



## **CONSULTATION PAPER**

# **ESKOM'S GRID CAPACITY RESERVATION AND/OR PRESERVATION FOR SECTION 34 INDEPENDENT POWER PRODUCERS**

**Published on 18 May 2024**

***Issued by***

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## DEFINITIONS

In this consultation paper, any word or expression to which a meaning has been assigned, shall have a meaning so assigned, unless the context otherwise indicates.

**'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.

**'Codes'** means the Distribution Code, the Transmission Code and any other Code approved by the National Energy Regulator of South Africa (NERSA).

**'Customer'** means a person who purchases electricity or a service relating to the supply of electricity.

**'Distribution System (DS)'** means the network infrastructure operating at nominal voltages of 132 Kilovolt (kV) or less.

**'Eskom'** means Eskom Holdings SOC Ltd a public State-Owned Company registered in accordance with the company laws of South Africa with registration number 2002/015527/30 in accordance with the provisions of the Eskom Conversion Act, 2011.

**'Independent Power Producer (IPP)'** means any person in which the Government or any organ of state does not hold a controlling ownership interest (whether direct or indirect), which undertakes or intends to undertake the development of new generation capacity pursuant to a determination made by the Minister in terms of section 34(1) of the Electricity Regulation Act, 2006 (Act No. 4 of 2006).

**'IPP procurement programme'** means a procurement process undertaken for the procurement of new generation capacity from IPPs.

**‘Integrated Resource Plan’** means the Integrated Resource Plan for Electricity 2019 – 2030 (published as GN 1360 of 18 October 2019 in Government Gazette No. 42784) (IRP 2019).

**‘Minister’** means the Minister of Electricity, by virtue of Proclamation 121 of 2023 published as Gazette Number 48662 of 26 May 2023 and titled – Transfer of Administrative Powers and Functions entrusted by the Electricity Regulation Act, 2006 (Act No. 4 of 2006) to the Minister of Electricity in terms of section 97 of the Constitution.

**‘Network Service Provider (NSP)’** means a legal entity that is licensed to provide network services through the ownership and maintenance of an electricity network.

**‘New generation capacity’** means: –

- a) the electricity generation capacity other than the capacity of existing generation facilities;
- b) the electricity derived from the capacity referred to in (a); and
- c) ancillary services related thereto, individually or in any combination thereof and including an increase in the electricity generation capacity of existing generation facilities.

**‘System Operator’** means a legal entity licensed to be responsible for short-term reliability of the Integrated Power System, which is in charge of controlling and operating the Transmission System and dispatching generation (or balancing the supply and demand) in real time.

**‘Schedule 2 Notice’** means the Schedule 2 amendment Notice in terms of section 36(4) of the Electricity Regulation Act, 2006 (Act No. 4 of 2006) and published as Gazette Number 47877 of 17 January 2023.

**‘Transmission System (TS)’** means a Transmission System that consists of all lines and substation equipment where the nominal voltage is above 132 kV.

**'the Act'** means the Electricity Regulation Act, 2006 (Act No. 4 of 2006).

**'Wheeling'** means conveyance of electricity from the Point of Connection to a point of consumption through a third-party transmission or distribution network.

## **ABBREVIATIONS AND ACRONYMS**

<b>DMRE</b>	Department of Mineral Resources and Energy
<b>IRP 2019</b>	Integrated Resource Plan of 2019
<b>IPP</b>	Independent Power Producer
<b>NERSA</b>	National Energy Regulator of South Africa
<b>OCGT</b>	Open Cycle Gas Turbine
<b>PAJA</b>	Promotion of Administrative Justice Act

## **EXECUTIVE SUMMARY**

The National Energy Regulator of South Africa (NERSA) is a regulatory authority established as a juristic person in terms of section 3 of the National Energy Regulator Act, 2004 (Act No. 40 of 2004) (NERA). Section 4(c) of the NERA empowers and mandates the Energy Regulator to exercise the powers and execute the functions detailed in section 4 of the Electricity Regulations Act, 2006 (Act No. 4 of 2006) ('the Act').

In executing performing its mandated functions, NERSA is required to ensure that the following objects are achieved:

- a. the efficient, effective, sustainable and orderly development and operation of electricity supply infrastructure in South Africa;
- b. 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. that investment in the electricity supply industry is facilitated;
- d. that universal access to electricity is facilitated;
- e. that the use of diverse energy sources and energy efficiency is promoted; and
- f. that competitiveness and customer and end-user choice are promoted.

In July 2023, Eskom published Grid Allocation Capacity Rules premised on the "first ready, first served" principle, aimed at giving preference to projects which were ready to connect to the grid.

On 6 May 2024, Eskom submitted an application to NERSA in terms of section 21(2) of the Act, seeking the Energy Regulator's approval to preserve and/or reserve grid connection capacity in favour of public Independent Power Producers (IPPs) emanating from the ministerial section 34 determination process, in anticipation of the upcoming Bid Window 7.

Eskom details in its application that it requests the approval of the Energy Regulator in terms of section 21(2) of the Act, to preserve and/or reserve capacity for public procurement, in light of the provisions of section 21(2) of the Act, read with its licence conditions and the provisions of the Grid Code, which obliges Eskom to provide third parties with, open and non-discriminatory access to Transmission and Distribution system, unless objectively justifiable and identifiable differences for discrimination as approved by the Energy Regulator.

The Energy Regulator is therefore called upon to make a decision, which decision must comply with section 10 of the NERA read with the provisions of section 4 and 5 of the Promotion of Administrative Justice Act, 2000 (Act No.3 of 2000) ('PAJA').

In the circumstances this consultation paper has been formulated to solicit inputs and views from interested and affected parties, in order to achieve a fair balance between the interests of customers and end users, licensees, investors in the electricity supply industry and the public at large, which input will be considered and form part of the decision making process, of the Energy Regulator.

Stakeholders are therefore requested to provide written comments on the Eskom's Grid Capacity Preservation and/or Reservation for section 34 determination IPPs, as set out in this consultation paper. The comments should be addressed to: **Mr Ezekiel Ngwasheng at the National Energy Regulator of South Africa, Kulawula House, 526 Madiba Street, Arcadia, Pretoria, 0083**

The e-mail to send comments is: **Ezekiel.Ngwasheng@nersa.org.za**

**The deadline for the submission of comments is 25 May 2024**

Kindly provide the name, address, telephone number, fax number and email address of the person or organisation submitting the comments. Submissions made after the deadline, will not be considered.



NERSA will collate all comments received by the deadline, which comments will be taken into consideration when the decision is taken by the Energy Regulator to either approve or not to approve Eskom's application in terms of section 21(2) of the Act. NERSA may hold a public hearing where interested and affected parties and other stakeholders, may be invited to make presentations.

## **1. BACKGROUND**

- 1.1 On 6 May 2024, NERSA received an application by Eskom in terms of section 21(2) of the Act, seeking the Energy Regulator's approval so that it can preserve and/or reserve grid connection capacity, in favour of public IPPs emanating from ministerial section 34 determinations, in anticipation of the upcoming Bid Window 7.
- 1.2 Section 21(2) of the Act provides that 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.
- 1.3 Eskom who has traditionally been designated as the Buyer in section 34 ministerial determinations, in accordance with sections 34(1)(c) and (d) of the Act, submits that the recent amendments to Schedule 2 of the Act opened up competition between public IPPs and private IPPs, for the limited available grid capacity.
- 1.4 As a result, Eskom needs to preserve and/or reserve, grid capacity for government procurement programs especially Bid Window 7 because it is duty-bound to support government's energy procurement program and if it fails to do, it will erode investors' confidence, undermine governments' efforts to attract foreign direct investment in the energy sector, and frustrate other government initiatives related to just energy transition.
- 1.5 Eskom is of the opinion that preservation and/or reservation of grid capacity for government procurement programs especially Bid Window 7 requires a just discrimination between public IPPs and private IPPs, to be approved by the Energy Regulator in terms section 21(2) of the Act.
- 1.6 The interpretation and applicability of section 21(2) of the Act, is centred on the definition of a customer, which the Act defines to mean a person who purchases electricity or service relating to the supply of electricity, as well as, whether Eskom has shown objectively justifiable and identifiable differences between public IPPs and private IPPs which necessitate the approval of discrimination, sought from Energy Regulator.
- 1.7 A further aspect which presents and which requires careful consideration, is that the section 34 ministerial determination process culminates in the creation of a licensee

in accordance with section 34(3) read with section 10 of the Act. The Act further defines a licensee separately to a customer, as such the licensee effectively becoming a customer, as submitted by Eskom, needs to be deliberated upon.

1.8 Following receipt of and responses to letters from Eskom requesting NERSA approval in terms of section 21(2) of the Act, NERSA guided Eskom to submit a formal application to enable Energy Regulator to make a decision.

1.9 Having received a formal application from Eskom, NERSA is undertaking a public participation process to ensure that the decision of the Energy Regulator complies with section 10 of the NERA read with the provisions of section 4 and 5 of PAJA.

**The main aspects of Eskom's Grid Capacity Preservation and/or Reservation for section 34 determination IPPs that are discussed in this Consultation Paper, include:**

- i. Eskom designated as a Buyer under section 34(1) determination of the Act.
- ii. Expected rationality by Eskom when it exercises section 21(2) of the Act in grid capacity connection reservation and preservation for public IPPs.
- iii. Eskom's timelines for the construction of the new infrastructure to increase grid connection capacity and uptake of new generation capacity.
- iv. Legal implications when certain sections of Schedule 2 Notice are perceived to be revoked by a section 21(2) Application.
- v. Any other stakeholder input or comment on Eskom's application in terms of section 21(2) of the Act.
- vi. Energy Regulator approval process of the Eskom application for grid capacity preservation and/or reservation brought in terms of section 21(2) of the Act.

## 2. ESKOM DESIGNATED AS A BUYER UNDER SECTION 34(1) MINISTERIAL DETERMINATIONS

- 2.1 The designation of Eskom as the Buyer, in section 34 ministerial determinations generated an obligation for Eskom to give effect to the determination and comply with the Electricity Regulations on New Generation Capacity contained in GNR.399 of 4 May 2011 ('New Generation Regulations').
- 2.2 The IPP Procurement Programme, to which Eskom is the Buyer, complied with the Integrated Resources Plan of 2019 (IRP2019) which determines that new generation capacity is needed to ensure the continued uninterrupted supply of electricity. IRP2019 included information from Eskom that addressed aspects of grid planning and grid development in order to support the envisaged projects in the IRP 2019.
- 2.3 Section 35(4)(j) of the Act empowers the Minister of Electricity ('the Minister') to make regulations on new generation capacity.
- 2.4 Regulation 4 of the New Generation Regulations provides for planning for new generation capacity and states that:

*”(1) The integrated resource plan shall—*

- (a) be developed by the Minister after consultation with the Regulator; and*
  - (b) be published in the Government Gazette by the Minister.*
- (2) The system operator, the NTC and the Regulator shall timeously provide such assistance as the Minister may require for purposes of developing and monitoring the implementation of an integrated resource plan.*
- (3) The Regulator shall, after consultation with the Minister, the system operator and the NTC, make rules relating to the keeping of relevant information, the submission of such information and the rendering of returns by licensees, as required in order to facilitate integrated resource planning.”*

- 2.5 In accordance with Regulation 4(2) of the New Generation Regulations, Eskom acting as a System Operator and as National Transmission Company (NTC) provided inputs for the development of the IRP2019.
- 2.6 It is necessary for the Energy Regulator to consider whether the issue of grid preservation as an operational competency of Eskom is possible, which must be exercised in compliance with the applicable statutory obligations and its licence conditions.

- 2.7 Operational competency of Eskom also includes to exercise the applicable statutory obligation emanating from New Generation Regulations to request the Minister to grant Eskom an exemption and/or condonation for not having a foresight and a capability to cater for all government initiatives that might emerge and that were not catered for in the initial planning when the IRP was developed.
- 2.8 Schedule 2 of the Act is a government initiative which made significant changes to the power procurement process aimed at promoting private IPPs to run a parallel process with public IPPs that made both parties to compete for limited availability of grid connection capacity.
- 2.9 In areas where there is limited grid connection capacity, Eskom must be exempted from executing private IPP procurement initiatives and be given a preference to initiate public IPP procurement programmes in order for government procurement programmes to succeed because the continued failure of public procurement programmes will erode government's ambitions relating to Just Energy Transition.
- 2.10 Regulation 11 of the New Generation Regulations provides for exemption and states:
- "The Minister may, where justifiable having regard to all the circumstances and subject to any terms and conditions that he or she considers appropriate, exempt any person whether in relation to a specific new generation capacity project or in general, from complying with any or all of the provisions of these regulations."*
- 2.11 Eskom has not indicated why an appropriate exemption was not sought and/or why the Minister was not approached to amend the New Generation Regulations in accordance with section 35(4)(j) of the Act, to enable Eskom to preserve and/or reserve grid connection capacity in favour of public IPPs in anticipation of Bid Window 7.

#### Question

1. Based on the above background, don't you think that Eskom was supposed to approach the Minister for an exemption or an amendment to the New Generation Regulations, in order to preserve and/or reserve the grid capacity for public IPPs (i.e. Bid Window 7 section 34 IPPs)?

### 3. EXPECTED RATIONALITY BY ESKOM WHEN IT EXERCISES SECTION 21(2) OF THE ACT IN GRID CAPACITY PRESERVATION AND/OR RESERVATION FOR PUBLIC IPPS

3.1 Eskom submits that it intends to preserve and/or reserve grid connection capacity in favour of public procurement IPPs at the expense of private IPP projects. Eskom intends to implement the envisaged discrimination as follows:

- i. **Preservation:** In circumstances where a generation connection capacity assessment identifies available grid on the network and a public procurement program is contemplated per section 34 of the Act and such a program shall make use of/or is intended to make use of the identified grid connection capacity. Preservation implies that Eskom shall hold in abeyance allocation of such capacity, for such time as may be necessary, for the sole benefit of, and exclusive allocation towards, the public procurement program.
- ii. **Reservation:** In specific congested areas of the network where there is limited grid connection capacity, such capacity shall be reserved for projects in the ongoing public procurement programmes at the expenses of affected customers. Colloquially, public IPP projects will be moved to the front of the queue and thus prioritised over private IPP projects.

3.2 Rationality must address public interest and its meaning. Objects of the Act aims to achieve a number of complex and interdependent objectives that can be aligned with public interest. Public interest can be viewed as a process that weighs hardship to the public against benefits to the public. This naturally entails the balancing of various factors such as attracting private investment, opening up a competition in the energy sector, short, medium and long-term energy security, as well as sustainability.

3.3 Eskom's licence is subject to a condition in terms of section 14(1)(a) which relates to the establishment of and compliance with directives to govern the relations between the licensee and its or end users, including the establishment of or end user forums. This condition speaks to the importance of licensees engaging their private IPPs, licensees and end users which are large industrial customers connected at Transmission voltage, on matters which will impact them, as well as the rationality of steps taken by a licensee.

- 3.4 It is not clear why Eskom has not used this platform to solicit their views in terms of directly and indirectly discriminating them, as they will be denied grid access in areas where there is limited grid connection capacity and that discrimination by Eskom will also affect end users who purchases electricity from Schedule 2 generators through private Power Purchase Agreements (PPAs) including bilateral wheeling agreements.
- 3.5 Eskom's legislative obligations and licence conditions that also stems from clause 3 of the Preamble Code that states the responsibility of the service providers to be as follows:

- *to show no interest whose product is being transported*
- *to ensure that investments are made within the requirements of the Grid Code*
- *to provide open access, on agreed standard terms, to all parties wishing to connect or use the Transmission System (TS)*

#### Questions

2. Do you think that it was premature for Eskom to seek the Energy Regulator's approval in terms of section 21(2) of the Act without having consulted its stakeholders which includes private IPPs, its licensees and end users, to solicit their inputs and/or objections to this process in line with licence conditions on Schedule 1 of NTCSA licence, licence number: NER/TX02/2023 read with section 14(1)(a) of the Act and clause 3 of the Preamble Code?
3. Do you think that Eskom's application can pass the rationality test in terms of the applicable laws?

#### **4. ESKOM'S TIMELINES FOR THE CONSTRUCTION OF THE NEW INFRASTRUCTURE TO INCREASE GRID CONNECTION CAPACITY AND UPTAKE FOR NEW GENERATION CAPACITY**

- 4.1 Eskom indicated that the construction of new infrastructure delayed the uptake of generation capacity, as a result of the inherent asymmetry of the associated lead times, from inception to commission, resulting in severe grid constraints in

Transmission's national corridors, especially in the Northern Cape, Eastern Cape and Western Cape.

- 4.2 As a mitigation measure, Eskom implemented Interim Grid Capacity Allocation Rules (GCAR) in 2023 that gave effect to the principle of "first ready, first served" in the area of grid capacity allocation.
- 4.3 Eskom also published a document titled Generation Connection Capacity Assessment 2025 (GCCA 2025) for the purpose of indicating additional capacity that has been made available in the Eastern Cape and Western Cape under curtailment.
- 4.4 It would have been better if Eskom provided a project plan with timelines for the Energy Regulator to consider as part of its application indicating how long the construction and commissioning of new infrastructure to solve grid constraint problems will take.
- 4.5 Eskom when defining preservation indicated that Eskom shall hold in abeyance the allocation of such capacity as may be necessary for the sole benefit of, and exclusive allocation towards, the public procurement program.
- 4.6 The use of the word "for such time as may be necessary" in the definition of preservation also gives an indication that the timeline to resolve grid capacity constraint is unknown to Eskom.
- 4.7 An approval by Energy Regulator of Eskom's application in terms of section 21(2) of the Act has the potential to discourage private IPPs from running the parallel procurement initiatives that compete for limited available grid connection capacity and/or to open up competition in the energy sector.



### Questions

4. Do you think an approval by Energy Regulator of Eskom's application in terms of section 21(2) of the Act, will undermine competitiveness in the electricity sector and discourage private IPPs from running the parallel procurement initiatives that compete for limited available grid connection capacity and/or to open up competition in the electricity sector?
5. Do you think Eskom's application satisfies the requirement of section 21(2) of the Act and have, furnished objectively justifiable and identifiable differences for the Energy Regulator to approve without having provided a project plan with timelines indicating when grid capacity constraints will be resolved?

## **5. THE IMPLICATION OF A SECTION 21(2) APPROVAL, ON AMENDED SCHEDULE 2**

- 5.1 The Minister of Mineral Resources and Energy in accordance with section 36(4) of the Act, empowered to amend Schedule 2 of the Act (Schedule 2 Notice) after consultation with the Energy Regulator and any person who may be affected.
- 5.2 The amendment of Schedule 2, through the Schedule 2 Notice, did not include a prohibition on private IPP participation in grid connections, nor did it provide for the preservation and/or reservation of grid capacity in favour of public IPPs.
- 5.3 It is further not clear whether Eskom has approached the DMRE, for the Minister of Mineral Resources and Energy to undertake amendments to the Schedule 2 Notice.
- 5.4 In the circumstances, an approval by the Energy Regulator of Eskom's application in terms of section 21(2) of the Act, suggests and/or is tantamount to an amendment of the Schedule 2 Notice and amounts to administrative action, which is susceptible to a judicial review in terms of section 6(2) of PAJA.
- 5.5 The approval sought by Eskom appears to impact upon the doctrine of separation of power and the need for it, to be strictly observed, at all times. In making its decision, the Energy Regulator must not be seen to be exercising powers which it does not have or making decisions which amount to the amendment of the law, as it is not empowered to amend the law.

### Questions

6. Would the Energy Regulator's approval of Eskom's application in terms of section 21(2) of the Act, amount to an amendment of the schedule 2 notice and an infringement of the doctrine of separation of powers?
7. Don't you think that Eskom should have embarked on a process of requesting a review of the Schedule 2 Notice, through the DMRE, to be effected by the Minister of Mineral Resources and Energy in line with section 36(4) of the Act, in order to address aspects of grid reservation and preservation for public IPPs at the expense of private IPPs?
8. Should the Energy Regulator approve Eskom's application in terms of section 21(2) of the Act? Please substantiate your answer.

## **6. ANY OTHER STAKEHOLDER INPUT OR COMMENT ON ESKOM'S APPLICATION IN TERMS OF SECTION 21(2) OF THE ACT**

Stakeholders are also requested to provide any other input or comment pertaining to Eskom's application (**Appendix A**) for grid capacity preservation and/or reservation in terms of section 21(2) of the Act, that were not raised in this consultation paper.

## **7. NERSA APPROVAL PROCESS OF THE ESKOM APPLICATION FOR GRID CAPACITY RESERVATION AND/OR PRESERVATION BROUGHT IN TERMS OF SECTION 21(2) OF THE ACT**

NERSA has processes and procedures in place to process such applications, in compliance with section 10 of the NERA read with sections 4 and 5 of PAJA.

Written comments should be sent to NERSA for the attention of **Mr Ezekiel Ngwasheng** at: **Email:** Ezekiel.Ngwasheng@nersa.org.za

**The closing date for the submission is 25 May 2024**

## **Attachments**

**APPENDIX A:** Eskom application for grid capacity preservation and/or reservation brought to the Energy Regulator in terms of section 21(2) of the Act

**APPENDIX B:** Eskom's GCCA 2025 Addendum on 2025 Connection Capacity with Curtailment for Renewable Energy Generators

**APPENDIX C:** Eskom's Interim Grid Capacity Allocation Rules