SUBMISSION BY THE AFRICAN CLIMATE REALITY PROJECT ("ACRP") RELATING TO THE ESKOM REVENUE APPLICATION TO NERSA FOR FY 2018/2019

EXECUTIVE SUMMARY

ACRP in summary makes the following submissions:

1. NERSA has to adjudicate Eskom’s application under a known legal framework about Eskom’s rights and obligations towards the South African rate payer and Eskom’s commercial counterparts. This is established by the Constitution, South Africa’s binding international commitments, the National Energy Regulator Act 40 of 2004 (NERA), The Electricity Regulation Act Electricity Regulation Act 4 of 2006 (ERA), the MYPD Methodology, the Electricity Regulations on New Generation Capacity promulgated under section 35(4)(j) of the Electricity Regulation Act ("the Regulations"), and ministerial determinations made under section 34 of the Electricity Regulation Act. The aforesaid Regulations were published under Government Notice R399 in Government Gazette 34262 of 4 May 2011, and amended on 4 November 2016;

2. The legal regime emanating from all of the above, as it is widely understood and accepted by all participants except Eskom, holds that electricity is a regulated commodity in South Africa and that the industry is regulated by NERSA. Eskom incurs expenses of a capital and operational nature in the execution of its mandate as the country’s vertically integrated monopoly, which expenses plus a return (if
prudently incurred) is covered from the consumer via the tariff. In the legal regime as it is understood, NERSA is the judge of whether the public is receiving value for money while the Department of Energy is the custodian of energy planning and the Minister of Energy activates programmes to establish new generation assets via Ministerial Determinations. The understanding is that Eskom as a State Owned Enterprise yields to NERSA’s authority and carries out the wishes of its shareholder, being the Department of Public Enterprises.

3. In the recent past, Eskom has directly challenged this established legal order. In Eskom’s view of the regulatory framework, Eskom itself is responsible for energy planning in the country and Eskom is the final arbiter of what the country needs, possesses a veto right over Ministerial Determinations, need not carry out the wishes of its shareholder and replaces NERSA as the final arbiter of value for money for the country.

4. The above manifests in many Eskom utterances, media statements, deeds and omissions but is most pertinently illustrated by its refusal to sign Power Purchase Agreements for preferred bidders under the REIPPPP Programme Rounds 3.5 – 4.5 (as will be illustrated below). Eskom has been resisting inter alia on the grounds that it is allegedly expensive (despite the fact that NERSA in each case has adjudicated on value for money and granted a generation licence), on the ground that the country does not need the power (despite the fact that the Minister of Energy has per Ministerial Determination ordained that the power be built). Eskom refuses despite public statements by the erstwhile Minister of Finance and the erstwhile Minister of Energy that the agreements need to be signed and that Eskom does not make energy policy, and despite an assertion by the State President in the February 2017 State of the Nation address that the agreements would be signed.

5. Eskom’s unlawful recalcitrance has led to five of the 12 new green industries reported at the end of 2015 closing, while operations at four are under review. According to GreenCape and the South African Renewable Energy Council, a total of five of the investments planned at the time have been suspended. The combined impact of these closures is substantial. At least 190 jobs have been lost, 600 forfeited and a further 620 are in jeopardy. A total of R2.84 billion in investment has been suspended and more than R1 billion invested in the manufacturing sector has been lost or is at risk. Moreover, infrastructure investment of some ZAR 58 billion has not occurred. The present projects are able to provide electricity at an average of 62c/kWh (2015), which the CSIR states is 40% less than the cost of comparable new coal power and even cheaper relative to the power from Medupi and Kusile.

6. The South African Wind Energy Association laid a complaint against Eskom at NERSA a year ago, and also lodged a complaint with the Competition Commission. At the time NERSA gave a verbal undertaking to SAWEA that the complaint would be finalized within three weeks. In the intervening year, NERSA has not decided SAWEA’s complaint and indeed has not even elevated it to a tribunal. Nor has...
NERSA collaborated with the Competition Commission in any meaningful way to halt the immense damage to the economy.

7. Eskom now applies for a price increase and claims compensation for the very contracts it is steadfastly refusing to sign (REIPPPP Round 3.5 – 4.5 and Small Scale).

8. South Africa is a signatory to the Paris (Climate) Agreement and has ratified it, making it part of South African law. The Paris Agreement envisions complete decarbonization after 2050, in other words the complete termination of any greenhouse gas emissions whatsoever. This implies an end to coal fired power generation as it exists today.

9. The Paris Agreement is part of the South African regulatory framework within which NERSA is duty bound to operate.

10. By 2050, by all credible and reasonable recent modelling scenarios, South Africa will have a renewable energy industry of between approximately 55,250 MW (DOE IRP 2016 base case) and 200,782 GW (CSIR decarbonized scenario). At the lower end this is larger than Eskom is now. It is thus of critical importance to protect the country’s renewable energy investors and workers in order to ensure that the skills and finances to build this very large infrastructure sector in the next three decades do not leave the country.

11. Eskom is resisting SAWEA’s challenge, claiming its fiduciary obligations under company law and under the Public Finance Management Act trump all the legal imperatives mentioned above.

12. Eskom is thus claiming, effectively, to have a veto right over what Independent Power Producers are allowed to build renewable or other electricity plants in the country.

13. Eskom cannot in one set of NERSA proceedings be allowed to deny any obligation to sign the REIPPPP Round 3.5 – 4.5 agreements and in another set of NERSA proceedings to claim back the cost of doing so.

14. NERSA has not decided SAWEA’s application. For this reason, it is unknown whether the regulatory regime as it used to be understood regulates the industry or whether Eskom does indeed have an effective veto right as described above.

15. If Eskom is correct, it means that the regulatory regime safeguarding independent power producers in the country has come to naught and that the latter will be completely delivered to the mercy of the Eskom monopoly, meaning that capital and skills will leave the country for more secure investment destinations, that South Africa will go into a long term energy future dominated by coal and perhaps
nuclear, that the electricity price will rise to levels far higher than the CSIR has shown it can be with a primary reliance on renewable energy, and that South Africa will likely default on its obligations towards the international community on climate protection.

16. NERSA’s decision on SAWEA’s complaint is thus of the utmost importance and needs to be made.

17. Moreover, the entire future of the Multi Year Pricing Methodology (MYPD) and NERSA’s traditional role as the custodian of the electricity sector depends on the specific decision. If NERSA agrees with Eskom’s interpretation, it will have effectively abdicated its responsibility as the custodian of the sector and made Eskom the custodian that NERSA itself used to be.

18. It is submitted that Eskom’s revenue application cannot be heard until NERSA has decided on SAWEA’s complaint, given especially that Eskom is claiming back from the tariff the full expense it is expecting to lay out on the very agreements it is refusing to sign - and denying in law that it is obliged to sign.

19. It is submitted that NERSA should postpone the revenue application process until such time as it has decided SAWEA’s complaint, and that failure to do so would be a misdirection that would open a decision on the revenue application to a judicial review.

20. On the merits of SAWEA’s complaint it is submitted that the law clearly requires NERSA to rule in SAWEA’s favour.

21. NERSA must make decisions in accordance with the objects of ERA and in accordance with its mandate under NERSA Act being:

   (a) achieve the efficient, effective, sustainable and orderly development and operation of electricity supply infrastructure in South Africa;
   (b) ensure that the interests and needs of present and future electricity customers and end users are safeguarded and met, having regard to the governance, efficiency, effectiveness and long-term sustainability of the electricity supply industry within the broader context of economic energy regulation in the Republic;... and
   (g) facilitate a fair balance between the interests of customers and end users, licensees, investors in the electricity supply industry and the public.

22. NERA states that every decision of NERSA must be consistent with the Constitution and all applicable laws and that it must be in the public interest (s 10).

23. It is submitted that given all of the above, NERSA should after the postponement of the revenue application rule in favour of SAWEA.
24. The revenue application can then be considered afresh with the legal uncertainties out of the way.

25. It is likely that the rights of municipalities to build or procure renewable energy to be wheeled through the Eskom network will also become pressing soon and requires clarity on whether NERSA is able in the final instance to hold Eskom to account.
CONTENTS

Part 1: Background on the AFRICAN Climate Reality Project (ACRP) ................................................................. 7
Part 2: The MYPD methodology as it flows from the regulatory framework ................................................................. 7
Part 3: The Regulatory Framework underpinning the MYPD ......................................................................................... 9
Part 4: The opinion of Unterhalter SC and Sisalana on Eskom’s refusal to sign PPA’s ................................................. 12
Part 5: ACRP’s submissions on the legal position ........................................................................................................ 20
Part 6: ACRP’s submissions on the recent Ministerial announcement that contracts would be signed at a new cap price of 77c/kWh .................................................................................................................. 21
Part 7: South Africa’s very large, future, renewable energy sector in the context of its international climate obligations ........................................................................................................................................ 22
Part 8: South Africa’s pledges to future generations and the international community ............................................... 22
Part 9: Protecting lives in South Africa ........................................................................................................................ 23
Part 10: Protecting jobs in South Africa ....................................................................................................................... 24
Part 11: Close ............................................................................................................................................................... 25
PART 1: BACKGROUND ON THE AFRICAN CLIMATE REALITY PROJECT (ACRP)

1. The African Climate Reality Project (ACRP) is the African chapter of former Vice President Al Gore’s Climate Reality Project and is hosted on the continent by Food & Trees for Africa. ACRP supports close to 600 African Climate Leaders in Africa, from government, NGOs, youth, media and scientists across the continent.

2. ACRP’s aim is to spread awareness and action and mobilise communities from Algeria to Zimbabwe to find solutions to climate change. Through the work of Climate Leaders across the continent, the movement urges people to take climate action now and communicates the urgent need for countries to act on their commitments under the Paris Agreement on Climate Change.

3. Our mission is to catalyse a global solution to the climate crisis by making urgent action to mitigate against climate change, a necessity across every level of society in Africa. We’re working to accelerate the global shift from dirty fossil fuels driving climate change to renewables so we can power our lives and economies without destroying our planet.

PART 2: THE MYPD METHODOLOGY AS IT FLOWS FROM THE REGULATORY FRAMEWORK

2.1 Eskom’s revenue applications have been regulated of late by the Multi-Year Price Methodology as it flows forth from the regulatory framework. The Honourable Supreme Court of Appeal set out both in some detail of late in the Borbet case (case number 288/2016; 1309/2016; June 2017; http://www.saflii.org/za/cases/ZASCA/2017/87.html). The former is quoted below, after which the framework as elucidated by the SCA will be recounted.

2.2 The Honourable SCA said the following in pars 15 - 21 of the judgment:

- **The Multi-Year Price Determination Methodology (the MYPDM)**

  It is common cause that tariffs to be charged by licensees are determined by NERSA at intervals in accordance with the MYPDM, ostensibly in terms of s 14(1)(e) of ERA. This is envisaged in the Electricity Pricing Policy, GN 1398, GG 31741,19 December 2008.

  Each price determination interval covers a period of three to five years, hence the description ‘multi-year price determination methodology’. The MYPDM is apparently updated in relation to each interval. It is the interpretation and application of the MYPDM that lies at the heart of this appeal.”

- In keeping with the principle of transparent and accountable governance and administration, the MYPDM is contained in a comprehensive document and was the product of extensive
consultation by NERSA with interested and affected parties. The introduction to the
document is significant and I consider it necessary to set it out in full:

‘The Multi-Year Price Determination (MYPD) Methodology is developed for the regulation
of Eskom’s required revenues. It forms the basis on which the National Energy Regulator
of South Africa (NERSA or “the Energy Regulator”) will evaluate the price adjustment
applications received from Eskom. The MYPD was first introduced in 2006 for
implementation from 01 April 2006 to 31 March 2009. It is a cost-of-service-based
methodology with incentives for cost savings and efficient and prudent procurement by
the licensee (Eskom). The Methodology also provides for Services Quality Incentives
(SQI) for Eskom. On an annual basis, the MYPD runs concurrently with Eskom’s financial
year(s). A second MYPD period started from 01 April 2010 to 31 March 2013, with the
next one scheduled to run from 01 April 2013 to 31 March 2018.

2.3 In explaining the MYPD Methodology, the Honourable SCA said:

In developing the MYPD Methodology, the following objectives were adopted:

1. to ensure Eskom’s sustainability as a business and limit the risk of excess or
   inadequate returns; while providing incentives for new investment;
2. to ensure reasonable tariff stability and smoothed changes over time consistent
   with socio-economic objectives of the Government;
3. to appropriately allocate commercial risk between Eskom and its customers;
4. to provide efficiency incentives without leading to unintended consequences of
   regulation on performance;
5. to provide a systematic basis for revenue/tariff setting; and
6. to ensure consistency between price control periods.

The development of the Methodology does not preclude the Energy Regulator from
applying reasonable judgment on Eskom’s revenue after due consideration of what
may be in the best interest of the overall South African economy and the public.’

The qualification in the last part of the introduction is significant. It allows NERSA
latitude to exercise ‘reasonable judgment’ after due consideration of what may be in
the public interest.

2.4 The Court went on to add that:

“…the MYPD reflects, in large part, government’s electricity pricing policy, issued by the Department
of Minerals and Energy. The MYPD and the pricing policy are in line with the tariff principles set out
in s 15 of ERA. It provides for the recovery of the full costs of licensed activities, including a reasonable margin or return and provides for prescribed incentives for continued improvement of technical and economic efficiency. Section 3 of the MYPDM3 sets out a formula to determine the allowable revenue for Eskom within the interval, which includes taking into account, inter alia, its asset base, weighted average cost of capital, expenses and other factors which for present purposes are not material.”

2.6 It is unclear what the effect of Eskom’s single year application on the applicability of the MYPD methodology might be. Given that Eskom is not making a multi-year application, it could be argued that the MYPD does not apply. On the other hand, given the regulatory framework from which the MYPD emanates, it is submitted that even in such a case, similar principles would regulate the present application. Given the main thrust of ACRP’s argument, the question need not be answered for purposes of this submission.

PART 3: THE REGULATORY FRAMEWORK UNDERPINNING THE MYPD

3.1 The Honourable SCA set out the regulatory framework underpinning the MYPD in paragraphs 4 – 14 of the Borbet case, as mentioned above:

- NERSA was established in terms of the National Energy Regulator Act 40 of 2004 (NERA),¹ which, inter alia, regulates the generation, transmission and distribution of electricity. Section 4 of NERA sets out NERSA’s functions and provides, amongst others, that NERSA is to undertake the functions set out in s 4 of the Electricity Regulation Act 4 of 2006 (ERA). In section 2 of ERA the powers and duties of the regulator are set out as follows:

   ‘The Regulator –

   (a) must –

   (i) consider applications for licenses and may issue licences for –

      (aa) the operation of generation, transmission or distribution facilities;
      (bb) the import and export of electricity;
      (cc) trading;

¹ Section 3 of the Act provides: ‘The National Energy Regulator is hereby established as a juristic person.’
(ii) regulate prices and tariffs;

(iii) register persons who are required to register with the Regulator where they are not required to hold a licence;

(iv) issue rules designed to implement the national government’s electricity policy framework, the integrated resource plan and this Act;

(iv) establish and manage monitoring and information systems and a national information system, and co-ordinate the integration thereof with other relevant information systems;

(v) enforce performance and compliance, and take appropriate steps in the case of non-performance;

(b) may –

(i) mediate disputes between generators, transmitters, distributors, customers or end users;

(ii) undertake investigations and inquiries into the activities of licensees;

(iii) perform any other act incidental to its functions.’ (My emphasis.)

3.2 The Court also dealt with the objects of the ERA:

The objects of ERA are as follows:

(a) [to] achieve the efficient, effective, sustainable and orderly development and operation of electricity supply infrastructure in South Africa;

(b) ensure that the interests and needs of present and future electricity customers and end users are safeguarded and met, having regard to the governance, efficiency, effectiveness and long-term sustainability of the electricity supply industry within the broader context of economic energy regulation in the Republic;

(c) facilitate investment in the electricity supply industry;

(d) facilitate universal access to electricity;

(e) promote the use of diverse energy sources and energy efficiency;

(f) promote competitiveness and customer and end user choice; and

(g) facilitate a fair balance between the interests of customers and end users, licensees, investors in the electricity supply industry and the public.’

3.3 The Court made mention of the Eskom conditions of licence and the general tariff principles:
Section 14(1) of ERA under the title ‘Conditions of licence’ provides, inter alia:

(1) The Regulator may make any licence subject to conditions relating to –

(d) the setting and approval of prices, charges, rates and tariffs charged by licensees;

(e) the methodology to be used in the determination of rates tariffs which must be imposed by licensees;

Section 15 of ERA sets out ‘Tariff principles’:

(1) A licence condition determined under section 14 relating to the setting or approval of prices, charges and tariffs and the regulation of revenues –

(a) must enable an efficient licensee to recover the full cost of its licensed activities, including a reasonable margin or return;

(b) must provide for or prescribe incentives for continued improvement of the technical and economic efficiency with which services are to be provided;

(c) must give end users proper information regarding the costs that their consumption imposes on the licensee’s business;

(d) must avoid undue discrimination between customer categories; and

(e) may permit the cross-subsidy of tariffs to certain classes of customers.

(2) A licensee may not charge a customer any other tariff and make use of provisions in agreements other than that determined or approved by the Regulator as part of its licensing conditions.

(3) Notwithstanding subsection (2), the Regulator may, in prescribed circumstances, approve a deviation from set or approved tariffs.’

Section 21(2) of ERA provides:
‘A licensee may not discriminate between customers or classes of customers regarding access, tariffs, prices and conditions of service, except for objectively justifiable and identifiable differences approved by the Regulator.’

- …the Eskom licence…sets out Eskom’s duties, largely in line with the provisions of ERA. Under ‘Specific Conditions’, Eskom is required to maintain financial records in relation to the distribution of electricity. Clause 4.6 of the licence provides that ‘the licensee’ shall comply with ‘the price and tariff methodology’ provided by NERSA in determining its prices and tariffs and it is restricted to charging the consumer and/or end-user tariffs and prices approved by NERSA. Under ‘General Conditions’, Eskom is required to comply with the applicable provisions of ERA. It is also required to take reasonably practical steps to protect the environment and to ensure safety in the course of operations associated with the licence, including, but not only those specified, in health and safety and environmental legislation. In terms of s 17 of ERA, NERSA may revoke a licence on the application of a licensee if the licenced facility or activity is no longer required and the licenced facility or activity is not economically viable. That provision is mirrored in clause 7 of Eskom’s licence. Section 18 of ERA deals with contraventions of a licence and allows for the Regulator to sit as a tribunal to deal with allegations of a failure to comply with a licence condition, or with any provision of ERA. Section 18(5) of ERA allows for financial penalties to be imposed on licensees, depending on the degree of non-compliance. Section 19 of ERA empowers the Regulator to apply to the high court for an order suspending or revoking a licence, if there are grounds for doing so. Many of the sections of ERA referred to and the licence conditions predominantly set and define the parameters of the relationship between NERSA and licensees…”

PART 4: THE OPINION OF UNTERHALTER SC AND SISALANA ON ESKOM’S REFUSAL TO SIGN PPA’S

4.1 The South African Renewable Energy Council briefed Unterhalter SC and Sisilana to advise on Eskom’s refusal to sign further PPA’s with Independent Power Producers. SAREC placed the opinion in the public domain on its website. Below are quoted some key elements:

Our consultant, SAREC, is a federation of industry associations in the renewable energy sector. It seeks our advice as to whether Eskom is legally obliged to conclude power purchase agreements with preferred bidders, the majority of whom are members of renewable energy industry associations that make up SAREC…Our advice is further sought on the prospects of success of any legal action to compel the conclusion of such agreements.
The Department of Energy announced that it had appointed 2 independent power producers ("IPPs") as preferred bidders in Bid Window 3.5, 26 IPPs as preferred bidders in Bid Window 4, and 10 IPPs as preferred bidders in the Small Renewables Programme. Of these IPPs, only one preferred bidder (in Bid Window 3.5) has achieved financial close (i.e. signed power purchase agreements). This leaves 37 IPPs waiting to sign power purchase agreements.

This whole process was conducted pursuant to the government’s policy introduced in 2011, called the Renewable Energy Independent Power Producer Procurement Programme. The policy was in turn adopted in terms of the Electricity Regulation Act 4 of 2006, the Electricity Regulations on New Generation Capacity promulgated under section 35(4)(j) of the Electricity Regulation Act ("the Regulations"), and ministerial determinations made under section 34 of the Electricity Regulation Act. The aforesaid Regulations were published under Government Notice R399 in Government Gazette 34262 of 4 May 2011, and amended on 4 November 2016; but the amendments are for present purposes immaterial.

Under this statutory scheme, the government procures renewable energy from IPPs. The procurement is put out to tender: an RFP is issued, tenderers submit bids, are assessed, and preferred bidders are appointed. The 37 preferred bidders referred to above were appointed under this scheme but have not concluded any power purchase agreements. The question is whether the conclusion of such agreements could be enforced in court at the instance of the preferred bidders. A subsidiary question is whether SAREC has locus standi to enforce conclusion of power purchase agreements. The short answer is that that is possible. A more convenient path is for SAREC to intervene in such enforcement proceedings brought by the preferred bidders, either as an interested party or as an amicus curiae (a friend of the court). It is even possible for SAREC to be a co-applicant with the preferred bidders. However, this issue may have to be explored further in due course, if and when proceedings are contemplated.

4.2 Counsel very helpfully added a discussion of the specific procurement framework to the general discussion of the regulatory framework as set out in the Borbet case above:

Section 34(1) of the Electricity Regulation Act provides for promulgation of determinations by the Minister in regard to new generation capacity, in the following terms

34. New generation capacity.—(1) The Minister may, in consultation with the Regulator—

(a) determine that new generation capacity is needed to ensure the continued uninterrupted supply of electricity;
(b) determine the types of energy sources from which electricity must be generated, and the percentages of electricity that must be generated from such sources;

(c) determine that electricity thus produced may only be sold to the persons or in the manner set out in such notice;

(d) determine that electricity thus produced must be purchased by the persons set out in such notice;

(e) require that new generation capacity must—

(i) be established through a tendering procedure which is fair, equitable, transparent, competitive and cost-effective;

(ii) provide for private sector participation."

4.3 Counsel concluded that:

“By section 34(2), the Minister is in addition afforded all powers necessary or incidental to any purpose of section 34(1), including, but not limited to, the powers expressly set out in section 34(2) of the Electricity Regulation Act.”

4.4 Counsel went on to point out that:

Section 35(4) of the Electricity Regulation Act provides that:

“(4) The Minister may, by notice in the Gazette, make regulations regarding—...

(j) new generation capacity[.]”

...the Minister has made such regulations. Regulation 6 provides in relevant part as follows:

6. Ministerial determinations. (1) The Minister may, in consultation with the Regulator, make a determination in terms of section 34 of the Act.

(2) A determination under section 34 (1) shall include a determination as to whether the new generation capacity shall be established by Eskom, another organ of state or an IPP.
(3) If the determination referred to in sub-regulation (2) requires that the new generation capacity be established by an IPP, the Minister shall also determine the identity of the buyer or, where applicable, the procurer and the buyer.

(5) A determination contemplated in this Regulation is binding on the buyer and the procurer.”

“Buyer” is defined in the regulations as follows: “buyer” means, in relation to a new generation capacity project, any organ of state designated by the Minister in terms of section 34 (1) (c) and (d) of the Act.

“Procurer” is defined in the following terms: “procurer” means the person designated by the Minister in terms of section 34 as being responsible for the preparation, management and implementation of the activities related to procurement of new generation capacity under an IPP procurement programme including the negotiation of the applicable power purchase agreements, which person may or may not be the buyer.’

We have been furnished with a determination made by the Minister under section 34(1) (published under Government Notice 733 in Government Gazette 39111 of 18 August 2015). The determination provides in clause 7 that the “procurer” is the Department of Energy. It also provides in clause 9 that the “buyer” is Eskom. The precise terms are these:

“[T]he electricity must be purchased by Eskom Holdings SOC Limited or by any successor entity to be designated by the Minister of Energy as buyer as buyer (off-taker).”

4.5 After this exposition, Counsel added:

Finally, we must refer to certain regulations which have a bearing on the question we are asked to answer. Regulation 3(d) states the following as one of the objectives of the Regulations:

“the facilitation of the full recovery by the buyer of all costs efficiently incurred by it under or in connection with a power purchase agreement including a reasonable return based on the risks assumed by the buyer thereunder and to ensure transparency and cost reflectivity in the determination of electricity tariffs.”

Regulation 10 provides that the Regulator shall, when determining licence conditions relating to prices, charges and tariffs, ensure that the buyer is able to recover, at least, the full amount
of the costs incurred by the buyer. And then it sets out the categories in respect of which costs incurred by Eskom would be recoverable.

Regulation 9(2) provides that, before Eskom concludes a power purchase agreement, Eskom or the Department of Energy must, subject to any approvals required in terms of the PFMA:

“put in place arrangements to ensure that any portion of the buyer’s allowable revenue approved or allocated by the Regulator for purposes of implementation of new generation capacity projects will be used solely for the purpose of ensuring that the buyer’s financial obligations in respect of new generation capacity projects will be met.”

**In short, the conclusion of a power purchase agreement entails no cost risk to Eskom.** Before Eskom concludes any power purchase agreements, it is entitled to ensure that it will be able to recover its costs under such agreements.

4.6 These remarks concluded counsel’s exposition of the regulatory regime. Counsel then moved to answering some of the questions put to it, as follows:

Under the statutory scheme set out above, it is clear that Eskom has no choice, once the Minister has made a determination, as she has, but to purchase renewable energy from IPPs. The only way in which it could do so, legally, is by concluding power purchase agreements with IPPs which have been selected as preferred bidders.

Therefore, once selected, it seems to us that the preferred bidders have a statutory entitlement, at the very least, to negotiating the conclusion of power purchase agreements with Eskom. At most, the preferred bidders have an entitlement to conclude power purchase agreements, provided, of course, they meet the requirements set out in the power purchase agreements. On either basis, the preferred bidders would be entitled to approach a court to enforce their entitlement, whether that is an entitlement to negotiating a power purchase agreement or an entitlement to the signature of a power purchase agreement with Eskom. We say this for the following reasons.

First, there is Constitutional Court authority to the effect that a reservation of right in the RFP not to award a tender does not, by itself, prevent a court from granting substitutionary relief, namely awarding the tender. In Trencon Construction (Pty) Ltd v the Industrial Development Corporation of South Africa Ltd 2015 (5) SA 245 (CC), the Constitutional Court said at para 70:

“The IDC’s argument cannot prevail. Almost all tender invitations issued by organs of state contain a clause giving the organ of state a discretion to cancel the tender or not
to award it at all. If, when arguing that remittal is the proper remedy, an organ of state is able to raise the fact that it has this discretion without more, a court would virtually never have the power to grant a remedy of substitution. The organ of state would always be able to argue that it still had a discretion not to award the tender, thereby constraining the power of the courts to grant just and equitable remedies. It is a fundamental principle of the rule of law that organs of state, like the IDC, can only exercise power that has been conferred onto them. They cannot, on their own volition, confer power unto themselves that was never there.”

The reasoning here is clear: an organ of state cannot raise the reservation of rights in the RFP to defeat a claim for substitutionary relief. Nor, following from this, can it raise such reservation of rights to refuse to conclude a power purchase agreement. This applies with greater force where, as here, the party seeking to conclude a power purchase agreement has been selected as a preferred bidder, which on its own confers a right to a power purchase agreement.

22. In our view, therefore, and on the regulatory scheme, preferred bidders have an entitlement to conclude power purchase agreements with Eskom if they meet the requirements set out in those agreements.

Second, and quite apart from authority, it appears to us that, on the statutory scheme, the preferred bidders have accrued rights, vis-à-vis the Department, to supply renewable energy to the Department or its nominee, Eskom. All that is left, now, is that the preferred bidders should be put in a position to enforce those accrued rights. The obligation to do so rests as much on the Department as on Eskom. This is further supported by the RFP (a copy of which was furnished to us) which in clause 10 of Part A requires preferred bidders, by 29 October 2014 to 30 July 2015, to do the following:

“Preferred Bidders to finalise their contractual arrangements, with, inter alia, their Members, Contractors, equipment suppliers, Lenders and Grid Provider in respect of the Fourth Bid Submission Date, and application by the Preferred Bidders and obtain of a budget quotation from a Grid Provider and a generation licence from NERSA.”

It appears to us that the intention was that, at least shortly after 30 July 2015, the preferred bidders should be ready to implement the power purchase agreements. If that is so, then we consider that the preferred bidders had an accrued right to sign power purchase agreements with Eskom within a reasonable time, provided they satisfy the requirements contained in those agreements. That right, quite apart from anything else, derives from the RFP itself, read together with the statutory scheme. Moreover, that right is in our view enforceable at law via a mandamus.
Third, there is some authority for the proposition that, on acceptance of a tender by the procurer, which is evidenced by a letter of award, a binding contract comes into being. In Boudewyn Homberg De Vries Smuts v Department of Economic Development and Environmental Affairs 2010 JDR 0918 (EDB) the court said:

I endorse the approach that says that the acceptance of a tender by an organ of state results in an agreement. That agreement may not be detailed enough and there may be outstanding matters that are not covered by the agreement. When such matters are lacking it may be an indication that the parties did not intend the agreement to be a final one. In the case of CGEE Alsthom the following statement was made:

“The existence of such outstanding matters does not, however, necessarily deprive an agreement of contractual force. The parties may well intend by their agreement to conclude a binding contract, while agreeing, either expressly or by implication, to leave the outstanding matters to future negotiation with a view to a comprehensive contract. In the event of agreement being reached on all outstanding matters the comprehensive contract would incorporate and supersede the original agreement.”

I agree with the statement I have just recorded. To me what that implies is that an agreement is binding in law upon the acceptance of the tender. It is then a contract in its own right. The parties may however agree to tie up in the form of a comprehensive agreement whatever matters that are outstanding in the first agreement. Once that is done the latter agreement would incorporate and supersede the first agreement. The first agreement together with what is commonly known as service level agreement translate to one comprehensive agreement.’

There is however contrary authority. In City of Cape Town v South African National Roads Agency 2015 (6) SA 535 (WCC), the court held at para 221 that:

“[221] On the basis of the BAFO evaluation, the contracts committee selected PPC and Overberg as the preferred tenderer and the reserve tenderer, respectively. That marked the end of the tender process, but, as presaged in the terms of the invitation to tender, it did not result in the award of the contract, but rather in the commencement of negotiations between SANRAL and the preferred bidder towards the conclusion of a BOT agreement. The invitation to tender made it clear, however, that SANRAL was not obliged to conclude a contract and had the right to withdraw from the process. We agree with SANRAL’s argument that the inchoate nature of the procurement process makes the City’s challenge to the selection of a preferred bidder a misdirectedly premature attack in the peculiar circumstances of the case.”
We consider, however, that the present case is distinguishable from the City of Cape Town case. In the present case, the RFP included a draft power purchase agreement. The letters of award (one copy of which was furnished to us) provide that the draft power purchase agreement, together with a suite of other agreements, are non-negotiable by the preferred bidder:

“In particular, the Department wishes to confirm that: in terms of paragraph 16.3 of Part A of the RFP, the terms of the draft PPA, Implementation Agreement, Direct Agreement, the Connection Agreements and the Connection Direct Agreement issued with the RFP (“Transaction Agreements”) are not negotiable...”.

That seems to us to suggest that, all that needs to happen is the signature of the power purchase agreements by Eskom and the preferred bidders. On the authority of Boudewyn, therefore, we are of the opinion that the preferred bidders have a right to approach a court and enforce the conclusion of the power purchase agreements. Further, we consider that they have reasonable prospects of success in that regard.

4.7 Counsel then gave very particular consideration to the question of whether Eskom could rely on section 50 of the PFMA and Regulation 9 as quoted above to delay the signature of the power purchase agreements?

We start with Regulation 9. That regulation provides that the buyer (Eskom) or the procurer (the Department) must first be satisfied of certain factors there listed before the buyer (Eskom) signs power purchase agreement. We have been instructed that the procurer (the Department) has conducted the investigation required in regulation 9. In those circumstances, we consider that Eskom cannot use regulation 9 to delay or prevent the signature of the power purchase agreements.

As regards section 50 of the PFMA, we have already pointed out above that, from the perspective of Eskom, the project appears to be risk-free. It is therefore inconceivable that there could be a section 50 (PFMA) concern entitling Eskom to delay or refuse to sign the power purchase agreements. In any event, such concerns, if they existed, would have to be tested for their validity against the peremptory nature of the statutory scheme which obliges Eskom, once the Department had done the preliminary work, to conclude the power purchase agreements.

We are therefore of the view that Eskom could not rely on regulation 9 or section 50 of the PFMA to delay or refuse to conclude the power purchase agreements with the preferred bidders.
4.8 After concluding that reasonable time had existed for Eskom to perform its duties, the investigation finally moved to the question of whether Eskom can appeal to policy considerations to delay or prevent the signature of the power purchase agreements. The answer is in the negative:

_We think not. By section 34 of the Electricity Regulation Act, the policy decision whether or not to have new generation capacity is reposed in the Minister acting in consultation with the Regulator. The Minister has made that policy decision in her determination._

_The determination is, by regulation 6(5), binding on Eskom (see paragraph 9 above). Therefore Eskom could not, in our opinion, rely on its own policy to sidestep the binding determination of the Minister. If Eskom has a contrary policy, on which it seeks to rely to sidestep that of the Minister, then it is required to review the determination by which it is bound._

_We conclude, therefore, that Eskom cannot rely on another policy to avoid its obligations under the Ministerial determination, which include signing the power purchase agreements…_

_…For all the above reasons, we conclude that the preferred bidders would be entitled to approach a court to enforce the signature of the power purchase agreements._

**PART 5: ACRP’S SUBMISSIONS ON THE LEGAL POSITION**

5.1 It is submitted that the legal position is set out correctly by Counsel above.

5.2 Eskom is challenging the validity of the entire procurement regime for Independent Power Producers and ostensibly claiming that it acquires an effective veto right over the entire process through the PFMA and its general fiduciary duties under the Companies’ Act.

5.5 NERSA has been asked to rule on the above by the South African Wind Energy Association approximately twelve months ago and has not done so as yet.

5.4 While refusing to sign the agreements, Eskom is simultaneously claiming in their revenue application the full repayment for expenses incurred for the self-same projects.

5.5 It is clearly not tenable in law for Eskom to simultaneously uphold contradictory interpretations of the law.

5.6 In the premises the correct course of action is for NERSA to postpone the revenue application until such time as it has ruled on the SAWEA complaint.
5.7 A failure to do so would be irregular and ACRP would reserve its rights to launch a judicial review with or without an application for interim relief suspending the implementation of any revenue increase allowed by NERSA.

5.8 When ruling on the SAWEA complaint, it should be considered that NERSA must make decisions in accordance with the objects of ERA and in accordance with its mandate under NERSA Act being:

(a) achieve the efficient, effective, sustainable and orderly development and operation of electricity supply infrastructure in South Africa;
(b) ensure that the interests and needs of present and future electricity customers and end users are safeguarded and met, having regard to the governance, efficiency, effectiveness and long-term sustainability of the electricity supply industry within the broader context of economic energy regulation in the Republic; and
(g) facilitate a fair balance between the interests of customers and end users, licensees, investors in the electricity supply industry and the public.

5.9 NERA states that every decision of NERSA must be consistent with the Constitution and all applicable laws and that it must be in the public interest (s 10).

5.10 It is submitted that given all of the above, NERSA should after the postponement of the revenue application rule in favour of SAWEA.

5.11 The revenue application can then be considered afresh with the legal uncertainties out of the way.

5.12 It is likely that the rights of municipalities to build or procure renewable energy to be wheeled through the Eskom network will also become pressing soon and requires clarity on whether NERSA is able in the final instance to hold Eskom to account.

PART 6: ACRP’S SUBMISSIONS ON THE RECENT MINISTERIAL ANNOUNCEMENT THAT CONTRACTS WOULD BE SIGNED AT A NEW CAP PRICE OF 77C/KWH

6.1 It was recently reported in the media that the Minister of Energy had announced that REIPPPP Round 3.5 – 4.5 projects (the subject of the legal opinion above) would be signed at the end of October, subject to a price cap of 77c/kWh.

6.2 ACRP submits that this announcement is void and irrelevant as it is not a determination in terms of section 34 and because NERSA has further not concurred with the “decision”. Indeed, it is our
understanding that NERSA has already granted generation licences to most if not all of these projects after determining that they constitute “value for money” for South Africa.

6.3 Indeed Eskom concedes in its revenue application (p 141 and further) that the higher prices of early renewables will be followed by much lower prices for later renewables., thus scuppering their own flawed arguments on affordability.

6.4 ACRP submits that NERSA should, after postponing the revenue application, rule on the SAWEA complaint (in SAWEA’s favour) while ignoring the Minister’s announcement as irrelevant and void. It is submitted that failure to do so would be a misdirection that would leave any NERSA decision on the matter open to judicial review.

PART 7: SOUTH AFRICA’S VERY LARGE, FUTURE, RENEWABLE ENERGY SECTOR IN THE CONTEXT OF ITS INTERNATIONAL CLIMATE OBLIGATIONS

7.1 South Africa has ratified the Paris (Climate) Agreement. This agreement is thus part of South African law. The Paris Agreement envisions complete decarbonization after 2050, in other words the complete termination of any greenhouse gas emissions whatsoever. This in the absence of dramatic progress with carbon capture and storage implies an end to coal fired power generation.

7.2 The Paris Agreement is part of the South African regulatory framework within which NERSA is duty bound to operate.

7.3 By 2050, by all credible and recent modelling scenarios, South Africa will have a renewable energy industry of between approximately 55,250 GW (2016 DOE base case modelling) and 200,782 GW (CSIR decarbonized scenario). At the lower end this is larger than Eskom is now. It is thus of critical importance to protect the country’s renewable energy investors in order to ensure that the skills and finances to build this very large infrastructure sector in the next three decades do not leave the country.

7.4 The above shows how critically important NERSA’s decision on the SAWEA complaint is and why it needs to be made before an Eskom revenue application can be entertained.

PART 8: SOUTH AFRICA’S PLEDGES TO FUTURE GENERATIONS AND THE INTERNATIONAL COMMUNITY
8.1 South Africa has presented its “INDC”\(^2\) or “Intended Nationally Determined Contribution” to the international climate community, aggregating around the international climate regime established by the United Nations Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement. The plan is based on a “peak- plateau-decline” foundation that also informs the National Climate Change Response Strategy. The INDC also references the National Development Plan.

8.2 On page 9 of the document, the following is said:

“South Africa has already made significant investments in mitigation. As part of a Renewable Energy Independent Power Producer Procurement Programme (REI4P) has approved 79 renewable energy IPP projects, total 5 243MW, with private investment totalling ZAR 192 billion (approx. US$ 16 billion). Another 6300 MW are under consideration. Investment in public transport infrastructure was US$ 0.5 billion in 2012, and is expected to continue growing at 5% per year. South Africa established a South African Green Fund with an allocated US$ 0.11 billion in the 2011 to 2013 budgets to support catalytic and demonstration green economy initiatives. Resources for the Fund will have to be increased in future to enable and support the scaling up of viable and successful initiatives, including contributions from domestic, private sector and international sources”.

8.3 The INDC includes extensive modelling to quantify the estimated incremental cost to expand REI4P, decarbonise electricity by 2050, carry out carbon capture and storage, move to electric vehicles, and introduce hybrid electric vehicles. This modelling lays the basis for the country to apply for international funding to assist the transition.

8.4 The above pledge to the international community implies that the REIPPPP Round 3.5 – 4.5 projects are a “done deal”. Eskom’s refusal to sign and NERSA delay in ruling on it now endanger South Africa’s international obligations and indeed, our good standing in the international community as a country that is as good as its word. Future generations here and elsewhere in the world depend on us to see that this pledge is carried out.

PART 9: PROTECTING LIVES IN SOUTH AFRICA


\(^2\) See http://www.climateresponse.co.za/home/gp/4, accessed 10 October 2017
According to a recent study on the life cycle costs of Kusile, the costs especially in water may drive the total to between R1.449-trillion and R3.279-trillion. The fact that these externalities are hard to quantify exactly does not mean they do not exist or that the damage caused is zero. People do die and others are hospitalised. Scarce water is consumed.

It is submitted that these aspects should be given due consideration when Eskom’s Revenue Application is heard.

PART 10: PROTECTING JOBS IN SOUTH AFRICA

10.1 It should be noted that less than 50,000 people work for Eskom.

10.2 Eskom’s revenue application intimates that five sequential price rises of 19% are required to effect cost reflective electricity tariffs (making Eskom “sustainable” in their view) and concedes that this would imply an annual loss of 137,000 job opportunities for South Africa, or 685,000 lost jobs over the next five years (see footnote 4 page 117 of the Revenue Application).

10.3 In this respect it should be noted that the CSIR’s lowest cost IRP modelling for 2050 has shown that the lowest cost system for South Africa also creates the most jobs, uses the least water and leads to the lowest greenhouse gas emissions.

3 See “IRP Analyses” at https://www.csir.co.za/csir-energy-centre, retrieved on 10 October 2017
PART 11: CLOSE

The long-term interest of South Africa’s economy coincides with the long term, global, environmental interest. What is required is good governance which ensures an optimal use of human and financial resources. This at the moment requires that the Eskom Revenue Application be postponed until such time as NERSA has ruled on the SAWEA complaint against Eskom. The reason for this is that Eskom’s opposition of this complaint calls into question the entire regulatory and procurement regime for renewable energy, on which our future economy will be built. International experience and CSIR’s modelling have shown that this is the lowest cost future in terms of protecting life, stretching financial resources as far as possible, avoiding greenhouse gas emissions, saving water and creating jobs. Safeguarding the governance regime safeguarding these things should take precedence now over Eskom’s revenue application.