Mr D. Zuma – 22 October 2015

Good morning Sir,
I trust that you made it out of the Parliament building unscathed.
I tried to call, please return my call when.

Kindest regards,
Duduzani.
MTSMS
2015/10/22 10:13:05 AM

Mr Jonas – 23 October 2016

Can we make it 1.30 same place
MO£SMS
2015/10/23 11:01:28 AM
Mr D. Zuma – 23 October 2016

Agreed Sir.
MTSMS
2015/10/23 11:04:52 AM

Mr Jonas – 23 October 2016

Can you call me
MOSMS
2015/10/23 1:02:45 PM

Here already
MOSMS
2015/10/23 1:13:21 PM

Mr D. Zuma – 23 October 2016

I am on my way up Sir.
MTSMS
2015/10/23 1:21:50 PM

Mr D. Zuma – 25 October 2016
f) The telephone records show that both Mr Jonas and Mr D. Zuma were at the Hyatt Regency Hotel on 23 October 2016 between 1:00 and 2:00 PM;

g) The records further show that there were calls between Mr D. Zuma and Mr Hlongwane on 23 October 2016 between 12:56 and 13:25 PM;

h) There were also calls between Mr Jonas and Mr Hlongwane on 23 October 2016 between 13:12 and 19:52 PM;

i) The telephone records show that Mr D. Zuma was at Saxonwold on 23 October 2016 from 14:00 PM to 17:10 PM;

j) The records show that Mr Hlongwane was also at Saxonwold on 23 October 2016 from 14:02 PM to 15:19 PM; and
k) The telephone records show that Mr Jonas was at the airport on at 16:42:33 PM on the same date.

5.24. The above telephone communication appears to confirm Mr Jonas version of events that prior to October 2015, he had never communicated with Mr D. Zuma.

a) The records further appear to confirm his version of events that he met with Mr D. Zuma at the Hyatt Regency Hotel in Rosebank who later transported him to Saxonwold.

b) Whilst the records place both Mr Hlongwane and Mr D. Zuma at Saxonwold, they did not show Mr Jonas at the same location. The records however show that Mr Jonas was at the airport later on the same date, which also confirms his version of events. According to the cellular network companies, there needs to be a billable event for a tower location to be recorded.

c) I am yet to interview both Mr Hlongwane and Mr D. Zuma to obtain their version of events.

d) Having had regard to the wider allegations including the allegations that members of the Gupta family are involved in the appointment of Cabinet members, I reviewed the telephone records of Mr Van Rooyen to establish his whereabouts on 8 December 2015, the day Mr Nene was informed by President Zuma that he will be removed as Minister of Finance.

e) The telephone records show that Mr Van Rooyen was at Saxonwold on 8 December 2015. The records further show that Mr Van Rooyen frequently
visits Saxonwold. Below is a reflection of calls made by Minister Van Rooyen while at Saxonwold:
5.25. Mr Ajay Gupta denied that Mr Van Rooyen visits his residence during my interview with him.

5.26. I received unsolicited letter from Mr Hlongwane on 29 September 2016 relating to the investigation. The title of Mr Hlongwane’s letter “Investigation into complaints of improper and unethical conduct by the President and officials of state organs due to their alleged inappropriate relationship with members of the Gupta family” is consistent with the title I have used in all my correspondence relating to the investigation. This indicates that Mr Hlongwane has had access to one of my official documents relating to the investigation prior to any correspondence with my office. The letter is summarised below:

a) The letter states “With respect to the alleged meeting involving Deputy Finance Minister Jonas, I had been made aware (by Duduzane Zuma) that Deputy Finance Minister had made statements that I was blackmailing him. I asked Duduzane Zuma to urgently convene a meeting between the three of us”;

b) “Duduzane duly convened the meeting at the Rosebank Hyatt. Prior to my arrival, I interrupted the meeting by calling Duduzane to speak to Deputy Minister Jonas. In that conversation with Deputy Minister Jonas, I proposed we move that meeting to a private venue. All parties agreed to this”;

c) “At the private venue, the blackmail story was specifically raised with Deputy Finance Minister Jonas. He (Jonas) stated that he had no recollection of any such blackmail conversations with anyone.”
d) During the discussion, a Gupta family member entered the room briefly and then left. I categorically deny that there was ever a discussion or offer, by anybody, of any government position to Deputy Minister Jonas. No commercial discussion took place either.”

**Interview with Mr Hlongwane**

5.27. I interviewed Mr Hlongwane on 11 October 2016 and he confirmed the above statements. In addition, Mr Hlongwane stated the following:

a) He provided Mr D. Zuma with Mr Jonas number for purposes of inviting him to the “SATY” awards;

b) He had known Mr D. Zuma for a while and he is an “uncle” to him;

c) He had also known Mr Jonas as a friend and comrade;

d) He has no relationship with President Zuma;

e) Member of the Gupta family are his casual acquaintances and he does not have a business relationship with them;

f) He confirmed that the meeting between Mr Jonas, Mr D. Zuma and him took place at the Gupta family residence in Saxonwold on 23 October 2015;

g) He denies that Mr Jonas was offered a Cabinet post during the meeting; and
h) He also denies that he drove Mr Jonas to the airport and that they had agreed to have a further meeting.

_The President’s Case_

5.28. I met with the President on 6 October 2016 to solicit his response to the above allegations. He did not respond to any of my questions.

**CONTRACTS AWARDED BY ESKOM TO TEGETA**

5.29. Ownership of a coal mine opens the possibility to exporting coal to foreign markets to meet the energy requirements of other countries. As a result, Eskom’s strategic objectives, financial resources and size of market share has positioned the SOE as a ‘king maker’ in the coal mining industry.

5.30. In line with the PFMA an SOE must take care in exercising its influence over the industry its ambit falls within and act in a responsible, ethical and fair manner that furthers the transformation objectives of the country as a whole.

5.31. Being an accounting institution as defined in the PFMA, Eskom’s and its leadership’s first responsibility is to the entity itself, and they must ensure that the SOE implements its strategies and operations in a manner that is compliant with laws and regulations of the country.

5.32. Eskom’s and its leadership’s first responsibility is to the entity itself, and they must ensure that the SOE implements its strategies and operations in a manner that is compliant with laws and regulations of the country.

5.33. Eskom also has a responsibility to manage conflicts of interest in the business. Conflicts of interest are common in SOEs, thus, the effective management of the risks that can arise is crucial in successfully managing the SOE. A conflict of
interest exists if an employee is in a position to make or influence a decision about whether and how to proceed with a proposed transaction, and has an affiliation with any other party to the transaction. An apparent conflict is one that a member of the public might reasonably believe might cause an employee’s decision to be tainted by self-interest.

5.34. Eskom falls under the portfolio of the Department of Public Enterprise, it is important for an SOE to manage conflicts of interests and act in accordance with the Constitution and the PFMA.

5.35. The same conditions would apply should the stakeholder be required to perform specific statutory functions defined in legislation e.g. Section 11 of the Mineral Petroleum Resource Development Act, which states that a mining or a prospecting right may not be transferred from one company to another without the Minister of Mineral Resources written consent.

5.36. Eskom Conflict of Interest Policy 32-173, was signed by the Chairman of the Board, Mr Zola Tsotsi, on 29 August 2014.

5.37. The policy statement states as follows:

a) “Eskom subscribes to ethical values and legal principles. This requires that Eskom, its directors, employees, customers, and suppliers 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.

b) 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.

c) The employee and director have the obligation to declare and manage conflicts 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.”

5.38. Paragraph 2.2.19 states as follows: “Related parties of employees must not engage in, nor have interests in any Eskom contract where there is a conflict of interest. This includes third-party related transactions with an indirect link to an Eskom contract (for example, having a personal or other interest in a business that has an interest in a Supplier to Eskom).”

5.39. The word “Related” is defined in paragraph 3.3.17:

(1) When used in respect of two persons, means persons who are connected to one another in any manner contemplated below:

(a) an individual is related to another individual if they,

   (i) are married, or live together in a relationship similar to a marriage;

   or

   (ii) are separated by no more than two degrees of natural or adopted consanguinity or affinity;

(b) an individual is related to a juristic person if the individual directly or indirectly controls the juristic person, as determined in accordance with the definition of control as set out in subsection (2) below; and

(c) a juristic person is related to another juristic person if—
(i) either of them directly or indirectly controls the other, or the business of the other, as determined in accordance with subsection (2) below;

(ii) either is a subsidiary of the other; or

(iii) a person directly or indirectly controls each of them, or the business of each of them, as determined in accordance with subsection (2) below.”

5.40. Paragraph 3.5 deals with Roles and Responsibilities, 3.5.1 and 3.5.2 reads as follows:

a) Managers and directors need to be aware that their seniority results in perceptions of conflict more readily, and their conduct is, therefore, subject to greater scrutiny.

b) Directors must exercise the powers and perform the functions of a director in good faith and for a proper purpose; in the best interests of the company; and with the degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions in relation to the company as those carried out by that director and having the general knowledge, skill and experience of that director.”

5.41. In order to adequately investigate the possible conflicts of interest I performed extensive due diligence searches on individuals within Eskom as well as individuals who are a party to transactions which will be discussed later in this report.

5.42. The ownership structure of Tegeta is comprised as follows:

a) 29.05% owned by Oakbay Investments (Pty) Ltd13 (2006/017975/07) (“Oakbay”). OAKBAY owns 79.99% in Oakbay Resources and Energy Ltd (2009/021537/06) (“ORE”). Atul GUPTA owns 64% of ORE which is held
through his shareholding in OAKBAY and Islandsite Investments 18015 (Pty) Ltd.

b) 28.53% owned by Mabengela Investments (Pty) Ltd16 (2008/014606/07) ("Mabengela"). Mabengela is owned by:

i. Duduzane ZUMA - 45%;

ii. Rajesh Kumar GUPTA - 25%;

iii. Aerohaven Trading (Pty) Ltd - 15%;

iv. Fidelity Investment (Incorporated in the UAE) ("Fidelity") - 10%;

v. Mfazi Investments (Pty) Ltd - 3%; and

vi. Ashu Chawla - 2%.

c) 12.91% owned by Fidelity.

d) 8.01%Accurate Investments Ltd (Incorporated in the UAE) ("Accurate")

e) 21.5% owned by Elgasolve (Pty) Ltd17 (2010/017836/07) ("Elgasolve"). The sole director of Elgasolve is Salim Aziz Essa ("Mr Essa") (ID 7801155017084).

5.43. The table below summarises that shareholding of Tegeta:

<table>
<thead>
<tr>
<th>No</th>
<th>Name of Entity</th>
<th>Percentage of shareholding</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Oakbay</td>
<td>29.05%</td>
</tr>
<tr>
<td>2</td>
<td>Mabengela</td>
<td>28.53%</td>
</tr>
<tr>
<td>3</td>
<td>Fidelity</td>
<td>12.91%</td>
</tr>
</tbody>
</table>
5.44. The directors of Tegeta are:

<table>
<thead>
<tr>
<th>No</th>
<th>Name of director</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Seedy Momodou Lette</td>
</tr>
<tr>
<td>2</td>
<td>Ravindra Nath</td>
</tr>
<tr>
<td>3</td>
<td>Nazeem Howa</td>
</tr>
<tr>
<td>4</td>
<td>Ashu Chawla</td>
</tr>
<tr>
<td>5</td>
<td>Rajeneesh Pahadia</td>
</tr>
<tr>
<td>6</td>
<td>Ronica Ragavan</td>
</tr>
</tbody>
</table>

5.45. Centaur Mining South Africa (Pty) Ltd (“Centaur”) is registered in South Africa and is a subsidiary of Centaur Holdings Ltd which is registered in the UAE. In 2016, Centaur signed a $100,000,000.00 (R1,500,000,000.00) revolving credit deal with an anonymous UAE-based family to expand its mining and natural resources projects in South Africa. Centaur also purchased the De Roodepoort coal mines in Mpumalanga during 2016. Centaur is one of the entities which contributed to the purchase price of OCH.

5.46. The directors of Centaur are

<table>
<thead>
<tr>
<th>No</th>
<th>Name of director</th>
<th>Country of Origin</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Aakash Garg Jahajgarha (married to the daughter of Anil Kumar Gupta)</td>
<td>Indian citizen</td>
</tr>
<tr>
<td>2</td>
<td>Simon James Hoyle</td>
<td>UK citizen</td>
</tr>
<tr>
<td>3</td>
<td>Daniel James Mcgowan</td>
<td>UAE resident</td>
</tr>
<tr>
<td>4</td>
<td>David Barnett Silver</td>
<td>South African</td>
</tr>
</tbody>
</table>

5.47. Trillian Capital Partners (Pty) Ltd (2015/111759/07) (“TCP”) is a diversified financial services and advisory firm with expertise in the fields of finance, management consulting, asset management, securities, engineering and property. TCP has various subsidiaries and has two major shareholders, namely Trillian Holdings (Pty) Ltd (“Trillian Holdings”) (2015/168302/07) with 60% shareholding and Zara W (Pty) Ltd (“Zara”) (2011/104773/07) with 25% shareholding. The remaining 15% is
held by employees and other smaller shareholders. TCP is one of the entities which contributed to the purchase price of OCH.

5.48. The directors of TCP are:

<table>
<thead>
<tr>
<th>No</th>
<th>Name of director</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Jeffrey Irvine Afriat</td>
</tr>
<tr>
<td>2</td>
<td>Tebogo Leballo</td>
</tr>
<tr>
<td>3</td>
<td>Eric Anthony Wood</td>
</tr>
</tbody>
</table>

5.49. The sole director of Trillian Holdings is Mr Essa, who also owns 21.5% of Tegeta through his company Elgasolve.

5.50. The sole director of Zara is Mr Eric Anthony Wood (“Mr Wood”), Mr Wood is also a director in TCP.

5.51. Regiments Capital (Pty) Ltd (“Regiments”) (2004/023761/07) is one of the entities which contributed to the purchase price of OCH.

5.52. The directors of REGIMENTS are:

<table>
<thead>
<tr>
<th>No</th>
<th>Name of director</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Lithia Mveliso Nyhonyha</td>
</tr>
<tr>
<td>2</td>
<td>Magandheran Pillay</td>
</tr>
<tr>
<td>3</td>
<td>Eric Anthony Wood</td>
</tr>
</tbody>
</table>

**Conflict of interest**

5.53. A conflict of interest is a situation in which a person or organisation is involved in multiple interests, financial interest, or otherwise, one of which could possibly corrupt the motivation of the individual or organisation.

5.54. The presence of a conflict of interest is independent of the occurrence of impropriety. A widely used definition is: "A conflict of interest is a set of
circumstances that creates a risk that professional judgement or actions regarding a primary interest will be unduly influenced by a secondary interest."

5.55. Primary interest refers to the principal goals of the profession or activity, such as the protection of clients, the health of patients, the integrity of research, and the duties of public office.

5.56. Secondary interest includes not only financial gain but also such motives as the desire for professional advancement and the wish to do favours for family and friends, but conflict of interest rules usually focus on financial relationships because they are relatively more objective, fungible, and quantifiable.

5.57. The secondary interests are not treated as wrong in themselves, but become objectionable when they are believed to have greater weight than the primary interests.

5.58. The conflict in a conflict of interest exists whether or not a particular individual is actually influenced by the secondary interest. It exists if the circumstances are reasonably believed (on the basis of past experience and objective evidence) to create a risk that decisions may be unduly influenced by secondary interests.

5.59. **OVERSIGHT AND CONFLICT OF INTEREST IN STATE OWNED ENTERPRISES**

5.60. SOE’s are institutions/entities through which the Executive delivers on services. The Executive Authority (Responsible Minister) plays various roles in its relationship with the SOEs. On one hand, Government as an owner and shareholder is concerned with obtaining a suitable return on investments, and ensuring the financial viability of the SOE. On the other hand, Government as policymaker is concerned with the policy implementation of service delivery. Finally, Government as regulator is
concerned with the industry practices of SOEs, pricing structures, and the interests of consumers.

5.61. The process to select and recommend a person to a SOE board is unclear and undefined in government protocols, safe to say the process is not without appointments that conflict personal and official interest.

5.62. The Executive Authority’s corporate governance responsibility as shareholder, involves ensuring that, from the Board of directors downwards, and also in respect of accountability of the Board upwards to the shareholder, all the necessary and appropriate corporate governance structures, procedures, practices and controls and safeguards, are established, properly implemented and operate effectively in the SOE concerned.

5.63. It is for these reasons that when a Minister recommends a board, his/her mind must be applied to select suitable individuals that would reduce the levels of conflicting interest.

5.64. It is important for the executive authority of the SOE (shareholder) and Cabinet to consider whether there are conflicts that may influence the objective performance of the Board and whether:

a) A board member might make a financial gain, or avoid a financial loss, at the expense of the SOE.

b) There is an interest in the outcome of a service or contract that will be awarded by the SOE, and whether the Board member would have access to sensitive or privileged information.

c) There are Board members that receive financial or other incentives to favour the interest of a particular party, over the interests of the SOE.
d) If a member of the Board receives or will receive from a person other than the SOE, an inducement in relation to a service provided to the SOE in the form of money, goods or services, other than the salary the employer receives for his role in the SOE.

5.65. If such scenarios arise, the shareholder (in this case the government and the Minister of Public Enterprise) should take steps to mitigate the risks posed to the SOE.

5.66. I further noted Eskom Minutes of the Board Tender Committee Meeting No 07/2014 in the Huvo Nkulu Boardroom, Megawatt Park on 12 August 2014 at 07:30.

5.67. Page 12 of the minutes reads as follows: “Pegasus Risk Consulting had been requested to provide probity checks on Optimum Coal Mine (Pty) Ltd (“Optimum Coal”). The Auditors reported that they were unable to confirm the shareholding of the Deputy President in one of the holding companies called Lexshell 849 (Pty) Limited. This rendered their finding inconclusive. It was submitted that the purpose of probity checks was that there should not be real or perceived bias. The fact that Eskom had a contract with a company in which the country’s Deputy President was a shareholders may lead to perceived bias, but it was submitted that there was an existing contract between Optimum and Eskom, which would run until 2018. This contract had been concluded prior to the Deputy President assuming that role but the perception in the mind of the public would have to be managed.”

5.68. At the time of the above mentioned board meeting, the Eskom board was as follows:

<table>
<thead>
<tr>
<th>Name</th>
<th>Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mr Zola Tsotsi</td>
<td>Chairperson</td>
</tr>
<tr>
<td>Mr Collin M Matjila</td>
<td>Acting Chief Executive</td>
</tr>
<tr>
<td>Ms Tsholofofe Molefe</td>
<td>Finance Director</td>
</tr>
<tr>
<td>Ms Queendy Gungubele</td>
<td>Independent Non-Executive Director</td>
</tr>
</tbody>
</table>
5.69. The Board of Eskom as mentioned above, made a concerted effort to manage any and all conflicts that may arise, be it an actual conflict or a perceived conflict.

### The Minister of Public Enterprises and the Board of Eskom

5.70. In December 2014 Cabinet announced the details of appointed members to Eskom’s Board. Eskom’s articles stipulate that the shareholder (Executive Authority - Public Enterprises Department) will, after consulting the board, appoint a Chairman, Chief Executive and Non-Executive Directors. The remaining Executive Directors are appointed by the Board after obtaining shareholder approval.

5.71. The Board of Eskom was recommended by Minister Lynn Brown and appointed by Cabinet during September 2015. The Eskom Board at the time of the purchase of OCH, as well as the awarding of certain contracts to Tegeta, consisted of twelve individuals, namely:

<table>
<thead>
<tr>
<th>Name</th>
<th>Appointment Date</th>
<th>Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dr Bernard Lewis Fanaroff</td>
<td></td>
<td>Independent Non-Executive Director</td>
</tr>
<tr>
<td>Ms Neo Lesela</td>
<td></td>
<td>Independent Non-Executive Director</td>
</tr>
<tr>
<td>Mr Mafika Mkhwanazi</td>
<td></td>
<td>Independent Non-Executive Director</td>
</tr>
<tr>
<td>Mr Phenyane Sedibe</td>
<td></td>
<td>Independent Non-Executive Director</td>
</tr>
<tr>
<td>Ms Lily Zondo</td>
<td></td>
<td>Independent Non-Executive Director</td>
</tr>
<tr>
<td>Ms Chwayita Mabude</td>
<td></td>
<td>Independent Non-Executive Director</td>
</tr>
<tr>
<td>Ms Yasmin Masithela</td>
<td></td>
<td>Independent Non-Executive Director</td>
</tr>
<tr>
<td>Ms Bajabulie Luthuli</td>
<td></td>
<td>Independent Non-Executive Director</td>
</tr>
<tr>
<td>Dr Boni Mehlomakulu</td>
<td></td>
<td>Independent Non-Executive Director</td>
</tr>
<tr>
<td>Brian Molefe</td>
<td>2015-10-01</td>
<td>Chief Executive Officer</td>
</tr>
<tr>
<td>Anoj Singh</td>
<td>2015-10-01</td>
<td>Chief Financial Officer</td>
</tr>
<tr>
<td>Zethembe Wilfred Khoza</td>
<td>2014-12-11</td>
<td>Non-Executive Director</td>
</tr>
<tr>
<td>Nazia Carrim</td>
<td>2014-12-11</td>
<td>Non-Executive Director</td>
</tr>
<tr>
<td>Suzanne Margaret Daniels</td>
<td>2015-05-25</td>
<td>Company Secretary</td>
</tr>
<tr>
<td>Venete Jarlene Klein</td>
<td>2014-12-11</td>
<td>Non-Executive Director</td>
</tr>
<tr>
<td>Giovanni Michele Leonardi (Swiss)</td>
<td>2015-05-25</td>
<td>Non-Executive Director</td>
</tr>
<tr>
<td>Chwayita Mabude</td>
<td>2011-06-26</td>
<td>Non-Executive Director</td>
</tr>
<tr>
<td>Devapushpum Naidoo</td>
<td>2014-12-11</td>
<td>Non-Executive Director</td>
</tr>
</tbody>
</table>
5.72. These individuals constituted the governing body of Eskom. They had absolute responsibility for the performance of the SOE and is fully accountable for the performance of the SOE. Governance principles regarding the role and responsibility of SOE Boards are contained in the PFMA and the Protocol on Corporate Governance.

5.73. The Board of Eskom appointed in December 2014 consisted predominately of individuals with direct and indirect business or personal relations with Mr D. Zuma, the Gupta family and their related associates, including Mr Essa.

**The following members of the Board as at 1 April 2016 have identified conflicts of interest:**

5.74. Dr Baldwin Ngubane ("Mr Ngubane") is a director of Gade Oil and Gas (Pty) Ltd ("Gade Oil") (2013/083265/07). Mr Essa was a previous director of this entity.

5.75. Mr Mark Pamensky ("Mr Pamensky") is/was a director of the following entities:

<table>
<thead>
<tr>
<th>Name of Entity</th>
<th>Registration Number</th>
<th>Comment/ Observation</th>
</tr>
</thead>
<tbody>
<tr>
<td>ORE (Mentioned above)</td>
<td>2009/021537/06</td>
<td>Mr Atul Gupta owns 64% of this entity</td>
</tr>
<tr>
<td>Shiva Uranium (Pty) Ltd (&quot;Shiva Uranium&quot;)</td>
<td>1921/006955/07</td>
<td>• ORE has a 74% shareholding in Shiva Uranium. • Tegeta has a 19.6% shareholding in Shiva Uranium.</td>
</tr>
<tr>
<td>Yellow Star Trading 1099 (Pty) Ltd</td>
<td>2000/020259/07</td>
<td>Mr Essa was a director of this entity.</td>
</tr>
<tr>
<td>B I T Information Technology (Pty) Ltd</td>
<td>2003/022444/07</td>
<td>• Mr Pamensky was a previous director. • Kubentheran Moodley (&quot;Mr Moodley&quot;) is also a director of this entity and is the spouse of ESKOM board member Ms Virosnini Naidoo. • Mr Moodley is a special advisor to the Minister of Mineral Resources and is the sole director of Albatime (Pty) Ltd</td>
</tr>
</tbody>
</table>
5.76. Public records confirm that Mr Pamensky has direct business interests in ORE and Shiva Uranium for which he received economic benefit. Mr Pamensky is also a member of Eskom’s Board. By virtue of officio function and role in Eskom he would have or could have access to privilege or sensitive information regarding OCH and various Eskom Contracts. Such information coupled with a personal economic interest would give Tegeta an unfair advantage over other interested buyers. It would be very important to understand the role of this individual in this transaction in light of a high degree of irregularities that appears to have occurred in Eskom.

5.77. Ms Devapushpum Viroshini Naidoo (“Ms D Naidoo”) is the spouse of Mr Moodley, who is the director of Albatime. As mentioned above Albatime contributed to the purchase of OCH.

5.78. Nazia Carrim (“Ms Carrim”) is the spouse of Muhammed Sikander Noor Hussain (“Mr Hussain”). Mr Hussain is a family member of Mr Essa. Ms Carrim has since resigned from the Board of Eskom.

5.79. Mr Romeo Khumalo (“Mr Khumalo”) resigned from the board of Eskom in April 2016. Mr Khumalo and Mr Essa were directors of Ujiri Technologies (Pty) Ltd (2011/010963/07). Mr Khumalo has since resigned from the Board of Eskom.

5.80. Ms Marriam Cassim’s (“Ms Cassim”) employment background states Sahara Computers (1997/015590/07), a 90% owned subsidiary of Sahara Holdings, as a previous employer. Ms Cassim has since resigned from the Board of Eskom.

5.81. The following was declared by the Eskom Board members in relation to the above mentioned conflicts identified:
5.82. Ms D Naidoo, in her declaration made on 19 February 2016, lists her husband as Mr K Moodley who is a part time advisor to the Minister of Mineral Resources and declares that this may be a conflict if she is in a forum at Eskom which seeks to influence the Governments mineral policy. Ms D Nadioo, lists herself as an employee of Albatime. This is as per her declaration made on 19 February 2016 and 31 May 2016.

5.83. Mr Ngubane does not list himself as a director of Gade Oil in his declaration made on 31 May 2016.

5.84. Ms Carrim did not declare her relationship with Mr Essa in her declaration made on 31 May 2016.

5.85. Ms Cassim does not list Sahara Computers has her previous employers.

5.86. Mr Pamensky does declare all his directoships held in ORE, Yellow Star Trading and BIT Information Technology. Mr Pamensky further states that he does not take part in any HR or procurement related activities.

**Minutes of the Board Committee Meeting (08/2015) held on 10 February 2016 in the Huvo Nkulu Boardroom at 09:00**

5.87. The board members present during this meeting were. Mr Z Khoza, Ms C Mabude, Ms D Naidoo and Ms N Carrim.

5.88. No interests were declared pertaining to matters on the agenda.

5.89. The board approved the sale of shares in OCM to Tegeta and released OCH from the guarantee given to Eskom.
5.90. It was also resolved that the CSA between OCH and Eskom be ceded to Tegeta.

*Minutes of the Special Eskom Board Tender Committee Meeting 09-2015/16 held at the Huvo Nkulu Boardroom on 07 March 2016 at 18H00*

5.91. The board members present during this meeting were. Mr Z Khoza, Ms C Mabude, Ms D Naidoo and Ms N Carrim.

5.92. Ms D Naidoo in this meeting, declared that her husband was an advisor to the Minister of Mineral Resources, it was agreed that this posed no conflict in relation to the items on the agenda.

5.93. A mandate was given to negotiate coal supply agreements with coal suppliers for the supply of coal to Arnot power.

5.94. Cellular phone record analysis

5.95. With a view to establishing relationships between individuals as well as potential conflicts of interest, I obtained the numbers of Mr Brian Molefe (“Mr Molefe”), Mr Ajay Gupta, Ms Ronica Ragavan (“Ms Ragavan”), Mr Nazeem Howa (“Mr Howa”), Mr Rajest Gupta, Mr D Zuma, Mr Atul Gupta and The Minister of Mineral Resources, Mosebenzi Zwane (“Minister Zwane”).

5.96. The following can be noted with regards to Mr Molefe and Mr Ajay Gupta:
5.97. The above illustrates that between the period 2 August 2015 and 22 March 2016 Mr Molefe has called Mr Ajay Gupta a total of 44 times and Mr Ajay Gupta has called Mr Molefe a total of 14 times.

5.98. Between 23 March 2016 and 30 April 2016, Ms Ragavan made 11 calls to Mr Molefe and sent 4 text messages to him. Of the calls made, 7 were made between 9 April 2016 and 12 April 2016. This includes one call made on 11 April 2016.

5.99. The following diagram depicts the number of instances placing Mr Molefe within the Saxonwold area:

5.100. For the period 5 August 2015 to 17 November 2015, Mr Molefe can be placed in the Saxonwold area on 19 occasions.
5.101. The diagram below, further depicts instances of contact between Mr Molefe, Mr Howa, Mr Rajesh Kumar Gupta and Mr Atul Gupta:

![Diagram showing instances of contact between Mr Molefe, Mr Howa, Mr Rajesh Kumar Gupta, and Mr Atul Gupta]

**Conflict of interest by the Minister of Mineral Resources**

5.102. Minister Zwane, is responsible for ensuring policymaking and policy implementation of service delivery for ESKOM. He also oversees the regulation of the MPRDA. In the execution of his functions the Minister relies on advisors. Mr Moodley was an advisor during the Tegeta purchase of OCH.

5.103. As mentioned earlier, Mr Moodley is married to Ms Naidoo (Eskom Board member). His role in the Tegeta acquisition of OCH remained unknown until it was established that his company Albatime made payments for the benefit of Tegeta towards the acquisition of OCH.

5.104. Media, business and politicians have questioned the role of the Minister Zwane in a Tegeta, OCH deal. In an article styled “Zwane denies joining Guptas on trip to
Switzerland” which was published on 25 May 2016, it was stated that Minister Zwane had met with Glencore CEO Mr Ivan Glasenberg at the Dolder Grand Hotel in Zurich.

5.105. Travel records obtained from Emirates Airlines confirm that Minister Zwane’s travel itinerary for a trip undertaken between 29 November 2015 to 7 December 2015, which includes whether or not the flight was boarded, is as follows:

<table>
<thead>
<tr>
<th>Flight details</th>
<th>Date of flight</th>
<th>Ticket number</th>
<th>Flown/Unused</th>
</tr>
</thead>
<tbody>
<tr>
<td>Johannesburg to Dubai</td>
<td>29 November 2015</td>
<td>1769244673469</td>
<td>Flown</td>
</tr>
<tr>
<td>Dubai to Zurich</td>
<td>30 November 2015</td>
<td>1769244673469</td>
<td>Flown</td>
</tr>
<tr>
<td>Zurich to Dubai</td>
<td>02 December 2015</td>
<td>1769244673469</td>
<td>Unused</td>
</tr>
<tr>
<td>Dubai to Delhi</td>
<td>03 December 2015</td>
<td>1769244673469</td>
<td>Unused</td>
</tr>
<tr>
<td>Delhi to Dubai</td>
<td>05 December 2015</td>
<td>1769244673469</td>
<td>Unused</td>
</tr>
<tr>
<td>Dubai to Johannesburg</td>
<td>07 December 2015</td>
<td>1769244673469</td>
<td>Unused</td>
</tr>
<tr>
<td>Dubai to Johannesburg</td>
<td>07 December 2015</td>
<td>1769244734145</td>
<td>Flown</td>
</tr>
</tbody>
</table>

5.106. The total cost breakdown for the trip is as follows:

<table>
<thead>
<tr>
<th>Ticket number</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>1769244673469</td>
<td>R 52,400.00</td>
</tr>
<tr>
<td>1769244734145</td>
<td>R 44,230.00</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>R 96,630.00</strong></td>
</tr>
</tbody>
</table>

5.107. It is unclear as to why Minister Zwane did not board his flights from 2 December 2015 to 5 December 2015. It is further unclear as to why an additional flight was booked from Dubai to Johannesburg on 7 December 2015. However, I still need to interview Minister Zwane in this regard.

5.108. What is further peculiar is how Minister Zwane, managed to reach Dubai on 7 December 2015 as there are no flight details for him travelling from Zurich to Dubai.
5.109. If Minister Zwane did in fact travel officially to meet Mr Glasenberg, it would imply that his travel and reason for travel would have been authorised by the president.

5.110. I have also received information from an independent source that Minister Zwane did in fact meet with Mr Glasenberg in Switzerland at the Dolder Hotel around 30 November 2015 to 5 December 2015. The other individuals present during said meeting/s was Mr Rajesh (Tony) Gupta as well as Mr Essa.

**Tegeta & Eskom**

5.111. Media reports have speculated how it came to be that Tegeta was awarded contracts with Eskom.

5.112. In order to refute and/or prove the allegations surrounding the awarding of contracts to Tegeta and the alleged preference which has been given to them, I performed an extensive review of all documentation received from various individuals and/or entities.

5.113. In addition to information received from various other individuals, the bulk of the information was received was from Eskom, it should be noted that Eskom has reserved their right to supplement the information supplied to my office and as such the information presented below represents what I received from Eskom.

5.114. I noted a report from National Treasury signed 12 April 2016 by Mr Kenneth Brown, Chief Procurement Officer in National Treasury, titled *REPORT ON THE VERIFICATION OF COMPLIANCE WITH TREASURY NORMS AND STANDARDS – APPOINTMENT OF TEGETA EXPLORATION AND RESOURCES (PTY) LTD*. The ensuing paragraphs details the contents of the report as well as the certain annexures attached thereto.
5.115. This report deals primarily with the supply of coal by Tegeta, from the Brakfontein Colliery and Brakfontein Colliery Extension to the Majuba Power Station.

**Report received from National Treasury**

*Minutes of Meeting with Goldridge held on 09 May 2014*

5.116. The following can be noted with regards to the meeting held on 9 May 2014:

   a) Eskom was approached by a company named Goldridge to supply coal to Eskom from the Brakfontein and Vierfontein mines. Goldridge stated that they owned these mines through Tegeta.

   b) Eskom stated that they prefer dealing with companies that are 50% +1 share black owned.

*Minutes of Meeting with Tegeta held on 10 July 2014*

5.117. The following can be noted with regards to the meeting held on 10 July 2014:

   a) Tegeta stated that it was fined for contravening environmental regulations.

*Minutes of Meeting with Tegeta held on 23 September 2014*

5.118. The following can be noted with regards to the meeting held on 23 September 2014:

   a) The combustion test results from Brakfontein Coal is potentially suitable for the Kendal, Kriel units 4-6, Lethabo and Matimba Power Stations.
b) It was expressly stated that Eskom would only be able to consider a seam 4 Lower of Brakfontein as the seam 4 Upper did not meet Eskom’s requirements as per the sample provided.

c) It was further stated that the Power Stations which could receive coal from Brakfontein have all their coal needs met for the financial year. As such an agreement between Eskom and Tegeta for the supply of coal can only be reached at the *earliest* on 1 April 2015.

*Minutes of Meeting with Tegeta held on 23 January 2015*

5.119. The following can be noted with regards to the meeting held on 23 January 2015:

a) It was reiterated that only the seam 4 Lower would be suitable for use at Eskom power stations.

b) Tegeta said that it would be difficult to mine only the seam 4 Lower.

c) Eskom requested that Tegeta revise their operations in order to only mine the seam 4 Lower.

d) Eskom further expressed concern at the prices offered by Tegeta. Tegeta offered a price of R17/GJ for the *seam 4 Lower* and R15/GJ for the blended product (Should be noted that the blended product was stated as not being suitable for Eskom).

e) It was agreed that Tegeta would revise their price offering, as well as present plans on how to address the quality of the *seam 4 Upper*.

*Minutes of Meeting with Tegeta-Idwala held on 30 January 2015*
5.120. The following can be noted with regards to the meeting held on 30 January 2015:

a) Eskom stated that the price of coal was too high in comparison to the price of coal which is currently being supplied to Majuba Power Station.

b) Eskom stated that any price agreed on between the parties would set new standards on the price of coal sold to Eskom.

c) Tegeta requested to call the Eskom board and obtain a mandate to adjust the price offer.

d) Tegeta revised their coal offer to 13.50/GJ for a five year contract at approximately 65000 tonnes per month.

e) Eskom accepted the Tegeta offer and further stated that the coal must meet all technical and combustion requirements of the Majuba Power Station.

f) A coal supply agreement was first signed between Eskom and Tegeta on 10 March 2015 with the commencement date being 1 April 2015.

5.121. A letter signed on 31 August 2015 was sent to Tegeta from Mr Matshela Koko (“Mr Koko”) of Eskom with title Suspension of Coal Supply: Brakfontein Colliery and Brakfontein Colliery Extension. The contents of the letter are as follows:

a) Eskom notes the significant increase in the number of out-of-specification coal stockpiles from July to August 2015. During August 2015, 50% of the stockpiles have been out of specification resulting in rejection. Further, Eskom notes the inconsistency in the laboratory results as the outcome of coal samples provided by the mine; and
b) This is of great concern to Eskom as it now calls into question the exact nature and quality of the coal that Brakfontein Colliery and Brakfontein Colliery Extension supplies to Eskom in terms of the coal supply agreement;

c) Therefore as a precautionary measure, Eskom hereby notify you of the suspension of offtake from the mines in order to investigate the root cause of the inconsistency in the coal quality management process; and

d) The suspension will come into effect by 16h00 today.

5.122. Additional letters of suspension, signed 31 August 2015 were also sent to SGS Services South Africa Pty Ltd and Sibonisiwe Coal Laboratory Services CC.

5.123. A letter signed on 5 September 2015 was sent to Tegeta from Mr Matshela Koko ("Mr Koko") of Eskom with title Upliftment of the Suspension of Coal Supply: Brakfontein Colliery and Brakfontein Colliery Extension. The content of the letter is as follows:

5.124. The above matter and our letter dated 31 August 2015 refer.

a) Eskom hereby lifts the suspension of coal supply from the Brakfontein Colliery and Brakfontein Colliery Extension effective immediately whilst it continues its investigation into the inconsistencies in the coal quality and management process.

b) License in terms of Chapter 4 of the National Water Act, 1998 (Act No. 36 of 1998)

5.125. This document is the water license issued to Tegeta. It is signed and dated 22 December 2014.
5.126. It should be noted that Tegeta first approached Eskom to supply coal on 9 May 2014. This is 6 months before it was granted a water license in order to proceed with mining.

Findings / Recommendations in the National Treasury Report

5.127. The report from National Treasury makes the following findings and recommendations with regards to their investigation:

5.128. There is no evidence to suggest that Tegeta settled the fine which it received from the environmental authorities. This was noted in a review of the annual financial statements of Tegeta where no mention is made of the any fines imposed on it.

5.129. It is unclear why the coal supply agreement entered into between Eskom and Tegeta include the seam 4 Upper, where this was previously deemed unsuitable for Eskom.

5.130. Eskom allowed Tegeta to supply the stockpile coal which did not conform to its standards.

5.131. There is no evidence to suggest that any remedial action was implemented by Eskom in order to rectify the issues identified with the coal being supplied by Tegeta.

5.132. National Treasury required Eskom to submit evidence of effective and appropriate steps taken to ensure that Tegeta:

   a) Supplied and continue to supply coal that conforms to Eskom’s standards;

   b) Complied and continue to comply with all obligations under applicable laws;
c) Submitted prescribed information to Eskom within 30 days after the publication of the annual report;

d) Settled the fine for contravening environmental laws imposed by competent authorities;

e) Complied with additional Water Use License requirements;

f) Selectively mined the seam, use a grader to remove the major seam partings and avoid over drilling and blasting to improve the quality of coal;

g) The Accounting Authority must submit evidence of effective and appropriate steps taken by Eskom after receiving the SABS coal test results dated 18 September 2015 which confirmed that Tegeta’s coal do not conform to contracted standards;

h) The Accounting Authority must submit evidence of effective and appropriate steps taken by Eskom after Tegeta justified its high coal price because of the increased BEE shareholding;

i) The Accounting Authority must submit evidence of effective and appropriate steps taken by Eskom to ensure compliance with clause 30 of the Coal Supply Agreement with regards to the submission of the legislative submission associated with compliance by the supplier; and

j) The Accounting Authority must submit evidence of effective and appropriate steps taken by Eskom to ensure that Tegeta was not paid for the tons of coal that did not comply with its standards.
5.133. Apart from the abovementioned report received and reviewed from National Treasury, I did not further investigate the award of contracts to Tegeta to supply coal to the Majuba Power Station. This will form part of the second phase of the investigation and will possibly be included in the subsequent reports to be released on these matters.

**Glencore / OCH / OCM**

5.134. An important and integral part of the investigation is the contracts as well as the general business relationship between Eskom and OCH/OCM.

5.135. I would like to point out that I have taken extracts out of each contract and/or correspondence which I have deemed relevant for the investigation at hand.

**Coal Supply Agreement between Eskom and Trans-Natal Coal Corporation Limited and Trans-Natal Collieries Limited**

5.136. On 4 January 1993, Eskom entered into a Coal Supply Agreement ("CSA") with Trans-Natal Coal Corporation Limited and Trans-Natal Collieries Limited (Operations of Optimum Collieries were transferred to this holding company). The terms of the agreement was *inter alia* as follows:

5.137. The agreement was for the supply of coal to the Hendrina Power Station.

5.138. The agreement was to run until 31 December 2008, with Eskom having the option to extend this agreement to 31 December 2018.

5.139. There were numerous clauses in the agreement which detail the specifications and quality of coal required to be supplied.
5.140. An important clause to note is that of clause 27 titled “Hardship Clause”. In essence this clause allows either party to raise this clause, should “relevant circumstances” arise, and this places an obligation on the other party to enter negotiations in order to agree new terms to the agreement and resolve the hardship being suffered. In the event negotiations could not be concluded the matter should be referred to arbitration.

First Addendum to Hendrina Coal Supply Agreement between Eskom Holdings Limited and Optimum Coal Holdings Proprietary Limited and Optimum Coal Mine Proprietary Limited

5.141. The details of the First Addendum to the Hendrina Coal Supply Agreement (“First Addendum”) are inter alia as follows:

5.142. The purpose of this agreement was to obtain consent from Eskom to the sale of Optimum Collieries from BHP Billiton Energy Coal South Africa Ltd (“BECSA”) to OCH and OCM. Furthermore, consent was needed from Eskom for the “cession and delegation by BECSA to OCM, of its rights and obligations in the terms of the CSA”.

5.143. Eskom would consent to the cession and delegation on condition that OCH and OCM agreed to new terms in relation to the CSA.

5.144. The maximum quantity of coal to be supplied per annum would be 5,500,000 tonnes.

5.145. The First Addendum also set out new requirements with regards to the quality of coal being supplied and specifically a clause which provided that:
a) “3.4.4 In the event that any of the Parties shall, at any time, be or become of the view that the specification clauses 3.4.2 and 3.4.3 shall not be properly and/or realistically representative of the cola which Optimum Colliery shall reasonably be expected (in the event that it were to conduct its operations in a proper manner and in accordance with best industry standards) to achieve from the exploitation of the coal deposits constituting the Optimum Colliery, such Party shall be entitled to notify them that it wishes to re-negotiate such specification.

b) 3.4.5 On being so notified, the other Party shall enter into discussions and negotiations in good faith with the first Party, in order to reach agreement in respect of the amendment of such specification.

5.146. A further clause in the contract titled “Payment Rejection” is important in relation to the future deals between Eskom and OCM. Clause 3.6.1.5 states as follows:

a) “In the event that any Quality Parameter shall fail to have been met for any seven day rolling period, the purchase price payable by Eskom to Optimum Colliery in respect of the coal (which shall not comply with the Quality Parameters) on the seventh day of such period and/or any subsequent consecutive day on which the Quality Parameters, or either of them, shall fail to have been met, shall be reduced to R1-00 per tonne.”

b) The agreement further stipulated the CSA shall last until 31 December 2018 and is referred to as the Additional Coal Period.

Settlement of Arbitration and Second Addendum to the Hendrina Coal Supply Agreement between Eskom Holdings Limited and Optimum Coal Holdings Limited and Optimum Coal Mine (Proprietary) Limited
5.147. The details of the Second Addendum to the Hendrina Coal Supply Agreement ("Second Addendum") are inter alia as follows:

5.148. Eskom and OCM by way of arbitration both agreed to amend the CSA.

5.149. The price payable by Eskom per tonne of coal would be R115.00 per tonne on an escalation basis as set out in the CSA.

5.150. The intended commencement date would be 1 April 2011

*Third Addendum to the Hendrina Coal Supply Agreement amongst Eskom Holdings SOC Limited and Optimum Coal Holdings (Proprietary) Limited and Optimum Coal Mine (Proprietary) Limited*

5.151. The Third Addendum to the Hendrina Coal Supply Agreement ("Third Addendum") which came into effect as at 15 January 2013, allowed for the deletion of the provisions of clause 4.1 and clause 4.2 of the Second Addendum.

5.152. There were no other material changes or additions made to the CSA.

5.153. Hendrina Coal Supply Agreement: Sizing Specifications

5.154. This is a letter between Optimum Coal Mine and Eskom dated 23 April 2013. The contents of the letter is as follows:

5.155. Referenced is made to a letter received from Eskom dated 22 April 2013 in which Eskom expresses concerns regarding sizing specification in terms of the First Addendum.
5.156. OCM states that since discussions in September 2012 with Eskom, they have made attempts to identify the reason for the change in sizing of the coal being supplied.

5.157. OCM therefore wished to renegotiate the specifications as per clause 3.4.4 and 3.4.5 of the First Addendum.

**Hendrina Coal Supply Agreement: Hardship**

5.158. On 3 July 2013 OCM sent this letter to Eskom formally invoking the Hardship clause of the agreement. The contents of the letter is inter alia as follows:

a) OCM further set out reasons for the hardship as well as the relevant circumstances which have arisen.

b) OCM stated that the difference between the cost to produce coal and the selling price to Eskom is approximately R166.40.

c) OCM further stated that it expects to lose R881 million during the course of 2013 due to the sale of coal to Eskom in terms of the CSA.

d) The letter further sets out the numerous reasons as to why the cost as escalated over the period of the CSA.

e) OCM further states that they wish to agree mutually acceptable amendments to the CSA in order to resolve their hardship.

f) According to representatives of OCH, a long negotiation process began with Eskom in order to resolve this dispute and come to a viable solution. Both Eskom
and OCH could not reach agreement on a number of issues. This culminated in the following agreement being signed.

Agreement between Eskom Holdings SOC Limited and Optimum Coal Mine Proprietary Limited and Optimum Coal Holdings Proprietary Limited regarding a process to engage on issues between the parties and for the review and future extension of the Coal Supply Agreement for the Hendrina Power Station

5.159. The purpose of the above agreement ("Co-operation Agreement") will be detailed in the ensuing paragraphs.

5.160. Clause 2 of the agreement speaks of the “issues” that have arisen between the Parties. The issues are listed as:

a) the interpretation, implementation and execution of the penalty provisions of the CSA;

b) the interpretation, implementation and execution of the sampling process contemplated by the CSA;

c) the quality of the coal supplied to Eskom and the price adjustment Eskom is entitled to impose in respect thereof;

d) issues relating to the availability and utilisation of the supply infrastructure;

e) the escalation mechanism in the CSA;

f) the hardship arbitration initiated by Optimum Mine and Optimum Holdings against Eskom, in terms of which Optimum Mine and Optimum Holdings invoked the hardship provisions of the CSA; and
g) the supply from Optimum Mine to Eskom after 31 December 2018.”

5.161. Clause 5 of the sets out the terms and conditions under which the agreement should be carried out. The following terms are of particular importance:

a) the Parties will instruct their attorneys to suspend the hardship arbitration on the following basis by no later than 23 May 2014;

b) the suspension of the arbitration will be entirely without prejudice to the claim;

c) notwithstanding the suspension of the arbitration, the Parties will arrange with the arbitrator and the Party’s counsel to reserve the dates required for a hearing in March 2015 on the basis that if the parties agree Terms of Reference on or prior to the Validation Date (as defined below) then such dates can be released;

d) if the Settlement Process is terminated on or before the Validation Date, then Optimum Mine may by notice in writing to Eskom immediately reinstate the hardship arbitration and the Parties will within two weeks meet to agree a revised timetable for the hardship arbitration with a March 2015 hearing date; and

e) If the Settlement Process is terminated at any other time, then Optimum may by notice in writing to Eskom immediately reinstate the hardship arbitration on the basis that the Parties will as soon as possible thereafter meet in order to agree a new timetable and hearing date for the hardship arbitration;
f) Eskom will, with retrospective effect to 1 May 2014 until the termination of the Settlement Process suspend the implementation of all penalties (including AI, CV, ash, sizing and short supply) in relation to the CSA, on the condition that Optimum Mine continues delivering coal in accordance with the specification to be agreed in the Terms of Reference;

g) If the Parties are unable by the Validation Date to agree and execute Terms of Reference, each of the Parties shall be entitled to advise the other that it no longer wishes to participate in the Settlement Process in which case the Settlement Process shall terminate;

h) The Parties agree that it is their current intention to conclude a new coal supply agreement which will govern the supply from Optimum Mine to Eskom from 1 January 2015; and

i) The Co-operation Agreement was signed on 23 May 2014.

Hendrina Coal Supply Agreement, letter dated 13 November 2014

5.162. In letter dated 13 November 2014, OCM in essence informed Eskom of the following:

a) The negotiations as per the Co-operation Agreement have not progressed adequately and at a sufficient pace and are thus considering shutting down OCM’s operations.

b) The letter further gave Eskom proposed solutions whereby coal would be supplied to Eskom for the period January 2015 to December 2018 at cost and for the period January 2019 to December 2023 coal would be supplied at cost plus an agreed upon margin.
c) There were additional proposals made by OCM in the letter which sought to give Eskom some sort of economic benefit in renegotiating term.

d) The letter further states that during these negotiation processes detailed financial information has been shared with Eskom in order for Eskom verify the costing information provided by OCM.

e) In concluding, OCM further states:

“neither Eskom nor OCM can accept the highly damaging situation whereby OCM ceases operating. As a result, there is no option other than Eskom and OCM reaching agreement to amend the Hendrina coal supply agreement. OCM believes that Eskom understands this but is not willing to conclude an agreement because it has residual concerns regarding OCM and Glencore’s bona fides and whether the position really is as severe as OCM has alleged. OCM believes that it has acted in the utmost good faith and with full transparency, beyond what would normally be expected from a commercial counterparty, to identify a solution which is fair and reasonable for both parties. This letter includes further proposals in this regard. If Eskom is still not satisfied, then we implore Eskom urgently to engage with us so that we can seek to address and resolve Eskom’s concerns and move towards an agreement.”

Draft Fourth Addendum to the Hendrina Coal Supply Agreement amongst Eskom Holdings SOC Limited and Optimum Coal Mining Proprietary Limited and Optimum Coal Holdings Proprietary Limited

5.163. The Draft Addendum was concluded after negotiations between the parties progressed. It is evident from said draft addendum that alterations were made to
the document by Eskom and OCH/OCM. The key aspects of the Draft Addendum was that there would ultimately be a new negotiated price for the supply of coal. Furthermore, there would be new agreed upon specifications for the quality of coal to be supplied to the Hendrina Power Station.

Minutes of Board Meeting 02-2015/16 held on 23 April 2015 Horseshow Boardroom, Eskom Bellville Offices, Cape Town from 09h00

5.164. The following board members were present during said meeting:

<table>
<thead>
<tr>
<th>Name</th>
<th>Appointment Date</th>
<th>Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>Zethembe Wilfred Khoza</td>
<td>2014-12-11</td>
<td>Non-Executive Director</td>
</tr>
<tr>
<td>Nazia Carrim</td>
<td>2014-12-11</td>
<td>Non-Executive Director</td>
</tr>
<tr>
<td>Venete Jarlene Klein</td>
<td>2014-12-11</td>
<td>Non-Executive Director</td>
</tr>
<tr>
<td>Chwayita Mabude</td>
<td>2011-06-26</td>
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</tr>
<tr>
<td>Devapushpum Naidoo</td>
<td>2014-12-11</td>
<td>Non-Executive Director</td>
</tr>
<tr>
<td>Pathmanathan Naidoo</td>
<td>2014-12-11</td>
<td>Acting Chairman</td>
</tr>
<tr>
<td>Baldwin Sipho Ngubane</td>
<td>2014-12-11</td>
<td>Non-Executive Director</td>
</tr>
<tr>
<td>Mark Vivian Pamensky</td>
<td>2014-12-11</td>
<td>Non-Executive Director</td>
</tr>
<tr>
<td>Romeo Khumalo</td>
<td>2014-12-11</td>
<td>Non-Executive Director</td>
</tr>
</tbody>
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5.165. The following extracts of said meeting should be noted:

a) The referral from the Board Tender Committee for approval of the mandate to conclude negotiations with Optimum Coal Mine for Coal Supply to Hendrina Power Station was tabled, details of which had been circulated to members.

b) It was requested that the submission should be taken off the Agenda and submitted to the Acting CE before being tabled for approval. In response to a member’s suggestion that Resolution 2.5 (around the mandate to negotiate but not to conclude with Optimum, for Eskom to take up a free carry shareholding of 10% to 15% equity and/or to engage with Optimum
to facilitate the purchase of Optimum by Eskom or one of the state owned mining companies) should be revised to include a seat on the Board for Eskom as well as oversight, it was reported that this had been included in the Board Tender Committee discussion.

5.166. The members of the Eskom board resolved the following in relation to the above mentioned matter:

a) the Referral from the Board Tender Committee for approval of the mandate to conclude negotiations with Optimum Coal Mine for Coal Supply to Hendrina Power Station is not approved: and

b) the mandate should be referred to the Acting Chief Executive before being tabled at Board for approval.”

*Hendrina Coal Supply Agreement, letter dated 22 May 2015*

5.167. This letter is stated as a follow up letter to the one dated 13 November 2014. The contents of the letter is as follows:

5.168. OCM states that in order to mitigate losses, it is closing its export operations. OCM further states that following this announcement Eskom’s negotiation team approached OCM and significant progress was made with regards to negotiating a new agreement.

5.169. OCM and the Eskom negotiating team had agreed the increase of the price of coal from 1 April 2015 to 31 December 2018 to cost (which costs were audited extensively by Eskom and its advisers). Additional terms agreed upon would also include an extension of the agreement beyond 31 December 2018 for a 5 year period whereby the price of coal would be cost plus an agreed upon margin.
5.170. An important extract of the letter reads as follows:

a) “Eskom’s negotiating team advised OCM that the terms of the deal were subject to approval by the Executive-Procurement Committee and then the Eskom Board Procurement Sub-Committee. On 25 March 2015, OCM was advised that the Executive-Procurement Committee had approved the terms of the deal. Thereafter, OCM were advised that the deal was presented to the Procurement Sub-Committee of the Eskom Board on 15 April 2015, but the sub-committee was not willing to make a decision and had referred the matter to the full Eskom Board for consideration. We understand that on 23 April 2015 the full Eskom Board did not make a decision and requested further information. Following such board meeting, OCM continued to engage with Eskom in the expectation that the deal was still supported by Eskom and that the negotiations with Eskom would result in some deal, perhaps on amended terms, being concluded. On 18 May 2015, the CEO of OCM met with the Acting CEO of Eskom, who advised that Eskom would not be concluding any deal with OCM and would continue enforcing the existing coal supply agreement.”

5.171. OCM states that it has exhausted its available banking facilities which sit at R2.5 Billion. OCM further stated that it requires approximately R100 million per month in order to continue its operations and that its shareholders have advanced approximately R1 billion to OCM since October 2014.

5.172. OCM states that if this position with Eskom continues it would be forced to place OCM in business rescue. However, OCM reiterates that even in business rescue, the only possible way to save the business would be to renegotiate the contract for the Hendrina CSA.
5.173. OCM received the above mentioned letter from Eskom which was signed on 10 June 2015 by Mr Molefe who was the acting Chief Executive at the time. The letter states as follows:

a) “We acknowledge receipt of your letter dated 22 May 2015 and the issues you raise in it. However, considering Eskom’s current financial position, which is public knowledge, we unfortunately cannot afford to reset the contract price, to that proposed by Optimum Coal Mine.

b) It remains priority for Eskom, to ensure the security of the coal supply to Hendrina Power Station not only for the remainder of the current coal supply agreement but also for the remaining life of Hendrina Power Station. Therefore it remains critical to all stakeholders that Optimum Coal Mine continues to deliver coal as per the current contract.

c) Eskom, to the extent that the Co-Operation Agreement still regulates the settlement process hereby notifies Optimum Coal Mine in terms of clause 5.6 of the Agreement, that it no longer wishes to participate in the settlement process. Eskom accordingly hereby terminates the settlement process and confirms that the provisions of the CSA and addenda are forthwith applicable in respect of, inter alia, coal qualities and quantity requirements of the Hendrina Power Station.

d) However, the negotiation teams should continue to negotiate a new CSA for after 2018, in respect of the remaining life of Hendrina Power Station.”

Hendrina Coal Supply Agreement: Reinstatement of Hardship Arbitration
5.174. The above mentioned letter dated 23 June 2015, is the response by OCM to the Eskom letter mentioned above. The letter reads as follows:

a) “We refer to your letter dated 10 June 2015, which we received on 22 June 2015.

b) We will respond in due course to the substance of your letter, but in light of your termination of the Settlement Process (as defined in Co-Operation Agreement), we wish to advise that in accordance with the provisions of clause 5.2.4 of the Co-operation Agreement, we hereby immediately reinstate the Hardship Arbitration initiated by Optimum Mine and Optimum Holdings against Eskom, by way of their statement of claim dated 28 February 2014.

c) Our legal representatives will shortly contact your legal representatives and the duly appointed arbitrator, in order, inter alia, to agree a new procedural timetable and hearing date for the arbitration. We note that in terms of Co-Operation Agreement you have an obligation to meet us as soon as possible to agree such new timetable and hearing date.”

Hendrina Coal Supply Agreement: Revised Offer

5.175. OCM sent the above mentioned letter to Eskom on 30 June 2015, the contents of the letter sets out OCM’s proposed new offer to supply coal to Eskom pursuant to a meeting between Mr Ivan Glasenberg (Glencore), Mr Clinton Ephron (OCM), Mr Molefe and Mr Vusi Mboweni. OCM makes *inter alia* the following offer to supply coal to Hendrina Power Station:
a) For the period 1 July 2015 to 31 December 2018 coal will be supplied at R 300 per ton exclusive of VAT subject to escalation on a yearly basis;

b) For the period 1 January 2019 to 31 December 2023 coal will be supplied at a rate of R 570 per ton exclusive of VAT subject to escalation on a yearly basis;

Offer received from KPMG

5.176. On 1 July 2015, Glencore received a letter from KPMG Services (Pty) Ltd, in which they state that they have been requested by one of their clients who at the time wish to remain anonymous. The purpose of the letter was an expression of interest to purchase either OCM or OCH. Further contents of the letter states as follows:

   a) Their clients wish to purchase OCM and/or all shares in OCH for R2 billion.

   b) With regards the financing the letter states as follows:
      “Our client has held discussions with its bankers regarding their capacity to fund the acquisition of Optimum Coal. Based on their existing business operations and assets (i.e. without recourse to the assets of Optimum Coal), they have received written letters of support for the required funding, which together with case resources, would allow them to fund the proposed purchase price of R2 billion, without recourse to the assets of Optimum Coal.”

   c) The letter further states that “the senior management of our client and the majority shareholder have approved our release of this Expression of Interest”.

   d) The letter is signed by Nick Matthews who is listed as a Partner, Deal Advisory Head Mergers & Acquisitions.
Demand for Repayment in Respect of Coal which Failed to Comply with the Quality Specification of the CSA during the period 1 March 2012 to 31 May 2015

5.177. This was a letter sent by Cliffe Dekker Hofmeyr ("CDH") on behalf of Eskom to OCM dated 16 July 2015. The contents of the letter is as follows:

a) Eskom stated that:

“… the settlement process contemplated by the Co-operation agreement terminated on 22 June 2015, which entitles Eskom to re-commence with the implementation of all penalties and/or payment reductions in terms of the CSA”.

“2.5 Optimum has for a consecutive period from 1 March 2012 to 31 May 2015 (the “Supply Period”), failed to supply and deliver to Eskom coal which meets the quality parameter contemplated by clause 3.4 of the First Addendum. The coal supplied and delivered to Eskom, amongst others, failed to comply with the sizing specifications, in that 20% to 45% of the coal supplied and delivered to Eskom by Optimum on a monthly basis, during the Supply Period, was smaller than 0.81mm. Despite this failure by Optimum, Eskom has, without prejudice to its rights in terms of clause 3.6 of the First Addendum, paid Optimum for such coal, without applying any adjustment or reduction to the payment, for Optimum’s failure to comply with the quality parameters, even though Eskom was entitled to adjust or reduce the payment accordingly.”

“2.6 Eskom has done a calculation of the reduction to the purchase price that Eskom was entitled to impose on the payment to Optimum for the coal supplied and delivered during the Supply Period, which failed to comply with the quality parameters in clause 3.4 of the First Addendum. The reduction Eskom is entitled to impose on the purchase price to Optimum for the Supply Period amounts to
R2,176,530,611.99 (two billion one hundred seventy six million five hundred and thirty thousand six hundred and eleven rand and ninety nine cents).”

**Business Rescue Plan OCH 31 March 2016**

5.178. The following can be noted with regards to the Business Rescue plan submitted on 31 March 2016:

a) The board of directors of OCH took the decision on 31 July 2015 to place the entity in Business Rescue.

b) On 4 August 2015, Piers Michael Marsden (“Mr Marsden”) and Petrus Francois van den Steen (“Mr van den Steen”), were appointed as joint Business Rescue Practitioners (“BRP’s”) for OCH.

c) On 5 August 2015, notice of the appointment of the BRPs was delivered to affected persons.

d) On 12 August 2015 the first statutory meeting of creditors took place.

e) An important paragraph to note is that of paragraph 1.6.2. It reads as follows:

“Aside from the statutory requirements prescribed in the Companies Act, the BRPs have, in addition to the aforesaid-

1.6.2.1 taken full management control of the Company in substitution for its board of directors in terms of section 140 (1) of the Companies Act, but have delegated certain of their functions to members of the board of directors and pre-existing management of the Company in accordance with the provisions of Chapter 6 of the Companies Act;
1.6.2.2 the BRPs have engaged with the management of the Company in order to, inter alia, (i) determine the financial position of the Company; (ii) determine the financial position of the Company; and (iii) identify the number of employees employed by the Company;

1.6.2.3 had extensive engagement with all stakeholders of the Company and OCM, including various Creditors, the Lenders, Eskom, the DMR, NUM, UASA, the shareholders of the Company and Persons interested in the Company”

Nomination as Arbitrator by The Law Society of the Northern Provinces in Terms of Clause 6.5 of the First Addendum to the Coal Supply Agreement Between Eskom Holdings SOC Limited // Optimum Coal Mine Holdings Proprietary Limited Optimum Coal Mine Proprietary Limited

5.179. This letter is sent by CDH on behalf of Eskom to Werksmans dated 5 August 2015 in which they wish to proceed with arbitration proceedings in terms of the First Addendum of the CSA. They further acknowledge that OCM and OCH has been placed in Business Rescue and requests Werksmans to engage with the BRPs in with regards to the arbitration.

Summons served on OCM and OCH

5.180. The summons was served on 5 August 2015 to OCM and OCH by Eskom, the summons was for Eskom’s claim for R 2,176,530,611.99.

Eskom Holdings SOC Limited / Optimum Coal Mine Proprietary Limited & Optimum Coal Holdings Proprietary Limited
5.181. This letter dated 6 August 2016 is from Werksmans to CDH and is a response to the letter from CDH regarding arbitration and the summons served to OCH and OCM. The contents of the letter is inter alia as follows:

a) Werkmans confirms that they act on behalf of the joint BRPs of OCM and OCH, Mr Marsden and Mr van den Steen.

b) The letter references section 133 of the Companies Act 71 of 2008 which states that no legal proceedings may be instituted against a company who is in business rescue without the consent of the business rescue practitioner or with the consent of the courts.

c) Paragraph 6 of the letter states as follows:

"6 Your client’s-

6.1 attempt to pursue the aforesaid arbitration proceedings through, inter alia, the unilateral appointment by your client of an arbitrator; and
6.2 issuing of summons in which your client’s claim replicates the claim referred to arbitration by your client, at a time when business rescue proceedings have already commenced, are in direct contravention of section 133 of the Companies Act."

d) The letter further states that CDH’s client (meaning Eskom), should follow the correct procedure and submit a claim to the BRP’s.

e) The letter further contests the appointment of the arbitrator and further states that if they proceed with either arbitration or the court action, the BRP’s will institute urgent proceedings to obtain an interdict against CDH and Eskom.
Optimum Coal Holdings Ltd (In Business Rescue) and Optimum Coal Mine (Pty) Ltd (In Business Rescue) letter dated 7 August 2015

5.182. This letter dated 7 August 2015 was sent from the BRPs to Mr Molefe as well as other individuals at Eskom. The content of the letter is as follows:

a) The BRPs state that they have reviewed the CSA with Eskom as well as correspondence between Eskom and OCM over a two year period.

b) The BRPs state that Eskom will obviously be a key stakeholder throughout the business rescue proceedings of both companies.

c) They further request an urgent meeting with Eskom in order to discuss the CSA between Eskom and OCM.

Optimum Coal Mine Proprietary Limited (In Business Rescue) / Eskom Holdings SOC Limited Re: Coal Supply Agreement – Suspension of Agreement and offer to supply letter dated 20 August 2015

5.183. This is a letter dated 20 August 2015 sent from Werksmans on behalf of the BRP’s to Eskom. The content of the letter is as follows:

a) Paragraph 4 states:
“You would further be aware from the notices in respect of the business rescue proceedings, the hardship claim initiated by OCM in 2013 and your extensive engagement with OCM pursuant to the settlement process conducted in terms of the co-operation agreement between Eskom and OCM dated 23 May 2014 (“Co-Operation Agreement”) (which settlement process Eskom terminated on 10 June 2015), that the principal reason for the commencement of OCM’s business rescue proceedings is the financial distress that the terms of the CSA have placed, and continue to place, on OCM. The financial position of OCM was clearly
communicated to Eskom on numerous occasions prior to the commencement of OCM’s business rescue proceedings in both written correspondence and in formal meetings held between representatives of OCM and Eskom. This financial position has been exacerbated by Eskom’s recent claim for historical and future penalties which, if upheld, will effectively result in OCM supplying coal to Eskom at R1 per ton.”

b) Paragraph 5 of the same letter states:
“….Marsden and Van den Steen can no longer allow OCM to continue performing the CSA on its current terms. This is even more the case given Eskom’s failure to timeously make payment for coal delivered to Eskom in July, notwithstanding that Eskom confirmed in writing on 14 August 2015 that Eskom would make such payment. The non-payment of amounts due constitutes a breach of the CSA, and our clients reserve all of their rights in this regard”

c) The letter further states that due to the above circumstances, the BRP’s are suspending all obligations of OCM in terms of the CSA.

d) They further state that the BRP’s are willing to supply coal to Eskom on terms which are sustainable for OCM. The BRP’s went further and attached to the letter an interim agreement, which was based on the initial negotiations between Eskom and OCM. The interim agreement would see OCM supply coal to Eskom at cash cost of production for OCM. The agreement would further see Eskom paying on a weekly basis.
5.184. Letter from CDH representing Eskom to Werksmans, dated 21 August 2015. In this letter Eskom requested all books in order to assess the economic viability of the proposal submitted to them.

5.185. The BRPs responded to the request from CDH in their letter dated 21 August 2015. Paragraph 2.2 with sub-heading “Long term supply agreement” of the letter reads as follows:

“Eskom have already performed considerable work on the company’s cost of production and due diligence. As part of the negotiations that commenced in May 2014 upon signing of the co-operation agreement a detailed due diligence was performed by Eskom and their advisors (Nedbank Limited and Basis Point Points Capital). The due diligence was led by Ayanda Nteta from Eskom’s Primary Energy Division.

As part of the due diligence the following information was supplied to Eskom and can be obtained from Ayanda Nteta:

- Detailed costing and production models
- Capital and amortisation schedules
- Financial Statements
- Management Accounts
- Reserve and Resource Statements”

a) Annexure 1, to the letter sets out a cash flow summary of OCM. The document lists its cost of production of coal as 22.32 R/Gigajoule ("GJ").
5.186. The letter dated 24 August 2015, is a reply to the letter dated 20 August 2015 from Werksmans. The letter states as follows:

a) Eskom cannot negotiate interim coal supply agreement without full financial disclosure.

b) The letter states that the BRP’s have given Eskom an ultimatum to either accept the agreement or face coal supply being stopped to Hendrina Power Station.

c) Eskom gives the following reasons, in paragraph 3, as to why the interim agreement is not acceptable:

“3.1.1 A complex coal supply arrangement of approximately 35 years (which precedes the 1993 agreement) cannot merely be changed at a whim, it’s clear that Eskom’s interest and that of the end consumer are not taken into account;
3.1.2 The price is approximately 300% more that the current price payable in terms of the suspended coal supply agreement;
3.1.3 Eskom must pay a higher price for lower qualities;
3.1.4 The proposed payment methodology is not acceptable;
3.1.5 There is no proposed quality management process acceptable to Eskom;
3.1.6 Eskom has no recourse for low qualities;
3.1.7 It does not provide for the recovery of Eskom’s subsidy from the export sales, once such operation is recommenced;
3.1.8 It does not take into account Eskom’s indulgence to Optimum in respect of the penalties not imposed for the past three years, but preserved in terms of the referral to arbitration.”
d) The letter concludes in saying that Eskom is willing to engage with the BRP’s provided that coal supply to Hendrina Power Station resumes.


5.187. This letter from Werksmans dated 26 August 2015 is a response to the letter from CDH dated 24 August 2015. The letter inter alia states as follows:

a) The BRP’s do not have sufficient funding to continue supplying coal under the current CSA.

b) The BRP’s make a request for Eskom to supply post commencement financing in order for OCM to continue to supply coal to Hendrina Power Station.


5.188. OCM states that it understands Eskom’s position in that it has a binding agreement with OCM and that Eskom cannot ignore the agreement solely for the purpose of rescuing OCM.

5.189. OCM states that the proposal consists of three components:

“an extension of the CSA which is designed to secure long-term source of supply for Eskom and allow for a price averaging which will provide some short-term relief for OCM until 2019;

a reasonable settlement of the alleged penalties which Eskom believes is has accrued against OCM; and
the implementation of a new black economic empowerment transaction to make OCM a majority black owned company.”


5.190. This is a letter sent by CDH to Glencore and the BRP’s. The letter states as follows:

“1 We refer to the meeting between Mr Clinton Ephron of Glencore, the BRP of Optimum Coal Mine (Proprietary) Limited (“Optimum”) and the CEO of Eskom Holdings SOC Limited (“Eskom”) on 3 September 2015.  
2 We confirm that it was agreed that Optimum shall with effect from 4 September 2015 re-commence the supply of coal to the Hendrina Power Station for a period of 60 days on the following basis-  
2.1 As per the Coal Supply Agreement;  
2.2 coal quality of 458 333 thousand tons per month;  
2.3 coal qualities in terms of the suspended 1993 Coal Supply Agreement (“CSA”) and addenda thereto, save for the relaxation of the sizing specification as recorded herein for convenience-  
3 For the duration of the 60 days arrangement, we record that-  
3.1 Eskom shall suspend the imposition of any penalties in respect of coal which fails to meet the quality specification. In that regard the power station and Optimum mine must continue on a daily/weekly/monthly basis to comply with all sampling and contractual requirements as required by the suspended CSA, including to provide Optimum with the required notices for non-compliance;  
3.2 Eskom shall on a weekly-basis within three (3) days from the date of receipt of an invoice from Optimum, make payment to Optimum for such coal supplied and delivered to the Hendrina Power Station during the preceding seven (7) days.”

5.191. The BRP’s refer to the letter sent by CDH on 19 September 2015. The contents of the letter is *inter alia* as follows:

a) Reference is also made to a meeting held between OCM and Eskom on 21 September 2015.

b) The agreement to re-commence coal supply to Eskom is on condition that discussions resume regarding the CSA.

c) There will be no sizing quality specification or any penalties levied during the 60 day period.

d) The BRP’s further state “We note that we do not accept that the power station has any difficulties with coal which does not comply with the quality specification contemplated by clause 3.4.3 of the First Addendum and we reserve all our rights arising from the notice served by OCM on Eskom in terms of clause 3.4.4 of the First Addendum on 23 April 2013.”


5.192. This is a letter dated 30 September 2015 addressed to OCM and the BRP’s. The letter is in reply to the letter sent on 17 September 2015. The letter reads as follows:
“2 We have been instructed that Eskom SOC Limited (“our client”) has considered your proposal and is not at this stage prepared to entertain it for , inter alia, the following reasons-
2.1 any discussion and negotiation on the new contract price for coal to the Hendrina Power Station will only be considered closer to 2017 and not at this stage prior thereto:
2.2 the penalty claim is not negotiable and it should be settled in full without any delay.
3 We record that it has come to our client’s attention that assets are being stripped at the Optimum mine. Our client requires full details of all assets that has been removed or stripped, and, an undertaking by no later than close of business today, that the Business Rescue Practitioners, would immediately desist with such actions, failing which our clients reserves the right to take the appropriate legal steps.”


5.193. This letter addressed to CDH from Werksmans is a reply to the letter from CDH dated 30 September 2015:

“2 We are disappointed that you have made no attempt to engage with the substance of our proposal or to make any counterproposal. Our clients are considering how to proceed and we will revert in due course.
3 Our clients categorically reject the allegation that any asses are being stripped at the Optimum mine. No assets have been removed from the Optimum mine except for certain arm’s length disposals of minor assets that were surplus to requirements, which have been approved by the joint business rescue practitioners in accordance with section 134 of the Companies Act and the secured creditor who has taken possession of all OCM’s movable assets.”
Optimum Coal Mine (Pty) Ltd – Non-Binding Offer letter dated 7 October 2015

5.194. This is a letter dated 7 October 2015 from the BRP’s to Oakbay. They refer to a letter dated 21 September 2015 and subsequent meeting held on 29 September 2015 regarding the offer to purchase OCM.

5.195. The BRP’s inform Oakbay that they have received another offer from a third party which offers more favourable terms. The BRP’s state that the third party has requested OCM to engage exclusively with them and OCM are thus no longer able to engage Oakbay with regards to their offer.

Optimum Coal Mine (Pty) Ltd – Non-Binding Offer letter dated 23 October 2015

5.196. This letter is addressed to Oakbay from OCM and the BRP’s dated 23 October 2015.

5.197. The BRP’s refer to a meeting held on 20 October 2015 in which the offer to purchase OCM was discussed.

5.198. The BRP’s confirm that they are now willing to proceed with the transaction with Oakbay on condition that a few requirements are adhered to.

5.199. The BRP’s make it clear in this letter that only OCM is for sale.

Optimum Coal Mine (Pty) Ltd (In Business Rescue) : Options letter dated 29 October 2015

5.200. This is a letter from OCM addressed to Mr Matshela Koko at Eskom. The letter makes reference to a meeting held at Eskom on 28 October 2015 and highlights
the various options discussed during the meeting. The contents of the letter is *inter alia* as follows:

a) Option 1- This entails a sale of OCM to a third party. This however would prove difficult due to the debt owed by OCM to the consortium of banks. The BRP’s state that they have been approached by Oakbay to purchase the assets of OCM. The BRP’s further state that they have limited time to explore this option due to the R 120 million worth of funding required to operate OCM and supply Eskom on a monthly basis.

b) Option 2- This entails a sale of OCM to Eskom. This would be a similar to Option 1. An important paragraph to note reads as follows: “*As noted in our discussions, OCM has the capacity to supply good quality coal not only to Hendrina, but also to other power stations if the currently curtailed mining sections are started up again. From a strategic point of view, this would potentially contribute positively towards coal supply security for Eskom in the long run.*”

c) Option 3- This entails a sale to a third party on condition that new terms can be agreed with Eskom.

*Optimum Coal Mine (Pty) Ltd (In Business Rescue) : Options letter dated 3 November 2015*

5.201. This is a letter from the BRPs to Eskom dated 3 November 2015.

5.202. The BRPs confirm that the publication of the business rescue plan has been extended to 29 February 2016.
5.203. The BRP’s also state that they have not been able to develop a plan to ensure coal supply to Eskom on the current CSA. The BRP’s state that if they do not develop a viable plan that would have to consider the option of liquidating OCM.

Optimum Coal Mine (Pty) Ltd (In Business Rescue) : Options letter dated 5 November 2015

5.204. Letter from Mr Matshela Koko of Eskom to OCM dated 5 November 2015. The contents of the letter is inter alia as follows:

“3. It is with grave concern that Eskom notes the continuous threat of liquidation at the same time as you are seeking constructive engagement between the parties. As a Glencore operation, OCM should enjoy far more than conditional funding for limited time periods. There appears to be no concerted commitment on the part of OCM and its operations to meaningfully engage on the issues without resorting to veiled threats of discontinuation of supply and recently, liquidation. I would request you desist from these types of tactics with immediate effect.

7. As matters stand currently, Eskom may be compelled to seek intervention from such institutions such as the Tribunal, the Department of Mineral Resources and service providers to ensure meaningful engagement with OCM. It may also be an appropriate time for Eskom to review the engagement with Glencore from a portfolio perspective.

8. Your earlier correspondence indicated possible options, one of which was the sale of Optimum to third parties. We note that you have an offer on the table. Eskom is happy to engage in a roundtable discussion with the interested party and yourselves to establish the veracity of the offer. You have repeatedly emphasized the limited time available to explore such options and Eskom would be willing to enter in such discussions provided that it aims to find a solution.”

5.205. This is a letter from the BRP’s to Eskom dated 13 November 2015 and is in response to the Eskom letter dated 5 November 2015. The contents of the letter is *inter alia* as follows:

a) The BRP’s acknowledge and state that they are aware as to how important it is that coal supply to Hendrina Power Station is maintained and is the very reason why the BRP’s have engaged with Eskom in order to find a solution to the coal supply agreement.

b) The BRP’s state that Oakbay has begun the due diligence process on OCM. The BRP’s state that they are hopeful of concluding a transaction with Oakbay with the consent of Eskom.

*Summary Record of Discussion Meeting Name: Exploratory Discussions on Sustainable Hendrina Coal Supply dated 24 November 2015*

5.206. The above mentioned document is the minutes of a meeting held between Eskom, OCM and Oakbay which took place on 24 November 2015. Mr Matshela Koko of Eskom chaired the meeting. The details of the meeting are as follows:

a) The purpose of the meeting was to seek the support of Eskom for the sale of OCM to Oakbay.

b) Oakbay confirmed that due diligence had begun and that they hope that an agreement will be in place on 15 November 2015.

c) The following paragraphs are of particular importance and reads as follows:
“The Chairman emphasised the Eskom position: Eskom’s priority is security of supply. There is a coal supply contract in place until 2018. Eskom expects Optimum Coal Mine to honour the contract at the contracted price until 2018. Eskom will not waive its penalty claim.

He noted that Koornfontein supply contract expires in December 2015. It appeared that the Koornfontein disposal and that of the export allocation are separate to that of OCM. This gave rise to the question of how does OCH survive beyond the life of the Koornfontein contract. He further questioned the financial strength of the new buyer; firstly would it be able to sustain a loss of ZAR 130M per month and secondly, how will the buyer survive without Koornfontein Contract and the export allocation? He postulated that if OCM were to be ring-fenced, Eskom was not convinced that it will survive on its own and hence he was compelled to engage in a discussion regarding OCH, and not OCM, in totality.

PM indicated that the BRP’s view of the claim differed to that of Eskom. In addition, there was a ZAR 2.7bn of senior secured bank debt held by the banking consortium which will need to be evaluated by Oakbay. The BRP has had open discussions with Oakbay on this debt. PM confirmed that there was no engagement around OCH solution and from a Glencore perspective, it may be open to this but at the moment Oakbay was dealing with the transaction from an OCM perspective.

NH confirmed that Oakbay was dealing with it from and OCM perspective and that it did not have a mandate to talk regarding OCH.

It was concluded that the Eskom position was now clear to all parties and that Oakbay required a mandate to take the discussion further. NH requested to reconvene with the Business Rescue Practitioner and Glencore at 17h30 to discuss further. The Chairman reiterated that the parties would not have Eskom
consent should it be limited to a transaction at OCM level. While it was supportive of a transaction with Oakbay, it would not be supportive were it to be limited to OCM level. The Chairman insisted that Eskom needs to know by the weekend that there is a prospect at OCH level to rescue the mine.”

d) The minutes were signed by Mr Matshela Koko.

_Sale of Shares and Claims Agreement between Optimum Coal Holdings Proprietary Limited (In Business Rescue) represented by Piers Michael Marsden and Petrus Francois van den Steen (In their capacity and Joint Business Rescue Practitioners) and Tegeta Exploration and Resources Proprietary Limited and Glencore International AG and Oakbay Investments Proprietary Limited_

5.207. This was the purchase agreement for the sale of all shares held in OCH to Tegeta signed on 10 December 2015.

5.208. The whole agreement was subject to certain suspensive conditions being met. Clause 3 of the agreement deals with the suspensive conditions. The transaction needed to be approved by the following individuals/entities before 31 March 2016:

a) The Lenders and the Security Agent;

b) The Competition Authorities; and

c) The Minister of Mineral Resources in terms of section 11 of the MRPDA.

5.209. Clause 3.1.4 reads as follows:

“3.1.4 on or before 31 March 2016, the Purchaser shall have obtained (in a form and substance reasonably acceptable to the Seller and the Purchaser) the irrevocable and unconditional-

3.1.4.1 consent of Eskom to the sale and purchase of the Sale Equity;

3.1.4.2 release by Eskom of the Eskom Guarantee; and
3.1.4.3 release by Eskom of the Seller and its past and current Affiliates (other than the Target Companies), with effect from the Closing Date, from all actions, claims, counterclaims, causes of action, debts, obligations, damages, liabilities, rights and demands whatsoever, of whatever kind or nature, in contract or in delict, known or unknown, which Eskom now has or ever had against the Seller and its past and current Affiliates that are and/or may be based upon, arise under, or be related to the CSA, prior to and including the Closing Date.”

5.210. The total amounts available as at 31 January 2016 in the Optimum Mine Rehabilitation Trust and Koornfontein Rehabilitation Trust is R 1,750,000,000.00 (1 billion and seven hundred and fifty million).

**Post-Commencement Finance Agreement among Tegeta Exploration & Resources Proprietary Limited and Optimum Coal Mine Proprietary Limited (in business rescue) represented by Piers Michael Marsden and Petrus Francois van den Steen (in their capacity as business rescue practitioners) signed on 10 December 2015**

5.211. This is the Post-Commencement Finance Agreement signed on 10 December 2015. The agreement *inter alia* states as follows:

a) The agreement in essentially states that Tegeta will provide Post Commencing Finance (“PCF”) for operating expenses of OCM.

b) The agreement states that the BRP’s by way of written notice, can request financing from Tegeta in order to fund its cash requirements.

c) Tegeta undertakes to pay the amounts required by the BRP’s.

**Acquisition of Optimum Coal Holdings (Proprietary) Limited (“OCH”) by Tegeta Exploration and Resources (“Tegeta”) letter dated 11 February 2016**
5.212. This is a letter sent by Pembani Development Trust ("Pembani") on 11 February 2016 to the BRP’s. Pembani states that they are aware Tegeta is in the process of acquiring 100% of the shares held by OCH.

5.213. Pembani states that they attempted to conclude a similar transaction, in that they would acquire 100% shareholding in OCM subject to the approval of Eskom and the Department of Mineral Resources.

5.214. Pembani states that “Eskom was not prepared to amend the OCM coal supply agreement ("CSA") or waive its rights to enforce the claim under the CSA, which led to the Pembani transaction failing”.

5.215. Pembani further states “that we are concerned about developments that led to the conclusion of the Tegeta Transaction and the failure of the Pembani transaction.”

*Post-Commencement Finance Agreement letter dated 13 January 2016*

5.216. This is a letter addressed to Tegeta dated 13 January 2016 from OCM and the BRP’s and signed by the BRP’s on 14 January 2016. They formally request an amount of R 26,000,000.00 (Twenty six million rand) on 15 January 2016 in terms of the PCF agreement which is in place.

*Post-Commencement Finance Agreement letter dated 13 January 2016*

5.217. This is a letter addressed to Tegeta dated 10 February 2016 from OCM and the BRP’s and signed by the BRP's on 10 February 2016. They formally request an amount of R 23,000,000.00 (Twenty three million rand) on 15 February 2016 in terms of the PCF agreement which is in place.
5.218. This is a contract between Tegeta and OCM signed on 13 January 2016 for the supply steam coal by OCM to Tegeta.

5.219. The contract is for 100 000 tons at a rate of R18.68/GJ on a gross as received basis plus R60.00 per ton for delivery. This price is exclusive of VAT. Invoicing will be done after every 25 000 tons is delivered.

5.220. The delivery point is listed as Eskom’s Arnot Power Station.

Coal Supply Offer—Tegeta Exploration & Resources

5.221. This is a letter sent by Tegeta on 22 January 2016 to Eskom.

5.222. Tegeta refers to a discussion which was had between Eskom and Tegeta. Tegeta now offers to supply Eskom with 250 000 tonnes of coal per month for a 3 month period starting on 1 February 2016.

5.223. The coal will be supplied at a rate of R22.00/GJ exclusive of VAT plus transportation costs on based on Eskom’s scale.

Re: Selection of Tegeta Exploration and Resources Proprietary Limited letter dated 9 February 2016

5.224. This is a letter sent by the BRP’s to Eskom dated 9 February 2016.

5.225. The letter makes reference to the meeting held on 24 November 2015 which was chaired by Mr Matshela Koko, where “he raised concerns around the sustainability of Optimum Coal Mine (“OCM”) as a standalone business. You further question how OCM could survive without the contribution from Koornfontein Mines
Proprietary Limited (“Koornfontein”) and the export allocation. You further stated Eskom’s position around the need for the continuity of coal supply with particular reference to the existing OCM coal supply agreement”

5.226. The letter states that three requirements that need to be satisfied by Tegeta in order for the sale to go through, relates to Eskom. These requirements are as follows:

“(i) the consent of Eskom to the Agreement;
(ii) the release by Eskom if OCH from the guarantee that it granted to Eskom in respect of the debts of OCM;
(iii) the release by Eskom of OCH and its past and current affiliates (other than the Target Companies) from liability that may arise from, or that is related to, the Coal Supply Agreement”

5.227. The letter further states as follows:

“Eskom has requested us, in our capacity as the business rescue practitioners of OCH, to demonstrate the basis upon which we believe that the Agreement presents the most compelling option for, inter alia, the affected persons of both OCH and OCM.

In this regard, we confirm that pursuant to the conclusion of the Agreement, Tegeta presented a turnaround strategy for OCM to us, which-
1. will take effect from the date of the closing of the Agreement (which is anticipated to be 31 March 2016, unless extended pursuant to the terms of the Agreement; and
2. the contribution from Koornfontein and OCT would further improve this sustainability as highlighted by you at the meeting on 24 November 2015.”

Submission to the Board Tender Committee (BTC) on 10 February 2016
5.228. This submission made to the Board Tender Committee was signed by Mr Vusi Mboweni (Senior General Manager: Primary Energy), Mr Neo Tsholanku (General Manager: Legal) and Mr Matshela Koko (Group Executive: Generation).

5.229. The purpose of this submission was to consent to the cession of the CSA between OCH and Eskom to Tegeta and Eskom.

5.230. The document states that a risk has been identified in Tegeta’s possible inability to pay the penalties levied by Eskom to OCH/OCM.

*Board Tender Committee Meeting (08/2015) held on 10 February 2016 in the Huvo Nkulu Boardroom at 09:00*

5.231. Board Members present during this meeting were Mr Z. Khoza (Chairman of the meeting), Ms C. Mabude, Ms D Naidoo and Ms N Carrim.

5.232. At this meeting a recommendation was made “to enter into the cession and assignment of the coal supply agreement between Optimum Coal Holdings (Pty) Ltd (OCH) and Eskom Holdings SOC Ltd (Eskom) from Glencore Operation South Africa (Pty) Ltd (Glencore) to Tegeta Exploration and Resources (Pty) Ltd (Tegeta).

5.233. No interests were declared during this Board Tender Meeting.

5.234. It was resolved that:

a) Eskom consents to the sale and purchase of shares in OCM;

b) Eskom releases OCH from the guarantee given to Eskom;

c) Tegeta will need to issue a guarantee in relation to the performance of the CSA; and
d) Cession is granted on the basis that all requirements in terms of the purchase agreement has been met.

**Re: Sale of Steam Coal-Contract No. 117 signed 18 February 2016**

5.235. This is a contract between Tegeta and OCM signed on 18 February 2016 for the supply steam coal by OCM to Tegeta.

5.236. The contract is for 400,000 tons of coal for the period February 2016 to April 2016 at a rate of R18.68/GJ plus the negotiated transport rate. The price is exclusive of VAT. Invoicing will be done after every 50 000 tons of coal is delivered.

5.237. The delivery point is listed as Eskom’s Arnot Power Station.

**Minutes of the Special Board Tender Committee Meeting 09/2015/16 held at the Huvo Nkulu Boardroom on 7 March 2016 at 18h00**

5.238. Board Members present during this meeting were Mr Z. Khoza (Chairman of the meeting), Ms C. Mabude, Ms D Naidoo and Ms N Carrim.

5.239. Ms D. Naidoo declared that her husband is an advisor to the Minister of Mineral Resources. It was agreed that there would be no conflict regarding the agenda at hand and Ms D. Naidoo was allowed to participate in the meeting.

**30 March 2016 Confirmation Regarding Suspensive Conditions to Sale of Shares and Claims Agreement**

5.240. This document signed 30 March 2016 essentially confirms that all suspensive conditions have been fulfilled in terms of the agreement signed 10 December.
Relevant approvals obtained

5.241. The following documents should be noted with regard to the approvals obtained by Tegeta:

a) *Competition Tribunal Approval of South Africa Case No.: LM212Jan16.* The merger between Tegeta and OCH is approved on 22 February 2016.

b) *Consent in terms of section 11(1) of the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002) (Hereinafter referred to as “The Said Act”) for the disposal of 100% controlling interest held by Optimum Coal Holdings (Pty) Limited in Koornfontein Mines (Pty) Ltd, Optimum Overvaal Mining & Exploration (Pty) Ltd and Optimum Coal Mines (Pty) Ltd to Tegeta Exploration & Resources (Pty) Limited.* This approval was obtained from the Department of Mineral Resources and signed on 29 March 2016.

c) *Consent in terms of section 11(1) of the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002) (Hereinafter referred to as “The Said Act”) for the disposal of 100% controlling interest held by Optimum Coal Holdings (Pty) Limited in Koornfontein Mines (Pty) Ltd and Optimum Coal Mines (Pty) Ltd to Tegeta Exploration & Resources (Pty) Limited.* This approval was obtained from the Department of Mineral Resources and signed on 29 March 2016.

Closing of Sale of Shares and Claims Agreement signed 8 April 2016

5.242. This agreement was signed on 8 April 2016 and further confirms that all suspensive conditions have been met and that the sale is unconditional.

5.243. Clause 2.1.4 of the agreement also states that Tegeta has obtained “the irrevocable and unconditional-
2.1.4.1 consent of Eskom to the sale and purchase of the Sale Equity;
2.1.4.2 release by Eskom of the Eskom Guarantee; and
2.1.4.3 release by Eskom of OCH and its past and current Affiliates (other than the Target Companies), with effect from the Closing Date, from all actions, claims, counterclaims, causes of action, debts, obligations, damages, liabilities, rights and demands whatsoever, of whatever kind or nature, in contract or in delict, known or unknown, which Eskom has now has or ever had against OCH and its past and current Affiliates that are and/or may be based upon, arise under, or be related to the CSA, prior to and including the Closing Date”

*Fourth Addendum to the Hendrina Coal Supply Agreement amongst Eskom Holdings SOC Limited and Optimum Coal Mine Proprietary Limited and Tegeta Exploration and Resources Proprietary Limited signed 30 March 2016*

5.244. The Fourth Addendum was concluded for the purposes of ceding OCH with Tegeta with regards to the CSA as well as any other obligations towards Eskom. The Fourth Addendum was signed on 30 March 2016.

5.245. Clause 2.1.5 of the agreement states as follows:

“2.1.5 Eskom has agreed to consent to the cession OCH’s rights to Tegeta and provide OCH with a release, subject to-
2.1.5.1 Tegeta concluding an addendum to the CSA with Eskom in respect of, amongst others, all and any of OCH’s obligations towards Eskom, all and any of Eskom’s claims for loss or damages (whether contractual or in delict) against OCH or its Affiliates (no known or in the future), including Penalties Claim; and
2.1.5.2 Eskom being issued with a guarantee by Tegeta on the same terms as the Eskom Guarantee, to Eskom’s satisfaction.”

5.246. Clause 3 of the agreement states as follows:

“3.1 From the effective date of the Sale of Shares Agreement-
3.1.1 Eskom hereby consents to the cession and assignment of all rights and obligations of OCH in terms of the CSA to Tegeta in terms of clause 29 of the CSA.

3.1.2 OCH is substituted by Tegeta as the contracting party with OCM to the CSA to ensure compliance with all and any obligations towards Eskom in terms of the CSA, including all actions, claims, counterclaims, causes of action, debts, obligations, damages, liabilities, rights and demands whatsoever, of whatever kind or nature, in contract or in delict, known or unknown which Eskom now has or ever had against OCH that are and/or may be based upon, arise under, or be released to the CSA and/or Eskom Guarantee (including (but not limited to), for the avoidance of any doubt, the Penalties Claim.”


5.247. This letter from Eskom dated 30 March 2016 addressed to OCH and the BRP’s. In the letter Eskom essentially consents to the cession of the CSA to Tegeta. The letter is signed by Mr V. Mboweni as well as by the BRP’s.

5.248. Paragraph 3 states as follows:

“3 Eskom hereby irrevocably and unconditionally releases and discharges (and shall procure, to the extent necessary, that each of its past and current Affiliates Irrevocably and unconditionally releases and discharges) each Released Party, with effect from the Effective Date from (and, to the extent necessary, Irrevocably and unconditionally waive) all actions, claims, counterclaims, causes of action, debts, obligations, damages, liabilities, rights and demands whatsoever, of whatever kind or nature, in contract of in delict, known or unknown, which Eskom now has or ever had against one or more of the Released Parties that are and/or may be based upon, arise under, or be related to the CSA and/or the Eskom Guarantee (including (but not limited to), for the avoidance of any doubt, the claim in the amount of R 2,176,530,611.59 (plus interest calculated at 9% a tempore more) that Eskom
alleges to have, amongst others, against OCH and for which it has instituted proceedings against OCH out of the High Court of South Africa, Gauteng Local Division, Johannesburg, under case number 28155/15 ("Penalties Claim"), prior to and including the Effective date.”


5.249. This letter is a notice from the BRP’s of OCH to affected persons stating that the business rescue plan is published and the affected persons are hereby directed to vote for the adoption of the business plan.

Offer to supply additional coal to Eskom Optimum Coal Mine (Pty) Ltd dated 11 April 2016

5.250. This is a letter sent from Tegeta to Eskom dated 11 April 2016. The letter states as follows:

“Kindly refer to the negotiations we had in the captioned matter. In this connection Tegeta Exploration and Resources (Pty) Ltd (Tegeta) is ready to supply Eskom an additional 1,250,000 (one million and two hundred fifty thousand) tonnes of coal from the Optimum Coal Mine (Pty) Ltd (OCM) over a period of 5 months at a rate of R20.41 (Rand twenty and cents forty one) per gigajoule plus VAT less 3.5% discount.

In case our request is considered favourably we are ready to sign the agreement in this regard.”

Submission to the Board Tender Committee on 11 April 2016
5.251. This was a submission prepared for the Board Tender Committee with regards to the approval of the pre-payment.

5.252. This submission required the following resolution from the Board:

2.1 **Addenda to the Short Term Coal Supply Agreements between various suppliers and Eskom be concluded to extend the supply of coal from various sources to Arnot Power Station for up to a further five (5) months and/or such period as may be requested by the supplier but not later than 20 September 2016;**

2.2 **The Chief Financial Officer is hereby authorised to approve the basis for prepayment to secure the fixed coal price for the period of extension provided that there is a discount in the price, the supplier offers a guarantee in favour of Eskom and that the CFO can provide assurance to the committee that the transactions are economically viable for Eskom;**

2.3 **The Group Executive (Generation) is hereby authorised to take all the necessary steps to give effect to the above, including the signing of any consents, or any other documentation necessary or related thereto.**

5.253. The “Salient Facts” are *inter alia* as follows:

“The requirement for the supply of contract coal originates from the April 2016 Supply Plan as presented at the Primary Energy Tactical Control Centre of 8 April 2016: It was identified that supply to Amot will not be adequate to meet the burn requirements of the power station over the winter months and that there is an urgent need for additional coal. This identified requirement is as a result of the need to build up stock days over a short period while the (RFP request for proposal) for Arnot is being finalised. This shortfall of supply amounts to approximately 2.1 million tonnes.”
At present, this RFP is in the negotiation phase and it is anticipated that it will take up to a maximum period of 5 (five) months to conclude the supply contracts.

The current short term portfolio consists of two suppliers, namely Umsimbihi Mining Pty (Ltd) and Tegeta Exploration and Resources (Pty) Ltd. Umsimbithi is contracted to supply Amot with 540 000 tonnes and is currently underperforming due to protracted Industrial action. The current contract supply will then be depleted in and around June 2016, should the Industrial action be stemmed and full mining operations resume. The supplier indicated a willingness to extend from July 2016 until September 2016 on similar terms and conditions.

Tegeta's short term contracts are for 600 000 tonnes of coal from Optimum's export. Supply for these contracts is due to be completed by the 15 April 2016. The coal from Optimum's export stock is a higher grade coal that is suitable for Amot and Kriel Power Stations and is difficult to source from elsewhere. These contracts were entered into in terms of the Medium Term Mandate granted by the Board Tender Committee (BTCI 11 September 200. The BTC approved a mandate to negotiate and conclude CSAs on a medium term basis for the supply and delivery of coal to various Eskom Power Stations for the period October 2008 to March 2018 and this included the beneficiation of coal by suppliers or their contractors.

The benefits for extending these Short Term Contracts Include:

- The coal is being mined and can be delivered without delay;
- Tegeta has the potential to supply approximately 250kt per month and Umsimbithi approximately 180kt per month. It would therefore be in the best interests of Eskom to negotiate and conclude extensions to these Short Term Contracts to alleviate the coal shortfall at Amot due to the closure of Amot colliery. Additionally to alleviate the shortfall coal requirements at Kriel Power Station due to the underperformance of Kriel Underground mine;
• By procuring this coal for Amot and Kriel Power Stations, it will assist towards building stock days as according to the April 2016 Supply Plan, as presented at the Primary Energy TCC of 8 April 2016 there is currently an estimated 2.14Mt tonnes shortfall at Amot Power Station for FY2017 and 280 000 tonnes shortfall at Mel Power Station for FY2017.

Both suppliers have indicated a willingness to extend current contracts, however, Tegeta has requested that Eskom consider some form of prepayment to enable it to meet the production requirements from the export component of the mine in lieu of the fact that is subsidises the direct feed to Hendrina Power and this will enable it to meet the coal supply demands for the two power stations in the short term.”

5.254. The document states that the cost of the Tegeta prepayment for the next 5 months will be approximately R 586,787,500.00.

5.255. This document is approved and signed on 11 April 2016 by Ms Ayanda Nteta, Mr Edwin Mabelane and Mr Matshela Koko.

Extract from the approved minutes of the Special Board Tender Committee 1-2016/17 held by Teleconference on 11 April 2016 at 21h00

5.256. This was a Special Board Tender Committee meeting held on 11 April 2016 at 21h00. The purpose of the meeting was to approve short term coal supply agreements.

5.257. The following was resolved by the Board:

“2.1.1 Addenda to the Short Term Coal Supply Agreements between various suppliers and Eskom be concluded to extend the supply of coal from various sources to Arnot Power Station for up to a further five (5) months and/or such period as may be requested by the supplier but not later than 20 September 2016;
2.1.2 The Chief Financial Officer is hereby authorised to approve the basis for prepayment to secure the fixed coal price for the period of extension provided that there is a discount in the price, the supplier offers a guarantee in favour of Eskom and that the CFO can provide assurance to the committee that the transactions are economically viable for Eskom;

2.1.3 The Group Executive (Generation) is hereby authorised to take all the necessary steps to give effect to the above, including the signing of any consents, or any other documentation necessary or related thereto.”

Extract from the minutes of the Meetings of Shareholders of Tegeta Exploration and Resources Pty Ltd (Registration No. 2006/014492/07) (The Company) Held at Sandton on 13/04/2016

5.258. This is a document signed by all the shareholders of Tegeta in which they pledged all shares to Eskom as security for the prepayment. The shareholders are listed as:

a) Oakbay Investments Pty Ltd;
b) Mabengela Investments Pty Ltd;
c) Elgasolve Pty Ltd;
d) Fidelity Enterprise Ltd; and
e) Accurate Investments Ltd.

Agreement Regarding Coal Supply and Limited Guarantee and Cession and Pledge in Security signed 13 April 2016

5.259. This is the agreement was signed on 13 April 2016 between Eskom and Tegeta with regards to the prepayment which was made.

5.260. Clause 4.1 of the agreement reads as follows: “Eskom will make an advanced payment to Tegeta in lieu of future coal supply in terms of the Existing Coal Supply
Agreement in the amount of R 659 558 079.00 (six hundred and fifty nine million five hundred and fifty eight thousand seventy nine rand and 38 cents) inclusive of VAT (“Advance Payment) payable on 13 April 2016.”

5.261. Clause 4.2.1 states as follows: “Tegeta will procure that for supply to Eskom from the Optimum mine in terms of the Existing Coal Supply Agreement, for the 5 month period commencing on 16th April 2016 to 30 September 2016, a 3.5% discount shall be applied to the agreed price of R20.41 (twenty rand and forty cents) per Gigajoule. Accordingly the price payable for the supply from the OCM mine shall be R 19.69 (nineteen rand and sixty nine cents) per Gigajoule.”

5.262. The document was signed by Mr Matshela Koko on behalf Eskom and Mr Ravindra Nath on behalf of Tegeta.

Re: Sale of Steam Coal-Contract No. 118

5.263. This is a contract between Tegeta and OCM dated 21 April 2016 for the supply steam coal by OCM to Tegeta.

5.264. The contract is for 250,000 tons of coal per month for the period May 2016 to October 2016 at a rate of R18.68/GJ plus the negotiated transport rate. The price is exclusive of VAT.

5.265. Invoicing will be submitted by OCM to Tegeta “within the first week of each month detailing the coal supplied in the preceding month.” Payment of each invoice will be made 30 calendar days from statement.

Optimum Coal Holdings Proprietary Limited letter dated 19 April 2016
5.266. This letter is from the BRP’s to all affected persons dated 19 April 2016. The letter confirms that the business rescue plan has been adopted and the business rescue proceedings of OCH has been concluded.


5.267. This letter is sent by Werksmans on behalf of the BRP’s to Tegeta on 24 April 2016. The contents of the letter is _inter alia:_

a) The letter reiterates to Tegeta that all actions taken by the OCM board must be done with the written consent of the BRP’s failing which such actions will be deemed void in terms of section 137(4) of the Companies Act.

b) All decisions with regards to the environmental trust and the investment thereof should be taken with the consent of the BRP’s.

c) The letter states that Ms Ragavan, attempted to transact with Standard Bank with regards to the environmental trust. The BRP’s further state that Ms Ragavan has no authority to transact on behalf of the trust as this power is vested in the trustees of the trust and subject to their fiduciary obligations to the trust.

d) The BRP’s expressly stated in the letter that consent is needed from them before transactions of such a nature can be concluded.

e) The letter further states that “OCM is under a legislative obligation to maintain sufficient funds in the trusts account to meet rehabilitation obligations of the company under regulation 53 and 54 of the Mineral and Petroleum Resources Development Act 28 of 2002 (“MRPDA”) and under section 24P of the
National Environmental Management Act 107 of 1998 ("NEMA") as read with the regulations promulgated under NEMA on 20 November 2015 dealing with financial provisions for rehabilitation and to ensure that the funds are held or invested into account and/or instruments which meet the requirements of section 37A of the Income Tax Act 58 of 1962 ("Income Tax Act").

f) The letter concludes in saying that “any contravention of the sections of the MPRDA and NEMA described above is a criminal offence under section 98 of the MPRDA and in terms of regulation 18 of the NEMA regulations promulgated on 20 November 2015 and may result in a fine and/or imprisonment in addition to any civil remedies that may be available to the business rescue practitioners, OCM and/or its affected persons.”

Minutes of the Eskom Board Tender Committee Meeting 03-2016/17 held at the Huvo Nkulu Boardroom on 21 June 2016 at 09h00

5.268. Board Members present during this meeting were Mr Z. Khoza (Chairman of the meeting), Ms C. Mabude and Ms D Naidoo.

5.269. No interests were declared during this meeting.

5.270. The committee approved that contracts can be negotiated for supply of coal to Hendrina power station from 31 December 2018 onwards.

Report In Terms Of Section 34(1)(A) Of The Prevention And Combatting Of Corrupt Activities Act 12 Of 2004

5.271. The following report was received at the Directorate for Priority Crime Investigation ("DPCI") on 1 July 2016 and was drafted by the BRP’s. The BRP’s:

"1 We were appointed on 4 August 2015 by the Companies and Intellectual Property Commission ("CIPC") as the joint business rescue practitioners of..."

2 OCH was discharged from business rescue on 15 April 2016. A copy of form CoR125.3 stamped by the CIPC is enclosed marked A. OCM is still in business rescue.

3 We are accordingly addressing this to you in our capacities as the former, and current, joint business rescue practitioners (“BRPs”) of OCH and OCM respectively. A copy of each of our certificates of appointment in respect of OCH and OCM is enclosed marked B1 and B2.

4 The information contained in this letter is provided in terms of section 34(1)(a) of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 (“PRECCA”).

5 At the time of our appointment as BRPs, OCH was the majority shareholder of OCM and Glencore was the ultimate beneficial majority shareholder of OCH.

6 During or about 10 December 2015, OCH (then in business rescue), Tegeta Exploration & Resources Proprietary Limited (“Tegeta”), Glencore International AG and Oakbay Investments Proprietary Limited entered into a written sale of shares and claims agreement (as amended by the First Addendum dated 7 March 2016, the Second Addendum dated on or about 7 April 2016 and the Third Addendum dated on or about 13 April 2016) (“Sale Agreement”), in terms of which Tegeta agreed to purchase the shares and claims (“Target Shares and Claims”) held by OCH in certain of its subsidiary companies, including OCM (“OCH/Tegeta Transaction”). The business rescue practitioners were a party to these agreements.
7 The details of the shareholders and the directors of Tegeta can be ascertained from the CIPC.

8 After the commencement of business rescue proceedings, OCM began supplying coal to, inter alios, Tegeta on agreed payment terms. We understand that Tegeta is a supplier of coal to Eskom Holdings SOC Limited ("Eskom").

9 In terms of the Sale Agreement, Tegeta was required, among other things, to make payment of the purchase price, in the amount of approximately R2.15 billion ("Purchase Price") for the Target Shares and Claims.

10 The Sale Agreement was subject to the fulfilment of certain suspensive conditions. These suspensive conditions were fulfilled and/or waived, as the case may be, by 8 April 2016, thereby rendering the Sale Agreement unconditional.

11 The Purchase Price was required to be paid by Tegeta to Werksmans Attorneys, as escrow agent ("Escrow Agent"), on the third business day after the date on which the Sale Agreement became unconditional, which was 13 April 2016.

12 Piers Marsden ("Marsden") received a telephone call from Nazeem Howa ("Howa"), on 11 April 2016 (ie two days before the payment was due under the Sale Agreement), requesting a meeting at the offices of Tegeta in Sandton on such date. The meeting was held on 11 April 2016 at approximately 10h00.
13 At such meeting, Marsden was advised by Howa that Tegeta was R600 million short in respect of the Purchase Price and requested Marsden to approach FirstRand Bank Limited (acting through its Rand Merchant Bank division), Investec Bank Limited (acting through its Corporate and Institutional Banking division) and Nedbank Limited (acting through its Corporate and Investment Banking division) (“Consortium of Banks”), to request a bridging loan in the amount of R600 million, to finance the shortfall on the Purchase Price. The Consortium of Banks were pre-existing lenders and the major creditor of OCH.

14 At 13h30 on 11 April 2016, Marsden arranged a meeting with the Consortium of Banks at the offices of Rand Merchant Bank in Sandton. The meeting was attended by representatives of the Consortium of Banks and Glencore, at which meeting the Consortium of Banks requested that Marsden advise Howa that the banks were not prepared to finance the shortfall of the Purchase Price.

15 Marsden telephonically communicated the decision of the Consortium of Banks to Howa on 11 April 2016 sometime after the conclusion of the meeting at approximately 15h00.

16 On 14 April 2016 the Escrow agent confirmed to us that the payment of the Purchase Price was made in full to the Escrow Agent’s account.

17 On 12 June 2016 and 19 June 2016 (“Episodes”), Carte Blanche aired a feature on the OCH/Tegeta Transaction, which precipitated the release of various press articles thereafter (“Articles”). A full length interview with Howa (“Interview”) was also made available on the Carte Blanche website on 20 June 2016.
18 We viewed the Episodes and Interview in the week of 20 June 2016 and we viewed the Articles.

19 Pursuant to the Episode, Interview and Articles, we learned, for the first time that –

19.1 Eskom had made a pre-payment to Tegeta, for the purchase of coal from Tegeta, in an amount of R586 million (“Pre-Payment”); and

19.2 the coal for which the Pre-Payment was made by Eskom appears to have been, or is to be, procured from OCM for Tegeta, and delivered by OCM to Eskom’s Arnot Power Station.

20 We have come to learn from the Episodes, Interview and Articles that the Pre-Payment was approved by a committee of Eskom representatives at a meeting held at 21h00 on 11 April 2016. This meeting was held on the same day on which the request for the bridging finance was made to, and rejected by, the Consortium of Banks.

21 Pursuant to the Interview, Howa remarked that the Pre-Payment had been made on the basis that OCM was in business rescue and required money for its liquidity and for the start-up of equipment.

22 We confirm that the Pre-Payment was not made to OCM and that OCM provides a 30-day payment term to Tegeta for the delivery of coal, on behalf of Tegeta, to the Arnot Power Station.

23 We are mindful of section 34(1)(a) of PRECCA and our obligation to report any suspicious activity. We do not intend to draw any conclusions from the aforesaid, but wish to draw your attention to the circumstances of which we are aware, as a matter of caution.
24 The content of this letter is private and confidential and is specifically addressed to the organs of state responsible for law enforcement and ancillary issues to deal herewith and is not intended to, and should not, be published.

25 We reserve our rights to provide supplementary documents and information as and when they may be required as a result of any investigation and/or prosecution that may be conducted.”


5.272. This letter is dated 13 July 2016 from OCM and the BRP’s to Tegeta. The letter states as follows:

“As you aware, Optimum Coal Mine Proprietary Limited (In Business Rescue) (“OCM”) is still in business rescue and under the management and control of the business rescue practitioners.

As the joint business rescue practitioners of OCM you are aware that we have access to the bank accounts of OCM.

It has come to our attention that an amount of R90 000 000 was transferred to Tegeta Resources and Exploration Proprietary Limited (“Tegeta”).

The transfer made from OCM to Tegeta was not authorised by either of the practitioners. Werksmans addressed a letter to you, on our behalf, dated 19 April 2016 wherein it was stated (and in particular in paragraph 7.2 thereof), that inter-company payments require the authorisation of the business rescue practitioners.
Whilst we have delegated authority to make payments in the ordinary course of OCM’s trade and business to the management of the OCM, in terms of section 140(1)(b) of the Companies Act, the transfer of R90 000 000 does not fall within the scope of such delegation of authority and accordingly required our authorisation.

As you are aware from our previous correspondence, all actions taken by the board and management of OCM require the prior written consent of the business rescue practitioners, failing which such actions will, in accordance with section 137(4) of the Companies Act 71 of 2008, as amended (“Companies Act”), be deemed to be void.

The transfer of the funds to Tegeta required our authorisation which authorisation was not procured, and as such, such transaction is accordingly void.

We take this opportunity to further advise you that we are dissatisfied with the manner in which various inter-company transactions have been reflected in the records of OCM. OCM has, since about 9 April 2016, been supplying coal to Tegeta on 30 day payment terms (“Tegeta Coal”) and Tegeta has, been providing post-commencement finance (“PCF”) to OCM on an ad hoc basis.

We requested that the payments that were made in respect of the Tegeta Coal and PCF be kept and recorded as distinct in the books and records of OCM, which has not occurred.

However, for your benefit, we have prepared a reconciliation of the net amount (which includes the R 90 000 000 referred to aforesaid) that we believe is payable by Tegeta to OCM.

In the circumstances, we are instructed to advise you that the amount of R 43 492 349 is to be transferred forthwith into the bank of account of OCM, failing which our clients may need to seek legal redress for the transfer of such amount.
In addition to the R43 492 349 which is currently due and payable, you should be mindful that the payment for Tegeta Coal supplied to Tegeta by OCM in the month of June to the amount of R 148 027 783.91 will become payable on 31 July 2016.”


5.273. This is a letter from the BRP’s to Tegeta in which the BRP’s state that an amount of R 289,842,376.00 is due and payable by 31 August 2016. A recon is further attached to said email detailing the amount owed.

Urgent Meeting email dated 24 August 2016

5.274. On 24 August 2016, the BRP’s sent an email with subject “Urgent Meeting” to Mr Howa and Ms Ragavan. The email inter alia states as follows:

a) The BRP’s needs assistance in order for the business rescue of OCM to be discharged.

b) Furthermore the BRP’s state the following: “Amounts payable by Tegeta: We have sent a reconciliation of the amounts that Optimum is owed by Tegeta. According to our records, there is currently R 112 million currently due with a further R177 million due at the end of August. We need confirmation that these amounts (or your comments on the recon) will be paid to OCM. If we don’t have a discharge of the business rescue by month end, we will need to issue a formal demand for these amounts (which will be the precursor to any legal proceedings against Tegeta to recover these amounts) and we will be compelled to suspend the supply of coal to Eskom pending payment.”

5.275. This is an email sent detailing the amounts owned to OCM by Tegeta. As per the recon attached to said email Tegeta owes OCM and amount of R289,842,376.00 as at July 2016.

Memorandum- Subject: Tegeta Exploration & Resources (PTY) Ltd Advance Payment Review

5.276. This is a memorandum prepared by Mr Molefi Nkhabu ("Mr Nkhabu"), Senior General Manager (Assurance and Forensics) at Eskom, and addressed to Mr Anoj Singh (Group Chief Financial Officer).

5.277. The objective of the memorandum was as follows:

“The robustness of the procurement process followed in awarding the Tegeta contract relating to the advance payment; Whether the advance payment made was in line with the governance processes and contract terms; and Whether the recoveries are in terms of the contract.”

5.278. The document finds the all correct due processes were followed and all relevant policies and procedures were followed correctly.

5.279. This document was signed on 14 September 2016 by Mr Nkhabu.

Additional information on Eskom Chairman’s statement issued today

5.280. The following media statement was on 11 June 2016 and was found on the Eskom website. The statement stated as follows:

“Exxaro Arnot Colliery had a contract with Eskom to supply coal to Arnot Power Station for 40 years. This contract expired in December 2015. The cost of coal at
expiry was R1132/ton. The tonnages supplied under the contract were below contractual volumes necessitating Eskom to supplement the supply with other contracts to mitigate security of supply which was a continuous challenge. In anticipation of the expiry of the contract, a Request for Proposal (RFP) was issued to the market in August 2015. This RFP is currently under evaluation and is expected to be awarded by September 2016. It should be noted that Tegeta has not responded to this RFP.

TEGETA AND UMSIMBITHI TRANSACTION

1. Independent intelligence obtained of a potential protest action at Rietkuil and surrounding areas increased the security of supply risk, prompting a declaration of an emergency in December 2015.

2. Continued monitoring of the security of supply risk from January to March revealed the need to build up stock requirements also coincided with strike action at Umsimbithi. This placed a further strain on stock levels prompting an immediate need for additional coal.

3. Subsequently initiatives were pursued which resulted with several suppliers, namely Hlagisa, South 32 (BECSA), Exxaro North Block Complex Colliery (NBC), Umsimbithi, Glencore Arthur Taylor Colliery, Just Coal (Pembani and Bankfontein), Keaton Mining (Pty) Ltd, Vunene Mining (Pty) Ltd Colliery, Tegeta Brakfontein, Optimum Coal Mine supplying coal to Arnot Power Station in January 2016.

4. This was a temporary and suboptimal measure as the coal was not all of the required coal quality for Arnot Power Station. Hence an alternative solution was needed to source the required coal quality due to the adverse effect on generation plant performance and maintenance.

5. In April 2016 the following suppliers (Exxaro (NBC), Hlagisa, Umsimbithi and Tegeta (Optimum)) remained supplying Arnot while the balance of the suppliers indicated above were redirected to supply their original designated Power Stations.
6. Exxaro (NBC), Hlagisa, Umsimbithi and Tegeta (Optimum) continued to supply Arnot, however, a deficit of 2.1M tons remained for the winter supply plan.

7. Exxaro (NBC) and Hlagisa were supplying the maximum quantities possible from their respective mines and consequently could not increase supply to mitigate the 2.1M ton shortfall.

8. The two remaining suppliers, namely Umsimbithi and Tegeta, were approached to increase supply to mitigate the shortfall. Both suppliers were able to meet Eskom’s requirements for additional coal quantities at the required coal quality which resulted in approval for extension of both contracts.

9. Tegeta indicated that the required coal quality can only be sourced if they divert their export quality coal to supply Eskom. In addition, there was an indication that additional equipment was needed to reach the required tempo of coal delivery to Eskom that would mitigate the shortfall. These factors led Tegeta to request a prepayment from Eskom.

10. Umsimbithi indicated that they are able to supply additional coal with no additional resource requirements.

11. Eskom concluded a contract with Tegeta to supply 1 250 000 tons of coal from April to September 2016 and have approval to extend the contract with Umsimbithi to supply 540 000 tons from June to September 2016. These two contracts in our view sufficiently address the winter shortfall and security of supply risk relating to coal procurement.

12. The cost of coal from Tegeta was R19.70/GJ and the cost from Umsimbithi was R18.50/GJ, the price difference being explained by the higher rejection level requirement for Tegeta. In both instances we would like to point out that the cost is far lower than the cost of approximately R51/GJ from the original Exxaro Arnot colliery that expired in December 2015.

13. The Tegeta prepayment request was considered on its merits, the current security of supply risk circumstance and previous transactions of a similar nature which is discussed below.
14. Additional conditions relating to the prepayment included a 3% prepayment discount on the coal price and sufficient security guarantees. The coal CV requirement was increased due to the prepayment request. In addition penalties are applicable in the event that Tegeta does not provide the contracted qualities.

15. Tegeta performance against the contract indicates that they are supplying coal with the contracted specification and are expected to deliver all tons, possibly ahead of the contract period.

16. Therefore, the transactions concluded with Tegeta and Umsimbithi are considered to be;
   · on an armslength basis
   · with significant commercial benefits accruing
   · Eskom has mitigated security of supply risk, the commercial aspects while
   · Ensuring generation performance and reduced maintenance due to high quality coal

17. These transactions have enabled Eskom to commit to no load shedding during the winter peak period which is a significant commitment to the country.

18. To ensure long term security of supply to Arnot Power Station the current RFP process is projected to be complete by September 2016. It is noteworthy that Tegeta is not one of the respondents to this RFP that has been issued to the market.

**PRE PAYMENT FOR COAL – COMMON PRACTICE**

19. Prepayment is a common commercial practice that is used widely and not unique to Eskom contracts. It is used in in large projects, coal mining contracts and emergency supply contracts. The first Eskom coal emergency arose is 2008 after load shedding due to constrained coal supply conditions.

20. During the 2008 emergency, Eskom Board approved advance payments to the value of R400M to enable suppliers to undertake projects needed to supply
coal. To this end, Eskom concluded a coal processing contract with Isambane (Pty) Ltd with prepayment terms. Three loans were granted to Isambane. Isambane was then required over a period of time to conduct beneficiation and stockpiling services. The agreement was that Isambane would perform these services and eventually pay off the prepayment.

21. Furthermore, a prepayment in the form of a loan was provided to Liketh in 2008 to buy equipment to process coal from Kleinkopje Pit 5 West. The loan was recovered in 12 consecutive instalments from 1 March 2008.

22. Eskom has also entered into loan agreements to assist Rand Mines for capital expenditure. The first loan was payable over a period of 20 years until 31 December 2013. The second loan was in 1998, and it will be paid in full by December 2017. Eskom also assisted another Rand Mines operation with a loan for bridging finance. This loan is paid up.

23. In costplus mine contracts, Eskom prepaid the mines to start up the mining operations. It subsequently pays for the operating costs and a management fee. In return Eskom receives security of supply at the right qualities and volumes. The cost plus mines future investment/prepayment capital requirement is R38bn. The beneficiaries of the R38bn are Anglo, Exxaro and South 32 (formerly BHP Billiton). This upfront payment is in line with the agreed 40 year long term contracts.

24. In October 2015, Exxaro requested full funding of its Matla costplus operation capital requirement. The estimated cost requested by Exxaro is R1.8bn for the establishment of a new mining shaft.

**COAL QUALITIES AN INDUSTRY-WIDE ISSUE**

25. Eskom continues to measure and monitor the coal qualities from all its suppliers. Tegeta coal qualities are monitored in accordance with Eskom’s Coal Quality Management Procedure. This includes Tegeta Brakfontein Colliery and Optimum Coal Mine. The Brakfontein colliery is dedicated to
Majuba and it meets Eskom’s coal quality requirements. This coal, like any other, is periodically diverted on a short term basis to alternative Power Stations to meet minimum coal stock requirements.

26. The Optimum Coal Mine provides two coal qualities to Eskom. The Optimum – Hendrina supply is a blended product of run-of-mine and washed product. This is supplied under the existing Optimum-Hendrina contract that expires in 2018.  
27. The second product from Optimum from their export mining compound. It is a higher quality coal and this is supplied to Arnot under the current short term agreement. 
28. It should be noted that Eskom has a claim against Optimum for R2bn relating to out of specification coal delivered. Eskom has vigorously pursued this claim with the previous owners of Optimum, registered its rights with the business rescue practitioners and also indicated its intention with the new owners of Optimum being Tegeta that Eskom will be pursuing this claim.

ESKOM’S RESPONSE TO COAL SUPPLY CHALLENGES
29. In general, Eskom has experienced numerous coal quality challenges with various suppliers, including long-term tied collieries. To mitigate this exposure, Eskom has, over time, improved on coal quality monitoring, assurance, and lately risk transfer. A number of changes are being considered and will be implemented for all new contracts and renegotiated for all contracts. These changes are as follows:
· transfer of coal quality certification and payment point to receiving point, power stations versus current quality pre-certification at the supply point by an Eskom-appointed and managed laboratory contractor;
· withholding of payment or coal price adjustment in the event that coal quality at the delivery point is inferior to contractual qualities; and
· upfront payment of a quality deposit by suppliers to Eskom.
30. Eskom continues to engage the industry on coal quality, as well as coal pricing, in order to ensure receipt of an optimal coal product at the right price. To this end, current coal contracting discussions are aligning coal pricing and escalations in line with Nersa coal cost determinants. Commercial decisions that consider security of supply, risks associated with coal costs, and optimal cost of coal continue to be balanced, ensuring that the optimal decisions are in the interests of Eskom and the South African consumer.”

*Nazeem Howa Interview with Carte Blanche dated 19 June 2016*

5.281. I noted an Interview done by Mr Nazeem Howa on Carte Blanche on 19 June 2016. After listening to the full unedited version of the interview with Mr Howa, Mr Howa stated the following during said interview:

a) Eskom previously bought coal R1132 from Exxaro for the Arnot Power Station. Tegeta’s supplies coal at half the price to Arnot Power Station.

b) Eskom approached Tegeta for the additional supply of coal.

c) Tegeta was approached to increase to 350 000 tons of coal per month.

d) Tegeta/OCM needed the prepayment for the Arnot deal. “It was an extra ordinary request from us”.

e) Until Eskom approached us to increase our supply there was no talk of a prepayment. We raised the prepayment saying we could not supply coal without the prepayment.

f) In December when we closed the purchase of OCH/OCM deal we needed to fund the deal. As part of the deal we needed to prove funding.
g) Tegeta initially gave the Loan Consortium three options:

a) Roll over the debt for the period committed for and keep all securities in place.

b) Second was Tegeta will put in a R1 billion in cash, roll over the rest and the Loan Consortium keep securities in place over OCM. The Loan Consortium would in addition, take the Eskom payment directly and Tegeta would not see any of the Eskom money.

c) This third option was “Give us a haircut and we purchase cash”.

h) We paid for the mine with a mixture of debt and our own funding.

i) Proof of payment for the mine was required December (Tegeta needed to show funding)

j) The Loan Consortium would not of accepted if they did not have the funding in place.

k) A Foreign bank gave them the funding for the purchase.

l) Some of the reasons given by Mr Howa for the prepayment were as follows;

m) Drag lines were decommissioned in June, equipment decommissioned, cost to restart the drag lines is R1 billion; and

n) The prepayment funds was used to service the Arnot contract.
o) Eskom still pays on a weekly basis due to OCM being in business rescue.

p) Mr Howa stated that OCM are in Business rescue and therefore special conditions exist for us.

q) Agreed to take over all obligations to Eskom when Tegeta purchased OCH/OCM.

r) With regards to the penalty claim:

a) “If you look at the history of the penalty claim, Glencore wanted to fight the penalty, we will also fight it.

b) It will be a fight with Eskom over the penalty claim.

c) I met with the BRP. The penalty claim if anything should be significantly lower.

d) Tegeta will take their chances with arbitration over the penalty claim.

s) We got a piece of export allocation. We hope to supply 5 million tonnes of coal.

t) We bought a mine in Business Rescue, we wanted to ensure we save jobs, to maintain power supply, to maintain Hendrina power supply.”

Response To The List Of Questions For Ayanda Nteta In Re Investigation Into Complaints Of Improper And Unethical Conduct By The President And Officials Of State Organs Due To Their Alleged Inappropriate Relationship With Members Of The Gupta Family

5.282. I posed a number of questions to Ms Ayanda Nteta (‘Ms Nteta’) who is the acting General Manager for Fuel Sourcing at Eskom. Ms Nteta was involved during the
processes of sourcing coal for Arnot Power and the awarding of contracts to Tegeta. The ensuing paragraphs will detail her response, as is, to said questions:

“6. The shortage of coal led to Eskom declaring emergencies in 2008 and 2015. In 2008 it became clear that Eskom had to develop strategies to enter into coal supply contracts that will ideally cover the balance of the estimated shortfall volume of coal required until March 2018. There were inherent difficulties in embarking on long term procurement strategies that were as a result inter alia of the timing constraints of the negotiating period and mine establishment.

7. Short to medium procurement was identified as being the best suitable option in light of the fact that Eskom at all times had to ensure that the burn requirements of its power stations were met. This was vital in order to maintain and ensure the acceptable stockpile levels for the required days and the burn rate of the power stations, all in the plight, to ensure security of electricity supply.

III. THE PROCUREMENT FRAMEWORK

Eskom’s Procurement and Supply Chain Management Policies (SCM)

9. In terms of section 51 of the Public Finance Management Act 1 of 1999 (“the PFMA”) an accounting authority must ensure that the public entity has and maintains an appropriate procurement and provisioning system which echoes the requirements of section 217 of the Constitution. It must be fair, equitable, transparent, competitive and cost-effective. The policy also needs to align with the Preferential Procurement Policy Framework Act 5 of 2000 and the regulations published thereunder. These prescribe the requirements regarding black economic empowerment considerations.
10. Eskom has developed such a procurement and provisioning system. The applicable SCM Policies (both current and replaced) that are necessary to understand the background of the procurement processes under investigation by the Public Protector are the following:

10.1 Eskom’s Procurement and Supply Chain Management Procedure 32-188 effective from 1 December 2006;

10.2 Eskom Short Term Emergency Coal Procedure GGP 1194 effective from dated April 2004;

10.3 Eskom’s Procurement and Supply Chain Management Procedure 32-1034; and

10.4 The Medium Term Coal Procurement Mandate of August 2008.

11. SCM Policy 32-188 and GGP 1194 was replaced by SCM 32-1034, save to the extent that the Medium Term Coal Procurement Mandate of August 2008 adopted in accordance with SCM Policy 32-188 remains valid until March 2018.

12. As with SCM Policy 32-188, SCM Policy 32-1034 made provision for emergency procurement and ratification. They define a procurement emergency as a situation that may give rise inter alia to the treat of interruptions in the supply of electricity to customers or to load loss.

13. SCM 32-1034 makes provision for a negotiation process without prior tendering with the following parameters:

13.1 The criteria for the use of this type of procurement method;

13.2 The process to be followed which includes the preparation of a mandate to be approved by the approval authority;

13.3 The negotiation team;

13.4 The table of delegations of authority and signing authorities; and

13.5 The prescribed templates.