

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no:

In the matter between:

ORGANISATION UNDOING TAX ABUSE NPC
(Registration no: 2012/064213/08)

Applicant

and

**THE NATIONAL ENERGY REGULATOR OF
SOUTH AFRICA**

First Respondent

KARPOWERSHIP SA COEGA (RF) (PTY) LTD
(Registration no: 2020/754336/07)

Second Respondent

KARPOWERSHIP SA SALDANHA BAY (RF) (PTY) LTD
(Registration no: 2020/754347/07)

Third Respondent

KARPOWERSHIP SA RICHARDS BAY (RF) (PTY) LTD
(Registration no: 2020/754352/07)

Fourth Respondent

KARPOWERSHIP SA (PTY) LTD
(Registration no: 2019/537869/07)

Fifth Respondent

**MINISTER OF MINERAL RESOURCES AND
ENERGY N.O.**

Sixth Respondent

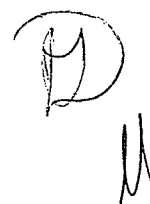
**MINISTER OF FORESTRY, FISHERIES, AND THE
ENVIRONMENT N.O.**

Seventh Respondent

ESKOM HOLDINGS (SOC) LTD
(Registration no: 2002/015527/30)

Eighth Respondent

FOUNDING AFFIDAVIT

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I, the undersigned,

STEFANIE FICK

do hereby make oath and say:

1. I am an adult female executive director of the applicant's Accountability Division with offices situated at Unit 4, Boskruin Village, Cnr President Fouché and Hawken Road, Bromhof, Johannesburg, 2188, Gauteng. I am duly authorised by resolution from the applicant's executive committee to represent the applicant in these proceedings and to depose to this affidavit on behalf of the applicant. The resolution is attached as annexure "FA1".
2. The facts contained herein fall within my personal knowledge, save where otherwise stated or appears from the context, and are true and correct.
3. Submissions of a legal nature are made on the advice of the applicant's legal representatives, which advice I accept as correct.

A. THE PARTIES:

(i) Applicant:

4. The applicant is the ORGANISATION UNDOING TAX ABUSE NPC (hereinafter referred to as "OUTA"), a non-profit company duly registered in terms of the Company laws of the Republic of South Africa with registration number 2012/064213/08 and principal place of business at Unit 4, Boskruin



Village, Cnr President Fouché and Hawken Road, Bromhof, Johannesburg, 2188, Gauteng.

(ii) **Respondents:**

5. The first respondent is THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA ("NERSA"), a regulatory authority established as a juristic person in terms of section 3 of the National Energy Regulator Act 40 of 2004 and principal place of business at Kulawula House, 526 Madiba Street, Arcadia, Pretoria.

5.1 NERSA is mandated to regulate the electricity, piped gas, and petroleum pipelines industries in South Africa in terms of the Electricity Regulation Act 4 of 2006, the Gas Act 48 of 2001 and the Petroleum Pipelines Act 60 of 2003.

5.2 NERSA is further listed as a public entity in Schedule 3 of the Public Finance Management Act 1 of 1999 ("PFMA"). NERSA is accordingly subject to the principles of transparency, accountability and sound management of its revenue, expenditure, assets, and liabilities as set out in section 2 of the PFMA.

6. The second respondent is KARPOWERSHIP SA COEGA (RF) (PTY) LTD ("Karpowership Coega"), a company duly registered in terms of the Company laws of the Republic of South Africa, with registration number 2020/754336/07 and registered address at 164 Totius Street, Groenkloof, Pretoria, 0027.

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7. The third respondent is KARPOWERSHIP SA SALDANHA BAY (RF) (PTY) LTD ("Karpowership Saldanha"), a company duly registered in terms of the Company laws of the Republic of South Africa, with registration number 2020/754347/07 and registered address at 164 Totius Street, Groenkloof, Pretoria, 0027.
8. The fourth respondent is KARPOWERSHIP SA RICHARDS BAY (RF) LTD (Karpowership Richards Bay"), a company duly registered in terms of the Company laws of the Republic of South Africa, with registration number 2020/754352/07 and registered address at 164 Totius Street, Groenkloof, Pretoria, 0027.
 - 8.1 For the sake of convenience and where applicable, I will refer to the second, third and fourth respondents interchangeably and/or collectively as "Karpowership".
9. The fifth respondent is KARPOWERSHIP SA (PTY) LTD ("Karpowership SA"), a company duly registered in accordance with the Company Laws of the Republic of South Africa, with registration number 2019/537869/07 and registered address at 164 Totius Street, Groenkloof, Pretoria, 0027.
 - 9.1 The second, third and fourth respondents are all wholly owned by Karpowership SA, a company that was selected by the Department of Minerals Resources and Energy ("DMRE") as preferred bidder RMIPPP

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programme. The majority owner of Karpowership SA is Karadeniz Holdings, a Turkish energy company that owns and operates land-based power plants and powerships through its subsidiary, Karpowership SA.

9.2 The fifth respondent is cited as an interested party and no relief will be requested against it save in the event of opposition.

9.3 Subsequent to the fifth respondent having been identified as a preferred bidder by DMRE, NERSA granted electricity generation licences to the second, third and fourth respondents for electricity generation at Coega, Saldanha Bay and Richards Bay respectively by its floating storage and regasification units (FSRU's), otherwise known as "powerships".

10. The sixth respondent is the MINISTER OF MINERAL RESOURCES AND ENERGY, cited in official capacity as the Minister responsible for energy, with head office situated at Trevenna Campus, 71 Meintjes Street, corner of Madiba and Francis Baard Streets, Block 2B 2nd Floor, Sunnyside, Pretoria. The sixth respondent is cited as an interested party and no relief will be requested against him save in the event of opposition.

10.1 Service of this application on the sixth respondent will be effected by service on the office of the State Attorney, SALU Building, 316 Thabo Sehume Street, Pretoria in terms of Rule 4(9) of the Uniform Rules of Court.

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10.2 This application will also be served on the Director-General of the Department of Mineral Resources and Energy ("DMRE") at the address mentioned in paragraph 10 above and on the office of the State Attorney at the address mentioned in paragraph 10.1 above, as required by section 2 of the State Liability Act 20 of 1957, as amended.

11. The seventh respondent is the MINISTER OF FORESTRY, FISHERIES, AND THE ENVIRONMENT, cited in official capacity as the Minister responsible for the environment, with head office situated at 472 Steve Biko and Soutpansberg Roads, Arcadia, Pretoria. The seventh respondent is cited as an interested party and no relief will be requested against her save in the event of opposition.

11.1 Service of this application on the seventh respondent will be effected by service on the office of the State Attorney, SALU Building, 316 Thabo Sehume Street, Pretoria in terms of Rule 4(9) of the Uniform Rules of Court.

11.2 This application will also be served on the Director-General of the Department of Forestry, Fisheries, and the Environment ("DFFE") at the address mentioned in paragraph 11 above and on the office of the State Attorney at the address mentioned in paragraph 11.1 above, as required by section 2 of the State Liability Act 20 of 1957, as amended.

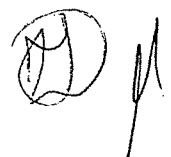
12. The eighth respondent is ESKOM HOLDINGS (SOC) LTD ("ESKOM") a state-owned company duly registered and incorporated in accordance with the



Company laws of the Republic of South Africa, with registration number 2002/015527/30 and registered offices at Megawatt Park, 2 Maxwell Drive, Sunninghill, Johannesburg, Gauteng. ESKOM is cited as an interested party and no relief will be requested against it save in the event of opposition.

B. PURPOSE OF THE APPLICATION:

13. This is an application in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") for the judicial review and setting aside of the decisions taken by NERSA to grant the second, third and fourth respondents generation licences for three FSRU's at Coega, Saldanha Bay and Richards Bay respectively.
14. The generation licences were approved by NERSA at a meeting held on 21 September 2021 and the reasons for the decisions were published by NERSA on its website at <https://www.nersa.org.za/regulator-decisions/> on 29 October 2021. The projected costs of the Karpowership projects over a 20-year period are reported to be in excess of R200 billion.
15. Copies of the published reasons for the granting of the generation licences are attached as follows:
 - 15.1 for Karpowership Coega: annexure "FA2";
 - 15.2 for Karpowership Saldanha Bay: annexure "FA3"; and
 - 15.3 for Karpowership Richard's Bay: annexure "FA4".



C. STANDING:

16. OUTA derives its standing to bring this application from section 33 read with section 38 of the Constitution of the Republic of South Africa, Act 108 of 1996 ("the Constitution").

16.1 Section 33(1) of the Constitution guarantees the right to lawful, reasonable, and procedurally fair administrative action to everyone. As will be more fully set out below, it is the applicant's case that this right is infringed.

16.2 Section 38 of the Constitution deals with the enforcement of rights and reads:

"Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:

- a) anyone acting in their own interest;*
- b) anyone acting on behalf of another person who cannot act in their own name;*
- c) anyone acting as a member of, or in the interest of, a group of class of persons;*
- d) anyone acting in the public interest;*
- e) an association acting in the interest of its member." (Emphasis added)*

17. OUTA has further been approved as a public benefit organisation in terms of section 30(1) of the Income Tax Act 58 of 1962, with its principal objective as set out in clause 3.1 of its Memorandum of Incorporation ("MOI") as:

"...the promotion and advocacy of human rights and democracy in South Africa through the advancement and protection of rights, values and principles enshrined in the Constitution of the Republic of South Africa."

18. Clause 3.2 of OUTA's MOI continues to define its objectives. In particular, clause 3.2 provides:

"3.2 In particular the Company shall, through conducting Activities, focus on-

3.2.1 promoting Taxpayer's rights by –

3.2.1.1 legitimately challenging the unlawful squandering, maladministration and/or corrupt use of Government Funding; and

3.2.1.2 legitimately challenging laws, policies and regulations which are irrational or ineffective for their intended purposes."

19. In order not to cause unnecessary prolixity of the papers I do not attach the complete and voluminous MOI and mission statement of OUTA, but only the relevant pages dealing with OUTA's objectives as annexure "FA5".

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20. OUTA accordingly has the requisite *locus standi* to launch review applications such as the present one where the legitimacy of decisions that affect the taxpayers' rights and the public interest taken by NERSA, a public entity, is challenged.

D. LEGISLATIVE FRAMEWORK:

21. For the convenience of the Court, I set out the main relevant legislative provisions below, as I am advised.

(i) The Electricity Regulation Act 4 of 2006 ("ERA"):

22. The preamble of the ERA confirms the purpose of the Act and appoints NERSA as the custodian and enforcer of the national electricity regulatory framework:

"To establish a national regulatory framework for the electricity supply industry; to make the National Energy Regulator of South Africa the custodian and enforcer of the national electricity regulatory framework; to provide for licences and registration as the manner in which generation, transmission, distribution, reticulation, trading and the import and export of electricity are regulated; to regulate the reticulation of electricity by municipalities; and to provide for matters connected therewith."

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23. Section 2 of the ERA lists the objects of the Act and reads:

"2. The objects of this Act are to-

(a) achieve the efficient, 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 the 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."

24. Section 4 of the ERA sets out the powers and duties of the NERSA. Section 4(a)(i) provides:

"4. The Regulator -



(a) must –

- (i) consider applications for licences and may issue licenses for-
 - (aa) the operation of generation, transmission or distribution facilities;
 - (bb) the import and export of electricity;
 - (cc) trading.

25. Section 10(2)(e) under the heading **Application for Licence** states:

“(2) Any application contemplated in subsection (1) must include –

- (e) the plans and the ability of the applicant to comply with applicable labour, health, safety and environmental legislation, subordinate legislation and such other requirements as may be applicable.”

(ii) **The Electricity Regulations on New Generation Capacity, 2011 to the ERA, as amended (GN 399 published in Government Gazette 342626) (“the Regulations”):**

26. Regulation 9 under the heading **Concluding the power purchase agreement** states:

- “(1) A power purchase agreement between the buyer and an IPP must meet the following requirements-
- (a) value for money;

- (b) *appropriate technical, operational and financial risk transfer to the generator;*
 - (c) *effective mechanisms for implementation, management, enforcement and monitoring of the power purchase agreement; and*
 - (d) *satisfactory due diligence in respect of the buyer's representative and the proposed generator in relation to matters of their respective competence and capacity to enter into the power purchase agreement.*
- (2) *Before the buyer concludes a power purchase agreement, the buyer or the procurer must, subject to any approvals required in terms of the PFMA-*
 - (a) *ensure that the power purchase agreement meets the requirements set out in sub-regulation (1);*
 - (b) *ensure that the buyer has a contract management plan that explains the capacity of the buyer, and its proposed mechanisms and procedures, to effectively implement, manage, enforce, monitor and report on the power purchase agreement and any other agreements relating to a new generation capacity project to which the buyer is a party, to National Treasury and the Minister on a regular basis; and*

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- (c) *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."*

27. Regulation 10, under the heading **Cost recovery** states:

"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 in the following categories:

- (a) *all payments made for the purchase of new generation capacity, in terms of a power purchase agreement entered into in terms of or as contemplated in these Regulations;*
- (b) *all amounts paid by the buyer in terms of the power purchase agreement (other than those referred to in paragraphs (a) and (e)), provided that the buyer shall have acted efficiently in the exercise of those rights and the fulfilment of those obligations in terms of the power purchase agreement which gave rise to such payments;*
- (c) *the efficiently incurred costs of the buyer in performing any function contemplated in these Regulations;*
- (d) *the efficiently incurred costs of the buyer in administering power purchase agreements;*



- (e) *costs of, and amounts paid by the buyer arising from the termination of a power purchase agreement; and*
- (f) *all other costs efficiently incurred by the buyer in participating in an IPP procurement programme and in purchasing new generation capacity through new generation capacity projects, including, without limitation, operating expenditure, professional fees and hedging costs."*

(iii) **The National Energy Regulator Act 40 of 2004 ("NERA"):**

28. Section 10(1) of the National Energy Regulator Act under the heading **Decisions of Energy Regulator** states:

"10(1) Every decision of the Energy Regulator must be in writing and be-

- (a) consistent with the Constitution and all applicable laws;*
- (b) in the public interest;*
- (c) within the powers of the Energy Regulator, as set out in this Act, the Electricity Act, the Gas Act and the Petroleum Pipelines Act;*
- (d) taken within a procedurally fair process in which affected persons have the opportunity to submit their views and present relevant facts and evidence to the Energy Regulator;*
- (e) based on reasons, facts and evidence that must be summarised and recorded; and*

(f) explain clearly as to its factual and legal basis and the reasons therefor."

29. Section 10(3) of the NERA provides for judicial review of NERSA decisions in terms of PAJA:

"(3) Any person may institute proceedings in the High Court for the judicial review of an administrative action by the Energy Regulator in accordance with the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000)

E. BACKGROUND FACTS:

30. During or about August 2020 and ostensibly in response to the energy crisis in South Africa, the DMRE published a request for proposal ("RFP") in respect of the Government's Risk Mitigation Independent Power Procurement Programme ("RMIPPP").
31. The RFP was for the procurement of 2000MW new generation capacity from a range of energy source technologies. The successful bidders that were selected to provide the new generation electricity would have to obtain generation licences from NERSA and enter into power purchase agreements ("PPA's") with ESKOM.
32. To the best of my knowledge and in accordance with information at present in the public domain, prior to the announcement of the RFP and in June 2020


Karpowership was awarded an exemption from having to undertake an environmental impact assessment ("EIA") by the DFFE under the emergency section 30A provision contained in the National Environmental Management Act 107 of 1998 ("NEMA"), purportedly to provide emergency power during the Covid-19 crisis.

33. The exemption referred to above was subsequently withdrawn in August 2020 after the DFFE concluded that it was awarded based on incorrect information.
34. Karpowership SA accordingly had to re-apply and conduct EIA's for environmental authorisation ("EA") for purposes of submitting its bid to the DMRE.
35. The process followed by Karpowership to obtain the initial emergency exemption in June 2020 subsequently prompted investigation by the Environmental Management Inspectorate, generally known to the public as the Green Scorpions. In terms of NEMA the Green Scorpions are tasked with investigating environmental crimes and enforcing legislation required by Section 24 of the Constitution that guarantees everyone the right to an environment that is not harmful to their health or well-being, and the right to have the environment protected for the benefit of future generations through legislation and other measures.
36. It has been reported that the Green Scorpions recommended criminal charges against Karpowership for its alleged attempt to bypass EIA studies required in



terms of NEMA. In June 2021 the Green Scorpions referred a docket to the Director of Public Prosecutions ("DPP") of North Gauteng. During the first week of February 2022 and again on 25 April 2022 the applicant's attorney of record, Ms Jennings of Jennings Incorporated Attorneys, contacted the offices of the DPP telephonically and spoke to one Ms Matshidiso Malema, who informed her that, if nothing has been reported yet in the media, the investigation by the DPP is still pending. To the best of my knowledge the criminal investigation is still pending at the time of deposing to this affidavit. A confirmatory affidavit from Ms Jennings is attached as annexure "FA6".

37. The initial emergency exemption granted to Karpowership, the subsequent revocation thereof and the criminal investigation by the Green Scorpions that followed were widely reported, as can be seen from the newspaper articles attached as annexures "FA7", "FA8", "FA9" and "FA10".
38. Several bid responses were received by the DMRE for the RMIPPP and in March 2021 Karpowership SA was selected as preferred bidder for the procurement of 450MW at Coega, 320MW at Saldanha and 450MW at Richard's Bay.
39. At the time when Karpowership SA was selected as preferred bidder by the DMRE, it did not have the required EA's in place but its EA application was pending. In June 2021, after Karpowership SA was selected as preferred bidder by the DMRE but *prior* to NERSA's decision to grant the generation licences, the EA's for all three the Karpowership RMIPPP projects were refused by the



DFFE. Karpowership subsequently lodged an internal appeal with DFFE in July 2021 pertaining to the refusal of the respective environmental authorisations. To the best of my knowledge the appeal is still pending.

39.1 The above alone should have led to refusal of the generation licence by NERSA because the refusal of EA's by a competent authority definitively shows that Karpowership is unable to comply with the relevant legislation. I revert to this aspect below.

39.2 Moreover, the reasons for the DFFE's refusal to grant the EA's are highly relevant for purposes of assessing the ability of an applicant to comply with the relevant environmental legislation as required in terms of section 10(2)(e) of the ERA, yet were not considered by NERSA in the decision-making process.

39.3 The applicant is not in possession of the DFFE's reasons for refusal of the EA's but invite the seventh respondent to provide a copy thereof to the Honourable Court in these proceedings.

(i) **OUTA's objection prior to the granting of the generation licences:**

40. All the capacity generated by the second, third and fourth respondents would be obtained by floating power plants or powerships that are to be moored at the Coega, Saldanha Bay and Richard's Bay harbours respectively.



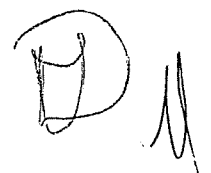
41. On or about 13 August 2021 OUTA submitted a document entitled *"Karpowership: No permits, no clarity, no value, no thanks"* (hereinafter referred to as "the OUTA objection") to NERSA wherein it called on NERSA to reject the Karpowership generation licence applications. The OUTA objection is attached as annexure **"FA11"** and the grounds for the objection at the time to the granting of the licences can be summarised as follows:

- (i) **no environmental authorisation:** environmental authorisation for the three Karpowership projects have been denied by the DFFE. Although an internal appeal has been lodged by Karpowership, there is no indication when the internal appeal will be heard by DFFE or when the final ruling will be announced. The granting of a licence in the absence of the outcome of the environmental authorisation is accordingly premature;
- (ii) **no port authority permits:** there is no evidence that the relevant port authorities will grant permits for the mooring of FSRU's in the harbours of Coega, Saldanha Bay and Richard's Bay, whilst NERSA's generation licensing procedures requires evidence of such permits or port authorisations to be included. This renders the granting of generation licences premature;
- (iii) **no licences to transport liquified natural gas:** no evidence is included in the Karpowership applications that NERSA, as the gas pipeline regulator has agreed or will agree to provide licences or permits for




pipelines to transport liquified natural gas ("LNG") from shipping tankers to the FSRU's floating in South African waters. Again, this renders the granting of generation licences premature;

- (iv) **no evidence that ESKOM will sign PPA's:** the Karpowership generation licence applications contain no evidence that the ESKOM board has agreed or will agree to enter into the PPA's with Karpowership. Reports at the time indicated that ESKOM has expressed reservations about entering into the PPA's with Karpowership for the next 20 years. By not taking the absence of clarity on PPA's into account, NERSA will effectively disregard the mandate provided to it by section 2(b), (e) and (g) of the ERA;
- (v) **ongoing criminal investigation by DFFE of the environmental authorisation application submitted by Karpowership:** the public and affected stakeholders require clarity in respect of the investigation by the Green Scorpions and any resulting criminal charges that may arise in order to understand the issues and legalities and provide meaningful comment and input on the behaviour of Karpowership;
- (vi) **pending legal challenge by DNG Energy disputing the award of preferred bidder status to Karpowership:** DNG Energy applied to Court to have itself substituted as preferred bidder for the three projects in the place of Karpowership. It alleged in its court papers that the tender process had procedural irregularities, conflicts of interest and was



corrupt. A decision while these proceedings were pending would be premature;

- (vii) **investigation by the parliamentary Portfolio Committee on Mineral Resources and Energy:** the said committee had obtained legal opinions that confirmed its right to initiate an inquiry into the award of preferred bidder status to Karpowership for the three projects under the RMIPPP project and intended to conduct such an investigation. In order to provide meaningful comment and input to NERSA on the licence applications, the public and affected stakeholders require clarity in respect of the subject and the outcome of the inquiry;
- (viii) **no financial close by Karpowership:** the date by which successful bidders had to obtain financial closure for the RMIPPP projects were announced on 18 March 2021 by DMRE Minister Gwede Mantashe as 31 July 2021. This was not met and had been extended to 30 September 2021. There is a likelihood that financial close may never be achieved for the Karpowership projects;
- (ix) **unaffordability over the 20-year contract period due to the tariff being linked to the US dollar price of gas:** the Karpowership projects will use fully imported LNG fuel, which makes up an estimated 60% of the tariff rate. This is linked to the US Dollar market price of LNG, the US Dollar/ZAR exchange rate, and the carbon price, causing price uncertainty and massive upside potential of price increases over the next

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20 years. Furthermore, the powerships are leased from the Turkish Karpowership holding company with the associated costs being another fully imported cost component, making up an estimated further 25% of the tariff rate. No information is available to the public and affected stakeholders as to how DMRE and its Independent Power Procurement Office evaluated the impact of price variations on the tariff rates over the 20-year contract period, leading to a lack of transparency. The details of the make-up of the business case, tariff rates and price adjustment formulae have been redacted in the Karpowership licence applications and are meaningless;

- (x) **Karpowership licences incomplete and consideration thereof will be premature:** the generation licence applications cannot be considered by NERSA in circumstances where the applications are incomplete. The announcement of the public participation process by NERSA to consider the licence applications is premature and inconsistent with NERSA's own processes and past practices where only complete licence applications are considered.

42. It bears mentioning that the DNG application referred to under point (vi) above was heard by the Honourable Raulinga J on 30 November 2021 – 2 December 2021. Judgment was delivered on 30 January 2022 wherein DNG's application was dismissed with costs. That application was brought against the DMRE (as first respondent) and others where the validity of the bid requirements and the tender process was challenged. NERSA was not a party to those proceedings,

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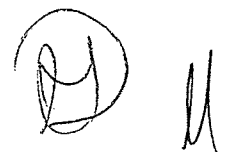
and it did not relate to the generation licences granted by NERSA to Karpowership.

43. Leave to appeal to the Supreme Court of Appeal in the above-mentioned review application was granted against the DMRE and Karpowership SA in that matter by the Honourable Raulinga J on 1 April 2022. A copy of the judgment is attached as annexure “FA12”.
44. It was reported in November 2021 that the DFFE will be appointing an independent expert to assist Minister Barbara Creecy in the Karpowership appeal pertaining to the DFFE’s refusal of the environmental authorisations. A copy of the news report from Fin24 (a part of News24) is attached as annexure “FA13”. As mentioned above, to the best of my knowledge the appeal is still pending and no outcome has been reached and/or announced.
45. The public hearings to consider generation licence applications of the successful bidders were scheduled by NERSA for 19 August 2021. These hearings continued despite OUTA’s objections and the objections of several other interest groups. The generation licences were subsequently approved at a NERSA meeting held on 21 September 2021 and the decisions were published by NERSA on its website on 29 October 2021.

(ii) **ESKOM Power Purchase Agreements (“PPA’s”)**



46. There is uncertainty as to whether ESKOM will enter into the PPA's. In August 2021 the CEO of ESKOM, Andre de Ruyter, took the unusual step of publicly expressing his wariness of entering into long term contracts with powerships that generate energy using LNG in a rapidly changing energy environment. The article from Fin24 where this was reported, is attached as annexure "FA14".
47. The position regarding ESKOM's signing of the PPA's remain unclear, even though it was a NERSA prerequisite for the granting of generation licences as published on the NERSA website at the time under the heading "*Genertion (sic) Licensing and Registration Frequently Asked Questions*", attached as annexure "FA15".
- 47.1 The document, which appears to contain NERSA's internal licencing procedures framed as "Frequently Asked Questions", was printed from the NERSA website during or approximately July - August 2021 when OUTA's objection was prepared. The document lists *inter alia* on page 2 thereof under "Q12. *What are they requirements for generation licencing?*", a signed Power Purchase Agreement showing the agreed tariff as a requirement for the granting of a licence.
- 47.2 The document has since been removed after an interview by the Radio Station 702 on 23 September 2021 with NERSA Regulator Member Nhlanhla Gumede, where questions were posed about this requirement (imposed internally by NERSA) that were not met. During this interview, NERSA's representative failed to provide a proper explanation as to why

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this internal requirement were not adhered when the decision pertaining to the granting of the generation licences to Karpowership were made, save than to state that it was not in line with the Act. For the sake of completeness I point out that the interview referred to is entitled "*Nersa explained why it granted generation licences to Karpowership*" is published and can be accessed at <https://omny.fm/shows/the-breakfast-show-702/nersa-explains-why-it-granted-generation-licenses>

- 47.3 Following the removal of the document from NERSA's website, I could not find NERSA's internal licencing procedures anywhere. It is expected that NERSA's internal licencing procedures that were applicable and considered at the time when the impugned decisions were taken will form part of the record.
48. As recently as 12 April 2022 Engineering News published an article relaying public statements made by De Ruyter, attached as annexure "FA16". De Ruyter is *inter alia* quoted as having said:

"Eskom as an entity has a fiduciary duty to ensure that when it signs a contract, any contract, but in particular power purchase agreements, that we protect the interests of the entity – that is the duty of our board of directors, and that's a duty that they take very seriously...."

"We are, therefore, very carefully scrutinizing the [RMIPPP] documents and where we see risks that could adversely affect Eskom as an entity, we require certain assurances from the IPP Office and/or the bidders."




49. From the above it is clear that there was at the time of the decision by NERSA to grant the generation licences, no certainty as to whether the PPA's will be signed by ESKOM. At the time of deposing to this affidavit this uncertainty remains. Nevertheless, NERSA incorrectly and irrationally accepted the signing of the PPA's as fact during its decision-making process.

(iii) **Absence of financial close:**

50. A further point of great concern and uncertainty is the fact that Karpowership has not met the deadline for financial close of 31 July 2021 as was originally announced as a "*non-negotiable*" date by Minister Gwede Mantashe on 18 March 2021.
51. This deadline was then extended to 30 September 2021, thereafter again to 27 January 2022, thereafter again to 31 March 2022, and thereafter again for an indefinite period. Karpowership has failed to obtain the requisite regulatory approvals by any of the earlier deadlines and at the time of deposing to this affidavit this remains the position.
52. On 31 March 2022 the DMRE issued the media response attached as annexure "**FA17**" in answer to an inquiry about whether any of the preferred bidders for the RMIPPP programme will reach financial close by 31 March 2022. I quote below from the DMRE response:

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"The preferred bidders were scheduled to sign the PPA's with Eskom, the Department, and their lenders on 31 March 2022. However, this had to be postponed due to outstanding matters and conditions to be addressed in respect of the (PPAs) with Eskom, and the need to provide the Preferred Bidders and their lenders adequate time to undertake due diligence reviews of the project agreements.

Consultations with the Buyer (Eskom) are underway. A new date for the signing of the PPAs will be communicated to the affected parties in due course. Members of the media will be invited to cover the signing ceremony."

53. It appears that the deadline keeps getting extended in an attempt to retrospectively cure the defective process that was followed and the irrational and unreasonable granting of the generation licences by NERSA, where it was incorrectly accepted as fact during the decision-making process that financial close would be reached by the following deadline (which at the time was 30 September 2021). This delay and repeated extensions become even more questionable when having regard to the purpose of the RMIPPP programme, i.e., to add 2000MW of electricity to the national grid on an urgent basis and as an emergency measure.

E. NERSA'S REACTION TO THE OBJECTIONS RECEIVED AND THE REASONS FOR THE DECISION TO GRANT THE GENERATION LICENCES:

54. In the reasons provided by NERSA on 29 October 2021 for the granting of the generation licences to Karpowership, many of the objections raised by OUTA



and various other third-party stakeholders were simply brushed aside and dealt with in a highly unsatisfactory manner. I summarise briefly below NERSA's responses relevant to the objections made by OUTA and OUTA's contention on each, as well as the reasons why it stands to be reviewed and set aside.

(i) **The absence of environmental authorisation by the DFFE:**

55. According to NERSA the objection falls within the policy development realm and NERSA cannot venture into such space. This, NERSA argues, falls outside its jurisdiction when considering section 10 of the NRA. In accordance with section 10(2)(e) an applicant is only expected to show its ability to comply with the environmental, labour and health aspect. According to NERSA it cannot decide on these aspects as the custodianship of them falls outside of NERSA.

56. I take note that NERSA cannot grant such environmental authorisations and as such, the granting of such authorisations would fall outside of NERSA's jurisdiction. However, NERSA cannot simply hide behind the wording of section 10(2)(e) of the NRA to excuse its failure to properly assess the ability of an applicant to comply with the applicable environmental legislation. Karpowership's ability to comply had at the time of granting the generation licences been assessed and decided unfavourably by DFFE. This fact could not and should not have been ignored by NERSA.

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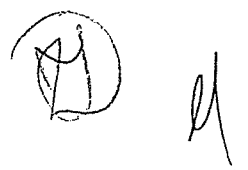
57. In the reasons provided, NERSA states *inter alia* the following under the heading "NERSA's Analysis" with regards to the refusal of the EIA by the DFFE and the documents submitted by Karpowership to the DFFE:

"NERSA does not have the authority to review these documents but it is satisfied that the plans submitted to the appropriate authority will enable the DFFE to make a decision. The applicant therefore showed plans and ability to comply with other legislation as in Section 10(2)(e) of the Act. There is no harm suffered by NERSA should NERSA issue a licence and the EIA appeal fails later, as there is provision in the legislation to revoke such licences. The Applicant will however suffer irreparable harm in form of loss of business, should NERSA delay issuing the licence based." (Emphasis added)

58. The above reasoning is flawed in several respects:

58.1 the mere fact that plans are submitted does not automatically mean that an ability to comply with legislation has been demonstrated. The inquiry into whether or not Karpowership has demonstrated the ability to comply with legislation must surely go further than the mere submission of plans;

58.2 the reasons provided by NERSA do not indicate what process was followed or what criteria was used for it to reach the conclusion that Karpowership has *"demonstrated the ability to comply with applicable labour, health, safety and environmental legislation, subordinate*



legislation and such other requirements as may be applicable” as required by section 10(2)(e).

- 58.3 NERSA appears to have envisaged a situation where Karpowership will use these licences prior to having the requisite environmental authorisation from the DFFE in place. This is evident from the last sentence quoted above where NERSA expresses a concern that financial losses that will be suffered by Karpowership if the licences are not granted (regardless of whether the requisite environmental legislation has been complied with).
59. Although NERSA does not elaborate on what such alleged “financial losses” will be, it is of great concern that NERSA, a South Africa public body using public funding, expresses concern about the financial affairs of a private Turkish majority-owned company, thereby creating the distinct impression that the financial well-being of Karpowership should enjoy preference above that of the South African public.
60. The financial well-being and potential losses that Karpowership may suffer due to its non-compliance with relevant legislation should not have come into play during NERSA’s decision-making process. The fact that this aspect was taken into account by NERSA in itself illustrates the flawed and irrational process.
61. Moreover, the EA’s have been decided and refused by DFFE. Unless and until the appeals succeed, the refusal of the EA’s stands and no conclusion can be

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reached rationally that Karpowership is able to comply with the applicable environmental legislation.

62. In addition to the above, it can never be said to be in the public interest where a generation licence is granted to a party still under criminal investigation as in the case of Karpowership.
63. In the premises the decisions taken by NERSA in all three applications regarding Karpowership's ability to comply with the applicable environmental legislation was not rationally connected to the information before NERSA at the time of making the decision and the reasons given. NERSA further took into account irrelevant considerations whilst failing to take into account relevant considerations in reaching its decision. Furthermore, the decision taken is unreasonable as no reasonable person would, on the information that served before NERSA at the time, come to the conclusions that Karpowership had the ability to comply with the applicable environmental legislation and would obtain an EA.
64. The decision is also in violation of section 10(2)(e) of the ERA as NERSA has failed to properly exercise its mandate to demonstrate that it has properly assessed whether Karpowership has the plans and the ability to comply with the relevant environmental legislation and obtain the requisite EA's.
65. The decisions accordingly fall to be reviewed and set aside due in accordance with sections 6(2)(e) and/or 6(2)(f) and/or 6(2)(h) and/or 6(2)(i) of PAJA.



(ii) **The absence of port authority permits:**

66. NERSA's answer to this objection is merely that the applicant has applied for the respective permits and NERSA is required only to consider the generation licence application.
67. In terms of section 62(1)(b) of the National Ports Act 12 of 2005 a licenced operator that is granted a port authority licence must comply with the NPA and any other law. (Emphasis added)
68. NERSA can therefore not view the granting of port authority permits in isolation and wash its proverbial hands off the issue of non-compliance with legislation merely because Karpowership has applied for the port permits. In terms of section 10(2)(e) of the NRA NERSA was still required to determine that Karpowership showed an ability to comply with the provisions of the NPA before it could grant the generation licences. It is submitted that a mere application for a permit does not meet this requirement, and that the investigation by NERSA should go further.
69. In the premises NERSA failed to take into account relevant considerations in its decisions, alternatively took into account irrelevant considerations in all three applications regarding Karpowership's ability to comply with the provisions of the NPA. The decisions are further irrational and unreasonable as no reasonable person would conclude that a mere application for a permit indicates an ability to comply.



70. The decision is also in violation of section 10(2)(e) of the ERA as NERSA has failed to properly exercise its mandate to demonstrate that it has properly assessed whether Karpowership has the plans and the ability to comply with the provisions of the National Ports Act and obtain the requisite permits.

71. The decisions accordingly fall to be set aside in accordance with section 6(2)(e) and/or 6(2)(f) and/or 6(2)(i) of PAJA.

(iii) **No evidence that ESKOM will sign the PPA's:**

72. NERSA's response to the above was merely "*The Minister has determined that ESKOM will be the buyer and ESKOM has not objected*". This is contrary to the concerns publicly expressed by Mr de Ruyter, ESKOM's CEO in August 2021.

73. The fact that, at the time of deposing to this affidavit, the PPA's have not been concluded and Treasury has not signed off on it, is further indicative of ESKOM's reservations about entering into PPA's with Karpowership. Financial close has also not been reached.

74. NERSA has further misled the public in the Richard's Bay decision (at p 8 thereof) where it states in paragraph 22.2 (at p 8 of the decision) that it had received the PPA between the Karpowership Richard's Bay and ESKOM as part of the supporting documents submitted by Karpowership. There was no PPA between ESKOM and Karpowership Richard's Bay or any of the other two



Karpowership respondents at the time when the impugned decisions were taken.

75. By having accepted that ESKOM will sign the PPA's and having used it as motivation for the granting of the generation licences to Karpowership, NERSA failed to adhere to its own internal licensing procedures and further, in its decision to grant the licences on this incorrect and unsubstantiated presumption, failed to take into account relevant considerations. It was further not rationally connected to the information before NERSA at the time of reaching the decision to grant the generation licences to Karpowership.
76. Moreover, NERSA failed to do a cost recovery analysis and make a decision regarding licence conditions in terms of regulation 10 of the Regulations which, it is submitted, should have been done in conjunction with any decisions involving ESKOM as the buyer.
77. In the premises the decision falls to be reviewed and set aside in terms of sections 6(2)(e) and/or 6(2)(f) of PAJA, alternatively section 6(2)(g) thereof.

(iv) **Financial close not reached:**

78. NERSA's answer to the above was that *"Financial close will only be achieved after the generation licence is issued. The financial close deadline was extended to end of September 2021."*

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79. The above loses sight of the fact that, when the first financial close deadline of 31 July 2021 was announced by the Minister on 18 March 2021, the intention appears to have been that such deadline would be met before the awarding of the generation licences. After financial close by this date proved impossible, the date was extended to 30 September 2021. NERSA clearly did not assess Karpowership's ability to reach financial close by this date but nevertheless proceeded to grant the licences.
80. After the first extension of the deadline to 30 September 2021, three further extensions were granted and Karpowership has yet to reach financial closure. NERSA was accordingly misleading the public in its decision by stating as fact that the financial closure would be obtained after the generation licence is issued, whilst this is still to materialise more than 7 months after the impugned decisions were taken on 21 September 2021, and after four extensions of the deadline already and still no certainty in sight.
81. In the premises NERSA failed to take relevant considerations into account, alternatively took into account irrelevant considerations. The decision is further not rationally connected to the information that was before NERSA at the time of the decision-making and the reasons given.
82. The decision accordingly stands to be reviewed and set aside in terms of section 6(2)(e) and/or 6(2)(f) of PAJA.

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(v) **Absence of information about tariff / price variation dependent on the US dollar:**

83. NERSA's answer to the lack of transparency regarding financial information was answered with a blanket reliance on confidentiality. It failed to deal with the issue of price variation in circumstances where prices over the next 20 years will be dependent on the US dollar price. This causes uncertainty and may come at tremendous costs for the South African public.
84. The lack of transparency points to a decision that was procedurally unfair as the public was not informed of and able to comment on and submit relevant facts and evidence to NERSA on the costs involved over the next 20 years. Furthermore, NERSA did not take into account relevant considerations and the decision was reached in an arbitrary manner.
85. In the premises the decision falls to be reviewed and set aside in terms of section 6(2)(c) and/or 6(2)(e) and/or 6(2)(f) of PAJA.

G. **EXPERT OPINION:**

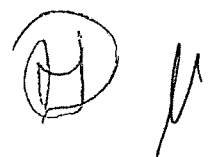
86. For purposes of this application and obtaining an expert opinion, OUTA consulted energy specialist Dr Grové Steyn, the Chief Executive Officer of Meridian Economics ("Meridian"). I was advised by Dr Steyn that, on the information already available and without the benefit of the full record, it is evident that many relevant factors were not properly considered by NERSA in

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reaching its decision to grant the generation licences. As such, NERSA failed to properly fulfill the oversight function bestowed upon it by the legislature and comply with its obligations in terms of the ERA. I summarise in paragraphs 87 – 102 below Dr Steyn's opinion based on the NERSA Reasons for Decision ("RfD") in the three Karpowership decisions and other documents and information available at this stage.

(i) Not required for meeting electricity demand:

87. The Karpowership generation licences and PPA's are not required to resolve South Africa's current loadshedding problems on an urgent basis. There are faster and substantially cheaper generation project options available to complement the portfolio of existing generation resources on the grid to eliminate loadshedding in the short-term.
88. Independent studies consistently demonstrate that there is no economic rationale or need for baseload or mid-merit (high-capacity factor) gas power generation in the South African power system for at least the next ten years. Karpowership projects will operate at a capacity factor of 50% and up to 66%. This will be in the mid-merit to baseload range. Forcing in projects such as the Karpowership ones licensed by NERSA will thus impose additional and unnecessary financial, economic, and environmental costs on the South African economy.

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89. It is further likely that trends in current technological developments in technologies that compete with the Karpowership solution (such as high-capacity factor wind generators combined with different forms of short- and longer term storage, and peaking plant) and rapidly increasing climate constraints, will soon have the effect of rendering mid-merit and baseload gas fired power projects uneconomic and technologically obsolete.

90. Powerships are typically deployed as a short-term emergency solution in the event of disaster or other power crisis. The granting of licences for the envisaged period of 20 years is unprecedented and inappropriate.

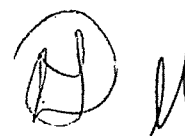
(ii) Failure to supply cost-effective power:

91. The 20-year Karpowership projects will expose consumers to much higher costs and much greater risk than the portfolio of alternatives available to resolve loadshedding in the short term and meet demand over the long term.

92. NERSA has failed to do a proper analysis of the project costs and cost risk, and more specifically appears to have misconstrued the issues surrounding the electricity pricing formulas (in particular the gas pricing components) approved as part of the decision. NERSA accordingly did not apply its mind to all the factors that it had to consider in making the decision, in particular pertaining to the following:

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- a) the price for power from the Karpowerships is significantly exposed to exchange rate risk and global gas prices, whereas the alternative generating technologies have little or no such exposure;
 - b) the RfD's state that Karpowership power for the year beginning April 2022 would cost R2.80/kWh, already up 90% from the ~R1.50/kWh bid as at April 2020;
 - c) Meridian's estimates based on its understanding of the bid prices and limited information on the PPA suggest the *current* price for Karpowership power is close to R5/kWh – roughly two to three times the cost of alternative portfolio based solutions to resolve loadshedding and more than the other more expensive winning bids in the RMIPPP process;
 - d) the gas component of the PPA's pricing formula as disclosed in the RfD appears to result in a substantial over recovery of the regasification cost. According to the RfD there is both a recovery of this in the fixed cost component as well as a percentage premium applied to the gas price. The latter would result in "windfall" profits for the Karpowership fuel providing company as the actual regasification cost is not linked to the price of gas. This has not been interrogated by NERSA at all.
- (iii) NERSA's failure to conduct a value for money assessment:
93. Section 10(2)(e) of the ERA requires that an application for a generation licence must include the plans and ability to comply with any applicable legislation or

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subordinate legislation. The plans and ability to comply with the Regulations should accordingly have been included in the licence applications.

94. With specific reference to regulations 9(1)(a) and 9(1)(b), the application should have included the plans and ability for the PPA's to meet the requirements of:

(a) value for money; and

(b) appropriate technical, operational and financial risk transfer to the seller.

95. It is Dr Steyn's opinion that the following is required for a conclusion of "value for money" to be reached:

a) the service provided by the seller must match the economic need of the buyer. This predetermines the utility or the value in the hands of the buyer (i.e. the service provided must actually be what the buyer needs); and

b) the price at which the service is provided must be:

(i) lower than the economic value of the utility in the hands of the buyer; and

(ii) competitive compared to that of the alternative providers available to the buyer.

96. While NERSA specifically raises these issues briefly in their respective RfD's under the heading "*POWER PURCHASE AGREEMENT*" (Coega RfD at par 86; Saldanha RfD at par 85; Richards Bay RfD at par 84) they provide no evidence that they have conducted any adequate assessment of them.

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97. In particular, NERSA did not apply the value for money test. In Dr Steyn's opinion, if NERSA did apply the test, it would have found that the Karpowership projects failed it. NERSA accordingly failed to consider these critical issues in its decision.

(iv) NERSA's failure to consider climate impacts as a critical economic risk to industrial and commercial electricity consumers:

98. The world is in the midst of a climate crisis with unprecedented implications for the biosphere and human wellbeing. The South African Government recently published its updated Nationally Determined Contribution ("NDC"), committing the country to decarbonisation targets by 2025 and 2030. Beyond that it is Government policy (along with most countries in the world) to achieve a net zero emissions economy by mid-century. In South Africa the highly carbon intensive power sector will have to do the early heavy lifting to enable South Africa to deliver on its international decarbonisation commitments and avoid punitive carbon border tax adjustments on its exports and other punitive financial impacts on the economy.
99. Dr Steyn is of the opinion, that given South Africa's decarbonisation policies and commitments read with the objects of the ERA, and the fact that the country's power sector is the most carbon intensive in the world, thereby exposing the entire economy to excessive trade and financing related climate risk, climate factors are not irrelevant when NERSA considers the award of a 20-year generation licence for a fossil fuel plant, when cleaner, cheaper and



faster options are available. South African electricity consumers will be forced to consume this power for this entire period and the state will be the guarantor of the power off-take. This is contrary to the objectives set out in section 2(b) of the ERA that places an obligation on NERSA to:

“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 ESI within the broader context of economic energy regulation in the Republic.”

100. High capacity factor gas power as proposed by Karpowership, will mostly not displace CO₂ emitting coal power as claimed by NERSA in the RfD, but will rather displace the amount of future renewable energy that will be built. It will thus result in a *higher* emitting power sector than what would otherwise have been the case, thereby undermining the country's efforts to decarbonise its economy.
101. According to Dr Steyn NERSA has not in any way considered and applied its mind to these critical climate related economic risk factors when it evaluated the Karpowership licence application. It would at a minimum have been necessary to consider whether the additional emissions from the Karpowership projects will compromise the ability of the power sector to fulfil its leading role in enabling South Africa to deliver on its self-adopted NDC emissions reduction targets.

102. Dr Steyn is further of the opinion that NERSA's assertion in the Rfd that *"It is factually correct that powerships are more labour intensive than renewables"*, is false. Empirical evidence overwhelmingly shows that renewables provide much more employment on a per kWh basis.
103. A confirmatory affidavit from Dr Steyn together with an abbreviated curriculum vitae setting out his qualifications and expertise is attached as annexure "FA18".
104. The above illustrates that there are numerous relevant considerations that NERSA failed to take into account when making the decisions to grant the generation licences to Karpowership. NERSA failed its obligation towards the South African public as set out in section 2 of the ERA and section 10(1) of NERA when the licences were granted without having regard to the public interest.

H. **FURTHER SUBMISSIONS:**

(i) **Procedural unfairness:**

105. At the time of making the impugned decisions NERSA must have been aware that there were experts who would have been able to advise on Karpowership's ability to comply with the applicable environmental legislation as well as on the costs, risks, and use of alternatives. Despite this, NERSA seems not to have taken the views of any such experts into account.

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106. NERSA was further under a statutory duty to act in the public interest and in a justifiable and transparent manner which include a procedurally fair process where affected persons are given the opportunity to submit their views and present relevant facts and evidence. With such a vast amount of information still outstanding at the time when NERSA invited public comments, this was not possible leading to the decision-making process being unjust and lacking transparency.

107. As such, the process and decision reached was procedurally unfair and stands to be reviewed and set aside in terms of section 6(2)(c) of PAJA read with section 10(1)(d) of NERA.

(ii) **Unlawfulness:**

108. In addition to NERSA's failure to adhere to the provisions of section 10(2)(e) of the ERA as referred to above, NERSA is in breach of its obligations set out in section 10(1)(f) of NERA in terms whereof it is obliged to clearly explain the factual and legal basis as well as the reasons for every decision it takes. The impugned decisions and reasons provided by NERSA fall short of this statutory requirement.

109. In the premises the decisions fall to be reviewed and set aside in terms of section 6(2)(i) of PAJA.



(iii) **Sustainable development:**

110. The concept of sustainable development, I am advised, entails the integration of social, economic, and environmental factors into planning, implementation, and decision-making so as to ensure that development serves present and future generations. This concept must guide the manner in which decisions are taken. A sustainable development is not a development in respect of which the sustainability is guaranteed (although the outcome is not irrelevant). The rationale is that by looking after the process, the desired outcome becomes likely or is ensured to the extent possible. In the context of NEMA and the environmental management system established by it, a 'sustainable development' is thus one where the planning, implementation and decision-making processes for that development are informed by taking into account and by integrating those social, economic, and environmental factors.

111. Karpowership's ability to comply with the imperative of sustainable development with reference to the economic viability of the project was not considered at all, in that in addition to what is pointed out by Dr Steyn as referred to above, at the time of reaching the impugned decisions:

111.1 NERSA had not considered alternative and more cost-effective power options independent from the tender that was awarded by the DMRE and no comparative analysis was done;



111.2 no water use licences, atmospheric emissions licences or waste management licences had been awarded;

111.3 NERSA had failed to evaluate the LNG supply agreements, licencing, and commercial arrangements between the LNG supplier (in the present case Shell), the gas trading Karpowership intermediary company and the second, third and fourth respondents;

111.4 no fuel pipeline licence had been awarded;

111.5 no fuel supply agreement had been concluded;

111.6 no licences to operate or construct gas storage, gas regasification facilities and gas distribution facilities had been granted to Karpowership.

112. Without considering these factors, the sustainability of the Karpowership projects could not properly be assessed and determined.

I. **APPLICATION INSTITUTED WITHIN TIME PERIOD ALLOWED FOR BY PAJA:**

113. The NERSA decisions and reasons therefore were published on 29 October 2021.

114. The DNG judgment was only granted on 30 January 2022 and obtained by the applicant on 3 February 2022. Had the application been successful, it would



have obviated the need for the present review application as Karpowership would no longer have been a considered a preferred bidder. The leave to appeal to the SCA was granted on 1 April 2022.

115. The applicant further had to obtain information regarding other objections made to NERSA prior to the granting of the licences and had to find and consult with relevant experts in the field.
116. In the premises it is submitted that the application was brought timeously within the 180 days allowed for by PAJA, and without unreasonable delay.

J. CONCLUSION:

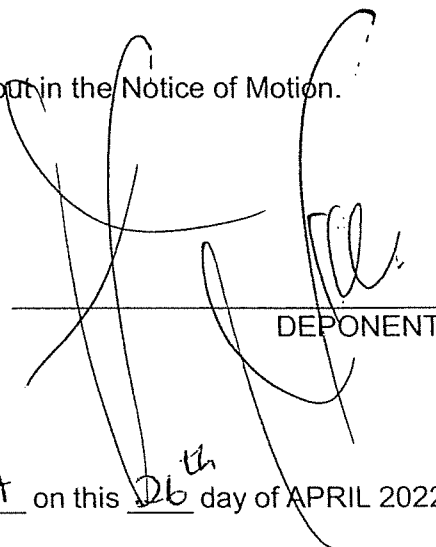
117. It is submitted that NERSA has displayed a cavalier attitude towards statutory compliance and public concerns throughout its decision-making process to award generation licences to Karpowership. By doing so, it has failed to properly exercise its mandate in terms of the ERA and fulfil its oversight functions of regulator without the necessary independent checks and balances to ensure that the interests of electricity suppliers are balanced with the interests of customers, the public and the South African economy.
118. The decisions to award the licences to Karpowership for generation at Coega, Saldanha Bay and Richard's Bay respectively were irrational, unreasonable, and taken without regard to relevant considerations or with regard to irrelevant circumstances.

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119. The impugned decisions further infringed upon sections 2 and 10(2)(e) of the ERA as well as the provisions of section 10 of NERA and the requirements of transparency and accountability as set out in section 2 of the PFMA. As such the decisions were also procedurally unfair.

120. Following what I have set out above, it is submitted that NERSA's decisions to grant generation licences to Karpowership fall to be reviewed and set aside in accordance with the provisions of section 6 of PAJA.

121. In the premises I will ask for an order as set out in the Notice of Motion.



DEPONENT

Signed and sworn before me at PRETORIA on this 26th day of APRIL 2022 after the deponent declared that she knows and understands the content of this declaration, has no objection to taking the prescribed oath and considers the prescribed oath to be binding on her conscience. There has been compliance with the requirements of the Regulations contained in Government Gazette R1258, dated 21 July 1972 (as amended).



COMMISSIONER OF OATHS

FULL NAMES:

ADDRESS:

EX OFFICIO:

TANYA DEMPERS

Praktiserende Prokureur/Practising Attorney
Kommissaris Van Ede / Commissioner Of Oaths
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