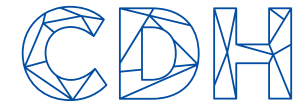


# Banking, Finance & Projects and Projects & Energy

ALERT | 12 September 2024



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## Power struggle: Eskom's bid to reserve grid capacity denied

On 6 May 2024, Eskom submitted an application to the National Energy Regulator of South Africa (NERSA) in terms of section 21(2) of the Electricity Regulation Act 4 of 2006 (ERA), seeking NERSA's approval to reserve and preserve grid connection capacity in favour of any project procured in terms of a ministerial determination published under section 34 of the ERA.

If approved, the consequences of the application would have appeared to abandon Eskom's 'first ready, first served' principle under the Interim Grid Capacity Allocation Rules (IGCARs) by allowing Eskom to discriminate between private and public market customers through the reservation or preservation of grid capacity in favour of the latter. Of major concern, however, was the unrestricted scope of the application, which, if approved, would grant Eskom unrestricted discretion to favour public projects for the foreseeable future. For more detail on Eskom's arguments, see our previous alert on the application [here](#).

NERSA invited the public to submit comments on the application, which was followed by a public hearing on 5 July 2024. Given the timeframes, the application extended the bid submission date for Bid Window 7 of Renewable Energy Independent Power Producer Programme (REIPPPP) to 15 August 2024. On 3 August 2024, NERSA refused Eskom's application.

### NERSA's decision

As noted, the application was brought under section 21(2) of the ERA, which requires that a licensee may not discriminate between customers or classes of customers regarding access, tariffs, prices and conditions of service, except for objectively justifiable and identifiable differences approved by NERSA.

In reaching its decision, NERSA found that Eskom had failed to objectively justify discriminating between public and private market energy projects in respect of access to grid capacity, highlighting that Eskom did not identify the specific customers or classes of customers that would be disadvantaged by the proposed policy.

While the application would have compromised the ability of the private sector to fairly compete for grid capacity (and thus continue to participate in the market at all), NERSA's decision has been met with some scrutiny. As also noted by Eskom in the application, there are concerns over the viability of future of public procurement programmes, in particular the REIPPPP, that are considered instrumental in stimulating socio-economic development and contributing towards energy security.

It is understood that industry wanted NERSA to strike a balance between competing interests by approving the application subject to a more restricted scope. However, the legal deficiencies highlighted in NERSA's decision mean that the application was ultimately materially flawed and thus unlikely to succeed regardless of its merits.

## Power struggle: Eskom's bid to reserve grid capacity denied

CONTINUED

### Conclusion

Reports on the bid responses submitted for Bid Window 7 of the REIPPPP indicate that there has, yet again, been an undersubscription for wind power. Whether the narrative would have been different had the application succeeded is unclear.

For now, NERSA's decision retains the status quo, with applications for grid capacity to be assessed on a 'first ready, first served' basis as contemplated under the IGCARs.

**Alecia Pienaar, Deepesh Desai and Azola Ndongeni**



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**BBBEE STATUS: LEVEL ONE CONTRIBUTOR**

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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