

**ESKOM'S FIFTH MULTI-YEAR PRICE DETERMINATION REVENUE  
APPLICATION FOR 2023 TO 2025 FINANCIAL YEARS**

**CONSULTATION PAPER**

**December 2021**

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## **Abbreviations and Acronyms**

EPP	Electricity Pricing Policy
ERA	Electricity Regulation Act, 2006 (Act No. 4 of 2006)
GWh	Giga Watt hours
IPP	Independent Power Producer
IRP	Integrated Resource Plan
M&V	Measurement and Verification
MEAV	Modern Equivalent Asset Value
MIRTA	Minimum Information Requirements for Tariff Applications
MWh	Mega Watt hours
MYPDM	Multi-Year Price Determination Methodology
NERA	National Energy Regulator Act, 2004 (Act No. 40 of 2004)
NERSA	National Energy Regulator of South Africa
O&M	Operating and Maintenance
OCGT	Open Cycle Gas Turbine
RAB	Regulatory Asset Base
RCA	Regulatory Clearing Account

## **1. Executive Summary**

- 1.1. The Multi-Year Price Determination (MYPD) is a process of determining allowable revenues for Eskom over a predetermined control period. The MYPD is based on a cost-of-service, rate of return-based methodology, the Multi-Year Price Determination Methodology (MYPDM), which provides the regulated entity with an opportunity to recover prudent costs and achieve a reasonable return. The application of the MYPDM should incentivise cost savings and efficient and prudent procurement by the licensee (Eskom). This process is a basis for determining tariffs for various customer categories. To ensure that electricity prices in South Africa are implementable by 1 April 2022, Eskom is required to table in Parliament the National Energy Regulator of South Africa (NERSA) approved tariff before 15 March 2022.
- 1.2. The multi-year price determination (MYPD) is developed as a guide to the Regulator in the regulation of electricity supply industry in a manner that could be deemed rationale and would result in predictable and stable prices. It forms the basis on which the National Energy Regulator (NERSA) will evaluate the price adjustment for Eskom over a multi-year period and becomes the de facto price path. The validity period of the current MYPD4 pricing methodology will be ending on the 31<sup>st</sup> of March 2022,
- 1.3. Eskom's MYPD5 revenue application has been developed using the MYPD4 methodology that NERSA published in October 2016. NERSA rejected this application, part of which was successfully challenged by Eskom as part of a high court review of the NERSA decision. Judge Kollapen's high court order of the 3 December 2021 (see 2.7), extended the application of the MYPD4 methodology for the 2022/23 year in the absence of a revised MYPD5 methodology, due to be published in 2022.
- 1.4. In compliance with the court order, the revenues and tariff decisions that will be determined by NERSA for the 2022/23 year, will be implemented from 1 April 2022 for non-municipal customers and from 1 July 2022 for municipal customers. The revenue/tariff determination will be completed by the 25 February 2022, as per the timelines outlined in 9.4.

## **2. Introduction**

- 2.1 In performing its duties to review regulatory tools, set tariffs, and evaluate Eskom application, NERSA is guided by, amongst others, the Electricity Regulation Act, 2006 (Act No. 4 of 2006) ('the ERA'), the Electricity pricing policy (EPP) and the regulatory framework.

- 2.2 According to the ERA, NERSA's regulatory framework requires the achievement of several objectives, which include:
- 2.2.1 safeguarding the needs of customers;
  - 2.2.2 achieving the efficient, effective and sustainable development of electricity supply infrastructure;
  - 2.2.3 facilitating investment;
  - 2.2.4 promoting universal access;
  - 2.2.5 promoting competitiveness and customer and end user choice, and importantly; and
  - 2.2.6 facilitating a fair balance between the interests of customers and end users, licensees, investors in the electricity supply industry and the public.
- 2.3 Thus, in setting tariffs NERSA has a broader set of objectives to consider. As some of these objectives may work in different directions, a balancing process is required
- 2.4 Eskom submitted its MYPD5 application (see Annexure A) on 2 June 2021. In this application, Eskom requests to be allowed R279 billion for the 2023 financial year (FY), R334 billion for FY2024 and R365 billion for FY2025. However, the court order was for FY2023, and as such, this consultation paper will focus on the R279 billion for FY2023.
- 2.5 The Energy Regulator, at its meeting held on 30 September 2021 considered and approved a recommendation by the Electricity Subcommittee and made a decision to reject Eskom's MYPD5 Revenue application and request Eskom to reapply for an interim tariff in terms of one of four options presented to it, one of which was submission of a revised application based on MYPD5 principles as had been done in past transitions from one MYPD control period to another, to take account of the changes in the electricity industry and shortcomings in the previous MYPD control periods.
- 2.6 This decision of the Energy Regulator was challenged by Eskom in court on the basis that, in the absence of any updated and published MYPDM, the prevailing methodology from 2016 should be used. Essentially, Eskom sought relief in two parts (the full legal context can be found in clause 4 below):
- 2.6.1 Part A – semi-urgent application to set aside the NERSA decision and compelling NERSA to use the 2016 MYPDM for its 2022/23 revenue application and the judgment on this matter is in 2.7 below.

- 2.6.2 Part B – the setting aside of the NERSA decision to reject its revenue application for 2023/24 and 2024/25. Part B was not heard as part of the urgent matter, and no ruling was made.
- 2.7 The matter was heard by the Pretoria high court of South Africa before Judge Kollapen, J and the judgement was issued on 03 December 2021 as follows (also refer to Annexure B):
- 2.7.1 Eskom’s non-compliance with the Rules of Court relating to service and time periods and the practice manual of this Court is condoned and the matter is heard as one of semi-urgency in accordance with Rule 6(12) of the Uniform Rules of Court.
- 2.7.2 Eskom’s revenue application for the 2022/2023 financial year, submitted to NERSA on 2 June 2021, is to be decided by NERSA, on the timetable set out in 3 [2.7.3] below, in terms of the Multi-Year Pricing Determination Methodology published in 2016.
- 2.7.3 The following timetable shall apply to the decision described in 2 (2.7.2 above) above:
- 2.7.3.1 Eskom’s revenue application submitted on 2 June 2021 shall be published on 8 December 2021
- 2.7.3.2 The public shall have until 14 January 2022 to make representations, if any, on the content of Eskom’s application.
- 2.7.3.3 Public hearings on the merits of Eskom’s revenue application shall be held between 17 and 21 January 2022.
- 2.7.3.4 NERSA shall make a final decision on Eskom’s application by 25 February 2022.
- 2.7.3.5 The costs of Part A of the application be costs in Part B of the application
- 2.8 This court order provides NERSA with an opportunity to exercise its mandate in terms of tariff determination, considering the impact of its decision on the economy and the opportunity to revisit its regulatory framework.
- 2.9 In compliance with the court’s ruling, NERSA has developed this consultation paper to request stakeholders to comment on the FY2023 of the application, NERSA’s discretion when processing the application and its impact on the economy.

### **3. Legal Basis**

- 3.1 Section 4(c) of the National Energy Regulator Act, 2004 (Act No. 40 of 2004) (NERA) empowers and burdens NERSA with the responsibility to undertake the functions detailed in section 4 of the Electricity Regulation Act, 2006 (Act No. 4 of 2006) ('the ERA').
- 3.2 The ERA sets out the powers and functions of NERSA. Specifically relevant to this application is section 4(a)(ii), in which NERSA is empowered and required to regulate prices and tariffs.
- 3.3 In performing its mandated functions, NERSA is required to ensure that the following ERA objects are achieved:
  - a) The efficient, effective, sustainable and orderly development and operation of electricity supply infrastructure in South Africa;
  - b) The interests and needs of present and future electricity customers and end users are safeguarded and met, having regard to the governance, efficiency, effectiveness and long-term sustainability of the electricity supply industry within the broader context of economic energy regulation in the Republic;
  - c) Investment in the electricity supply industry is facilitated;
  - d) Universal access to electricity is facilitated;
  - e) The use of diverse energy sources and energy efficiency is promoted;
  - f) Competitiveness and customer and end user choice are promoted:  
and
  - g) A fair balance between the interests of customers and end users, licensees, investors in the electricity supply industry and the public is facilitated.
- 3.4 To facilitate compliance with the regulatory framework and create regulatory certainty regarding Eskom's revenue applications, NERSA developed a Multi-Year Price Determination Methodology in line with section 14(1)(g) of the ERA and Minimum Information Requirements for Tariff Applications (MIRTA) in line with section 14(1)(e) of the ERA, which are to be complied with by Eskom but do not restrain the exercise of discretion by the Energy Regulator when taking a decision.
- 3.5 Regarding the decisions of the Energy Regulator, section 10 of the ERA states the following:
  - a. 10. (1) Every decision of the Energy Regulator must be in writing and (a) consistent with the Constitution and all applicable laws; in the public interest; (c) within the powers of the Energy Regulator, as set out in this Act, the Electricity Act, the Gas Act and the Petroleum

Pipelines Act; taken within a procedurally fair process in which affected persons have the opportunity to submit their views and present relevant facts and evidence to the Energy Regulator;(e) based on reasons, facts and evidence that must be summarised and recorded; and explained clearly as to its factual and legal basis and the reasons therefor.

- b. 10 (2) Any decision of the Energy Regulator and the reasons therefor must be available to the public except information that is protected in terms of the Promotion of Access to Information Act, (Act No. 2 of 2000).
- c. 10 (3) Any person may institute proceedings in the High Court for the judicial review of an administrative action by the Energy Regulator in accordance with the Promotion of Administrative Justice Act, 2000(Act No. 3 of 2000).
- d. 10 (4) (a) Any person affected by a decision of the Energy Regulator sitting as a tribunal may appeal to the High Court against such decision(b)The procedure applicable to an appeal from a decision of a magistrate's court in a civil matter applies, with the changes required by the context, to an appeal contemplated in paragraph (a).

3.6 Section 10 (3) of the Energy Regulator Act is the legal basis for the decision of the Energy Regulator to be taken on judicial review by Eskom.

#### **4. Legal context of the MYPD5 application in terms of the court order.**

4.1 Eskom revenue approval process, is a process founded in terms of the legality principle and an approved methodology. The ERA sets out the principles which must be considered and the approved 2016 Methodology sets out the parameters which must be observed and complied with when applying and considering the application. The methodology is a living document which can be revised from time to time at the end of the decision period which it was applicable to.

4.2 It is moot that Eskom made an application on 02 June 2021 and also that the Energy Regulator rejected the consideration of such an application in September 2021. The decision to reject the consideration of the 02 June 2021 application is under judicial review in terms of National Energy Regulator Act and Promotion of Administrative Justice Act.

4.3 Eskom also brought a semi urgent application to compel NERSA to consider its 2022/23 revenue determination in terms of the Methodology as the Methodology remained valid and applicable. The relief sought by

Eskom was granted and NERSA is compelled to consider the 2022/23 revenue determination in terms of the Methodology.

- 4.4 The application which Eskom has brought to NERSA on 02 June 2021 consisted of three years' revenue determination, and the application which Eskom made to court seeking that NERSA be compelled to consider its application in terms of the 2016 Methodology was only related to 2022/23 period.
- 4.5 With the court having compelled NERSA to consider the 2022/23 in terms of the 2016 Methodology, NERSA does not have the discretion to consider the other two years of the application submitted on 02 June 2021 because, the other two years are still bound by the decision of the Energy Regulator of September 2021 to reject the three years' application.
- 4.6 NERSA cannot consider the other two years because of the recognised principle of *functus officio*. The founding law of NERSA does not allow it to revisit a decision that it has taken at its own instance. The expectation is that NERSA will implement the court order as it is otherwise NERSA risks being in contempt of court which may result in the Energy Regulator members appearing in court.
- 4.7 The court order did not appropriate or prohibit the powers of the Energy Regulator from exercising discretion when considering the application which discretion may be on, deviating from portions of the methodology if the strict application with result in irrational and unreasonable outcome or exercising a balancing act if the outcome will render the decision unreasonable when considering the objects of section 2 of the Electricity Regulation Act.
- 4.8 It is also important to take note that, the exercise of administrative powers is an act requiring fairness, balancing of interest, compliance with the law and reasonability. In the exercise of discretion, the Energy Regulator is encouraged to consult with Eskom where the discretion will be tantamount to deviation or would result in the change to the expected process or outcome. Consultation with Eskom will not be expected wherein the discretion is being exercised through an already approved regulatory instrument which one would have anticipated that it will be used.
- 4.9 The court could not interfere with the discretionary powers of the Energy Regulator as it would have been a violation of the standing legal principle of separation of powers. The law sets out the circumstances under which the courts can transcend the boundary of separation. Furthermore, the court could not have decided on what was not brought before it or argued on the day of the hearing as it would have exposed the judgement to review.

- 4.10 In a nutshell, the consideration of Eskom one-year revenue determination through the 2016 methodology is a consequence of a court order and not the discretion of the Energy Regulator. Despite it being a court order which compelled NERSA to process the application, the order did withdraw the requirement of section 10 of NERA and section 4 of PAJA which NERSA must comply with. Failure by NERSA to comply with the cited laws exposes the decision to judicial review.
- 4.11 Although only the Eskom revenue application is limited to projected revenue required to cover forecasted 2022/23 costs, there are a number of already approved revenues, court orders and pass through costs that would also need to be recovered in the FY 2022/23 revenue determination. These would also include recently approved and recently applied for RCAs, whose implementation periods have not been decided on by the Energy Regulator. These additional revenues are reflected in Table 8.1-1 below.

## **5. Scope of Consultation**

- 5.1. The court order only deals with Part A of the relief sought by Eskom and orders NERSA to determine Eskom's required revenue for the 2022/23 financial year - as outlined in 2.6. NERSA, however, rejected Eskom's MYPD5 application in its entirety on the 30 September 2021, consequently until Part B is heard, the rejection of the remaining years of the MYPD5 application remain in force until a court has reviewed the NERSA decision on the 2023/24 and 2024/25 financial years of the application and made a judgement.
- 5.2. Stakeholders are therefore requested to comment on the following three areas:
- 5.2.1. The Eskom MYPD5 revenue application, but only for FY 2022/23,
  - 5.2.2. NERSA's discretion when applying the MYPD4 methodology, and;
  - 5.2.3. The impact of Eskom's application considering the already approved RCAs.
- 5.3. The questions are raised for each area identified and stakeholders are requested to comment on each question raised.

## **6. Comments on the FY2022/23 of the Application**

- 6.1. Eskom's revenue application amounts to R279 billion for 2022/23, and the main drivers of this application are:
- regulatory asset base (RAB);
  - primary energy;
  - independent power producers (IPPs);

- operating costs; and
- depreciation.

**Stakeholder Question 1:**

- a) Stakeholder are requested to Comment on the 2022/23 financial year of the Eskom application, attached as Annexure A.

## **7. NERSA's Discretion in Applying the MYPD4 Methodology**

- 7.1. This application is made based on the MYPD4 methodology which has its own limitations. The methodology is not law; however, each time NERSA has to deviate from applying its requirement, NERSA is required to observe the audi alteram partem principle
- 7.2. NERSA applies the established Revenue Requirement methodology to allow certain costs/expenses in order to set Eskom's tariff. The methodology is founded on three regulatory principles that determine whether utilities will be provided with an opportunity (not an assurance) to recover their costs and earn a return on their capital investments - costs and investments must be:
- 7.2.1. 'prudent';
  - 7.2.2. 'used and useful'; and
  - 7.2.3. 'known and measurable'.
- 7.3. Allowed expenses, whether capital or operating, must satisfy these principles to be part of a firm's revenue requirement
- 7.4. There are areas in the methodology that should be reviewed; these include sales forecasting, coal costs, RAB and operating costs.
- 7.5. Given that fact:
- 7.5.1. Eskom has conceded that there has been fraud and corruption. Consequently, the allowed revenues must not be spent imprudently – in 2021 alone, more than R3 billion in procurement malfeasance has been exposed in the press.<sup>1,2,3</sup>

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<sup>1</sup> <https://www.timeslive.co.za/news/south-africa/2021-06-01-former-eskom-executives-contractors-r745m-corruption-case-postponed/>

<sup>2</sup> <https://www.bloomberg.com/news/articles/2021-02-28/south-africa-probes-2-billion-rand-eskom-fraud-city-press-says>

<sup>3</sup> <https://mg.co.za/news/2021-02-06-abandoned-flats-cost-eskom-r840-million/>

7.5.2. The useful utilisation of Eskom’s fleet has languished at 62% for the past 12 months<sup>4</sup>.

7.5.3. The averaging of generation costs across the entire Eskom fleet ‘shields’ inefficiencies, procurement malfeasance and debt allocation from scrutiny.

7.6. NERSA has a duty to ensure some, and promote other, objectives of the EPP and the ERA objectives, suggesting reasonable latitude to exercise its discretions when adjudicating Eskom’s revenue application.

**Stakeholder Question 2:**

- a) What discretion does NERSA have on the treatment of coal costs?
- b) What discretion does NERSA have on the treatment of operating costs, in particular workforce costs?
- c) Is there any discretion that NERSA has on the regulatory assets base?
- d) What discretion does NERSA have on sales forecasting?
- e) How should NERSA deal with the issue of fraud and corruption given that this is a forward looking application?
- f) Stakeholders are requested to comment on the utilisation of Eskom’s fleet and how that should be factored in the revenue determination.
- g) Stakeholders are requested to comment on the imprudence / inefficiency of Eskom and how such imprudence/inefficiency should be addressed.
- h) On all the above how should NERSA exercise its discretion in this regard and specifically regarding this application?

**8. Impact of Eskom’s Application**

8.1. Table 8.1-1 below shows the revenues as applied for by Eskom in MYPD5 application, as well as all the outstanding approved and applied for RCA and Court decisions in respect Government support that was recognised as revenue in the MYPD 4 control period. This table includes the approved RCA amount of R3.4Billion on which the decision of implementation is yet to be made as well recently made RCA application of R10.7Billion, which is yet to be considered.

8.2. The following has been considered when developing the impact of total assumed revenues:

8.2.1. The revenues are as per Eskom’s application without prudency test conducted;

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<sup>4</sup> <https://www.esi-africa.com/industry-sectors/asset-maintenance/life-extension-of-nuclear-power-station-big-risk-for-sa/>

- 8.2.2. Include a recovery of the R46billion Government support, which is the subject of a 2020 Court order;
- 8.2.3. Considering the impending changes to the MYPD methodology, the total outstanding R46billion has been included under FY 2022/23;
- 8.2.4. All approved RCAs have been included;
- 8.2.5. Only the approved STPPP has been included;
- 8.2.6. Considering the impending changes to the pricing methodology, the approved 2019/20 RCA has been included; and the
- 8.2.7. 2020/21 RCA has been included as applied for.

*Table 8.1-1 - Interim Eskom MYPD5 tariff application*

<b>Eskom's FY 2022/23 MYPD 5 tariff increase</b>	
<b>R'm</b>	<b>2022/23</b>
FY 2022/23 Revenue application as applied	279 018
MYPD 3 RCA (Yr 2,3,4)	7 776
RCA arising (2018/19)	6 150
Approved STPPP	742
2019/20 RCA	3 461
2020/21 RCA As applied	10 720
Government injection	46 000
<b>Total Revenue from standard customers</b>	<b>353 867</b>
Sales Volumes(GWh sold)	171 549
Production Volumes (GWh sent out)	180 475
Price bases on sales volumes	206,28
<b>Price bases on Production volumes</b>	<b>196,08</b>
<b>Percentage Price Increase based on sales</b>	<b>54,35%</b>
<b>Percentage Price Increase based on production</b>	<b>49,6%</b>

**Stakeholder Question 3:**

- a) Stakeholders are requested to comment on how the Energy Regulator can objectively deal with these additional revenues in the applied for revenue determination.
- b) Stakeholder are requested to comment on the impact of the proposed Eskom revenues as shown in Table 1 above and how should this impact be mitigated.
- c) What would be the most acceptable stable increase for the economy, affordable by and what is the basis of such acceptable increase?
- d) What would be the fairest increase that can reduce the impact of energy costs on households?
- e) What is stakeholder view on the rationality of the RCA mechanism and its impact on price stability and how can this impact be managed?

## 9. The Consultation Process

- 9.1. Stakeholders are requested to comment in writing on the Consultation Paper on Eskom’s MYPD5 revenue application. Written comments can be forwarded to mypd@nersa.org.za; hand-delivered to Kulawula House, 526 Madiba Street, Arcadia, Pretoria, or posted to PO Box 40343, Arcadia, 0083, Pretoria, South Africa. The closing date for the submitting of comments is **14 January 2022 at 16:00**.
- 9.2. NERSA will collate all comments received, which will be taken into consideration when the decision is made. Public hearings will be held using MS Teams in line with the COVID-19 restrictions and applicable government regulations; wherein presentations may be made by interested and affected parties may make presentations.
- 9.3. The process for consultation and decision-making is outlined in the Table 9-1 below.

*Table 9-1 - Timelines as per court order*

Task Name	Duration	Start	Finish
<b>Approval of the consultation paper on MYPD5</b>	<b>89 days</b>	<b>Mon, 06//12/21</b>	<b>Thu, 07/04/22</b>
Electricity Subcommittee (ELS) to approve publication of the applications and indicative timelines	1 day	Mon, 06/12/21	Mon, 06/12/21
Incorporation of comments from members of the ELS and preparation of the publication	1 day	Tue, 07/12/21	Tue, 07/12/21
Publication of the consultation paper and the supplementary applications to solicit written stakeholder comments	2 days	Tue, 07/12/21	Wed 08/12/21
Closing date for stakeholder comments on the supplementary applications	27 days	Thu, 09/12/21	Fri 14/01/22
Microsoft Teams public hearings <sup>5</sup>	5 days	Mon, 17/01/22	Fri 21/01/22
Analysis of stakeholders comments and drafting of the Reasons for Decision (RfD) for ELS consideration	5 days	Mon, 24/01/22	Fri, 28/01/22
Special ELS meeting to recommend the Draft Decision and Reasons for Decision	3 days	Mon, 31/01/22	Wed 02/02/22
Requesting licensee to provide comments on the ELS recommendation before the Energy Regulator’s (ER) approval	2 days	Thu, 03/02/22	Fri, 04/02/22
Energy Regulator’s decision	15 days	Mon, 07/02/22	Fri, 25/02/22

- 9.4. Table 9-2 below shows the indicative timelines that will be published on NERSA website.

<sup>5</sup> Details provided in Table 3 below

Table 9-2 - Public Hearing indicative dates and venues

PROVINCE	CITY	DATE
Western and Eastern Cape	Virtual meeting	17 January 2022
Kwa-Zulu Natal	Virtual meeting	18 January 2022
Free State, Mpumalanga and Limpopo	Virtual meeting	19 January 2022
Northern Cape and North West,	Virtual meeting	20 January 2022
Gauteng	Midrand (physical public hearing) and Virtual meeting	21 January 2022

\*The dates of the public hearings might be extended/reviewed depending on the number of presenters registered.

9.5. Due to Covid-19 restrictions, public hearings will be conducted virtually. Provision will be made for one physical public hearing in Gauteng as the risk will be less in that there will not be any travelling/usage of airports and hotels. NERSA will continue to observe developments in the COVID19 regulations and make amendments where necessary.

9.6. For more information and queries on the above, please contact Mr Thilivhali Nthakheni or Ms Lehuma Masike at the National Energy Regulator of South Africa:

Physical address: Kulawula House  
526 Madiba Street  
Arcadia  
Pretoria

Tel.: 012 401 4025/4724

Fax: 012 401 4700

**End.**