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

In the matter between:

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

and

THE MINISTER OF ENERGY	First Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	Third Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Fourth Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Fifth Respondent

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FOUNDING AFFIDAVIT

I, the undersigned

PHILLIPINE LEKALAKALA

do hereby make oath and state:

I. INTRODUCTION

1. I am employed as a Branch Coordinator by the first applicant, (**Earthlife**).

2. The facts contained in this affidavit are unless the contrary appears from the context, within my personal knowledge, and are to the best of my knowledge and belief both true and correct.

3. Where I make submissions of law, I do so on the advice of the applicants' legal representatives.

II. A SYNOPSIS OF THIS APPLICATION

4. The matter involves the Minister of Energy's (**the Minister's**) and the government's precipitous pursuit of what will be the largest procurement ever entered into by South Africa: the procuring of multiple nuclear power plants in order to generate 9.6 gigawatts (**GW**) of electricity, at a cost that could well exceed R1 trillion (that is a thousand billion rand**)**.

5. Notwithstanding the vast sums of money to be committed, and the potentially long-term effect on the economy and for consumers of electricity and present and future generations of South Africans, the decision to proceed with procuring these nuclear power plants (the so called nuclear fleet), and to have concluded such procurement in the next few months, has occurred without any of the necessary statutory and constitutional decisions having been lawfully taken. In particular:

   5.1 Prior to the start of any procurement of new nuclear power plants the Minister and NERSA, in consultation, were obligated to have determined, after a procedurally fair process, that new generation capacity is required and that the electricity must be generated from nuclear power and the percentage thereof, in terms of sections 34(1)(a) and (b) of the Electricity Regulation Act 4 of 2006 (**ERA**) – "***the ERA***

nuclear requirement decision" ;

5.2 Had they made such a determination, the Minister and NERSA would then have been obligated to make a determination in terms of section 34(1)(e), read with section 217 of the Constitution, after a procedurally fair process, that the procurement of such nuclear new generation capacity, must take place in terms of a procurement system that is fair, equitable, transparent, competitive and cost-effective, which system must evidently need to be specified – "***the ERA nuclear procurement system decision***".

5.3 Moreover, for the Minister to exercise any of her powers in section 34(2) the Electricity Regulation Act 4 of 2006 (**ERA**), in particular the power to engage in activities (including entering into contracts) necessary to organise the procurement or facilitate the procurement process of new nuclear new generation capacity, the Minister was required, with the concurrency of NERSA, to have first made the ERA nuclear requirement and ERA nuclear procurement system decisions.

5.4 No ERA nuclear requirement decision or ERA nuclear procurement system decision has been taken.

5.5 However, the facts reveal – although the government has been less than transparent about the details – that the

process of procuring nuclear new generation capacity has commenced.

6. These failures to take the necessary decisions after a lawful and procedurally fair decision making process, are signal. Not only do they render the commencement of a process to procure nuclear power, and any concomitant exercises of the Minister's powers under section 34(2), irredeemably unlawful. The failures also mean that the purposes of a procedurally fair process cannot be met. As the Constitutional Court has recently held: "***insistence on compliance with process formalities*** *has a* ***three-fold purpose****: (a) it* ***ensures fairness to participants*** *in the bid process; (b) it* ***enhances the likelihood of efficiency and optimality in the outcome****; and (c)* ***it serves as a guardian against a process skewed by corrupt influences***."[1]

7. Compounding these failures is that on 11 June 2015, the Minister tabled and made public a number of intergovernmental agreements (**IGAs**) in relation to nuclear procurement and co-operation between South Africa and foreign governments in Parliament. This was done purportedly in terms section 231(3) of the Constitution, in order for them to become binding on the state by mere tabling before Parliament. There are a number of legality issues with these agreements:

[1] AllPay Consolidated Investment Holdings (Pty) Ltd and Others v CEO of SASSA and Others 2014 (1) SA 604 (CC) para 27, emphasis added.

7.1 First, one of the IGAs is an agreement on strategic partnership and co-operation in the fields of nuclear power and industry between South Africa and Russia (**the Russian IGA**). The content of the Russian IGA (tellingly and substantially different to the terms of the other IGAs) renders it unlawful and unconstitutional. It records binding undertakings in relation to the procurement of new nuclear generation capacity, and South Africa's liability consequent on such procurement, prior to any constitutionally and statutorily compliant procurement process having been undertaken, and before any statutorily compliant determination as to the requirement for nuclear new generation capacity has been made (as more fully discussed below). Moreover, it is an international agreement which, given its nature, required parliamentary approval under section 231(2) and therefore could not lawfully be tabled and made binding in terms of section 231(3).

7.2 Second, two of the other IGAs that were table were signed years before: the USA IGA[2] was signed in 1995 (some twenty years before it was tabled), and the South Korean IGA[3] was signed in 2010 (some five years before it was tabled). Section

[2] Agreement for Cooperation between the Government of the Republic of South Africa and the United States of America concerning Peaceful Uses of Nuclear Energy.

[3] Agreement between the Government of the Korea and the Government of the Republic of South Africa regarding Cooperation in the Peaceful Uses of Nuclear Energy.

231(3) requires that even if an international agreement is claimed to be the type of agreement which does not require parliamentary approval in terms of section 231(2), it must nevertheless be tabled before Parliament within a reasonable time to be made binding. These two IGAs were not tabled within a reasonable time, and therefore the decision to table them under section 231(3) was unconstitutional and invalid.

8. Within that context, this application seeks relief on an expedited basis, and the applicants seek that the time-frames for the filing of the relevant papers and records be truncated, and that the matter be heard as a semi-urgent application before this Court.

9. The relief sought relates to a range of unlawful actions, broadly described above, that provide the backdrop to the nuclear procurement. In particular, the following orders are sought:

9.1 Declaring that:

9.1.1 the Minister's decision to sign the Russian IGA,

9.1.2 the President's decision to authorise the Minister's signature thereof; and

9.1.3 the Minister's decision to table the Russian IGA before Parliament in terms of section 231(3) of the Constitution;

are unconstitutional and unlawful, and are reviewed and setting aside

9.2 Declaring unlawful and unconstitutional, and reviewing and setting aside the Minister's decision to table the US IGA and South Korean IGA before Parliament in terms of section 231(3) of the Constitution.

9.3 Declaring that prior to the commencement of any procurement process for nuclear new generation capacity (being at the latest prior to the appointment of a bid specification committee or persons tasked with drawing up the invitation to bid) and/or the exercise of any powers under section 34(2) of the ERA in relation to the procurement of nuclear new generation capacity, the Minister and NERSA are required first, after procedurally fair public participation processes, to have taken the ERA nuclear requirement decision and the ERA nuclear procurement system decision.

9.4 Declaring that the Minister's and/or government's (*to the extent the Minister claims that she was not the relevant decision maker*) decisions to facilitate, organise, commence and/or proceed with the procurement of nuclear new generation capacity (including, at least, the decision to appointment a bid specification committee or persons tasked with drawing up the bid invitation, and all related decisions

subsequent thereto) and/or any decisions by the Minister to exercise any powers under section 34(2) of the ERA in relation to the procurement of nuclear new generation capacity, prior to the taking of the ERA nuclear requirement decision and the ERA nuclear procurement system decision, are unlawful and unconstitutional, and are reviewed and set aside.

10. In the notice of motion the applicants have provided for truncated timeframes for the filing of the records and further affidavits, and the notice of opposition. The timeframes are nevertheless reasonable, and will provide sufficient time for the respondents to file the necessary papers. The applicants intend approaching the Judge President for a preferential hearing date on the semi-urgent roll, and appropriate directions in relation to the filing of further papers. The question of expedition is discussed below. Given the importance of nuclear procurement, it is in the interest of the government respondents, and the public, that this matter be dealt with expeditiously, and the serious issues raised need to be determined prior to the completion of the nuclear procurement process.

11. This affidavit supports the relief sought in the notice of motion and the grounds of review addressed below, which, to the extent necessary, will be amplified, once the record/s in relation to the decisions which are challenged in this matter are furnished in terms of Rule 53(4).

III. THE PARTIES

12. The first applicant is Earthlife Africa–Johannesburg (**Earthlife**) a non-governmental non-profit voluntary association, which has the power to sue and be sued in its own name, and which has its offices at 5th Floor, 87 De Korte Street, Braamfontein 2107, Johannesburg, South Africa.

13. Earthlife was established by environmental- and social-justice advocates to mobilise civil society around environmental issues in relation to people, and includes a Sustainable Energy and Climate Change Project that works to promote local and global environmental and social justice on sustainable energy and climate change issues. Earthlife is an autonomous branch of Earthlife Africa.

14. I attach a copy of Earthlife's resolution authorising the institution of the current application, marked "**PL1**".

15. The second applicant is the South African Faith Communities' Environmental Institute (**SAFCEI**), a registered Public Benefit and Non-Profit Organisation, which has its offices at The Green Building, Bell Crescent, Westlake Business Park, Cape Town.

16. SAFCEI was established by multi-faith environmental- and social-justice advocates to, among other things, confront environmental and socio-economic injustices, and to support and encourage faith leaders and their communities in Southern Africa to take action on eco-justice,

sustainable living and climate change issues. SAFCEI includes an Energy and Climate Change Programme that focuses on climate change and energy.

17. I attach a copy of SAFCEI's resolution authorising the institution of the current application, marked "**PL2**".

18. Earthlife and SAFCEI (**the applicants**) bring this application in:

18.1 their own interests, as contemplated in section 38(b) of the Constitution: they are organisations primarily concerned with environmental, social-economic, and social justice issues, and the decision to commence and proceed with the procurement of nuclear power plants to generate 9.6 gigawatts (**GW**) in the unlawful manner in which it is occurring has a negative and direct impact on the environment, social-economic, and social justice issues, which decision violated their right to procedurally fair process which would have allowed them to provide input in relation to serious environmental and socio-economic issues implicated by any decision to procure new nuclear generation capacity;

18.2 in the public interest, as contemplated in section 38(d) of the Constitution: the question of whether the Minister and government have unlawfully decided to procure nuclear power plants, at a cost of potentially more than R1 trillion, evidently raises issues of the highest public and constitutional

importance, in which all South Africans have an interest.

19. The first respondent is the MINISTER OF ENERGY **(the Minister)**. The Minister's office is located at Parliament Building, 7th Floor, 120 Plein Street, Cape Town. The Minister is served care of the State Attorney, 4th Floor, Liberty Life Building, 22 Long Street, Cape Town. The Minister is cited, inter alia, due to her decisions to facilitate, organise, commence and/or proceed with the procurement of nuclear new generation capacity, her decisions to sign the IGAs on nuclear co-operation (and in particular the more extensive Russian IGA[4] which claims to create a strategic partnership), her decision to table the IGAs in terms of section 231(3) of the Constitution, and by virtue of the fact that the Department of Energy (**DOE**) has, according to the DOE's own press statements, been appointed the procuring agency for the procurement of 9.6GW of nuclear power plants.

20. The second respondent is the PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA (**the President**). The President's office is located at the Tuynhuis Building, Parliament Street, Cape Town. The President is served care of State Attorney, 4th Floor, Liberty Life Building, 22 Long Street, Cape Town. The President is cited in his capacity as head of the National Executive and by virtue of the fact that the executive authority of the Republic is vested in him in terms of section 85(1) of the Constitution, and therefore as the representative of the

[4] The Agreement between the Government of the Republic of South Africa and the Government of the Russian Federation on Strategic Partnership and Cooperation in the fields of Nuclear Power and Industry.

Government of South Africa ("**the government**"). The President is also cited because of his decision, in terms of a President's Minute, to authorise the Minister to sign the Russian IGA.

21. The third respondent is the NATIONAL ENERGY REGULATOR OF SOUTH AFRICA **(NERSA)**. NERSA's office is located at Kulawula House, 526 Madiba Street, Arcadia, Pretoria**.** NERSA is a regulatory authority, and organ of state, established in terms of section 3 of the National Energy Regulator Act, 2004 (Act No. 40 of 2004). In terms of section 34 of the ERA it is required to take decisions in consultation with the Minister in relation to the requirement for, and procurement of, electricity new generation capacity. No relief is sought against NERSA, other than for a costs order in the event that NERSA seeks to oppose the application.

22. The fourth respondent is the SPEAKER OF THE NATIONAL ASSEMBLY (**the Speaker**). The Speaker's office is located at Room E118, Parliament Building, Parliament Street, Cape Town. The Speaker is elected in terms of section 52 of the Constitution of the Republic of South Africa, 1996 (**Constitution**). The Speaker is cited in her representative capacity as the relevant official to be cited where the interests of the National Assembly may be implicated, which they may be given the unlawful tabling in Parliament of the Russian IGA. No relief is sought against the National Assembly, other than a costs order in the event that the Speaker opposes the relief sought in this application.

23. The fifth respondent is the CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES (**the Chairperson**). The Chairperson's office is located at Room S11, Parliament Building, Parliament Street, Cape Town. The Chairperson is elected in terms of section 64 of the Constitution. The Chairperson is cited in her representative capacity as the relevant official to be cited where the interests of the National Council of Provinces (**NCOP**) may be implicated, which they may be given the unlawful tabling in Parliament of the Russian IGA. No relief is sought against the NCOP, other than a costs order in the event that the Chairperson opposes this application.

IV. THE RELEVANT CONSTITUTIONAL, STATUTORY AND REGULATORY FRAMEWORK

24. It is necessary to first set out the statutory and regulatory framework that governs the lawful procurement of nuclear new generation capacity, which will inform this Court's consideration of the decisions by the Minister, the President and/or the government.

A. Electricity Regulation Act, 2006

25. The Electricity Regulation Act 4 of 2006 (**ERA**) was promulgated, inter alia, to establish a national regulatory framework for the electricity supply industry.

26. Section 1 defines "*generation*" as meaning "*the production of*

electricity by any means."[5]

27. With regard to establishing of new *generation* capacity, section 34(1) of the ERA provides that the Minister may (among other things), in consultation with NERSA:

27.1 determine that new generation capacity is required to ensure the continued uninterrupted supply of electricity;

27.2 determine the types of energy sources from which electricity must be generated, and the percentage thereof;

27.3 determine that the electricity produced may only be sold to the persons or in the manner set out in such notice;

27.4 determine that electricity thus produced must be purchased by the persons set out in such notice; and

27.5 require that new generation capacity must be established through a tendering procedure which is fair, equitable, transparent and cost effective.

28. Section 34(2) of the ERA gives the Minister such powers as may be necessary or incidental to any purpose set out in section 34(1). In other words the Minister is empowered to exercise section 34(2) powers after having taken the relevant decision in consultation with NERSA under section 34(1). Those powers include:

[5] Emphasis added.

28.1 Undertaking such **management and development activities**, including **entering into contracts**, as may be **necessary to organise tenders and to facilitate the tendering process for the development, construction, commissioning and operation of such new electricity generation capacity** (that is new generation capacity specifically determined to be required under section 34(1)(a) read with (b)) (section 34(2)(a));[6] and

28.2 Subject to the Public Finance Management Act, 1 of 1999 (**PFMA**), issue any guarantee, indemnity or security or enter into any other transaction that binds the State to any future financial commitment that is necessary or expedient for the development, construction, commissioning or effective operation of a public or privately owned electricity generation business (section 34(2)(e)).

B. National Energy Regulator Act

29. The National Energy Regulator Act 40 of 2004 (**NERA**), created NERSA.

30. The functions of NERSA include that it "*must…undertake the functions set out in section 4 of the Electricity Regulation Act, 2006*."

31. Section 10 provides that:

[6] Emphasis added.

"(1) Every decision of [NERSA] 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) explained clearly as to its factual and legal basis and the reasons therefor.

(2) Any decision of the Energy Regulator and the reasons therefor must be available to the public except information that is protected in terms of the Promotion of Access to Information Act, 2000 (Act 2 of 2000).

(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)."

32. This section applies to decisions taken by NERSA under section 34(1) of the ERA.

C. Electricity Regulations on New Generation Capacity

33. On 4 May 2011, in terms of the ERA, the minister promulgated the Electricity Regulations on New Generation Capacity (GNR.399).

34. These regulations provide for a framework for the procurement of new generation capacity. However, and importantly for this matter, the regulations have not been made applicable to new generation

capacity derived from nuclear power technology.

D. Integrated Resource Plan (IRP) and Regulations

35. Section 1 of the ERA defines an integrated resource plan (**IRP**) as "*a resource plan established by the national sphere of government to give effect to national policy*". Save for requirements that the Regulator must issue rules designed to implement the IRP and for license applicants to demonstrate compliance with the IRP, the ERA does not include additional provisions dealing with IRP.

36. On 6 May 2011, the Minister promulgated the Electricity Regulations on the Integrated Resource Plan 2010-2030 (referred to interchangeably as the **IRP2010-2030** and **IRP2010**).[7]

37. It is stated in the summary to the IRP2010 that it was derived from an integrated resource plan initiated by the DOE, which laid out the "*proposed generation new build fleet*" for South Africa for the period 2010-2030 and was based on the cost-optimal solution for new build options (considering direct costs of new build power plants).

38. Following a first round of public participation in 2010 in which the applicants both made extensive written submissions, a Revised Balance Scenario (**RBS**) was published in October 2010 which 'balanced' the cost-optimal solution in accordance with various considerations including climate change mitigation, diversity of supply,

[7] Government Gazette GNR.400.

localisation and regional development.[8] The RBS included a nuclear fleet of 9.6 GW as part of a proposed new build fleet totalling 38.3 GW. It is stated in the summary that a second round of public participation (in which the applicants again both made extensive written submissions) led to several changes in IRP assumptions, including the adjustment of investment costs for nuclear units by an increase of 40% based on recent construction experience.

39. The IRP2010 indicates at paragraph 1.1 that the IRP is a "*living plan that is expected to be continuously revised and updated as necessitated by changing circumstances. At the very least, it is expected that the IRP should be revised by the [DOE] every two years, resulting in a revision in 2012*."

40. The IRP2010 states that the projected scenarios indicate that the future electricity capacity requirement could, in theory, be met without nuclear, but that this would increase risk to security of supply (from a dispatch point of view and being subject to future fuel uncertainty) (paragraph 4.2).

41. Three policy options were identified at paragraph 4.3, namely:

    41.1 commit to the nuclear fleet as indicated in the RBS;

    41.2 delay the decision on the nuclear fleet indefinitely (and allow alternatives to be considered in the interim); or

[8] Appendix A, paragraph A8.

41.3 commit to the construction of one or two nuclear units in 2022-4, but delay a decision on the nuclear fleet until higher certainty is reached on future cost evolution and risk exposure for both nuclear and renewables.

42. The IRP2010 indicates at paragraph 4.4 that the DOE accepted the nuclear fleet policy option of committing to a full nuclear fleet of 9600MW (**9.6GW**).

43. This policy was adopted notwithstanding that the IRP2010 acknowledges that the failure to conclude or release a socio-economic impact study was an important oversight that was expected to be remedied within "the next few months"[9] and that further research was required on the full costs relating to specific technologies (including nuclear) around the costs of decommissioning and managing waste in the case of nuclear specifically spent fuel.[10]

44. The IRP2010 also recognises that if the nuclear build costs turn out to be higher than assumed, this could increase the expected price of electricity, but states further that this can be mitigated with a commitment to 3GW of nuclear (paragraph 6.9.2).

45. It is relevant to note that during or about 2013 the DOE commenced a process (which included a public participation process in which the applicants participated by submitting detailed technical submissions)

[9] Annexure A, paragraph B.2.
[10] Paragraph 7.11.

aimed at updating the IRP2010-2030, which culminated in a draft *Integrated Resource Plan for Electricity (IRP) 2010-2030 – Update Report 2013* (**IRP2010 Update**). The DOE acknowledged on its website and in the IRP2010 Update summary that there have been a number of developments in the energy sector in South and Southern Africa since the IRP2010 was published, and that the electricity demand outlook has changed markedly from that expected in 2010. The IRP2010 Update summary indicates that the demand in 2030 is now projected to be in the range of 345-416 TWh as opposed to the 454 TWh expected in the policy-adjusted IRP2010, and identifies various other uncertainties, including uncertainty in the cost of nuclear capacity and future fuel costs (specifically coal and gas), as well as in fuel availability. It is stated further in the IRP2010 Update summary that:

> "[A]ll these uncertainties suggest that an alternative to a fixed capacity plan (as espoused in the IRP 2010) is a more flexible approach taking into account the different outcomes based on changing assumptions (and scenarios) and looking at the determinants required in making key investment decisions'."

46. The IRP2010 Update summary indicates further that in the shorter term (next two to three years) there are clear guidelines arising from the scenarios, including that:

> "The nuclear decision can possibly be delayed. The revised demand projections suggest that no new nuclear base-load capacity is required until after 2025 (and for lower demand not until at earliest 2035) **and that there are alternative options, such as regional hydro, that can fulfil the requirement and allow further exploration of the shale gas potential before prematurely committing to a technology that may be redundant if the**

electricity demand expectations do not materialise."

47. The IRP2010 Update summary concludes that:

> "Considering the changes in consumption patterns and technology costs over the past three years it is imperative that the IRP should be updated on a regular basis (possibly even annually), while flexibility in decisions should be the priority to favour decisions of least regret. **This would suggest that commitments to long range large-scale investment decisions should be avoided**."

48. The DOE advises on its website that a final draft IRP2010 Update would be submitted to Cabinet for final approval by March 2014, whereafter the approved document would be promulgated and published in the *Gazette*.

49. However, it has been reported in the press that the Parliamentary Committee of Energy chairperson, Mr Fikile Majola, has stated that the IRP2010 Update would not see the light of day. I attach a copy of this press statement marked "**PL3**".

50. I also draw attention to the report by Energy Research Centre of April 2013 commissioned by the National Planning Commission (the relevant portions of which are attached marked "**PL4**").

51. The executive summary indicates as follows:

> "Many of the assumptions in the 2010 Integrated Resource Plan (IRP) are now out of date and no longer valid. These include the anticipated demand growth, and data on technology and fuel availabilities and costs. **If the 2010 IRP continues to be used as a basis for investment decisions, it will result in a sub-optimal mix of generation plants, and higher electricity prices. It is therefore critical that the IRP assumptions are revised and that a new plan is developed**." (emphasis added)

52. This report was commissioned by the National Planning Commission as part of its on-going mandate to provide independent research and advice to the government.

53. Most recently on 2 September 2015, it was reported in the press that a 2015 update to the IRP was in process, although no indication was given as to when this 2015 IRP might be finalised. I attach a copy of this press statement marked "**PL5**".

54. It is important to emphasise that the IRP2010, and the Update, at best merely record government policy decisions. These policy decisions are apparently under review (and likely to change or be updated), are not legislation, and cannot bind the discretionary power vested by statute and the Constitution in the relevant parties and bodies. Importantly the IRP2010 makes clear that while in 2010 the government may have favoured the construction of new nuclear power plants, this was a policy comment, not a final determination, as lawfully required, by the Minister and NERSA in terms of section 34.

55. In particular, while the IRP2010 indicated that it was the DOE's decision to adopt a policy of procuring nuclear power, this did not constitute an exercise of the Minister's and NERSA's power to determine that new generation capacity was required, how much was required, and that the source should be nuclear, as required by section 34.

56. This is important, since there appears to have been certain statements made by government that suggest that it erroneously views the IRP2010 as constituting the necessary approval for the procuring of new nuclear power plants. In particular:

56.1 The President of the Republic of South Africa in his 2015 State of the Nation Address referred to the nuclear fleet build ‘as approved’ in the IRP 2010.

56.2 The Minister also referred in her 2015/2016 budget speech to the Cabinet-approved IRP2010 as providing for 9.6GW of electricity to be generated through nuclear power as part of the expanded nuclear build program.

57. As noted, and as will be discussed below, the IRP merely records a policy commitment (which itself is liable to further consideration and updating, and which sits uncomfortably with other policy commitments made by the government, including under the NDP), and could not and does not constitute a binding decision taken by the relevant bodies empowered to take the necessary decision in terms of section 34 of the ERA.

58. The fact that section 34 of the ERA empowers the Minister together with NERSA to make a proper determination as to the requirement for new generation capacity and the sources thereof, makes clear that no policy determination can either substitute for the proper exercise of

that power, nor can any policy determination emasculate the power of the authorized decision makers: the Minister and NERSA.

E. National Development Plan (NDP)

59. The *National Development Plan 2030 Our future – make it work* (**NDP**) approved in 2012 states that South Africa needs to devise policies and plans to improve the country's energy situation, including in respect of the "*timing and/or desirability of nuclear power*", and in reference to diversifying energy supply mentions the possibility of a nuclear programme from about 2023.

60. The NDP states that "*[a]ccording to the Integrated Resource Plan, more nuclear energy plants will need to be commissioned from 2023/24*". While referring to nuclear energy as a low-carbon base-load alternative, the NDP acknowledges that while a decision on nuclear energy use has been taken in principle:

> "South Africa needs a thorough investigation on the implications of nuclear energy, including its costs, financing options, institutional arrangements, safety, environmental costs and benefits, localisation and employment opportunities, and uranium enrichment and fuel-fabrication possibilities. While some of these issues were investigated in the IRP, **a potential nuclear fleet will involve a level of investment unprecedented in South Africa. An in depth investigation into the financial viability of nuclear energy is thus vital. The National Nuclear Energy Executive Coordinating Committee (NNEECC)… will have to make a final "stop-go" decision on South Africa's nuclear future, especially after actual costs and financing options are revealed**" (emphasis added).

61. The NDP goes on to say that South Africa needs an alternative 'Plan B' should nuclear energy prove too expensive, should sufficient

financing be unavailable, or should timelines be too tight. Alternatives indicated include incremental investment in gas turbines, the development of shale and off-shore gas resources, and the development of infrastructure for the import of liquefied natural gas as insurance for the future.

F. Nuclear Energy Act and National Nuclear Regulator Act

62. For the sake of completeness, I note that neither the National Nuclear Regulator Act 47 of 1999 nor the Nuclear Energy Act 46 of 1999 deal with making a decision that there is a requirement for nuclear new generation capacity or the matter that nuclear new generation capacity should be procured.

V. THE DECISIONS TAKEN TO FACILITATE, ORGANISE AND/OR COMMENCE NUCLEAR PROCUREMENT

63. The preceding statutory and policy framework gives the proper context within which to consider the relevant facts leading up to the decision to enter into the IGAs, and in particular the Russian IGA. It also provides the context within which to consider the related decisions and/or steps by the Minister and/or government to procure new nuclear power plants, which has precipitated the need for the current application.

64. As will be seen from the accounts below I do so with reliance on the few statements that have been made publicly by government regarding the process. Given the lack of transparency that has

pervaded the process (despite the efforts by the applicants who have written to the Minister for details but who never received a response), I have also been forced to draw largely on media reports to provide the facts – such as they are – of what steps government has engaged in to date, but as far as possible I have sought to rely on the government's own press statements. It will be seen too from what I say below that along the way the government has reportedly adopted contradictory positions as to the steps it has taken and/or the bases upon which the process is unfolding. Three things are palpably clear though: first, the government has engaged Russia through the Russian IGA in a manner materially different to other states; second, it has done so without following a lawful process directed towards the procurement of nuclear energy from Russia (or any other country); and third, government is intent on finalising the procurement process (that is, by contracting with Russia or another stakeholder, including through concluding an international agreement) on an accelerated basis, apparently by the end of this year (December 2015), or at least the current financial year (March 2016).

A. Reports of agreements with Russia and other countries in relation to nuclear procurement

65. On 22 September 2014, the DOE and Russia's atomic energy agency (**Rosatom**) both released identical press statements (effectively a joint statement) confirming their joint understanding of what the two governments had agreed and advising that on 21 September 2014 the Russian Federation and the Republic of South Africa signed an

Intergovernmental Agreement on Strategic Partnership and Cooperation in Nuclear Energy and Industry. I attach a copy of the DOE's press release marked "**PL6**".

66. The DOE's press release indicated that:

66.1 the Minister, on behalf of the government, and Director General of Rosatom on behalf of the Russian government, had signed this agreement on the side-lines of the 58th session of the International Atomic Energy Agency (**IAEA**) General Conference in Vienna.

66.2 "*The Agreement lays the foundation for the large-scale nuclear power plants (NPP) procurement and development programme of South Africa based* ***on the construction in RSA of new nuclear power plants with Russian VVER reactors with total installed capacity of up to 9,6 GW*** *(up to 8 NPP units).* ***These will be the first NPPs based on the Russian technology to be built on the African continent.*** *The signed Agreement,* ***besides the actual joint construction of NPPs,*** *provides for comprehensive collaboration in other areas of the nuclear power industry, including construction of a Russian-technology based multipurpose research reactor, assistance in the development of South-African nuclear infrastructure, education of South*

African nuclear specialists in Russian universities and other areas."

66.3 The DOE's press release makes clear that agreement was reached that Russia **will** be building new power plants in South Africa.

66.4 The Minister stated that "*I am sure that cooperation with Russia will allow us to implement our ambitious plans for the creation by 2030 of 9,6 GW of new nuclear capacities based on modern and safe technologies. This agreement opens up the door for South Africa to access Russian technologies, funding, infrastructure, and provides a proper and solid platform for future extensive collaboration*."

67. Rosatom was reported as saying at the time that the deal was worth $50 billion. I attach copies of the relevant news report marked "**PL7**".

68. It was subsequently reported in the media that the DOE and Nuclear Energy Corporation of South Africa ("**NECSA**") had clarified the joint statement by Rosatom and the DOE, stating – contrarily – that there was no procurement deal but a country-to-country framework agreement that was a necessary precursor to a commercial relationship over nuclear power, and that similar framework agreements are to be signed (rather than already signed) with other nuclear vendor countries. It was also reported that the agreements

would not be made public. I attach a copy of the relevant news report marked "**PL8**",

69. In November 2014, it was reported in the media that vendor parades hosted by the DOE had been held with a Russian delegation, while China, France, France and the United States were hosted a few weeks later. The DOE's Deputy Director-General: Nuclear Energy is reported as stating that this was a "*pre-procurement process*", and that the information presented would be used to draw up a road map to the procurement process. I attach a copy of the relevant news report marked "**PL9**".

B. Initial correspondence sent to the Minister and other departments

70. On 30 January 2015, the applicants' attorneys of record (Adrian Pole Attorneys – hereinafter referred to as "***Pole***") wrote to the Minister expressing the applicants' deep concern given the press statements indicating that various IGAs had been signed that "*pave the way for establishing a nuclear procurement process*" in the context of evolving energy and resource planning processes, and before establishing a system for nuclear energy procurement, and which were viewed as premature.

71. Among other things, Pole noted the concerns that:

71.1 while Electricity Regulations on New Generation Capacity had been promulgated under the ERA, these regulations excluded

new generation capacity derived from nuclear power technology, and that no Electricity Regulations on New Generation Capacity dealing with new generation capacity derived from nuclear power technology had been promulgated;

71.2 while the Electricity Regulation Act empowers the Minister, in consultation with NERSA, to make a determination relating to new generation requirements and the types of sources from which electricity must be generated, no determination had been made relating to new generation capacity relating to nuclear energy; and

71.3 while the ERA empowers the Minister, in consultation with NERSA, to require that new generation capacity must be established through a tendering procedure that is fair, equitable, transparent, competitive and cost effective, no such tendering procedure had been established.

72. Pole advised the Minister that the applicants had actively participated in the nuclear energy debate, and had made substantive submissions in the IRP2010, draft IEP and IRP2010 Update processes. Concerns raised by Earthlife regarding the IRP2010 included that:

72.1 the commitment to a nuclear fleet as indicated in the RBS was imposed on (rather than being a result of) the integrated resource planning process;

72.2 the costing for nuclear energy was severely unrealistic (in respect of both construction and capital costs); and

72.3 the IRP2010 itself acknowledged that further research was required on the full costs relating to specific technologies (including nuclear) around the costs of decommissioning and managing waste (in the case of nuclear specifically spent fuel).

73. Pole advised the Minister further that the applicants had also made substantive representations regarding the IRP2010 Update.

74. Pole communicated the applicants' views that any decision to procure 9.6GW of nuclear power stations (with estimated costs ranging from R400 billion to R1 trillion) would have a direct and potentially significant detrimental impact on all South African citizens, including future generations as in the applicants' view electricity users will ultimately bear the costs of such unprecedented expenditure.

75. Pole stated that any decision to commit to the procurement of 9.6GW of nuclear power stations could prove calamitous should nuclear technology in the future become redundant or economically unviable due to, for instance, the cost of electricity generated by nuclear power plants proving unaffordable for electricity users.

76. Given the applicants' past engagements in the nuclear energy debate up to that point, Pole requested an opportunity for the applicants (and

other stakeholders) to make representations to the first respondent before any decision on procurement of a nuclear reactor fleet is made, and advised further that in the absence of a nuclear energy procurement system that is fair, equitable, transparent, competitive and cost-effective, and in the context of an energy and resource planning process that is incomplete and/or outdated, any decision on procurement of 9.6GW of nuclear power stations would be premature, irrational and unconstitutional.

77. Pole requested the Minister, inter alia, to:

77.1 confirm that no decision on procuring a fleet of nuclear reactors would be taken without affording the applicants (and other stakeholders) an opportunity to make representations on (amongst other things) the need for, financial viability of and economic risks associated with procuring a fleet of nuclear reactors;

77.2 confirm that a nuclear energy procurement system that complies with section 217 of the Constitution would be established before any further steps were taken to procure a fleet of nuclear reactors; and

77.3 confirm that the applicants (and other stakeholders) would be afforded an opportunity to make representations on any proposed nuclear energy procurement system before it was finalised and implemented.

78. The letter was sent by facsimile and email on 1 February 2015, and by registered post on 10 February 2015. A copy of the letter, and proof of delivery, is annexed marked "**PL10"**.

79. No response was ever received.

80. On 23 February 2015, Pole sent a follow-up letter to the Minister (by email on 23 February 2015, by facsimile on 24 February 2015 and by registered post on 25 February 2015). A copy of the letter, and proof of delivery, is annexed marked "**PL11**".

81. On 2 and 3 March 2015, Pole emailed representatives of the Minister requesting confirmation that the 30 January 2015 and 23 February 2015 letters had been received and forwarded to the Minister. Delivery failed in respect of these emails. As a consequence, Pole made enquiries of the Minister's representative Mr Duncan Hindle. Mr Hindle confirmed telephonically that the aforementioned letters had been received.

82. On 16 March 2015, Pole sent a further follow-up letter to the Minister by email and facsimile, and by registered post on 23 March 2015. Delivery again failed in response to these emails. As a consequence, Pole again caused his assistant to make telephonic enquiries to confirm which email addresses to use to correspond with the Minister. Also on 16 March 2015, Pole sent a further email to the attention of the Minister attaching the follow-up letter and the originating letter dated 30 January 2015, recording that Mr Hindle had confirmed

receipt of the originating letter dated 30 January 2015 and requesting acknowledgment of receipt of the correspondence. An email reply dated 16 March 2015 from the DOE's Ms Olga Ockhuis-MacZali was received confirming receipt of the documentation and advising that it would be shared with "*the relevant people*". A copy of the letter and related emails are annexed marked "**PL12**".

83. For completeness, I also point out that Pole sent a letter by registered post and email to the Minister of Public Enterprises on 10 February 2015, as well as a follow-up letter by email on 27 February 2015, by email on 16 March 2015, and by registered post on 23 March 2015. In response to a request by Pole, an email of the same date was received acknowledging receipt and advising that the content would be forwarded to the Minister for her attention. A copy of these communications is annexed marked "**PL13"**.

84. A letter in reply dated 14 April 2015 was received from the Minister of Public Enterprises, advising that the energy concerns and issues raised by the applicant must be addressed to the Minister of Energy. A copy of this letter is annexed marked "**PL14**".

C. Further revelations about the proposed nuclear procurement are reported in the press

85. During the period when these communications were being sent to the Minister and her representatives, and going unanswered, information was trickling into the public domain.

86. On 09 February 2015, the President was reported in the media as stating in an address to editors that *"[w]e're building huge power stations. We are also going to build nuclear*". I attach a copy of this report marked "**PL15**".

87. On 12 February 2015, the President in his State of the Nation Address said that:

> "Government is also exploring the procurement of the 9 600 megawatts nuclear build programme as approved in the Integrated Resource Plan 2010-2030.
>
> To date government has signed inter-governmental agreements and carried out vendor parade workshops in which five countries came to present their proposals on nuclear.
>
> These include the United States of America, South Korea, Russia, France and China.
>
> All these countries will be engaged in a fair, transparent, and competitive procurement process to select a strategic partner or partners to undertake the nuclear build programme.
>
> Our target is to connect the first unit to the grid by 2023, just in time for Eskom to retire part of its aging power plants."

I attach a copy of the relevant portion of the President's address marked "**PL16**".

88. On 13 February 2015, details in relation to the Russian IGA were reported in the media, and an unofficial English translation of a Russia version of the agreement was made available online by at least one newspaper. I attach a copy of this report marked "**PL17**".

89. However, the signed English translation of the Russian IGA was not made public. The first time it became public is when it was unlawfully tabled in Parliament in terms of section 231(3) in July 2015 (as discussed more fully below). The tabling of the agreement under section 231(3) was also the first time that it became clear that the Minister intended to make the agreement binding, by merely tabling the agreement, and without parliamentary approval.

90. On 18 February 2015, the acting Director General of the DOE, Wolsely Barnard, was reported in the media as stating that the DOE was finalising key policy documents including the Integrated Energy Plan (**IEP**) and IRP, that no binding agreements had been signed with any other country, and that South Africa had invited countries to offer nuclear technology solutions and show what economic development would accompany it. Barnard was reported as stating further that "[***t]his year, the next steps would be taken towards finalising a procurement process****, then a decision would be made by the Cabinet*". I attach a copy of this report marked "**PL18**".

91. On 20 February 2015, in response to questions about the Russian IGA, the deputy director for nuclear energy in the DOE, Mr Zizamele Mbambo, was reported in the media as having stated that "*[a]t this stage, the department is engaged in the pre-procurement phase. The type and nature of procurement process has not been approved by Cabinet*". I attach a copy of this report marked "**PL19**".

92. On 25 February 2015, Deputy Energy Minister, Thembisile Majola, was reported as having told a media briefing regarding nuclear procurement that "*in terms of request for proposals… it will be open in terms of those who have come and presented what [their] offerings are to us*", and that South Africa has agreed already to build six "*mini-nuclear*" power plants to help supplement Eskom's Power supply. Trade and Energy Minister Rob Davies was reported as having emphasised that remarks made by President Zuma on nuclear power procurement should be seen in context, and that "*the work that has been done up to now… has been pre-tender. Any (nuclear power) tender would be an open and competitive process*". I attach a copy of this report marked "**PL20**".

93. On 26 March 2015, Deputy President Cyril Ramaphosa was reported as stating in the National Council of Provinces that "*when the president addressed the State of the Nation… he did say that all these things are being done with regards (sic) to nuclear energy are going to be in an open and transparent manner. That is what our president said… I think we should rely on that"*. I attach a copy of this report marked "**PL21**".

94. On 19 May 2015, the Minister announced in her 2015/16 budget speech that, once approved by Cabinet, the "*much awaited*" Integrated Energy Plan (**IEP**) will be published as a policy document to inform our future energy mix and prioritize policy interventions for

future programmes within the energy sector. I attach a copy of the relevant portions of the budget speech marked "**PL22**".

95. The Minister also advised that the government's Nuclear Energy Policy, 2008 provides for the expansion of the nuclear build program in a co-ordinated manner to address our socio-economic needs and to bolster the economy, and stated that the "*Cabinet approved IRP2010 provides for 9,600 Megawatts of electricity to be generated through nuclear power, with the first unit commissioned by 2023*". Mention was also made of IGAs having been signed which lay the foundation for cooperation, trade and exchange of nuclear technology "*as well as procurement*", with the Minister saying that these agreements will be submitted to Cabinet for discussion and endorsement "*in the coming weeks*" and will be followed by the "*requisite parliamentary processes for **ratification** of these agreements*" (emphasis added). The Minister stated further that vendor parades have been completed with nuclear vendor countries that have shown an interest in the nuclear build programme.

96. The Minister advised that ***"[w]e will commence with the actual procurement process in the second quarter of this financial year to select a Strategic Partner*** *or Partners in a competitive, fair, transparent and cost-effective manner.* ***We expect to present the outcome of this process to Cabinet by the end of the year***". (emphasis added)

97. On 3 June 2015, Nuclear Energy Corporation of South Africa (**NECSA**) Chief Executive Officer Phumzile Tshelane was reported as having confirmed to a round-table conference of the BRICS countries that government was planning to name its strategic partner for the nuclear build by the end of this year (2015). I attach a copy of the report marked "**PL23**".

98. On 10 June 2015, the Minister signed a letter authorising the Parliamentary Liaison Officer to submit the IGAs signed with various nuclear vendor countries for tabling in Parliament in accordance with section 231(3) of the Constitution. In particular, the follow IGAs were tabled:

98.1 Agreement for Cooperation between the Government of the Republic of South Africa and the United States of America concerning Peaceful Uses of Nuclear Energy (**the US IGA**), signed on **25 August 1995**;

98.2 Agreement between the Government of the Republic of Korea and the Government of the Republic of South Africa regarding Cooperation in the Peaceful Uses of Nuclear Energy (**the South Korean IGA**), signed on **8 October 2010**;

98.3 Agreement between the Government of the Republic of South Africa and the Government of the Russian Federation on Strategic Partnership and Cooperation in the fields of Nuclear Power and Industry, signed on **21 September 2014**;

98.4 Agreement between the Government of the Republic of South Africa and the Government of the French Republic on Cooperation in the Development of Peaceful Uses of Nuclear Energy (the French IGA), dated **14 October 2014**;

98.5 Agreement between the Government of the Republic of South Africa and the Government of the People's Republic of China on Cooperation in the field of Civil Nuclear Energy Projects, signed on **7 November 2014**;

99. I understand that these IGAs were tabled in Parliament on 11 or 12 June 2015, and return to discuss the IGAs, and particularly the Russian IGA, in more detail below. I attach a copy of the letter from the Minister (marked "**PL24**"), together with the IGAs. These IGAs range in date from 1995 to 2014. I attach the IGAs together with one President's Minute that was included in relation to the French IGA (authorising the Minister to sign the IGA), marked "**PL24.1"** to "**PL24.5"**.

100. I note that the IGAs and President's Minute tabled with the Minister's letter curiously did not include the relevant President's Minute in relation to the Russian IGA (or any President's Minutes for any of the IGAs save for the French IGA). However, SAFCEI received a copy of the President's Minute for the Russian IGA (President's Minute No. 289 dated 20 September 2014), through an access to information

request that had been made to the DOE. For the sake of completeness, I note the following in this regard:

100.1 SAFCEI, assisted by the Open Democracy Advice Centre, sought a range of documents from the DOE in relation to the procurement of nuclear new generation capacity.

100.2 The DOE's Deputy Information Officer refused the request.

100.3 SAFCEI appealed to the Minister in terms of section 74(1) of PAIA.

100.4 On 13 July 2015, the Minister overturned the decision of the Deputy Information Officer and substituted it with a decision to grant access only to the President's Minute in relation to the Russian IGA. I attach a copy of the decision marked "**PL25"**, and a copy of the President's Minute, date 20 September 2014, marked "**PL26**".

D. The DOE's Nuclear Procurement Process Update press release of 14 July 2015, Advertorial, and presentation to Parliament

101. In its *Media Statement: Nuclear Procurement Process Update* dated 14 July 2015 (a copy of which I attach marked "P**L27**"), the DOE stated, inter alia, that:

101.1 In March 2011, Cabinet approved and promulgated a 20 year IRP in accordance with which the first nuclear power plant would be commissioned by 2023;

101.2 In line with the policy prescripts of the National Development Plan approved in 2012, government has undertaken detailed studies on various aspects of the nuclear fuel cycle value chain, including amongst other, costs, financing, funding model, skills development, and economic impact of localisation. These studies have confirmed that this programme is fundable and will contribute positively to the economy of the country;

101.3 Government invited the International Atomic Energy Agency (**IAEA**) to conduct an Integrated Nuclear Infrastructure Review (**INIR**) mission to assess the country's infrastructure as it relates to readiness to start purchasing, constructing and operating nuclear power plants, and that the INIR report was received on 30 May 2013;

101.4 A recommendation made in the INIR report (which report I understand has not yet been made public), that South Africa should finalise its contracting strategy for the nuclear build, has now been met;

101.5 A further recommendation in the INIR report was that Bid Invitation Specifications (**BIS**) and related evaluation criteria,

which would be a prerequisite for the tendering and procurement process, would be finalised by the end of July 2015;

101.6 A recommendation made in the INIR report that the designation of the Procuring Agent should be made, has been completed, with the DOE designated as the "Procuring Agency".

101.7 Studies have been completed and recommendations are undergoing an approval process in respect of a recommendation made in the INIR report that once its contracting strategy has been finalised, South Africa should complete its financing arrangements for the nuclear build programme;

101.8 Government has signed IGAs with several vendor countries, including China, France, Russia, USA and South Korea, and that negotiations are underway to conclude IGAs with Canada and Japan. These IGAs "*lay the foundation for cooperation, trade and exchange of nuclear technology as well as procurement*". The IGAs were presented to Cabinet for discussion and approval, and have "*recently been tabled in Parliament and now ready for further debate and Parliamentary endorsement*".

101.9 Vendor parade workshops focussing on (among other things) nuclear plant technology and construction, and financing and commercial matters, were completed in March 2015;

101.10 Going forward, government plans the following as part of the broad procurement process:

101.10.1 To follow the approved procurement process that will include a competitive bidding process that is transparent and cost effective and in line with legislation.

101.10.2 Start procurement in Second Quarter (July 2015)

101.10.3 <u>Procurement Process to be completed by end of 2015 financial year</u>

101.10.4 Select Strategic Partner or Partners by end of 2015 financial year.

101.10.5 "*Government remains committed to a procurement process that is in line with the country's legislation and policies*".

102. I note that in addition to the media statement released by the DOE, it also published an advertorial in the SAA inflight magazine in July 2015. I attach a copy marked "**PL28**".

103. The Advertorial recorded the following:

103.1 "*Policy prescripts [an apparent reference to Nuclear Energy Policy of 2008, the IRP2010, and the National Development Plan] are meant to add 9600mW to the national electricity grid*".

103.2 "*Government held consultations with a number of nuclear vendor countries including the USA, South Korea, Russia, France, Japan, and China*."

103.3 South Africa had signed agreements with the USA, South Korea, Russia, France, and China, and "*[i]nter-governmental framework agreements with Canada and Japan are at an advanced stage and are expected to be concluded soon*."

103.4 The IGAs "*mark the initiation of the preparatory stage for the procurement process that will be undertaken in line with the country's legislation and policies*."

103.5 Nuclear vendor parade workshops were concluded with all the countries: with the first workshop with Russian only in October 2014, the second workshop with China, France, the US, and South Korea in November 2014 and with the third and final workshop concluded from 21-29 March 2015 with Canada and Japan.

103.6 "*Going forward, the procurement process will be presented for approval by the Energy Security Cabinet Sub-committee and endorsed by Cabinet. The procurement process will then be presented for deliberation by Parliament, after which government will launch a procurement process well in time to ensure that SA commissions the first unit by 2023 and the last unit by 2030*."

104. As will be noted below, other than in this Advertorial, there has been no suggestion by the DOE that a procurement process is going to be first approved by Parliament. It is similarly unclear what is meant by the fact that the process is to be "endorsed" by the Cabinet. Instead, there is every indication that the procurement process, as suggested by the DOE's own press release, has already begun, since the BIS and evaluation criteria were to be finalised (and bids presumably submitted shortly thereafter), by July 2015.

105. Furthermore, the Advertorial and the DOE's press release for the first time suggest that further IGAs are being concluded with Canada and Japan – a fact not previously disclosed in any of the public statements by government. As mentioned below, on 1 September 2015 the Parliamentary Committee on Energy issued a press statement after it had received a briefing from the DOE. The press statement made clear that even by the beginning of September 2015, the Minister was still unable to provide a date by which the IGAs with Canada and Japan would be concluded. At the time of preparing this affidavit no

further information had been made public in relation to whether IGAs have been concluded with Japan and Canada, and if so whether these would also be tabled before Parliament in terms of section 231(3). The lack of transparency, and the fact that the procurement process appears to have commenced in the absence of agreements with certain nations while other potential vendor nations have agreements (including the Russia IGA, discussed more fully below) provides further indications that the process may be skewed and is evidently being conducted in an *ad hoc* and non-transparent or potentially unfair manner, and not in accordance with a constitutionally or statutorily compliant procurement system.

106. Importantly, as discussed below, the Parliamentary Committee on Energy has indicated that even by 13 August 2015, there had been no attempt to place any matter in relation to the procurement process before the committee.

107. Furthermore, certain of the facts included in the media statement appear to have been confirmed by DOE's Performance Reports to Parliament's Portfolio Committee on Energy, on 4 August 2015. Importantly, the presentation indicated that:

107.1 "***Procurement process for new nuclear build programme <u>in progress</u>***" (slide 12) (emphasis added).

107.2 For the 4th Quarter of the 2014/2015 financial year, it indicates that the pre-procurement process is completed (with

a comment that "*Preparation for a procurement process only* ***ended in March 2015***");

107.3 For the 1st Quarter of 2015/2016 financial year, it is indicated that the quarterly goal of "*implementation of the procurement process (if approved*)", was "not achieved", with comment that "*Cabinet Granted Conditional approval* ***pending few other submissions*****."** (emphasis added)

107.4 I draw attention to the fact that there is no mention in this presentation that the DOE would be seeking the Committee's or Parliament's approval of the procurement process, notwithstanding what was alleged in the Advertorial.

107.5 I also draw attention to the reference to Cabinet approving the procurement process (which has also been variously referred to in other press statements by the DOE). There is no indication what is meant by this, nor, I am advised, is there any statutory or constitutional provision that empowers or requires Cabinet to approve any procurement processes.

107.6 The relevant parts of the presentation are attached marked "**PL29**".

107.7 Ms Angela Andrews, an attorney at the LRC, was present at the presentation, representing Earthlife. She indicates that the DOE officials took the Parliamentary Committee through a

Power Point presentation which included a slide (12) which states 'Programme 5 (Nuclear Energy 4th quarter 2014/2015)…. Comments - procurement process for new nuclear build programme in progress'. However, at the end of the presentation the Acting Director General simply stated, without explanation, and seemingly in contradiction of the impression given by the other officials, that procurement had not yet started. It is of course unclear what the Acting Director General would deem to be the "start" of procurement, or why he deemed it necessary to offer this clarification. This is yet a further indication of the obfuscation and lack of transparency in relation to the largest procurement this country has ever undertaken.

E. The LRC's letter to Parliament in relation to the IGAs tabling in Parliament

108. On 9 July 2015, the LRC in Cape Town, wrote to the Portfolio Committee for Energy on behalf of Earthlife, inter alia, enquiring into the process followed by the Minister in placing the IGAs before Parliament. The LRC also sought clarity as to when the presentation of the procurement process to the Portfolio Committee for its approval, as indicated in the DOE's advertorial, was likely to take place.

109. I attach a copy of that letter, marked "**PL30**".

110. Some two months later, on 13 August 2015, the Portfolio Committee finally responded. I attach a copy of the letter marked "**PL31**".

111. The Portfolio Committee confirmed that on 11 June 2015, the Minister tabled in Parliament five international agreements in terms of section 231(3) of the Constitution and that the agreements were formally referred to the Portfolio Committee on Energy on 5 August 2015.

112. The Portfolio Committee further confirmed that in terms of section 231(3) of the Constitution, such agreements become binding without the approval of Parliament, but must be tabled within a reasonable time.

113. Nevertheless, the Portfolio Committee surprisingly noted that "*Be that as it may, the Committee will meet in due course to decide on the manner and date to facilitate public involvement in* the process before *the Committee. You will be advised of this decision."*

114. It is not clear what "*public involvement*" the Portfolio Committee could have in mind, given that the agreements were tabled under section 231(3), and the Committee accepted, as per the plain meaning of that section, they were accordingly binding without Parliament's approval.

115. In relation to the promised tabling of the procurement process for approval by Parliament (as promised in the Advertorial), the Portfolio Committee, given the tone of the response, makes clear that DOE had made no attempt to place this issue before the Committee

(indeed, as indicated above, it appears that the statement in the Advertorial, is misleading and inconsistent with the DOE's other statements and actions). This is clear from the following terse paragraph by the Portfolio Committee:

> "On the advertorial in the SA Airways magazine published in July 2015, the said agenda item is not on the Portfolio Committee on Energy's meetings programme. I advise that the Legal Resource Centre monitor the Z-list, which is the National Assembly and National Council of Provinces: Meetings of Committees. This information is available on the Parliamentary website."

F. Final correspondence to the Minister and NERSA, and their failure to respond, necessitating the institution of these proceedings

116. Prior to instituting these proceedings, the applicants sought through their attorneys to obtain clarification both from the Minister and from NERSA in relation to whether any of the necessary and constitutionally required statutory decisions had been taken.

117. Both the Minister and NERSA were given reasonable periods to respond to the requests for information and to give assurances that the procurement process would not continue absent the taking of the necessary and lawful decisions.

118. As will be discussed below, at the time of launching this application, neither the Minister nor NERSA had responded substantively to the letters sent by the applicants' attorney.

(i) *The final correspondence with the Minister*

119. On 26 July 2015, Pole wrote again to the Minister, given the further revelations about the procurement of nuclear power stations and government's plans and intentions in that regard since Pole's last letter to the Minister on March 2015. I attach a copy of that letter marked "**PL32**". That letter also annexed copies of Pole's previous letters (which, to avoid duplication, are not included again).

120. It is important to traverse in some detail what was stated in Pole's letter, as it reiterates the key issues raised by the applicants in this application, and highlights that the applicants continued to attempt to engage with and allow the Minister to provide relevant information and answers in order to avoid the need to approach the Court. Unfortunately, the Minister refused to engage with the applicants.

120.1 Pole's letter began by drawing attention to a number of the relevant developments that had been made public in relation to nuclear procurement, as discussed above, including the DOE's press statement of 14 July 2015, titled "Nuclear Procurement Process update".

120.2 In relation to the Minister's tabling of the IGAs in terms of section 231(3) of the Constitution, Pole pointed out that the Russian IGA, given its content, and in particular articles 3, 4, 7, 15, 16, and 17, is an international agreement which required parliamentary approval under section 231(2) and

therefore could not lawfully be tabled and made binding in terms of section 231(3). Pole went on to note that the applicants also took the view that the content of the Russian IGA renders it unlawful and unconstitutional since it records binding undertakings in relation to the procurement of new nuclear generation capacity (including in respect of South Africa's liability consequent on such procurement), prior to any constitutionally and statutorily compliant procurement process having been undertaken, and before any determination as to the requirement for nuclear new generation capacity having been made (as more fully discussed below).

120.3 Pole went on to note that having regard to the DOE's media statement, the actions and/or decisions by the Minister, the DOE and government in relation to nuclear procurement appeared to have occurred and been made in a manner that is not compliant with established constitutional procurement principles and without properly putting in place the prerequisites for such nuclear new generation capacity procurement, including in terms of section 34 of ERA.

120.4 Therefore, Pole raised a number of important questions with the Minister, in relation to what if any statutory or legal processes had been complied with, to which the applicant required urgent responses. In particular, Pole asked:

120.4.1 If the Minister, in consultation with NERSA, had made any determination/s in terms of sections 34(1)(a) and (b) of the ERA that new generation capacity is needed, that electricity must be generated from nuclear energy sources, and determining the percentages of electricity that must be generated from such nuclear sources?

120.4.2 If so, could the Minister provide Pole with copies of these section 34 determinations?

120.4.3 Under what statutory power was the determination made that nuclear new generation capacity was required and the amount thereof?

120.4.4 In terms of what statutory power has the Department been designated as “the Procuring Agency”?

120.4.5 What does the DOE’s designation as the “Procuring Agency” entail: will the Department’s role be limited to overseeing any procurement process, or is it intended that the DOE itself will contract with any successful bidder for the provision of the nuclear new generation capacity? If the DOE’s role will be limited to overseeing the procurement process, with which entity will the successful bidder be contracting?

120.4.6 If the Minister, in consultation with NERSA, had made any decision in terms of section 34(1)(e) read with section 217 of the Constitution requiring that new nuclear generation capacity must be established through a tendering system which is fair, equitable, transparent, competitive and cost-effective, that is a system specifically created for the procurement of nuclear new generation capacity?

120.4.7 If not, in line with and in terms of what legislation has "the approved [nuclear] procurement process" been created?

120.4.8 Why has the nuclear procurement system – to the extent it has been established – not been made public, which is an essential requirement of a "transparent" system as required by section 217 of the Constitution and section 34(1)(e) of the ERA?

120.4.9 If such a system has not been put in place, on what basis and in terms of what power has the creation of "the Bid Invitation Specification (BIS) and related evaluation criteria" (which is soon to be finalised) for nuclear procurement been undertaken?

121. Pole also made clear to the Minister that the applicants:

121.1 had direct interests in any determination made that there is a need for nuclear new generation capacity and in any system to procure such nuclear new generation capacity, and would wish to, and have a right to be afforded an opportunity to, make representations in any such processes (as indicated in Pole's letter of 30 January 2015 (**PL10**));

121.2 took the view that any decisions and steps taken to date that form part of the procurement of nuclear new generation capacity, have been taken in the absence of a lawful determination that such nuclear new generation capacity is required, in the absence of any fair, equitable, transparent, competitive and cost-effective system established specifically for the procurement of nuclear new generation capacity, and/or in the absence of any system (since no system of any nature has been made public, a basic necessity of transparency), and as a result are unlawful and unconstitutional.

122. Pole furthermore notified the Minister that any further procurement decisions and steps in relation to nuclear procurement will be unlawful and unconstitutional until such time as:

122.1 lawful and constitutionally compliant determinations are made that new generation capacity is needed, that electricity must be generated from nuclear energy sources, and the

percentages of electricity that must be generated from nuclear sources;

122.2 a lawful and constitutionally compliant system for the procurement of nuclear new generation capacity has been established (which in the context of nuclear procurement clearly requires a context specific and public and published procurement system); and

122.3 procedurally fair public participation processes in respect of the above are conducted.

123. In the circumstances, Pole, requested that the Minister (a) provide urgent answers to the questions set out in this letter and (b) give a written undertaking that the nuclear procurement process will not continue or commence until such time as:

123.1 in consultation with NERSA, you have made the necessary and lawful determinations and decisions in relation to nuclear new generation capacity; and

123.2 a lawful and constitutional nuclear procurement system has been established.

124. Pole informed the Minister that given that the DOE's media statement indicated that the bid invitation specifications and evaluation criteria for the nuclear procurement were about to be published, the

applicants required the requested written undertaking and answers to the aforesaid questions by no later than **7 August 2015.**

125. Pole expressly advised the Minister that should she nevertheless proceed with the nuclear procurement in the absence of having complied with the necessary statutory and constitutional requirements, and notwithstanding that this has been expressly drawn to her attention, she did so in full knowledge, and having accepted the risk, that any nuclear procurement process, award made or contract entered into must, in terms of section 172(1)(a) of the Constitution, be declared constitutionally invalid. Furthermore, Pole noted that it was assumed that if the Minister nevertheless proceeded with the nuclear procurement notwithstanding the letter, she would only do so having fully advised the prospective bidders of the risks involved in bidding, including the risk that in due course any procurement decisions and contracts entered into pursuant thereto will be declared invalid by a Court.

126. In conclusion, Pole informed the Minister that in the event that she failed to answer the questions and/or failed to provide the applicants with the undertaking requested by 7 August 2015, the applicants would have no choice but to approach the High Court for a declaratory order on the legality and constitutionality of the nuclear procurement process outlined for the first time in the Department's media statement of 14 July 2015.

127. On 27 July 2015, the Minister's representative, Ms Olga Ockhuis-MacZali, wrote back to Pole (I attach a copy of the email marked "**PL33**") and stated that:

> "I hereby confirm receipt of your correspondence and will share it with the Minister. I am sorry that your correspondence did not receive the attention that it should have received.
>
> I truly hope you find this in order."

128. Notwithstanding Ms Osckhuis-MacZali's expressed apologies and hopes, 7 August 2015 came and went with no substantive response to Pole's letter forthcoming from the Minister.

129. The Minister's failure to respond meant that the applicants were left with no option but to approach this Court for the relief sought in this application.

(ii) *Correspondence with NERSA*

130. On 26 July 2015, Pole wrote a letter to NERSA, also raising certain questions with NERSA, given the DOE's press statement of 14 July 2015 in relation to the nuclear procurement. I attach a copy of the letter, marked "**PL34**".

131. In particular, Pole raised the following issues with NERSA (which to a certain extent overlapped with the questions raised with the Minister):

131.1 Has NERSA been consulted and given its concurrence in respect of any determination/s in terms of sections 34(1)(a) and (b) of the ERA that new generation capacity is needed,

that electricity must be generated from nuclear energy sources, and determining the percentages of electricity that must be generated from such nuclear sources?

131.2 Has NERSA been consulted and given its concurrence in respect of any determination by the Minister that the purportedly required new nuclear generation capacity must be established through a tendering system which is fair, equitable, transparent, competitive and cost-effective, that is system-specifically created for the procurement of nuclear new generation capacity, in terms of section 34(1)(e), as read together with section 217 of the Constitution?

132. Pole requested that if either of the above questions were answered in the affirmative that NERSA provide evidence (minutes, records, decision-memoranda, etc.) of the consultation and concurrence.

133. Pole also indicated that the applicants have a direct interest in any determination that there is a need for nuclear new generation capacity and in any system to procure such nuclear new generation capacity, would wish to, and have a right to be afforded an opportunity to, make representations in any such processes.

134. Pole indicated that given the urgency in the matter NERSA should provide answers by 7 August 2015. Pole also made clear that if NERSA failed to respond by 7 August 2015, for purposes of any court proceedings that may be initiated it would be assumed that NERSA

was not consulted and did not provide the concurrence referenced in paragraphs 4.1 and 4.2 his letter to NERSA.

135. Despite NERSA being provided two weeks to respond, no response was received, and none has been received at the time this application was launched.

136. On a conspectus of all the facts, together with the failure to respond, this Court should accept that no proper determinations in terms of section 34 were made in consultation with NERSA in relation to either the requirement for nuclear new generation capacity or the system for the procurement of such nuclear new generation capacity.

G. Relevant press reports subsequent to the final letters sent to the Minister and NERSA

137. In late August and early September 2015, while the applicants' legal representatives were in the process of preparing these papers there were certain reports in the press that are relevant. They compound the lack of transparency inherent in the process to date, including in relation to the timeframe for proceeding with the procurement process. I attach these reports marked "**PL35"** to "**PL38**", which include a press statement from the Parliamentary Committee on Energy dated 1 September 2015.

138. In particular, those reports indicate that:

138.1 The Minister now claims that there had been no decision yet taken by government to procure 9.6GW (this notwithstanding, *inter alia*, the terms of the Russian IGA, and the DOE's own press statements, referred to above);

138.2 A costing study on nuclear power has been submitted to the Cabinet for a decision on the size, model and cost of new-generation infrastructure to be built by the government;

138.3 The Business Day also reported that it sought access under PAIA (with the assistance of the ODAC) to reports commissioned by the DOE in the past year from KPMG, Ingerop and Deloitte to provide information on nuclear-procurement models, the cost of nuclear plants and financing models undertaken by government in preparation for the procurement of the 9.6 GW. It appears these are the reports that were to be placed before Cabinet. However, the Deputy DG refused the access to information request on the basis that "the records contain information **to be used in the procurement process**. The disclosure of such information will compromise the negotiations or prejudice the commercial competition as far as third parties are concerned" (emphasis added). The Deputy DG's decision also indicated without explanation that the reports were also classified. The ODAC has made a copy of the Deputy DG's decision available to SAFCEI. I attach a copy marked "**PL39**", which confirms the

information provided by the Business Day's report;

138.4 While government was due to release its bid requirements by the end of July 2015, at least one report indicates that this has been delayed – no indication has been given how long the delay would last.

138.5 The Minister had indicated to the Parliamentary Committee that the DOE and the National Treasury are still working on a funding model for the nuclear build (it appears from the Committee's press statement that this included a "cost benefit analysis"). The Committee indicated that the Minister informed them that "*Once we have taken a decision as a government and Cabinet, we will communicate. There is no secrecy*." This appears to be a reference to a decision in relation to the funding model. In the circumstances, the Minister dismissed the R1 trillion projected costs reported in the media.

139. It is possible that these reports reflect a reappraisal by the Minister of the government's approach hitherto to the procurement process and/or a delay of the process. Yet the applicants and the public have been left none the wiser, given the failure on the part of the Minister and NERSA to respond to their letters.

140. Furthermore, there have been no indications whether in press reports or otherwise, that the Minister intends to in fact, in concurrence with

NERSA, take the necessary decisions in terms of section 34(1), after proper public participation, prior to beginning or continuing the procurement process. This notwithstanding that this issue was raised squarely in the correspondence with the Minister. The ongoing lack of transparency and accountability, despite protestations to the contrary, confirms the need for this Court to consider the lawfulness of the Minister's and the government's actions.

VI. LEGAL BASIS FOR THE CHALLENGE

141. Before setting out the specific grounds of challenge in this matter, which to some extent have already been foreshadowed in the correspondence to the Minister, and have been summarised in the introduction to this affidavit, I first situate those grounds of challenge within the proper constitutional framework regarding the exercise of public power by organs of state and the review powers of this Court.

142. First, in terms of the principle of legality that flows from section 1(c) of the Constitution and the rule of law, all exercises of public power, including executive action, are subject to the Constitution and review by our courts. The principle of legality and the rule of law therefore require, inter alia, the following:

142.1 Organs of state can exercise only those powers conferred lawfully on them;

142.2 Executive action must be rational;

142.3 Not only the substance of the decision, but also the procedure leading to the decision, must be rational.

142.4 Therefore, there are circumstances in which rational decision-making calls for interested persons to be heard.

143. Secondly, in terms of the Promotion of Administrative Justice Act (**PAJA**), which gives effect to section 33 of the Constitution:

143.1 All administrative action must be lawful, reasonable and procedurally fair.

143.2 These obligations of lawfulness, reasonableness and procedural fairness are further delineated in section 6 of PAJA.

143.3 Administrative action includes any failure to take a decision.

143.4 Administrative action that fails to meet the requirements of section 6 is reviewable in terms of section 7.

144. Third, the principle of openness and accountability:

144.1 Section 1 of the Constitution sets out its founding values. These include, at section 1(d): **"***accountability, responsiveness and openness***".**

144.2 Section 195 of the Constitution provides:

"(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

a) A high standard of professional ethics must be promoted and maintained.
b) Efficient, economic and effective use of resources must be promoted.
c) . . .
d) …..
e) People's needs must be responded to, and the public must be encouraged to participate in policy-making;
f) **Public administration must be accountable**." (Emphasis added.)

144.3 The sum of these provisions, among others, is to confirm what the Constitutional Court has called "*a culture of openness and democracy*".

144.4 As the Constitutional Court has held, transparency must be fostered by providing the public with timely, accessible and accurate information.

144.5 It is within this culture and context that the respondents' conduct must be evaluated. The applicants submit that the respondents have acted in a manner which is secretive, obstructive and prejudicial to the rights of the applicants and the public.

145. Fourth, as a function of the separation of powers, government policy, not being a legislative instrument, cannot override, amend or be in conflict with laws. In this regard the following principles emerge from

the decisions of the Constitutional Court, Supreme Court of Appeal, and the High Court:

145.1 Policy decisions may not emasculate the power of the authorised decision maker;

145.2 Policy must be consistent with the operative legislative framework;

145.3 Policy may serve as a guide to decision-making, but may not bind the decision-maker inflexibly;

145.4 Policies cannot supplant the statutory provisions which are the sole source of the ambit of the power or any procedure related to it.

145.5 Policies cannot constrain the exercise of a discretion or detract from a duty conferred by a statutory provision.

146. Fifth, in terms of section 217 of the Constitution organs of state, inter alia, in the national sphere of government when contracting for goods or services "*must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective*."

147. Sixth, section 2 of the National Environmental Management Act 107 of 1998 (NEMA) sets out a list of principles that apply throughout South Africa to the actions of all organs of state that may significantly affect the environment and shall apply alongside all other appropriate

and relevant considerations, including the State's responsibility to respect, protect, promote and fulfil the social and economic rights in Chapter 2 of the Constitution. These principles must therefore be taken into account in making any decisions or taking any other actions in relation to the procurement of nuclear power plants, since such actions may significantly affect the environment. Of particular relevance is the principle that sustainable development requires the consideration of all relevant factors including that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions (section 2(4)(a)(vii)).

VII. GROUNDS FOR CHALLENGE

148. I now set out the grounds upon which the applicants contend, in summary, that the President's decision to authorise and the Minister's decisions to sign and then table the Russian IGA under section 231(3) of the Constitution, the Minister's decisions to table the US IGA and South Korean IGA under sections 231(3), and the decisions and/or steps to facilitate, commence or proceed with the procurement of nuclear new generation capacity, are unlawful and unconstitutional.

149. I am advised that in due course upon receipt of the Rule 53 record/s the applicants will be entitled to supplement their founding affidavit and notice of motion, and may, if so advised, at that stage add to or amend their grounds of challenge.

150. For present purposes, therefore, and until the Rule 53 Record/s has/have been produced and supplementation has occurred, the applicants' grounds of challenge are set out thematically below.

A. The decisions to sign and table the Russia IGA are unlawful and unconstitutional

(i) *Introduction*

151. The terms of the Russian IGA are more extensive and include far greater commitments, than any of the comparative IGAs in relation to nuclear co-operation that were tabled before Parliament at the same time. The comparison is instructive, because it makes clear that the entering into of the Russian IGA was not merely a precursor to any engagement with Russia in relation to nuclear procurement.

152. The true nature and extent of the Russian IGA are revealed by the following provisions thereof:

152.1 **The Preamble** states that the agreement provides for "*the legal fixation of the **strategic partnership** in the fields of nuclear power and industry*" (emphasis added).

152.2 **Articles 1** provides that the agreement "*creates the foundation for the **strategic partnership** in the fields of nuclear power and industry… aimed at the successful implementation of the national plan for the power sector development of the Republic of South Africa*" (emphasis

added).

152.3 It should be recalled that the term “strategic partner” has been used by government to refer to the party that will ultimately construct the new nuclear power plants: as noted above, this is not only apparent from the DOE’s joint press release issued with Rosatom on 22 September 2014, but also by the fact that the Minister and the President have both referred to a fair process that will be followed to select a “strategic partner”, and the CEO of NECSA also stated that government is planning to have its “strategic partner” for the nuclear build by the end of the year (2015). It is therefore of significance that the Russian IGA specifically refers to the creation of a strategic partnership; particularly in view of the contents of the IGA which will be discussed below. None of the other IGAs make reference to the agreement creating a “strategic partnership”.

152.4 **Article 3**, provides that:

> “**The Parties shall create** the conditions for the development of **strategic cooperation and partnership in the following areas**:
>
> (i) development of a comprehensive nuclear new build program for peaceful uses in the Republic of South Africa, including enhancement of key elements of nuclear energy infrastructure in accordance with IAEA recommendations;
>
> (ii) **design, construction, operation and decommissioning of NPP [new nuclear power plant] units based on the VVER reactor technology in the**

Republic of South Africa, with total installed capacity of about 9,6 GW;

(iii) design, construction, operation and decommissioning of the multi purpose research reactor in the Republic of South Africa;" (emphasis added)

152.4.1 I note the peremptory language used ("shall create") and the reference to a "strategic partnership" and that the VVER reactor technology is unique to Russia.

152.5 **Article 4** provides as follows:

"1.The Parties collaborate in areas as outlined in Article 3 of this Agreement which are needed for the implementation of priority joint projects **of construction of two new NPP units with VVER reactors** with the total capacity of up to 2,4 GW at the site selected by the South African Party (either Koeberg NPP, Thyspunt or Bantamsklip) in the Republic of South Africa and other NPP units of total capacity up to 7,2GW at other identified sites in the Republic of South Africa and construction of a multi-purpose research reactor at the research center located at Pelindaba, Republic of South Africa. **The mechanism of implementation of these priority projects will be governed by separate intergovernmental agreements, in which the Parties shall agree on the sites, parameters and installed capacity of NPP units planned to be constructed in the Republic of South Africa**." (emphasis added)

152.5.1 I note that none of the other IGAs include this type of specificity and firm commitments: it makes clear that there is an agreement to construct particular types of reactors (only manufactured by Russia), particular numbers, and provides an initial indication of the location thereof; and the agreement indicates that South Africa and Russia "*shall agree on the sites, parameters and installed capacity of NPP units*

planned to be constructed in the Republic of South Africa" (emphasis added).

152.6 For the purpose of providing further context, I note that **Article 5** provides the following:

"1. For the purpose of implementing this Agreement each Party shall designate competent authorities:

(i) For the Russian Party the Competent Authority shall be the State Atomic Energy Corporation "Rosatom" (for all areas of cooperation) and the Federal Service for Ecological, Technological and Atomic Inspectorate (for support of enhancement of the regulatory framework in the field of nuclear and radiation safety in the Republic of South Africa, including development of relevant legal base, licensing system and regulation);

(ii) For the South-African Party the Competent Authority shall be the Department of Energy of the Republic of South Africa.

2. The Parties shall promptly notify each other in writing through diplomatic channels of any change of Competent Authorities, their titles or functions or designation of new Competent Authorities."

152.7 To make matters worse **Article 7** effectively precludes the involvement of other countries in the construction of new nuclear power plants without Russia's consent. The article provides as follows:

"Cooperation in areas as outlined in Article 3 of this Agreement, will be governed by separate agreements between the Parties, the Competent Authorities, as well as by agreements (contracts) between Russian and (or) South African authorized organizations, which are involved by the Competent Authorities of the Parties for the implementation of

cooperation in the framework of this Agreement. The Competent Authorities of the Parties can, by mutual consent, involve third countries' organizations for the implementation of particular cooperation areas in the framework of this Agreement."

152.7.1 Recall that one of the areas of cooperation listed in Article 3, which would require Russian consent if any other countries' organisations are to be involved, is the "*design, construction, operation and decommissioning of NPP units based on the VVER reactor technology in the Republic of South Africa, with total installed capacity of about 9,6 GW*".

152.7.2 While, the VVER reactor technology is proprietary to Russia, article 7 read with article 3, may be interpreted to mean to a) reinforce that South Africa must procure the 9.6Gw capacity from Russia (absent consent from Russia); and/or b) that if Russia withholds consent, South Africa is obligated in terms of this IGA, *inter alia*, when contracting for the design, construction, operation and decommissioning of nuclear power plants, to contract exclusively with Russia. In other words, this clause apparently precludes (absent Russia's consent) a situation where some of the nuclear power plants are constructed (or operated) by other countries in addition to Russia.

152.8 **Article 9** provides as follows:

> "For the purpose of implementation of this Agreement the South African Party will facilitate the provision of a special favorable regime in determining tax and non-tax payments, fees and compensations, which will be applied to the projects implemented in the Republic of South Africa within the areas of cooperation as outlined in Article 3 of this Agreement, subject to its domestic legislation."

152.8.1 The government agrees that it will afford Russia a favourable tax and financial regime, inter alia, in relation to the construction by Russia of new nuclear power plants. Not surprisingly, no other country obtained such an agreement from the government.

152.9 **Article 15** provides as follows:

> "1. **The authorized organization of the South African Party** at any time and at all stages of the construction and operation of the NPP units and Multi-purpose Research Reactor shall be the Operator of NPP units and Multi-purpose Research Reactor in the Republic of South Africa and **be fully responsible for any damage both within and outside the territory of the Republic of South Africa caused to any person and property as a result of a nuclear incident occurring at NPP or Multi-purpose Research Reactor and also in relation with a nuclear incident during the transportation, handling or storage outside the NPP or Multi-purpose Research Reactor of nuclear fuel and any contaminated materials or any part of NPP or Multi-purpose Research Reactor equipment both within and outside the territory of the Republic of South Africa**. The South African Party shall ensure that, **under no circumstances shall the Russian Party or its authorized organization nor Russian organizations authorized and engaged by their suppliers be liable for such damages as to the South African Party and its Competent authorities, and in front of its authorized organizations and third parties**.

2. Nuclear liability due to nuclear incident occurring when handling and transporting the nuclear fuel shall be transferred from the authorized Russian organization to the authorized South African organization after the physical handing over of the nuclear fuel at a place determined in separate agreements (contracts) as concluded in accordance with Article 7 of this Agreement.

3. Should the Vienna Convention on Civil Liability for Nuclear Damage enter into force for the Republic of South Africa, the issues of civil liability for nuclear damage under this Agreement for the South African Party shall be regulated by this Vienna Convention.

152.9.1 Not only is the government hereby agreeing to incur liability, which given the subject matter (nuclear incidents) and the geographic scope (within or outside South Africa), could be enormous, it is also providing an indemnification to Russia.

152.9.2 It is signal that this commitment is made in an agreement, which, as discussed below, has been tabled under section 231(3) as opposed to 231(2). Thus parliament is not given an opportunity to consider whether to approve the agreement and this clause in particular, and the concomitant constitutionally required public participation inherent in seeking parliamentary approval, is circumvented.

152.9.3 That this commitment has been made is yet a further indication that the IGA is intended to constitute a firm commitment to using Russia to construct the required

nuclear power plants. If this were not the case, there would be no need for such an indemnification to have been sought by Russia or given by South Africa. As will be discussed below this also raises questions as to the government's power to provide such an indemnification.

152.9.4 Once again, none of the other IGAs placed before Parliament has any similar clause.

152.10 **Article 16** provides that: "*In case of any discrepancy between this Agreement and agreements (contracts), concluded under this Agreement, the provisions of this Agreement shall prevail*."

152.10.1 This again makes clear that the undertaking provided under the Russian agreement is intended to take precedence over any subsequent agreements. This is significant. It underscores that the agreement is intending to bind the South African government, regardless of any subsequent agreements. In other words, even if the Minister or the government enters into a more specific contract with Russia and/or Rosatom for the construction of the nuclear power plants, at a set price, for instance after any purportedly fair tender process, the government will

already have fettered its discretion, since it is bound by the terms of the IGA. This would at least be relevant in the context of the indemnity already provided (which would then no longer be an issue for further discussion or parliamentary input), and the fact that third country involvement can be vetoed by Russia, and the favourable tax regime that is promised.

152.11 In terms of **article 17**, the agreement is a 20-year agreement, with an automatic renewal for 10 years, although it can be cancelled on a year's notice. However, it has a savings clause:

> "4. The termination of this Agreement shall not affect the rights and obligations of the Parties which have arisen as a result of the implementation of this Agreement before its termination, unless the Parties agree otherwise.
>
> 5. This Agreement may be amended by mutual consent of the Parties through an Exchange of Notes between the Parties through diplomatic channels. Such amendments shall form an integral part of this Agreement.
>
> 6. The termination of this Agreement shall not affect the performance of any of the obligations under agreements (contracts) which arise during the validity period of this Agreement and are uncompleted at the moment of such termination, unless the Parties agree otherwise."

153. From these articles it is clear that the Russian IGA records a binding agreement in relation to the procurement of new nuclear reactor

plants (including in respect of South Africa's liability consequent on such procurement) from a particular country.

154. It is therefore not surprising that the DOE and Rosatom, the Russian designated competent authority under the agreement, went public on 22 September 2014 (as discussed above) the day after the agreement was entered into to claim that they signed a deal for the construction of nuclear power plants in South Africa. That understanding was clearly warranted, on a plain reading of the agreement. It is telling that the government then immediately sought to downplay the significance of the agreement, and sought at first to keep the agreement secret given that it would evidently be unlawful to enter into such an agreement absent the conclusion of a lawful procurement process as required by section 217.

155. The explicit terms of the Russian IGA, in contradistinction to the other IGAs, speak to the true position – it is even termed a "strategic partnership" agreement, unlike any of the other IGAs: the Russian IGA is obviously not a mere "framework" or non-binding agreement.

(ii) *The power to sign international agreements*

156. The power to sign international agreements is sourced in the Constitution. Section 231(1) of the Constitution states that "*[t]he negotiating and signing of all international agreements is the responsibility of the national executive*."

157. The Constitutional Court has held that section 231(1) is a collective responsibility of the Cabinet.

158. As noted above the President expressly authorised the Minister to sign the Russian IGA. The relevant President's Minute provides as follows

> "In terms of section 231 of the Constitution of the Republic of South Africa, 1996, I hereby approve that the attached Agreement between the Government of the Republic of South Africa and the Government of the Russian Federation on Strategic Partnership and Cooperation in the Fields of Nuclear Power and Industry be entered into, and I hereby authorise the Minister of Energy to sign the Agreement."

159. While in terms of section 231(1) the national executive is empowered to negotiate and sign international agreements, this exercise of power must accord with the rule of law and the principle of legality, discussed above.

(iii) *Unlawful signature of the Russian IGA*

160. The Minister's signature of the Russian IGA and the President's authorisation of the signature as head of the national executive were unlawful and unconstitutional on the following grounds:

160.1 ***First***, the agreement violates section 217 of the Constitution. Section 217 requires that the national sphere of government when it "*contract[s] for goods or services*" "*must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective*."

160.2 The Russian IGA:

160.2.1 makes binding undertakings to contract with Russia and its agency in relation to construction and operation of nuclear power plants; and/or

160.2.2 contains a specific clause that ensures that it take precedence over any subsequent agreements in relation to the construction and operation of nuclear power plants;

160.2.3 indicates that Russia has been give a veto over the inclusion of a third party country in any part of the design, construction, and operation of the required nuclear power plants; and

160.2.4 contains a specific provision that grants indemnity to Russia for damages arising from the construction and operation of nuclear power plants.

160.3 Therefore, the Russian IGA contains sufficient particularity and firm commitments so as to fall within the remit of contracting for “goods and services” under section 217 of the Constitution (which the courts have given a broad interpretation, since section 217 requires that “the tender process, **preceding the conclusion of contracts for the**

supply of goods and services, must be 'fair, equitable, transparent, competitive and cost-effective'."

160.4 Yet, at the time the Minister signed, and the President authorised her signature of, the IGA, there was no procurement system in place that complied with section 217 in relation to the procurement of nuclear new generation capacity (indeed as will be argued below, such a system should have been, but was not, determined by the Minister and NERSA, in terms of section 34(1)(e)). Nor was there any process followed in reaching the agreement that could remotely be argued to have been fair, or competitive, or equitable, or transparent, or cost-effective. This therefore means that decisions by the President to authorise the signature of, and the Minister's decision to sign, the agreement was in violation of section 217.

160.5 ***Second,*** while the agreement makes a commitment in relation to the procurement from Russia of 9.6GW of capacity, there had been no determination made by the Minister and NERSA: i) that a certain percentage of nuclear new generation capacity was required (the ERA nuclear requirement decision), and (ii) that procuring of such nuclear new generation capacity must be undertaken in terms of a fair, transparent, competitive, equitable and cost-effective system (the ERA nuclear procurement system decision).

160.6 ***Third,*** and in any event, even if the Russian IGA is interpreted as not falling within the remit of section 217, the Minister's decision to sign and the President's decision to authorise the signature of the agreement are nevertheless irrational and in violation of the principle of legality, since:

160.6.1 There is no discernible (nor publicly expressed) legitimate government objective that required the government to pre-empt the procurement process by signing this type of agreement (including indemnifying Russia in respect of any future nuclear accident), which has significant financial implications.

160.6.2 Indeed, by way of comparison, the other IGAs with other states in relation to nuclear cooperation are nowhere near as comprehensive nor do they express agreement by South Africa to any of the key undertakings provided to Russia.

160.6.3 Entering into a more comprehensive agreement with one potential bidder leads to reasonable apprehension of bias in any future procurement process. Therefore, it is irrational to taint the fairness of the proposed procurement process by entering into such an agreement.

160.6.4 The terms of the Russian IGA, as set out above, give rise to a fettering of government's discretion in relation to the proposed procurement process and subsequent contracting phase, including but not limited to an irrevocable indemnity for Russia.

(iv) *Unlawful tabling of the Russian IGA*

The Minister's decision to table the Russian IGA under section 231(3) of the Constitution, in order that such an unlawful agreement could become binding without Parliamentary approval, was itself unlawful.

161. Section 231, in relevant part, states that

> "(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
>
> (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time."

162. Given the Russian IGA's content and extent, as discussed above, it was clearly the type of agreement which required approval by Parliament by resolution in terms of section 231(2).

163. This is so, given the financial commitments being made to Russia, that are necessarily entailed in the indemnity provisions, and the agreement to appoint Russia to construct the new nuclear power plants. Given that this agreement has significant financial implications, it is evidently not an “international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession”. This is confirmed by the Department of International Relation's own internal handbook which indicates that an international agreement which has budgetary implications must be tabled before Parliament under section 231(2) in order to obtain parliamentary approval. I attach a copy of the relevant page of the handbook as annexure “**PL40**”.

164. Moreover, the fact that the agreement is intended to take precedence over any subsequent agreements, as more fully discussed above, is a further indication that it is the type of agreement that needs parliamentary approval.

165. Similarly, even if it could be argued that properly interpreted the Russian IGA does not constitute a firm undertaking to appoint Russia (which is denied, and is at odds with the DOE’s and Rosatom’s own joint description of the IGA), the fact that the agreement may pre-empt the procurement process, and at least creates the perception (and indeed reality) of favouring one potential bidder (given the far more extensive and favourable content of the agreement as opposed to the

other IGAs, as discussed above), also indicates that it is an agreement that requires parliamentary approval.

166. In the circumstances, the tabling of the Russian IGA under section 231(3), was unlawful.

167. The fact that the Minister tabled the agreement under section 231(3) and not (2), is no mere formality nor an apparent accident. By doing so the Minister specifically removed the lawful requirement of a parliamentary approval process. This would have required both the NA and the NCOP to have considered the IGA and determined whether to approve it. In doing so they would have been required under the Constitution (see section 59) to have undertaken a public participation process. This would have allowed interested parties such as the applicants to make representations in relation to the IGA, thereby allowing a number of important issues to be raised, including, inter alia, environmental issues, socio-economic issues, and issues in relation to constitutionally and statutorily compliant procurement.

168. I should note that the fact that the Parliamentary Committee on Energy has now indicated that it still intends holding hearings, is of little relevance. The committee accepts, as they must, that since the agreement was tabled under section 231(3), it has already become binding. Therefore, any hearings will be entirely after the fact, and would not have any impact on whether South Africa is bound by the agreement.

B. The decision to table the US and South Korean IGAs was unlawful.

169. As indicated above on or about 10 June 2015, the Minister decided to table a number of IGAs. These included an US IGA and a South Korean IGA, which were both entered into years before the Russian IGA. It appears that the real purpose behind the sudden tabling of these agreement and the signature and tabling of the Chinese and French IGAs, is little more than window dressing. As discussed above, the government had already entered into the Russian IGA, which the DOE itself initially announced constituted an agreement that Russia would construct nuclear power plants for South Africa, which was evidently unconstitutional and unlawful.

170. In tabling the agreements, it appears that the government did not even go through the pretence of entering into any new broad co-operation agreements with the US and South Korea. It simply sought to dust off prior agreements that had never previously been approved by or tabled before Parliament, for presentation alongside the Russian IGA.

171. The US IGA was signed by South Africa and the US on 25 August 1995.

172. The South Korean IGA was signed by South Africa and South Korea on 8 October 2010.

173. Section 231(3) provides that "*An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces,* ***but must be tabled in the Assembly and the Council within a reasonable time***."

174. In order for the Minister to table the US and South Korean IGAs before Parliament in terms of section 231(3), she would have to have formed the viewed that both agreements were of a technical, administrative or executive nature, or were agreements which do not require either ratification or accession.

175. Without seeing the record, it is not clear on what basis the Minister formed this view, or whether the Minister even considered this issue properly.

176. However, even if the Minister having applied her mind to the content of the agreements formed this view, and leaving aside whether the agreements are correctly classified as section 231(3) agreements, section 231(3) requires that international agreements that fall within the terms of section 231(3), must be tabled before Parliament within a reasonable time.

177. Tabling the US IGA **twenty years** after it was entered into, and the South Korean IGA **five years** after it was entered into, fails to meet

the standard of a reasonable time**.** This is especially so given the constitutional injunction in section 237, that all constitutional obligations must be performed diligently and without delay. If the intention was that these agreements should be made binding without parliamentary approval, then they should have been tabled years ago. This did not happen.

178. Therefore, the Minister's decision to table the US IGA and the South Korean IGA before Parliament in terms of section 231(3) was unconstitutional and invalid, quite aside from confirming that the Russian IGA and the related procurement process are unlawful.

C. The steps taken to facilitate procurement of new generation capacity absent a decision in terms of section 34 of the ERA that such new generation capacity was required

179. Section 34 of the ERA provides in relevant part (as indicated above), that

"(1) The Minister may, in consultation with the Regulator-

(a) **determine that new generation capacity is needed to ensure the continued uninterrupted supply of electricity**;

(b) **determine the types of energy sources from which electricity must be generated, and the percentages of electricity that must be generated from such sources**;

…..

(e**) require that new generation capacity must-**

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

….”

180. Given that section 34 of the ERA specifically empowers the Minister and NERSA to determine whether new generation capacity (and electricity source and amount from that source) is ***required*** in consultation, it is evident that the government and the Minister cannot circumvent section 34 by making an ad hoc or policy determination to acquire new generation capacity from nuclear sources. Rather section 34 set the legislative parameters for how such a determination that nuclear new generation capacity is required must be made. As indicated above, as a matter of constitutional law, at best any government policy may be used as a guide when NERSA and the Minister exercise their powers under section 34, but it cannot fetter their discretion, pre-empt their decision, or stand in substitution for a proper decision under section 34 of the ERA.

181. That is not to say the Minister and NERSA are invariably required to exercise the power under sections 34(1)(a) and (b). But if they or the government wishes to procure new nuclear generation capacity, then they must follow the procedure set out in section 34. The Minister and NERSA must first make the necessary determination that such nuclear new generation capacity is required in terms of sections 34(1)(a) and (b) (***the ERA nuclear requirement decision***).

182. The ERA nuclear requirement decision would not be a mere formality:

182.1 *First*, it would have to be taken “in consultation” with NERSA. That would require NERSA’s independent consideration of and concurrence in the decision.

182.2 *Second*, the decision in terms of PAJA would be required to be reasonable, rational and take into account relevant considerations. These relevant considerations would include the significant cost of nuclear power versus other forms of power generation, and a proper cost-benefit analysis, an issue which has been raised by the applicants and is referenced in the government’s own policy documentation including the White Paper, IRP2010, and NDP considered above.

182.3 *Third*, the decision would require a procedurally fair form of public participation prior to the taking of the decisions, in terms of section 4 of PAJA, since this is clearly administrative action which affects the public. Moreover, it involves a decision by NERSA, which in terms of section 10(1)(d) of the National Energy Regulator Act, must be “*taken within a procedurally fair process in which affected persons have the opportunity to submit their views and present relevant facts and evidence to [NERSA]*”. Of course, one of the key issues likely to be raised during such public participation is the significant costs-burden of nuclear electricity generation.

182.4 The decision to procure a certain amount of nuclear new generation capacity has profound consequences for South Africa. It raises issues not only in relation to costs, but significant issues in relation to the environment, and directly implicates inter alia section 24 of the Constitution (the right to a healthy environment). These are issues that the applicants, together with others, would have been well placed to address. However, the Minister and government appeared intent on avoiding taking the ERA nuclear requirement decision, and thereby short-circuited the need to engage in public participation.

183. As indicated above, no response has been received either from NERSA or from the Minister in relation to whether an ERA nuclear requirement decision has been made. The silence confirms that no such decision was taken. This is evident also from the fact that any such decision would have required procedural fairness, and despite repeated requests the Minister has never afforded the applicants an opportunity to make submissions in relation to the requirement for nuclear new generation capacity.

184. Moreover, none of the media reports or press statements from the DOE suggest that any such decision has been taken. In fact, they appear to base the procurement of the nuclear new generation capacity on policy determinations reflected, inter alia, in the IRP2010.

185. This is confirmed also by the Minister's own PAIA appeal decision, discussed above, in which, in response to the request for access to the record of the decision by government to procure 9.6Gw of nuclear energy, the Minister simply referred SAFCEI to a series of policy documents including the IRP2010.

186. Yet, policy does not have the force of law, and in any event cannot be in violation of or in conflict with legislation or the Constitution. In this case the relevant legislation is section 34 and its requirements must be met, before any government policy in relation to the procurement of nuclear new generation capacity can lawfully take effect or be acted upon.

187. The facts set out above indicate clearly that decision(s), whether taken by the Minister (or the government, to the extent that the Minister claims that she was not the relevant decision maker),have been taken to commence with the procurement of nuclear new generation capacity (particularly when viewed cumulatively):

187.1 First, the Minister on behalf of the government entered into the Russian IGA, which specifically mentions the need to procure 9.6Gw, and makes firm commitments as indicated above.

187.2 Second, the Minister on behalf of the government entered into new IGAs also with China and France, both of which also specifically refer to the 9.6Gw.

187.3 Third, the Minister's and DOE's statements that IGAs lay the foundation for procurement, and that they mark "*the initiation of the preparatory stage for the procurement process".*

187.4 Fourth, the DOE has conducted "vendor" parades workshops: with Russia in October 2014; with China, France, South Korea, and the United States, in November 2014; and more recently with Canada and Japan in March 2015.

187.5 Fifth, the DOE was designated as the procuring agency.

187.6 Sixth, the DOE informed the Parliamentary Portfolio Committee that the pre-procurement process was completed in the fourth quarter of the 2014/2015 financial year, and in particular that "*Preparation for a procurement process only* ***ended*** *in March 2015*";

187.7 Seven, the DOE had indicated that by the end of July 2015 the bid invitation specifications and related evaluation criteria would be finalised – which presupposes that a bid specification committee (or some equivalent person or body) has already been appointed to produce the bid invitation and set the evaluation criteria, and has concluded or is about to conclude its work. At the very latest the appointment of persons to prepare the bid invitation would mark the beginning of a formal procurement process.

188. The applicants submit that these decisions and/or steps could not lawfully be taken without the Minister and NERSA first determining that a specific amount of nuclear new generation capacity is required (the ERA nuclear requirement decision) and then determining that the procurement thereof should be undertaken in terms of a fair, equitable, transparent, competitive and cost-effective tender system (the ERA nuclear procurement system decision, as will be discussed in more detail in the next section).

189. Furthermore, section 34(2)(a) states that the Minister has such powers as may be necessary or incidental to any purpose set out in section 34(1), including the power to undertake such management and development activities, including entering into contracts, as may be necessary to organise tenders and to facilitate the tendering process for the construction, commissioning of such new electricity generation capacity. At least certain of the aforesaid steps would in addition appear to be steps which the Minister is specifically empowered to undertake under section 34(2)(a), since they relate to organising and facilitating the tendering process. However, these section 34(2) powers can only be exercised once there has first been the necessary ERA nuclear requirement and nuclear procurement system decisions.

190. None of the documents in the public domain indicate whether any of these decisions or steps were taken by the Minister in purported exercise of her section 34(2) powers, or under what power the

Minister claimed to take any of these decisions and/or steps. Once the relevant records have been filed in terms of Rule 53, the position may have been clarified.

191. Nevertheless, to the extent that the listed decisions and/or steps (or any other decisions that the applicants are unaware of) were purported exercises of the Ministers' section 34(2) powers, they were clearly unlawful and ultra vires her power, given the absence of the necessary ERA nuclear requirement and nuclear procurement system decisions.

192. In the circumstances, the decisions and/or steps taken, including one, more, or all of items list above which relate to the facilitation of, the commencement, or continuation of the procurement of nuclear new generation capacity in the absence of the necessary ERA nuclear requirement decisions, were unlawful and unconstitutional.

193. Concomitantly, at least some, if not all, of these decisions or steps could not have been taken in the absence of the necessary ERA nuclear procurement system decision, as discussed in more detail below.

D. No specific system for the procurement of nuclear new build capacity in violation of section 34 read with section 217

194. Even assuming that a proper determination had been made in terms of section 34 of the ERA that such new generation capacity from nuclear sources is required (which it clearly has not), any

procurement of such new generation capacity is a matter of fundamental importance to the country. That is so because of the size of the project, the money and length of construction (the facts suggest that construction would only be completed over a decade), the fact that the bidders are likely to be foreign state owned companies (given the limited domestic expertise in the field and Rosatom's public announcement mentioned above), and the fact that the items to be contracted for (nuclear power plants) raise serious environmental, safety and socio-economic issues for the life of the plants so procured and beyond (such as spent nuclear fuel disposal, risk of catastrophic nuclear incidents and decommissioning costs). All of this places an obvious premium on lawful and transparent procurement.

195. Given these factors, there would need to be in place a specific system for the procurement of nuclear new generation capacity. No generic procurement system would meet the requirements of section 217 of the Constitution that a system must be "*fair, equitable, transparent, competitive and cost-effective.*"

196. It is submitted that it is for this reason that the legislature saw fit by way of section 34 to require the Minister and NERSA specifically to determine such a procurement system, which expressly evokes the requirements of section 217.

197. Section 34(1)(e) of the Electricity Regulation Act, 2006 (ERA) provides as follows:

> "(1) The Minister may, in consultation with the Regulator-
>
> …..
>
> (e) **require that new generation capacity must**-
>
> (i) **be established through a tendering procedure which is fair, equitable, transparent, competitive and cost-effective**;"

198. It is submitted that properly interpreted the section requires that if there has been a determination that new generation capacity is required under sections 34(1)(a) and (b) and the source and amount thereof determined, then under section 34(1)(e) the Minister and NERSA must require that the procurement of such new generation capacity occurs through a procedure (or "system" using the language of section 217) which is fair, equitable, transparent, competitive and cost-effective – which I have repeatedly referred to as "***the ERA nuclear procurement system decision***".

199. This requires that such a system or procedure be specifically determined by the Minister and NERSA after properly conducting a procedurally fair process, and requires that the system be made public in order that the procurement can transparently occur in accordance with the public system.

200. I should note as an aside, that the terms of section 34(1)(e) make clear that it is the Minister and NERSA that must determine the

procurement system, and not Cabinet. This makes clear that any proposed "approval" of a procurement system by Cabinet, as suggested in certain documentation from the DOE, discussed above, is not sufficient for the purposes of compliance with the ERA.

201. Importantly, it is not enough (either in terms of section 34(1)(e) or section 217) that the procurement can be claimed retrospectively to have been fair, equitable, transparent, competitive and cost-effective, not least of all since transparency clearly requires a system to be put in place proactively in advance of the processes that are engaged in terms of that system. What section 34, read with section 217, requires is the putting in place of a system which is fair, equitable, transparent, competitive and cost-effective, and then once that system is in place and public, the relevant procurement must be commenced in accordance with that system. This is important, since it ensures that at every stage of the procurement, and prior to the commencement of the procurement, the public, the state's officials, and the participants within the process can meaningfully assess the procurement and decisions taken thereunder against the predetermined system.

202. Importantly, in terms of section 34(1)(e) of the ERA, the system may not be determined by the Minister alone; rather it must also be determined in consultation with NERSA. Moreover, prior to determining the system, there must be a procedurally fair process followed (as discussed above in relation to decisions in terms of

sections 34(1)(a) and (b)), which includes that the decision must be "*taken within a procedurally fair process in which affected persons have the opportunity to submit their views and present relevant facts and evidence to [NERSA]*".[11]

203. Notwithstanding letters being sent to the Minister and NERSA, it is clear that no specific system was lawfully created for nuclear procurement. Indeed, it appears from the facts (as set out above) that such procurement process has already begun in the absence of any fair and transparent procurement system being put in place. I say that for the following reasons:

203.1 *First*, a nuclear procurement system is required to be created in terms of section 34, by agreement between the Minister and NERSA.

203.2 There was no decision taken by NERSA to concur in any such system. There has been no press statement or other media report that gives any indication that NERSA had any part in the proposed procurement of nuclear power plants.

203.3 *Second*, before any such procurement system could have been created, there should have been a public participation process, in relation to the crafting of the system.

[11] Section 10(1)(d) of the National Energy Regulator Act.

203.4 There was no public participation process, thus depriving the applicants and other interested and affected persons of the opportunity to making representations.

203.5 *Third*, by its very nature a system must be transparent. In particular, given the costs and nature of what is being procured, this requires that a system (as to its existence, and its content) first itself be published, and therein make provision for the procurement to as far as possible ensure public involvement at all relevant times.

203.6 Yet, as indicated above, thus far the procurement process itself has largely been cloaked in secrecy. While there have been some statements by government officials that the procurement will be fair, it is evident that the process is clearly not being conducted in a transparent manner and no system for procurement has transparently been put in place.

204. As indicated in the previous section, the Minister (and/or government) has taken a number of decisions and/or steps in relation to the procurement of nuclear new generation capacity. At the very least it is submitted that the fact that persons have already been tasked with drawing up the specifications and evaluation requirements for the procurement indicates that the procurement process has begun (similarly, even the DOE claims that what it refers to as the “pre-procurement” process was concluded some months ago).

205. Therefore, it is evident that procurement has commenced in the absence of any ERA nuclear procurement system decision having been taken by the Minister and NERSA.

206. In the circumstances the Minister's and/or the government's decision and/or actions in commencing and proceeding with the procurement of nuclear energy without there first being an ERA nuclear procurement system decision, is unlawful and unconstitutional.

VIII. THE RELIEF SOUGHT

207. The relief sought is fully set out in the Notice of Motion, and summarised in detail in the introduction of this affidavit. That relief may be amended once the relevant records of decision have been provided in terms of Rule 53.

208. In accordance with section 172(1)(a) of the Constitution, when a Court considers remedy, the starting point, as a matter of high constitutional principle, is that invalid administrative or executive conduct, which violates the Constitution, must be declared unlawful.

209. Thereafter, the Court is required to consider what relief would be just and equitable.

210. The unlawfulness and unconstitutionality of the decisions and actions of the Minister and/or the government, and the President and the

government have been made clear above. In the circumstances, the Court is required to declare such conduct unconstitutional.

211. I turn to specifically discuss the various impugned decisions and conduct and the relief sought in relation thereto.

A. Relief in relation to the Russia IGA

212. In relation to the Russian IGA, the applicants seek an order in the following terms:

212.1 Declaring unlawful and unconstitutional and reviewing and setting aside:

212.1.1 the Minister's decision to sign the Russian IGA,

212.1.2 the President's decision to authorise the Minister's signature thereof; and

212.1.3 the Minister's decision to table the Russian IGA before Parliament in terms of section 231(3) of the Constitution.

213. I have set out in detail why a) the decision to sign and the decision to authorize the signature of the Russia IGA, and b) why the decision to table the Russian IGA under section 231(3) of the Constitution, were unlawful and unconstitutional. Therefore, in terms of section 172(1)(a) of the Constitution, this Court must declare these decisions unlawful and unconstitutional.

214. The setting aside (or invalidity) of the unconstitutional conduct is the natural consequence of declaring such conduct unlawful. Indeed, absent any decision by this Court to suspend such a declaration, the conduct declared unlawful and unconstitutional is *de lege* invalid, *ab initio*. However, in order to avoid any uncertainty in this respect, a specific order has also been sought reviewing and setting aside the relevant decisions.

215. This relief will also make clear that as a matter of South African law the agreement could not be entered into and lawfully be made binding by the government. This is relevant, inter alia, since the IGA indicates in article 3, that "*cooperation within the framework of this Agreement shall be implemented strictly in compliance with the Parties' respective national legislations*."

B. The unlawful tabling of the US and South Korean IGAs

216. The applicants have sought the following relief in relation to the US and South Korean IGAs in the following terms:

216.1 Declaring unlawful and unconstitutional and reviewing and setting aside the Minister's decision to table the US IGA and South Korean IGA before Parliament in terms of section 231(3) of the Constitution.

217. As discussed above, it is evident that the tabling of the US IGA twenty years after it was entered into, and the South Korean IGA five year

after it was entered into, constituted unreasonable delays. In the circumstances the Minister's decision to table these IGAs in terms of section 231(3) was unconstitutional and unlawful.

218. The Court must declare such decision unconstitutional, and set aside the decision, and there is no basis upon which the Court should limit the normal consequences of unconstitutionality.

C. The need to take the ERA nuclear requirement and nuclear procurement system decisions

(i) *General declarator*

219. The applicants have first sought a general declarator in the following terms

219.1 Declaring that prior to the commencement of any procurement process for nuclear new generation capacity (being at the latest prior to the appointment of a bid specification committee or persons tasked with drawing up the invitation to bid) and/or the exercise of any powers under section 34(2) of the ERA in relation to the procurement of nuclear new generation capacity, the Minister and NERSA are required first, after procedurally fair public participation processes, to have taken the ERA nuclear requirement decision and the ERA nuclear procurement system decision.

220. It is submitted that this declarator is necessary since there is no indication from the Minister's, the DOE's or the government's

statements that they accept that the the ERA nuclear requirement and the ERA nuclear procurement system decisions are necessary prerequisites to procuring nuclear new generation capacity and/or exercising the powers in relation thereto under section 34(2). In fact, quite the contrary.

221. Moreover, the declaration is necessary, to the extent that the Minister or the government would seek to contend that the time for taking the ERA nuclear requirement and nuclear procurement system decisions has not yet arrived, for instance on the basis that the procurement process has not yet begun, whether as a matter of fact or law (which is denied).

222. In addition, it is important for this Court to make clear to the government respondents that the necessary ERA decisions can only be taken after procedurally fair public participation processes.

223. In the circumstances, this Court should grant the declaratory relief requested, in order to uphold the rule of law and open and accountable government, since the Minister and government have given no indication that they intend at any point to make the necessary decision under section 34(1). It goes without saying that the ERA nuclear requirement decision and the ERA nuclear procurement system decision, cannot be taken after or even during the procurement process for that new generation capacity. Since the Minister has ignored the letter written to her specifically drawing this

to her attention, and the complete lack of any suggestion that the relevant decisions would be taken, it is reasonable to infer that the Minister and government either wish to avoid the requirements of section 34 of the ERA, or unintentionally misunderstand the obligations created by the ERA. In either event, it is in the interests of justice for this Court to provide the necessary clarity, given the significant public importance in ensuring that the procurement of nuclear new generation capacity is undertaken lawfully and with proper public participation.

(ii) *Unlawful decisions in the absence of ERA decisions*

224. Furthermore, the applicants then seek the following relief,

224.1 Declaring that the Minister's and/or government's (*to the extent the Minister claims that she was not the relevant decision maker*) decisions to facilitate, organise, commence and/or proceed with the procurement of nuclear new generation capacity (including, at least, the decision to appointment a bid specification committee or persons tasked with drawing up the bid invitation, and all related decisions subsequent thereto) and/or any decisions by the Minister to exercise any powers under section 34(2) of the ERA in relation to the procurement of nuclear new generation capacity, prior to the taking of the ERA nuclear requirement decision and the ERA nuclear procurement system decision, are unlawful and unconstitutional, and are reviewed and set

aside.

225. The applicants submit that the decisions and steps already taken by the Minister in relation to nuclear new generation capacity, in particular those specified above, and including at least the decision to appointment a bid specification committee or persons tasked with drawing up the bid invitation, and all related decisions subsequent thereto, constitute decisions and/or steps taken to proceed with the procurement of nuclear new generation capacity. Yet these decisions and/or actions have been taken without first taking the necessary ERA nuclear requirement decision and ERA nuclear procurement system decision. Therefore, these steps were unconstitutional and unlawful.

226. The Court is therefore required to declare them unconstitutional and unlawful, and to review and set aside those decisions. The applicants submit that there would be no need to suspend the declaration or to decline to set aside the decisions and/or conduct aside. The setting aside of these decision and/or conduct would be just and equitable, as this will allow for the correction of the unlawful actions. The just and equitable effect of expressly reviewing and setting aside such conduct or decisions is that the Minister and the government must, if they so choose, begin a fresh procurement process, which would only commence after the necessary and lawful decisions have been taken, after proper public participation, in terms of section 34 of the ERA.

D. Costs

227. In relation to costs, I am advised that trite principles as determined by the Constitutional Court in relation to constitutional and public interest litigation of the nature of the current application should apply: the applicants are entitled to their costs if substantially successful, and there should be no order as to costs if the applicants are not successful.

IX. REASONS FOR SEMI-URGENCY AND TRUNCATED TIME-FRAMES

228. The applicants submit that the issues in this application cannot be decided in the usual course, and that if this matter were heard in the ordinary course, the applicants would be unlikely to receive substantial redress (or the Court's ability to grant that redress may be curtailed) since the procurement process may already have been concluded.

229. There are a number of reasons why this application satisfies the requirements to be heard on a semi-urgent basis, and in terms of the slightly truncated time period provided for in the Notice of Motion.

230. First, the DOE has indicated that the nuclear procurement process has already begun and will culminate with the awarding of a contract intended to be as soon as the end of the year (2015) or the financial year (March 2016). In other words, the process would at the very least have already begun, and probably have been concluded prior to

judgment, if this application was dealt with in the usual course. Once the tender has been concluded, it will be more difficult, if not impossible, to grant substantive just and equitable relief, other than academic declaratory relief. In particular, by that stage the government may have already made contractual commitments in relation to the payment of specific amounts for the construction of new nuclear power plants. Since, it appears that all the proposed bidders are foreign countries (and their agencies), these contractual obligations will invariably be in the form of binding international agreements (the Russian IGA for instance specifically envisages further international agreements being entered into). This may place South Africa in a position where it owes obligations to foreign countries and/or companies in international law (possibly with damages claims being subject to international arbitration), which, depending on the terms of such international agreements, may not be negated (at least on the international plane) by any findings of domestic unlawfulness by South African courts.

231. Second, the matter involves issues of immense public concern and interest: the procurement of nuclear power plants at staggering costs, that will involve decades of construction (even the government's own estimates indicate the final plants would only be constructed by 2030). It is therefore essential that the process leading up to any such procurement is lawful and conducted in an open and transparent manner. This can only be achieved by ensuring that the necessary decisions and systems are first put in place after proper public

participation. This cannot be retrospectively achieved, and any orders granted by this Court after the process has been concluded may also run the risk of being academic.

232. Third, the unlawfulness in this matter is clear cut, and it cannot be remedied after the event by the procedure put in place under any tender. It therefore would not be in the interests of justice to allow the tender process to proceed, while the lawfulness of the entire procurement is under question. Far better would be for a Court to properly and expeditiously determine these issues so that any procurement thereafter can proceed with a firm finding in relation to the lawfulness of the current process, and what process should be followed. Indeed, it is anticipated that the Respondents would share the applicants' view in this regard. It is not in the interests of the government, the potential bidders, or the country to have a tender process proceeding when serious questions in relation to its lawfulness remain unanswered.

233. Fourth, and related to the previous point, a tender process involves significant costs and time. However, for the reasons identified above, the current procurement process will unavoidably result in a flawed, unlawful award of the tender. It would therefore be liable to be set aside, thus leading to a significant waste of time and cost.

234. Finally, the applicants specifically wrote to the Minister prior to instituting this application, and sought an undertaking that the nuclear

procurement process would not continue until such time as in consultation with NERSA, the Minister has made the necessary and lawful determinations and decisions in relation to nuclear new generation capacity and a lawful and constitutional nuclear procurement system has been established. No response was ever received. In the absence of any undertaking from the Minister, it is essential that this matter be dealt with on the expedited basis proposed in the Notice of Motion or provided for by directions from the Judge President.

235. As indicated in the introduction, once those Respondents that wish to oppose this application have filed their notices of opposition, the applicants will arrange to meet with the Judge President, together with those Respondents opposing the applicant, in order to obtain a preferent hearing date, and directions in relation to filing of the record and further papers.

X. CONCLUSION

236. In light of what is set out above, the applicants pray for the relief sought in the notice of motion.

PHILLIPINE LEKALAKALA

The terms of Regulation R. 1258 published in Government Gazette No. 3619 of 21 July, 1972 (as amended) having been complied with, I hereby certify that the deponent has acknowledged that he/she knows and understands the contents of this

affidavit which was signed and sworn to before me at on this day of 2015.

COMMISSIONER OF OATHS