In the matter of the complaint by:

Organisation Undoing Tax Abuse (OUTA)

COMPLAINANT

and

ESKOM

RESPONDENT

SUMMARY OF CASE AND STATEMENT OF FACTS AND CONTEXT ON BEHALF OF THE COMPLAINANT

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SUMMARY OF CASE AND RELIEF REQUESTED

1. Electricity is a key input into the South African economy. It was historically very affordable, leading to an energy-intensive yet thriving economy.

2. Electricity prices have risen dramatically in the past ten years, due amongst other things to the fact that Eskom has set out on a new-build of power plants that is running severely over budget. It is also likely that poor governance by Eskom's leadership has fostered corruption and maladministration, which has led to price increases.

3. At present power from independent power producers and especially renewable energy is considerably cheaper than new Eskom power and in many cases, cheaper than Eskom's average selling price of electricity. Indeed, the cheapest renewable energy may soon be cheaper than Eskom's average cost of production.

4. This situation is likely to be exacerbated in the next few years as Eskom is allowed by NERSA to again raise its price considerably in order to recoup sunk costs.

5. Consequently, large consumers like municipalities and energy intensive users could buy power from independent power producers at costs far below the costs of buying from Eskom (about 25% now, perhaps 40% in two years).

6. Even if the costs of expanding and running the national grid are compensated for, this price differential would remain significant. This is due to the fact that Eskom is no longer a cost-effective producer of electricity.

7. Eskom is however a vertically integrated monopoly. Its generation division and its grid management functions are imbedded within one State Owned Enterprise.

8. In order to protect the monopoly of its inefficient electricity generation division, Eskom has been engaged in various abuses of its monopoly position and exclusionary acts that deny its competitors access to the national grid.

9. The complaint is that Eskom is abusing its dominant market position in the South African Electricity Supply Industry ("ESI") as a vertically integrated electricity utility who is refusing to

sign Power Purchase Agreements with Independent Power Producers ("IPPs") which have been appointed by the Department of Energy ("DoE") as Preferred Bidders in the DoE's Renewable Energy IPP Procurement Programme ("REIPPPP") (Tender No: DOE/003/13/14), in defiance of Government policy and international conventions signed by the Republic of South Africa, and in attempt to retain its historical electricity generation monopoly for the long term and to squeeze out new market entrants/IPPs and competition from the South African ESI.

10. The complaint is furthermore that Eskom is using the abovementioned recalcitrance, media channels and selective facts (which are not factually accurate regarding renewable energy IPPs) to attempt to influence the policy debate on the country's energy mix in its favour, which policy is underpinned by the Integrated Resource Plan ("IRP") 2010 and updates thereto, most prominently the IRP 2016 just released for comment.

11. The impact of this agitation may be that, while the lowest cost electricity path for the country as per the CSIR would see Eskom's market share drop to approximately 15 – 28% by 2050 (depending on who owns the gas fleet), the building of a large nuclear fleet and continued reliance on coal power would see them maintain a market share of approximately 55 – 70%, depending on the exact scenario that unfolds and who owns the gas fleet. This might extend Eskom's market monopoly into the next century.

12. Eskom's motive is clearly to ensure its dominant position for the next 34 years at least but probably the next 70 - 100 years. If Eskom succeeds in including the unneeded and very expensive nuclear programme in the IRP and/or to continue with such procurement in circumvention of the IRP, its dominant market position will be assured for this period of time unless they meet with insolvency, at great cost to the country and its tax payers.

13. Section 8(b) of the Competition Act prohibits a dominant firm from 'refusing to give access to an essential facility when it is economically feasible to do so.' The national grid is submitted to be an essential facility – "an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers"

14. As appears from the totality of the documentation submitted:

- Eskom is a dominant firm – Eskom's own website indicates that they generate approximately 95% of the electricity used in South Africa and it is undisputed that they have a complete monopoly on transmission and is seen by Government as the 'Single Buyer" of electricity;

- that refuses to give access – it is clear that Eskom is refusing to sign agreements with Independent Power Producers named as preferred bidders under Rounds 3.5 and 4 of the REIPPPP; is defying Ministerial Determinations to so; is ignoring communication from the IPP Office attempting to get these projects to financial close; has been actively and over time seeking ways to stop issuing Budget Quotes for connecting to the grid to these companies and has been programmatically allowing existing and binding Budget Quotes to lapse;

- to competitors – the IPP's are clearly Competitors that are incrementally removing Eskom's position of dominance as they become operational;

- to an essential facility - The national grid is an "essential facility" – "an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers"

- while it is economically feasible to do so – from a national perspective, the CSIR has shown definitively (as has the work done on the IRP at the request of MACE) that a gas and renewable energy future is by far the lowest cost for the country. Thus, it is clearly financially feasible for the country to go down this road that Eskom is trying to scupper. From Eskom's own perspective, it is a national utility that is supposed to serve the country and is wholly owned by Government. Its finances are governed by legislation and Eskom is essentially allowed a certain return on capital deployed which is paid for by NERSA setting electricity rates at a level that would give Eskom their legislated return. It is clear that the costs of connecting IPP's to the grid and also the impact of any loss of sales that Eskom may incur through IPP's coming in all go into the calculation of the electricity tariff that is passed through to the electricity rate payers of the country. Under recoveries and over recoveries are equalised in time through the Regulatory Clearing Account. Eskom at present is over recovering but in the long run will still be brought back to its regulated return. Eskom's absolute profit is a function of its market share (capital deployed) but it should not be Eskom's aim as a national utility to remove all competition. The White Paper on Energy of 1997 envisions exactly the opposite.

15. Moreover, with reference to section 8(c) of the Competition Act which prohibits a dominant firm from "*engaging in an exclusionary act … if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain*.

- Refusing to sign Power Purchase Agreements is an 'exclusionary act' – it 'impedes or prevents' …..IPP's ……. 'from entering into, or expanding within the market'.

- Nothing is gained for the country by Eskom's behavior and it is imminently feasible for them to welcome Independent Power Producers to the grid, as their website purports to do.

16. Eskom's exclusion of Independent Power producers from the national grid amounts to an exclusionary act that has an anti-competitive effect. The anti-competitive effect of the act far outweighs any relevant gains.

17. The effect of Eskom's abuse of its dominant market position and exclusionary acts, if unchecked, would be that the South African economy becomes hostage to Eskom's steeply increasing price path, that the country's competitiveness is very likely to suffer and that economic activity would be suppressed and/or would decline to the prejudice of the common good in the country.

18. Moreover, the nascent Independent Power Producer sector would be destroyed and the capital deployed there would be partially lost with the remainder being deployed elsewhere in the economy or outside the country.

19. In the process Eskom's prices would continue to rise while the costs of domestic solar with storage would continue to drop, risking a cross-over point at some time in the future where a sufficient number of customers have chosen to leave the grid so that the remaining customers can no longer sustain payment of Eskom's fixed costs and marginal costs on a lower base of sales.

20. At that point, on the present trajectory, the Independent Power Producers will have been driven away and South Africa would be left with neither a functional electricity utility nor a thriving private sector. Moreover, unless unbundled, the Eskom's grid operations would be compromised by the problems created by the generation division.

21. These abovementioned actions occur at a time where the country has an opportunity to migrate to a modern and cheap electricity system with affordable electricity, high sustainability and low levels of pollution. This energy future as detailed by the CSIR is dominated by gas and renewable energy and requires Eskom to allow competition into the market.

22. Eskom is however agitating to keep competition out of the market and to steer the country towards a nuclear/coal dominated energy future that will cost the country approximately ZAR 90 billion per annum more than the clean energy future dominated by renewable energy and gas and enabled by Independent Power Producers. The quantum of damage was revealed by the CSIR at the IRP public hearings in December 2016.

23. For order of magnitude, evidence can be tendered that shows that this amount, if not wasted, could pay for the following:

- Free tertiary education for three times the students South Africa has today; or
- It can pay for three new Gautrain projects per year - or about 100 Gautrains by 2050; or
- It can fund the National Health Insurance Scheme within 4 years and 9 times over by 2050; or
- It can fund the cost of approximately 900,000 thousand RDP houses every year (30 million RDP houses by 2050); or
- It can fully fund all free tertiary education in South Africa, build a Gautrain every year, build 90,000 RDP houses every year and still fund the National Health Insurance within about 14 years.

24. Moreover, as detailed in the suite of documents submitted, Eskom is claiming that as a grid operator it does not have the capability to connect the new gas and renewable energy plants

to the national grid fast enough and that therefore, the vastly more expensive nuclear/coal option should be chosen. This unsubstantiated and self-serving claim has now led to an artificial and very low constraint being inserted in the modeling of the country's future energy blueprint (the "IRP") that leads inevitably to a modeling outcome steering us towards the expensive nuclear future. See: CSIR presentation to IRP 2016 hearings, Boksburg, December 2016.

25. It is appreciated that the Competition Commission will conclude the matter as it considers best, given its mandate. OUTA nevertheless submits that the logical end-state in the energy sector would be the following:

- Eskom should be fined now in order to signal that such behavior will not be tolerated;

- Eskom should be unbundled so that its generation and grid operations become the distinct endeavours of two distinct, state-owned corporate entities. The Department of Energy or the National Treasury should become the owner of the national grid company incorporating a market operator while the Department of Public Enterprises can remain as the shareholder of the generation company (for an extensive expert report on the matter, see http://rcci.co.za/wp-content/uploads/2016/11/Eskom-Asset-Restructuring-Tariff-path-project_Final_06052016.pdf);

- In this manner Eskom's present conflict of interest would be removed, allowing the grid company to buy the most inexpensive power available on the market;

- Municipalities should in principle be granted Ministerial Determinations to build their own generation plant or to buy directly from IPP's, as may start to become easier/possible given mooted amendments to the Electricity Regulation Act that are in draft at present;

- The resultant grid company must enable and facilitate a rational Integrated Resource Plan by buying the electricity that the plan requires from both public and private electricity generators;

- The Eskom decommissioning schedule must be completely transparent to allow the Grid operator to clearly understood in the national interest so that we know when the existing capacity will disappear (or not) and so that the required level of capacity can be maintained around it;

- Investigation must be done into adding flexibility to the Eskom coal fleet (eg the ability to operate at intermediate outputs and/or to ramp up and down in response to demand) so that it can support the development of a renewable energy dominated electricity system;

- Any further Eskom new-build should be scrutinized to ensure that the resultant electricity can be provided to the country on a cost-effective and competitive basis;

- The Eskom new-build at Medupi and Kusile should be scrutinized vis-à-vis decommissioning schedules for existing coal plant to ascertain whether some of the inefficient older plants can be commissioned early alternatively whether some of the planned new units should be scrapped entirely or can be postponed;

- Electricity price increases could then be contained by allowing low-cost alternatives to Eskom to gradually penetrate the generation mix to a much greater extent;

- Eskom's amortised plant would still have an important role to play in providing the national economy with low cost electricity until such time as these plants are decommissioned;

- Eskom's sunk costs on plant not yet amortised could then be amortised over an appropriate period of time and financed in a manner that ensures that electricity prices stay stable and the competitiveness of the national economy is maintained;

- An assessment needs to be done to ascertain whether the new Grid Company as a distinct entity from the existing Eskom would have the required skill, ambition, money and know-how to expand and modernize the grid as required by the future energy mix of the country. If not, competition should be considered in that market and/or the entity might be replaced by an international operator that is up to the task.

26. The above is enabled by unbundling Eskom into "GenCo" and "GridCo". The current internal conflicts of interest incentivize Eskom to act in an anti-competitive manner and this can only be resolved by separating the entity as described herein.

27. It is submitted that the Competition Commission has the mandate to do what is required as described above. It can fine Eskom and to order Eskom to refrain from further abuse of their dominant position/refrain from committing further and on-going exclusionary acts.

28. It is further submitted that there is no other remedy than unbundling Eskom to ensure that abuses do not recur in future. This indeed was the very reason why parliament approved the now-abortive ISMO act. Eskom's conflict of interest runs so deep that only extreme bona fides on the part of Eskom can avoid abuses as described herein.

29. At the moment Eskom is deeply implicated in fraudulent practices by both the Public Protector's "State of Capture" report and the Dentons' Report (details below). There is thus no reason to believe that Eskom can be trusted to display bona fides.

30. The Competition Tribunal has the authority to order a divestiture of shares, in terms of sections 58 and 60 of the Act. It is submitted that the unbundling of Eskom into a "GenCo" and "GridCo" as described herein would not amount to a "divestiture" as the State would continue to hold the shares in all assets presently owned by Eskom – the assets would merely be placed in two distinct, state-owned enterprises preferably administered by two distinct ministries.

31. It is submitted that the provisions of section 60 (2) – (4) of the Act would consequently not apply to such an order.

32. It is nevertheless submitted that careful consideration needs to be given by the Commission to what entities may need to be joined should the matter proceed to the Tribunal, with the Republic of South Africa being one possibility.

33. The Competition Commission is requested to:

- Investigate the complaint;
- Move it the tribunal as expeditiously as may be possible;
- Fine Eskom, bearing in mind that a fine against the State Owned Entity might not change the behaviour in that the fines may not be punitive because the fines will be

recouped from the public through tariff increases to the consumer or via treasury intervention;

- Consider a recommendation for the unbundling of Eskom Generation and Eskom Grid Operations into two distinct, state owned entities with two distinct boards serving two distinct agendas;
- Move for such additional and/or further relief from the Tribunal as the Commission may see fit, given the imperatives described above.

34. In the event that the Competition Commission is of the opinion that any of the relief requested herein is beyond the mandate of the Tribunal to order (which is denied), the Commission is requested nevertheless to move for such relief as may be competent at the Tribunal and in parallel, without delay, in terms of section 21 of the Act is requested to investigate the regulatory regime permitting the present abuse (section 21(k) would apply) and to report same to the Minister of Trade and Industry, who would then table the report in the National Assembly in terms of section 21(3) of the Act, thus enabling the resolution of the matter by statutory means.

SUMMARY OF EVIDENCE AND SOURCES OF EVIDENCE

35. Eskom is a *dominant firm* – This is most likely not in dispute. As pointed out above, Eskom's own website indicates that they generate approximately 95% of the electricity used in South Africa and it is undisputed that they have a complete monopoly on transmission and is seen by Government as the 'Single Buyer" of electricity. Any uncertainty can be cleared up by NERSA.

36. Eskom refuses and / or delays giving access – Eskom is admitting in the media that it has been refusing to sign agreements with Independent Power Producers named as preferred bidders under Rounds 3.5 and 4 of the REIPPPP. The documentation proving their defiance of Ministerial Determinations to do so and their ignoring of communication from the IPP Office attempting to get these projects to financial close is fully documented by the IPP Office and the documentation is likely also in the possession of NERSA. Eskom's recalcitrance on Budget Quotes is documented by NERSA and more information can be obtained from the IPP Office, who also has a list of all preferred bidders. The preferred bidders can further elucidate the

matter. The illegality of Eskom's actions appear from the opinion of Unterhalter SC, attached hereto as Annexure 1.

37. Eskom mala fides: Eskom's mala fides are revealed by its public campaign against renewable energy and independent power producers, captured in the sections below, as well as in the weight of evidence pointing to deep-seated corruption that emanate from the Public Protector's report, the Dentons' Report and other documentation referred to in sections below.

38. The national grid as an "essential facility" – "an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers" – it is submitted that this is a res ipsa loquitur as there is only one national grid, it is common cause Eskom controls it. If further elucidation is required, NERSA is well placed to do so.

39. It being economically feasible for Eskom to comply – from a national perspective, the CSIR has shown definitively (as has the work done on the IRP at the request of MACE) that a gas and renewable energy future is by far the lowest cost for the country. The CSIR is able to provide voluminous and robust evidence to this effect. The cost of Independent Power to Eskom is a pass-through to the consumer.

40. Eskom is acting illegally: The legal opinion attached as Annexure A is available in the public domain at http://sarec.org.za/legal-opinion-power-purchase-agreements/.

INTRODUCTION

41. OUTA is the complainant in this matter and has duly mandated its representatives to proceed accordingly.

42. The Organisation Undoing Tax Abuse ("OUTA"), is a proudly South African non-profit Civil Action Organisation, comprising of (and supported by) people who have an interest in improving the prosperity of our nation.

43. OUTA is apolitical and relies on funding from the public, business and other donor institutions, who provide the organisation with the mandate to act on behalf of thousands of its members and the general public who give the organisation locus standi to act on their behalf. Its Constitution provides (amongst other things) for the promotion, protection and advancement of the South African Constitution.

44. OUTA in addition to acting for its members as electricity rate payers is one itself. OUTA has been actively participating in discussions relating to the IRP 2016 and various processes requiring public hearings by NERSA.

45. The content hereof is true and to the best of our knowledge correct and provided in support of a complaint lodged to the Competition Commission South Africa. The material is further relevant to a related complaint filed on 14 October 2016 by the South African Wind Energy Association with the National Energy Regulator ("NERSA").

JURISDICTION

46. It is our understanding that this complaint against Eskom falls under the concurrent jurisdiction of the National Energy Regulator and the Competition Commission (herein referred to as "the Commission").

- In terms of General Notice 3067 published in the Government Gazette on 29 November 2002, a memorandum of agreement was entered into between NERSA's predecessor in title and the Commission.

- Our understanding of the MOA is that both have jurisdiction to hear the present matter and will cooperate to resolve the matter as they see fit (See preamble and section 3 of the document).

- The matter is lodged with the Commission and will be forwarded to NERSA after being lodged.

PENDING COMPLAINT PROCEEDINGS AGAINST ESKOM AT NERSA

47. Eskom's exclusionary acts and abuse of dominance as they pertain to the exclusion of Independent Power Producers from the grid (particularly REIPPPP Round 3.5 and 4 successful bidders) are presently preventing infrastructure projects worth more than ZAR 50 billion from commencing.

48. Spades are literally ready to go into the ground the moment Eskom signs these agreements and restores the validity of Budget Quotes.

49. Eskom has however been frustrating the process for several months, leading to a complaint by the South African Wind Energy Association to NERSA on 14 October 2016 in which NERSA is requested to direct Eskom to comply with Ministerial Determinations and sign the Power Purchase Agreements and further that NERSA fines Eskom should they remain defiant.

50. The process is proceeding and NERSA's ruling is awaited.

51. In the course of the proceedings it emerged that the IPP Office wrote to Eskom on five separate occasions to set up the signature of the said REIPPPP agreements and was totally ignored on each occasion.

52. Nevertheless it is understood that Eskom's formal position is that it denies refusing to sign the agreements.

53. This formal position contrasts starkly with that of their Acting CEO Mr Koko, who has been strident on social media, especially twitter, on one occasion saying signing would be "MADNESS" to sign and on another indicating that Eskom and Eskom alone would decide what it signs and what not. These quotes appear below in the section "Eskom's recent move against independent power producers and renewable energy".

54. This effectively means that Koko regards Eskom as operating outside the laws and policy frameworks of the Republic of South Africa and as being a complete law unto itself.

55. Much greater detail of Eskom's attack on Independent Power Producers appears below.

BACKGROUD ON THE ELECTRICITY SECTOR IN SOUTH AFRICA

56. The National Energy Regulator of South Africa ("NERSA") regulates the electricity market in South Africa. The market is subject to extensive legislation. Eskom's conflicted position as primary Generator, Grid operator and single buyer is presently entrenched, leading to a high potential for abuse.

57. As mentioned in the introduction to this document, Eskom is a vertically integrated monopoly. It generates the bulk of electricity in the country while also being responsible for electricity transmission, reticulation and distribution.

58. A good summary of Eskom's dominant position can be gleaned from the Eskom website: (http://www.eskom.co.za/OurCompany/CompanyInformation/Pages/Company_Information.aspx)

    Eskom generates approximately 95% of the electricity used in South Africa and approximately 45% of the electricity used in Africa. Eskom generates, transmits and distributes electricity to industrial, mining, commercial, agricultural and residential customers and redistributors. Additional power stations and major power lines are being built to meet rising electricity demand in South Africa. Eskom will continue to focus on improving and strengthening its core business of electricity generation, transmission, trading and distribution.

59. The utility is inherently conflicted in that it is also designated as the "Single Buyer" of electricity from IPP's (see http://www.eskom.co.za/WHATWEREDOING/Pages/GuideIPP.aspx). In this capacity Eskom is at present actively restricting access to the national electricity grid and thereby restricting market entry for IPP's by refusing to buy from them and allowing grid connection documents to lapse.

60. The national grid is an "essential facility" as defined by the Competition Act. The Act defines same as "*an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers*".

61. Eskom fits the definition of a "Dominant firm" as envisioned by section 7(a) of The Competition Act 89 of 1998. It has over 90% of the electricity generation market and has a complete monopoly in electricity transmission.

62. As pointed out in the totality of this document, IPP's are being denied from access to the grid (an "essential facility") by Eskom, a "dominant firm."

63. Many academics and commentators have pointed out Eskom's conflicted position over the years and suggested a separation of its "generation" and "grid" activities into separate state owned entities to remove the conflict. See as one example http://www.fin24.com/Economy/Eskom/eskoms-ipp-snub-shows-need-for-sector-shake-up-eberhard-20160829.

64. The Independent System and Market Operator ("ISMO") Bill was passed by Parliament in order to commence this process of separation, but was allowed to lapse in November 2013. The result was that the status quo persisted.

65. At the time the Minster of Energy also acknowledged the inherent conflict and said that "*Eskom could not be player, referee and linesman*". (Refer to: http://www.bdlive.co.za/business/energy/2014/02/19/eskom-no-longer-player-referee-and-linesman-if-new-plan-is-approved).

66. The said Minister promised that renewed efforts would be made to fast-track the proposed legislation to 'level the playing field' between Eskom (as the monopolistic utility) and IPPs. This however has not happened.

67. Government and the private sector have successfully collaborated through the DoE's REIPP and Coal IPP Procurement Programmes, and Government has successfully procured electricity from renewable energy IPPs over the past few years. Government has successfully managed to procure 6,376 MW capacity from renewable energy IPPs during Rounds 1 to 4 of the REIPPPP (note: certain Round 3.5 and all Round 4 IPPs currently await signing of final Power Purchase Agreements with Eskom in order to achieve financial close and commence construction). The progress in the industry is summarised by the Department of Energy as follows (see https://www.ipp-projects.co.za/About):

Introduction to the IPP procurement programme

The National Development Plan (NDP) identifies the need for South Africa to invest in a strong network of economic infrastructure designed to support the country's medium- and long-term economic and social objectives. Energy infrastructure is a critical component that underpins economic activity and growth across the country; it needs to be robust and extensive enough to meet industrial, commercial and household needs.

The NDP requires the development of 10,000 MWs additional electricity capacity to be established by 2025 against the 2013 baseline of 44,000 MWs.

The (policy adjusted) Integrated Resource Plan (IRP) 2010 developed the preferred energy mix with which to meet the electricity needs over a 20 year planning horizon to 2030.

In line with the national commitment to transition to a low carbon economy, 17,800 MW of the 2030 target are expected to be from renewable energy sources, with 5,000 MW to be operational by 2019 and a further 2,000 MW (i.e. combined 7,000 MW) operational by 2020.

Planning requirements further include capacity to supply for base load and medium term risk mitigation (MTRM) plans.

In May 2011, the Department of Energy (DoE) gazetted the Electricity Regulations on New Generation Capacity (New Generation Regulations) under the Electricity Regulation Act (ERA).

The ERA and Regulations enable the Minister of Energy (in consultation with NERSA) to determine what new capacity is required. Ministerial determinations give effect to components of the planning framework of the IRP, as they become relevant.

68. Government has additionally procured a total of 863 MW of independent coal power.

69. When an IPP wants to connect to the grid, the grid operator (currently Eskom) has to make it possible for it to do so. The process is that Eskom provides a Cost Estimate Letter (indicative cost estimate) which is followed by a Budget Quote (a cost that is binding for a period of time that is used by the IPP to calculate whether the project is feasible and sustainable for the long term).

70. Despite the progress that has been made to date (as outlined above and as will appear below in more detail), Eskom is abusing its dominant market position in the ESI and committing exclusionary acts in the following ways:

- By refusing to sign (as it is required to do by Ministerial determination and law) Power Purchase Agreements ("PPAs") with IPP's which have been appointed as preferred bidder projects in Round 4 of the Government's REIPPPP (a legal opinion on the matter appears as Annexure A hereto and is in the public domain at www.sarec.org.za.

- By simultaneously and programmatically allowing all Budget Quotes coming up for renewal to lapse so that the IPPs no longer have valid and binding documents in terms of which Eskom can be compelled to connect them to the grid.

- Eskom's refusal is taking place as the designated "Single Buyer" of electricity, and the effect is clearly to protect Eskom's own electricity generation business.

- IPPs are in direct competition with Eskom's electricity generation business.

- Eskom is impeding and/or preventing private sector firms from entering into, participating in or expanding within the South African electricity industry.

- By disregarding the fact that the Integrated Resource Plan is still under development and by pre-emptively and openly agitating for a future energy mix with a heavy emphasis on nuclear energy. The Department of Energy has indicated that such nuclear energy, if ever procured, would be built by Eskom and the Minister of Energy has made a Ministerial Determination to this effect recently.

- Eskom is however putting not only its generation division but all its divisions at risk of insolvency by pursuing an unaffordable nuclear programme that is highly likely to increase electricity prices to a level where the utility death spiral would be inevitable.

- The Eskom Head of Generation, Mr Koko has been on an intensive and sustained, open media campaign to discredit renewable energy and promote Eskom's ambitions in nuclear energy (more detail appears below). Indeed, he was incongruously included in the Department of Energy panel doing the media briefing on the publication of the IRP 2016 base case in November 2016. See http://www.fin24.com/Economy/Eskom/greenpeace-aims-to-block-anti-green-koko-becoming-eskom-ceo-20161201
- By using its own, alleged incompetence as a reason why the country should have nuclear power and not renewable energy. In this respect Mr Koko has alleged that it is impossible for Eskom to connect the amount of renewables required by the IRP to grid annually:

  "Asked to explain the discrepancy between the Department of Energy's base case timeline and Eskom's plans to procure nuclear by 2025, Koko said if the addition of new renewable energy sources was constrained - as was the case in the 2010 IRP to a maximum of 1 000MW of new capacity per annum - and the country chose to implement a carbon budget, then there was a requirement for 1 359MW of nuclear capacity by 2025, equal to one reactor.

  This would be followed by 2 718MW by 2027 and another reactor by 2030, ultimately reaching more than 20 000MW by 2050.

  Koko said after the briefing the 'writing is on the wall' as far as constraining renewables was concerned because it wasn't possible to expand the capacity of the grid fast enough to accommodate the maximum possible rate of new energy supply from renewable sources.

See: http://www.iol.co.za/business/companies/writings-on-the-wall-says-eskoms-koko-2092578

- Mr Koko's assertions seem self-serving if it is noted that China installed 45 GW of wind and solar PV in 2015 – some twenty eight times more than the assumed limit in South

Africa. India has already achieved more than 5 GW of new PV/Wind connections in 2015 and the trend is very much up for most countries, as appears from the table below.[1]

Countries installing high amounts of renewable energy in 2015 (absolute terms, wind and solar PV, MW)

Country	**New wind power 2010**	**New solar PV 2010**	**Total 2010**	**New wind power 2015 (MW)**	**New solar PV power 2015**	**Total for 2015 (MW)**
China	18,921	500	19,421	30,500	15,130	45,630
USA	5,015	878	5,893	8,598	7,286	15,884
Germany	1,493	7,100	8,593	6,013	1,300	7,313
India	2,139	<161	<3,300	2,623	2,500	5,123
South Africa (limit of ability assumed constant until 2050 in IRP 2016)	*1,600*	*1,000*		*1,600*	*1,000*	*2,600*

In relative terms, the assumptions about South Africa's ability to connect renewable projects to the grid is equally unimpressive relative to what is being achieved internationally, as appears from an extract from the CSIR submission on the IRP public hearings:

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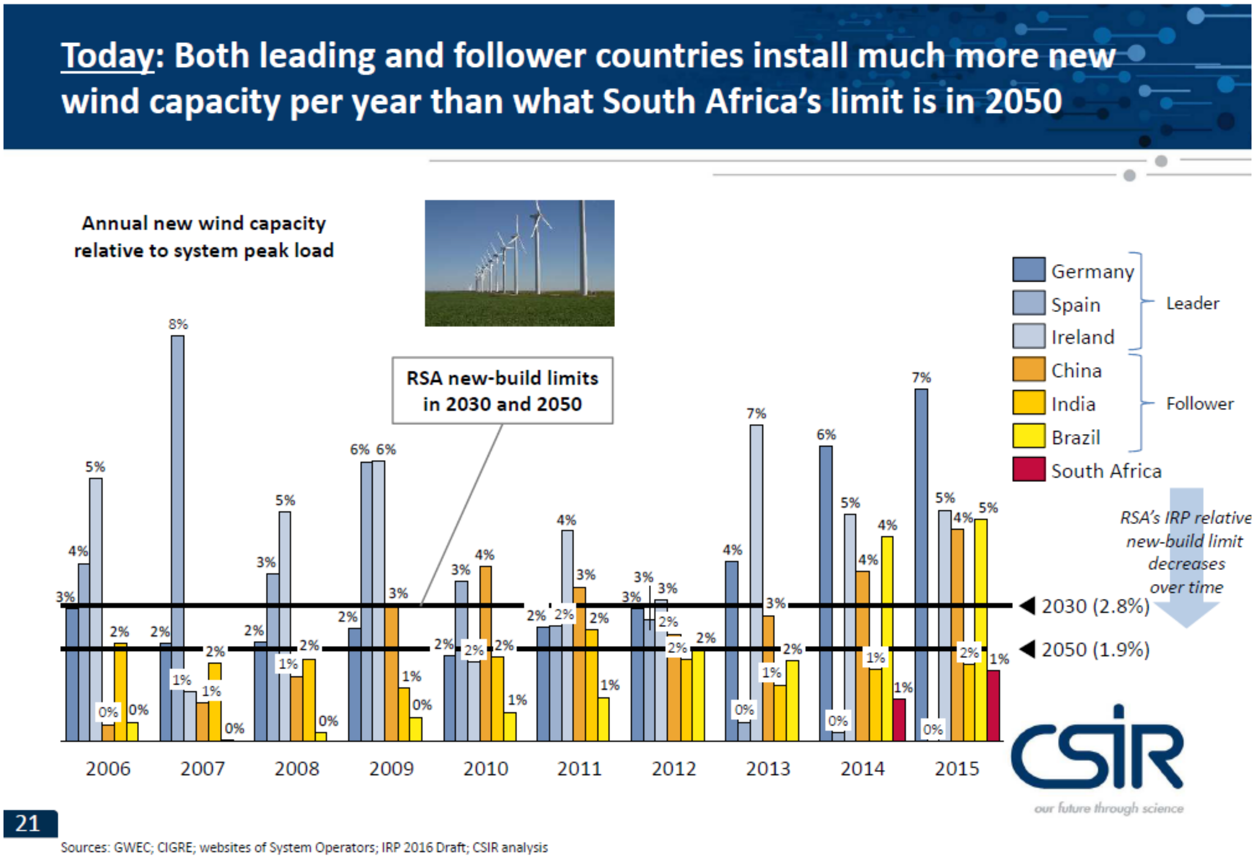
[1] https://en.wikipedia.org/wiki/Wind_power_in_China and https://en.wikipedia.org/wiki/Solar_power_in_China plus http://www.gwec.net/wp-content/uploads/vip/GWEC-PRstats-2015_LR.pdf and http://www.seia.org/news/us-solar-market-sets-new-record-installing-73-gw-solar-pv-2015; https://www.ise.fraunhofer.de/en/publications/veroeffentlichungen-pdf-dateien-en/studien-und-konzeptpapiere/recent-facts-about-photovoltaics-in-germany.pdf; http://mercomcapital.com/indian-solar-market-ready-to-takeoff-says-mercom-capital-group-raising-solar-installation-forecast-to-2.5-gw-for-2015; https://en.wikipedia.org/wiki/Solar_power_in_India; https://en.wikipedia.org/wiki/Solar_power_in_Germany; http://www.gwec.net/publications/global-wind-report-2/global-wind-report-2011/



- While thus claiming to be unable to operate at the level of international grid operators, Eskom somehow believes it can commission around twenty major nuclear power stations in a matter of thirteen years from 2037 without any cost over runs or delays. There is no new-build limit assumed for nuclear power despite the fact that Medupi, Kusile and Ingula are all running several years behind schedule, are 2 to 4 times over budget and that the construction of a nuclear reactor/power station is orders of magnitude more complex than, for instance, building a solar PV plant or expanding the grid.

- While Mr Koko's assertion may prove to be true that Eskom does not have the capability to run a modern electricity grid, there are many public and private sector entities internationally who do and in such a case, the operation of the South African grid should be entrusted to a suitably competent entity.

THE IMPORTANCE OF AFFORDABLE ELECTRICITY IN SOUTH AFRICA

71. The electricity price in South Africa is fundamentally important to economic activity. This is because the economy is energy-intensive with a strong emphasis on mining and minerals beneficiation.

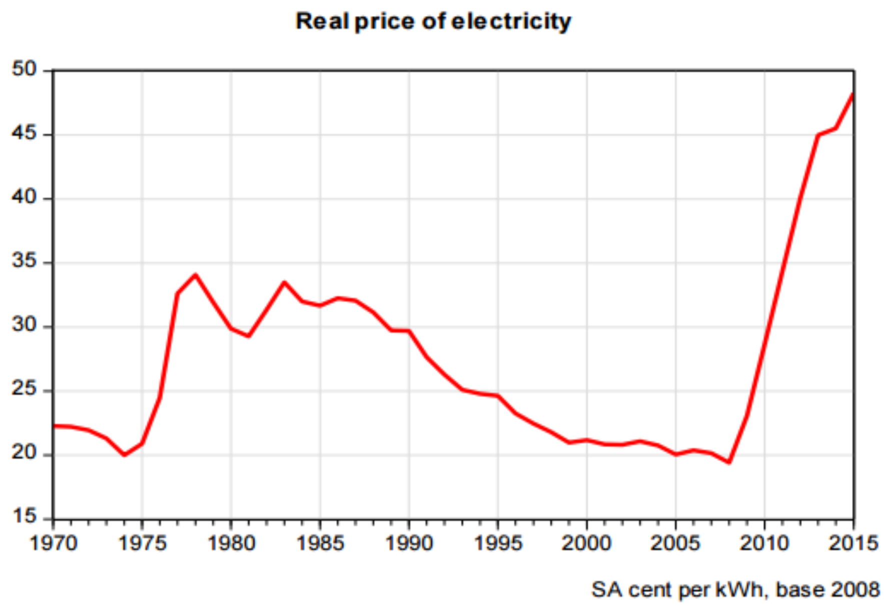
72. To this end it can be noted that the Energy Intensive User's Group consists of 33 companies producing about 20% of the country's Gross Domestic Product ("GDP") and consuming approximately 36% of all electricity in the country.

73. The electricity price is fundamentally important in the success of these companies and many others. These companies are almost invariably also large contributors to the fiscus through various forms of tax and are heavily burdened even in the absence of the price they pay for electricity.

74. Moreover, the South African consumer typically buys electricity from a municipality that typically marks up the price by 60 – 100% (or more) in order to cross-subsidize non-electricity related activities and free basic electricity to the poor.

75. It is clear from the above that it is fundamentally important to keep electricity prices in the country affordable.

76. In the past few years, the electricity price has increased dramatically. The below are <u>real prices that exclude inflation</u>.



See: http://businesstech.co.za/news/energy/91216/eskoms-shocking-annual-price-hike-since-2007

ESKOM'S VIEWS ON THE IMPORTANCE OF INDEPENDENT POWER PRODUCERS (ACCORDING TO ESKOM'S WEBSITE)

77. During the time of energy shortages and load shedding in 2015, Eskom was more than willing to receive all renewable energy as it saved Eskom significant amounts of money in reduced diesel costs from the Open Cycle Gas Turbines ("OCGTs").

78. It was only once the energy shortfall eased that Eskom started to move against renewable energy.

79. The Eskom website still reflects its former consent to implement Government policy on energy and concomitant socio-economic development.

80. Accordingly, it extols the virtues and importance of IPPs. At http://www.eskom.co.za/WHATWEREDOING/Pages/GuideIPP.aspx as of 29 August 2016, they say inter alia the following:

"It is crucial that the private sector plays a role in addressing the future electricity needs of the country. This will reduce the funding burden on Government, relieve the borrowing

requirements of Eskom and introduce generation technologies that Eskom may not consider part of its core function which may play a vital role in the future electricity supply options….The introduction of private sector generation thus has multiple benefits. It will contribute greatly to the diversification of both the supply and nature of energy production, assist in the introduction of new skills and capital into the industry, and enable the benchmarking of performance and pricing."

81. These passages are in stark contrast to Eskom's recent behaviour and utterances. By the measure they have chosen for themselves, they are failing to live up their own standards.

82. These abovementioned actions occur at a time where the country has an opportunity to migrate to a modern electricity system with affordable electricity, high sustainability and low levels of pollution. This energy future is dominated by gas and renewable energy and requires Eskom to allow competition into the market.

83. Eskom is however agitating to keep competition out of the market and to steer the country towards a nuclear/coal dominated energy future that will cost the country approximately ZAR 90 billion per annum more than the clean energy future dominated by renewable energy and gas.

PUBLIC INTEREST IN ESKOM STAYING FINANCIALLY FEASIBLE

84. It was detailed above that an affordable electricity price is crucial to the wellbeing of our economy.

85. Likewise, the existence of a financially sound grid operator is critical to the country. We need at any point in time to be able to operate the national grid successfully and to get electricity from producers to consumers.

86. In the same manner, the country's existing fleet of power stations are critical to maintaining stable and sufficient electricity supply. While most of these power stations are nearing end of life, they are now in the phase of amortization where they can produce electricity affordably - if managed well.

87. In a competitive environment, the grid operations and power generation functions should each be carried out by a distinct entity that can be government owned, if required. This would allow the grid operating entity to look at possible sources of supply dispassionately and to make objective decisions on who electricity is procured from.

88. At present Eskom is still a vertically integrated monopoly but has become a rogue agent serving its own agenda rather than the people of South Africa. Not only has it grossly mismanaged the newbuild programme at Medupi, Kusile and Ingula, it has been deeply implicated in corruption by the report of the Public Protector, called "State of Capture".

89. It has further embarked on a concerted drive to become the owner and operator of a very large fleet of very expensive nuclear power plants that will reportedly cost between ZAR 800 billion and R1,5 trillion and will raise electricity prices to levels where ordinary South African and business most likely would no longer be able to afford it.- See "Eskom to release nuclear RFP this week – Koko" on News24 www.fin24.com>economy>breaking-eskom-to-release-nuclear-rfp-this-week-koko-20161213.

90. In the process, Eskom would suppress demand for its own product through the ever-increasing price path and may very well enter what is colloquially known as the "utility death spiral".

91. Should it meet with insolvency, this would then compromise not only its generation division but also its grid operation function.

92. It is clear that having Eskom as a single monopoly entity creates an aggregation of risk for its non-generation divisions, especially given the nuclear ambitions of its Head of Generation and now Acting CEO, Mr Koko.

93. An unbundling of Eskom would ensure proper governance in at least its grid operations division and likely a better level of governance in its generation division.

94. This is in the public interest in our country.

ESKOM BLOCKING THE COUNTRY FROM PROCEEDING TOWARDS THE FUTURE INTERNATIONAL ELECTRICITY SYSTEM

95. The utility death spiral is an international phenomenon, as pointed out recently by a prominent academic:

The recent misfortunes of Peabody Energy serve as a warning. Innovation towards a low-carbon economy has outflanked large energy behemoths that still depend on fossil fuels. Trying to keep track of the number of households, companies and municipalities that have invested in their own sources of renewable energy has become impossible. The falling cost of photovoltaic generation, the introduction of modular generation capacity, rapid innovation in battery technologies and the ambition of a new generation of energy entrepreneurs has exposed the belief that electricity supply is a natural public good and the exclusive domain of the state.

Within a generation, we will look back on the system under which we relied on; a centrally co-ordinated, state-owned energy utility in the same light as we regard serfs in the feudal manor relying on their lord for food. The types of technologies being pushed by Musk and others have removed the scale economies that justified state-owned energy utilities in the first place.

The shift to cleaner, cheaper and locally controlled electricity was going to happen anyway, but the irony is that Eskom's supply and pricing crises provided just the spur the industry needed to accelerate the quest for alternatives. Necessity mothers invention, but what makes the financial implications of this shift so damaging to Eskom is that it is losing the clients it desperately needs to keep."

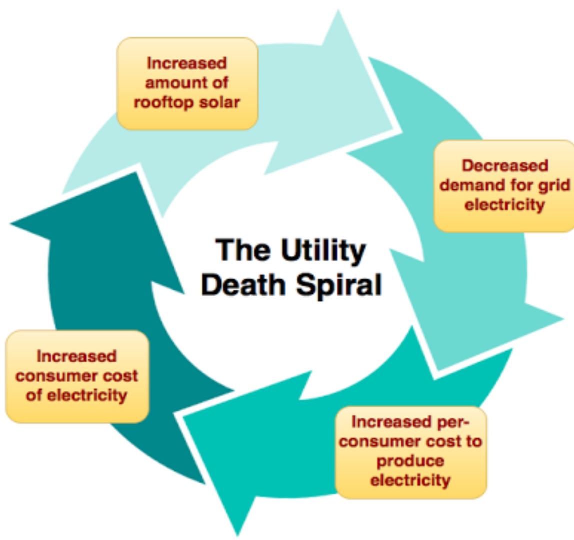
See: Anton Cartwright http://www.businesslive.co.za/bd/opinion/2016-08-04-eskom-can-avoid-going-down-an-evolutionary-cul-de-sac/ Cartwright is a green economy researcher at the African Centre for Cities and a Senior Associate of the Cambridge Institute for Sustainability Leadership.

96. Indeed, there is a fundamental move away from decentralized power generation based on conventional mega-plants selling to consumers. The new world of energy is likely to consist of

distributed/imbedded generation from a multiplicity of sources by "prosumers" who sometimes generate and sometimes consume energy.

97. While the REIPPPP enables mostly large, utility-scale renewable energy (and the Coal IPP Programme enables medium scale, private coal plants) energy policy and the reality in South Africa have been moving towards the developments described above.

98. Eskom's abuse of its dominant position and exclusionary acts risk taking not only itself but all of the country onto an evolutionary dead end.

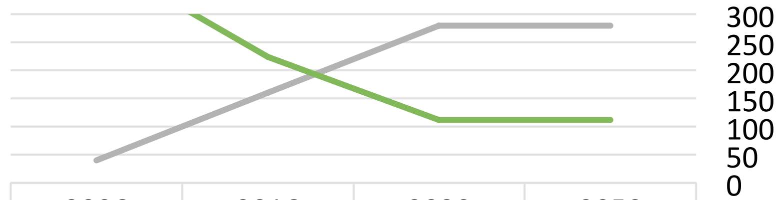


Source: Google images "Utility death spiral"

99. The image above uses increased solar PV rooftop as the trigger but the vicious cycle could equally be triggered by increased energy efficiency and/or a lowering of energy intensive economic activity due to increased electricity prices.

100. Below, an indicative example is given of how a nuclear build might create incentives for grid defection and put in motion the utility death spiral.

Grid defection under a nuclear scenario – municipal vs off-grid costs (shopping centre)



	2006	2016	2030	2050
Eskom average sale price c/kWh				
Eskom average sale price c/kWh with nuclear				
Municipal sale price c/kWh with nuclear	40	160	280	280
Wind costs/kWh LCOE				
Solar costs/kWh LCOE				
Rooftop PV plus storage LCOE c/kWh	400	224	112	112

Source: SA Renewable Energy Council: "Energy storage business briefing", Long Beach, California, April 2016

<u>THE IRP AND THE SERIES OF MINISTERIAL DETERMINATIONS SINCE 2010</u>

101. The Integrated Resource Plan or "IRP" is South Africa's energy blueprint for the next twenty years. It is based on extensive computer modelling done by Eskom staff with inputs from other parties under the leadership of the Department of Energy that produces a "lowest cost" scenario which is then "policy adjusted" to best reflect a balance of cost and policy objectives.

102. The IRP was modelled and finalised in 2010 but has not been updated since. A 2016 version has been published for public comment.

103. A copy of the "policy adjusted" IRP 2010 can be found at http://www.energy.gov.za/IRP/irp%20files/IRP2010_2030_Final_Report_20110325.pdf.

104. Page 7 of the document contains an excellent visual representation of the lowest cost and the policy adjusted scenarios. It is important to keep in mind that the lowest cost model

contained more renewable energy but was adjusted down. Please refer to the footnote below[2].

105. The conversion from energy plan into practice takes place via Ministerial Determinations made by the Minister of Energy in terms of section 6 of the Electricity Regulation on New Generation Capacity ("the Regulations") gazetted on 4 May 2011 in terms of the Electricity Regulation Act no 4 of 2006 ("ERA"), determining that a certain amount of energy capacity (measured in

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[2] The main "policy adjustment" away from the mathematical least-cost option was the introduction of a 9.6 GW nuclear fleet to cater for uncertainties (at the time) around the (at the time) for-casted cost reductions of renewables. In 2010, a number of scenarios were tested, based on the input assumptions that were applicable at that time. All scenarios were optimised to be "least cost" within the boundary conditions imposed on them. The "Base Case" was the least-cost scenario without a CO2-emission limit imposed on the model. It neither included nuclear new-build nor renewables. The "Base Case" was almost exclusively coal-based and reflected the status quo. The "Emission Limit" scenario introduced a CO2-emission limit to the model and as a result the model built a nuclear fleet of 9.6 GW (6 x 1.6 GW units) for the power system to be able to stay within the imposed CO2-emission limit. The Revised Balanced Scenario (RBS) was the synthesis of all least-cost optimised scenarios as of October 2010. It included a nuclear fleet of 9.6 GW. A second round of public consultations was then conducted from October 2010 to January 2011. Following the public input, nuclear and renewables costs were adjusted (nuclear up, renewables down) and solar technologies were disaggregated. As a result, the new least-cost base case was now the scenario "Adjusted Emission", which still had the same CO2-emission limit as per the RBS, but did not include the nuclear fleet anymore. The nuclear fleet of the RBS was replaced by a mix of solar PV, wind, CSP and natural gas. The model only built nuclear in the scenarios "Risk Averse" and "Peak Oil". "Risk Averse" limited the amount of allowable imported electricity, which in return required more domestic power generation. Because wind and solar PV were artificially limited to 1.6 GW/a and 1 GW/a speed of roll-out and to 10 GW of total installed capacity each, the model had no other choice but to build nuclear as the only domestic, carbon-neutral source of electricity (more domestic coal was not an option for the model because of the CO2 limit). "Peak Oil" assumed higher cost of coal, which made both nuclear and renewables cost competitive to new coal. Therefore less new coal plants were built in this scenario. The gap in electricity could not be filled with wind and solar PV (because of the annual new-build limits and the total capacity cap), and hence the model had no other choice but to build nuclear. The synthesis of the new least-cost scenarios from February 2011, which all imposed a CO2-emission limit was the Policy-Adjusted IRP. The policy-adjustment was to keep a 9.6 GW nuclear fleet in the plan (as per RBS), despite the fact that the new least-cost scenarios "Adjusted Emission", "High Efficiency", "Low Growth" and "Earlier Coal" all did not plan any new nuclear, and the only two scenarios with a nuclear fleet were those were renewables ran into artificial new-build constraints. Please refer to page 11 for the policy choice to keep the 9.6 GW fleet in the plan. Please refer to page 28 for a comparison of Base Case, RBS, and Policy-Adjusted IRP. Please refer to page 41 for a comparison of all least-cost scenarios after consultation process (February 2011).

MegaWatts) should be established for a specific technology and specifying that the capacity should be built by the private sector or by Eskom.

106. At this point the competitive procurement process commences and Eskom has no discretion regarding from whom the power must be purchased. In the case of the REIPPPP and other IPP procurement programmes, Government manages a competitive bidding process and Eskom is obliged to buy the power from whomever the DoE selects as a winning bidder in the procurement programme. Section 7(3) of the Regulations confirm this, as does the legal opinion referred to above.

107. The REIPPPP process has run through 3 successful bidding rounds and the DoE has appointed Preferred Bidder projects in the REIPPPP bid rounds 3.5 and 4 and these IPPs are approaching financial close and commencement of construction, but for signing of the PPAs with Eskom.

108. Copies of relevant Ministerial Determinations are in the possession of NERSA but can be supplied if required. As appears therefrom, the Ministerial Determinations in total exceed the amount of megawatts procured and built by renewable energy IPPs thus far. There is therefore a remaining allocation for renewable energy IPPs and it is expected that there will be a continuation and expansion of the renewable energy industry in South Africa in the short and medium term.

109. Eskom has no legal basis to call for renewed debate about the IRP nor to refuse to sign the PPAs with the Preferred Bidder IPPs in the DoE's REIPPPP. The decisions on what a policy adjusted IRP looks like take place at a Government level far above Eskom and Eskom has no discretion but to follow the decisions of Government in this regard. See again the legal opinion referred to above.

110. The cost of the electricity procured from IPPs is a pass-through to the South African electricity consumer via the electricity tariff approved by NERSA (see section 34 of the ERA, read with sections 6 and 10 of the Regulations). Procuring power from renewable energy IPPs does not "cost" Eskom anything but has led to Eskom attempting to protect its monopoly position in the electricity industry.

111. Indeed, perusal of the NERSA's document on Eskom's Revenue Application - Multi Year Price Determination 2013/14 to 2017/18 (MYPD3) available at: http://www.eskom.co.za/CustomerCare/MYPD3/Documents/NersaReasonsforDecision.pdf as compared with records of actual spend kept by the DoE's IPP Office demonstrates that Eskom has thus far over-recovered about ZAR 1.6 billion from the South African consumer for renewable energy.

112. This will likely be equalised later through the NERSA's Regulatory Clearing Account but as things stand today, electricity generation from renewable energy IPPs has not cost Eskom anything, and Eskom has in fact over-recovered by ZAR 1.6 billion.

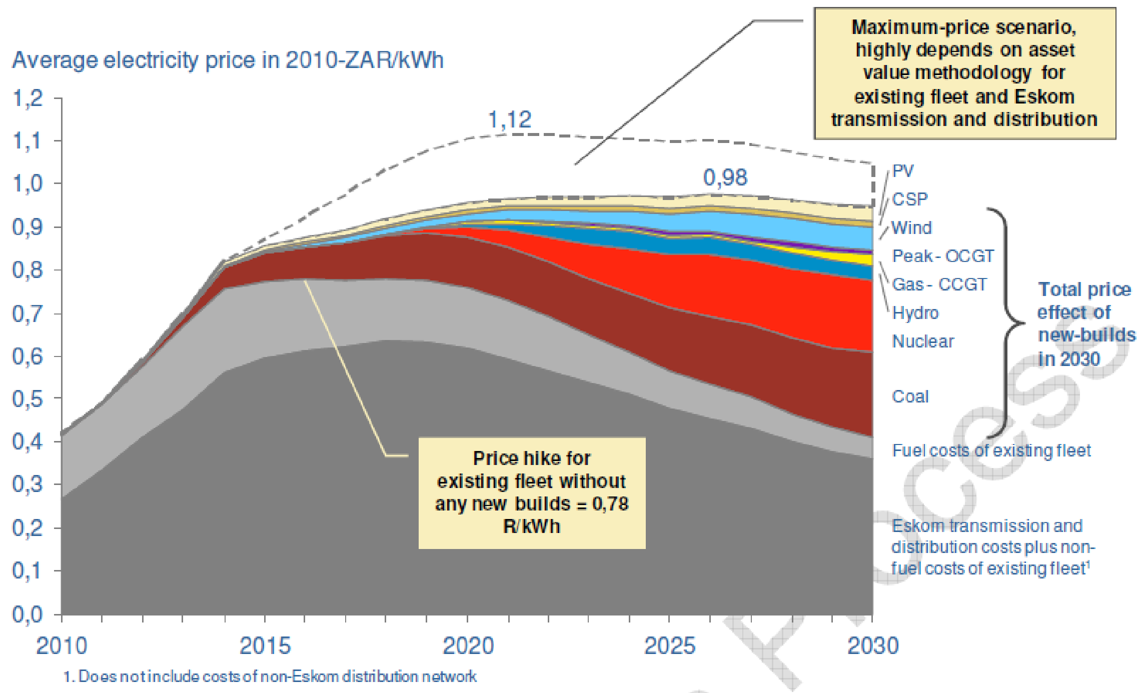
113. While renewable energy produced by the private sector can never cost Eskom money, what does happen is that Eskom as the (single) buyer of electricity can be forced into buying electricity not produced by Eskom. In this way, Eskom's sales would effectively be reduced below what would otherwise be the case. Even if it is in the best interests of South Africa to buy extremely cost competitive electricity from IPP's, it is not in Eskom's interest that this occurs.

114. It is precisely to prevent this loss of profit and market monopoly that Eskom is now abusing its dominant position as a vertically integrated electricity utility by refusing to sign PPAs with IPPs, which have participated in a comprehensive procurement process costing each of them up to ZAR 15 million in development and bidding costs, and having been selected as Preferred Bidders by the DoE in the REIPPPP. The REIPPPP process has duly taken place in accordance with Ministerial Determinations, Government policy and South Africa's international climate change obligations. Eskom is now attempting to prevent DoE and the Preferred Bidder IPPs from achieving the final hurdle in the REIPPPP process, being financial close, before they can commence construction and operations.

115. Eskom is unilaterally appointing itself as arbiter of South Africa's energy policy and best interest after the fact, as is detailed below.

116. Moreover, Eskom is distorting the facts on the reasons for recent electricity price increases. The graph below is taken from the IRP 2010 (page 20) and shows the drivers of cost escalations in energy.

Figure 4. Breakdown of anticipated average electricity price path[2]



117. As is abundantly clear from the above (look at everything above the light blue section), renewable energy is a tiny component of price increases while the Eskom new build, transmission and coal costs are the elephant in the room.

118. Eskom's media campaign against independent power producers and especially renewable energy is attempting to reverse these roles in the minds of the public and media.

119. NERSA assesses value for money before granting Independent Power Producers a generation licence and Eskom's assertions that purchasing such power is "INSANE" and should be reconsidered in a public debate effectively constitutes contempt for NERSA's authority and decision-making.

120. The IRP 2016 has just been published for public comment. In the "base case", nuclear energy is only required in 2037 while in the unconstrained renewables scenario (arguably the "true base case") there is no nuclear power.

121. Despite the fact that lead time for nuclear in generally assumed to be about 10 years, Eskom has been insisting that it will forge ahead immediately with a nuclear Request for Interest

("RFI"). This was issued late in December 2016 and puts Eskom at odds with government about energy policy once again. This has led to a public expression of concern by Business Unity South Africa about the misalignment. See http://www.iol.co.za/business/news/eskom-proceeds-with-nuclear-preparations-2092492 and http://www.miningweekly.com/article/busa-concerned-about-eskom-govt-misalignment-on-nuclear-component-of-irp-2016-11-24

122. Indeed, esteemed commentators have concluded that the IRP 2016 has been manipulated and/or reverse engineered to ensure that nuclear power does not drop out of the equation altogether.

THE REIPPPP PROGRAMME AND THE GROWTH OF INDEPENDENT POWER PRODUCERS IN SOUTH AFRICA

123. The Renewable Energy Independent Power Producer Programme or 'REIPPPP" is an internationally acclaimed success that has created a ZAR 192 billion industry in the country within 5 years, all with private money. From Bid window 1 – 4, ZAR 53.4 billion in foreign equity and financing will flow into the country (IPP Office). See Ernest and Young "Africa Attractiveness Report 2016 http://www.ey.com/Publication/vwLUAssets/ey-africa-attractiveness-program-2016/$FILE/ey-africa-attractiveness-program-2016.pdf for an account how renewable energy took South Africa to the top of the African list. See also http://www.engineeringnews.co.za/article/awareness-low-of-south-africas-astounding-renewables-success-us-survey-finds-2016-12-01

124. A report commissioned by the Public-Private Infrastructure Advisory Facility ("PPIAF") in the World Bank Group has quoted an investor calling it "the most successful public-private partnership in Africa in the last 20 years". The report is available at http://www.gsb.uct.ac.za/files/PPIAFReport.pdf and while it does not contain the very latest information (it is dated May 2014) the executive summary on pages 7 – 9 nevertheless gives an excellent overview of the programme. Further detail is available at http://www.ipprenewables.co.za.

125. The salient points are the following:

- It is a competitive bidding programme with safeguards built in to ensure that the renewable energy projects that are bid, are built. To date, near all IPPs which have been appointed as Preferred Bidders in REIPPPP have proceeded to (or are in the process of) construction, commissioning and operations.

- Multiple bidding rounds (Rounds 1 - 4 and Expedited Bid Window) have led to a significant decrease in tariffs to such an extent that the lowest tariffs bid from both wind and solar PV projects are now approaching 50% of the projected cost of the power from Eskom's Medupi power plant (more detail below).

- REIPPPP has a clear objective of achieving socio-economic development and enterprise development in rural communities in South Africa. In addition to compulsory local community ownership of renewable energy projects, IPPs are required to invest a proportion of project revenues into socio-economic and enterprise development contributions to communities located within a 50 kilometer radius of the project. In total, this has led to about ZAR 19 billion (in nominal terms) being set aside for these initiatives over the next twenty or so.

- REIPPPP projects are funded entirely by the private sector, and no money needs to be diverted from other Government imperatives like healthcare or education. South African electricity consumers pay only for the electricity over the life of the renewable energy projects via the electricity tariff.

- Risks of time and cost over-runs are minimized as the renewable energy projects are run by private sector investors who are highly cost and time efficient.

- REIPPPP has created over 90 South African IPP companies in only five years, diversifying the market away from Eskom's near-complete monopoly. Many of these renewable energy projects are already in operations, generating electricity for the South African grid.

126. In her introduction to a 2015 report on 'the State of Renewable Energy in South Africa", published by the DoE with the assistance of GIZ, the Minister of Energy said:

"South Africa has taken off on a new trajectory of sustainable growth and development; there is no turning back. Since 2011 the country has introduced a world class competitive

bidding process, which to date has delivered 92 Independent Power Producers who will contribute in excess of 6,327 MW. This world-renowned programme is set to inform the design of other related programmes on the continent and across the globe. The REIPPPP programme has successfully created an enabling framework for attracting substantial private sector expertise and investment for utility scale RE. It has delivered cost effective, clean energy infrastructure to the country and contributed to security of electricity supply that is expected to bring about a virtuous circle of investment and economic growth. In a period of just less than five years, we are proud to have secured a position among the top-10 countries in the world with significant investments in RE technologies. Pioneering work by officials within Government, state owned entities, the private sector and the international donor community, contributed immensely towards the achievement of this milestone – and for this, South Africa will always be grateful."

127. The report goes on to provide excellent background material and to detail the multiple socio-economic and pure economic benefits of the REIPPPP.

128. The success of the programme has led Government to expand and expedite it. More detail can be found in a media statement by the Minister of Energy at https://www.ipp-projects.co.za/Home/PressCentre, titled "Minister's speech in respect of Expansion and Acceleration of the Independent Power Producer Procurement Programme".

129. Since the inception of REIPPPP, the prices of renewable energy technologies globally have become even more cost competitive.

130. Renewable Energy IPPs have demonstrated that the private sector can successfully deliver power to the South African ESI at extremely cost competitive tariffs, with no cost overruns or time delays. The steadily declining tariffs over the REIPPPP bidding rounds has demonstrated that renewable energy power led by wind power is the cheapest form of new generation capacity in the country. It is questionable, therefore, that Eskom would wish to stall the REIPPPP, unless Eskom is doing so in order to protect its own monopoly interests in the industry.

THE REIPPP PROGRAMME VIS-À-VIS THE AIMS OF THE COMPETITION ACT 89 of 1998

131. Renewable Energy is a fast-growing infrastructure sector presently in South Africa worth ZAR 192 billion and delivering renewable and clean energy to the country at as little as 56c/kWh, which is approximately half the cost of new coal power built by Eskom.

132. Community shareholding in these projects is estimated to be worth more than ZAR 10 billion and approximately ZAR 19 billion has been set aside for socio-economic development around renewable energy plants.

133. The great majority of loan finance for these projects comes from South African banks, while the local content level for these projects is often over 50%.

134. New market entrants include many local companies large and small as well as international players with household names like Siemens, Vestas, Globeleq, Enel Green Power and others.

135. During 2011, the South African Government articulated and communicated a comprehensive, ambitious vision regarding the creation of a Green Economy. This was done through the NEDLAC structures and led to multi-lateral conversations between Government, Business (BUSA), Labour and Communities. The renewable energy community took part in these conversations and assisted in the development of the Green Economy Accord, which was signed in November 2011. The document is available online at http://www.sarec.org.za/Accord_GREEN.pdf.

136. The REIPPP Programme shows good alignment with the aims of the Competition Act on a number of points (numbered to correspond with sub-sections of section 2 of the Act):

a) It promotes efficiency, adaptability and development of the economy in various ways. It brings the cheapest source of new electricity to the country, creates diversity and thus adaptability into the energy mix and allows for the development of the economy by providing affordable electricity, working for localisation of supply chains and working to uplift communities and create enterprises in rural areas;

b) It provides in the case of wind power and solar PV power rate payers with competitive prices well below the cost of new Eskom power and indeed below the cost of any other power at bulk scale from either the private of public sector;

c) Through the innovative and world-leading socio-economic development initiatives, it promotes employment and advances the social and economic welfare of South Africans;

d) It expands opportunities for South African participation in world markets and recognises the role of foreign competition in the country. One example of this is that wind turbine service technicians are already being trained at the SARETEC Centre in Cape Town to standards that make them employable all across Africa and indeed the globe. Another example is the local presence of Italian, French, Spanish and other international renewable energy companies bringing international expertise and low cost of capital to the country.

e) If measured against the size of Eskom, more than 90 medium-sized renewable energy enterprises already have an equitable opportunity to participate in the South African economy.

f) Through the community ownership structures and through the broader BBBEE requirements of the REIPPPP, a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons, is achieved.

THE DEPARTMENT OF ENERGY AS "PROCURER", ESKOM AS BUYER" _- ESKOM HAS NO DISCRETION BUT IS SUPPOSED TO FOLLOW NATIONAL ENERGY POLICY

137. As alluded to above, the procurement of energy in South Africa is done in accordance with the IRP, and through Ministerial Determinations from the Minister of Energy.

138. Eskom by virtue of being designated as the "Single Buyer" of electricity in the country is the ultimate buyer but has no discretion on whether to buy or not and from whom.

139. The costs of procuring electricity are a pass through to South African electricity consumers via the electricity tariff and Eskom makes neither profit nor loss on the energy procured (including from IPPs).

140. As alluded to above, the procurement of energy in the country is guided by the IRP, through Ministerial Determination from the Minister of Energy.

141. NERSA constitutes the safety net at the end of the process, assessing value for money as described above.

THE BENEFIT TO ESKOM AND SOUTH AFRICA OF RENEWABLE ENERGY

142. As will be detailed further below, the cost of renewable energy has dropped dramatically in South Africa and also globally since 2011, when the REIPPPP was launched.

143. The pattern of cost in the introduction of renewable energy in the country was likely to be such that the initial costs were less economical as the new industry is established and the risks are understood, while the later prices would be lower and lower.

144. Due to the electricity shortages in the country this likely trend has been markedly improved upon. The savings in diesel occurring because renewable energy was available meant that some technologies came in at negative cost (less than zero). So for instance, in the first six months of 2015 (later data is not available) wind power saved Eskom and the country the amount of ZAR 300 million (see the CSIR study at http://ntww1.csir.co.za/plsql/ptl0002/PTL0002_PGE157_MEDIA_REL?MEDIA_RELEASE_NO=7526896)

145. This saving was achieved despite the fact that wind power prices have dropped from 114c/kWh is the first bid round to about 56c/kWh in the fourth bid round (these prices are not escalated but quoted as they were at the time).

146. The total saving for the country from renewable energy was ZAR 4 billion, equating to ZAR 2,00/kWh.

THE VERY LOW COST OF RENEWABLE ENERGY VIS-A-VIS NEW ESKOM POWER

147. As detailed in a study by Chris Yelland of EE Publishers, the levelised cost of electricity ("LCOE") for wind and solar PV power has dropped well below the cost of the power from Eskom's coal plants Medupi and Kusile which are currently under construction.

148. More detail is available at http://www.ee.co.za/article/understanding-cost-electricity-medupi-kusile-ipps.html

149. This was acknowledged by the Minister of Energy in her budget speech dated 19 May 2015 in Cape Town, in which she said "*Through the Competitive Procurement approach, the average per kilowatt tariff, in April 2014 terms, for onshore wind has declined by 55% to an average of 62 cents per unit and for solar PV by 76% to 79 cents per unit*".

150. The Minister's speech together with others that are all stressing the success and vital importance to the country of the REIPPP is available in our records in PDF format that cannot easily be attached hereto but can be made available at any time.

151. As detailed below, Eskom is now waging a campaign through the media to manipulate public perception that renewable energy IPPs are the dominant reason why electricity prices have risen.

152. As shown below, this is demonstrably and patently untrue.

ESKOM OVERSPENDING AT MEDUPI, KUSILE AND INGULA PLUS ALLEGATIONS OF CORRUPTION BY THE NATIONAL TREASURY

153. One of the root causes of the steeply rising electricity prices in our country is the extreme over-spend at Medupi and Kusile.

154. As detailed in the last-mentioned article, the Capital Expenditure on these plants are now ZAR 193 billion and ZAR 213 billion respectively.

155. Medupi was originally budgeted to cost ZAR 69 billion (https://en.wikipedia.org/wiki/Medupi_Power_Station) and Kusile ZAR 80 billion (see http://www.dailymaverick.co.za/article/2016-07-07-medupi-kusile-and-the-massive-costtime-overrun/#.V8cZfeQkpxI)

156. The Ingula pumped hydro scheme has increased in price from about ZAR 9 billion to an alleged ZAR 36 billion (see http://www.fin24.com/Economy/Eskom/eskom-under-fire-as-ingula-costs-said-to-balloon-to-r36bn-20160822)

157. These steeply increased costs have resulted in steeply increased electricity prices in the country and have raised considerable unease with regards to the governance of Eskom.

158. In the last week of August 2016 it emerged that the National Treasury states categorically that Eskom has resisted its efforts to investigate possible corruption in Eskom's coal contracts. See http://www.fin24.com/Economy/Eskom/eskom-has-failed-to-honour-coal-review-process-treasury-20160829.

159. Eskom at first indicated that it was "shocked and perplexed" at this allegation and asserted that it had indeed collaborated in the investigation of claims that the utility paid ZAR 134 million for worthless coal. See http://www.fin24.com/Economy/Eskom/eskom-hits-back-at-treasury-over-coal-deals-20160829

160. Soon after the Minister of Public Enterprises intervened to avoid a possible Eskom credit downgrade whereupon Eskom stated that they have "dispatched a driver" to deliver the required documents. See http://www.fin24.com/Economy/Eskom/eskom-gives-in-to-treasury-on-coal-report-20160830

161. The IPP Office that is the custodian of the REIPPPP and is run jointly by the DoE and the National Treasury. It is unclear whether Eskom's last minute refusal to sign further REIPPPP PPAs is connected to its dispute with the National Treasury.

162. On 31 August 2016 Futuregrowth Asset Management (with ZAR 170 billion under management) communicated a decision to suspend loans to a list of State Owned Enterprises including Eskom. The reason given was concern about governance. See http://www.fin24.com/Economy/full-statement-why-futuregrowth-wont-grant-loans-to-soes-20160831.

PRIMA FACIE EVIDENCE OF PROFOUND CORRUPTION AT ESKOM BY THE PUBLIC PROTECTOR

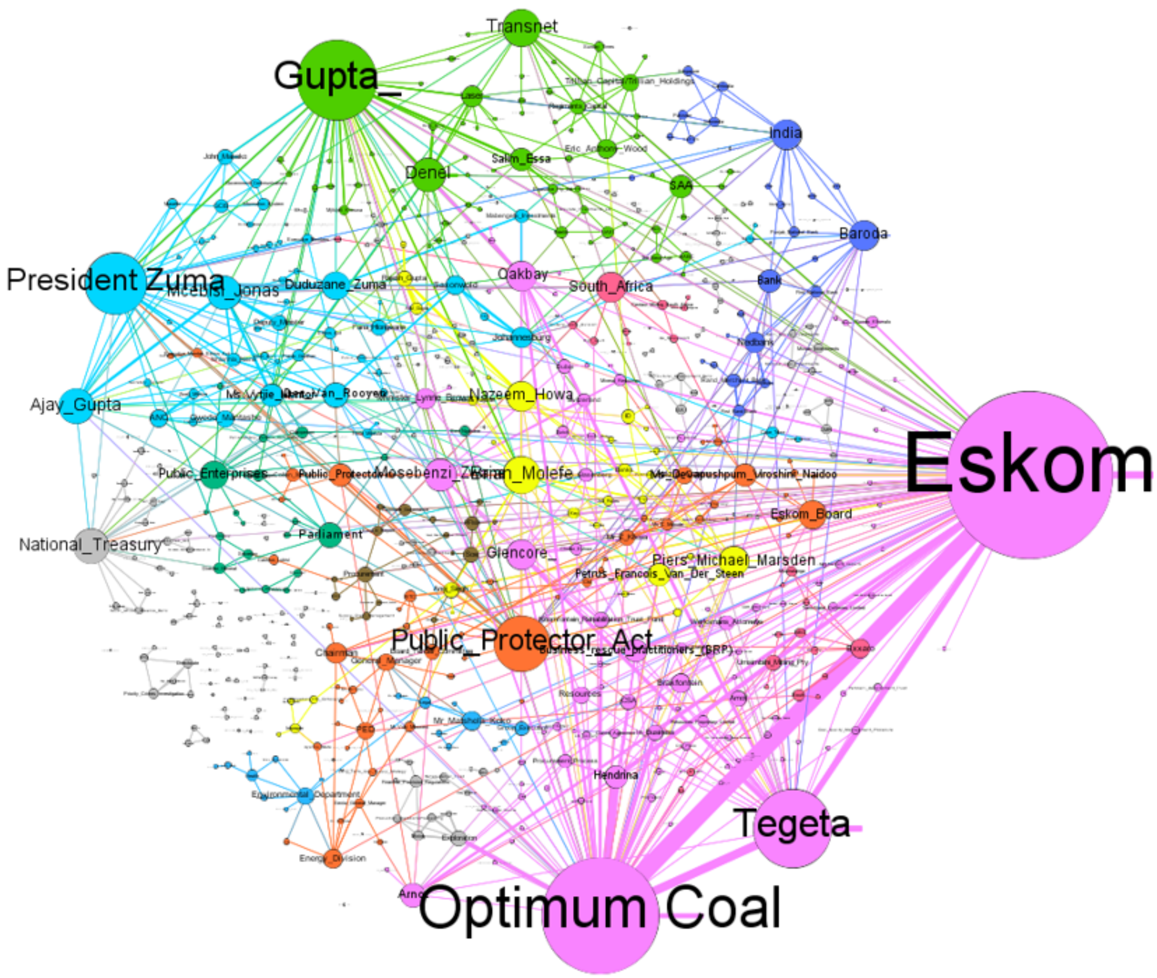
163. The "State of Capture" report by the Public Protector was published early in November 2016. The report finds prima facie evidence of deep-rooted corruption for very large amounts and deeply implicates Eskom. The full report is available at http://www.pprotect.org/library/investigation_report/investigation_report.asp

164. In response, two statisticians used complex techniques to draw a visual presentation of what might be happening in State Capture. http://www.superlinear.co.za/visualising-the-web-of-state-capture/

165. The diagram below is from their report.

166. It is submitted that the full investigation of all this prima facie corruption is likely to leave public confidence in Eskom at an all-time low.

167. Within this context it is intolerable that Eskom wants to play gatekeeper to who enters the electricity market to compete with them. Also that Eskom is manipulating facts and public opinion in the hope that taxpayers will entrust them with an additional ZAR 2 trillion.



Source: http://www.superlinear.co.za/visualising-the-web-of-state-capture/

PRIMA FACIE EVIDENCE OF PROFOUND CORRUPTION AT ESKOM FROM THE "DENTONS' REPORT"

168. The Dentons investigation was ordered by Eskom's Board after the Minister of Public Enterprises indicated she was going to order an Enquiry into Eskom.

169. Eskom then decided to pre-empt the Minister's Enquiry by holding its own investigation.

170. Dentons was asked to investigate the following aspects:

- Poor performance of Generation Plant;
- Delays in bringing new generation plant on stream;
- High costs of Primary Energy;
- Eskom's Financial challenges;
- Integrity of procurement processes and compliance with legislation;
- Contract management, cost escalations and the like;
- Security failures at National Keypoints

171. Whilst the investigation was initially estimated to last at least 12 months, it was eventually severely curtailed by Eskom, ostensibly due to the revelations being made and the implication of highly placed personnel in corruption.

172. Despite being so short lived, the results of the Dentons investigation was so damming that Eskom ordered the first report to be destroyed, in contravention of Company policy.

173. Three further drafts were prohibited from being made publically available.

174. Even the sanitised version now made available to the media contains references to numerous damming acts of corruption from the board downwards, to amounts seemingly in the billions of Rands.

175. Eskom's contention that Dentons investigation was curtailed because it became superfluous is highly questionable as the report itself highlights the fact that time constraints as well as restrictions of access to information prevented a full overview of all the misdemeanours and questionable practices.

176. Even a cursory read of the Dentons report confirms that Eskom has become a "rogue agent" focussed on fulfilling the private aspirations of its directors and managers, at a vast and unquantified cost to the public. The report is available at: https://cdn.mg.co.za/content/documents/2017/02/09/150702dentonseskomlow-resocr.pdf. A comprehensive report on the matter was featured in the Financial Mail of 9 February 2017, titled "The Rot inside Eskom".

177. This further confirms the opinion of the complainant that Eskom has become an "abusive and a law unto itself" defying proper compliance and acceptable Corporate Governance procedures (see Dentons report on Eskom 2015).

ESKOM'S LOAN FROM THE WORLD BANK

178. As detailed above, Eskom has overspent on the Medupi power station by between ZAR 50 and 120 billion – see as background https://en.wikipedia.org/wiki/Medupi_Power_Station and http://www.iol.co.za/news/medupis-hidden-costs-add-to-our-woes-1556961#.Uqgnn9hDHIU.

179. Similar has happened at Kusile and Ingula, as detailed above.

180. Having run short of funds for Medupi, Eskom approached the World Bank in 2010 for what was ultimately a USD 3,75 billion loan (approximately ZAR 53 billion at prevailing exchange rates).

181. The prospective loan met with strong resistance from international NGO's on the basis that, from a climate perspective, the World Bank should no longer be funding coal investments.

182. For an account of this highly contested history, see http://www.nytimes.com/cwire/2010/04/09/09climatewire-south-africa-wins-375-billion-coal-loan-17887.html?pagewanted=1.

183. It is clear that the loan was ultimately granted very much on the assumption and condition that there is give and take: the money for a polluting coal plant is advanced but a portion of

the total loan would need to be spent on emissions lowering technologies like wind and solar as well as energy efficiency.

184. To quote from the World bank website: "*The project development objective (PDO) of the Eskom Investment Support Project for South Africa is to enhance its power supply and energy security in an efficient and sustainable manner so as to support both economic growth objectives and South Africa's long term carbon mitigation strategy*." See http://www.worldbank.org/projects/P116410/eskom-investment-support-project?lang=en&tab=overview.

185. By now choosing to obstruct the roll-out of renewable energy in South Africa, Eskom is certainly violating the spirit of the World Bank loan. Indeed, it may very well be that it is breaching the explicit terms of the agreement and may be in default, allowing the World Bank to cancel the loan and demand immediate repayment.

186. Should this happen, the South African tax payer and/or electricity rate payer would again be the victims of the mismanagement as they would have to fill the funding gap through increased taxes or increased electricity prices.

187. It is understood that the World Bank is concerned about this and is attempting to engage Eskom on the matter.

ESKOM'S LOAN FROM KFW

188. As detailed at http://www.esi-africa.com/news/renewable-power-kfw-grants-339m-loan-to-eskom/, Eskom secured a loan from the German Development Bank KFW of about ZAR 4 billion in 2015 for the express purpose of upgrading the national electricity grid in order to evacuate greater amounts of renewable energy.

> *"With the country's power grid under severe constraint, the loan will be used to connect renewable energy power solutions including wind and solar plants to the national grid to contribute towards achieving a reliable and secure supply of power, KfW said.*

Norbert Kloppenburg, a management board member at KfW, said in a statement: "The adjustment of the energy supply is a big step for South Africa away from dependency on coal towards a more sustainable electricity generation."

189. There is a wealth of international funding available for facilitating renewable energy, with the Green Carbon Fund capitalised to the tune of about USD 10 billion. These funds are potentially available to assist Eskom if so required - as the loan from KFW shows.

190. Eskom's latest actions to deliberately block renewable energy are contrary to the aims and spirit of the contract with KFW.

191. While it is unclear whether Eskom's action would constitute a legal breach or not, they are certainly closing the door on a potential friend and funder, to the detriment of the country.

192. The South African tax payer and/or electricity rate payer would again be the ultimate victims of the mismanagement as Eskom's cost of borrowing will increase and the public would have to fill the funding gap through increased taxes and/or increased electricity prices.

193. The country's image would suffer tremendously internationally and our ability to attract climate finance in future would be severely impeded.

ESKOM'S DUPLICITOUS STATEMENTS TO PARLIAMENT

194. In May of 2016, Eskom's erstwhile CEO Mr Brian Molefe addressed parliament.

195. Despite the fact that renewable energy had done much to pull the country through the load shedding and that the net cost of some technologies had been below zero for that period, meaning effectively that renewable energy had been far, far cheaper than anticipated, Molefe told parliament that:

- Renewable Energy had "disappointed"
- The technology would only be mature and reliable in about ten years (he compared it to a ten year old mobile phone)
- Eskom would "battle through".

196. The event is captured adequately at http://www.moneyweb.co.za/news/south-africa/renewables-disappointed-us-molefe/.

ESKOM'S TRANSMISSION LICENCE CONDITIONS

197. Eskom acquires its transmission licence from NERSA. Eskom has to comply with the transmission licence, in the absence of which steps can be taken to enforce compliance alternatively to revoke the licence.

198. There are several conditions in the transmission licence aimed at avoiding the situation described elsewhere in this document.

- Section 15 requires Eskom to act lawfully: "*The Licensee shall comply with all applicable laws and especially those governing the electricity supply industry including regulations, codes, directives, guidelines as effected from time to time*".

- Section 4 prescribes that "*The terms on which the Licensee, in conducting its business under this Licence, provides any other service, other than those prescribed above, must be fair and reasonable.*"

- In particular, section 4.2.3 dictates that "*The Licensee shall ensure non-discriminatory access to users of the Transmission System*."

- Section 5 dictates that Eskom "*shall annually compile and publish a national indicative resource plan for the electricity supply industry, as directed by the NER*." ("the "IRP")

- Section 5.1 dictates that "*The Licensee, as a holding company, shall maintain separate and ring-fenced accounts for the elements of its Transmission Division as defined in schedule 3, so that the revenues; costs; assets; liabilities; reserves and provisions for, or reasonably attributable to the transmission system are separately identifiable in the books of the Licensee from those of any other business*."

- Section 8 confers upon NERSA the right to settle disputes emanating from the licence conditions.

199. It is submitted that Eskom has failed to comply with the bulk of the above duties and is in contravention of its Transmission Licence.

200. In the case of such a contravention, NERSA can in terms of section 18(4) of the ERA fine Eskom the equivalent of 10% of annual revenue per day for non-compliance.

201. In terms of section 10 of the Transmission Licence, NERSA may:

(a) Issue a notice requiring the Licensee to remedy the breach within a set period;
(b) In the event of the breach not being remedied, issue such penalties as may be permitted by legislation or regulation;
(c) Require the Licensee to deliver a report by a set date, setting out the causes of the failure to comply with its duties and obligations, and the action taken to prevent a re-occurrence of the breach;
(d) Undertake an enquiry into the failure to comply. The Licensee shall co-operate with such enquiry and failure to co-operate shall be considered a further breach of its obligations;
(e) Issue directives as to how the Licensee shall in future act so as to prevent further failures to comply;
(f) Revoke the Licence in terms of Section 12 of this Licence.

BID ROUND 3.5 AND 4 – APPROACHING FINANCIAL CLOSE

202. REIPPPP Bid Rounds 3.5 and 4 are waiting for financial close and Eskom's erstwhile CEO, Brian Molefe, admitted in the media that he is refusing to sign the PPA's with the Preferred Bidder IPPs.

203. These projects have been developed over multiple years by highly dedicated and skilled teams in South Africa, at very appreciable cost and on the assumption that government policy on energy can be taken at face value, in good faith and will be carried out by all those in the public sector.

204. What is fact happening is that Eskom's top management and Board have deliberately decided to obstruct all of the above for a very narrow interest that in no way overlaps with the national South African interest.

205. As detailed elsewhere in this document, this is already leading to job losses and the closure of at least one manufacturing plant.

206. It is ironic in the extreme that the concern for public interest does not extend to cost over-runs extending into hundreds of billions of rand but is quick to arise in allowing competition into the market.

<u>ESKOM'S RECENT MOVE AGAINST INDEPENDENT POWER PRODUCERS AND RENEWABLE ENERGY</u>

207. The first indication that the growing partnership of renewable energy players with Eskom (also outside of its generation division) might soon be taking strain was in September 2015 when Eskom unilaterally and without warning advised that the Eskom Board has resolved not to support REIPPP projects post Round 3.

208. The letter states that the **Eskom Board** has resolved not to issue any budget quotes after round 3.

209. This effectively means that all subsequent projects would be denied access to the national grid by Eskom, due ostensibly to liquidity constraints.

210. This, despite the fact that the costs of renewable energy are a pass through to the consumer and that six months before, Eskom secured a ZAR 4 billion loan from KFW to integrate renewable energy projects into the grid.

211. If there is no net cost from Eskom buying renewable energy, the only potential impact on Eskom liquidity is lower Eskom sales from generation, meaning that Eskom had explicitly resolved to limit grid access for renewable energy to protect its revenue from its own sales.

212. It is submitted that this is the very definition of the abuse of a dominant market position by a vertically integrated utility.

Eskom

The RSA Grid Code Secretariat
Attention: Mr. Target Mchunu
Eskom System Operator
P.O. Box 103
GERMISTON
1400

Date:
26 September 2015

Enquiries:
Tel +27 11 800 4829

Dear Mr. Mchunu

GRID CODE EXEMPTION FROM THE NETWORK CODE CLAUSE 2 (2) FOR THE ISSUING OF QUOTES TO CUSTOMERS

Application is hereby made for an exemption from the requirements of the Network Code clause 2 (2), Issuing of quotes to customers within specified time periods, until the end of the MYPD3 period (31 March 2018).

GRID CODE REQUIREMENT

The requirement is:
2 (2) The NTC shall provide quotes or cost estimates for new connections (or for upgrading existing connections)....

MOTIVATION FOR THE EXEMPTION

Eskom is facing serious liquidity issues, making it impossible to commit to any of the DOE ReIPP programmes after bid window 3. This affects the issuing of Budget Quotes (BQs) to IPPs.

The Eskom Board has decided to not issue any BQs after Round 3 at this point in time. This is contrary to the DOE timelines for these IPP programmes.

Although the issuing of quotes is a license condition, the outcomes of the relevant RCA submissions are not guaranteed so that Eskom cannot responsibly commit to the related expenditures. Eskom has addressed this issue with Nersa in a separate communication and requested appropriate guarantees.

EXEMPTION REQUEST

The Grid Code Advisory Committee is requested to exempt Eskom from issuing Budget quotes to IPPs, as specified in clause 2 (2) of the Network Code, up to 31 March 2018.

Transmission Group
Office of the Group Executive
Megawatt Park, Maxwell Drive, Sunninghill
PO Box 1091, Johannesburg SA
Tel +27 11 800 4829 Fax +27 800 4449 www.eskom.co.za
Eskom Holdings SOC Limited Reg No 2002/015527/06

213. The harm threatened by this letter was averted by urgent intervention at the GCAC by the South African Renewable Energy Council, but still caused consternation in the renewable energy market. There was a significant negative impact on investor confidence.

214. The next attack came in May 2016 in Parliament, when Mr Molefe used the platform to disseminate falsities about the reliability of renewable energy, as detailed above.

215. In about August 2016, in a third attack, the Eskom CEO wrote to the Department of Energy saying Eskom would not be willing to support projects beyond REIPPPP Round 4.5.

216. This letter leaked into the media and again caused consternation. See http://www.bdlive.co.za/business/energy/2016/07/21/eskom-cuts-off-private-power and http://www.fin24.com/Economy/Eskom/nuclear-watch-to-start-if-eskom-cuts-out-private-sector-20160721 and http://www.timeslive.co.za/sundaytimes/businesstimes/2016/07/22/Eskoms-Molefe-should-lose-bonus-over-IPP-decision-DA

217. The Minister of Finance felt compelled to point out that that the Eskom CEO does not determine South Africa's energy policy and that the IPP Programme was still important. See http://www.bdlive.co.za/business/energy/2016/07/28/policy-not-set-by-eskom-ceo-says-gordhan

218. The Minister of Energy released an OpEd assuring the market that the REIPPPP would continue - see http://www.bdlive.co.za/opinion/2016/07/29/we-cant-turn-back-on-the-path-of-ipps. So far her assurance has not led to any action as Eskom continues to defy its shareholder, the Government.

219. Despite this the Eskom CEO then proceeded to postpone the signing of the Redstone renewable energy project for a second time and to state to both the IPP Office and the media that this would be the status quo while he educates himself on the implications. References elsewhere in this document. See also http://www.bdlive.co.za/business/energy/2016/08/29/brian-molefe-hardens-stance-against-independent-power-producers

220. As this unfolded, the Head of Eskom Generation, Mr Koko, entered the fold both in the media and on social media - see http://engineeringnews.co.za/article/eskoms-ipp-pushback-continues-despite-cabinet-endorsement-2016-08-30.

221. Like Molefe he presumes to speak for the public interest in South Africa as he argues for a reconsideration of the independent power producer programme.

222. On 28 August 2016 and presumably as part of a debate on whether sufficient capacity might allow Eskom to shut down some of its oldest and most polluting coal plants, he tweeted "*we*

will stop signing IPP's first before shutting down any of our plants that has an average coal cost of 30c/kWh". See @koko_matshela (this specific tweet may have been erased later but is available in our records).

223. The statement is revealing in several respects:

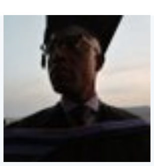
- The veneer of public interest is now absent and there is a far stronger tone of "us and them" detectable;

- The tweet shows clearly that he believes Eskom is all-powerful in this domain also in terms of making policy and can make the final decision on what goes and does not go in South Africa;

- He (like the Eskom financial statements) compares the pure fuel costs for coal power with the all-in costs for renewable energy. In ignoring the capital costs, maintenance and owner's development costs that Eskom has in a coal plant he compares and tries to reverse the truth about the costs of renewable energy.

224. His tweets reveal the likely falsity of Molefe's statements that the delay in signing the REIPPP agreements is merely due to him (Molefe) taking time to educate himself. There is record of the Eskom Board collectively deciding to oppose the REIPPPP/IPP Programme as far back as September 2015 and then again in July 2016, when Molefe wrote to the DOE saying "the Eskom Board…." has decided. (see above)

225. Koko's tweets often move in concert with Molefe, suggesting an orchestrated and carefully considered campaign. A few examples suffice:

1.  **Matshela Koko** @koko_matshela Aug 23

If I had the privilege of being a director of @Eskom_SA and exercising my fiduciary duties,I will not sign these IPPs now. There is no logic

2. Matshela Koko Retweeted

702 @Radio702 Aug 24

Brian Molefe defends @Eskom_SA Ingula plant, says @carteblanchetv is 'disingenuous'. Read here: bit.ly/2bMM8Vb @702JohnRobbie

1. 

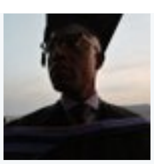
Matshela Koko @koko_matshela Aug 27

Research Finds Few Obstacles to Long-Term Operations for Nuclear Plants - Nuclear Energy Institute shar.es/1w5XbQ via @sharethis

3. Matshela Koko Retweeted

Fin24 @Fin24 Aug 31

Molefe: I am captured by the Constitution, not Guptas

1. 

Matshela Koko @koko_matshela Aug 31

Can #South Africa really afford spending R1.2trn on 7300MW of REIPPs with a load factor of 31% ? bdlive.co.za/business/energ …

4.  **Matshela Koko** @koko_matshela Aug 24

What Ompi is not telling is that @Eskom_SA will spend R22.6Bn this year to buy 11954GWh from IPPs,189c/kwh. INSANE. bdlive.co.za/business/energ …

226. In summary it is clear that the Eskom Board as a whole has decided some time ago to move against the renewable energy programme and that this effort is now culminating in a media campaign.

227. In the third week of September 2016, when it started becoming clear that the IRP asks for renewable energy and gas, Eskom's CEO appeared in parliament and said that South Africa would really need nuclear power in 2035 or would be in trouble.

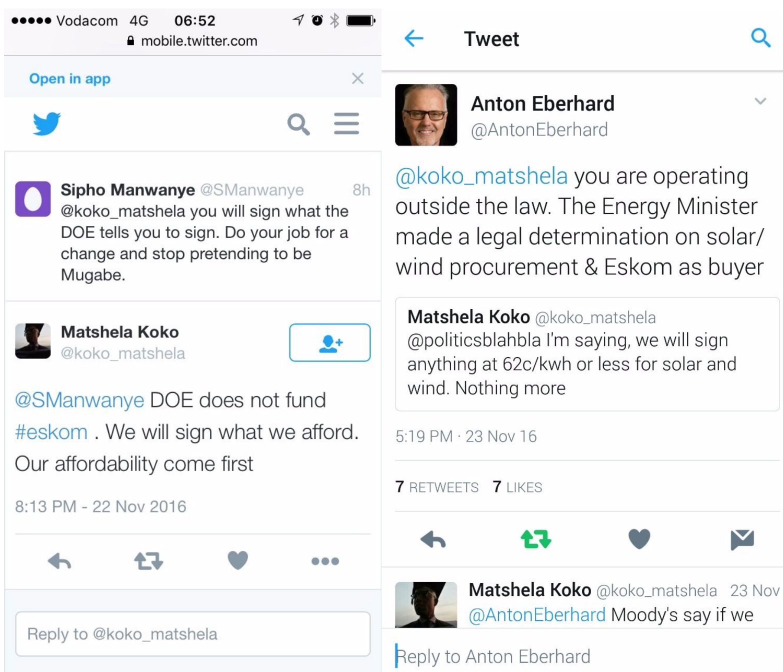
228. There is no reason for him to specify what power source would be required at a such a future date – the need can be met from many sources.

229. Given that even a pessimistic timeframe for procuring and building nuclear power would be perhaps twelve years, it is clear that the statement trying to get a decision in the present for something only possibly needed far into the future, shows a clear agenda to manipulate the energy mix in the country in Eskom's favour. See http://www.fin24.com/Economy/molefe-no-nuclear-by-2035-could-mean-another-power-crunch-20160921.

230. In the interim Koko has been appointed acting CEO of Eskom and he has been a constant presence in the media and social media, casting doubt on independent power and especially renewable energy. See http://www.pressreader.com/south-africa/cape-times/20161011/281530815535050, http://www.bdlive.co.za/opinion/2016/04/05/nuclear-is-

not-too-costly-and-should-remain-part-of-sas-energy-mix; http://www.iol.co.za/business/opinion/eskom-plan-needs-to-be-updated-to-reflect-reality-2061871 and http://m.fin24.com/fin24/Opinion/eskoms-koko-uses-nuclear-scale-and-pace-card-on-ipps-20161122 and http://www.iol.co.za/business/companies/writings-on-the-wall-says-eskoms-koko-2092578?utm_source=dlvr.it&utm_medium=twitter.

231. All pretence has not been dropped and Koko is clearly positioning himself as the man to make all decisions on what electricity gets bought from whom irrespective of the law, as appears from his most recent tweets:



232. Even though Mr Koko and Eskom are receiving money in trust through the tariff for IPP-produced electricity and it is thus a mere pass-through, Mr Koko seems to assume this payment is a given irrespective of whether Eskom actually pays money over to IPP's. He seemingly thinks he can optimise Eskom's finances by only paying over what he wants to and assuming that irrespectively the money will continue to come his way through the tariff.

233. It needs to be stressed that Eskom has signed no REIPPPP Agreements whatsoever since the present impasse started and that Koko's assertions that he will sign what he deems to be good value for money are merely made to create a false sense of reasonability.

234. On 11 October the Minister of Energy seemed to grant Eskom a veto over who may participate in the energy sector when she intimated that the country has to follow what Eskom decides – see http://www.fin24.com/Economy/renewables-will-also-cost-sa-over-r1trn-joemat-pettersson-20161011.

235. She seemed to repeat almost verbatim what Eskom had said before about the alleged costs of renewables, indicating very strongly that Eskom's strategy had won the day and the Department of Energy had raised the white flag.

236. In the same week, the Department of Energy indicated that it wants to give Eskom full control over nuclear procurement for the country and would no longer be taking responsibility.

237. In the interim Eskom has pledged to forge ahead with testing the market for nuclear with a Request for Information even though the IRP base case only requires it 21 years from now.

238. It also appeared that Eskom had ignored the IPP Office five times in setting up dates from REIPPP round 3.5 and 4 signatures, leading inescapably to the conclusion that they are deliberately frustrating the process to perpetuate their own monopoly.

THE PRESENT IMPASSE AND WHAT IS AT STAKE

239. It is OUTA's understanding that, in the week ending 26 August 2016, the Eskom CEO, Mr Brian Molefe, contacted the IPP Office (custodian of the REIPPPP process) and advised that he would not be signing any further Power Purchase Agreements under the REIPPPP until he has understood the implications.

240. As of an interview in that week (now months in the past) Mr Molefe has effectively conceded that he is refusing or neglecting to carry out his mandate even though he understands that he is legally obliged to do so. http://www.fin24.com/Multimedia/Videos/watch-5-questions-to-eskom-ceo-brian-molefe-20160831

241. Having been in his CEO position for 11 months he claimed that he needed to understand the implications first, however he had already signed one agreement without being concerned

about this, as detailed below. Furthermore, what he was claiming to need time to do is clearly of no consequence financially to Eskom (financial pass-through) or in the ambit of cabinet/NERSA (determining the policy adjusted IRP/best interest of South Africa/value for money of the projects).

242. There was no telling whether his efforts to understand the implications would take a day or a year – he effectively reserved the right to proceed at his pleasure.

243. He has, as of 1 December 2016, been succeeded by Mr Koko, the same man waging a concerted campaign against renewable energy and Independent Power Producers. Indeed, the Minister of Public Enterprises, who herself has been under investigation by the Public Protector, has chosen to appoint as Eskom CEO someone who has clearly and unambiguously stated that he will not obey Ministerial Determinations by the Minister of Energy.

244. It cannot be beyond the CEO of Eskom to understand and know that the costs are a pass through to the customer nor that the best interest of the country are not his to defend as a vertically integrated monopoly.

245. For more detail see the following: http://www.bdlive.co.za/business/energy/2016/08/29/brian-molefe-hardens-stance-against-independent-power-producers

246. See also the following opinion piece from a prominent academic pointing out and underlining much of what is said in this document: http://www.fin24.com/Economy/Eskom/eskoms-ipp-snub-shows-need-for-sector-shake-up-eberhard-20160829

247. In the immediate aftermath of Eskom's stance against IPP's, an international investor closed his manufacturing plant and left the country as a direct result, see http://www.timeslive.co.za/thetimes/2016/08/12/Cape-solar-shocker-Global-energy-firm-quits-SA-over-%E2%80%98wavering%E2%80%99-government. The fact that Eskom has in the interim become ever more recalcitrant leads to the strong suspicion that seeing renewable energy firms leave the country is exactly what Eskom's top management is now after. For the impact, see http://energy.org.za/news/eskom-delays-on-ipp-signatures-are-costing-jobs.

ESKOM'S BEHAVIOUR TO LEAD TO LESSER COMPETITION FROM IPP'S

248. Eskom is now starting to regain some reserve margin after a considerable period where there was none to speak of.

249. Also for the first time in years, Eskom is in the position where it could generate more electricity than it is presently selling.

250. Renewables self-dispatch under the REIPPPP contracts, meaning that when they are generating, Eskom must take the electricity even if it has some excess capacity available somewhere. This is the usual and normal arrangement internationally.

251. In such a situation there is direct "competition" between Eskom's own power (mostly coal based) and renewable energy from IPPs.

252. Due to the overspend and mismanagement detailed above, Eskom's balance sheet is under pressure and Eskom now attempting to shut IPPs out of the market to protect its monopoly.

253. If unchecked Eskom's actions will lead to lesser competition in the market and will keep very low cost wind energy out the energy mic to the detriment also of the consumer and country.

ESKOM DERIVING AN ECONOMIC BENEFIT FROM ITS BEHAVIOUR/OUTA'S STRATEGY ON RESOLVING THE UNFAIR BEHAVIOUR BY ESKOM

254. It is clear from the above that Eskom's conduct is providing it with an undue economic benefit. The Competition Commission has the power to check and reverse this.

255. However, the structural tension between Eskom as both generator of electricity and grid operator means that fundamental action is required to remove same, or Eskom's behaviour could flare up again at any time.

256. OUTA will continue to advocate for new legislation separating Eskom into distinct state owned enterprises for grid and generation.

257. We submit that a thorough investigation by the Commission/NERSA of the abuses detailed herein together with appropriate remedial/punitive action would serve to re-establish at least to some extent the bona fides required for the system to operate fairly while Eskom's conflicted position of generator and grid operator persists in law.

REQUESTED RELIEF

258. The requested relief is detailed above. As pointed out, there is concurrent jurisdiction between NERSA and the Commission and the Commission and NERSA are requested to collaborate accordingly to ensure that the appropriate body makes the appropriate order.

259. OUTA reserves the right, should same be required, to approach the Commission for interim/interdictory relief. Such relief if it becomes necessary is likely to entail an order preventing Eskom from entering into further new-build projects or contracts for same pending the outcome of this complaint and/or an order to compel Eskom to sign all Power Purchase Agreements with preferred bidders under the REIPPPP and coal procurement programmes while the present investigation and subsequent proceedings are finalised.

260. It further reserves the right, should same be required, to approach the High Court for urgent relief as specified in the paragraph above.

ANNEXURE A – OPINION ON ILLEGALITY OF ESKOM'S ACTION BY UNTERHALTER SC AND L SISILANA

Ref:- http://sarec.org.za/legal-opinion-power-purchase-agreements/