IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case No: 19529/15

In the matter between:

EARTHLIFE AFRICA – JOHANNESBURG	First Applicant
SOUTHERN AFRICAN FAITH COMMUNITIES' ENVIRONMENT INSTITUTE	Second Applicant

And

THE MINISTER OF ENERGY	First respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second respondent
THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	Third Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Fourth Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Fifth Respondent
ESKOM HOLDINGS (SOC) LIMITED	Sixth Respondent

APPLICANTS' SUPPLEMENTARY HEADS OF ARGUMENT IN RELATION TO THE 2016 DETERMINATION

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Glossary of terms

We will continue to use the same abbreviations used in the main heads of argument, duly supplemented as required to deal with the supplementary papers filed.

Parties

The **DOE** – the Department of Energy.

Eskom - Eskom Holdings (SOC) Limited

The **Government respondents** – a collective reference to **the Minister of Energy** and **the President**, who are the only respondents opposing this application.

The **Minister** – the Minister of Energy, the first respondent – unless otherwise indicated no distinction is drawn between the different holders of the office in the periods discussed in this matter (the current incumbent took office in May 2014).

NERSA - the National Energy Regulator of South Africa.

The **President** – the President of the Republic of South Africa, the second respondent, who is the head of the National Executive (Cabinet).

The **DG** – the Director General of the DOE.

Terms

IGA(s) – intergovernmental agreement(s).

The **IRP2010** – the Integrated Resource Plan (**IRP**) for Electricity 2010-2030. Although years out of date, no more recent final IRP has been gazetted.

The **2013 s 34 Determination** or the **2013 Determination** – the determination in terms of section 34 of the ERA by the Minister with the concurrence of NERSA (signed on November and December 2013 respectively), in relation to the requirement for and procurement of 9600 MW of electricity from nuclear energy, which was only made public by the Minister by publication in the gazette on 21 December 2015.

The **2016 Determination** – the determination in terms of section 34 of the ERA by the Minister with the concurrence of NERSA (signed in October and

December 2016 respectively), in relation to the requirement for and procurement of 9600 MW of electricity from nuclear energy, and that Eskom would be the procurer, which was gazette on 14 December 2016.

Legislation

PAJA – the Promotion of Administrative Justice Act 3 of 2000.

The **NERA** – the National Energy Regulator Act 40 of 2004.

The **ERA** – the Electricity Regulation Act 4 of 2006 (all references to “section 34”, are references to section 34 of the ERA.

I. INTRODUCTION

1. At the hearing of this matter on 13 December 2016, counsel for the Government Respondents (the Minister and the President) advised this Court that a few days prior to the hearing, a further section 34 determination, in relation to new nuclear capacity had been made. Although not yet gazetted, counsel further advised that the determination was made by the Minister with the concurrence of NERSA, along similar lines to the 2013 s 34 Determination being challenged, but now designating Eskom as the procurer of the new nuclear power plants (**the 2016 Determination**).

2. This Court ordered a postponement of the matter to allow for the lawfulness of the 2016 Determination to be decided together with the other relief sought in the matter, with punitive costs against the Minister. It also granted orders in respect of the filling of further papers to ensure that the 2016 Determination and its lawfulness could be properly placed before the Court on an expedited basis.

3. That 2016 Determination was gazetted the day after the hearing, and was formally placed before this Court, together with a record, in accordance with this Court's order

4. The Record reveals that the 2016 Determination was plainly unlawful.

These heads of argument deal with that unlawfulness.

5. The 2016 Determination (much like the 2013 s 34 Determination) was unlawful and unconstitutional, for, *inter alia*, the following reasons:

5.1 It was taken secretly without public consultation or any other fair or rational procedure to allow submissions from interested and affected parties by the Minister or NERSA;

5.2 The Minister irrationally and unlawfully blindly followed the outdated IRP2010, instead of making a current and independent determination of how much nuclear new generation capacity was required;

5.3 NERSA gave its concurrency (in a mere three days), not in the exercise of its independent statutory discretion, having properly applied its mind to the Determination and having satisfied itself that it was warranted, but rather because it mistakenly believed that it was compelled to give its consent.

6. In the circumstances, this Court is required in terms of section 172(1)(a) of the Constitution to declare the 2016 Determination unlawful and unconstitutional.

7. Accordingly, a proposed draft order, that now also seeks a declaration that

the 2016 Determination is unlawful and unconstitutional, was filed as an annexure to the applicants' supplementary affidavit.[1]

8. As will be dealt with below, Eskom has now been joined as a respondent in this matter, and provision has been made for further papers to be filed (together with supplementary heads), should they seek to file any substantive opposition to the relief that the applicants seek.

9. The further papers in relation to the 2016 Determination were served on NERSA, and it has continued to not oppose this application and the further relief sought now in relation to the 2016 Determination.[2]

10. These heads should be read as supplementary to the heads of argument filed in November 2016 (**the main heads of argument**), and in general, the legal principles and facts dealt with therein, are not repeated, save as is necessary for the sake of clarity.

11. Finally, we also note that, without prior warning, at approximately 4:30 pm on Thursday, 26 January 2017, the Minister filed a further affidavit. This was done with no regard to the fact that these heads were due effectively one court day thereafter (on Monday, 30 January 2016). In the circumstances, it has not been possible to consider that affidavit in

[1] The Applicants' affidavit in answer to the Minister's supplementary affidavit **(the Applicants' supplementary affidavit**), annexure PL61, p 1679-81.
[2] Applicants' supplementary affidavit para 124, p 1647.

preparing these heads. Once the applicants have had a proper chance to consider the affidavit, and to the extent necessary, we will address any issues arising therefrom in oral argument, or in brief supplementary written argument.

II. THE KEY FACTS IN RELATION TO THE 2016 DETERMINATION

12. The following facts appear from the Minister's supplementary affidavit, and the documents that form the Minister's and NERSA's record of decision (**the Record**), which were attached thereto, together with other facts that are not in dispute.

13. During September 2016, the Minister received legal advice with regard to the development of a procurement strategy for the nuclear programme.[3] This advice "*resulted in a revisiting of the appointment and role of the DOE as the designated procurement agency in respect of the nuclear procurement programme*."[4] The Minister does not put up this legal advice, which clearly formed part of the Record, despite being called upon to do so.[5]

14. On 29 September 2016, the DG of the DOE provided the Minister with a Decision Memorandum in relation to the 2016 Determination (**the 2016**

[3] Minister's supplementary affidavit para 5, p 1517.
[4] Minister's supplementary affidavit para 5, p 1517.
[5] Applicants' supplementary affidavit para 14, p 1586.

Decision Memorandum) for approval.

15. **The 2016 Decision Memorandum** elucidates on the advice given to the Minister: "*it was indicated in a legal opinion sought from Adv. Marius Oosthuizen that the Minister and/or Department of Energy is not empowered by law to directly procure on behalf of other juristic entities, which are also organs of state (such as Eskom) unless their consent is obtained. It was indicated by an authorised representative from Eskom that Eskom would not provide their consent for the Minister and/or Department of Energy to procure on their behalf*."[6]

16. No further information regarding Eskom's refusal to provide its consent for the Minister and DOE is put up as part of the Record. Similarly, no information is provided as to the basis for the Minister and her counsel forming the view that the procurement by the DOE would need to be "*on behalf of other juristic entities*" (in particular Eskom).

17. Moreover, while Eskom is now apparently intended to be the owner-operator of the nuclear power plants, it is notable that the 2013 s 34 Determination did not provide for it to be the owner-operator.[7] The 2016

[6] 2016 Decision Memorandum, paragraph 3.2, p 1548.
[7] See Applicants' replying affidavit para 170, p 1428-9, paras 174 to 175, p 1430-1.

Determination merely provides for it to be the procurer.[8]

18. The Minister approved the 2016 Decision Memorandum on 18 October 2016.[9]

19. On 18 October 2016, the Minister also wrote to the Chairperson of the Board of Eskom and to the Minister of Public Enterprises. The Minister advises that: "*I reminded them of the previous determination and my decision, taken after we have consulted with representatives of Eskom, to designate Eskom as the procurer of the 9600MW of the nuclear programme and the owner-operator of the nuclear power plants. We also informed them that, as a result, the previous determination had to be amended and they were provided with a draft amended determination for their information"*.[10]

20. On 5 December 2016, a letter was sent to the Chairperson of NERSA, attaching a draft of the 2016 Determination, already signed by the Minister.[11] Two duplicate versions of the letter were annexed to the Minister's affidavit, although the Minister accepts it was sent on 5

[8] 2016 Determination p 1576.
[9] 2016 Decision Memorandum, p 1550.
[10] Minister's supplementary affidavit para 9, p 1521, read with Annexure TJP3 (p 1551-2) and TJP4 (p 1553-4).
[11] Minister's supplementary affidavit Annexure TJP6 p 1564ff.

December 2016:[12]

20.1 A version of the letter is signed by the Minister and is dated 18 October 2016.

20.2 A duplicate of this letter (identical but for the date) was attached to the NERSA email to the DOE dated 12 December 2016 confirming NERSA's concurrence,[13] but is dated 5 December 2016.

21. No explanation is provided by the Minister for these date discrepancies. What appears clear is that the Minister, having prepared and signed the letter to NERSA at the same time as she sent letters to Eskom and the MPE (on 18 October 2016), for some unexplained reason, chose not to send the letter, and rather only sent it, newly dated, on 5 December 2016. This is why the letter that NERSA refers to, and attaches to its email, is dated 5 December 2016.

22. After receipt of the Minister's letter seeking concurrence in the 2016 Determination, the Board of NERSA took its decision by way of a round robin resolution on or about 8 December 2016.[14] The resolution was approved by the Acting CEO of NERSA on 5 December 2016 (the same day as the Minister's letter requesting NERSA's concurrence was sent),

[12] Minister's supplementary affidavit para 13, p 1522.
[13] Minister's supplementary affidavit Annexure TPJ8, p 1574.
[14] Minister's supplementary affidavit Annexure TPJ7 (**NERSA Resolution**), p 1567ff.

and subsequently by the Chairperson on 8 December 2016 (and supported on the same date by the Deputy Chairperson and the Regulator Members).[15]

23. On or about 12 December 2016, a senior adviser in the Minister's office received an email from NERSA advising that NERSA had concurred in the amended determination.[16]

24. At that same time, a process to update the IRP2010 (which was blindly followed as the basis for the 2016 Determination), which had been long delayed, was underway:

24.1 On 25 November 2016, the DOE gazetted the Integrated Resource Plan Updated Assumptions, Base Case Results and Observations (dated October 2016) – "**draft 2016 IRP update**".[17] At the same time a revised version bearing the same name but dated November 2016, and marked Revision 1, of the draft 2016 IRP update was published marked as a draft for consultation.[18] The closing date for written

[15] NERSA Resolution p 1567.
[16] TPJ8, p 1573.
[17] Notice no 1431 contained in Government Gazette number 40445 of 25 November 2016, applicants' supplementary affidavit para 78.1, p 1619.
[18] Applicants' supplementary affidavit para 78.1, p 1619, available on the DOE's website: http://www.energy.gov.za/IRP/2016/Draft-IRP-2016-Assumptions-Base-Case-and-Observations-Revision1.pdf.

comments was communicated and is now 31 March 2017.[19]

24.2 This of course indicates that in the weeks and months prior to 25 November 2016, the DOE was in the process of preparing this draft update. This included, as discussed below, the obtaining of expert advice in September 2016, which was received in October 2016, which indicated that "*[a] least cost IRP model, free of any artificial constraints and before any policy adjustments* ***does not include any new nuclear power generators.*** *The optimal least cost mix is one of solar PV, wind and flexible power generators (with relatively low utilisation).*"[20].

24.3 The draft 2016 IRP update states "*this report highlights the process, progress and observations from the IRP update base case as well [as] list[ing] the scenarios to be* ***analysed before the IRP is finalised***."[21]

24.4 On the front page of the draft 2016 IRP update it is stated that "*the IRP update documentation is released for consultation purposes only.* ***The final IRP will be published once the consultation process***

[19] Applicants' supplementary affidavit para 78.3, p 1619-1620, pg 6 of the draft 2016 IRP update.
[20] Applicants' supplementary affidavit para 78.13.4, p 1624, emphasis added.

***and policy adjustment has been concluded*.**" (emphasis added)[22]

24.5 The draft 2016 IRP update states that "*[w]hile the IRP 2010 remains the official government plan for new generation capacity until it is replaced by an updated plan,* ***there are a number of assumptions that have changed and they include:***

- *The changed electricity landscape over the past three years, in particular in electricity demand and the underlying relationship with economic growth;*

- *New developments in technology and fuel options (locally and globally);*

- *Scenarios for carbon mitigation strategies and the impact on electricity supply up to 2050; and*

- *The affordability of electricity and its impact on demand and supply.*"[23]

25. On 13 December 2016, at the hearing of this matter, the parties, and the Court (together with the public) learned for the first time that the 2016

[22] Applicants' supplementary affidavit para 78.4, p 1620.
[23] Draft 2016 IRP update, page 6, Applicants' supplementary affidavit para 78.6, p 1620-1.

Determination had been made.[24]

26. On 14 December 2016, the 2016 Determination was published in the gazette.[25]

27. Notwithstanding the fact that the Minister indicates that the intention[26] of the 2016 Determination was to amend the 2013 s 34 Determination:

27.1 The 2016 Determination makes no mention of the 2013 s 34 Determination;

27.2 The 2016 Determination does not indicate that it amends the 2013 s 34 Determination in whole or in part; and

27.3 The 2016 Determination does not indicate that it replaces the 2013 s 34 Determination, or that the 2013 s 34 Determination has been withdrawn or repealed.

III. THE RELEVANT CONSTITUTIONAL AND STATUTORY FRAMEWORK

28. The key legal principles and the relevant constitutional and statutory

[24] Applicants' supplementary affidavit para 8, p 1581.
[25] 2016 Determination, p 1577.
[26] Minister's supplementary affidavit para 16, p 1523, and Decision Memorandum paras 3.3 and 3.5, p 1548.

framework in relation to the review of s 34 Determinations, and the interpretation of ERA and the NERA, has been fully set out in the main heads of argument.[27]

29. We do not repeat those here, but will refer to and rely on certain of the principles as necessary.

IV. THE UNLAWFULNESS OF THE 2016 DETERMINATION

30. The 2016 Determination was unlawful on a number of grounds, many of these are the same grounds as the 2013 s 34 Determination (including an absence of public participation, irrational and blind reliance on the outdated IRP2010, and NERSA's erroneous belief that it was bound to give its concurrence).

31. The grounds of unlawfulness will be dealt with below.

32. Before dealing therewith, we begin by emphasising that:

32.1 For the reasons more fully set out in the main heads of argument, section 34 Determinations are administrative action and are, in any event, the exercise of a statutory power.[28]

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[27] See main heads of argument paras 29 – 41, and paras 46 – 53.
[28] Main heads of argument para 129, and para 59.

32.2 Therefore, the 2016 Determination, is properly classified as administrative action, *inter alia*, since:

32.2.1 It is administrative in nature [29] – requiring, as it does, the concurrence of NERSA, the energy regulator;

32.2.2 It has the capacity to affect rights and interests and has direct, external legal effect, [30] since *inter alia*:

32.2.2.1 the 2016 Determination, determines the amount of nuclear new generation capacity required and that it should be procured;

32.2.2.2 the 2016 Determination, determines that Eskom is now the procurer of that nuclear new generation capacity – thus making it responsible for the largest procurement in South Africa's history;

32.2.2.3 no person may operate a power generating plant without

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[29] *Permanent Secretary of the Department of Education and Welfare, Eastern Cape, & another v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA (1) (CC) at para 18.

[30] See *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others 2005 (6) SA 313 (SCA)* at paras 23-24 (relied upon and approved in *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC), para 27, and *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others* 2014 (1) SA 604 (CC) (*AllPay I*) para 60.

a licence issued by NERSA,[31] and NERSA in issuing any generation licence is bound by any section 34(1) determination.[32]

33. Therefore, the 2016 Determination is reviewable:

33.1 in terms of the requirements of lawfulness, procedural fairness and reasonableness under PAJA;[33] and/or

33.2 in terms of the principle of legality, given that it is the exercise of a public statutory power, which principle requires lawful and substantively and procedurally rational decision making, taken in good faith and not based on a material error of law or fact. [34]

A. Procedural unfairness and/or procedurally irrational – No public participation or consultation

34. As is more fully traversed in the main heads of argument, the applicants' (and the public's) right to participate in the Minister's section 34 decision and NERSA's decision in concurrence therewith is founded on sections 3

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[31] Section 7 of the ERA, provides that "(1) No person may, without a licence issued by the Regulator in accordance with this Act -
(a) operate any generation, transmission or distribution facility"

[32] Section 34(3).

[33] Main heads of argument para 48.

[34] See main heads of argument para 47 and authorities included there, as well as *Democratic Alliance v President of the Republic of South Africa* 2012 (1) SA 417 (SCA) para 112.

and 4 of PAJA and s 10(1)(d) of the NERA.[35]

35. This right to consultation or public participation certainly applies to the 2016 Determination – a binding statutory determination that a very significant quantity of nuclear power is required and must be procured by Eskom.

36. We submit that even if the 2016 Determination is not administrative action:

36.1 given the nature and implication of the Determination for South Africa's energy-mix and the costs of electricity and general costs, it is evident that a rational decision making process[36] would require public participation (whether by way of a notice and comment procedure, or otherwise);

36.2 NERSA was obligated by section 10(1)(d) of the NERA to conduct a procedurally fair process, which expressly includes a requirement to give affected persons the opportunity to submit their views and present relevant facts and evidence to NERSA. In this regard we note that:

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[35] Main heads of argument paras 60-69.

[36] *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* 2013 (6) SA 421 (SCA) para 68; *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC) para 34; *Democratic Alliance v President of the Republic of South Africa* 2012 (1) SA 417 (SCA) para 66; *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) ("Albutt") paras 50-1; and *Minister of Justice and Constitutional Development v Chonco* 2010 (4) SA 82 (CC) ("Chonco") paras 12 and 36.

36.2.1 the NERSA round robin resolution, expressly provides that NERSA's decision to concur was taken in terms of section 8(9)(b) of the NERA;[37]

36.2.2 section 8(9)(b) of the NERA provides that "*If the Energy Regulator **takes a decision** in any other manner than at a formal meeting, **such decision** comes into effect after it has been reduced to writing and signed by a majority of the members and it must be submitted for noting at the first formal meeting of the Energy Regulator following the decision*"; (Emphasis added); and

36.2.3 it is therefore clear that section 10(1) (which applies to "*every decision*" of NERSA) applied to NERSA's decision to concur, since it was evidently a decision contemplated by the NERA (as is patent from NERSA's express statement that the decision to concur by resolution was taken in terms of section 8(9)(b) of the NERA).

37. The record and papers make clear that neither the Minister nor NERSA undertook any public participation process or undertook any form of external consultation prior to making the Determination or otherwise gave

[37] NERSA Resolution p 1566.

any affected parties the opportunity to make submissions.[38]

38. Indeed, NERSA gave its concurrence (reached by round robin resolution), in only three days.[39]

39. By failing to undertake a public participation process, the Minister and NERSA failed to afford the applicant (and other members of the public and/or interested and affected persons) an opportunity to influence the decision.[40] It was therefore procedurally unfair, and the decision-making process was not rationally connected to the purpose of properly determining how much nuclear new generation capacity was required, and which entity should procure it.

40. In light of the above, we submit:

40.1 the Minister's and NERSA's s 2016 Determination decisions were unconstitutional because they were procedurally unfair (and are therefore reviewable in terms of section 6(2)(c) of PAJA), and/or were procedurally irrational and therefore reviewable in terms of the

[38] See Minister's supplementary affidavit para 16, p 1523; in the 2016 Decision Memorandum under the heading "Consultation/Project Team" reference is made only to "Internal stakeholders and the National Energy Regulator of South Africa", para 5, p 1548; and in the NERSA Resolution, under the heading "Institutions/Bodies Consulted", reference is made only to "Full Time Regulator Members" and "Electricity Regulation Division", para 4, p 1569.

[39] NERSA Resolution p 1566ff, made on 8 December 2016.

[40] See the Applicants' supplementary affidavit paras 50-54, p 1603-7, for examples of the type of issues that would have been raised in public participation.

principle of legality;

40.2 NERSA's decision to concur failed to comply with a mandatory and material procedure or condition of an empowering provision (namely section 10(1)(d) of NERA) (and is therefore reviewable in terms of section 6(2)(b) of PAJA), and/or the principle of legality.

B. The Minister's decision was irrational and/or unreasonable and taken without regard to relevant considerations, or with regard to irrelevant considerations

41. The irrationality of the Minister's 2016 Determination decision (including the failure to have regard to relevant considerations, or having regard to irrelevant ones), can be dealt with by having regard to two key thematic issues (and the subsidiary issues related thereto):

41.1 The blind reliance on the outdated IRP2010;

41.2 The designation of Eskom as the procurer, because it refused to give its consent to allow the DOE to procure on its behalf.

42. We deal thematically with these two issues below.

1. Continued irrational reliance on the outdated IRP2010 and failure to take into account relevant considerations in this regard

43. When making her decision on the 2016 Determination and seeking

NERSA's concurrence therein, the Minister failed to apply her mind to whether or not 9.6GW of new nuclear generation capacity was still required, notwithstanding:

43.1 a number of material changes to the electricity sector and economy since the IRP2010 was published in the Gazette, and since the 2013 s 34 Determination was signed in late 2013 and subsequently published in the Gazette;

43.2 a new IRP update process (including a public participation process) was underway at the time.

44. The Minister explains regarding the 2016 Determination that:

> Being an amendment to the 2013 Determination, this amended determination was **mainly informed** by the same considerations that informed the 2013 determination and are already canvassed in the answering affidavit.[41]

45. The 2016 Decision Memorandum indicates that the IRP2010 allocated 9.6GW of new nuclear generation from nuclear power,[42] and that the Minister is empowered under s 34 of the ERA to determine that new generation capacity is required and determine the types of energy sources from which electricity must be generated *"after having considered the IRP*

[41] Minister's supplementary affidavit para 16, p 1523, emphasis added.
[42] 2016 Decision Memorandum para 2.1, p 1547.

which specifically details new nuclear generation capacity".[43]

46. Yet, the Minister did not properly "consider" the IRP. As was done with the 2013 s 34 Determination, the Minister blindly followed the outdated IRP2010, and determined that 9.6GW of nuclear power was to be procured, without independently considering the amount of nuclear new generation capacity that was in fact now required.

47. This was clearly irrational and impermissible, firstly since section 34 does require the Minister to follow an IRP, and since the IRP2010 itself indicated that it was meant to be updated at least every two years,[44] and it was by December 2016, *years out of date*.

48. The Minister's supplementary affidavit and the Decision Memorandum do not set out any other relevant considerations relating to the procurement of nuclear energy, including (but not limited to) issues such as affordability of nuclear power, potential negative impacts on electricity prices and potential socio-economic and environmental impacts. As was the case with the 2013 s 34 Determination, these documents, and the Minister's subsequent decision to sign the nuclear 2016 Determination, show that there was a failure to appreciate that an outdated policy-adjusted choice

[43] 2016 Decision Memorandum para 2.2, p 1547.

[44] IRP2010 para 1.1 provides that "The Integrated Resource Plan (IRP) is a living plan that is expected to be continuously revised and updated as necessitated by changing circumstances. At the very least, it is expected that the IRP should be revised by the Department of Energy (DoE) every two years, resulting in a revision in 2012."

was made in the IRP2010 to commit to a nuclear fleet of 9.6GW

49. As noted in our main heads of argument,[45] the IRP2010 is a policy document that is not legislation and therefore cannot bind the discretionary power vested in the Minister and NERSA by statute and the Constitution.

50. Importantly, when the Minister signed off on the 2016 Determination, and sought NERSA's concurrence on 5 December 2016, which was predicated solely on the IRP2010, she did so in the teeth of her own department already having finally, and belatedly, embarked on a process to update the IRP2010, including a public participation process (but which process was not complete, and which had not yet rendered an updated IRP2010 in the form of a final 2016 IRP).[46]

51. The importance of properly considering the latest IRP is apparent from the draft 2016 IRP update which records, inter alia,

51.1 under the heading of "*Planning Assumptions and Input Parameters*" the key assumptions that have changed from the promulgation of the IRP 2010, namely technology costs, electricity demand projection,

[45] See main heads of argument para 99-101, read with para 53, and also para 104.

[46] As discussed above in the facts section, see also Applicants' supplementary affidavit para 78, p 1619-1625.

fuel costs and Eskom's existing fleet performance;[47]

51.2 that there has been a significant fall off in electricity demand;[48] and

51.3 that there has been a steep decline in the prices experienced in South Africa for renewable energy.[49]

52. All these changes are obviously material considerations that ought to have featured in any assessment to steam ahead with the 2016 Determination of the amount of nuclear new generation capacity required, and who should procure it.

53. An example of the relevant issues and inputs that should be considered prior to the 2016 Determination being made (but clearly were not), are the views expressed by the experts appointed by the Minister herself on the draft 2016 update (notably none of these were considered or dealt with in the Decision Memorandum (nor did they form part of the record), nor did the Minister await the outcome of her own expert analysis):

53.1 On 16 September 2016, the Minister appointed an expert Working Group to analyse certain concerns expressed by members of the Ministerial Advisory Council on Energy (MACE) on a number of

[47] Heading 2; and Applicants' supplementary affidavit para 78.7, p 1621.
[48] Applicants' supplementary affidavit para 78.9, p 1622.
[49] Draft 2016 1RP update, heading 3.4; Applicants' supplementary affidavit para 78.10, p 1622.

assumptions used to derive the 2016 IRP base case scenario and to report back to the Minister on their findings.[50]

53.2 On 31 October 2016, the MACE Working Group reported back to the Minister, which report has been made public.[51]

53.3 The main finding of the report was that "A least cost IRP model, free of any artificial constraints and before any policy adjustments **does not include any new nuclear power generators.** The optimal least cost mix is one of solar PV, wind and flexible power generators (with relatively low utilisation)."[52]

53.4 This is of course a highly relevant consideration to any section 34 Determination in relation to nuclear power (being diametrically opposed to any determination that any nuclear new generation capacity is required, let alone 9.6 GW).

54. Not only did the Minister unlawfully fail to conduct a public consultation process under section 34 (as discussed above), she also side-stepped and rendered meaningless, inputs that might have been forthcoming under the 2016 IRP update process (inasmuch as it is now clear that the Minister pre-emptively closed her mind to anything that the public might

[50] Applicants' supplementary affidavit para 78.13.1, p 1623-4.
[51] Applicants' supplementary affidavit para 78.13.2, p 1624.
[52] Applicants' supplementary affidavit para 78.13.4, p 1624, emphasis added.

have wished to say in respect of that process by the closing date of 31 March 2017 (and NERSA too, in its role of providing concurrence, has similarly been denied this input)).

55. Had the Minister acted rationally (procedurally and substantively) and in good faith, then she would have (a) taken these considerations into account, and (b) (as discussed above) conducted a public participation process prior to making the 2016 Determination, where these and other issues could have been taken into account. It is notable that neither the Record nor the Minister's affidavit provide any basis for rushing ahead with the decision in circumstances where waiting just a few months and obtaining input on her decision would have enhanced the integrity of the process and maximised the chances of her taking the decision on the basis of all relevant and updated considerations.

56. Tellingly, the Minister was on notice – given the arguments already before this Court in respect of the 2013 Determination – that rationality, fairness transparency and accountability required a public participation and consultative process, also to enhance and improve the Minister's decision-making (a purpose confirmed by the Constitutional Court). That the Minister would deliberately choose, despite the importance of the decision and its potential impact on South Africa and its people for generations to come, to press on regardless and despite any availing urgency to arrive at her decision, is evidence of a closed mind, rigid adherence to the nuclear

route, and an unwillingness to be informed of alternatives. Moreover, having unlawfully elected not to conduct any public participation or consultative process in relation to the 2016 Determination, it was substantively and procedurally irrational for the Minister to fail to await the outcome of the public participation process in relation to the 2016 IRP update – particularly in light of the concerns expressed not least of all by the Minister's own expert advisors about nuclear procurement.

57. The only reasonable inference is that the Minister deliberately, and irrationally, sought to avoid any public consultation (whether under section 34 or otherwise), including by bypassing the 2016 IRP update process, and did so for the ulterior motive of rushing through the determination in advance – well aware, that at the very least the 2016 IRP update process was likely to highlight a significant change in the need for and financial viability of the nuclear energy option.

58. In the circumstances, it is obvious that the Minister:

58.1 unreasonably and irrationally placed unqualified reliance on an outdated policy document (IRP2010);

58.2 blithely ignored the relevant and material changes and developments contained in the 2016 IRP update process, including advice from her own expert advisors;

58.3 failed to draw any of these relevant considerations, including the advice from the Minister's expert panel, to NERSA's attention;

58.4 empowered Eskom to procure 9.6GW of nuclear power, based on an outdated IRP, at the very time that the Minister's department, the DOE, was supposedly seeking public comment on the long overdue updating of the IRP, which, given the Minister's blind reliance on the IRP2010, was certainly a relevant consideration;

58.5 irrationally and unconstitutionally and/or in bad faith made the 2016 Determination and sought NERSA's concurrence, based solely on the IRP2010, in advance of the conclusion of the IRP 2016 update process or even the closing date for public comments on the IRP 2016 update.

59. In the circumstances, the Minister's decision is reviewable on the basis that the decision was:

59.1 irrational (in terms of sections 6(2)(f)(ii) of PAJA) and/or the principle of legality,

59.2 based on irrelevant considerations or the failure to have regard to relevant considerations (in terms of 6(2)(e)(iii) of PAJA) and/or the principle of legality, and/or

59.3 taken in bad faith (in terms of section 6(2)(e)(v) of PAJA) and/or the principle of legality.

2. Unlawful and/or irrational designation of Eskom as the procurer, based on Eskom's failure to consent

60. The 2016 Decision Memorandum reveals the astonishing fact that a key reason for the Minister's designation of Eskom as the procurer was Eskom's refusal to provide consent to the DOE to procure on its behalf.

61. The 2016 Decision Memorandum stated that "*It appeared that one of the factor that the Minister considered in her decision, was that it was indicated in a legal opinion sought from Adv Marius Oosthuizen SC that the Minister and/or DOE is not empowered by law to directly procure on behalf of other juristic entities, which are also organs of state (such as Eskom) unless their consent is obtained.* ***It was indicated by an authorised representative from Eskom that Eskom would not provide their consent for the Minister and/or DOE to procure on their behalf***."[53]

62. Instead of confronting the issue and the Minister seeking through appropriate channels, given that Eskom is a State-owned Entity, in which government is the sole-shareholder,[54] to ensure Eskom gave the consent required, the Minister has capitulated to Eskom's intransigence by

[53] The 2016 Decision Memorandum, paragraph 3.2, p 1548.
[54] Eskom Conversion Act 13 of 2001 section 2.

designating it as the procurer of 9.6GW of new nuclear generation capacity.

63. Alternatively, to the extent that Eskom was lawfully entitled to its intransigence and the Government was unable to pursue other options to obtain its consent, then the rational decision for the Minister on the facts was plain: To the extent that the legal advice provided to her (which has not been placed before this Court) was correct, then since Eskom refused to provide consent to allow DOE to procure, she should have refused to allow Eskom to be the owner-operator of the nuclear power plants (particularly where the DOE or another entity that was willing to give its consent could have been the owner of the power plants, which would therefore have allowed the DOE to continue acting as the procuring agency).

64. The Minister therefore designated Eskom as the procurer, irrationally and/or unlawfully at the behest of or due to the unwarranted dictates of Eskom,[55] notwithstanding, and without due regard to the fact that:

64.1 The DOE, not Eskom, had already conducted vendor parades with a number of nuclear vendor countries;

[55] See e.g. *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 2000 (1) SA 1 (CC) paras 39- 40; *Minister of Environment Affairs and Tourism & Another v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA) para 20.

64.2 The Minister, has signed IGAs with governments of various countries, on behalf of the Government, which the Government respondents have averred on oath are necessary for procuring from their various nuclear vendor countries;

64.3 The Russian,[56] the Chinese,[57] the French,[58] and the South Korean IGAs,[59] each designated the DOE, and not Eskom, as the competent authority on behalf of the South African government;

64.4 There was nothing precluding the DOE or another appropriate organ of state willing to provide any necessary consent from being the owner of the nuclear power plants.

65. In the circumstances, the Minister's decision is therefore reviewable in terms of section 6(2)(e)(iv) and/or section 6(2)(f)(ii) of PAJA and/or the principle of legality.

C. NERSA's unlawful decision to concur in the 2016 Determination

66. NERSA's decision to concur in the 2016 Determination is recorded in a

[56] Russian IGA article 5, Vol 1, p 291.
[57] Chinese IGA article 4, Vol 1, p 303.
[58] French IGA article 6, Vol 1, p 225.
[59] South Korean IGA article 5, Vol 1, p 255.

round-robin resolution (**the NERSA resolution**).[60]

67. Section 10(1)(e) and (f) of NERA provide together that every decision of NERSA must be in writing and must be based on reasons, facts and evidence that must be recorded, and explained clearly as to its factual and legal basis and the reasons therefor.

68. The following is noted from the NERSA Resolution:

68.1 The Resolution was approved following a round robin process by the Acting CEO of NERSA on 5 December 2016 (the same date as the Minister's letter),[61] and subsequently by other NERSA members and the Chairperson on 8 December 2016.[62]

68.2 The Resolution makes reference to the concurrence by NERSA on the 2013 s 34 Determination (para 2.1.1).[63]

68.3 The Resolution indicates that the 9.6GW nuclear new generation capacity is in accordance with the capacity allocated under the IRP2010 (para 2.1.2).

68.4 The Resolution notes that the 2013 s 34 Determination included

[60] NERSA resolution, p 1566 – 1572.
[61] NERSA resolution, p 1567.
[62] NERSA resolution p 1570-2.
[63] NERSA resolution, p 1568.

concurrence by NERSA on the DOE being recorded as the designated procurer (para 2.1.3).[64]

68.5 The Resolution notes that the Minister has proposed an amendment to the 2013 s 34 Determination regarding the replacement of the DOE as the procuring agency by Eskom. It is stated that *"The amendment of the determination cannot be complete without the concurrence of the Energy Regulator therefore the Minister is requesting the Energy Regulator to concur"* (para 2.1.4).[65]

68.6 Under the heading "*Issues*", the resolution states as follows:

> "2.2.1 Without a decision by the Energy Regulator on the proposed amendment, the determination will not be in compliance with the Act and can negatively impact on the nuclear procurement process;
>
> 2.2.2 The Energy Regulator in concurring with the proposed amendment, must record that the amendment replaces clause 5 of the 26 November 2013 decision to concur."[66]

68.7 Under the heading *"Problem Statement*", the resolution states as follows:

> "2.3.1 Without the Energy Regulator decision to concur with the proposed amendment, the nuclear programme can be negatively affected.

[64] NERSA resolution, p 1568.
[65] NERSA resolution, p 1568.
[66] NERSA resolution, p 1569.

> 2.3.2 Considering that the proposed amendment is on a determination that the Energy Regulator has already concurred, **it can be viewed as mala fide for the Energy Regulator to delay or refuse to concur with the proposed amendment**." (Emphasis added)[67]

68.8 Under the heading *"Motivation",* the resolution states that:

> "2.4.1 The proposed amendment is procedurally fair and legally valid at [sic] the Energy Regulator can concur and bring finality to the implementation of the nuclear procurement programme."

68.9 The Resolution indicates that there are no financial implications (para 3), and that the *"Institutions/Bodies/Persons Consulted"* were the "*Full Time Regulator Members"* and "*Electricity Regulation Division"* (para 4).

68.10 Under the heading *"Organisational Implications",* the resolution states:

> "5.1 Constricting the implementation of the Act with regard to facilitating investment in the electricity supply industry.
>
> 5.2 Not promoting the diverse use of energy sources."[68]

68.11 The resolution contains the following recommendations:

> "It is recommended that the Electricity Subcommittee approve the:

[67] NERSA resolution, p 1569.
[68] NERSA resolution, p 1570.

> 6.1 Concurrence with the proposed amendment by the Minister in relation to clause 5 of the Energy Regulator decision of 26 November 2013.
>
> 6.2 The amendment of the decision of the Energy Regulator of 26 November 2013."[69]

69. NERSA's reasons, provided in an unseemly hurry and without proper interrogation for the enormity of its concurrence, are bad on their face and gossamer-thin. They confirm a number of fatal flaws in the lawfulness of NERSA's concurrence.

70. ***First***, the key reason for NERSA giving its concurrence was that it believed that it would be "*mala fides*" for it not to concur.

71. In other words, NERSA formed the view that it had to concur, on the short-cut basis that it had previously concurred some three years earlier in the 2013 s 34 Determination.

72. Yet, quite aside from abdicating its decision-making role in this way, there is no legal or factual basis for this understanding. The 2016 Determination was the exercise of a discretionary statutory power, vested in NERSA, regardless of whether it was an amendment of a previous Determination or a self-standing Determination. NERSA had the discretion and the duty to decide whether to concur or not, and it was not bound by its past

[69] NERSA resolution, p 1570.

decision in 2013 (moreover the new Determination, as discussed above, was materially different, in that it designated Eskom as the procurer, and was to be taken years later when the facts underpinning the previous 2013 determination had or might have changed), nor was NERSA required to accept that the Minister's Determination was correct. NERSA was required to take the appropriate time to exercise an independent mind, on updated facts.

73. NERSA clearly did not do so.

74. This rendered its decision to concur unlawful, since it was predicated on a material error of law or fact.

75. ***Second***, and relatedly, it is evident from the above that NERSA failed to apply it mind to whether or not 9.6GW of nuclear new generation capacity was still required, or indeed whether any of the queries raised by NERSA when concurring in the 2013 s 34 Determination had been resolved. These queries included concerns relating to: overstated electricity forecasts; the outdated IRP2010; and the levelised costs of electricity (and in particular the implications of nuclear power on electricity prices).[70]

76. The resolution reveals that NERSA signally failed to consider these relevant considerations when making its decision to concur in the 2016

[70] Supplementary founding affidavit para 137.4, Vol 2, p 434 – 441; and see the main heads of argument para 107, and the record references set out therein.

Determination. In addition, the resolution reveals that NERSA had no regard to relevant and material changes in the electricity sector and economy since its 26 November 2013 decision in concurrence with the 2013 s 34 determination was made, including the 2016 IRP update process that was underway at the time when it rushed its decision (within three days of having received the Minister's request to concur in her 2016 Determination decision).

77. ***Third***, the resolution reveals that no consideration was given to the implications of designating Eskom as the procurer of the 9.6 GW of nuclear new generation capacity.

78. For instance, the resolution states that there are no financial implications to the decision to concur in the 2016 Determination. This indicates that NERSA predicated its decision on the factual view that designating Eskom as the procurer, in preference for the DOE, could have no financial implications. That was certainly factually incorrect.[71]

79. In conclusion, for the reasons set out above, NERSA's decision to concur in the 2016 Determination violated the requirements of PAJA and the principle of legality (which requires decisions to be substantively and procedurally rational and to be taken in good faith without material error of law or fact), on one, more or all of the following grounds:

[71] Applicants' supplementary affidavit para 54, p 1605-1607, and para 101, p 1636-7.

79.1 NERSA's decision was taken on the basis of material errors of law and/or fact – it is therefore reviewable in terms of sections 6(2)(d) and/or 6(2)(e)(iii) and/or the principle of legality.

79.2 NERSA's decision was taken because irrelevant considerations were taken into account or relevant considerations were not considered – it is therefore reviewable in terms of section 6(2)(e)(iii) of PAJA and/or the principle of legality.

79.3 NERSA's decision was also taken because of the unauthorised or unwarranted dictates of another person or body – it is therefore reviewable in terms of section 6(2)(e)(iv) of PAJA and/or the principle of legality.

79.4 NERSA's decision was unreasonable (and therefore reviewable in terms of section 6(2)(f)(h) of PAJA) and irrational, and therefore reviewable in terms of section 6(2)(f)(ii) of PAJA and the principle of legality on the basis of irrationality and/or that the decision was vitiated by bad faith.

D. No specific system for the procurement of nuclear new build capacity in violation of s 34 of the ERA, read with s 217 of the Constitution

80. In the main heads of argument,[72] we submit that, even assuming that a proper ERA nuclear requirement determination had been made, having regard to the fundamental importance to the country of the procurement of nuclear energy, and on a proper construction of section 34(1)(e), read in light of the requirements of section 217 of the Constitution,[73] there would need to be in place a specific procedure (or system)[74] for the procurement of nuclear new generation capacity.

81. Thus, when a section 34 Determination is made that new generation capacity is required and is to be procured (as in the present case), constitutionally interpreted, a lawful exercise of the powers in section 34(1)(e), would require that the Minister and NERSA exercise their powers to specify the procurement procedure to be used to procure that new capacity.[75]

82. With regard to a procurement procedure for nuclear energy the 2016 Determination provides only as follows:

> "that electricity produced from the new generation capacity ("the electricity"), shall be procured through tendering procedures which are

[72] Main heads of argument paras 109 – 117, see also paras 136 - 140.

[73] See the main heads of argument paras 54 to 56, on the proper, constitutional, approach to interpretation of legislation.

[74] The terms "procedure" in section 34(1)(e)(i) and "system" in section 217 of the Constitution are clearly synonyms, given the identical context and the ordinary grammatical meaning of the words, see main heads of argument paras 111-112.

[75] See e.g. *Van Rooyen and Others v The State and Others* 2002 (5) SA 246 (CC) para 178-182, read with para 88 and footnote 163

fair, equitable, transparent, competitive and cost-effective…."[76]

83. As argued in relation to the identical wording in the 2013 s 24 Determination, and more fully traversed in the main heads of argument, this wording is tautological, and by simply reiterating the wording used in the empowering statutory provision (section 34(1)(e)(i)), the 2016 Determination is incomplete and defective.[77]

84. Moreover, unlike the 2013 s 34 Determination, the 2016 Determination, does **not even** include the following generic statement in relation to the role of the procurer: "*the role of the procurement agency will be to conduct the procurement process, including preparing any requests for qualification, requests for proposals and/or all related and associated documentation, negotiating the power purchase agreements, facilitating the conclusion of the other project agreements, and facilitating the satisfaction of any conditions precedent to financial close which are within its control".*[78]

85. On a proper, constitutionally compliant, interpretation of section 34(1)(e)(i) of the ERA, having determined that new nuclear capacity was required and should be procured, the Minister and NERSA were empowered and enjoined to prescribe the procurement procedure (or system) to be

[76] 2016 Determination, para 2, p 1577.
[77] Main heads of argument paras 120-122.
[78] 2013 s 34 Determination para 6, Vol 2, p 500.

followed (which would need to be fair, equitable, transparent, competitive and cost-effective, in terms of section 34(1)(e) of the ERA (read with section 217 of the Constitution)).

86. It is clear from the 2016 Determination that the Minister (with NERSA's concurrence) failed to specify such a procurement procedure. The tautologous wording is identical to that used in the 2013 s 34 Determination, save that an additional phrase has been added requiring that private sector participation be provided for (repeating the wording of subsection 34(1)(e)(ii)).

87. This constitutes a violation of section 34(1)(e).

88. The 2016 Determination has failed to specify the procurement procedure to be followed. In particular, it provides no guidance or specificity (even in the most general terms) to the tendering procedure required to be followed. Instead, Eskom has, apparently, been given free reign over all of these issues, in relation to the largest procurement in South Africa's history, which will have national and inter-generational importance – the entire procurement process, *sans* guidance or detail, has effectively been outsourced to Eskom.

89. Moreover:

89.1 No provision has been made for how procurement steps already undertaken by the DOE are to be dealt with, including its previous conducting of vendor parades. No indication is given whether these were, or whether there are other, necessary steps for prospective bidders in the Eskom procurement process.

89.2 As noted in the main heads of argument, the Government respondents insist that Canada's and Japan's failure to sign IGAs with the Government would preclude them participating in the nuclear procurement process.[79] This would suggest that this is part of the procedure for nuclear procurement. Yet no generic procurement systems would make provision for the signing of IGAs as a necessary prerequisite for procurement.

90. Not surprisingly, already confusion prevails and the respondents' own understanding of the process confirms the inherent lack of clarity and coherence that ought to be the hallmarks of a fair and transparent procurement system – and all of these confusions could and should have been avoided by adopting a clear and transparent process in advance, which is the very purpose of section 34(1)(e)(i). For example, while the Court was advised at the hearing of this matter on 13 December 2016 by the Government Respondents' lead counsel (echoing what was being said outside Court on the day by the acting COO of Eskom, as reported in

[79] Answering Affidavit, para 125.73, Vol 3, p 882-3.

contemporaneous news reports, which the Court was referred to)[80] that a RFP would be issued imminently, Eskom has already changed tack by issuing, instead, on 20 December 2016, a Request for Information (**RFI**). This appears to be obviously different from an RFP, given the description thereof in the covering letter to the RFI, which reads as follows:

> "This RFI is a standalone information-gathering and market-testing exercise only, and is **NOT** a competitive tender. Therefore, the information provided will **not** be used as a basis for awarding a contract or order, or in any manner preclude a supplier's participation in future competitive tender / enquiry. Eskom encourages responses to this RFI to ensure information is sourced which may assist with the preparation of future competitive tender / enquiry relating to the NNBP."[81]

91. All of this highlights that there was a critical need, to ensure transparency, as required by section 217 of the Constitution, and to comply with a constitutional interpretation of section 34(1)(e)(i) which meets the test of legality and rationality, for the procurement procedure to be properly specified in the Determination.

92. The Minister and NERSA have, unlawfully and irrationally, designated Eskom as the procurer, without proper guidelines, and without setting any checks and balances on the procedure it must use when undertaking the procurement.

93. By failing to specify a procurement procedure for new electricity

[80] Applications' supplementary affidavit para 68, p 1613.
[81] RFI, p 1653.

generation capacity derived from nuclear energy, the Minister and NERSA have violated section 34(1)(e)(i), and the requirements of section 217, including that procurement must occur in terms of a transparent system.

94. In conclusion, for the reasons set out above, the failure to specify the procurement procedure to be used rendered the 2016 Determination reviewable on one, more or all of the following grounds:

94.1 There was non-compliance with a mandatory and material condition prescribed by an empowering provision (section 34(1)(e)(i) of the ERA) – in terms of section 6(2)(b) of PAJA and/or the principle of legality;

94.2 The decision was materially influenced by an error of law (to the extent the Minister and NERSA failed to appreciate that a procedure had to be properly specified) – in terms of section 6(2)(d) of PAJA and/or the principle of legality;

94.3 The decision was irrational – in term of s 6(2)(f)(ii) of PAJA and/or the principle of legality;

94.4 The decision was unreasonable – in terms of section 6(2(h) of PAJA.

E. 2016 Determination fails to withdraw or amend the 2013 s34 Determination

95. The Minister indicated that the intended purpose of the 2016 Determination was to amend the 2013 s 34 Determination.[82]

96. Similarly, NERSA believed that it was concurring in an amendment to the 2013 s 34 Determination.[83]

97. Despite the Minister's and NERSA's stated intention in making the 2016 Determination, the Determination does not on its own terms amend, revise or withdraw the 2013 s 34 Determination, and does not purport to do so.

98. As noted above, the 2016 Determination makes no reference to the s 2013 s 34 Determination: it does not purport to amend it, repeal it, or replace it.

99. Thus, Minister and NERSA have not, despite their apparent purpose in making the 2016 Determination, in fact withdrawn or amended the 2013 s 34 Determination.

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[82] See Minister's supplementary affidavit para 16, p 1523, read with the Minister's letter sent on 5 December 2016 to NERSA requesting its concurrence (p 1564-5), wherein she states that "*the Section 34(1) Determination must be amended. Accordingly, we seek your concurrence with the Section 34(1) Determination which is attached herewith***."** See also the Decision Memorandum paras 3.3. and 3.5, p 1541.

[83] In particular, in its resolution, the following recommendation is made and approved:
It is recommended that Electricity Subcommittee approve the:
6.1 Concurrence with **the proposed amendment by the Minister in relation to clause 5 of the Energy Regulator decision of 26 November 2013**.
6.2 The **amendment of the decision of the Energy Regulator of 26 November 2013**. (emphasis added)

100. In the circumstances, the 2016 Determination is irrational and/or based on a material error of law or fact (this violates the principle of legality and the requirements of sections 6(2)(d), 6(2)(e)(iii), and/or 6(2)(f)(ii) of PAJA):

100.1 The Minister and NERSA intended to amend the 2013 s 34 Determination;

100.2 Yet, the 2016 Determination, is on its own terms, completely self-standing – it neither purports to repeal and replace the 2013 Determination, nor to amend it;

100.3 This results in the anomalous situation where two gazetted s 34 nuclear Determinations, on their own terms, have the force of law, yet are mutually inconsistent, since the 2013 Determination designates the DOE as the procuring agency of the nuclear power programme, and the 2016 Determination designates Eskom as the procurer of the nuclear power programme.

V. THE APPROPRIATE RELIEF

101. As pointed out in the main heads of argument:

101.1 Section 172(1)(a) provides that "*[w]hen deciding a constitutional matter within its power, a court…must declare that any law or*

conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency".

101.2 Therefore, in terms of section 172(1)(a) of the Constitution, when a Court considers remedy, the starting point, as a matter of constitutional principle, is that invalid administrative or executive conduct, ***must*** be declared unconstitutional and invalid.[84]

102. The relief sought in the amended notice of motion[85] as it stood prior to the filing of the supplementary papers in relation to the 2016 Determination, is dealt with fully in the main heads of argument,[86] and is, with certain additions, persisted with.

103. There can be no suggestion that the 2016 Determination would have any relevance to the relief sought in prayers 1 and 2, in relation to the IGAs. That relief and the basis therefor is dealt with in the main heads of argument.

104. It is submitted that the fact of the 2016 Determination also does not change the need for the relief already sought in prayers 3 and 4(a). The Minister's supplementary affidavit does not make any averments relating

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[84] *Bengwenyama Minerals (Pty) Limited v Genorah Resources (Pty) Limited* 2011 (4) SA 113 (CC) paras 81 - 82; *AllPay I* para 56.

[85] Vol 2, p 359-360.

[86] Main heads of argument paras 253 - 287

to the effect, if any, that the 2016 Determination is alleged to have on the relief in relation to the 2013 s 34 Determination. However, in oral argument on 13 December 2016, there appeared to be some initial submission by government's lead counsel that the 2016 Determination would make the determination of the validity of the 2013 Determination moot.

105. In the circumstances, it is necessary to make certain submissions in relation to the relief sought in prayer 3 and prayer 4 of the amended notice of motion.

106. ***First***, the Minister's and NERSA's continued failure, in taking the 2016 Determination, to comply with the requirements of section 34, once again highlights the need for the general declaratory relief in relation to section 34 that has always been sought in prayer 3.

107. ***Second***, a case or issue is moot only if it no longer presents an existing or live controversy.[87]

108. Issues of legality are always important, and require the courts to say plainly what their conclusions on those issues are, because unlawful conduct on the part of the state is inimical to the rule of law and to the

[87] See *Buthelezi and Another v Minister of Home Affairs and Others* 2013 (3) SA 325 (SCA) para 3 and 4; *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) para 11.

development of a society based on the Constitution's founding values.[88]

109. In this matter there is clearly a live controversy as to the lawfulness of the 2013 s 34 Determination.

110. Furthermore:

110.1 given that the 2013 s 34 Determination continues to have the force of law, since the 2016 Determination does not purport to repeal or amend it, the grounds of challenge and the relief sought in relation to this Determination and its belated publication in the *Gazette* remain live issues before the Court;

110.2 alternatively, if, despite the clear terms of the 2016 Determination, it is held that the 2016 Determination is merely an amendment to the 2013 s 34 Determination, then if the 2013 s 34 Determination is declared invalid (which would mean that it was void ab initio) as it should be given its unconstitutionality, then this would as a matter of law and fact render the 2016 Determination invalid too (since it would purport to amend a decision that was a nullity – yet, an invalid act,

[88] *Mohamed v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC) at para 70*; Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) at para 32.

being a nullity, cannot be ratified, validated or amended);[89]

110.3 the declaration and grounds of challenge sought in relation to the 2013 s 34 Determination directly implicates the lawfulness and constitutionality of the 2016 Determination.

111. ***Third***, even if a matter is moot, the Court nevertheless has a discretion to determine the matter.[90] The discretion must be exercised according to what the interests of justice require.[91]

112. In *Pillay*[92] the Constitutional Court held, in particularising the type of issues to be taken into account in determining the interests of justice, that:

> "… it may be in the interest of justice to hear a matter even if it is moot if 'any order which [it] may make will have some practical effect either on the parties or on others'. The following factors have been held to be potentially relevant:
>
> - The nature and extent of the practical effect that any possible order might have;
> - The importance of the issue;
> - The complexity of the issue;
> - The fullness or otherwise of the argument advanced; and
> - Resolving disputes between different Courts"[93]

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[89] *Kruger v the President 2009 (1) SA 417 (CC)* para 61, 64. As Cora Hoexter states in *Administrative Law in South Africa* 2nd Edition (2012) at 547: "[a]n invalid act, being a nullity, cannot be ratified, 'validated' or amended".

[90] *Independent Electoral Commission v Langeberg* Municipality 2001 (3) SA 925 (CC) para 11.

[91] *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 32.

[92] 2008 (1) SA 474 (CC)

[93] Para 32.

113. It is submitted that regardless of whether there could be any argument as to the mootness of the constitutionality of the 2013 s 34 Determination, it is in the interests of justice for the Court to determine its constitutionality, given that:[94]

113.1 the determination of the issues will be relevant for future section 34 Determinations, including the 2016 Determination;

113.2 the Court has been furnished with full written argument in relation to the constitutionality and lawfulness of 2013 s 34 Determination;

113.3 there is an ongoing dispute between the applicants and the Government respondents as to the lawfulness of the 2013 s 34 Determination;

113.4 the lawfulness of the 2013 Determination raises constitutional issues of grave national importance, having implications for the lawful use of the extraordinary power vested in the Minister and NERSA by section 34;

113.5 given the importance of the constitutional issues presented by this matter, it is therefore essential that this Court say plainly what its conclusions on those issues are, because unlawful conduct on the

[94] *Pillay para 32.*

part of the state is inimical to the rule of law and to the development of a society based on the Constitution's founding values.

114. In relation to the 2016 Determination, we submit as follows:

114.1 The general declaratory relief sought in prayer 3 in relation to the requirements of section 34 would by necessary implication, invalidate or render susceptible to invalidity, the 2016 Determination, since the 2016 Determination does not comply with material parts of that declaration (in relation to the need for public participation, and the need to specify the procurement system or procedure in the Determination).

114.2 Similarly, many of the grounds that provide the basis for the unconstitutionality of the 2013 s 34 Determination (for instance blind reliance on the IRP2010 and the failure to undertake any public participation or other consultation), are equally applicable to the 2016 Determination.

114.3 In the circumstance, (a) for the avoidance of doubt as to the effect of the current relief on the 2016 Determination, and (b) given that the Record of the 2016 Determination clearly indicates that it was unlawful for one, more, or all the reasons set out above, it submitted that it would be in the interest of justice and in accordance with this

Court's duty under section 172 of the Constitution for this Court to expressly declare the 2016 Determination unconstitutional and invalid.

114.4 As with the 2013 s 34 Determination, if the 2016 Determination is invalid, it is clear that any RFP and/or RFI which is issued pursuant to the 2016 Determination would similarly be invalid. The Court should declare this to be so, for the sake of clarity.

115. In conclusion, the applicants persist in seeking the relief as set out in the amended notice of motion, supplemented by a declaration in relation to the 2016 Determination, and consequential relief in relation to any RFP or RFI issued pursuant thereto.

116. The issue of costs is addressed in the main heads of argument, and there is no need to add to what is stated there.[95] Should Eskom, which has now been joined as a respondent (as discussed below), seek to substantively oppose the application and file further papers, then the issue of costs in relation thereto, will be dealt with in supplementary heads of argument.

117. A proposed draft order in accordance therewith, is attached to the

[95] Main heads of argument para 283-287.

applicants' supplementary affidavit.[96]

VI. ESKOM'S JOINDER

118. At the hearing on 13 December 2016 the Court was advised by the Minister (through her lead counsel) that the primary purpose of the 2016 Determination was to designate Eskom as the procurer. It was further understood by all the parties and the Court that the purpose of the postponement and agreed timetable was to allow the 2016 Determination and its lawfulness to be placed before the Court. Accordingly, the applicants immediately after the hearing wrote to Eskom (albeit that Eskom legal representatives attended Court on 13 December 2016, and were present in chambers, when the terms of the postponement were discussed and agreed).[97]

119. In summary:

119.1 Eskom was provided with the paginated papers and heads of argument in the matter (to the extent it did not already have these);

119.2 The applicants proposed that given the Order of the Court, and that the 2016 Determination was to be placed before the Court, in the

[96] Draft Order p 1679-81.
[97] Applicants' supplementary affidavit para 111, p 1642.

event that Eskom wished to join in the matter, it was requested to:

119.2.1 file a joinder application (including any substantive affidavit dealing with the merits of the matter) by not later than 16 January 2017;

119.2.2 with the applicants, to the extent necessary, file an answer to any such application by 23 January 2017.[98]

120. Despite much further correspondence from Eskom's attorneys wherein they promised to give a substantive response, no substantive response indicating whether Eskom intended joining the proceedings, and whether it agreed to the proposed timetable, was timeously received.[99]

121. This necessitated the applicants launching an urgent joinder application.[100] Eskom did not oppose that application. On 25 January 2017, in terms of the order granted by this Court, Eskom was joined as a respondent, and was given time to file any substantive response in this matter, with the applicants given the opportunity thereafter to file a replying affidavit, and with Eskom and the Applicants to file further heads by 15 February 2017 if necessary to deal with these subsequent papers.

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[98] Applicants' supplementary affidavit para 113, p 1643.
[99] See separate joinder application papers.
[100] Ibid.

122. Should Eskom file a substantive response, the applicants will file further papers and heads of argument, to the extent necessary, to deal therewith.

VII. THE MANNER IN WHICH THE 2016 DETERMINATION WAS REVEALED

123. Given the duty on organs of state, such as the Minister, to not play possum with the Court and other parties and to place all relevant facts before the Court,[101] which flows from the constitutional duty to assist the courts,[102] and the general duty of open and accountable government,[103] it is necessary to specifically deal with the way in which the 2016 Determination was revealed, given the fuller facts now detailed in the Minister's supplementary affidavit.

124. At the hearing of this matter on 13 December 2016, the Minister's senior counsel, Mr Oosthuizen SC, advised the Court that he had only learned of the 2016 Determination the day before (12 December 2016) – and that accordingly he would contend that the relief in relation to the 2013 s 34 Determination had become moot. It is notable that even having so learnt of the Determination the day before the hearing, and his newfound instructions to contend for mootness, the Minister's legal team failed to

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[101] *Van Niekerk v City Council of Pretoria* 1997 (3) SA 839 (T) (per Cameron J) para 850.
[102] Section 165 of the Constitution.
[103] Main heads of argument para 49, and the relevant sections in the Constitution and authority referred to therein.

alert the applicants or the Court on 12 December of this development – leaving it instead to the morning of the hearing.

125. Similarly, the Minister states that she only learned of NERSA's concurrence in the 2016 Determination, given on 8 December 2016, on 12 December 2016 (para 15). Of course, why the Minister only sought NERSA's concurrence on 5 December 2016 (rather than on 18 October 2016), mere days before the hearing, is not explained.

126. However, these facts reveal that even though the Minister and her counsel only learned of the concurrence of NERSA on 12 December 2016:

126.1 The Minister had made a decision to take the 2016 Determination on 18 October 2016. She had formally advised Eskom and the MPE of that decision, and that NERSA's concurrence was being sought, on the same date (some two months before the hearing).

126.2 As discussed more fully above, the reason for the Minister taking the decision to make the 2016 Determination was the advice of Mr Oosthuizen SC, given sometime in September 2016 (para 5 of the Minister's supplementary affidavit).

127. None of these material facts – relevant and known months prior to the hearing of 13 and 14 December 2016 (at least by the Minister and the

DOE) – were advised to the Court or to the applicants.

128. Moreover, much as the 2013 s 34 Determination was kept secret and only gazetted two years after it was signed, NERSA was only advised of the Minister's decision to make the 2016 Determination and asked to provide its concurrence, on 5 December 2016, almost two months after the Minister in fact made the decision, by approving the Decision Memorandum. There is no explanation given for this delay, especially given that both Eskom and the MPE were advised at the time the decision was taken on 18 October 2016 (and told, erroneously, that NERSA's concurrence was being sought).

129. This is all highly relevant, given that the Constitutional Court in *Kirland* has held that *"there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the Courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly."*[104]

130. This Court has already marked its displeasure with the actions of the Minister, by ordering that she pay for the costs of postponement on a

[104] *MEC for Health, Eastern Cape & Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) para 82.

punitive scale. Yet, these fuller facts, now emphasise the appropriateness of that order, and given the constitutional obligations on the Minister, these facts should not be allowed to go unmarked.

VIII. CONCLUSION

131. In the premises, the applicants seek the relief more fully set out in the draft order.[105]

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MAX DU PLESSIS
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Chambers, 30 January 2017

[105] Draft Order p1679 -81.

LIST OF AUTHORITIES

Please note that the applicants' list of authorities is as annexed to its main heads of argument, with the addition of the following authorities

CASES

1. *Buthelezi and Another v Minister of Home Affairs and Others* 2013 (3) SA 325 (SCA)
2. *Independent Electoral Commission v Langeberg* Municipality 2001 (3) SA 925 (CC)
3. *Kruger v the President* 2009 (1) SA 417 (CC)
4. *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC)
5. *MEC for Health, Eastern Cape & Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC)
6. *Minister of Trade and Industry and Another v E L Enterprises and Another* 2011 (1) SA 581 (SCA)
7. *Mohamed v President of the Republic of South Africa and Others 2001 (3) SA 893 (CC)*
8. *Pheko and Others v Ekurhuleni Metropolitan Municipality 2012 (2) SA 598 (CC)*
9. *Van Niekerk v City Council of Pretoria* 1997 (3) SA 839 (T)
10. *Van Rooyen and Others v The State and Others* 2002 (5) SA 246 (CC)

LEGISLATION

11. Eskom Conversion Act 13 of 2001

OTHER AUTHORITY

12. Hoexter, *Administrative Law in South Africa*, 2nd Ed (2012)