenarios for South Africa.

¹⁶ Western Cape Government: Environmental Affairs and Development Planning “Western Cape Climate Change Response Strategy 2nd Biennial Monitoring and Evaluation Report 2017/18” (March, 2018) available at https://www.westerncape.gov.za/eadp/files/atoms/files/WC%20Climate%20Change%20Response%20Strategy%20Biennial%20M%26E%20Report%20%282017-18%29_1.pdf.

¹⁷ See examples of the impacts of the country-wide droughts at <https://pmg.org.za/committee-meeting/29261/>;

<https://www.sanews.gov.za/south-africa/kzn-roll-out-drought-emergency-plan>; and

<https://www.politicsweb.co.za/politics/declare-nw-a-drought-disaster-area-to-assist-agris>

¹⁸ <https://www.weforum.org/global-risks/reports>.

deaths annually, costing government USD 2,372.78 annually.¹⁹ Similarly, the use of gas for electricity generation will increase the atmospheric concentration of harmful air pollutants such as sulphur dioxide, nitrogen oxides, particulate matter, volatile organic compounds and hydrogen sulphide, exacerbating the burdens already placed on peoples' health and wellbeing in South Africa as a result of toxic air pollution.

15.3. **Water and broader environmental harms:** both coal-fired power and gas power stations require large volumes of water in order to operate. Coal plants pose a risk of polluting water in the areas in which they operate and store their coal and toxic ash waste. Gas, throughout its lifecycle and particularly during extraction, poses major threats to vulnerable and scarce water resources.

15.4. **Economic harms:** a report by Carbon Tracker²⁰ says that "*Coal developers risk wasting more than \$600 billion because it is already cheaper to generate electricity from new renewables than from new coal plants in all major markets.*" Baseload coal in South Africa costs approximately R1.08/kWh compared to new-build solar that costs less than R0.60c/kWh. The COVID-19 crisis will result in a recession with severe economic impacts for South Africa. Government needs to focus on the most cost-effective electricity sources, to ensure that all people have access to affordable electricity. Fossil fuel technologies will simply make electricity more expensive and unaffordable for most. We can no longer afford to subsidise an inefficient fossil fuel sector with expensive, harmful and inefficient technologies.

16. NERSA's obligations span wider than the negative obligation of saying "no" to harmful electricity sources. As NERSA's decisions have to be in the public interest and because it is bound by the Constitution and other legislation, NERSA is obliged to make decisions which facilitate and promote affordable and clean electricity.

Response to NERSA's consultation paper questions

17. The consultation paper requests stakeholder input on the questions listed below. To the extent that they are appropriate and relevant to our interest and expertise, our responses are stated below.

17.1. *Is 2 000 MW sufficient to ensure uninterrupted supply of electricity in the short and medium-term?*

We do not have the expertise to make any recommendations on the required amount of capacity for the short and medium-term. However, we note that whereas the IRP 2019 put the supply gap at 2 000 to 3 000 MW, and subsequent load shedding has taken 6 000 MW off the grid, the determination calls only for 2 000 MW. The COVID-19 crisis will no doubt impact upon electricity demand. These factors should be given due consideration in determining demand and the capacity needed.

17.2. *What should be the minimum and maximum plant size that should be allowed to be connected into the Grid?*

We are not in a position to comment on the particular capacity and size of plants for this allocation. However, we submit that preference should be given to smaller community-scale generation with coordinated technical support from government for local communities.

Larger projects may be appropriate for municipal utilities and industrial energy users, with medium size projects at shopping centres and office blocks, for example.

In short, the optimal plant size may vary between different categories of proponent. But the 2 000 MW limit on this allocation and the short timeframe suggest practical limits to size in any event.

¹⁹ <https://lifeaftercoal.org.za/wp-content/uploads/2017/04/Annexure-A4.pdf>.

²⁰ "How to waste over half a trillion dollars: The economic implications of deflationary renewable energy for coal power investments" available at <https://carbontracker.org/reports/how-to-waste-over-half-a-trillion-dollars/>.

Further criteria would include a preference for generation at, or close to, the point of use (as required in the IRP 2019's definition of "distributed generation" in any event) and a commitment to distribute this capacity spatially.

17.3. Provide your opinion on the socio-economic aspects of procuring energy from a range of energy source technologies (i.e. in terms of the number of jobs each technology can develop)?

Preference must be given to the generation technologies which are least harmful in terms of climate, health and environmental impacts, and which are cost-effective, in order for NERSA to meet its mandate of making decisions which are consistent with the Constitution and in the public interest.

Furthermore, regulation 9 of the 2011 Electricity Regulations on New Generation Capacity GN R399 (GG 34262) (the "**New Generation Regulations**"), published under the ERA requires, *inter alia*, that a power purchase agreement for new generation capacity under ERA must be "*value for money*". The New Generation Regulations define "value for money" as "*that the new generation capacity project results in a net benefit to the prospective buyer or to Government having regard to cost, price, quality, quantity, risk transfer or a combination thereof, but also where applicable to the Government's policies in support of renewable energy*" (emphasis added).

Arguably, these requirements exclude any generation sources from fossil fuels from the technologies to be considered as part of the "*range of energy source technologies*". We refer further to our general submissions at paragraphs 13 to 16 above in response to this question.

Modelling by the Council for Scientific and Industrial Research (CSIR) and others indicates that a renewable energy system requires more jobs per unit of output than a coal baseload system. These jobs are in construction and installation as well as in operation. Beyond the energy system, a large pipeline for renewable energy projects would create the demand for manufacturing investments. It highlights that a decarbonised scenario (95% decarbonisation by 2050) would create the most jobs, with between 112 000 - 144 000 jobs by 2030, reaching up to 331 000 by 2050.²¹ The DMRE's (then Department of Energy) own study²² finds that 30% more permanent direct jobs per unit of energy are created with the renewable energy mix than with coal.²³ A book titled "South Africa's Energy Transition",²⁴ which explains the significant job potential of renewable energy in South Africa, explains that "*South Africa is in a strong position to decarbonise its energy mix cost effectively and without undermining security of supply, jobs or the economy. In fact, this decarbonised platform will be cheaper than any other mix currently being contemplated. Because South Africa has better solar and wind resources than just about any other country, its power will be comparatively cheaper ... Building and operating an electricity system based on solar, wind and flexible generation technologies will create more jobs than any of the alternatives. South Africa is extremely well positioned to pursue an 'electrification-of-almost-everything' future, where the decarbonised electricity system powers a competitive industrial economy, drives an electric-mobility revolution and creates new export and investment opportunities*" (emphasis added).²⁵ There are therefore, significant socio-economic benefits to be derived from the transition to clean energy.

A major benefit of dispersed generation is that power is generated close to the source. This not only reduces losses but also means that the grid can be smaller. For this reason, long distance wheeling should

²¹ Council for Scientific and Industrial Research (CSIR). 2017. *Formal comments on the Integrated Resource Plan (IRP) Updates Assumptions, Base Case and Observations*. Pretoria: CSIR. Available at https://www.csir.co.za/sites/default/files/Documents/20170331CSIR_EC_DOE.pdf.

²² A study on jobs in relation to the IEP - DoE IEP Annexure B: Macroeconomic Assumptions.

²³ P138, Chapter 7, South Africa's Energy Transition.

²⁴ By Tobias Bischof-Niemz and Terence Creamer.

²⁵ P152, Chapter 7, South Africa's Energy Transition.

be excluded. Own generation or feeding into neighbourhood or smaller local distribution grids (municipal or Eskom) should be preferred as a least-cost, least-impact, and resilient option for the country.

17.4. What do you think should be the dominant energy source of technology in this allocation?

Various press reports indicate that responses to the RFI included a range of technologies comprised potentially of the following:

- 'own generation' projects from companies such as Sasol, Anglo Platinum and ArcelorMittal (AMSA) – with Sasol proposing 600MW from a combination of solar PV, wind and gas;²⁶ AMSA proposing 100 MW PV;²⁷ and Anglo Platinum's PV project possibly complementing already installed battery storage;²⁸
- large smelters and other industries using 'off-gases' or waste heat to produce power;
- co-generation projects to produce heat, steam and power (a possible overlap with 'own generation');
- fossil gas-fired plants;
- general waste incinerators;
- timber and sugar mills burning or gasifying plant matter that they waste;
- biogas from bio-digesters; and
- power from existing renewable energy independent power producer (**REIPP**) projects which produce more than is specified in their power purchase agreements with Eskom. At present, and despite Eskom's capacity shortage, this power is curtailed but could be immediately available.

It is not clear, however, which technology sources are being considered by the DMRE and NERSA for this allocation (we refer to our comment and request for clarity in paragraph 5 above), and this should be clarified in order to better inform the response to this question.

As stated above, preference must be given to the generation technologies which are least harmful in terms of climate, health and environmental impacts and which are affordable. The RFI also specifically requires "*generation capacity that can be grid connected in the shortest time at the least possible cost*". This should exclude any generation sources from fossil fuels.

Energy derived from other inherently destructive industries and/or practices should similarly be avoided. That includes, amongst others, timber and sugar mills which depend on destructive land use on industrial plantations, and waste incineration, which entails bad waste management.

On the other hand, the use of industry off-gases and waste heat should not only be encouraged but required – for energy conservation - provided that the plants meet legislated MES under the National Environmental Management: Air Quality Act, 2004.

Wind and solar PV should be preferred, dominant sources in this allocation – particularly where existing potential output is not used because it exceeds power purchase agreement capacity allocations – and provided all environmental and other legal requirements are met. We note this too in the context of the 2019 ANC manifesto plans to "*support the use of renewable technologies in the country's energy mix to reduce the cost of energy, decrease greenhouse emissions, build the local industry through increased localisation and create jobs*".²⁹

²⁶ See <https://www.engineeringnews.co.za/article/sasol-confirms-making-600-mw-own-gen-proposal-in-response-to-dmre-rfi-2020-02-24>.

²⁷ See <https://www.engineeringnews.co.za/article/amsa-says-regulatory-changes-could-open-way-for-100-mw-vanderbijl-solar-farm-2020-02-06>.

²⁸ See <https://www.biznews.com/wef/2020/01/23/anglo-american-govt-energy-nolitha-fakude>.

²⁹ <https://www.politicsweb.co.za/documents/the-ancs-2019-election-manifesto>.

NERSA must give due consideration to the above, in order to meet its mandate of making decisions that are in the public interest and aligned with the Constitution. We refer further to our general submissions at paragraphs 13 to 16 above in response to this question.

17.5. *If the energy source is technology Solar PV and/or Wind Generation, should storage be included to cater for peak periods? If so what should be the storage capacity?*

Storage capacity should not be a rigid requirement of projects under this allocation, though it may be welcomed. Storage technologies are developing fast and different technologies may be appropriate at different scales. Municipal (or Eskom) distribution grids provide a good location for storage using a variety of technologies including gravity, batteries and biogas.

We support the development of storage options for South Africa and recommend that this allocation be supplemented by municipal storage projects additional to the 2 000 MW proposed in the draft determination.

17.6. *Do you think coal-fired generation technology should form part of this allocation?*

Coal-fired power should **not** form part of this, or any future, allocation. We refer to our submissions at paragraph 15 in support of this response. It is not clear if this question refers to stand-alone power plants or proposals to retrofit existing industrial boilers with turbines to 'co-generate' power. In any event, no coal-fired power should be admitted and industries should be seeking alternatives to coal-fired boilers, for the reasons already explained above. As the determination calls for technologies that can be brought online by 2021, it is presumed that this allocation cannot include new, stand-alone coal capacity.

17.7. *Should this range of energy source technologies be dispatchable?*

Similarly to our response to question 18.5 above, it should not be a requirement that the energy source technologies be dispatchable.

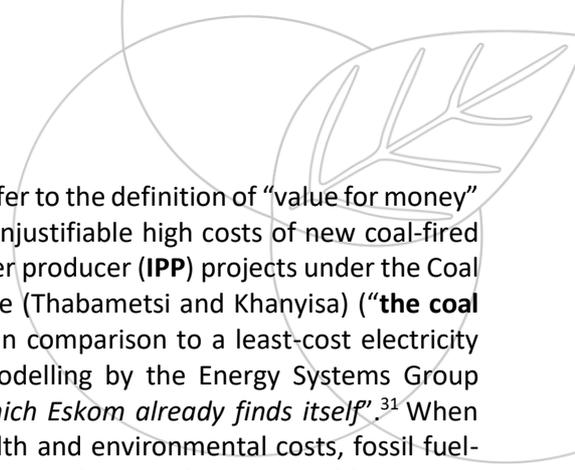
17.8. *Do you think the time allowed for this build allocation will assist in alleviating load shedding?*

It is fundamental that clean and affordable generation sources be enabled to come online as soon as possible to alleviate supply constraints. That being said, NERSA cannot do away with or curtail necessary and legally-required public participation processes. While, NERSA should facilitate new clean energy capacity coming online as soon as possible, it must ensure that it does so within a fair and lawful process that facilitates consultation with communities who will be most affected.

17.9. *Provide your thoughts on the cost that will be associated with the new allocated generation capacity in line with a mandate to ensure long term sustainability of electricity supply industry as well as affordability?*

Regulation 9 of the New Generation Regulations referred to above states, *inter alia*, that:

“(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 generator;
(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 generator in relation to matters of their respective competence and capacity to enter into the power purchase agreement.” (emphasis added)



We refer to our submission at paragraph 17.3 above, where we refer to the definition of “value for money” in the New Generation regulations and where we refer to the unjustifiable high costs of new coal-fired power capacity. The two preferred bidder coal independent Power producer (IPP) projects under the Coal Baseload Independent Power Producer Procurement Programme (Thabametsi and Khanyisa) (“**the coal IPPs**”), alone would cost South Africa an additional R20 billion in comparison to a least-cost electricity system which does not include the coal IPPs, according to modelling by the Energy Systems Group (previously ERC),³⁰ and “*accelerate the utility death spiral in which Eskom already finds itself*”.³¹ When factoring in the climate costs and risks, along with external health and environmental costs, fossil fuel-based electricity becomes even more unaffordable. Any new capacity from coal or gas would not meet the draft determination’s “cost-effective” requirement, nor would it be value for money as required by the New Generation Regulations.

18. In relation to the procurement process, NERSA asks the following questions in its consultation paper:

18.1. Provide your thoughts on Eskom as a chosen buyer of the new generation capacity?

Notably absent from the draft determination and the consultation paper is any reference to plans for the restructure of Eskom – a pivotal consideration for any planning of future electricity generation and procurement. This should be addressed. Any state-owned transmission entity/division of Eskom to come out of the process of transforming Eskom must be the buyer of energy fed into the national grid - including from municipalities.

Municipalities should also be enabled to purchase electricity capacity.

Much also depends on the technologies and costs. Eskom should not be forced to lock itself into unaffordable power purchase agreements with fossil fuel projects, which are also at risk of becoming stranded assets, and contributing to high electricity costs (which will have negative impacts for Eskom’s revenues). The coal IPPs serve as a good example of such a risk for Eskom.

Eskom faces a number of constraints under the Public Finance Management Act, 1999 (PFMA) in that the accounting authority for a public entity (in this instance, Eskom’s board) “*must— (a) exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity; (b) act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity; ... and (d) seek, within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the state*”.³²

18.2. Must it only be Eskom who is the Buyer of this electricity or other Licensed Electricity Distributors (i.e. Municipalities or Private Distributor) must also be allowed to buy?

As stated above, municipalities should also be buyers of electricity.

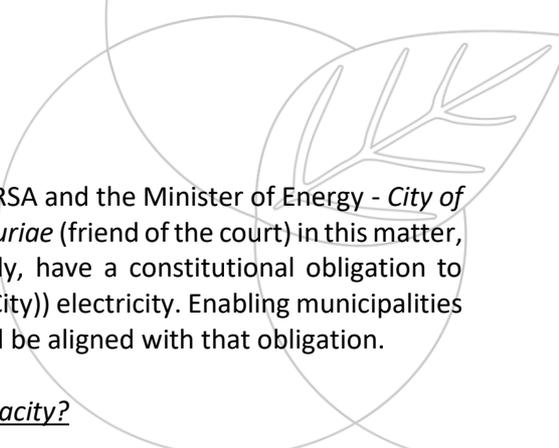
NERSA is obliged to make decisions which enable and promote affordable and clean electricity, as being in the public interest. In this regard, NERSA should agree to the licensing of municipalities to procure their own electricity, even in the absence of a Ministerial Determination. NERSA should also support and call for the designation of municipalities as generators and buyers under this allocation. We note this too, in the context of Cyril Ramaphosa’s 2020 State of the Nation Address, in which he stated that municipalities in good financial standing would be enabled to procure their own power from IPPs.³³

³⁰ See <https://cer.org.za/wp-content/uploads/2018/05/ERC-Coal-IPP-Study-Report-Finalv2-290518.pdf>.

³¹ P8, <https://cer.org.za/wp-content/uploads/2018/05/ERC-Coal-IPP-Study-Report-Finalv2-290518.pdf>.

³² S50(1), PFMA.

³³ <https://www.gov.za/speeches/president-cyril-ramaphosa-2020-state-nation-address-13-feb-2020-0000>.



We refer to the case brought by the City of Cape Town against NERSA and the Minister of Energy - *City of Cape Town v Minister of Energy & Others*.³⁴ The CER, as an *amicus curiae* (friend of the court) in this matter, has submitted that municipalities, and government more broadly, have a constitutional obligation to provide clean and healthy (as well as affordable (as argued by the City)) electricity. Enabling municipalities to build and/or procure their own clean generation capacity would be aligned with that obligation.

18.3. *Do you think the trader should also be allowed to buy this new capacity?*

It is not clear what is meant by this question. There is no explanation of who ‘the trader’ is and it is not clear what is meant by buying ‘capacity’ as opposed to buying energy. We request that NERSA provide clarity here.

18.4. *Do you think it fair for Eskom to be restricted as the buyer instead of providing an option for it to be part of the build allocation?*

We have long-maintained that Eskom Generation should ideally lead on the construction of new utility-scale renewable generation intended to feed directly into the national grid. However, given the current crisis at Eskom, perpetuated by: delays and exponential costs for Medupi and Kusile; poor maintenance and declining energy availability factor (EAF) at the rest of Eskom’s plants; resistance to or disdain of environmental compliance; and bad management of coal contracts, we accept that this approach, in current circumstances, is problematic. As stated above, any restructuring arrangements for Eskom that entail unbundling the entity into generation, transmission and distribution, should facilitate the development of renewable energy by Eskom and/or a new separate state-owned entity (potentially within Eskom Holdings) responsible for generation. This would be aligned with the 2019 ANC manifesto, which talks about repositioning Eskom to “*play an active role in the renewable energy sector and promote public ownership in renewable energy infrastructure.*”³⁵

18.5. *Provide your thoughts on IPPs as the chosen builders of the new generation capacity?*

NERSA defines an IPP as any ‘person’ in which government or any organ of state does not have a controlling interest. Such persons could include socially-owned community or worker cooperatives but, as currently worded, it excludes municipalities. Municipalities should be enabled to generate their own electricity capacity. The Life After Coal Campaign does not support the privatisation of generation capacity, to private for-profit business.

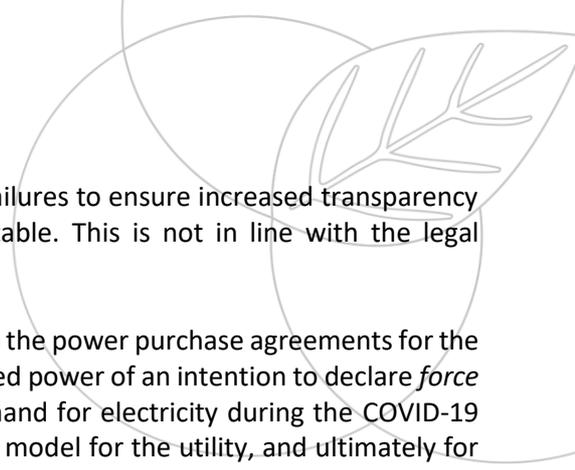
18.6. *Provide your thoughts on the method of procurement chosen for the procurement of new generation capacity?*

The draft determination states that the electricity procured from the new generation capacity will be procured through tendering processes which are “*fair, equitable, transparent, competitive and cost effective*”.³⁶ We dispute that previous tender processes have been fair, equitable, cost-effective and particularly, we dispute that they have been transparent. The IPP procurement processes for the coal IPPs were not preceded by any public consultation or democratic process – despite the significant impacts of such procurement for the public and the fact that the determinations, as administrative action, required public participation. Previous new generation procurement processes were transparent only to industry, if at all. But certainly not to citizens. There has been no transparency on, for example, the tender and procurement requirements for the various IPP procurement programmes; or the financial and commercial close deadlines. The public should have full access to all of this information, and should be notified of all

³⁴ <https://cer.org.za/virtual-library/case-watch/city-of-cape-town-v-the-national-energy-regulator-of-south-africa-and-the-minister-of-energy>.

³⁵ <https://www.politicsweb.co.za/documents/the-ancs-2019-election-manifesto>.

³⁶ Para 2, draft determination.



stages of the processes. The DMRE, the IPP office and NERSA's failures to ensure increased transparency and public consultation in these processes has been unacceptable. This is not in line with the legal requirements for just administrative action and a fair process.

Further, the circumstances in 2017 around Eskom's refusal to sign the power purchase agreements for the renewable IPPs, and now its notification for IPPs of wind-generated power of an intention to declare *force majeure* on the power purchase contracts, due to a lack of demand for electricity during the COVID-19 lockdown, demonstrate problems with the current procurement model for the utility, and ultimately for taxpayers.

Provide what you consider to be the risks associated with the new capacity?

The risks associated with procuring coal-fired power are manifold: increased system costs, increased climate impact, increased pollution and water use at mines and power stations, increased conflict with local communities over pollution and water, and declining performance of plants due to climate change impacts and carbon constraints. Both power stations and mines are likely to end as stranded assets in the next decade (2030-2040). Gas plants similarly risk stranding, along with their extensive supporting infrastructure that is still to be built. The responsibility for remediating the damage left behind will fall to government. In short, we can expect to subsidise considerable and continuing environmental destruction for little benefit – this is a high risk, at a time when the people of South Africa already face exorbitantly high living costs in the face of an economic crisis, perpetuated by the COVID-19 pandemic, Eskom and the climate crisis.

Waste incinerators are likely to have been proposed in response to DMRE's RFI. In contradiction to the waste management hierarchy, incinerators rely on a large supply of waste. Incinerator pollution to air includes fly ash, metals and dioxins and furans – all very toxic. Dioxins and furans typically escape abatement equipment. Such fly ash and metals as are trapped by abatement equipment must be disposed to landfill together with bottom ash. Material for disposal thus concentrates toxins, posing a high risk to people's health.

The risk most usually associated with renewables relates to variable supply. Addressing this simply requires that the system migrate from rigid baseload to flexible load-following. While it requires more flexibility, the CSIR and others have shown that this is the least-cost path for the country's electricity system as a whole. As stated above, this also shows higher employment figures, compared to coal-fired power. A further risk of renewables relates to waste when facilities are decommissioned in 20 to 40 years. Equipment and materials should be designed for re-use and recycling and so adapted for the circular economy.

From a perspective of seeking to mitigate risk, security of supply is best served by many relatively small-scale dispersed plants. The experience of the last decade shows that the loss of a single large unit has a major impact on the system. Beyond load-shedding, there is no security of supply for the 60% of the people who are accounted poor by StatsSA, or for the next 20% whose economic condition is precarious – many of them are unable to afford increasingly-expensive electricity. Nor is there security for anyone who lives in a municipality that is simply failing to supply electricity to people. This is one reason why people want to see local production under social ownership.

The DMRE has not adequately prioritised or planned for small-scale embedded generation (**SSEG**) as integral to the electricity system, or for the inclusion of the majority of people as prosumers within a transformed system. The draft determination opens a narrow path to privatisation of generation, but not to transformation, which is a risk for the long-term sustainability of the electricity system and for the realisation of the goal of affordable access to electricity for all.

18.7. Provide your opinion on the security of supply impact in general as well as in light of the additional capacity?

It is not clear what this question means, and NERSA is requested to provide clarity. In any event, we submit that a decentralised and localised electricity system would be more resilient and better-equipped to provide electricity security in current circumstances and in the face of increased challenges – financially and from public health and climate impacts.

18.8. Must the NERSA concur with this ministerial determination as per the prescripts of section 34 of the Act?

It is not clear if this question is asking for stakeholders' views on NERSA's legal obligations under section 34 of ERA (i.e. whether NERSA is legally obliged to concur) or whether it is asking for views on whether or not it is appropriate for NERSA to concur.

Section 34(1) of ERA states 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”. The judgment by the Western Cape High Court in the case of *Earthlife Africa Johannesburg and Southern African Faith Communities Environment Institute v the Minister of Energy & Others*, (“the nuclear case”)³⁷ states that “the power exercised by the Minister in terms of section 34(1) of ERA is unusual in that a decision on his part is inchoate until such time as NERSA concurs therein and the section 34 determination is thereby made”.³⁸ The judgment further refers to NERSA's action as a “vital link in the chain which makes up the sec 34 determination”. If there is any doubt as to NERSA's legal obligations and powers in terms of section 34 ERA, this judgment confirms that NERSA's concurrence is required in order for a section 34 determination to have legal effect. This also empowers NERSA to refuse to concur and/or to require amendments to the draft determination before it concurs.

As to the question of whether NERSA should concur with the draft determination, in the absence of key information regarding, for example, the proposed sources for the generation capacity under this allocation, we are unable to respond to this question, and submit that the clarity requested from NERSA above and below (see paragraph 25) must be provided before stakeholders can fully respond to this question. Nevertheless, as stated above, we have no objection to the generation of electricity from distributed and cogeneration, to address immediate-term electricity supply constraints, provided the sources relied upon are in the public interest (least-cost and least harmful to health, climate and the environment) and aligned with the Constitution.

Submissions on the Consultation Process Followed by NERSA

19. We note that NERSA intends to conduct a fast-tracked concurrence process in this instance, dispensing with a public hearing process for stakeholders. While we acknowledge the need for an expedited process for the procurement of electricity which is cost-effective, clean (with minimal negative impacts for human health, the climate and environment) and able to meet demand as soon as possible, we record that NERSA – whose decisions are administrative action – is obliged to ensure that its actions and decisions comply with the requirements of the PAJA. It is obliged to follow a procedurally fair decision-making process.

20. As confirmed by the Western Cape High Court in the nuclear case,³⁹ a decision by NERSA to concur in the issuing of a determination in terms of section 34 of the ERA constitutes administrative action which materially affects the public.⁴⁰

³⁷ (19529/2015) [2017] 3 All SA 187 (WCC); 2017 (5) SA 227 (WCC) (26 April 2017).

³⁸ Para 40.

³⁹ *Earthlife Africa Johannesburg and Southern African Faith Communities Environment Institute v the Minister of Energy & Others* (19529/2015) [2017] 3 All SA 187 (WCC); 2017 (5) SA 227 (WCC) (26 April 2017).

⁴⁰ Paras 32 and 40.

21. Section 4 of PAJA 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”.*

22. NERSA’s Guidelines on Public Consultation state that *“If the Energy Regulator decides to follow a notice and comment procedure, the administrator must :- (a) take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them”* (emphasis added).

23. If NERSA does not intend to hold public hearings for this draft determination, then it must **at least** ensure that this proposed decision is effectively and adequately communicated to - and comment sought from - those who will be most affected by its proposed decision – communities who are unable to afford electricity or who are not being provided with electricity, for example, and those in the Mpumalanga Highveld, the Vaal Triangle and the Waterberg, living in close proximity to coal-fired power stations, mines and other industrial activities.

24. We have seen no indication of any attempts by NERSA to bring this consultation paper and draft determination to the attention of affected communities or to facilitate a comment process that enables communities to express concerns and inputs for NERSA’s consideration. **We request that NERSA provide clarity on the processes, if any, it has followed, or plans to follow, to bring this consultation paper and the draft determination to the attention of affected communities and to provide them with an opportunity to make comments.**

Conclusion

25. We request that NERSA urgently provide the clarity requested in paragraphs 5, 6 and 24 above. Namely that it advise:

- 25.1. what generation sources are envisaged for the distributed generation and cogeneration components of this allocation;
- 25.2. on the RFI responses received, how these are being considered by the DMRE and NERSA, how they will inform decision-making on the draft determination, and what the legal status and envisaged next steps are for the responses that were received; and
- 25.3. what processes, if any, NERSA has followed, or plans to follow, to bring this consultation paper and the draft determination to the attention of affected communities and to provide them with an opportunity to make comments.

26. We reserve our rights to supplement these comments once we receive NERSA’s response.

27. Kindly contact us if you require any further information from us.

Yours faithfully

CENTRE FOR ENVIRONMENTAL RIGHTS

per: 

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