

**ESKOM'S FIFTH MULTI-YEAR PRICE DETERMINATION REVENUE
APPLICATION FOR 2023/24 AND 2024/25 FINANCIAL YEARS**

CONSULTATION PAPER

JULY 2022

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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 2023, Eskom is required to table in Parliament the National Energy Regulator of South Africa (NERSA) approved tariff before 15 March 2023.
- 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 has ended on 31st of March 2021. However, the court extended its existence until a new methodology is in place. Eskom's MYPD5 revenue application has been developed using the MYPD4 methodology that NERSA published in October 2016.
- 1.3. NERSA rejected Eskom's 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, 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. Furthermore, Judge Millar's high court order of 5 July 2022(see Annexure B), extended the application of the MYPD4 methodology for the 2023/24 financial year in the absence of a revised MYPD5 methodology.
- 1.5. In compliance with the court order, the revenues and tariff decisions that will be determined by NERSA for the 2023/24 year, will be implemented from 1 April 2023 for non-municipal customers and from 1 July 2023 for municipal customers. The revenue/tariff determination will be completed by the 7 November 2022, as per the timelines outlined in 7.3.

2. Introduction

- 2.1 Eskom submitted its MYPD5 application on 02 June 2021 and in this application Eskom is requesting to be allowed an amount of R279bn, R335bn and R365bn for financial years 2022/23, 2023/24 and 2024/25 respectively.
- 2.2 The main drivers of this application are:
- Regulated Asset Base (RAB)
 - Primary energy;
 - IPPs;
 - Operating costs and
 - Depreciation.
- 2.3 Stakeholder are requested to comment on the application submitted by Eskom, discretion NERSA has in applying its methodology and the impact of Eskom request on the economy.
- 2.4 A consultation paper has been developed with detailed on questions that stakeholders are requested to provide oral submission on (See Annexure C).
- 2.5 The recovery is the outstanding R59bn equity injection will also need to be considered as per the relevant Court order, that is, allow R15bn over and above allowable revenues.
- 2.6 Table 1 below shows Eskom's application for the three financial years, the consultation paper deals with the 2023/24 and 2024/25 financial years.

Table 1 : Eskom MYPD5 tariff application

Allowable Revenue (R'm)	AR	Formula	Application FY2023	Application FY2024	Application FY2025	Post Application FY2026	Post Application FY2027
Regulated Asset Base (RAB)	RAB		1 263 247	1 254 636	1 246 151	1 256 395	1 261 675
Return on assets %	ROA	X	0.01%	0.69%	0.87%	1.65%	3.04%
Returns			126	8 682	10 879	20 668	38 292
Returns adjustment to -1,99% RoA in FY2023 to get a 20,5% price increase (i.e customer subsidy)		+	(25 278)	-	-	-	-
Returns applied for			(25 151)	8 682	10 879	20 668	38 292
Primary energy	PE	+	79 627	78 804	84 170	85 462	91 206
International purchases	PE	+	4 589	4 878	5 157	5 466	5 794
IPPs	PE	+	70 019	85 321	101 807	124 128	133 616
Environmental levy	L&T	+	6 610	6 243	5 906	5 451	5 362
Carbon tax	L&T	+	2 714	10 121	10 099	9 680	10 052
Arrear debt	E	+	5 666	6 511	7 110	7 802	8 541
Operating costs	E	+	66 690	63 115	65 852	70 327	72 251
Research and Development	R&D	+	-	-	-	-	-
Depreciation	D	+	68 254	71 001	74 214	71 455	72 447
MYPD5 Allowable revenue			279 018	334 676	365 195	400 437	437 562
Add: Approved RCA's for liquidation	RCA		14 412	-	-	-	-
MYPD5 Allowable revenue including RCA decision already made	R'm		293 430	334 676	365 195	400 437	437 562

2.7 The following timetable shall apply to the decision :

- 2.7.1 Eskom's revenue application submitted on 2 June 2021 shall be published on 1 August 2022 together with the revised assumptions submitted in January 2022.
- 2.7.2 The public shall have until 8 September 2022 to make representations, if any, on the content of Eskom's application.
- 2.7.3 Public hearings on the merits of Eskom's revenue application shall be held between 19 – 23 September 2022.
- 2.7.4 NERSA shall make a final decision on Eskom's application by 7 November 2022.

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 FY2023/24 of the application.

3. Legal context of the MYPD5 application in terms of the court order.

- 3.1 The general mandate of NERSA is to regulate prices and tariffs as embodied in section 4 of the Electricity Regulation Act. The generality of the section is amplified by section 15 of the very Act. The section provides a specific mandate on NERSA and reciprocal obligation on licensees in as far as tariffs is concerned. The specific mandate is predicated on the licence condition issued in terms of section 14 of the Act. It is settled that NERSA has issued Eskom with licence condition relating to the approval of its tariffs through the usage of a methodology.
- 3.2 It is trite that tariff approval of Eskom cannot be processed without the availability and compliance with the methodology unless there is circumstance which has necessitated the deviation which was considered to be fair, just and reasonable. The methodology referred to in the licence condition is not a static regulatory instrument but a time, factor and conditions based instrument revised from time to time to enable the achievement of the objects of the Act.
- 3.3 The current Eskom application is not being considered because of the court order but it's the regulatory instrument to be used in determining the tariff which the court has pronounced on. The litigious history of MYPD5 has disrupted the consideration of the application as a multi-year to annual approval. The general administrative principles applicable to the decision making by NERSA have not been eroded by the litigation proceedings that have taken place.
- 3.4 The litigation phases regarding the MYPD5 have become moot as the year one has been implemented pursuant to the court order of 03 December 2021 and the remaining two years of the application have been addressed in the court order of 05 July 2022. What is fundamental about the court judgement of 05 July 2022 is that: (a) it compels NERSA to use the 2016 MYPD Methodology; (b) it sets the timelines for the processing of the application; (c) it compels the utilisation of the application submitted on 02 June 2021; (d) it leaves the door open to NERSA to introduce a new methodology for the consideration of 2024/25 application.
- 3.5 It is imperative on us that when considering the current application, we are mindful of the dates set by court to avoid being in contempt and open the gates for Eskom to approach the court with an application for judicial deference. It is also important to highlight that courts have the duty to intervene in constitutional violations, but they have a prerogative to decide when and to what extent to intervene when such a violation occurred within the domain of government. The decision on whether to intervene and then, to what extent, will depend on the standard of judicial review the courts employ.

- 3.6 In the instance wherein the content of the application is not substantive enough to enable proper evaluation/analysis, a request can be made to Eskom to substantiate the item and that will not be tantamount to the amendment or revision of the application. It is also noteworthy that the record of the request is clearly recorded and filed.
- 3.7 The dates in the court order are not only important to the consideration and finalisation of the revenue application but also the publication of the new/revised methodology. If the date of 30 September 2022 is missed for the finalisation of new/revised methodology, the 2024/25 revenue application falls to be considered in terms of the 2016 methodology.
- 3.8 It is also crucial to highlight that 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 will result in irrational and unreasonable outcome or the exercising a balancing act if the outcome will render the decision unreasonable when considering the objects of section 2 of the Electricity Regulation Act.
- 3.9 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.
- 3.10 Even though it is not a consequent of the court order that NERSA must consult stakeholders in the consideration of the application, the founding legislation obligates us to undertake or afford stakeholders an opportunity to partake in the process of decision making for the decision to be lawful. Lawfulness of the decision should be separated from substantive correctness of the decision, the former relates to compliance with the law whereas the latter relates to content correctness of the decision.
- 3.11 The consultation purported in the law has a variety of process and the law is not concerned with the highest level of consultation which entails knocking on the doors of persons soliciting comment but with the process which is open, fair and acceptable within the democratic values enshrined in our Constitution. With the advent of technology enabling participation, caution should also be noted in that the process is reserved for the elite whereas the decision affects the broader nation.

4. Impact of previous decisions on both financial years

4.1. **Error! Reference source not found.** below is a demonstration of the possible impact of the previous decisions and applied revenue by Eskom.

Table 2: : Eskom MYPD5 pro forma tariff calculations

R'm	2023/24	2024/25	Notes
Categories			
Revenues as applied	317 696	347 299	a
2019/20 RCA Approved	3 461		b
2020/21 RCA as Applied	10 645		c
Government Injection	15 000	15 000	d
Total Revenue from standard customers	346 802	362 299	
Volumes	171 440	170 370	e
Price	202,29	212,65	
Percentage Price Increase	38,10%	5,12%	

4.2. The following have been considered when developing the possible impact of total assumed revenues:

- a) The revenues of R317bn for 2023/24 and R347bn 2024/25 financial year are as per Eskom application without prudency test conducted by NERSA. These amount exclude Negotiated Pricing Agreement (NPA) revenue of R13.2bn and R13.8bn for FY 2023/24 and FY 2024/25 respectively. The amounts will change after NERSA has conducted prudency testes for efficiency; public consultation and consideration for economic impact.
- b) The 2019/20 RCA has been approved by Energy Regulator on 06 December 2021. There has not been a decision on how the amount will be liquidated, the regulator may decide to implement the amount over one year, two years or more after consideration of economic impact.
- c) The 2020/21 RCA of R10bn is as applied for, no decision and no prudency test was conducted. NERSA is yet to finalise analysis of the application and the amount may change after efficiency test.
- d) During the MYPD4 revenue determination government has injected R23bn for the period of three years making it R69bn. NERSA deducted these amount from the MYPD approved revenue to avoid excess returns. Eskom challenged NERSA's decision and the court find in favour of Eskom on 28 July 2020 whereby NERSA was requested to add back R23bn to Eskom revenues. NERSA appealed

the decision at the supreme court, the matter was subsequently settled between Eskom and NERSA and the court ordered as follows on 06 June 2022:

- i. After such time NERSA has determined the allowable revenue for 2023/4,2024/25,2025/25 and 2026/27 financial years, the following sum will be added to the determinations:
 - In FY2023/24, 15bn will be added to the allowable revenue
 - In FY2024/25, 15bn will be added to the allowable revenue
 - In FY2025/26, 15bn will be added to the allowable revenue
 - In FY2026/27, 14bn will be added to the allowable revenue
 - ii. The amount of R15bn in the table above for FY2023/24 and FY 2024/25 are as a results of the court order and NERSA is obligated to implement the comply with the order hence the amount will be added as they are as per court order.
- e) The volume of 170 440GWh for FY2023/24 and 170 340GWh are as applied for by Eskom and only related to standard tariff customers. NERSA is yet to conduct efficient test on theses volumes.

5. Scope of Consultation

- 5.1. The court order only deals with the relief sought by Eskom and orders NERSA to determine Eskom's required revenue for the 2023/24 financial year - as outlined in 1.4. NERSA, however, rejected Eskom's MYPD5 application in its entirety on the 30 September 2021, consequently until Part B is heard. Part B was heard and the court ruled that the 2023/24 revenue application should be dealt with from 1 August 2022, the rejection of the remaining year of the MYPD5 application remain in force until a court has reviewed the NERSA decision on the and 2024/25 financial year of the application and made a judgement.
- 5.2. With regards to the publication of this consultation papers, there are fundamental emphasis of the court order which are worth being repeated. The court in Order 4 has emphasised the long held principle that Eskom revenue application should be determined using a methodology. This outlaws any means that NERSA can adopt to consider Eskom revenue application. The second emphasis made by the court order is that, for the new methodology to be used in determining Eskom revenue application, such a methodology must be finalised no later than 30 September 2022 otherwise the 2016 will be applicable.
- 5.3. Whether it is the 2016 or 30 September 2022 methodology to be utilised to determine the Eskom revenue application, the legal requirement to consult

stakeholder remains embedded in the process for procedural fairness and lawfulness. The court did not traverse this principle because it forms the cornerstone of administrative action. In order to drive efficiency in the instance that the 30 September 2022 timeline is not achieved, the decision to consult broadly on the 2023/24 and 2024/25 does not violate the court order as the court has already pronounced on the default of failure to meet the 30 September 2022 timeline. In the instance that NERSA completes the methodology by 30 September 2022, it will be compelling for NERSA to use the new methodology on a revised application which Eskom must bring.

- 5.4. It is vital to recognise that, the consultation on 2024/25 based on the decision of the Energy Regulator on 26 July 2022 is conditional on the finalisation of the new methodology by 30 September 2022. A revised application would have to be submitted by Eskom prior to the date set by court.
- 5.5. Stakeholders are therefore requested to comment on the following three areas:
 - 5.5.1. The Eskom MYPD5 revenue application for both 2023/24 and 2024/25 financial years,
 - 5.5.2. NERSA's discretion when applying the MYPD4 methodology, and;
 - 5.5.3. R15bn will be added to allowable revenue each financial year
 - 5.5.4. The impact of Eskom's application considering the already approved RCAs.
- 5.6. The questions are raised for each area identified and stakeholders are requested to comment on each question raised.

6. Comments on the FY2023/24 and FY2024/25 of the application

- 6.1. Eskom's revenue application amounts to R335bn for 2023/24 and R365bn for the 2024/25 financial year, 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) Stakeholders are requested to comment on the 2023/24 and 2024/25 financial years 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 – ie. to inform Eskom and provide an opportunity to respond.
- 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 conventional 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 the fact that:
- 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, whilst another R2.3 billion exposed in 2022.^{1,2,3,4}

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

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

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

⁴ <https://www.moneyweb.co.za/news/south-africa/allegedly-corrupt-former-employees-of-eskom-contractor-nabbed/>

7.5.2. The useful utilisation of Eskom’s fleet has languished at 62% for the past 12 months⁵.

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. The Consultation Process

8.1. Stakeholders are requested to comment in writing on the Consultation Paper on Eskom’s MYPD5 revenue application. Written comments can be forwarded to mydp@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 **8 September 2022 at 16:00**.

8.2. 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.

⁵ <https://www.esi-africa.com/industry-sectors/asset-maintenance/life-extension-of-nuclear-power-station-big-risk-for-sa/>

8.3. The process for consultation and decision-making is outlined in *Table 3* below.

Table 3: Indicative timelines

Task Name	Duration	Start	Finish
Approval of the consultation paper on MYPD5	74 days	Wed 22/07/27	Mon 22/11/07
Electricity Subcommittee (ELS) to approve publication of the applications and indicative timelines	1 day	Wed 22/07/27	Wed 22/07/27
Incorporation of comments from members of the ELS and preparation of the publication	1 day	Thu 22/07/28	Thu 22/07/28
Publication of the consultation paper and the application to solicit written stakeholder comments	1 day	Fri 22/07/29	Fri 22/07/29
Closing date for stakeholder comments on the supplementary applications	30 days	Fri 22/07/29	Thu 22/09/08
Microsoft Teams public hearings	5 days	Mon 22/09/19	Fri 22/09/23
Analysis of stakeholders comments and drafting of the Reasons for Decision (RfD) for ELS consideration	10 days	Mon 22/09/26	Fri 22/10/07
Special ELS meeting to recommend the Draft Decision and Reasons for Decision	3 days	Wed 22/10/19	Fri 22/10/21
Requesting licensee to provide comments on the ELS recommendation before the Energy Regulator's (ER) approval	2 days	Mon 22/10/24	Tue 22/10/25
Energy Regulator's decision	10 days	Tue 22/10/25	Mon 22/11/07

8.4. Table 4 below shows the indicative public hearings timelines that will be published on NERSA website.

Table 4: Public Hearing indicative dates and venues

PROVINCE	CITY	DATE
Western Cape	Hybrid meeting (physical and virtual)	19 September 2022
Kwa-Zulu Natal	Hybrid meeting (physical and virtual)	20 September 2022
Gauteng	Hybrid meeting (physical and virtual)	21 September 2022
Free State, Northern Cape and Eastern Cape	Virtual Meeting	22 September 2022
North West, Limpopo and Mpumalanga	Virtual Meeting	23 September 2022

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

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

Physical address: Kulawula House

526 Madiba Street
Arcadia
Pretoria

Tel.: 012 401 4724/4025
Fax: 012 401 4700

End.