

The Minister
Department of Forestry, Fisheries and the Environment
Attention: Appeals Directorate
Private Bag X447
PRETORIA
0001

Date:
19 November 2021

Enquiries:
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Eskom Ref No: GEM21-L161
DFFE Ref No: Eskom/postponements

By email: mrakgogo@environment.gov.za
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Dear Sir/Madam

NOTICE OF INTENTION TO LODGE AN APPEAL IN TERMS OF SECTION 43 OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT 107 OF 1998 (“NEMA”) AND REQUEST FOR AN EXTENSION / CONDONATION TO LODGE THE APPEAL

On 3 November 2021, Eskom Holdings SOC Limited (“**Eskom**”) received a copy of the decisions of the National Air Quality Officer (“**NAQO**”) of the Department of Forestry, Fisheries and the Environment (“**DFFE**”) (as per the email from Mr Derrick Makhubele of the DFFE, annexed hereto as “**Annexure A**”) in response to Eskom’s applications for postponement from the Minimum Emission Standards, published in GN.1207 of 18 October 2018 (“**Decisions**”).

The Decisions do not indicate the process to be followed to obtain a review of the decision, or any specific requirements to notify interested and affected parties of the Decisions. Eskom has requested clarity from the DFFE on these matters but has not received a response as yet. Adopting a conservative approach, Eskom has assumed that regulation 4(2) of the Environmental Impact Assessment Regulations, 2014 (published in GNR.982 of 4 December 2014, as amended) (“**EIA Regulations, 2014**”) and the National Appeal Regulations (published in GNR.993 of 8 December 2014) (“**National Appeal Regulations**”) apply.

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According to regulation 4(1)(b) of the National Appeal Regulations, an appeal must be lodged within 20 calendar days from the date that the notifications of the Decisions was sent to Eskom (i.e. 23 November 2021).

Eskom hereby notes its intention to lodge an appeal in terms of section 43(1) of NEMA to the Minister of the DFFE against the Decisions. Unfortunately, however, Eskom will not be in a position to lodge its appeal(s) by 23 November 2021. In this regard, Eskom respectfully requests an extension to submit the appeal(s) **by close of business on 15 December 2021** in terms of section 47C of NEMA, and/or otherwise in terms of the discretion you have to grant such an extension.

It is submitted that the extension request is justified for the following reasons:¹

- The extent of the period requested and degree of lateness: Eskom requests an indulgence of approximately three weeks to submit the appeal(s). It is submitted that this is a reasonable request given the complexity and importance of this matter. It is also noted that this request has been asked in advance and that Eskom is not late and is not asking for condonation after the due date of submission on the 23 November 2021.
- The factual basis of the motivation for the request and the explanation thereof: The Decisions are contained in 68 pages. Although many of the reasons provided for in the Decisions overlap with one another, it is important for Eskom to consider and come to terms with each of the Decisions, which contain sub-decisions and separate reasons. The merits of the Decisions on each of the postponement applications that Eskom submitted must be assessed. Eskom will also need to discuss the merits of the Decisions with various internal personnel and external legal counsel. The matter is complex and raises a number of technical, legal and environmental issues that require input from persons with various skillsets. It will take time to collate and synthesise the inputs required from these various parties, which is not possible to do in the 20-day time period that has been provided in the National Appeal Regulations.
- The importance of the case: The Decisions have major consequences for a critical component of Eskom’s business, namely power generation and sustainable development which is importance to not only Eskom but the entire country (and neighbouring countries who Eskom supplies electricity to). The potential consequences of the Decisions in as much as they may force the early closure of multiple units at Eskom power stations are far reaching and it is in the interests of justice for Eskom to be provided with a reasonable time period in which to respond to the Decisions in its appeal submission.

¹ In accordance with the requirements for condonation, as set out in the case of *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* (619/12) [2013] ZASCA 5; [2013] 2 All SA 251 (SCA) para 11 and the DFFE’s website: https://www.dffe.gov.za/projectsprogrammes/appeals_legalreview.

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- Whether factors outside of the control of the requesting party have played a role: At this stage, there are no factors outside of Eskom’s control that have played a role in the extension request.
- A respondent’s interest in the finality of the case: Eskom (the appellant), the DFFE and any potential respondents all have an interest in the case being finalised. However, given the complexities of the matter, it is important that the issues are fully investigated and ventilated. The indulgence requested by Eskom is entirely reasonable in the circumstances. It is submitted that the extension of 3 weeks will not unreasonably delay the finalisation of the matter. The matter is likely to require further exchanges between the parties and is unlikely to be finalised purely on the basis of Eskom’s appeal(s).
- Potential prejudice in granting or refusing the request to any of the parties and the balance of convenience: An appeal suspends the Decisions in terms of section 43(7) of NEMA², pending their final resolution (by appeal or subsequent proceedings). As a result, Eskom would be the main party to suffer prejudice as a result of the extension being granted as Eskom requires the appeal to be submitted urgently to suspend the Decisions and the longer that it takes for positive decisions to be forthcoming, the greater the inconvenience to Eskom. No other parties will suffer material prejudice if a three-week extension is granted to Eskom to submit the appeal(s). Contrasting this, Eskom will suffer significant prejudice if the extension is not granted as it will be required to rush its consideration of important issues that will need to be raised in the appeal(s) (legal, factual and technical).
- The interests of justice and the avoidance of unnecessary delay in the administration of justice: The merits of the appeal will have major implications for South Africa, sustainable development and a just energy transition. There will also be significant consequences for Eskom’s generation business. The interests of justice favour the full ventilation and consideration of the appeal(s). The integrity of the appeal process will be enhanced by granting the requested extension.
- The prospects of success on the merits of the appeal: It is submitted that Eskom’s prospects on the merits are good. The reasons for the Decisions suggest that considerations that are relevant to the sustainability enquiry were ignored by the NAQO in taking the Decisions.
- Whether good cause is shown to extend a time period: In light of all of the abovementioned circumstances, it is submitted that Eskom has demonstrated good cause to extend the time period.

In the circumstances, Eskom respectfully requests an extension to submit the appeal(s) **by close of business on 15 December 2021**. We submit that our request is reasonable.

² A consequence of the suspension of the Decisions is that applications for variations of the AELs to reflect the Decisions will not be made until the appeal and/or subsequent proceedings have been finalized.

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We request that the contents of this letter receive your urgent attention. Kindly acknowledge receipt of this letter and revert as soon as possible, especially since the expiry of the 20-day period to lodge an appeal is fast-approaching.

Yours sincerely



Deidre Herbst

GENERATION ENVIRONMENTAL MANAGER

GENERATION DIVISION