The Honourable Minister Gwede Mantashe

Re: Procurement of new nuclear capacity

We act for Earthlife Africa – Johannesburg (ELA-JHB) and the South African Faith Communities' Environment Institute (SAFCEI).

Our clients are deeply concerned following recent press statements indicating that the Department of Mineral Resources and Energy (DMRE) will soon commence the development of a roadmap for a 2500MW nuclear new build programme, that the market would be tested for robust funding options, and that *'[a] request for information would be issued to assess market appetite for the development of small modular nuclear reactors and to enable the department to assess the pace and scale at which such a programme should proceed'*.[1] DMRE virtual presentations to the Portfolio Committee on Mineral Resources and Energy (on 7 May 2020) and to the Select Committee (NCOP) (on 19 May 2020) indicate that '*[t]he IRP2019 states that preparations must commence for the nuclear build programme, adding 2 500 MW, as this is a no regret option. The DMRE will commence immediately with the procurement process to ensure the security of supply, and is considering Small Modular Reactors (SMR) to take into account the pace and scale that the country can afford.'*[2]

Having regard to the complexities and costs implicit in any nuclear power programme, it would be inappropriate, unlawful and unconstitutional for government (or any state-owned entity) to proceed with nuclear determinations or procurement in the absence of clarity, transparency and consistency regarding the decision-making processes. These decision-making processes necessarily require that meaningful opportunities are provided for public participation at every stage (which also requires access to relevant information).

The Honourable Minister's attention is drawn to the order made on 26 April 2017 by the High Court of South Africa (Western Cape Division) in *Earthlife Africa – Johannesburg & Another v. Minister of Energy & Others (Case No. 19529/2015)* that:

- The Minister of Energy's decision on or about 10 June 2015 to table the Russian IGA [international governmental agreement] before parliament in terms of section 231(3) of the Constitution was unconstitutional and unlawful, and was reviewed and set aside;
- The Minister of Energy's decisions on or about 10 June 2015 to table agreements for cooperation between South Africa and the governments' of the United States of America and the Republic of Korea were unlawful and unconstitutional, and were reviewed and set aside;
- Determinations under section 34(1) of the Electricity Regulation Act gazetted on 11 November 2013 and 14 December 2016, made by the Minister of Energy with the concurrence of NERSA, were unlawful and unconstitutional, and were reviewed and set aside; and
- Any Request for Proposals or Request for Information issued pursuant to these determinations were set aside.

The Justices held (at paragraph 24 of the judgment) that section 34(1) of the Electricity Regulation Act[3] (ERA) '*operates as the legislative framework by which any decision that new electricity generation capacity is required*' and that '*any decision taken by the Minister in that regard, has no force and effect unless and until NERSA agrees with the Minister's decision'.*

The Justices pointed out (at paragraph 32 of the judgment) that the source of power exercised by the Minister was section 34(1) of the ERA and that the nature of the power was one which has far reaching consequences for the public as a whole and for specific role-players in the electricity generation field. The Justices stated that the determination had external binding legal effect, that affected parties also included other electricity generation providers such as oil, gas or renewable energy, and that these factors all pointed to the section 34 determination constituting administrative action. The Justices state (at paragraph 40) that the power exercised by the Minister under section 34(1) of the ERA is unusual in that any decision on his part is inchoate until such time as NERSA concurs therein and the section 34 determination is thereby made. The Justices expressed the view that if NERSA's action, as a vital link in the chain which makes up the section 34 determination, did not meet the test for fair administrative action, little point would be served in scrutinizing any decision by the Minister, prior to the section 34 determination having been made. The Justices stated that because NERSA's action (being one link of the chain) was fatally flawed from an administrative law point of view, the chain (i.e. the section 34 determination) was broken. It is submitted that, by necessary implication, the chain would also have been broken if the Minister's decision in terms of section 34 was scrutinized and found to have failed to meet the test for fair administrative action.

The Justices went on to discuss (at paragraph 40) the requirement for procedural fairness in administrative decision as described in sections 3 and 4 of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA), and held that *'… a rational and fair decision-making process would have made provision for public input so as to allow both interested and potentially affected parties to submit their views and present relevant facts and evidence to NERSA before it took a decision on whether or not to concur in the Minister's proposed determination'* (at paragraph 45 of the judgment). It is submitted that, by necessary implication, a rational and fair decision-making process would also have made provision for public input so as to allow both interested and potentially affected parties to submit their views and present relevant evidence and facts to the Minister before he made a decision in terms of section 34.

The Justices went on to say that any section 34 determination decision would also have to *'…satisfy the test for rational decision-making, as part of the principle of* legality'. The Justices stated that applying this to the applicants' challenge on the basis of an unfair procedural process, '*the question is whether the decision by either the Minister or NERSA (or the combined decision of the Minister and NERSA) fell short of constitutional legality for want of consultation with interested parties'* (at paragraph 47 of the judgment). The Justices pointed out that '*[o]ur courts have recognised that there are circumstances in which rational decision-making calls for interested persons to be heard*' (at paragraph 48 to the judgment), and that it follows that the process by which the decision is made and the decision itself must be rational (at paragraph 49 of the judgment, citing *Democratic Alliance v President of the Republic of South Africa & Others* 2013 (1) SA 248 (CC) para 34). The Justices went on to recognise that there are sectors of the public with either special expertise or a special interest regarding the issue of whether it is appropriate for extra generation capacity to be set aside for procurement through nuclear power, and emphasised that NERSA is also under a statutory duty to act in the public interest in a justifiable and transparent manner, and to utilise a procedurally fair process giving affected persons the opportunity to submit their views and present relevant facts and evidence. It held that NERSA had failed to do so, and that NERSA's decision failed to satisfy the test of rationality based on procedural grounds alone (at paragraph 50 of the judgment).

The Justices also confirmed that it would be "*unnecessary and superfluous*" to declare that prior to the commencement of any procurement process for nuclear new generation capacity, NERSA would be required to determine (as provided in section 34), in accordance with a procedurally fair public

participation process, that new generation capacity is required and that the electricity must be generated from nuclear power and the percentage thereof, since "*[t]he finding that [NERSA] is under such a duty is central to this judgment and does not require restatement in a declarator*" (at paragraphs 141 and 142 of the judgment).

The Honourable Minister's attention is also drawn to the urgent High Court application brought by our clients under the same case number, which matter was heard by Madam Justice Cloete in the Western Cape High Court, on Wednesday, 29 November 2017. The Acting Director-General in the Department of Energy stated on oath that the Minister of Energy had complied and intended to comply with the Earthlife judgment (handed down on 26 April 2017), and that '*the Minister appreciates that his failure to comply with the judgment would be unlawful and would certainly result in contempt of court proceedings being instituted against him*', and that *'[i]it is incontrovertible that the compliance with an order or decision issued by a court is a constitutional imperative which is enshrined in section 165(5) of the Constitution… Section 165(5) of the Constitution states that an order or decision issued by a court binds all person to whom and organs of state to which it applies*'. Furthermore, it is stated on oath that *'[t]he Minister undertakes to act in accordance with the judgment. By implication the Minister therefore undertakes to act in accordance with prayer 2 of the notice of motion in as far as it relates to* him'. The Minister of Energy's confirmatory affidavit was subsequently received on 28 November 2017 (a copy of which we attach for your ease of reference).

For avoidance of doubt, prayer 2, which the Minister of Energy expressly undertook to our clients and to the Court to comply with, provides that:

> 'It is declared that no steps, including the issuing of a Request for Proposals or a Request for Information, may be taken by the Minister (the first respondent) and/or Eskom (the third respondent) for the procurement of new electricity generation capacity derived from nuclear power in the absence of a lawful determination in terms of section 34 of the Electricity Regulation Act 4 of 2006 (ERA) that such new electricity generation capacity derived from nuclear power is required, which determination must:
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> 2.1 be with the concurrence of NERSA (the second respondent) in terms of section 34(1) of the ERA, and
> 2.2 NERSA may only concur after following a procedurally fair public participation process in relation to the said determination.'

The Honourable Minister will clearly appreciate that he is equally bound by the Earthlife judgment and the undertaking made by the former Minister of Energy acting as in that capacity. Accordingly, we draw it to the Honourable Minister's attention that he may not take any steps, including the issuing of a Request for Proposals (RFP) or a Request for Information (RFI), for the procurement of new electricity generation capacity derived from nuclear power in the absence of a lawful determination in terms of section 34 of the ERA.

Should the Minister (or the DMRE) commence the procurement process for 2500 MW of new electricity generation capacity derived from nuclear power, or issue an RFP or RFI in this regard, the Minister will be in constructive contempt of court, as well in breach of the undertaking given on oath by the former Minister of Energy to act in accordance with the judgment and prayer 2 of the notice of motion.

In the circumstances, our clients respectfully request that you:

(a) Confirm that you will comply with the *Earthlife* nuclear judgement handed down on 26 April 2017;
(b) Confirm that you will honour the undertaking given under oath by the former Minister of Energy to act in accordance with prayer 2 of the Notice of Motion in the urgent application heard on 29 November 2018; and
(c) Confirm that our clients (and other stakeholders) will be afforded an opportunity to make representations to you prior to your making any decision in terms of section 34(1) of the ERA relating to new nuclear generation capacity.

We look forward to receiving the Honourable Minister's reply at his earliest convenience.

Our clients reserve their rights, including their right to approach the courts for urgent interdictory relief should this become necessary.
Yours sincerely

Adrian Leonard Pole