



2<sup>nd</sup> floor, Hillside House  
17 Empire Road,  
Parktown  
Johannesburg  
2193  
Tel (International): +27 (10) 214-0651  
Tel (Tollfree): 0800 222 097  
Email: [inquiries@sastatecapture.org.za](mailto:inquiries@sastatecapture.org.za)  
Web: [www.sastatecapture.org.za](http://www.sastatecapture.org.za)

**JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE,  
CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE**

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**CHAIRPERSON'S DIRECTIVE IN TERMS OF REGULATION 10(6) OF THE  
REGULATIONS OF THE COMMISSION**

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**TO : MR BRIAN MOLEFE**

**C/O : RAMBEVHA MOROBANE ATTORNEYS  
LOFTUS OFFICE PARK  
BUILDING B, 3<sup>rd</sup> FLOOR  
416 KIRKNESS STREET  
ARCADIA  
PRETORIA**

**TEL : 012 346 3494/0822**

**EMAIL : [ramor@ramorattorneys.co.za](mailto:ramor@ramorattorneys.co.za)**

1 By virtue of the powers vested in me in my capacity as Chairperson of the above-mentioned Commission by Regulation 10(6)<sup>1</sup> of the Regulations of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, I hereby direct you, **Mr Brian Molefe**, to:

1.1 deliver on or before 20 November 2019 to the Secretary or Acting Secretary of the Commission at the address given above an affidavit or affirmed declaration in which:

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<sup>1</sup> Regulation 10(6) of the Regulations of the Commission reads: "For the purposes of conducting an investigation the Chairperson may direct any person to submit an affidavit or affirmed declaration or to appear before the Commission to give evidence or to produce any document in his or her possession or under his or her control which has a bearing on the matter being investigated, and may examine such person."

- (a) you state whether you admit or deny the allegations made about, or against, you in the affidavit or statement or affirmed declaration of **Mr Jabulane Albert Mabuza dated 16 January 2019** attached hereto which was submitted to the Commission for the purpose of its investigations and in the oral evidence which he gave before the Commission on 22 and 25 February 2019 (DAY 54 and DAY 55) which can be accessed from the Commission's website being [www.sastatecapture.org.za](http://www.sastatecapture.org.za). The affidavit of Mr Jabulane Albert Mabuza is attached hereto as "A".
- (b) you state whether you deny or dispute any allegation or statement made about, or against, you in the said affidavit or statement or affirmed declaration, the grounds on which you base your denial and give your full version in regard to the allegation(s) or statement(s) or issue(s) or matters or incidents covered in that statement or affidavit which refer, or relate to you.
- 2 If you would like assistance from the Commission in order to prepare the affidavit or affirmed declaration, you must, within five days (excluding weekends and public holidays) of receipt of this directive, contact, or communicate with, the Secretary or Acting Secretary of the Commission and indicate that you would like such assistance in which case the Commission will provide someone to assist you with the preparation of the affidavit or affirmed declaration. In such a case you will not pay anything for such assistance. Should you have difficulty in reaching the Secretary or Acting Secretary or should the Secretary or Acting Secretary not return your call or respond to you letter or emails, you may contact Ms Natalie Lerato Chesi-Buthelezi at 060 773 9825 or at [leratob@commissionsc.org.za](mailto:leratob@commissionsc.org.za).
- 3 If, in order to prepare the affidavit, or affirmed declaration, you do not need any assistance from the Commission, you must, with or without the assistance of a lawyer of your own choice, prepare the affidavit or affirmed declaration and have it delivered to the Secretary or Acting Secretary of the Commission on or before the date given above for the delivery of the affidavit. If you make use of a lawyer of your own choice to assist you to prepare such affidavit or affirmed declaration, the Commission will not be responsible for the payment of your lawyer's fees or costs.

- 4 This directive is issued for the purpose of pursuing the investigation of the Commission.
- 5 Your attention is drawn to Regulations 8(2), 11(3)(a) and (b) and 12(2)(b) and (c) of the Regulations of the Commission. Regulation 8(2) reads:

“8 (1) ...

(2) A self-incriminating answer or a statement given by a witness before the Commission shall not be admissible as evidence against that person in any criminal proceedings brought against that person instituted in any court, except in criminal proceedings where the person concerned is charged with an offence in terms of section 6 of the Commissions Act, 1947 (Act No. 8 of 1947).”

Regulation 11(3)(a) and (b) reads:

“11 (1) ...

(2) ...

(3) No person shall without the written permission of the Chairperson-

(a) disseminate any document submitted to the Commission by any person in connection with the inquiry or publish the contents or any portion of the contents of such document; or

(b) peruse any document, including any statement, which is destined to be submitted to the Chairperson or intercept such document while it is being taken or forwarded to the Chairperson.”

Regulation 12(2)(b) and (c) reads:

“12 (1) ...

(2) Any person who

(a) ...

(b) wilfully hinders, resists or obstructs the Chairperson or any officer in the exercise of any power contemplated in regulation 10; or

(c) contravenes a provision of regulation 11, is guilty of an offence and liable on conviction –

(i) in the case of an offence referred to in paragraph (a) to a fine, or to imprisonment for a period not exceeding six months; and

- (ii) in the case of an offence referred to in paragraph (b) or (c), to a fine, or to imprisonment for a period not exceeding 12 months.”

SIGNED IN JOHANNESBURG ON THIS 30<sup>th</sup> DAY OF Oct 2019.



**JUSTICE RMM ZONDO**  
**DEPUTY CHIEF JUSTICE OF THE REPUBLIC OF SOUTH AFRICA**

**and**

**CHAIRPERSON: JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE**

**MABUZA**



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**SUBMISSION BY THE CHAIRMAN OF THE BOARD OF ESKOM  
TO THE ZONDO COMMISSION OF INQUIRY**

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I, the undersigned,

**JABULANE ALBERT MABUZA**

do hereby make oath and say that:

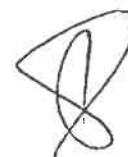
1. I am the Chairman of the Board of Eskom Holdings SOC Limited ("Eskom"). Eskom has been requested to answer certain questions posed by the State Capture Commission of Inquiry ("the Commission"). As the Chairman of the Board of Directors of Eskom ("the new Board") I have been asked by the new Board to make this Submission on behalf of the new Board.
2. In providing a response to the Commission Eskom has placed its personnel and resources fully at the disposal of the Commission and in this regard the Commission has interviewed various personnel from Eskom and has received statements from these personnel. The Commission has also informally requested and received a substantial volume of documents from Eskom. Much of this is documentation that has also been provided to the various other investigations and enquiries mentioned below. Some of the requested documentation has been attached to the statements and have already been given to the Commission by individuals interviewed by the Commission. An index of additional documents submitted to

the Commission is attached as **Annexure B**. In addition, Eskom is providing a flash disk with information to the Commission that is relevant to the matters specifically addressed in this Submission and is listed in **Annexure C**.

3. This Submission focuses on informing the Commission on the steps that the new Board has taken since its appointment. In so far as historic matters are concerned these are generally not within my own personal knowledge and experience or that of other members of the new Board.
4. This Submission provides an overarching framework and high-level summary of the matters which the Board has been asked to consider, it references the statements submitted by individuals (current or previous Eskom personnel) in response to the Commission's questions. These statements, however, by their very nature reflect the personal perspective of the individuals in question and are not Eskom's position or formal response to the Commission's questions and are not incorporated into this Submission itself.

## I. BACKGROUND AND INTRODUCTION

5. On 2 November 2016, the Office of the Public Protector of the Republic of South Africa released a *"Report on an investigation into alleged improper and unethical conduct by the President and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of Ministers and Directors of State-Owned Enterprises resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta family's business"*, being the **"The State of Capture Report"**.



6. Among the recommendations made in The State of Capture Report was that a commission of inquiry headed by a Judge nominated by the Chief Justice of the Republic of South Africa should be established by the President to investigate matters raised in The State of Capture Report pertaining to malfeasance and maladministration in state owned companies.
7. Eskom is listed as a major public entity in terms of Schedule 2 of the Public Finance Management Act No.1 of 1999 ("PFMA"). The main business and objective of Eskom is to provide electricity and related services including the generation, transmission, distribution and retail thereof. Eskom is one of the state owned companies that are mentioned in The State of Capture Report.
8. Pursuant to the release of The State of Capture Report and after much public disquiet and scrutiny regarding The State of Capture Report, the President of the Republic of South Africa appointed a Judicial Commission of Inquiry Into State Capture, Corruption and Fraud In the Public Sector Including Organs of State in terms of section 84(2)(f) of the Constitution of the Republic of South Africa by way of Proclamation No.3 of 2018 published in the Government Gazette of 25 January 2018 (Government Gazette No. 41436).
9. The questions attached as Annexure A were posed to Eskom on 29 October 2018 (the "Commissions Questions").

## **II. CONTEXT FOR THIS SUBMISSION BY THE CHAIRMAN OF THE NEW BOARD ON BEHALF OF THE NEW BOARD**

10. The new Board was constituted on 19 January 2018, as set out in paragraph 15 below.
11. The members of the new Board face some difficulty in providing an "Eskom" response to the Commission's Questions as the majority of the persons involved in these issues are no



longer in the employ of Eskom. Furthermore, the Board members themselves do not have personal insight into the matters undertaken before their tenure.

12. There are a number of ongoing public investigations into the matters covered by the Commission's Questions. These include those conducted by Public Protector (in respect of The State of Capture Report), the National Treasury investigations as reflected in the Final Report: Forensic Investigation into Various Allegations at Transnet and Eskom in respect of Tender Number NT 022-2016 RFQ26-2017 commissioned by National Treasury and conducted by Fundudzi in November 2018 and the ongoing investigation of the Special Investigating Unit ("SIU"), the Parliamentary Report of the Portfolio Committee on Public Enterprises on the Inquiry into Governance, Procurement and the Financial Sustainability of Eskom, dated 28 November 2018, the Directorate for Priority Crime Investigation (the "Hawks") and the work undertaken by this Commission.

13. Eskom is cooperating with all relevant authorities regarding these ongoing investigations. The new Board needed to strike a balance between addressing the past problems at Eskom and moving forward to build a strong, solvent, motivated organization able to carry out its public mandate. The new Board has undertaken multiple "clean up" and consequence management processes related to past practices (described further below), these relate to a myriad of past governance failures and not all are related to matters within the Commission's mandate. In the context of all of the ongoing external enquiries and investigations the new Board did not consider it a prudent use of Eskom's limited resources to commence with multiple forensic investigations of the matters related to state capture in an instance where this may hamper the process, or lead to a duplication of efforts of the investigations already underway. The new Board has been advised that the SIU has requested that Eskom does not conduct further investigations into the matters relating to



state capture as this may interfere with and impede with the SIU's ongoing criminal investigation and may hamper official evidence collection efforts. As such, the new Board does not necessarily have specific insight into these matters beyond what is in the public domain and what has been specifically uncovered in the context of disciplinary processes and other internal audit recovery processes detailed further in this document.

14. The new Board has however undertaken a number of disciplinary processes and measures of reform in order to address the past unlawful practices and governance failures within the organization. Information on these is also provided with this Submission.

#### **Appointment of the New Eskom Board Members in January 2018**

15. In terms of the Eskom Conversion Act 13 of 2001 and the Companies Act 71 of 2008 ("the **Companies Act**"), Eskom is a public company and the sole shareholder of Eskom is the Government of the Republic of South Africa. In accordance with Eskom's Memorandum of Incorporation, the Government as the sole shareholder, acting through the Minister of Public Enterprises, has the exclusive power to appoint directors of Eskom pursuant to the provisions of section 66(4)(a)(i) of the Companies Act and section 63(2) of the PFMA.

16. At the time of the Board's appointment to Eskom on 19 January 2018 the company was undoubtedly facing one of the most difficult times in the organisation's 95-year history, experiencing a tumultuous year, characterised by weak financial ratios, coupled with leadership and governance issues. A number of the challenges were widely stated to have stemmed mainly from the qualified audit incurred in the year ended 31 March 2017, which were due to:



- a. incompleteness of the irregular expenditure information in terms of PFMA requirements;
- b. the many allegations of financial mismanagement and corruption against executives and senior management; and
- c. a myriad of other issues related to lapses in governance processes and other internal controls.

17. These challenges, amongst others, were widely stated as the biggest contributors to the deterioration of confidence in Eskom by financial markets which constrained access to funding, leading to a liquidity crunch and consequently being a contributory factor towards serious concerns regarding the long-term financial viability and the going-concern status of the group. Eskom needed to raise loans of R20 billion in the period 1 February 2018 to 31 March 2018 after having had no access to funding since July 2017.

18. It was against this backdrop - in the wake of various ratings downgrades, facing a potential JSE delisting of its bonds and funders calling for change in governance structure and leadership that the then Deputy President of the Republic of South Africa, Mr Cyril Ramaphosa announced the appointment of a new Board and Interim CEO on 20 January 2018 with a clear mandate to stabilise Eskom and to deal decisively with governance lapses.

19. The non-executive directors and members of the Board of Eskom in January 2018 were as follows including their dates of appointment:

Name of Director	Date of Appointment	Resignation Date
Jabulane Albert Mabuza	19 January 2018	n/a
*Jacky Molisane	19 January 2018	18 September 2018

Dr Pulane Molokwane	23 June 2017	n/a
Sifiso Dabengwa	19 January 2018	n/a
Busisiwe Mavuso	19 January 2018	n/a
Nelisiwe Magubane	19 January 2018	n/a
Sindisiwe Mabaso-Koyana	19 January 2018	n/a
Dr Rod Crompton	19 January 2018	n/a
*Mark Lamberti	19 January 2018	6 April 2018
*George Johannes Sebulela	19 January 2018	19 October 2018
Professor Malegapuru Makgoba	8 December 2017	n/a
Professor Tshepo Mongalo	8 December 2017	n/a
Dr Banothile Makhubela	23 June 2017	n/a

**Note:** Directors whose names bear asterisks have since resigned for various reasons, which will be shared with the Commission herein below.

20. Mr Mark Lamberti resigned on account of a High Court judgment which suggested that he discriminated and ill-treated a black woman and overlooked her for appointment when she was suitably qualified and had the requisite experience for the job.

21. Ms Jacky Molisane resigned owing to a decision taken by the Minister of Public Enterprises not to have any of his staff as Board members of state owned companies.

22. Mr George Johannes Sebulela resigned as a result of an undeclared conflict of interest related to his company, Sebtech (Pty) Ltd.

### What the New Board Found at Eskom

23. Immediately after its appointment in January 2018 the Board was confronted with the following challenges at Eskom:

- liquidity crisis with no access to funding;
- unsatisfactory sales revenue generated by Eskom;
- low investor confidence as evidenced by the credit rating downgrades;
- increasing municipal and Soweto debt;
- deteriorating EBITDA margins;
- ballooning capital expenditure;
- high operating expenditure;
- high debt servicing costs;
- high costs of maintenance;
- a myriad of allegations of mismanagement and corruption against Senior officials;
- breaches of the PFMA and lapses of governance systems and controls;
- delayed financial results on the back of going concern challenges; and
- low staff morale.

24. Eskom is a major driver of the South African economy and its direct impact on the South African GDP as a result of its operational and capital expenditure is approximately 3%. Eskom is a key driver of the development of new industries in South Africa, both through its localization programme and by providing electricity for the establishment of new businesses. It is also one of the largest employers, employing over 48 000 people directly, and one of the largest buyers of goods and services in the country.



25. The extent of the challenges was almost insurmountable. However, the Board decided to prioritise the following critical and inter-related issues seen as underpinning stabilisation:

- a. addressing the many governance-related matters as a matter of urgency – this was also a key condition to solve our lack of access to funding;
- b. finding solutions to the liquidity issues in the face of credit downgrades and zero funding appetite by markets; and
- c. releasing the then delayed interim results and in the process addressing the “going concern” issues which were at risk of triggering defaults on existing funding facilities.

26. To pass the “going concern” test, Eskom needed to be liquid and solvent. To meet its financial obligations, it needed to be capitalized. To obtain external capital, the providers of capital needed to gain comfort, not only about Government support and the new Board appointments, but in regard to action that was also going to be taken to improve the corporate controls and more importantly to deal decisively with the many allegations of malfeasance and corruption against a number of its executives and management.

27. In line with the above and to execute on its mandate, the Board looked to expedite investigations into the said allegations and to take corrective action within the legal framework. Immediately disciplinary processes were instituted against certain managers and are set out in the section below.

28. The Board also became aware that there were also various commercial transactions and disciplinary proceedings that were worrisome. The Commission has specifically asked Eskom for information regarding The New Age Media transaction and the Optimum Coal Holdings Limited (“Optimum”) and Tegeta Exploration and Resources (Pty) Limited (“Tegeta”) (Brakfontein Colliery) transactions. Others identified by the Board and referred to in this Submission include the McKinsey/Trillian transactions, dealings between Eskom



and Impulse International, Nkonki, the Huarong transaction. Others such as the SAP and T-Systems transactions previously raised in the public domain will be dealt with by Eskom at a future date. Although the Commission has not requested information on these at this stage, these are briefly discussed herein and can be canvassed in more detail if required by the Commission in future. There could well be other transactions of relevance and interest to the Commission and Eskom will provide all relevant information on such other transactions as requested by the Commission.

### III. CORPORATE GOVERNANCE PROTOCOLS AND PRACTICES FOLLOWED BY THE NEW BOARD

29. A set of the relevant Eskom Policies and Procedures referenced in this document is included in Annexure D of this Submission.

30. As is explained elsewhere the new Board's mandate is to stabilize Eskom. In its first year the new Board has undertaken this mandate through numerous interventions within the organization and taken forward this mandate across the various committees of the Board.

In this regard the following is a record of the meetings held by the Board and Board committees since January 2018.

BOARD	ARC Audit & Risk Committee	BTC Board Tender Committee	IFC Investment & Finance Committee	P&G People & Governance Committee	SES Social, Ethics & Sustainability Committee	STRATCOM Board Strategy Committee	TOTAL
19	11	9	7	8	3	4	61

**Probity checks required to be undertaken by the appointing authority**

31. In accordance with Eskom's Memorandum of Incorporation, the Shareholder appoints Board members. The appointment process as well as fit and proper testing of directors is conducted by the Department of Public Enterprises ("DPE") and guided by the:

- a. Protocol on Corporate Governance in the Public Sector and Board induction and orientation toolkit- issued by DPE.
- b. Handbook for the appointment of persons to Boards of SOE's and state controlled institutions- issued by the Department of Public Service and Administration.

**Probity checks required to be undertaken by Eskom**

32. Eskom is required by section 217 of the Constitution and section 51(1)(iii) of the PFMA to have an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective. In order to ensure and manage full adherence to the legislative provisions above and the principles of the King IV Report, all potential conflicts of interests must be declared by suppliers and employees in the prescribed manner. Such declared interests must then be assessed to ensure that they do not prejudice the procurement process or negatively influence it in any manner. For this reason, probity reviews and other related reviews are performed to identify and report potential conflicts of interests and other risks throughout the Eskom procurement value chain.

33. At present, probity reviews are performed by the Assurance and Forensic Department of Eskom for all transactions valued at R500million and above. The Assurance and Forensic Department provides an assurance function in respect of compliance with legislation, policies and procedures, in accordance with Eskom's Code of Ethics 'The Way Policy'. The



probity reviews are performed to identify conflicts of interests between the supplier's directors and members, and officials of the Eskom governance and approval committee (board, board tender committee, Exco tender committee and divisional tender committee), cross functional team members (employees involved in the procurement transaction), commercial team members and all their respective spouses/partners. The probity also extends to any shareholder of the supplier who has a shareholding interest in excess of 20% (20% being the percentage that is considered reasonable to balance the number of shareholders reviewed and cost of the reviews).

34. Probity reviews are also performed for modifications (no modifications as to contract value are conducted but only for extension of time) for transactions entered into with Eskom subsidiaries or any state owned companies and any sole source. The Eskom group commercial department performs *ad hoc* probity reviews on commercial staff from time to time.

35. The Eskom Secretariat Management Procedure is attached as **Annexure E**.

#### **Declaration of Interests required by Board members**

36. The new Board members of Eskom are aware of the obligations imposed on them by the Companies Act in so far as declaration of personal financial interests and management of conflicts pertaining to those personal financial interests are concerned.

37. The new Board members of Eskom are also aware of the provisions of section 75(5) of the Companies Act which provides that if a director of a company, other than a company contemplated in subsection (2)(b) or (3), has a personal financial interest in respect of a matter to be considered at a meeting of the Board, or knows that a related person has a personal financial interest in the matter, the director –



- (a) must disclose the interest and its general nature before the matter is considered at the meeting;
- (b) must disclose to the meeting any material information relating to the matter, and known to the director;
- (c) may disclose any observations or pertinent insights relating to the matter if requested to do so by the other directors;
- (d) if present at the meeting, must leave the meeting immediately after making any disclosure contemplated in paragraphs (b) and (c);
- (e) must not take part in the consideration of the matter, except to the extent contemplated in paragraphs (b) and (c);
- ;
- (f) must not execute any document on behalf of the company in relation to the matter unless specifically requested or directed to do so by the Board.

38. In addition to the provisions of the Companies Act dealing with personal financial interests, the new Board of Eskom is aware of the Conflict of Interest Policy and the Declaration of Interest Procedure of Eskom. The policy statement of the Conflict of Interest Policy (32-173) of Eskom, which is contained in paragraph 2.1, provides as follows:

## **"2. Policy Content**

### **2.1 Policy Statement**

*Eskom subscribes to ethical values and legal principles. This requires that Eskom, its directors, employees, customers and suppliers to act with integrity and create public confidence by conducting business in a fair, impartial and transparent manner. For this reason, Eskom makes every effort to ensure that conflicts of interest do not compromise or are not perceived to compromise its business decisions and actions.*

*Eskom is also committed to fair, objective and transparent business dealings, and for this reason care must be taken when accepting or offering any business courtesies. Business courtesies are used to build good relationships and are*

*offered as a kind gesture and to show courteousness or respect and may only be offered or accepted for these reasons.*

*The employee and director have the obligation to declare and manage conflict of interest. This process is critical to ensure that the objectivity and integrity of the employee or director are not compromised, that the employee or director acts in Eskom's best interest, and that Eskom avoids situations where it can be accused of improper or unfair conduct.*

*In support of its vision, values and statutory responsibilities, Eskom will take all steps within its reasonable control to manage conflict of interest throughout Eskom."*

39. Despite the clear and unambiguous provisions of the Conflict of Interest Policy of Eskom, the practice before January 2018 among Eskom employees, executives including erstwhile directors was the opposite. In terms of the Conflict of Interest Policy (and paragraph 2.6.2 of the Declaration of Interest Procedure), the monitoring of declarations submitted by the Board of Eskom rests with the Chairman of the Board, supported by the Company Secretary. The Conflict of Interest Policy clearly sets out the manner and nature of the declarations which are required to be made in respect of conflicts of interest, including that all conflicts of interests, directorships, related or inter-related persons must be disclosed and such conflicts must be managed appropriately and responsibly. Importantly, the employee or director may not participate in any decision relating to the matter in which there is a conflict.

**Declaration of Interests required of Board members prior to meetings:**

40. The *pro forma* agenda in respect of procurement transactions is sent to Assurance and Forensics and Governance to conduct a probity check and investigate for any conflict by a Board member.

41. In the event that there is a potential, perceived or actual conflict of interest, the Chairman of the Committee and the Group Company Secretary are advised. The Chairman then discusses the matter with the conflicted Board member. The treatment thereof is then in

terms of section 75 of the Companies Act. Should a conflict be identified, the Board member will not be provided with the information pertaining to that matter and will be required to recuse him/herself from the proceedings when the matter is discussed.

**Declaration of Interests required of Board members at meetings:**

42. The procedure for declaring conflicts of interest at meetings is set out in the Declaration of Interest Procedure. † Directors of Eskom, including Executive Directors, have access to an electronic declaration of interest register through the Board website. ‡ In terms of this procedure, Directors are required to disclose a conflict of interest in respect of a matter to be considered at a meeting, before the matter is considered at the meeting, together with any material information related in respect of that matter. §

43. Board Members complete and sign a declaration of interest form before the commencement of every Board and Committee meeting. Further, the Board member is required to verify the information provided on the current Declaration of Interest form at every meeting. This is to ensure that the information at hand is current and that there are no conflicts, which may have arisen immediately prior to the meeting.

44. In addition to completing and signing the register, the Board members are required to formally state as part of the meeting proceedings if they have any conflict in relation to matters being discussed in the meeting as stated on the agenda or any items that may be agreed to be added to the agenda. In accordance with paragraph 3.1.2.2 of the Declaration of Interest Procedure, "Declarations of Interest" is a standing agenda item at all Eskom

† See paragraph 3.1.2 of the Declaration of Interest Procedure.

‡ see paragraph 3.1.1.1 of the Declaration of Interests Procedure.

§ paragraphs 3.1.2.1.1 and 3.1.2.1.2 of the Declaration of Interests Procedure.

Board and Committee meetings to ensure that members have an opportunity to consider and declare any conflicts, as well as to discuss issues of ethics they might have at the start of each meeting. Any conflicts are recorded as part of the proceedings and in accordance with Eskom's policies and procedures and the applicable legislative and regulatory guidelines.

**Declaration of interests required of Board members after meetings:**

45. The register is reviewed by the designated Ethics Officer in the Office of the Company Secretary to establish whether there are any changes that members may have indicated on the register. If there are any changes, the electronic register is updated.
46. An electronic web based system is available to any of the Board members and can be accessed at any time to update and amend the information. This enables any member to access their own or other member's interest should the need arise. This is monitored by the designated Ethics Officer to ensure that records are up to date.

**Declaration of interests required by employees and related conflicts**

47. Whilst the policies and the law sought to deal with the declaration of personal financial interests, the Board discovered that it was a norm at Eskom for employees including executives to be directors and shareholders in entities who were also suppliers to Eskom without declaring these interests. Some executives would even receive directors' fees without disclosing the fees to Eskom.



48. Based on the Special Investigating Unit Report under Proclamation No.R2 of 2012 which was finalized in December 2017 but only released to Eskom on 4 October 2018 by the President of the Republic of South Africa through the Minister of Public Enterprises, some 3 475 (three thousand four hundred and seventy five) Eskom employees have faced disciplinary action for having failed to declare their personal financial interests over a number of years.

49. The new Board on 24 January 2018 passed a resolution prohibiting any Eskom employee from being a director and shareholder in entities that are suppliers to Eskom. The Eskom employees had to decide whether they wanted to be employees of Eskom or suppliers to Eskom, as they could not have it both ways. This decision culminated in numerous resignations by Eskom employees as directors from these supplier entities with some employees instead resigning from Eskom to pursue their business interests. As a result of this discovery, the new Board engaged the services of Bowman Gilfillan Inc. trading as Bowmans to assist with a review of the conflict of interests' policy to align it to international best practice. The revised conflict of interest policy is currently going through the internal governance structures of Eskom for approval.

50. In addition to the foregoing, the new Board took a decision that the Board members must not be involved in bidding for Eskom tenders and further that all Eskom employees, starting with the executives and senior management should be subjected to lifestyle audits. To this end, Edward Nathan Sonnenbergs Inc. trading as ENS Africa was appointed in July 2018 to conduct lifestyle audits of executives including senior management and Eskom awaits their final report before the end of March 2019. The interim report has revealed that some executives have thus far refused to comply with the instruction to submit themselves to a



lifestyle audit. Consequently, disciplinary proceedings are being brought against such employees.

#### IV. INITIAL DISCIPLINARY PROCESSES UNDERTAKEN BY THE NEW BOARD

51. When the Board took office in January 2018 there were Executives who had been identified in the public domain and in internal investigations undertaken previously within Eskom whose disciplinary processes had not been actively pursued by the previous Board.

52. The following Executives were facing serious allegations of misconduct, some believed to be linked to the controversial state capture related transactions and as such the process of finalizing their respective disciplinary processes was of critical importance:

- a. Matshela Koko (Former Acting Group Chief Executive and former Head of Generation)
- b. Edwin Mabelane (Former Chief Procurement Officer)
- c. Charles Kalima (Former Acting General Manager Sourcing)
- d. Anoj Singh (Former Chief Financial Officer)
- e. Prish Govender (Former Head of Group Capital)
- f. Abram Masango (Former Group Executive Group Capital)
- g. Suzanne Daniels (Former Company secretary and Head of Legal)

53. Except for Abram Masango and Suzanne Daniels all the other executives mentioned above resigned from Eskom in the face of disciplinary processes that were instituted. As a result it was only the initial charges against Mr Masango and charges against Suzanne Daniels



that were tested in an independent disciplinary process, these processes are discussed below.

54. Mr Maritz the former Acting Group Chief Executive was also placed in suspension and resigned shortly after the new Board took office and his disciplinary process is also discussed below.

55. The following table summarises the processes followed in relation to these executives facing charges in January 2018 – details on other executives who have faced disciplinary action since January 2018 are dealt with in different parts of this submission:

	<b>Individual</b>	<b>Hearing date</b>	<b>Status</b>
1.	<b>Mr MM Koko</b> Former Acting Group Chief Executive and former Head of Generation (Formal charges made against Mr Koko in 2018 related to various matters including failure to give an honest account to Parliament, disclosure of confidential information to a third party, McKinsey and Trillian and conflicts of interest. Additional charges brought in 2017 related to Impulse dealt with at discredited disciplinary hearing. Further charges related to Optimum and Tegeta have emerged since Mr Koko resigned and are under investigation by the authorities.)	Suspended 29 January 2018. Detailed charges and evidence bundle provided 7 February 2018 Disciplinary hearing scheduled for 16 and 17 February 2018 Mr Koko resigned with immediate effect half an hour into the disciplinary process.	<b>Completed</b> Outstanding matter: Eskom to determine whether it has a claim against Mr Koko for losses suffered as a result of his actions. Criminal case under investigation related to the relevant transactions and all relevant information shared with the authorities.
2.	<b>Mr M Maritz</b> Former Acting Group Chief Executive, and former Chief Information Officer (Charges related to HEA/Huarong, McKinsey and Trillian)	Suspended 31 January 2018 Detailed charges provided 26 February 2018 Disciplinary Hearing Scheduled for 8 and 9 March 2018 Mr Maritz resigned with immediate effect 27 February 2017.	<b>Completed</b> Outstanding matter: Eskom to determine whether it has a claim against Mr Maritz for losses suffered as a result of his actions. Criminal case under investigation related to the relevant transactions and all relevant information shared with the authorities.
3.	<b>Mr A Singh</b> Former Chief Financial Officer (Charges related to various matters including Optimum/Tegeta, Trillian and McKinsey and conflicts of interest.)	Suspended 2017 Resigned with immediate effect 22 January 2018.	<b>Completed – no referral to CCMA.</b> Outstanding matter: Eskom to determine whether it has a claim against Mr Singh for

			losses suffered as a result of his actions. Criminal case under investigation related to the relevant transactions and all relevant information shared with the authorities.
4.	<b>Mr P Govender</b> Head of Group Capital (Charges related to Trillian and McKinsey.)	Suspended 2017. Reinstated after suspension at the end of December 2017. Resigned with immediate effect approximately 24 January 2018.	<b>Completed – no referral to CCMA.</b> Outstanding matter: Eskom to determine whether it has a claim against Mr Govender for losses suffered as a result of his actions. Criminal case under investigation related to the relevant transactions and all relevant information shared with the authorities.
5.	<b>Mr E Mabelane</b> Chief Procurement Officer (Charges related to Trillian and McKinsey.)	Suspended 2017 Letter of Termination sent 24 January 2018 following ultimatum. 22 February 2018 referral to the CCMA for unfair dismissal seeking reinstatement. Offered reinstatement and disciplinary hearing seeking summary dismissal. Offer refused. CCMA arbitration not pursued within the relevant time period. No communication since 14 March 2018.	<b>Completed</b> Outstanding matter: Eskom to determine whether it has a claim against Mr Mabelane for losses suffered as a result of his actions. Criminal case under investigation related to the relevant transactions and all relevant information shared with the authorities.
6.	<b>Mr C Kalima</b> Former Acting General Manager Sourcing (Charges related to Impulse, Trillian and McKinsey.)	Suspended 2017 Resigned 23 January 2018 Claimed constructive dismissal. Initiated a CCMA process and reinstated following offer of disciplinary hearing. Final charges and evidence bundle provided to him 24 April 2018. Resigned 30 April 2018 with immediate effect.	<b>Completed</b> Outstanding matter: Eskom to determine whether it has a claim against Mr Kalima for losses suffered as a result of his actions. Criminal case under investigation related to the relevant transactions and all relevant information shared with the authorities.

7.	<p><b>Mr A Masango</b> Suspended Group Executive Group Capital (Mr Masango's initial charges were unrelated to the Trillian, McKinsey, HEA and Impulse matters.)</p>	<p>Suspended 2017 Disciplinary Charges put to him on 27 February 2018 Disciplinary Hearing heard in March 2018 before Independent Chairperson from the Johannesburg Bar. Independent Chairperson found Mr Masango not-guilty and he was reinstated in May 2018. Further charges put to him in November 2018. Resigned with immediate effect 16 November 2018.</p>	<p><b>Completed</b> Outstanding matter: Eskom to determine whether it has a claim against Mr Masango for losses suffered as a result of his actions. Criminal case under investigation related to the relevant transactions and all relevant information shared with the authorities.</p>
8.	<p><b>Ms S Daniels</b> Company Secretary and Head of Legal and Compliance (The charges related to Optimum/Tegeta, Trillian and McKinsey, sharing of confidential information with a third party and PFMA breaches related to payments on behalf of Mr Ben Ngubane.)</p>	<p>See below.</p>	<p><b>Ongoing</b> Outstanding matter: Eskom to determine whether it has a claim against Ms Daniels for losses suffered as a result of her actions. Criminal case under investigation related to the relevant transactions and all relevant information shared with the authorities.</p>

**Ms Suzanne Margaret Daniels – Head of Legal and Company Secretary**

56. As this matter progressed to a disciplinary hearing it is set out separately in this Submission.

57. Ms Daniels was on suspension with full pay when the new Board was appointed. She had approached the CCMA to challenge her suspension alleging that her suspension was substantively and procedurally unfair and the CCMA subsequently ruled in her favour and ordered that she be reinstated in March 2018.

58. Due to new and further evidence emerging, Ms Daniels was again placed on suspension on 19 March 2018 and subjected to a disciplinary hearing facing four charges of: (1) distribution of confidential and proprietary information belonging to Eskom to a third party

who ought not to have received the information, this was reasonably believed by Eskom to be to Mr Salim Essa, a Gupta associate; (2) authorizing Eskom to pay the legal fees of Dr Ben Ngubane pertaining to a Parliamentary enquiry into his role as the SABC Chairperson from Eskom funds; (3) her involvement in the Tegeta guarantee and prepayment for coal and various other transactions which extended the contractual dealings of companies in the Optimum and Tegeta group with Eskom; and (4) her involvement in the McKinsey and Trillian transactions, such as supporting payments to Trillian and settlement of the matter in the face of legal advice.

59. An independent chairperson, Adv. Nazir Cassim SC, was appointed to preside over Ms Daniels' disciplinary hearing and after the hearing he found Ms Daniels guilty on 20 July 2018 on all four charges. Ms Daniels was summarily dismissed on 20 July 2018 as recommended by Adv. Cassim SC.

60. Adv. Cassim SC in his findings further recommended that the Eskom Board should consider the role played by suppliers to Eskom such as Cliffe Dekker Hofmeyr ("CDH") in the Tegeta and McKinsey transactions. In considering this the Board took a decision that Eskom should sever ties with CDH. CDH is currently not a supplier to Eskom.

61. Ms Daniels is currently challenging her dismissal in the CCMA and referred Adv. Cassim to the General Council of the Bar.

#### Other disciplinary processes

62. The Submission has highlighted in the preceding section the disciplinary action taken immediately upon appointment involving Executives within Eskom. There were many other disciplinary processes which were undertaken during the Board's first year in office related

to questionable activities taken at all levels of the organization. Some of these are discussed in the sections that follow in this document and are included in the discussion of processes concerning individuals involved in Tegeta and Optimum transactions and the Impulse transactions (amongst others). The Submission also mentions below certain individuals involved in specific transactions in case the Commission wishes to call the relevant individuals or wishes to obtain more information where this is relevant to the specific transactions.

#### **V. FIDUCIARY BREACHES AND PFMA BREACHES BY PREVIOUS BOARD MEMBERS AND EXECUTIVES**

63. In the internal and external processes undertaken by Eskom to date, specific breaches of the fiduciary duties and obligations found under the PFMA of the previous Board of Eskom have been revealed and indicate that certain members of the previous Board and executives played an intrinsic role in ensuring that payments were advanced in circumstances where they should not have been advanced.

64. These breaches have been raised by Eskom where relevant in the context of the litigation and disciplinary processes which Eskom has initiated, including the Eskom Review Application (brought in the North Gauteng Division of the High Court under Case Number 22877/18) and the Koko and Daniels, disciplinary charges and hearings (the other disciplinary matters did not progress beyond the stage of the levelling of charges). These records will all be made available to the Commission.

65. The breaches identified related to a wide range of transactions including the Optimum and Tegeta transactions, the McKinsey and Trillian contracts and payments and the Huarong

transaction. A number of the records and recordings of the Board Tender Committee meetings and Board meetings which were accessed for purposes of these litigation and disciplinary matters, reveal the corporate governance failures within Eskom at the time and reveal the breaches of duties by a number of individuals within Eskom including members of the Board and Board Tender Committee. All implicated Board members had left Eskom by the time the new Board took office.

66. For the reasons set out above, once the relevant disciplinary processes discussed herein were completed and all implicated Executives had left the organization the Board handed the full record of such proceedings and related documentation over to the relevant authorities and to avoid duplication and fruitless expenditure did not undertake further independent investigations into the actions and omissions of the executives and previous Board members. Eskom has however opened its records up to the Commission and other State investigative bodies to allow all relevant investigations to be undertaken and is happy to offer further assistance in this regard.

## VI. DEFICIENCIES WITH PAST PROCUREMENT SYSTEMS:

### Modifications and expansion of Eskom supplier contracts generally

67. A particular deficiency in past practices that has been investigated and dealt with by the new Board is the manner in which the Eskom procurement policy framework allowed for contracts that have been concluded for various products and services to be modified or expanded within the legal and policy framework.

68. In practice such modifications and expansion can take the form of any of the following:



- a. time modifications being amendments to the envisaged duration to completion of a contract project or delivery of a service;
- b. value modification being a change in the originally quoted and contracted value of a project, product or service outside of any contingencies that may have been provided for;
- c. expansion of the agreed contract scope; and
- d. any other changes to what the originally contracted service offering or product including any related costs thereto.

69. Whilst modifications and expansions in themselves are not an incorrect or unknown practice, the volume and values of these became a cause for concern for the new Board, in light of the following:

- a. The definition of a modification in terms of the policy had no limitation which resulted in the new Board being asked to approve modifications as much as 300% of the original contract provisions.
- b. This means there was a culture of poor planning and contract management to begin with which amounts to poor business practice.
- c. This also lead to governance risks in that while contracts are approved in line with the Delegation of Authority but the modifications are not looked at in aggregate and as such not escalated to the correct approval platforms.

70. The new Board believes there is a high risk of mismanagement in that contracts may be priced incorrectly so as to obtain approval at lower levels of the delegated authority, with subsequent modification that see values increase to levels that, had they been priced in initially, would have required approval at higher levels of authority including the Board itself.



71. The modification and expansion of contracts were a norm and not an exception at Eskom. Contracts were not managed properly and processes to replace existing contracts in a timely manner were not followed, because of the strong possibility that existing contracts would be extended or modified.
72. The previous Board was often under pressure to approve modifications and expansion because the contracts in question are for the so called 'essential services' which if not in place may have an adverse impact on the business' ability to effectively run operations.
73. In the past, modifications and expansions of contracts were undertaken without the National Treasury approval. Please see attached hereto a schedule of modifications and expansions of contracts for the period 2016 to 2018 marked **Annexure F**.
74. There was neither a culture nor a practice of consequence management relating to these transgressions – seemingly because this was considered a normal business practice.
75. The new Board, in light of the above and as a part of its clean-up programme, took a resolution to cease entertaining any modifications and/or expansions to contracts without sufficient justification of their exceptional nature. It also decided to enforce consequence management for breaches of governance and the PFMA.
76. Pursuant to this, 1049 historical cases relating to modifications and expansions of contracts were identified and reported to the new Board and to the Parliamentary Standing Committee on Public Accounts ("SCOPA") on 28 August 2018 attached. 822 of these 1049 cases have since been addressed through disciplinary processes resulting in 97 employees exiting Eskom. A remainder of 227 of the 1049 cases are not yet finalised. See **Annexure G** for a progress report on these processes.



77. The new Board found that Eskom's policies allow for what is termed "emergency procurement" which tended to be the tool used by executives when there was a push back by the new Board on approving modifications.
78. In response to all of the above, the new Board resolved to complete an overhaul of the procurement policy framework to ensure that it is supportive of the required business and financial discipline and less conducive to financial mismanagement and ill business discipline. This work is currently underway.
79. The new Board and Eskom management are also working closely with the National Treasury to align the policies of Eskom to the National Treasury practice notes and ensure adherence to the PFMA.

## VII. SPECIFIC CONTRACTS ON WHICH THE ZONDO COMMISSION HAS REQUESTED INFORMATION

### The New Age Media (Pty) Ltd

80. The new Board has not undertaken any independent investigation of the New Age Media (Pty) Ltd contracts which were not current when the new Board commenced.
81. Individuals who have knowledge of this matter have been asked to cooperate with the Commission and have had various interactions with the Commission. Various statements of the individual's knowledge of the matter have been submitted to the Commission, and these individuals would be able to provide further information and clarification if required. These will include statements from Mr Pieter Pretorius (Senior Manager: Corporate Affairs Division), Mr Freddy Ndou (formerly employee of Eskom - Divisional Executive: Strategy



Support) and Mr Chose Choeru (employee of Eskom at the time he made his statement - Divisional Executive: Corporate Affairs Division). Of these individuals only Mr Pieter Pretorius remains in the employ of Eskom, Mr Ndou and Mr Chose are no longer employed by Eskom. I understand that the Zondo Commission is obtaining additional statements from various individuals.

82. The new Board has been able to establish the following which has been shared with the authorities, the SIU and the Hawks are conducting further investigations:

- a. The New Age Media (Pty) Ltd ("TNA") was introduced to Eskom through the office of the then Group Chief Executive, Mr Brian Dames, by Messrs. Nazeem Howa, Jacques Roux and Ajay Gupta. The TNA had a newspaper publication whose circulation figures could not be verified through the Accredited Bureau of Circulation ("ABC").
- b. TNA was introduced to Eskom and became a supplier without an open procurement process through the Media Shop, a supplier to Eskom, and the arrangement between Eskom and TNA was disguised as a sponsorship agreement. The first so called sponsorship contract was entered into in 2012 for over R10 million.
- c. The corporate affairs division ("CAD") of Eskom in 2012 neither had a strategy nor a budget targeted at the kinds of services TNA offered, but the budget was nevertheless found through the then Group Chief Executive Officer's office paying for televised breakfast shows on SABC2, two 10 seater tables and 6 pull up banners at these breakfast, events. This was contrary to section 38(2) of the PFMA.
- d. The Public Protector on 3 September 2013 sent a letter to Eskom querying the funds spent by Eskom on TNA publications. Her view was that it was fruitless and wasteful expenditure. This view was disregarded by the then Eskom executives.



- e. The second so called sponsorship contract between Eskom and TNA was also not procured through an open tender process. Instead it was executed by Eskom directly with TNA and valued at R1.2 million. Mr Chose Choeu signed on behalf of Eskom for four breakfast shows.
- f. In 2014, Eskom, acting through Mr Colin Matjila who at the time was the Interim Group Chief Executive of Eskom executed a three year so called sponsorship contract with TNA valued at R43.2 million.
- g. To date the new Board has not taken further action regarding this matter which was not an ongoing matter when it took over but will follow the recommendations of the SIU and or the Zondo Commission in this regard.


#### Optimum and Tegeta

83. Eskom's dealings with Tegeta from approximately 2013/2014, Tegeta's acquisition of Optimum in 2015/2016 and Eskom's further dealing with the companies in the Optimum group thereafter have been the subject of numerous enquiries and investigations, including this latest investigation by the Commission.
84. Eskom has supplied a large volume of documentation to these various enquiries and investigations including to the Commission. The list of additional documents supplied to the Commission is attached as **Annexure B**.
85. The new Eskom Board has not undertaken any further independent investigation of Eskom's dealings with Tegeta, Tegeta's acquisition of Optimum and Eskom's further dealing with the companies in the Optimum group. These transactions were however relevant to and canvassed in the disciplinary proceedings and charges levied against



various people who have been dismissed or are no longer in the employ of Eskom, these include:

- a. Matshela Koko (various positions including Group Executive: Commercial & Technology, and / or Group Executive: Generation, and/ or interim Group Chief Executive resigned at the commencement of his disciplinary hearing into a range of disciplinary charges including related to communications with external parties reasonably believed to be Gupta associates. As Mr Koko resigned he did not face the further charges that emerged after the Board was able to access Eskom's records which showed Mr Koko's collaboration with various parties including private email communications with Department of Mineral Resources ("DMR") officials, communications with Mr Eric Wood and Mr Salim Essa regarding the R1,68 billion December 2015 prepayment/guarantee, Mr Koko was shown to be involved in the facilitation of this prepayment/guarantee internally and externally. Mr Koko is also implicated in a number of other dealings between Eskom and Gupta associated companies and their facilitation of his travel to Dubai);
- b. Anoj Singh (CFO resigned in the face of disciplinary charges, implicated in the issue of the R1.68billion guarantee in December 2015 without Board approval and the facilitation of the prepayment of R659 558 079.00 in April 2016);
- c. Ayanda Nteta (resigned in the face of disciplinary charges, the supply of coal fell under her portfolio at the time, and was involved in preparing the submission made to the previous Board in respect of the prepayment of R659 558 079.00 which was issued and various other dealings detailed in the Fundudzi report to National Treasury dated November 2018);



- d. Edwin Mabelane (various positions including Chief Procurement Officer employment terminated, involved in preparing the submission made to the previous Board in respect of the prepayment of R659 558 079.00 to Tegeta for coal);
- e. Suzanne Daniels (various positions including Senior Manager to the Office of the Chairman, Company Secretary, Head of Legal, dismissed following guilty finding of independent disciplinary hearing on a range of charges including preparation with Mr Koko, Mr Singh, Mr Mabelane and Ms Nteta of various Board and Board Tender Committee submissions related to the Optimum and Tegeta matters, such as involvement not previously disclosed in preparing the April 2016 Board Tender Committee prepayment submission and the procurement of a guarantee of R1.68 billion for Tegeta from Eskom in December 2015; communication with external parties reasonably suspected to be Gupta associates regarding these and other matters; failure to disclose the involvement of Mr Eric Wood/Regiments Capital/Trillian in advising on the December 2015 submission to the Board for the prepayment of R1,68billion to Tegeta in April 2016);
- f. Maya Bhana/Naidoo (General Manager – Office of the Chief Financial Officer) resigned in the face of an impending disciplinary process. Involved in and facilitated many of the Optimum, Tegeta, McKinsey and Trillian and Huarong payments and related transactions (amongst others).

Brian Molefe also appears to be implicated in this matter particularly the decision not to negotiate with Glencore regarding Optimum but left the employ of Eskom before the matter was properly canvassed. In addition, it appears that Regiments Capital/Trillian advised on the prepayment/guarantee of R1.68billion and various communications and arrangements were made between Eric Wood (who is also implicated at the heart of the



Trillian / McKinsey matter), Mr Koko and Mr Singh, in order to facilitate this in December 2015.

86. Of specific relevance to the Commission is the evidence and information which was found in emails on Eskom's server regarding communications between Mr Koko, Ms Daniels and members of the Eskom Board with third parties including persons reasonably believed to be associates of the Gupta family such as Mr Salim Essa and Mr Naseen Howa regarding these transactions and Eskom's public position on these transactions from at least July 2015 to August 2016. These server emails also show the involvement of Regiments Capital/Trillian (which was owned by Mr Salim Essa), represented by (amongst others) Mr Eric Wood in the formulation of these transactions and advice to the Board on the transactions in December 2015. In addition, the letter from the DMR in December 2015 which 'required' Eskom to prepay for the coal from the Tegeta/Optimum mine, was shown to be constructed between Ms Daniels, Mr Koko and an official from the DMR by way of an e-mail to the DMR official's private e-mail address.

87. Individuals still within Eskom who have knowledge of this matter have been asked to cooperate with the Commission and have had various interactions with the Commission. Various statements of the individual's knowledge of the matter have been submitted to the Commission, and these individuals would be able to provide further information and clarification if required. In this regard Eskom is aware of statements prepared by Dr Mark Van der Riet, Mr Dan Mashigo, Mr Gert Opperman and Mr Snehal Nagar. Eskom understands that the process of taking statements is ongoing.

88. A criminal case was opened regarding this transaction at the Sandton Police Station. The SIU and the Hawks are conducting further investigations.



89. The SIU issued proceedings in December 2018 to set aside certain of these contracts but to date Eskom has not been updated on these proceedings by the SIU and is in the process of sourcing the relevant information.

#### VIII. ADDITIONAL CONTRACTS WHICH ARE RELEVANT TO THE ZONDO COMMISSION

90. The new Board understands that the Commission's Questions posed to date are the first phase of its investigations and further matters will be dealt with in future. This section deals at a very high level with additional transactions in which the new Board has identified that previous executives and Board members allowed third parties particularly associated with the Gupta group of companies and others to unlawfully influence its decisions and or to facilitate substantial unlawful payments to parties within the Gupta group of companies.

#### McKinsey and Company Africa (Pty) Ltd ("McKinsey") / Trillian Management Consulting (Pty) Ltd (and other Trillian group companies) ("Trillian")

91. This matter is an important one for investigation by the Commission as substantial payments were made to a Gupta owned company unlawfully and without Eskom receiving value.

92. This matter has previously been investigated in some detail by Eskom and a detailed record of all documentation relevant to it has been prepared for the purposes of the Review Application which Eskom launched in March 2018. The full record and pleadings of this matter will be provided to the Commission with this Submission and is included in Annexure



C. This matter has also featured in a number of the disciplinary processes which Eskom undertook including those detailed below.

93. This matter involved numerous executives and Board members from Eskom in irregular activities. The matter concerned the misuse of the sole source basis of procurement of suppliers and the irregular and unlawful awarding of the contract to McKinsey for the provision of consulting services, (including under the Master Services Agreement ("MSA")) and irregular and unlawful direct payments to Trillian which was apparently owned by Gupta associate Salim Essa.

94. The various contracts were negotiated and concluded without Eskom engaging in any open and competitive tender process. Under the MSA, McKinsey was to receive risk based remuneration entitling it to a share of any savings it secured for Eskom. This was a substantial departure from the National Treasury's Instructions for the remuneration of external consultants, but Eskom failed to seek or obtain National Treasury's approval for it. In addition, this matter pertains to unlawful and irregular payments effected by Eskom to Trillian with the connivance of a number of executives and the approval of Board and Board Tender Committee members when there was no contract between the two and no existing subcontracting arrangement between McKinsey and Trillian.

95. McKinsey was paid over R1 billion in "settlement" despite the substantial irregularities with the contractual and internal approval processes which were known at the time of the settlement. Trillian was irregularly and unlawfully paid R600 million without a contract with Eskom or McKinsey when the irregularities were known at the time of payment. Eskom, working together with the Asset Forfeiture Unit of the National Prosecuting Authority ("AFU"), managed to recoup a payment of R902 274 123.31 on 7 July 2018 from McKinsey



with an additional R99 741 407.00 on 23 July 2018 towards interest. In total Eskom recouped R1 002 015 530.31 from McKinsey.

96. Eskom, in March 2018 launched a review application at the Gauteng Division, Pretoria High Court aimed at setting aside its own decisions in terms of section 1(c) of the Constitution and recovering all funds paid out under the unlawful transactions. With the payment of R1 002 015 530.31 received from McKinsey Eskom is pursuing the recovery of R600 million irregularly paid to Trillian. Eskom, working with the AFU and Interpol are also looking for Trillian's assets at other jurisdictions outside the country.

97. This matter and charges related to this matter have featured in the disciplinary processes regarding at least the following Eskom Executives and Employees:

- a. Mr Matshela Koko (various positions including Group Executive: Commercial & Technology, and / or Group Executive: Generation, and/ or interim Group Chief Executive resigned at the outset of his disciplinary hearing at which he faced charges related to this transaction including initiating and facilitating Eskom's sole source dealings with McKinsey in September 2015, initiating and facilitating dealings with Trillian between July 2015 and December 2015, including with Mr Eric Wood and approving, alternatively failing to prevent payments to Trillian in February 2017 in the face of knowledge of their unlawfulness while Acting Group Chief Executive and carrying the Board mandate for these payments);
- b. Mr Anoj Singh (CFO resigned in the face of charges related to this transaction including Eskom's sole source dealings with McKinsey in September 2015, supporting various payments to McKinsey and Trillian in February 2017 in the face of knowledge of their unlawfulness);



- c. Mr Edwin Mabelane (various positions including Chief Procurement Officer dismissed in the face of charges related to this transaction);
- d. Mr Prish Govender (various positions including Executive: Group Capital resigned in the face of charges related to this transaction);
- e. Ms Suzanne Daniels (various positions including Senior Manager to the Office of the Chairman, Company Secretary, Head of Legal, dismissed following guilty finding of independent disciplinary hearing on a range of charges including facilitating and supporting payments to Trillian in December 2016 and February 2017 in the face of knowledge of their irregularity and unlawfulness.)
- f. Mr Sean Maritz (Interim Group CEO charged for his withdrawal of a letter of demand to McKinsey and Trillian and his involvement in undermining efforts to deal with these unlawful transactions, resigned with immediate effect.)
- g. Maya Bhana/Naidoo (General Manager – Office of the Chief Financial Officer) resigned in the face of an impending disciplinary process. Involved in and facilitated McKinsey and Trillian payments and related transactions (amongst others).

98. Criminal cases have been opened regarding these transactions at the Sandton Police Station. This case is currently being investigated by the SIU and the Hawks.

**Impulse International (Pty) Ltd (“Impulse”) / ERI and Eskom**

99. This matter involved emergency purchases through round robin approvals by Eskom Executives, sole source procurement and fraudulent subcontracting. Eskom employees, particularly Mr Matshela Koko colluded to ensure that Impulse enjoyed unfair and continued enrichment at ERI (a subsidiary of Eskom) and at Eskom across multiple power stations



using their influence and position. Mr Matshela Koko, a group executive of Eskom and member of the ERI Board at the time failed to declare an interest that his step daughter was a shareholder of Impulse which was a beneficiary of lucrative contracts at ERI and Eskom.

100. A discredited disciplinary process in late 2017 cleared Mr Koko of charges related to Impulse but this remains under investigation by external parties and Eskom is cooperating in all such investigations.

101. Eskom took steps in July and August 2017 to terminate all agreements with Impulse and related companies.

102. Various disciplinary processes were followed and are ongoing against individuals within Eskom, across various power stations and ERI who allowed and facilitated Impulse transactions. More information on these disciplinary processes can be provided if necessary.

103. A criminal case was opened against employees involved in the fraudulent scheme. The SIU and the Hawks are investigating this matter further.

104. Please let us know if you would like us to make any documentation available to the Commission regarding these transactions.

**Nkonki Inc. Accountants (KPMG amongst others)**

105. It appears that Eskom executives sought to unduly influence the appointment of Nkonki Inc. Accountants as a subcontractor. Nkonki Inc was shown to be acquired by Gupta associates in approximately 2016/2017.

106. Eskom has concluded an investigation regarding Nkonki Inc's appointment as a subcontractor by KPMG. There may have been other questionable subcontractor appointments for Nkonki and enquiries into this are ongoing.



107. Eskom paid R63 005 770.00 to Nkonki Inc. as a subcontractor to KPMG which was flagged as an irregular expenditure.
108. A criminal case has since been opened regarding this transaction at the Sandton Police Station. The SIU and the Hawks are investigating this matter further.
109. The New Board noted the weaknesses on panel approvals and management of subcontracting processes and enhanced the control systems in the panels.
110. Please let us know if you would like us to make any documentation available to the Commission regarding this.

#### Huarong

111. Eskom commenced negotiation with the Chinese Huarong Energy Africa Proprietary Limited ("HEA") regarding a finance agreement styled as an Asset Development Framework Agreement ("ADFA") in late 2016 for funding from Huarong Asset Management ("Huarong"), one of the largest asset companies from China. The relationship between HEA and Huarong was not clear.
112. An RFI process was undertaken during this period. HEA submitted a response to this RFI but Eskom officials engaged with Huarong and HEA prior to this and concerns were raised internally with this process.
113. A Request for Proposals process was also followed in 2017 which in May 2017 authorized negotiation but not conclusion of an agreement with HEA. However, prior to this the former CFO, Mr Anoj Singh, signed a term sheet in March 2017 binding Eskom to a US\$1.5 Billion facility.



114. Under ongoing pressure from Mr Ben Ngubane the Chairman of the Eskom Board at the time and following a meeting with Ms Lynne Brown, former Minister for Public Enterprises the former Interim Group Chief Executive of Eskom, Mr Sean Maritz, executed the ADFA in October 2017 (shortly after Mr Johnny Dladla was removed as the Interim Group Chief Executive Officer) in the face of internal advice against this and without the requisite authority and approvals from the board, the Minister of Public Enterprises or National Treasury. The ADFA was for a framework to enable future negotiation on a US\$ 500 000 000.00 asset development loan facility with Huarong ostensibly to assist with Eskom's liquidity position at the time. Mr Maritz also signed a Fee Letter on the same day committing Eskom to an immediate payment to HEA of US\$21 888 000.00 or approximately R340 million.

115. Both Mr Singh and Mr Maritz resigned when they were confronted with this transaction, the latter after the commencement of a disciplinary process in which charges were made against him related to the conclusion of the ADFA and Fee Letter. No payments were made to HEA under the Fee Letter.

116. Eskom does not consider itself bound by the ADFA or the Fee Letter and this was communicated to HEA by the newly appointed CEO Mr Phakamani Hadebe.

117. This case is currently being investigated by the SIU and the Hawks.

118. Please let us know if you would like us to make any documentation available to the Commission regarding this transaction.



**Dongfang**

119. This matter is the subject of ongoing assessment and investigation including by the SIU and the Hawks.

120. Eskom awarded the tender for the Duvha Unit 3 Recovery Project to Dongfang after an open tender. The contract was signed on 28 March 2017. Alstom t/a General Electric (GE), an unsuccessful tenderer, brought an urgent court application against Eskom to stop Eskom and Dongfang from implementing the contract awarded to Dongfang pending the review application which seeks to set aside the award. Murray & Roberts Shanghai Electric Consortium (MRSEC), another unsuccessful tenderer, intervened in the application for the same purpose.

121. The BEE Commission also issued a draft report with findings that Dongfang did not comply with the BBBEE Act on 12 March 2018. The recommendation made in this draft report have been implemented by the New Board.

122. The matter is still proceeding in the Pretoria High Court and additional information can be made available on request.

**IX. CONCLUDING COMMENTS BY THE BOARD**

123. The new Board's observation is that there was previously a culture of corrupt practices, mismanagement and malfeasance that has been inculcated in Eskom by certain individuals in Eskom over a period of time. The issues of impropriety within Eskom seemingly extend



beyond the matters which are under investigation by the Commission. This was clearly a pervasive culture and was sanctioned from within the Board, the Executive and Senior Management. The 'fish rots from the head'.

124. The new Board had to strike a balance between dealing with the past irregularities which it found at Eskom and building a capable, strong organization able to carry out its public mandate.

125. In addition to what has been described above, the audit qualification recovery program was a key part of Eskom's efforts to rectify past irregularities, this has seen a greater number of irregularities surface, the new Board has come to understand the following:

- a. Procurement processes and people are at the centre of the challenges;
- b. The internal controls have not been effective;
- c. The system and practices are not set up for proper accountability and consequence management;
- d. Some of our policies are too vague and lend themselves to loopholes that can be abused; and
- e. There were lapses in governance wherein the roles of the shareholder, the board and the executive often overlapped and flouted best corporate governance practices.

126. Any process of renewal and ridding the organization of impropriety, whether state capture related or not, needs to solve the aforementioned. An Audit recovery Progress Report dated 24 December 2018 is attached for information marked **Annexure H**.


127. The new Board continues to focus on rooting out impropriety and dealing decisively with affected and implicated employees through internal processes and also in partnership with law enforcement agencies when our ambit is limited.



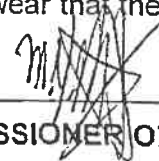
128. The new Board believes that much has been and will be revealed through the various inquiries but would recommend that the Executives listed above referred to law enforcement agencies, be brought to account as soon as possible. Not least as the financial markets upon which Eskom is dependent, desire to see legal consequences for the malfeasance revealed.

129. The new Board also believes that the previous board members of Eskom need to answer questions about their decisions that were not in compliance with the law and the fulfilment of their fiduciary duties questioned.

130. The challenges that Eskom faces today which pose systemic risks to the economy, have had a lot to do with decisions that were made, not in the interests of the company but instead to further certain other interests and for that reason there must be accountability by those involved.

  
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JABULANE ALBERT MABUZA

I CERTIFY that this affidavit was signed and sworn to before me at JOHANNESBURG on this the 16<sup>th</sup> day of January 2019 by the deponent who acknowledged that he knew and understood the contents of this affidavit, had no objection to taking this oath, considered this oath to be binding on his conscience and who uttered the following words: "I swear that the contents of this affidavit are true, so help me God".

  
\_\_\_\_\_  
COMMISSIONER OF OATHS  
Name  
Address :  
Capacity :

MOHAMMED YOUSUF RAVAT  
LEGAL CONSULTANT LARGE BUSINESS  
COMMISSIONER OF OATHS EX OFFICIO  
SARS LARGE BUSINESS CENTRE  
MEGAWATT PARK  
MAXWELL DRIVE  
SUNNINGHILL  
2157

16/01/19