

NATIONAL ENERGY REGULATOR OF SOUTH AFRICA

In the matter regarding

A REVOCATION APPLICATION

by

OILTANKING GRINDROD CALULO (PTY) LTD

of its combined licences issued for the construction and operation of petroleum storage facility and marine loading facility, with auxiliary pipelines within the

PORT OF NGQURA, GQEBERHA, EASTERN CAPE PROVINCE

Licence Number: **PPL.SF.F1/102/2011/AM5 and PPL.SF.F3/121/2013**

THE DECISION

On **06 December 2021**, the National Energy Regulator of South Africa (NERSA or ‘the Energy Regulator’) approved the revocation of the combined licences issued to Oiltanking Grindrod Calulo (Pty) Ltd (‘OTGC’) for the construction (Licence Number: PPL.SF.F1/102/2011/AM5) and operation (Licence Number: PPL.SF.F3/121/2013) of the storage facility and marine loading facility, with auxiliary pipelines located within the Port of Ngqura, Gqeberha, Eastern Cape Province.



Adv. Nomalanga Sithole

Chief Executive Officer

National Energy Regulator of South Africa

REASONS FOR DECISION

BACKGROUND

1. On 14 December 2011 and 10 June 2013, the Energy Regulator issued combined licences to OTGC for the following activities within the Port of Ngqura, Gqeberha, Eastern Cape Province, (GPS coordinates 33°47'52.29" South and 25°40'18.17" East) respectively:
 - a. Construction of a petroleum storage facility and a marine loading facility, with its auxiliary pipeline (Licence Number: PPL.SF.F1/102/2011/AM5); and
 - b. Operation thereafter of this petroleum storage facility and a marine loading facility, with its auxiliary pipelines (Licence Number: PPL.SF.F3/121/2013).
2. The construction of these petroleum import facilities at the new Port of Ngqura, and operation on completion thereof, were meant to replace the current licensed import facilities located at the Dom Pedro Oil Complex, in Gqeberha Harbour, Gqeberha, Eastern Cape Province. Transnet National Ports Authority's (TNPA) envisaged that the facilities in Dom Pedro will be shut-down in 2014, and be demolished, with the intention of converting the harbour area into a waterfront, which features a shopping mall and other amenities. However, the closure of Dom Pedro has been postponed more than once and the latest official date communicated, was December 2021.

THE CURRENT APPLICATION

3. Subsequently, on 06 July 2021, OTGC submitted two applications to the Energy Regulator for the revocation of the combined licences under consideration herein. These applications were submitted on the basis that *"the licensed facility or activity is not economically justifiable"* in terms of section 24(1)(b).
4. The applications were assessed for completeness and found to be inadequate for further processing and NERSA requested supporting documentation/information from OTGC on 29 July 2021. Subsequently, all the requested additional information and documents were submitted by OTGC on 04 August 2021. The applications were then found to meet the requirements prescribed in the Petroleum Pipelines Act Rules, 2019 ('the Rules') and considered to be adequate for further processing and on 10 August 2021.

THE LICENSEE

5. Oiltanking Grindrod Calulo (Pty) Ltd is a limited liability joint-venture company incorporated in terms of the company laws of South Africa, with registration number 2008/025681/07.
6. The shareholding in the OTGC joint venture is as follows:
 - a) Oiltanking GmbH (Germany) – ■%;
 - b) Grindrod South Africa (Pty) Ltd – ■%;
 - c) Calulo Terminals (Pty) Ltd (South Africa) – ■%; and
 - d) Adopt-a-School Foundation – ■%
7. According to OTGC's website, the joint-venture company combines Oiltanking's global expertise in the field of bulk liquids handling, with local expertise and the full Broad-Based Black Economic Empowerment ('BBBEE') credentials of Grindrod South Africa (Pty) Ltd and Calulo Terminals (Pty) Ltd. Through direct holdings via Calulo and indirect holdings via Grindrod South Africa, the joint-venture is a fully empowered entity with a level 2 BBBEE classification.

FACILITY DETAILS

8. The details of the petroleum products storage facility and auxiliary equipment ("the storage facility") located at: **Oiltanking Grindrod Calulo Terminal, Zone 8, Coega IDZ, Port of Ngqura, Gqeberha, Eastern Cape Province**, are contained in Table 1 below, while Figure 1 shows the site layout.

Table 1: Tank Details and allocation

Tank No.	Tank Type	No of Tanks	Product	Individual Tank Capacity (m ³)	Total Capacity (m ³)	Diameter (m)	Height (m)
T C01-C04	Internal floating roof	4	Petrol	11,500	46,000	27.57	19.2
T BO2	Internal floating roof	1	Petrol	6,000	6,000	21.44	16.4

Tank No.	Tank Type	No of Tanks	Product	Individual Tank Capacity (m ³)	Total Capacity (m ³)	Diameter (m)	Height (m)
T C05-C08	Internal floating roof	4	Diesel	11,500	46,000	27.57	19.2
T B01	Domed roof	1	Diesel	6,000	6,000	21.44	16.8
T A01 & A02	Domed roof	2	Jet Fuel	2,300	4,600	15.03	12.0
T A03 – A04	Domed roof	2	Kerosene	1,200	2,400	11.31	12.0
T D01 – D02	Domed roof	2	Fuel Oil	5,600	11,200	18.10	21.6
Total		16			122,200		

Figure 1: Site Layout (Confidential in its entirety)

9. A petroleum product loading facility and auxiliary pipelines ("the loading facility") located at: **Berth 100, Port of Ngqura, Gqeberha, Eastern Cape Province** as follows:
- Four, 12-inch diameter loading arms capable of handling an average of nine vessels (40 000 DWT) a month;
 - Three, 24-inch diameter and approximately 3 kilometres long berth pipelines between the Berth 8100 and the storage facility, with bi-directional flow possible, and capable of a maximum design flow rate of 3 000 cm³/hour; with an average achievable transfer rate for each of the loading arms ranging from 350 to 1 000 cm³/hour depending on the product and vessel; and
 - Auxiliary infrastructure in the berth area including piping, valves, equipment safety containment systems etc.

BRIEF HISTORY OF THE LICENCE

10. To date, the Energy Regulator has amended the OTGC construction licence conditions 5 (five) times, all on application by the licensee in terms of section 23(1)(a) of the Act.

The details of these amendments are detailed in Table 2 below:

Table 2: OTGC Amendments between 2012 and 2019

AM No.	Approval Date	Amendments
1	27-Sep-12	<u>Change of Facility details:</u> number of tanks, product allocation (including 19 LPG tanks) and combined storage capacity increased by 50 000m ³ . No change to construction schedule.
2	27-Feb-14	<u>Extension of the commencement date of construction:</u> 11.1 Construction of the facilities must commence within- a) 6 months of the date that the Energy Regulator confirms in writing that it has received from the licensee proof that the licensee has the necessary authorisation from the Transnet National Ports Authority to construct the licensed activities; or b) 6 months from receipt by the Licensee of a final positive Record of Decision from the relevant environmental authorities in accordance with the National Environmental Management Act, 1998 (Act No. 107 of 1998) permitting the activities for which this licence is granted whichever is the latter and in any event within twenty-eight (28) calendar months of the date of issue of this licence. 11.3 The construction of the facilities must be completed and ready for operation within forty months of the commencement of construction date contemplated in condition 11.2(b).
3	17-Jun-2015	<u>Extension of the commencement date of construction:</u> 11.1 Construction of the facilities must commence within: a) 16 months of the date that the Energy Regulator confirms in writing that it has received from the licensee proof that the Licensee has the necessary authorisation from the Transnet National Ports Authority (TNPA) to construct the licensed activities; and in any event within fifty-seven (57) calendar months of the date (14 December 2011) of issue of this licence.
4	17-Nov-2016	<u>Extension of the commencement date of construction:</u> 11.1 Construction of the facilities must commence within: a) 16 months of the date that the Energy Regulator confirms in writing that it has received from the

AM No.	Approval Date	Amendments
		licensee proof that the Licensee has the necessary authorisation from the Transnet National Ports Authority to construct the licensed activities; and in any event within seventy (70) calendar months of the date (14 December 2011) of issue of this licence.
5	30-May-2018 (not approved)	<u>Extension of the commencement date of construction and tariff application:</u> <i>'Three (3) calendar months of the date of final approval of the National Energy Regulator of South Africa's (NERSA) tariff for the Oiltanking Grindrod Calulo's Ngqura terminal.'</i> The Energy Regulator decided not to approve the amendment.
	25 September 2019	<u>Extension of the commencement date of construction and change of facility details:</u> 11.1 Construction of the facilities must commence within: a) 16 months of the date that NERSA confirms in writing that it has received from the licensee proof that the licensee has the necessary authorisation from the TNPA to construct; in any event within seventy (70) calendar months of the date of issue of this licence'. Ninety-one (91) calendar months of the date (14 December 2011) of issue of this licence; by 14 July 2019. b) Secondly, the amendment also seeks to amend the products, number of storage tanks and capacities of storage tanks to be constructed

REASONS FOR THE REVOCATION

11. The application was made in terms of section 24(1)(b) of the Act, which states that "*the Authority [Energy Regulator] may revoke a licence on the application of a licensee if - the licensed facility or activity is not economically justifiable*".

APPLICANT'S MOTIVATION FOR THE REVOCATION

12. In its application, OTGC stated that the reason for the revocation was the inability to secure customer commitments for the utilisation of the petroleum facilities. Oiltanking

Grindrod Calulo stated that it was unable to achieve any formal storage agreements with prospective customers, consequently the project was not economically viable and has been discontinued.

APPLICABLE LAW

13. The legal mandate for the Energy Regulator to revoke a licence it has issued is derived from the National Energy Regulator Act, 2004 (Act No. 40 of 2004) read together with the Act.

DECISION MAKING PROCESS

Confidential Treatment of Information

14. OTGC did not submit any request for the confidential treatment of any information contained in its revocation applications, in terms of Rule 4 of the Petroleum Pipelines Act Rules, 2019 ('the Rules'). However, the application contains the identity number and personal contact numbers of OTGC's mandated representative.
15. On 13 August 2021, in terms of section 2(a) of the Petroleum Pipelines Delegation Matrix approved by the Energy Regulator on 03 June 2021, the Energy Regulator decided to treat the following information in the application as confidential:
- a. Details of mandated representative (Personal mobile numbers); and
 - b. Identity number of mandated representative on Solemn Declaration.

Public Consultation

26. As required by section 4 of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) ('the PAJA') read with the Act and the Rules, NERSA published notices of the application on 26 August 2021 in the *Business Day* and in the *Sake24 - Beeld* and *Die Burger* newspapers. These notices invited members of the public to submit written comments and/or objections on the application to the Energy Regulator by 8 October 2021.
27. The non-confidential version of the application was made available for public viewing at OTGC's offices. The application was also published on NERSA's website for the duration of the public consultation period.

28. Due to the ongoing COVID-19 pandemic, NERSA decided not to conduct public hearings as a means of stakeholder participation process. Instead, NERSA utilised the notice and written comments process in accordance with section 4(1) of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) (PAJA), to satisfy the public consultation requirements of section 10(1)(d) of the National Energy Regulator Act, 2004 (Act No. 40 of 2004) read with PAJA. However, if any objections or comments were received from stakeholders during the public consultation process, a virtual public hearing would be held. This application received no written comments and, as such, no public hearing was scheduled for the application under consideration.

NERSA ANALYSIS

29. The following issues have been identified as key issues for consideration:

- a) OTGC's motivation for the revocation;
- b) Eastern Cape Storage Market; and
- c) Challenges with investment in the storage market.

OTGC's motivation for the revocation

Application

30. OTGC stated that the project was unable to proceed due to a lack of sufficient customer commitment. OTGC was unable to achieve any formal storage agreements with prospective customers; consequently, the project was not economically viable and has been discontinued. Further, the Built-Own-Operate-Transfer (BOOT) agreement with Transnet National Ports Authority (TNPA) for the project has lapsed.

NERSA's View

31. In terms of section 24(1)(b) of the Act, *"the Authority [Energy Regulator] may revoke a licence on the application of a licensee - if the licensed facility or activity is not economically viable"* [own emphasis].

32. NERSA is of the view that OTGC has submitted all the information required by the Rules. The information submitted by OTGC shows that the licensed activities are no longer required for petroleum usage by its customers. The amendments for the extension of the commencement of construction that OTGC applied for since the licence was issued by NERSA in December 2011, are a clear indication that this project

experienced challenges and might not proceed given the uncertainty/risk to make such a large investment without firm storage agreements in place. Coupled with this was the request from OTGC for an “indicative tariff” prior to construction, which was meant to lure potential customers and/or evaluate the financial viability of this project, albeit the fact that the OTGC joint-venture consisting of financially capable partners and global experience in developing such terminals, as submitted in the original application.

33. However, the Energy Regulator does not approve or set “indicative tariffs”, while OTGC and potential customers needed certainty on the tariff to try secure customers and make a final investment decision on the project, which the company committed to when applying for the concession with TNPA as well as the necessary NERSA licences.

34. Since NERSA issued OTGC with a construction licence in December 2011, it was granted an Environmental Authorisation, finalised and signed the BOOT agreement with TNPA. It finalised the facility design, cleared and fenced off the proposed site and commence with the civil works on the site, at risk pending finalising customer agreements. There have not been any further construction activities since then, and the challenges as highlighted resulted in the applications to extend the commencement of construction to mitigate non-compliance with the conditions of licence.

35. These developments happen with full knowledge of TNPA intent to shut-down the current Dom Pedro petroleum import facilities, with the aim of relocating them to the proposed OTGC facilities within the Port of Ngqura. OTGC since decided that the project is not viable any longer, given the risks/circumstances, and therefore not to proceed with the project. The BOOT agreement was terminated. This meant that another party had to take over this project and initially TNPA has indicated interest. Therefore, it is necessary to revoke the OTGC licences in order to afford another willing and able party to take-over the responsibility of constructing and operating the proposed replacement petroleum facilities in the Port of Ngqura.

Eastern Cape Storage Market and Logistics

Table 3: Licensed facilities in the Eastern Cape

Licensee	City /Town/ Area	Facility Status	Date of Approval	Combined Design capacity (m ³)	Petroleum Products
Astron Energy (Pty) Ltd	East London	Operational	06-Dec-2016	21 115	Petrol; Diesel
Astron Energy (Pty) Ltd , Engen Petroleum Ltd & Total SA	Port Elizabeth (Dom Pedro)	Operational	06-Dec-2017	61 027	Petrol; Diesel
BP Southern Africa (Pty) Ltd	East London	Operational	22-Sep-2014	63 001	Diesel/Petrol; JetA1/IP
BP Southern Africa (Pty) Ltd	Port Alfred	Operational	18-Aug-2008	60	Avgas
BP Southern Africa (Pty) Ltd	East London	Operational	18-Aug-2008	355	Avgas; Jet A-1
EasiGas (Pty) Ltd	Port Elizabeth (Dom Pedro)	Operational	09-Dec-2013	4 016	LPG
EasiGas (Pty) Ltd	Port Elizabeth	Operational	15-Apr-2010	315	LPG
Engen Petroleum Limited	East London	Operational	07-Oct-2020	41 049	ULP 95; ADO 50; IK
Engen Petroleum Limited	Port Elizabeth (Dom Pedro)	Operational	07-Oct-2020	9 628	HFO
Engen Petroleum Limited	Aliwal North	Operational	07-Oct-2020	972	IK; ADO50; ULP95
Engen Petroleum Limited	Cedarville	Operational	07-Oct-2020	1 162	ADO 50; ULP 95; IK
Engen Petroleum Limited	Elliot	Operational	07-Oct-2020	906	ADO50; ADO; IK
Engen Petroleum Limited	Queenstown	Operational	07-Oct-2020	1 367	ADO50; IK
FFS Refiners (Pty) Ltd	Patterson	Operational	08-Jan-2010	318	Used Lube oil
Shell Downstream SA (Pty) Ltd	Port Elizabeth (Dom Pedro)	Operational	10-Jun-2016	39 540	Jet A1; Diesel(LSD), ULSD; ULP95; IP
Total South Africa (Pty) Ltd	East London	Operational	24-Jan-2018	20 965	Diesel; ULP95

Note: Dom Pedro facilities highlighted in grey

36. As shown in Table 3, Astron, EasiGas, Engen and Shell will be affected by the closure of Dom Pedro; the total design capacity of 114,211m³ will be impacted as a result.

37. These companies informally indicated that they would rather road freight petroleum products from Mossel Bay, Western Cape and East London, Eastern Cape, which might not be sustainable or adequate. Mossel Bay, which is about 400km from Gqeberha, has a combined import capacity of about 185,404m³, which consists of both Shell Downstream SA (Pty) Ltd and PetroSA SOC Ltd. While East London import facilities, which is about 300 km away and supplies areas as far as Queenstown, has a combined capacity of approximately 123,169m³. These facilities may seem enough to cater for the

Gqeberha area as well but there is the increased safety risk associated with road freighting petroleum products for such distances, plus the number of trucks required.

38. In addition to the aforesaid, the operations of the Dom Pedro import petroleum facilities, with a combined design capacity of approximately 124,336 m³, were meant to be replaced with these facilities within the Port of Ngqura with a combined licensed storage capacity of approximately 122,200 m³. Out of the eight TNPA controlled harbours in the country, the Port of Ngqura is the newest and a home to the Coega Industrial Development Zone, in which the new replacement OTGC import storage and marine loading facilities were supposed to be located.
39. This revocation, even if it is necessary, will reduce the country's import capability, especially in the Eastern Cape province area, unless another party decides to embark of such project.
40. Alternatively, fuel in Gqeberha will have to be road hauled from import facilities in East London and Mossel Bay, which are about 300 km and 400 km away from Gqeberha, respectively. This exercise will increase the safety risks, which are being avoided if imports can be done via the Port of Ngqura. Consideration also needs to be given to the ability of the storage and marine loading facilities in both Mossel Bay and East London to handle the increased traffic in order to cater for the additional demand from the Gqeberha area.
41. This can result in constraints for fuel supply in both Gqeberha and the Eastern Cape province. It is therefore imperative that Gqeberha has its own affordable import petroleum facilities, in order to prevent a supply crisis. As long as OTGC holds the licence, it may prevent other parties to apply. Therefore, the revocation of the OTGC licences are justifiable.

Challenges with investment in the storage market

16. Manufacturing, distribution and retailing of liquid fuels has been regulated by the South African government in diverse ways. Over time, the instruments used for regulation have differed, but it has been observed that the main objective of regulation has been to facilitate and support investment in various parts of the value chain.

17. There are however various barriers to investment such as strategic, structural barriers and regulatory barriers¹. The discussion below is on the impact of regulatory barriers on the investment in the storage market.
18. The DMRE used various methodologies to determine margins such as the “PAR” introduced in 1984 and the Marketing of Petroleum Activities Return (MPAR) introduced in 1990. The underlying basis for the methodologies was to incentivise investment in the downstream petroleum industry. The Regulatory Accounting System (RAS) was introduced in 2013 and margins are reviewed annually in December by the DMRE. The retail margin was the biggest component of the RAS, with the wholesale, secondary storage and secondary distribution margins being of less consequence².
19. It has been observed that market related pricing is not provided for by RAS. Over time, since NERSA was established in 2005, investment in storage facilities has been decreasing. From the implementation of RAS to date, 82 facilities were removed from the market. Of the storage facilities removed from the market, 66% were facilities previously owned by oil companies that were licensed by NERSA during the transitional period.
20. Based on the investments by large independent storage operators such as Burgan in the Western Cape and Vopak in KwaZulu-Natal in the past five years, there has been interest in the liquid fuels storage market. However, the interest can only be expected to grow if the pricing framework regulated by the DMRE and the tariffs determined by NERSA are reviewed and aligned, because the current price regulatory framework does not facilitate or incentivise investment. The tariffs determined by NERSA are said to be too high compared to the storage margins determined through the RAS.
21. According to the Liquid Fuels Wholesalers Association (LFWA), in July 2013 at the Parliamentary Portfolio Committee meeting for Energy on the downstream liquid fuels sector, the wholesale and storage margins did not include all the costs or the actual costs of servicing the market. In its director’s report of June 2018, the LFWA stated that pricing mechanisms did not reflect the change in the industry over the last 20 years, and this threatened the sustainability of independent operators and new entrants. Control still

¹Paelo, A., Genna, R. and Vilakazi, T. (2017) ‘Competition and incumbency in South Africa’s liquid fuel value chain’, in Jonathan Klaaren, S. R. and mraan V. (ed.) *Competition Law and Economic Regulation in Southern Africa*. Wits University Press, pp. 172–188.

² Crompton, R., Sing, M. and Filter, V. (2020). *Petrol price regulation in South Africa Is it meeting its intended objectives?* 140. Available at: <https://sa-tied.wider.unu.edu/sites/default/files/SA-TIED-WP-140.pdf>.

rested with oil companies and, if changes were not made to regulation, the sustainability of independent participants would be at risk (LFWA, 2018³).

22. Concerns around the DMRE storage margins compared to the NERSA storage tariffs were also raised in the Tariff Application for Vopak Terminal Durban (Pty) Ltd for petroleum storage facilities located in Island View, Durban KwaZulu-Natal decided on by NERSA in May 2021. Comments received from participants in the market were that NERSA tariffs do not consider the recovery mechanism for independent storage tariffs, storage tariffs exceeded the recoveries allowed through the DMRE fuel pricing framework and storage tariffs are not feasible for customers.
23. The response provided by NERSA to the comments raised in the Vopak tariff application, is that there are engagements taking place as part of regulatory advocacy for policy amendment to consider alignment between storage margins determined by the DMRE and storage tariffs determined by NERSA.
24. Tariffs determined by NERSA often exceed allowed recoveries through the coastal storage and service differential. Due to the large sunk costs, storage facility investors like OTGC have to either secure customer commitment with refining or independent wholesalers/importers before constructing or acquiring a facility that had previously been owned by an oil major - like Royale Energy Terminals has done, to be guaranteed to earn a reasonable return and be profitable.

CONCLUSION

26. Oiltanking Grindrod Calulo (Pty) Ltd's application for revocation of the combined licences issued to it for the construction and operation of a petroleum storage facility and a marine loading facility, with its auxiliary pipelines within the Port of Ngqura, Gqeberha, Eastern Cape Province, meets the requirements for consideration, in terms of the Rules.
27. On the conspectus of facts and evidence, it is appropriate and in compliance with the requirements of section 10 (1) of the National Energy Regulator Act, 2004 (Act No. 40 of 2004) to approve the revocation of the combined licences issued to OTGC for the construction (Licence Number: PPL.SF.F1/102/2011/AM5) and the operation (Licence

³ LFWA. (2018). *Equality of Misery LFWA*. Sandton Gauteng. Available at: <http://lfwa.co.za/sample-post/>.

Number: PPL.SF.F3/121/2013) of the petroleum storage facility and marine loading facility, with auxiliary pipelines within the Port of Ngqura, Gqeberha, Eastern Cape Province.